

SERU (Shared Electronic Resource Understanding): Opening Up New Possibilities for Electronic Resource Transactions

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Abstract

Licensing of electronic resources has become a norm for libraries and publishers, and both communities have labored to promote shared understanding of expectations for many license terms. While negotiated contracts are appropriate for some transactions, libraries and publishers are questioning its necessity for all transactions. The Shared Electronic Resource Understanding (SERU) project offers a mechanism that can be used as an alternative to a license. The SERU statement expresses commonly shared understandings of the subscribing institution, the licensing institution and authorized users; the nature of the content; use of materials and inappropriate uses; privacy and confidentiality; online performance and service provision; and archiving and perpetual access. Widespread adoption of the SERU model for many electronic resource transactions offers substantial benefits both to publishers and libraries by removing the overhead of bilateral license negotiation.

Introduction

Publishers and librarians are well into their second decade of experience with active e-resources. Many new and transformed business models are operating in the electronic resource market, many of which are subscription models of various types. Early subscriptions for electronic content almost always incorporated the use of license agreements as a mechanism for defining the purchase transaction and also the usage rights of the subscribers. Many publishers and librarians developed a presumption that license agreements were a legal necessity of e-resource transactions. This assumption has occasionally been challenged, and recent observations suggest that a surprising number of publishers have been offering electronic publications without the use of a license.

However, only recently has a systematic examination of the assumed license requirement been made, with the result that it has been possible to create a new option for organizing the relationship between publishers and librarians for electronic resource transactions. SERU (the Shared Electronic Resource Understanding)ⁱⁱ is a new tool available to libraries and publishers who are comfortable forgoing a license in an e-resource transaction.

License Agreements and Electronic Resources

As digital content entered the market, contract law was almost immediately pitted against copyright as both publishers and librarians grappled with the reality that contracts trump copyright (Davis 1997). Electronic delivery raised the possibility that new business models could be created that parsed previously bundled uses of content. The new possibilities for selling limited rights to use content immediately engendered interest in using contracting approaches to library sales. In addition, almost all early digital content was expensive to produce and consequently expensive to purchase. It was perhaps inevitable that the first generation of electronic resource products were licensed to libraries. Uncertainty was high on both sides of the sales counter and the negotiations involved in sales easily extended beyond price into user rights, site definitions, applicable law, indemnification, and a host of other issues.

Despite the fairly obvious appeal of license-based sales, some of the problems created when buying and selling by using a licensing paradigm were apparent even in the earliest days. The process of license negotiation is time consuming and resource intensive, requiring significant expertise by both participants in any balanced negotiation. At first, both the publishing and library communities faced

steep learning curves. Great efforts were made by a variety of individuals and organizations to educate stakeholders and to create and promulgate best practices.

In 1994, the READI project (Rights for Electronic Access to and Delivery of Information) offered guidance on license and contract negotiation to the licensing community. This groundbreaking effort by the Coalition for Networked Information was based on conversations with a range of stakeholders and laid out a set of contract elements appropriate for electronic resource license agreements (Ubell and Tesoriero 1994). Six library organizations released "Principles for Licensing Electronic Resources" in 1997, a consensus document that presented six principles that libraries expect publishers to honor in preparing license agreements (American Association of Law Libraries et al. 1997; Schottlaender 1998). The Association of Research Libraries also developed a series of workshops that educated many librarians and publishers about licensing principles and practice (Ogburn 2001; Luther 1999).

Liblicense was launched by Yale University library with support from the Council on Library and Information Resources. This influential project provided a forum for ongoing discussion around licensing issues and substantially improved licensing practice through the development and promotion of model license agreements and standard definitions for many common license terms (Okerson 1999).

Publisher organizations also developed model license agreements and licensing principles. Probably the most visible was the work of John Cox (Cox 2000). The STM Library Relations Committee commissioned Cox to produce a white paper, "Publisher/Library Relationships in the Digital Environment." The white paper emphasized the need for cooperation and the creation of a mutual understanding between publishers and librarians.

The efforts to create standard license agreements have been successful in creating shared understanding of common license terms for electronic publications and have assisted in many areas in moving libraries and publishers toward mutual agreement on many issues.

