Building Your Licensing and Negotiation Skills Toolkit

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The advent of electronic resources brought about the need for license agreements between libraries and publishers. Many librarians today are new to licensing and negotiating with publishers, or have received limited training and education. Based on her years of licensing and negotiation experience, Clair Dygert of the Florida Virtual Campus (FLVC) provided librarians with practical advice and tools for working with licenses and negotiating with publishers, as well as encouragement for entering into these new areas. She included examples taken directly from FLVC’s licensing guidelines and negotiation proposals and encouraged attendees to use those documents in creating their own local documents. She also drew on the book Getting to Yes: Negotiating Agreement Without Giving In by Roger Fisher and William Ury to describe principled bargaining as the most effective and constructive method of negotiation.

KEYWORDS electronic resources, licensing, license agreements, negotiation

INTRODUCTION

Claire Dygert, Assistant Director for Licensing and E-Resources at the Florida Virtual Campus (FLVC) in Gainesville, Florida, presented a half-day workshop on licensing and negotiation following the 30th Annual NASIG Conference. Sixteen librarians representing various libraries and library types in the United States
and the United Kingdom attended the session. Some attendees had previous experience in licensing and negotiation, while others were very new to the area. Several attendees reported that they had “inherited” licensing responsibility due to staff cuts, reorganizations, or a shift toward acquiring more electronic resources.

Dygert provided some background on FLVC, which was created in 2012 from four different library and education support organizations in Florida. FLVC chiefly supports the libraries of the Florida State University System (SUS) and the Florida College System (FCS). It also provides some services for a fee to the Independent Colleges and Universities of Florida (ICUF). In 2014, changes in Florida legislation required reorganization for FLVC. Previously affiliated with the University of Florida, FLVC was incorporated into the University of West Florida’s Innovation Institute and Complete Florida Plus Program as of January 1, 2015. FLVC has a $7.1 million budget for SUS and FCS e-resources. It also coordinates group licensing activities for the SUS and FCS and handles e-journal package negotiation and management for SUS and ICUF, with cost-recovery fees from ICUF totaling around $45,000 per year.

**LICENSING**

Licensing in libraries arose with the shift from print resources to e-resources. Print resources are governed by copyright law, which includes provisions that are very important to libraries. The first-sale doctrine allows libraries to lend, sell, or discard materials that they have purchased. Fair-use allows reproduction of materials in certain cases, such as research, teaching, and criticism. Educational and library exceptions allow for inter-library loan and use of materials in course packets. Publishers and vendors of electronic content were concerned that copyright law would not provide enough control or protection for their content, given that electronic content can be transferred and reproduced much more widely, rapidly, and easily than physical items such as books. Therefore, e-resource providers favored license agreements that detail specific rights and responsibilities for accessing their content. License agreements are governed by contract law; the most important thing to know is that contract terms take precedence over existing rights and exceptions provided by copyright law.

**Anatomy of a License Agreement**

License agreements can vary in complexity, however, many contain generally the same elements. Dygert outlined the main elements common to all licenses, led an examination of each one, and shared sample clauses drawn from *Complete Florida Plus Guidelines for E-Resource License Agreements.* The first of these elements is the definition of licensor and licensee. Licensor refers
to the content provider. Licensee refers to the subscriber and may include multiple participating institutions. Institutions may have specific requirements for how they are represented in contracts; it is good to ask the institution’s legal counsel about such requirements. The definition of licensor and licensee may be followed by a glossary of terms with detailed definitions of terms used within the license; a glossary is not a mandatory element.

Next, the license should address authorized users and authorized sites. It is extremely important that libraries define their authorized users and sites and not simply accept the publisher’s definitions. Authorized users and sites should be defined based on affiliation with the institution, not geographic location, since universities and other institutions commonly establish sites and serve users all over the world. Publishers tend to define users and sites very narrowly, often at the level of the individual library rather than at the level of the entire institution. Libraries, on the other hand, should strive to be as inclusive as possible and should add provisions for walk-in visitors to the library.

Authorized uses are another element of license agreements. Because contract terms take precedence over the rights and exceptions granted by copyright law, libraries should add a clause requiring that these rights and exceptions be retained. The library can add a clause to the publisher’s authorized uses clause, or can add an umbrella clause such as:

Nothing in this License shall in any way exclude, modify, or affect any of [the Licensee’s] statutory rights under national copyright law.

