

E-Book Licensing and Research Libraries—Negotiating Principles and Price in an Emerging Market

Charles B. Lowry, ARL Executive Director

Julia C. Blixrud, ARL Assistant Executive Director, Scholarly Communication

Background

ARL actively began a licensing effort in the fall of 2010. Members of the Association had expressed interest that ARL find ways to positively influence the scholarly content marketplace; emerging e-book markets were identified as the area in which to begin, but with the proviso that success would lead to similar efforts for other content. ARL especially wanted to ensure that the emerging market and access structures developed for e-books would serve the needs and support the values of the research and academic library community. Members of the Association did not want to repeat the license restrictions found in e-journal agreements that they are now trying to renegotiate. While price matters, especially as budgets continue to be constrained, another primary driver for ARL's e-book activities was the need to identify specific principles that would be especially important to research libraries in the acquisition of electronic resources, determine the content that could first be acquired using those principles, and develop a strategy through which the work could be accomplished. Some ARL libraries have developed advocacy and values statements about e-books—see the accompanying sidebar at the end of this article.

E-book task forces and consultants recommended and the ARL Board agreed that a project to license e-books from university presses be given the highest priority.¹ The market was relatively new and ARL members are often closely aligned with university presses at their institutions. University presses were beginning to develop models for individual and aggregated e-book strategies. A collective ARL effort would provide a way to shape the licensing terms, business models, and technical platforms that would be mutually beneficial to libraries and to presses. Since ARL did not want to provide new infrastructure to negotiate member license agreements, a critical piece of the project included the identification of an agent to conduct that work on behalf of interested members.

More importantly, ARL developed a set of evaluation requirements that included technical specifications and licensing rights required by research libraries.² The agent was required to use these “Detailed Evaluation Requirements and Desirables” (a.k.a. “ARL E-Book Requirements”) when negotiating the e-book content licenses.³ In order to determine the rights terms and provisions ARL members might require for e-book content, existing licensing principles and documents were examined. Since there were no general principles for e-book licensing available when the project began, some principles were drawn from best practices in license packages for e-journals. Consultants and task force members supplied language for other principles based on local licenses or developed language through consensus. Legal expertise was sought for some principles. When referencing copyright, both the US and Canadian acts are referenced since ARL membership is located in both countries. There was a general recognition throughout negotiations that some requirements would be attenuated by technology limits of vendor platforms. ARL sought accommodation to meet these in initial contracts, while pressing for technical modifications that would allow closer conformity to the principles it sought to advance.

LYRASIS was selected as the ARL agent⁴ and the first license negotiated on behalf of ARL was for the University Press Content Consortium (UPCC) Book Collections on Project MUSE (hereafter “provider,” “vendor,” or “licensor”). Readers are referred to the “ARL E-Book Requirements” for detail regarding the technical and service specifications. What follows is a description of some of the key license provisions, some of the principles upon which they were based, and how they were addressed during the negotiations.

Key License Provisions

The final license successfully addresses many key points. ARL acknowledges Johns Hopkins University Press and Project MUSE for their willingness to work together to craft a license in this new arena. A significant characteristic of the license, which allows many of the provisions, is the absence of digital rights management (DRM) on the UPCC e-book files.

Archival, Preservation, and Perpetual Use

The “ARL E-Book Requirements” include extensive language based on principles for perpetual use that archival preservation, refreshing, or migrations ensure continued use and/or retention of the data. One copy of any material sold or discontinued must be made available from the provider to the library in a mutually acceptable format. In addition the provider would grant a nonexclusive, royalty-free, perpetual license to use any licensed materials accessible during the term of the agreement after the agreement terminates. Third-party trusted archive services and collaborative archiving could fulfill the requirements for the perpetual-use provision. A copy of the licensed materials should be provided upon termination of the agreement for research libraries to use to fulfill their preservation responsibilities.

The provider agreed to grant a nonexclusive, royalty-free, perpetual license to use any content that was accessible during the term of the agreement. Perpetual access would be available at no charge if access was purchased within the previous 24 months or, if not active, a reasonable annual fee would be charged to recover costs to provide continuing access. In addition, a machine-readable copy would be provided upon termination and further copies could be made for the purpose of archival preservation. A third-party trusted archive is also allowed to provide services.