As publisher and library experience with licensing blossomed, the fundamental limitations of a licensing approach also became clearer. The inability of either libraries or publishers to fully adopt standard license agreements presents

problems that are not easily resolved. Other characteristics of license-based sales present further drawbacks for both publishers and librarians.

It has become apparent that there is no single license a publisher can offer to which all libraries can agree. As Linda Beebe from the American Psychological Association observed, "Increasingly, institutions are required by university regulations or state law to add very substantive clauses before they can sign a license. Issues include liability, indemnification, governing law, security, and perpetual access among others" (Beebe 2005).

Equally, there is no standard license a library could offer that would be agreeable to all publishers, and inevitably any publisher – at a minimum – would have to review each library's license. Bilateral negotiation of each transaction seemed inescapable.

License negotiation requires considerable resources for license management and coming to agreement cannot be done without the elapse of significant amounts of time, delaying payment for publishers and access for libraries. When negotiations are confined to a limited number of expensive information products, the resources and delays incumbent in the process may be acceptable conditions for doing business. However, scholarly publishing has always involved a multitude of small enterprises, and research libraries, at least, must acquire publications from publishers of all sizes and kinds. For many e-resource transactions, the costs of license negotiation can conceivably approach the costs of content production. For libraries faced with hundreds or even thousands of transactions annually, the resources needed to manage license negotiations for each transaction substantially erode the resources available for purchasing content.

Licensing inevitably colors the relationship between publishers and librarians. Constant negotiation of each transaction creates a perception of ongoing conflict, even in the absence of a body of cases requiring enforcement of license terms.

Working Without a License

Increasingly, publishers and librarians have questioned whether the benefits of license negotiation outweigh the costs for all e-resource transactions. An early commentary on the situation is that of Rick Anderson, who observed that license agreements are not a legal requirement of e-resource transactions but rather a

chosen instrumentality (Anderson 1999). Publishers such as the OECD (Organization for Economic Co-operation and Development) have as a matter of policy used license agreements only when required by a library.

Once it is acknowledged that e-resource transactions can legitimately take place in the absence of a license, it becomes evident that the way forward to a more diverse set of practices involves some mechanism for enhancing mutual trust and cooperation between libraries and publishers. The willingness of some publishers to make minimal use of license agreements and public discussions challenging the assumption that universal licensing is inherent in e-resource sales suggest that both publishers and librarians have reached a level of trust where new approaches can be considered.

In 2005 and 2006, a series of discussions were held at a variety of publisher and library meetings. Lead by Judy Luther of Informed Strategies and Selden Lamoureux of the University of North Carolina, Chapel Hill, there was broad exploration of the situation. By the spring of 2006 it was clear that many publishers and librarians wanted to find a way to manage e-resource transactions without engaging in license negotiation (Collins 2007).

Luther and Lamoureux approached a combination of library and publisher organizations to see if they would support a project to develop a new "license-less" option for e-resource transactions. Four organizations agreed that this work was worth pursuing: the Association of Research Libraries, the Association of Learned and Professional Society Publishers, the Society for Scholarly Publishing, and the Scholarly Publishing and Academic Resources Coalition. After an initial exploration of the legal landscape that verified that license-less transactions could be viable legally and commercially, a small group convened to explore the situation and recommend a plan of action. The participants were carefully balanced between librarians and publishers and included two participants with legal training, a consortium staff member, and a serials agent. This discussion concluded that an instrument for license-less transactions was possible and desirable, with the result that a working group was formed by the National Information Standards Organization (NISO) to create such an instrument: the Shared Electronic Resource Understanding (SERU).

Shared Understanding

The SERU Working Group members were convinced that shared expectations had developed among a substantial number of publishers and librarians around

a limited set of issues. These would provide the basis for the shared understanding statement. The Working Group agreed that the statement could not serve as a license, but would serve to facilitate transactions by offering a different kind of structure.

Several principles emerged as necessary for the successful development of a statement of shared understandings. Legal language would be avoided. The statement would address only areas of agreement and could only address the most common situations. Exceptional circumstances abound and would need to be addressed through other mechanisms.

Since it is not a contract, the statement would not attempt to resolve disagreements. For instance, although disagreements about the interpretation of all provisions of copyright law persist, acceptance of copyright law as the determining body of law governing acceptable use would have to be assumed. The mechanism of a shared understanding embodies an approach to conflict quite different from that embodied in the application of license agreements. Disagreements and misunderstandings between publishers and librarians would be inevitable, but many publishers and librarians have sufficient trust that they could work out disputes as they arose, relying on existing law as a last resort.

