Kluwer Copyright Blog

Unfair licensing practices: the library experience

Teresa Nobre (COMMUNIA) · Thursday, May 15th, 2025


Interior of a bookshop in 1815

This week, COMMUNIA released a new report detailing unfair practices in the licensing of digital resources to libraries (as a PDF file). This report describes contractual practices identified by licensing managers from public and academic libraries across Europe during a meeting organised by COMMUNIA under the Chatham House Rule. The report also contains clauses from licensing agreements sourced from academic library consortia and individual libraries in Europe ahead of the meeting. Together they provide evidence that freedom of contract is often exploited by publishers to the detriment of libraries and access to knowledge.

The report details a range of obstacles arising from unfavourable licensing practices: overly

restrictive terms of use that limit scientific research in the digital ecosystem, including text and data mining (TDM) and artificial intelligence (AI) prohibitions; overly broad liability and non-compliance clauses; and obstacles to building and lending digital collections from refusal to license to licensing models that are not adequate to the needs and specificities of the institutions.

Contractual practices that restrict scientific research

A persistent contractual practice limiting scientific research are restrictive AI clauses: participants explained that there has been a noticeable push by publishers to prohibit library users from using e-books and e-journals in combination with AI systems since 2023. Participants reported that, in addition to prohibiting AI uses, publishers have become emboldened and have begun to insist on clauses prohibiting TDM. These trends were also noted in a forthcoming study of 100 licenses by Ana Lazarova.

A general ban on the use of AI tools prevents common uses by researchers and library patrons, such as the use of AI-powered browsers, as exemplified by this clause:

> *The use of automated IT applications, in particular AI applications, which analyse the technical properties of the database and/or retrieve, analyse, modify, enrich, aggregate, use to generate texts or other content (…) is not permitted. In particular, the use of browsers with integrated or connected functionality of an automated IT application, especially an AI application, is also prohibited. (…)*

Many of the uses restricted by the analysed clauses are protected under the national TDM exceptions that implement Article 3 of the DSM Directive. However, these contractual restrictions create legal uncertainty for library users. Furthermore, when the license agreement is subject to a foreign law, the library and its users may not be able to assert their rights under such exceptions. Even though those exceptions are generally protected against contractual overrides, as mandated by Article 7(1) of the DSM Directive, a choice-of-law agreement may be enough to circumvent those exceptions, if none of the protective mechanisms under the Rome I Regulation applies.

Contractual practices that penalize libraries for actions of users

When such contractual prohibitions are in place, publishers can simply remove the library's access to the licensed content, if they suspect that a user is trying to conduct TDM on their content or using it in connection with AI tools. One licensing manager explained that, as access is provided via the publisher's platform, publishers can, and have in the past, cut the entire campus' access to the publisher's site as a consequence of a single user's alleged mis-use of the licensed material.

The breach of the TDM and AI restrictions can expose libraries to strong penalties for non-compliance, as exemplified by this clause:

> *In the event that Publisher determines, at its sole discretion, that Licensee has breached the terms of this section, Publisher reserves the right to take any actions it deems necessary, including, without limitation: (a) immediate termination of this Agreement, without refund or additional compensation to Licensee; (b) denial of Licensee's existing or future access to*

any Content; and/or (c) legal action, including but not limited to, injunctive relief, monetary damages, civil or criminal penalties, and/or other available legal remedies.

The sense of vulnerability among the practitioners from the library sector is increasing also due to the fact that there has been strong pressure from publishers to broaden the liability of libraries. Participants described that institutional liability has always been limited as long as the institution takes reasonable measures to prevent license infringement, such as requiring user authentication and informing users of the license terms. However, recent license offers expose libraries to unprecedented liability standards for actions of library users.

As a result, many licence negotiations in the past year have reached a deadlock due to disagreements over the liability clauses. A publicly known example of this are the negotiations between the FinELib consortium and the American Chemical Society (ACS) for the 2025 consortium agreement, which are reported to have concluded without success due to "fundamental differences of views on the liability issues."

Contractual practices that affect the building and lending of digital collections

In addition, the report also shows how the near total reliance on licenses to access digital resources gives publishers tremendous power to refuse to deal with libraries and to segment access through inadequate licensing models and arbitrary withdrawal of titles.

The licensing models on offer to libraries have been previously documented and include bundling individual titles in a single (often expensive) licensing package, leading academic libraries to spend library budgets only on a handful of publishers and on titles they do not need; metered licenses, which behave as if there was a "self-destruct" attached, forcing public libraries to repurchase licences for the same titles on a more regular basis than they would buy a physical book; and one-book-per-student licenses or "named" licenses, which restrict access to unique users, which is unaffordable for most academic libraries and raises privacy concerns, due to the potential monitoring of student reading behaviour.

Publishers reserve the right to remove or replace licensed content at any time and often without notice. While removing access to titles may be justifiable in some cases (e.g. legal grounds), an arbitrary withdrawal (e.g. retracting course-relevant materials just before the start of the university term or removing titles from public libraries after the selection of the title for an annual reading promotion) is more difficult to accept.

Conclusions and recommendations

Libraries face significant obstacles to acquire digital resources under fair and reasonable terms. The near total reliance on licenses, which are subject to the principle of freedom of contract, combined with the monopoly position of rightholders, enables publishers to unilaterally determine the access models on offer to libraries, impose conditions on the use of materials that exceed their legitimate entitlement and, in some cases, to refuse to deal with libraries at all.

Two measures would go a long way in remedying this situation and offsetting the economic effect

of unequal bargaining power of libraries vis-a-vis publishers: a positive obligation to license or to sell digital works to libraries under fair and reasonable terms (see our Policy Paper #21 on the right to license and own digital materials) and the introduction of private international law protections to ensure that research policies are not circumvented by choice-of-law agreements (e.g. qualifying the scientific research TDM exception as an overriding mandatory provision within the meaning of Article 9 of the Rome I Regulation, to set aside the foreign law chosen if it leads to a loss of research rights).[1]

Resolving these issues would ideally be part of a comprehensive regulation, a Digital Knowledge Act, addressing more broadly the needs of libraries and other knowledge institutions in the digital environment.

This post was first published on the COMMUNIA blog.

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[1] *A recent report prepared for the European Commission explores this and other mechanisms to protect authors, performers and producers from the effects of choice-of-law agreements included in rights transfer agreements.*

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