

White Paper: Trends in Licensing

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Introduction

Since the 1990s, publishers and libraries increasingly use license agreements to establish use permissions that previously had been guided by national copyright law. An important and traditional mission of the research library, to share resources with other libraries, has been affected by this shift away from copyright law to contract law. While copyright law recognizes and addresses interlibrary loan (ILL), there remains no single **licensing** standard for ILL. Currently, the overwhelming majority of publishers allow some form of ILL; and only a minority of publishers restrict lending to the same country.

Not all licenses, however, allow ILL, or allow it to the same degree. Given the importance of resource sharing to research libraries and to the communities they serve, research libraries should actively promote inclusion of ILL privileges when negotiating license agreements or add language stating that nothing in the license may restrict exceptions permitted under copyright law. If publishers see that libraries are willing to sign away key ILL rights for service to “secondary” user communities, increasing numbers may disallow ILL privileges. Under such circumstances, the result of moving to licensed electronic versions rather than purchased print versions would leave research libraries with no right to lend to or obtain non-subscribed materials from peers.¹ Finally, while many publishers show a great willingness to support ILL, the language used to express permissions is often contradictory, suggesting a lack of understanding of ILL tools and practice. There would be tremendous value in having greater uniformity and clarity in licensing terms and conditions.

ILL and Electronic Journals

Informal surveys of ILL clauses in academic library licenses indicate two principle

findings: (1) there is considerable acceptance of ILL services, and (2) there is no uniformly adopted language or permission describing ILL services.²

- The majority of publishers allow ILL.³
- Of those publishers that deny ILL, the majority are small scholarly societies.
- The majority of publishers do not restrict ILL to same country.^{4,5}
- The majority of publishers allow ILL, using secure e-transmission via resource-sharing software systems such as Ariel or ILLiad. It is fairly standard for publishers who allow secure e-transmission to require digitization from a printed copy rather than supplying a copy of the e-format. This point is often successfully negotiated to permit use of the electronic copy to send via Ariel or ILLiad.
- ILL language, even that taken from model licenses, is often contradictory making it difficult both to interpret and to comply with; license language may fail to show an understanding of ILL tools and workflow, making it difficult for libraries to track in appropriate ways; and it may include conditions impossible for libraries to comply with, even if willing.⁶
- Commission on New Technological Uses of Copyrighted Works (CONTU) Guidelines on Photocopying under Interlibrary Loan Arrangements are mentioned in a minority of licenses allowing ILL.⁷

ILL and Electronic Books

The e-book environment is younger and business terms for e-books are far more elastic than those for e-journals; at the same time, e-book rights management issues are more complex. Many publishers embrace the notion of ILL for e-books, although it is not clear exactly what that means or how tracking and delivery will be managed. Informal conversations with representatives of two of the three largest scientific, technical, and medical (STM) publishers have indicated a willingness to experiment with e-book ILL.

- The basic lending unit of a print book is the entire book. A publisher's e-book license frequently allows copying and lending of chapters only via ILL. In some situations (e.g., a work of fiction) this would be insufficient access for the user.
- E-book aggregators, and services that act as e-book platforms for third-party publishers (i.e., ebrary, Ebook Library (EBL), and NetLibrary) have not made arrangements to permit ILL.

Findings and Conclusion

As online-only subscriptions become the norm, there is an increased need to secure the right for research libraries to conduct ILL, and to do so in a standard and reasonable fashion.

Some licenses forbid ILL and prevent additional users from obtaining the materials they need. As a result, as was done last year with confidentiality clauses, ARL may wish to consider making specific ILL rights a deal-breaker. Research libraries will have to carefully decide when to insist on ILL privileges in new products and for renewal licenses that frequently have variant terms. One approach may be to make this request of publishers where our faculty editors and society officers can best assert their influence.

An important part of the strategy will be the definition of a uniform method of dealing with licenses that are silent on the issue. It appears that there is no consistent approach by legal counsel. ARL directors may wish to consult with local counsel as to what constitutes a safe harbor especially as state law and university legal policy may well vary among public institutions. (See Appendix A for further information.)