Rather than devising a standard, SERU development occurs within the context of NISO's best practices program. This reflects the goal of creating an option that appropriately applies to only a subset of electronic resource transactions.

The resulting SERU approach addressed the following areas of agreement:

- The subscribing institution
- The licensing institution and authorized users
- The nature of the content
- Use of materials and inappropriate uses
- Privacy and confidentiality
- Online performance and service provision
- Archiving and perpetual access

The SERU document includes an introduction and guidelines for implementation, as well. While the development process has generated substantial commentary from diverse stakeholders, the absence of disagreement with the basic categories suggests that these truly represent the main areas of general agreement between publishers and librarians. Not surprisingly, these

areas have been commonly discussed in statements of licensing principles and standard license agreements from a wide range of library and publisher organizations.

The general agreement on the broad categories does fully extend to the specifics each addresses. While helpful commentary has improved each section, even within the Working Group it is clear that two areas present particular challenges: use of materials and archiving and perpetual access.

Appropriate and inappropriate use of materials has been an arena where publishers and librarians have frequently struggled in agreeing on common ground in license negotiation. SERU references copyright law and does not offer to interpret that law. This is appropriate, as SERU is not intended to serve as a contract.

An even more dynamically evolving arena has perhaps been that of preservation, archiving, and access rights to archived content. Both recent research and public statements suggest that the library community is struggling in expressing its concerns about how license agreements do or do not address preservation rights beyond those inherent in copyright law (Farb 2006; Waters 1995). Widely available preservation mechanisms for electronic journals are relatively recent developments, and there is still significant variability in the level of engagement by libraries and publishers in current programs like LOCKSS, CLOCKS, and Portico (Kenney et al. 2006). Audit programs to establish broader trust in repositories are still in development (RLG 2005). While, in principle, there is clearly shared agreement on the importance of preservation, the relative immaturity of present preservation systems makes it difficult to clearly express shared expectations.

Despite some difficulties, the speed with which it has been possible for the Working Group to develop its statement and engender community support for the statement indicates that there is substantial maturity in the library and publisher communities with regard to electronic resource transactions that can be expressed in a public statement like SERU. A trial phase for SERU draft 0.9 was released only seven months after the Working Group formed.

Diffusion of SERU

As SERU is an expression of community accord, its value will lie in the extent to which it is broadly used within the community. Just as licensing is predicated on

bilateral license negotiations, SERU can only be appropriate where both the publisher and the library are willing to adopt the mechanism. Broadening adoption of SERU will require an ongoing engagement by publishers and librarians to build on and enhance the trust that already exists in their ability to count on responsible behavior, resolve disagreements and avoid conflicts.

This trust-building cycle should be encouraged by the substantial flexibility inherent in the SERU model. A publisher can use SERU for transactions involving only some of its electronic resource titles. Alternatively, SERU can be used for transactions only with certain types of subscribers. From the subscriber perspective, SERU use can be limited to certain publishers or certain kinds of transactions, for instance, transactions falling below a predetermined price threshold.

SERU adoption is also being encouraged by the creation of a trial period for using a stable draft of the statement that will allow publishers and librarians to gain experience with SERU transactions and offer the Working Group feedback based on field tests. Public experimentation should lower the perceived level of risk for early adopters. NISO supports this process by maintaining a public registry of publishers and libraries that are willing to use the SERU mechanism for at least some kinds of transactions.^{III}

Early use of SERU is likely to occur among small publishers that feel close to their customer base and are seeking to minimize overhead of transaction costs. SERU is not designed for high-risk transactions or products with unusual features or pricing models.

In a landscape where some publishers are already simply omitting license agreements from their sales practices, SERU can serve to enhance transactions that are license-less. By clarifying common behavior and areas of common expectations, pressure to develop license agreements can be reduced.

SERU can also lower publisher and library overhead by enabling serials vendors to record publisher and library preferences for SERU use. Criteria defining the "comfort zone" can easily be encoded into vendor systems.

SERU is compatible with machine encoding in another way. Increasing adoption of electronic resource management (ERM) systems is leading to the development of license encoding standards. While SERU is not a license, many of the encoding categories can be applied to the SERU statements, as well. This should make it

easy for libraries to create a template for resources obtained by a SERU-mediated transaction.