One recent development that may also ensure that libraries retain copyright law provisions is Shared Electronic Resource Understanding (SERU), a NISO best practice. Libraries, consortia, publishers, and vendors can join the SERU Registry. Because SERU is based on copyright law, no license agreements are needed for transactions between the participating libraries and publishers.

Interlibrary loan (ILL) of electronic resources should be permitted as authorized use. Publishers’ ILL clauses may require the library to provide data or statistics about ILL uses, limit ILL to only certain types of libraries, or place geographic limitations on ILL. Libraries should strike through these restrictions. Although loaning chapters of e-books is a common practice, loaning entire e-books remains a problem. There are potential solutions such as Occam’s Reader currently in development. One workshop attendee had heard of another possible solution, “external short-term loans (STL).” This would allow short-term access to users at other libraries for a small fee. It is not clear yet, however, how external STL would work. Currently, libraries may find it easiest to license e-book content at a state or consortial level and bypass ILL altogether. A similar emerging issue is the use of licensed e-resources in course management systems. It has become more and more common that faculty wish to use e-books as class textbooks. While many licenses include
clauses for course packets, libraries should ensure that they also include permissions for use in course management systems. An attendee commented on problems with online streaming video packages, such as titles moving out of packages after a certain amount of time; this causes problems for faculty who use videos in classes. Libraries may want to ask publishers for the ability to license certain titles for longer periods of time.

Licenses may include clauses restricting commercial use of e-resources. In this case, the library should add a clause clarifying that charging administrative fees to cover the cost of making permitted copies is not prohibited. The library should also clarify that use of licensed materials for research funded by commercial organizations is not considered a commercial use.

Depending on the type of e-resource, the license may include perpetual access rights. Database licenses generally do not provide perpetual access, but e-journal licenses generally do, at least for some titles in packages. Fees for perpetual access should be included in the fee schedule. Even when provided by a license, perpetual access is sometimes problematic. If, for example, an e-resource changes publisher, the new publisher may not honor the previous publisher’s agreement to provide perpetual access.

Every license should detail licensor responsibilities and licensee responsibilities. Licensor responsibilities include maintaining licensees’ privacy, ensuring the quality of service, providing usage statistics to licensees or permitting the collection of usage statistics by a third party, and providing for withdrawn materials. Licensee responsibilities include notifying users of license terms, avoiding breach of contract, and disciplining users who commit breaches. Licenses may contain language requiring the licensee to avoid and discipline breach; this language should be amended to make reasonable efforts to. Furthermore, a clause should be added to the licensor responsibilities requiring the publisher to notify the library if they discover a breach, allow reasonable time for the library to respond and fix the breach, and notify the library before cutting off access.

Licenses may include additional legal statements. It may declare that the license is governed by law of a particular place. If so, this place should be amended to the state where the licensee’s home institution is located. Some e-resources have online “click-through” user agreements. However, a written agreement supersedes any online agreement. Any changes to a license must be in writing and agreed to by both licensor and licensee. Licenses may also include legal concepts such as indemnification, warranties, and limitation of liability. Dygert recommended that librarians always consult with legal counsel regarding these more complex legal concepts.

The body of the license agreement will usually end with a signature page. Licenses should be signed by an authorized person designated by the institution. Signing authority may depend on the dollar amount of the license; in case of doubt, it is best to consult legal counsel. Without proper signing authority, the person who signs a license may be held personally responsible for it.
One or both parties may add schedules and attachments detailing terms that do not fit neatly into the body of the license. Schedules and attachments commonly include fee schedules, details on participating libraries, lists or descriptions of licensed content, invoicing instructions, and contact information. The additional documents need not be long or complex. They should be referenced in the main body of the license.

Getting Started in Licensing

After discussing the anatomy of license agreements, Dygert offered advice and encouragement for librarians beginning to work with licenses. She urged librarians not to be afraid or intimidated by licenses, but to simply begin to read and work with them, as that is one of the best ways to learn and grow comfortable with them. Librarians should not hesitate to strike through or otherwise amend licenses, as publishers and vendors are accustomed to receiving marked up licenses. In fact, it is better to err on the side of asking for more rather than fewer changes. Doing so leaves more opportunities for negotiation; if the licensor does not agree to some of the requested amendments, they might be more willing to accept others. It is important for librarians to remember that they are the customers in the transaction and the publisher or vendor wants to keep them as customers.