It would be useful to articulate clearly ILL clauses that are consistent with research libraries' missions, ILL best practice, and ILL management tools. In looking over the variety in licensing language used to describe ILL permissions for e-journals, it becomes clear that there is greater need on the part of publishers and negotiating librarians for understanding of ILL workflow and the tools used to support it. Certain features of ILL permissions are favored by ARL libraries because they replicate best practices established in the print environment. Library-friendly ILL license language may include such features as:

- Include a licensing provision stating that nothing in the license may restrict exceptions permitted under copyright law.
- Confine constraints on ILL permissions to the lending libraries. Just as libraries cannot control the behavior of their users, they cannot monitor or control the behavior of the borrowing library.
- Do not restrict ILL to same country. Restricting to the same country was not a condition governing print ILL, and it imposes a needless constraint at exactly the moment we are entering into an increasingly global information age. A better response to create shared understandings of what constitutes a responsible ILL transaction is to develop international standards.

- Allow the use of a digital copy of the electronic article without printing prior to sending through Ariel or Ariel-like software. Ariel and Ariel-like software degrade the electronic image whether that image is made from a print or an electronic copy. There is no additional security gained by first printing then scanning the article.
- Medical and veterinary libraries may want to secure the right to include the use of LoansomeDoc[®], a library-to-clinician lending software that is commonly used in these fields, and more expansive than fair use.

¹ Lynn Wiley, "License to Deny? Publisher Restrictions on Document Delivery from E-Licensed Journals," *Interlending & Document Supply* 32, no. 2 (2004): 94–102. In 2004, Lynn Wiley surveyed Committee on Institutional Cooperation (CIC) institutions on their policies and practices for including ILL in e-journal license negotiations. All 13 schools reported that they ask for ILL rights, but 9 of them accepted "total prohibition of ILL" (69%), while the other 4 schools had "no knowledge of licenses" (meaning ILL could potentially be prohibited at all 13 schools, i.e., no one in the CIC considers this a deal-breaker). Almost half of the schools (6 out of 13) reported that ILL was "[f]orbidden to some borrowers, i.e., commercial or foreign forbidden." When faced with the issue of canceling print copies of a journal, over half of the schools (7 out of 13) said a resulting lack of ability to loan from the remaining e-version "was important but not the first consideration, those responding no said it wasn't a large issue or that the budget was a larger priority." Wiley reported that CIC ILL departments sometimes canceled ILL requests due to restrictions in the license; "[t]he numbers were not large, no higher than 600 over a six-month period, but bear watching for any increase." In the eight years since this survey, more CIC schools have undoubtedly canceled print versions, a move that may well have resulted in less ability to provide loans to peers and a corresponding lessening in ability to obtain loans from peers.

² North Carolina State University: ILL information from 80 publishers was used in an informal sample, including information from 27 of the approximately 100 members of the International Association of Scientific, Technical & Medical Publishers. University of Minnesota: the ILL clauses of its 241 e-journal licenses were examined.

³ At the University of Minnesota, the success rate is 89% (214 out of 241 licenses).

⁴ In those licensing agreements between publishers and the University of Minnesota that allow ILL, if requested by a library in the US, (note the library usually needs to be a non-profit) this represents ~12% (25/214) of the allowing publishers. In the sample of 27 STM publishers, the percentage requiring same-country restrictions was slightly higher, though still a minority (19%).

⁵ From the Elsevier ScienceDirect ILL policy: "A note on national boundaries: Interlibrary loan and document delivery activities and the legal basis for such activities vary from country to country. As an international publisher, Elsevier has worked hard to establish an international level playing field, where all libraries can provide documents to libraries on the same terms and conditions. Those terms are intended to support domestic ILL. They are also intended to reign in those libraries who have abused ILL and provide what is more accurately described as document delivery to anyone anywhere in the world in the name of ILL." Last updated April 1, 2011, http://www.elsevier.com/wps/find/intro.cws_home/SDinterlibraryloan.