Authorized Users and Authorized Uses

Research libraries have diverse and dispersed communities. This license principle expressed in the “ARL E-Book Requirements” is similar to that used by libraries for e-journals and journal packages. It specifies that the user community include those who the institution authorizes to access secure institutional networks. Those individuals may be within the library, but are more likely to need remote access. The principle also allows walk-in users for those institutions that offer unaffiliated users onsite access.

The uses made of the content are for the purposes of research, education, or other non-commercial use. Provision is made that the licensee and authorized users may make all use of the licensed materials as is consistent with the exceptions and limitations of the US Copyright Act, including 17 USC §107, §108, §110, §121, and the Copyright Act of Canada. Nothing in the agreement is to be interpreted to limit in any way rights under the exceptions and limitations of the US Copyright Act and the Copyright Act of Canada to use the licensed materials. Commercial use would not be considered authorized use.

The principle also states that the licensing libraries should be protected from liability for unauthorized uses so long as they have implemented reasonable and appropriate methods to notify users of any restrictions. Libraries are responsible for establishing policies that create the environment in which appropriate uses of content can be made and have a mechanism for carrying out due process if there is a violation.

The resulting agreement supported all of these principles and allows unlimited access to the full text of the e-books in the collection with no contractual limits on the number of authorized users from one campus at any given time.

Compliance with Americans with Disabilities Act

A required principle is that the content provider should comply with the Americans with Disabilities Act (ADA) by supporting the necessary software or devices consistent with the guidelines published by the World Wide Web Consortium's Web Accessibility Initiative.⁵

The provider agreement stated that they would comply by supporting the necessary software and devices as indicated by the Web Accessibility Initiative's guidelines.

Device Neutrality

While specifying in the "ARL E-Book Requirements" that access to the licensed materials should not be restricted to any one type of device as part of the licensing provisions, ARL does recognize that this also is a technical challenge for content providers as delivery platforms and mechanisms evolve. Initially the e-book content is likely to be PDF, but the long-term expectation is standard file formats that allow for full functionality on any computer or reader.

The content from the provider for this project is PDF and can be sent to any device that reads that format.

Display, Printing, and Downloading

Users doing research may need to access or use an entire work for an extended period of time, so it was important for ARL to include a principle for authorized users to display or download the complete extent of individual titles. That ability to download also should not be restricted to any specific device. Printing is to be consistent with the exceptions and limitations of the previously referenced copyright acts.

The provider agreement states that users may download and print one copy of each e-book chapter for personal use and archive the content on their own personal devices.

Course Reserves and Course Management Systems

This "ARL E-Book Requirements" principle requires that licensed materials can be used in preparation of course reserves and course management systems, whether print or electronic.

The resulting agreement allows chapter linking for the duration of a course using a persistent or durable URL where access is restricted to students enrolled in the course, to the course instructors, and to library staff maintaining the links.

Indemnification

A principle in the “ARL E-Book Requirements” is that the publisher warrants to the licensee that the content does not infringe the copyright or any other proprietary or intellectual property rights of any person. The publisher shall indemnify and hold the licensee harmless from and against any loss, damage, costs, liability, and expenses (including reasonable legal and professional fees) arising out of any legal action.

The provider did agree to this principle provided that there is prompt notification of any claim or threat of claim, there is full cooperation in the defense or settlement of the claim, and the publisher has sole and complete control over the defense or settlement of the claim.

Scholarly Sharing Rights

An important aspect for global scholarship is that users often share content with colleagues. This “ARL E-Book Requirements” principle states that authorized users may transmit to a third-party colleague in hard copy or electronically the licensed materials for personal use or scholarly, educational, scientific research, or professional use, but in no case for re-sale. In addition, authorized users have the right to use (with appropriate credit) figures, tables, and excerpts from the licensed materials in the authorized user’s own scientific, scholarly, and educational works.

The resulting agreement allowed the sharing of content, although it is limited by the system to chapter-by-chapter transmission. While this implementation is not altogether desirable, ARL continues to press for it to be changed. That will require technical work on the licensor platform.

Usage Data

The “ARL E-Book Requirements” oblige content suppliers to provide use data in conformance with the Codes of Practice for Project COUNTER.⁶ The data must be gathered in a manner consistent with applicable privacy and data-protection laws, keeping users anonymous and their searches confidential.

Under the resulting agreement, usage data will be provided to the participating libraries and to the agent and ARL and gathered in a manner consistent with applicable privacy and data-protection laws. The anonymity of individual users and confidentiality of their searches will be protected.