While librarians should not fear or hesitate to begin working with licenses, they need not do everything on their own. Dygert recommended that librarians build a support network within the library and with other departments of the institution. The institution’s purchasing office is a good resource that librarians might not think of initially. Purchasing staff have experience with contracts and negotiation. The institution’s office of general counsel is another useful ally. Legal staff can provide expertise on legal issues such as indemnification, warranties, and intellectual property. They can also assist the library with developing local licensing guidelines. Dygert recommended that libraries develop such guidelines and suggested that institutions’ guidelines, such as FLVC’s can be used as model. Having written guidelines ensures that library staff are on the same page and consistent in how they handle licenses. Guidelines are helpful in explaining library needs and concerns to the institution’s legal counsel and beginning a larger dialogue and partnership with legal staff.

To ensure adequate time for reading and amendment, librarians should request a copy of the license early in the acquisitions process. They should request the license in an editable format such as a Microsoft Word document. The word processor’s “track changes” feature should be used to edit the license and add comments. Comments can help the licensor and their legal staff understand why the library is requesting the amendments. Without this understanding, they might refuse the amendments immediately or spend time questioning the
library. The librarian should also refer them to any guidelines or best practices used in amending the license. Once all amendments and comments are made, the librarian should send a copy to the sales representative and ask about their review timeline. After reviewing the library’s amendments and deciding on which to let stand, the publisher will return an updated copy to the library for signing.

NEGOTIATING WITH CONFIDENCE

To illustrate the importance of negotiation skills, Dygert shared a statement from science publisher Jan Velterop:

Only librarians, on the whole, complain about the Big Deal, since their researchers are mostly not aware of costs and cost increases. And librarians have limited power. They also have no strong track record when it comes to negotiating, only in rare cases employing professional negotiators, it seems. That is their weakness, and the publishers’ strength.4

Dygert asked attendees to pause for a moment and think about what negotiation means to us and what emotions it inspires in us. Thoughts and feelings about negotiation are commonly negative. We may think of negotiation as an argument, all about winning or losing, gaining power or losing it. It can cause feelings of anger or intimidation. However, negotiation does not have to be a negative experience.

There are two very different approaches to negotiation: positional bargaining and principled bargaining.5 When we think of negotiation as a negative thing, we are likely thinking of positional bargaining. Positional bargaining involves each party taking up—and then giving up—a succession of positions. This type of negotiation tends to be very confrontational and very personal. It can become a competition of wills; egos can become identified with the positions. It may damage relationships between the parties. Principled bargaining, on the other hand, focuses on issues rather than positions, using objective data and criteria. It separates the issues from the persons involved. Its goal is to create options for mutual gain. Dygert noted that written licensing guidelines are a great tool for principled bargaining, in that they provide a non-personal focus for the discussion.

Gathering Information and Building Leverage

There are three general steps to the negotiation progress: planning and information gathering, putting together a proposal, and negotiating the deal. Because principled bargaining requires objective data and criteria, advance planning and information gathering is a vital step in the process. Libraries must
collect as much data and evidence as possible to support their negotiations and demonstrate leverage.

Librarians must educate themselves about the publishing industry and about the particular publisher they are negotiating with. They should know, for example, the profit growth of the publisher. Publishers in the science, technology, engineering, and mathematics (STEM) area have enjoyed high profit margins, with an annual profit growth of around 10%. These publishers maintained revenue growth during the recession. Furthermore, the publishing industry has increasingly used out-sourcing and off-shoring to reduce their costs.

In addition, librarians must have knowledge of their library and institution’s status. They should have facts about how the library’s budget has been impacted for the last three to five years and how that has affected the library’s buying power. Librarians should know how changes in curricular and research needs have impacted the library. They should also be able to describe and demonstrate their support for the publisher, including not only how much money their library has spent for the publisher’s content but whether and to what extent the library’s researchers have contributed to the publisher’s content. It is also extremely beneficial to build relationships with other libraries and institutions and let the publisher know that the library has leverage and may even be able to introduce the publisher to a new market via another library or institution.

Ideally, it would be helpful to know what kinds of deals other institutions or consortia are getting from the publisher. However, getting specific information may be difficult due to confidentiality clauses in license agreements. Some information can nevertheless be gleaned from sources such as public records requests for public institutions and literature reviews.

Librarians must know and assess their collections and how the collections are being used. Some subscriptions may no longer be needed to support the curriculum or research needs. Cost-per-use analysis may help identify content that is not being utilized or may be more economically purchased on a per-transaction basis. Librarians should be able to tell publishers how the publishers’ content works or does not work for the library’s users.