⁶ For example, "The Licensee may, subject to clause 6 below, supply to an Authorized User of another library (whether by post or fax [or secure transmission, using Ariel or its equivalent, whereby the electronic file is deleted immediately after printing]), for the purposes of research or private study and not for Commercial Use, a single paper copy of an electronic original of an individual document..." (Licensing Models, "Academic Single Institution License," accessed May 13, 2011, <http://www.licensingmodels.org/SingleAcademicInstitutionLicense.html>.) This language, on the one hand, permits secure e-transmission; on the other hand, it requires delivery of a paper copy. It also makes a request of the lending library (the licensee) that they do not have the ability to enforce, as the format delivered to the patron by the requesting library is beyond the lending library's control.

⁷ At University of Minnesota, 29% of allowing publishers refer to the CONTU Guidelines that were established by the Library of Congress in 1979. CONTU Guidelines place the burden of tracking the number of requests on the requesting library. ILL software widely used in ILL transactions facilitates compliance with this guideline; the software does not provide the mechanism for the lending library to keep track of this data.

Appendix A: Legal Licensing Issues

When a license agreement is silent as to the permissibility of ILL and there have been no informal discussions of the issue between the parties, institutions should assume standard ILL practice is allowed and fulfill requests accordingly. All else being equal, reasonable licensors should assume that the licensee intends to engage in whatever activities are customary and permitted by law unless the license specifies that those activities are forbidden. As most licenses that address the issue do allow ILL, and ILL (including to non-US partners) is a long-established practice, the burden should be on the licensor to specify that it wants to deviate from this default practice.

For the same reason there is no need to deliver copies of “silent license” materials in inferior formats such as scanning or faxing printouts rather than electronic delivery of files in the same format that is available to licensee’s authorized users. The default expectation should be delivery in the most useful and efficient format allowed by law.

The inclusion of a generic savings clause, such as “All rights not specifically granted to Licensee are expressly reserved,” has no effect on a library’s rights under fair use and Section 108, and hence does not bar lending under ILL arrangements. A publisher’s rights are expressly limited by the exceptions in the law, including Sections 107 and 108, so they have no right to forbid activities that Sections 107 and 108 allow. It is often said that “a license trumps fair use,” but this isn’t entirely accurate. **Conflicting provisions** in a license do override default rights under fair use and other exceptions, but the mere fact that a license exists does not alter the default legal rules that govern the use of copyrighted materials. Libraries do not need a publisher’s permission to engage in these activities, so a publisher’s declaration that its grant of permission is limited is irrelevant to activities covered by statutory exceptions. Only an affirmative promise by the library that it will not engage in activities other than those specifically discussed in the license would be sufficient to bar a library from engaging in ILL. Such a provision should raise red flags for libraries, which should resist this kind of erosion of their legal rights. In addition, judges construe ambiguous provisions against the drafter of the agreement (almost always the publisher), especially in one-sided negotiations, which are typical in this context. So a generic savings clause will not be construed broadly to limit the rights of libraries where, as here, there is a better interpretation that is friendly to libraries.

Some license agreements appear to include language to the effect that articles in the database cannot be downloaded, reproduced, transmitted, and so on, “except as permitted by [national/international/applicable] law.” This language is likely meant to give licensees permission (or, consistent with the discussion above, to be clear that the library is not waiving its rights) to take advantage of exceptions and limitations such as fair use and Section 108. However, an attorney would have to see the full text of a license agreement to be sure of any provision’s meaning. For example, language in the JSTOR license allowing ILL if in compliance with “international copyright laws, guidelines, or conventions” appears designed to give licensees rights (or, again, to make clear that licensees are not waiving rights) to do whatever ILL practices are legal or customary in licensee’s country or community. In short, this kind of language is likely meant to preserve libraries’ default rights, not take them away, and should be interpreted to allow ILL in compliance with US law.

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