Licensing Success

The negotiations were protracted as ARL, its agent, and the content provider worked together on a new product offering. The final license is in alignment with nearly all of ARL’s technical, licensing, and service requirements. This achieved ARL’s several objectives: to work with the university press community, address license terms that affect research libraries, and create a business and technical specification model that would meet the needs of both content producers and purchasers.

As previously pointed out, some provisions are dependent on technical capabilities or with whom the license is negotiated (an aggregator or the e-book publisher).

Interlibrary Loan

The “ARL E-Book Requirements” include specific language for its principle regarding interlibrary loan:

Licensee may fulfill requests from other institutions, a practice commonly called Interlibrary Loan. Participating Member Institution agrees to fulfill such requests in compliance with Section 108 of the United States Copyright Law (17 USC §108, “Limitations on exclusive rights: Reproduction by libraries and archives”), as well as the Copyright Act of Canada.

Libraries are authorized to interlibrary loan the e-book for a short-term loan. The loan constitutes one of the libraries’ simultaneous users. Interlibrary loan is not restricted to other libraries within the same country.

This language does not specify whole book, single-file lending but the resulting agreement allowed interlibrary loan at the chapter level, with no limits on the number of chapters that could be loaned. The publishers favored chapter-by-chapter downloading both as a license and technical response to whole-book downloads. To allow whole-book lending, a technical short-term lending option is currently in development for 2013.

Text Mining

A principle for text mining, which is of interest to researchers who wish to analyze a full corpus of material, is also included in the “ARL E-Book Requirements”:

Authorized users are permitted to engage in text processing, which is any kind of analysis of natural language text. This may include but not be limited to a process by which information may be derived from text by identifying patterns and trends within natural language through text categorization, statistical pattern recognition, concept or sentiment extraction, and the association of natural language with indexing terms. Technology may not be used to hinder any rights granted under this section or any other section of this agreement.

ARL listed this as desirable rather than required since technical capabilities by content providers might not be available at the time licenses were being negotiated. The agent was encouraged, however, to negotiate for those rights when possible. The resulting agreement allows text mining with prior notification so that arrangements can be made to prevent system crashes, modify abuse-monitoring system warnings and potential disabling features, and adjust usage statistic counts.

Author Rights

ARL is encouraging authors to retain their own content rights and included in the “ARL E-Book Requirements” a license clause originally developed for journal articles:

Notwithstanding any terms or conditions to the contrary in any author agreement between Authors and Licensor, Authors affiliated with Licensee whose work (“Content”) is accepted for publication within the Licensed Materials shall retain the non-exclusive, irrevocable, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the Content in institutional, subject-based, national or other open repositories or archives (including the author’s own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.

For the avoidance of doubt, it is the intent of the parties to this agreement that Authors are third party beneficiaries of this provision of the Agreement.

Aggregators do not have these rights to grant and the resulting agreement does not address this provision. The rights are managed between the author and the e-book publisher and could only be negotiated if the publishers in the aggregation have them. Since authors manage rights for articles differently than monographs, author and publisher education may be needed in order for research libraries to be able to include this provision.

Next Steps

Some important business and technical requirements could not be met for the first license, but the provider agreed to address them in the next year’s offering:

- The business model offered was a collection-based model, which does not meet the needs of all research libraries. Libraries expressed the need for title-by-title selection options. Subsequent to the licensing process, the vendor developed and implemented the title-purchase capability.
- The linking of current collection management activities through vendor-approval plans to avoid title duplication is needed. As with title selection, this capacity has now been put in place.
- Some libraries desire a demand-driven purchase option.
- More e-book content that represents a higher percentage of the total publisher output would increase research library interest in the overall package.
- Interlibrary loan was a chapter-by-chapter solution and a new short-term lending option is in development to allow whole-book lending.

Negotiations for the next year’s license for the UPCC collections have begun. Other university press e-book publishers and aggregations learned of the ARL project and have contacted the agent. They too were given the opportunity to respond to the principles and rights terms identified in the “ARL E-Book Requirements” before any negotiations took place. Negotiations were completed with both Oxford University Press for University Press Scholarship Online and De Gruyter for the Harvard University Press eBooks. A positive response from both publishers led to these new offerings for ARL members. ARL considers the initial project quite successful and accordingly will continue to pursue future opportunities.

Sidebar: Research Library Statements on E-Books

As demand for e-books has increased in the research library community, libraries are shifting content previously made available in print to electronic form. This shift is not unlike the one nearing completion in the journal environment. Although the intellectual content of the scholarly materials in print and electronic form might be similar or even the same, the technical capabilities and the marketplace issues are placing demands on how libraries provide access to the content.