Creating a Proposal

In some cases, libraries may benefit from submitting a proposal to the publisher, detailing the library’s needs and drawing on everything learned during the information gathering, assessment, and leverage building process. An example of when a proposal might be helpful is when the publisher has regularly been charging increased rates, while the library has experienced flat budgets. One of the biggest mistakes libraries make is protesting to the publishers that we cannot afford their products, but renewing nonetheless. If
the library can show evidence of their financial situation and suggest options for how it may be improved, publishers may be willing to negotiate. The library should clearly articulate the terms they want, such as which content they want to license, pricing terms and fees, treatment of transfer and new start titles, and discounts for print. At the same time, the library should demonstrate mutual gain for itself and the publisher. The publisher wants to keep customers and save sales. The library should demonstrate that it wants to remain as a customer.

Proposals, like licensing guidelines, support principled negotiation. The proposal details the issues, not the people involved. Interest is focused on finding terms that both parties can agree on and benefit from. It can provide new options and opportunities for the publisher while meeting the needs of the library. The bargaining is based on verifiable facts such as budget information and pricing history.

Dygert shared with the group a sample proposal to reduce mid-term contract costs with a major STEM publisher when the economic recession hit. Some of the institutions within FLVC suffered significant budget cuts. In this proposal, Dygert provided specific percentages of the budget cuts suffered by the SUS library budgets over two consecutive fiscal years. She also mentioned that these cuts had already resulted in the cancellation of more than thirty databases. Finally, she pointed out that the SUS libraries were being asked to plan for an even larger budget cut in the upcoming fiscal year. After illustrating the dire financial situation of the libraries, Dygert cited a news article in which the publisher’s chief executive talked about a 21% increase in profits and said that 80% of the business would experience growth despite the economic difficulties of that time. Dygert pointed out that during the time of the publisher’s growth, the Florida SUS had invested a great deal of money in their content, thereby contributing to the publisher’s success. Dygert provided a graph that illustrated the disparity between the upcoming costs of the next contract year and the libraries’ decreased buying power. She also graphed out a line in the middle of the two, which was the amount she was proposing for future charges.

Additional Considerations for Negotiation

When entering into a negotiation, a librarian should make sure that all internal constituents are on the same page and in agreement. Library staff should set their collective expectations high, while also knowing where the points of compromise are. Stopping to confer with internal or external groups can buy the negotiator time during the process, and this can help avoid making commitments under pressure.

It is important to identify and negotiate with the publisher’s decision maker from the beginning. If the contact person has been a sales
representative, the librarian should ask the sales representative who the decision maker is and work with them. Negotiating with the actual decision maker saves a great deal of time and effort. Dygert recommended meeting publisher representatives in person if at all possible, at least initially. Library staff should set the agenda and tone for the meeting, set expectations high, and be prepared to answer difficult questions. It is a good idea to learn and use the publisher’s terminology as appropriate, as this can level the playing field and demonstrate to the publisher that library staff are well-educated and prepared for the discussion.

The foremost communication skill is to listen very hard. Listening closely can provide opportunities to probe the publisher for more information. It is also important to allow for periods of silence in order to think over what has been said and weigh options. These silences can diffuse pressure and perhaps prompt the publisher to insert further information or new options. In the event that tempers get flared, negotiators should take a break. It is important to document and periodically summarize points of agreement and understanding; this can help keep both parties focused on the positive. Finally, librarians should be themselves, but know their strengths and weaknesses. The most important thing of all is that personal integrity is of the utmost importance. A negotiator should never lie or promise anything they cannot deliver.

Librarians can develop a network of support within their institutions. As with licensing, staff from the purchasing office and office of general counsel will have experience with negotiations and can serve as good advisors. Business librarians can assist with gathering information about publishers, such as their recent profits. A boss or higher authority in the library should also be able to advise or even take over difficult negotiations. A negotiation team can be helpful, although it requires a very strong team leader who everyone involved will listen to. Finally, librarians should seek out and attend corporate negotiation seminars; these can be helpful in understanding how publishers and other corporate parties approach negotiations.

In closing, Dygert reminded the group that nobody is born an expert negotiator. Each negotiation experience will provide opportunities for learning and growth. Librarians should assess each experience and ask themselves what went right and what went wrong, what could have been done better, and how they felt emotionally during the experience. They should always forgive themselves for mistakes and continually experiment and adjust their negotiation styles.

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NOTES


ADDITIONAL RESOURCES


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