As publisher experience with SERU grows, there is reason to expect that even large publishers may adopt SERU for some subset of their transactions. Simply because a publisher is large does not mean every e-resource transaction is high value or high risk. Even large organizations can benefit from the overhead reduction SERU offers.

While the library community can ultimately use SERU only where publishers share their comfort with the approach, the advantages of SERU use can easily extend to libraries of any size. In fact, large libraries may engage in low-risk transactions even more frequently than libraries with smaller collections.

The potential savings for libraries and publishers are enormous and lie not just in reducing staff time and aggravation. Customer service and customer relations benefit when transactions can be concluded expeditiously. The scholarly publishing market can be enriched if reducing license negotiation translates into reduced barriers to entry for new publishers or barriers to persistence for small publishers are mitigated.

The development of the SERU project has already challenged preconceptions among both publishers and librarians regarding the legal and operational necessity of license negotiation for e-resource transactions. By offering a significant opportunity for at least occasionally stepping away from the inherently antagonistic negotiating process, new emphasis is placed on shared perspectives and common concerns. There is good reason to think that SERU use offers that rare option, the win-win strategy.

Notes

ⁱ Hahn is co-chair of the NISO SERU Working Group, along with Judy Luther, Informed Strategies.

ⁱⁱ Information on the SERU project, as well as a copy of the current SERU statement can be found at <http://www.niso.org/committees/SERU/>.

ⁱⁱⁱ The trial use registry is available at <http://www.niso.org/committees/SERU/registry.html>

References

- American Association of Law Libraries, American Library Association, Association of Academic Health Sciences Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association. 1997. Principles for Licensing Electronic Resources. Place Published. <http://www.arl.org/sc/licensing/licprinciples.shtml>
- Anderson, Rick. 1999. To License or Not to License – That Really Ought to Be the Question – Of the many changes that the electronic information revolution has brought to library acquisitions, perhaps none is as significant as the licensing agreement. *Against the Grain* 11 (2):68-72.
- Beebe, Linda. 2005. Licensing electronic products at the American Psychological Association. *Serials Librarian* 48 (1/2):175-184.
- Collins, Maria. 2007. SERU: An Alternative to Licensing – An Interview with Selden Durgom Lamoureux. *Serials Review* 33:122-128.
- Cox, John. 2000. Model generic licenses: cooperation and competition. *Serials Review* 26 (1):3-9.
- Davis, Trisha L. 1997. License agreements in lieu of copyright: Are we signign away our rights? *Library Acquisitions: Practice and Theory* 21 (1):19-28.
- Farb, Sharon. 2006. Libraries, licensing and the challenge of stewardship. *First Monday* (7), http://firstmonday.org/issues/issue11_7/farb/index.html.
- Kenney, Anne R., Richard Entlich, Peter B. Hirtle, Nancy Y. McGovern, and Ellie L. Buckley. 2006. E-Journal Archiving Metes and Bounds: A Survey of the Landscape. In *CLIR pub 138: Council on Library and Information Resources*.
- Luther, Judy. 1999. Licensing electronic resources to libraries - An ARL workshop for publishers. *Against the Grain* 11 (1):67, 70.
- Ogburn, Joyce. 2001. A look back at licensing. *Against the Grain* 13 (4):90-91.

Okerson, Ann. 1999. The LIBLICENSE project and how it grows. *D-Lib Magazine* (9), <http://www.dlib.org/dlib/september99/okerson/09okerson.html>.

RLG. 2005. *An Audit Checklist for the Certification of Trusted Digital Repositories*. Mountain View, CA: RLG.

Schottlaender, Brian. 1998. The development of national principles to guide librarians in licensing electronic resources. *Library Acquisitions: Practice and Theory* 22 (1):49-54.

Ubell, Robert, and Mark Tesoriero. *Negotiating Networked Information Contracts and Licenses: READI (Rights for Electronic Access to and Delivery of Information)*. Coalition for Networked Information, November 15, 1994. <http://www.cni.org/projects/READI/guide/>.

Waters, Donald J. *Urgent Action Needed to Preserve Scholarly Electronic Journals*, October 15, 2005
http://www.arl.org/bm~doc/ejournalpreservation_final.pdf.