In order to address how research libraries might make the best use of these materials, some ARL members are developing statements about e-books and their applicability to research, teaching, and learning. The values articulated in these statements parallel many of the negotiating principles ARL included in its licensing initiative.

Access and User Experience

Many research library users read e-books on personal devices. Libraries value nonproprietary platforms that will allow portability of content among devices. Research library users need to be able to have access whenever and wherever they need it and libraries are committed providing unlimited, simultaneous access to content they acquire. The ability to display, download, cut, and paste is important for any user conducting research.

Libraries also value compliance with the Americans with Disabilities Act and similar laws that ensure technical capabilities to allow all readers access to e-books. Protection of the privacy of readers is important to libraries in a print environment and the value is being upheld for e-books as well.

Learning and Scholarly Research

Sharing content is an important consideration for scholarship, and research libraries value licensing terms that do not limit fair use, first sale, or interlibrary loan. No digital rights management (DRM) allows content to flow freely between and among scholars, teachers, and learners. Libraries value licenses that support use of course management systems and reserves. And as larger corpuses of aggregated content become available, research libraries value the ability of researchers to use that content to conduct text mining.

Acquisition and Preservation

The values expressed by libraries for acquisition models include the ability to acquire e-books through multiple methods of purchase, including demand- or patron-driven acquisition. Libraries, on behalf of their users, value simultaneous publication of print and electronic content and reasonable pricing models when purchasing or leasing either or both. The ability to incorporate purchased or subscribed content within workflows is also highly valued.

As research institutions that take responsibility for the preservation of recorded knowledge, research libraries value the ability to archive the content provided by e-book providers. They also value perpetual access to any purchased or subscribed content.

Expressions of these and other values can be found in the following examples of research library e-book statements.

Duke University Libraries. "E-Book Advocacy Statements." Accessed Apr. 11, 2013. <http://library.duke.edu/ebookstrategy/statements.html>.

Duke University Libraries E-Book Strategy Committee. "Every Reader Her or His Book: An E-Book Advocacy Statement from the Duke University Libraries." Aug. 24, 2011. http://library.duke.edu/ebookstrategy/e_book_advocacy.pdf.

North Carolina State University Libraries. "NCSU Libraries Value Statement for the Scholarly Ebook Marketplace." Accessed Apr. 11, 2013. <http://www.lib.ncsu.edu/cdsc/ebooks/>.

Triangle Research Libraries Network. "TRLN: Beyond Print." Last modified Nov. 14, 2012. <http://www.trln.org/BeyondPrint/>.

University of California, Los Angeles, Library. "UCLA Library E-Book Value Statement." June 2012. <http://www.library.ucla.edu/libraries/managing-collections/e-book-value-statement/>.

Endnotes

- 1 The Task Force to Identify Actions for ARL in the Licensing Environment was established in October 2010 with co-chairs Brinley Franklin (Connecticut) and Michael Ridley (Guelph). Members included Paul Courant (Michigan), Carol Diedrichs (Ohio State), Carole Moore (Toronto), and Michael Stoller (New York). The ARL Board accepted their resulting white paper and recommendations for action in February 2011.
- 2 The Task Force on Licensing E-Book Packages included Helen Clarke (consultant), Janice Flug (consultant), Brinley Franklin (Connecticut), Mary Jo Romaniuk (Alberta), and Michael Stoller (New York). This task force prepared the agent RFP and evaluation requirements and license principles, which were approved by the ARL Board. Julia Blixrud and Charles B. Lowry provided staff support for both task forces.
- 3 "ARL E-Book Requirements," 2012, <http://www.arl.org/storage/documents/publications/arl-e-book-requirements-2012.pdf>.
- 4 "ARL and LYRAsIS Sign Agreement for Licensing Initiative," Julia Blixrud and Celeste Feather, Nov. 29, 2011, <http://www.arl.org/news/arl-news/2660-arl-and-lyrasis-sign-agreement-for-licensing-initiative>.
- 5 "Publications," W3C Web Accessibility Initiative, Web Content Accessibility Guidelines Working Group, last updated Dec. 19, 2012, <http://www.w3.org/WAI/GL/#Pubs>.

6 “Codes of Practice,” COUNTER, last updated Feb. 2013, http://www.projectcounter.org/code_practice.html.

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