Licensing and negotiating: exploring unfamiliar ground

NOL VERHAGEN

Director of Libraries, University of Amsterdam

The E-Resources Management Handbook – UKSG

Over the last decade the scene in which librarians have had to operate has completely changed. Librarians have migrated from book-buyers to licence-negotiators, from circulation experts to providers of digital services. This chapter tries to map some of the fields that they have entered and to identify some of the obstacles they can encounter.

This is a post-modern chapter; it has no beginning or end. It is not quite a never-ending story, although the process of negotiating licences often seems like one, but neither is it a smooth-running discussion, with clear-cut conclusions. Instead it is made up of a kaleidoscope of stand-alone elements, that may be read separately or as a whole.

I write, as the director of a large European university and the former chair of a consortium of Dutch university and research libraries, about experiences in the field of digital information supply during the last five or six years. These include agreements made with publishers, discussions with colleagues in The Netherlands and overseas, and the revolutionary changes that have taken place from the library perspective. In addition, a number of topics that directly or indirectly relate to licensing and negotiating are included. The Netherlands occupies a distinct position because some of the larger commercial scholarly publishers have their headquarters here and are managed by Dutch nationals. This results in negotiations taking place in a more intense atmosphere and on a higher level than is perhaps experienced in other countries.

The UKB

UKB is the Dutch co-operative organization of university libraries; members of UKB all represent 'research universities' that can co-operate on the same level in almost all aspects. In The Netherlands, polytechnics and universities are not yet integrated into one system of higher education. UKB universities' financial structures are, for the most part, comparable. All of them receive most of their budget from the Ministry of Education, Culture and Research. They share the same scholarly tradition and culture, which differ quite strongly from those of the polytechnics that, until now, have had a less scholarly remit.

The UKB includes 13 universities, the Royal Library, the Royal Academy of Sciences, and the Open University of The Netherlands, serving a total of 185,000 students. It is a homogeneous consortium but there are important differences between the universities. Three are technological universities (engineering schools), one is the Agricultural University of Wageningen; only eight universities have a medical school and an academic hospital; some have a science faculty, some do not. Only six are broad universities with an almost complete academic curriculum. Since the late 1990s, the UKB has been moving towards becoming a 'real' consortium. However, all UKB members are independent, autonomous institutions that are responsible for their own management and their own budgets.

In 1998 UKB, together with the Gemeinsamer Bibliotheksverbund (GBV) in Germany, took the initiative for the so-called 'licensing' and this was embraced quickly by the International Coalition of Library Consortia (ICOLC) movement, both in Europe and in the USA. These principles set an early standard for

negotiations with both large and smaller academic publishers and have contributed to a much better understanding among both publishers and libraries of the issues at stake. They have shaped a framework for negotiations, making it possible for libraries and consortia to better assess offers from publishers. To support the negotiations, UKB established a small licensing office. This office has found its place in the SURF organization, the Dutch equivalent of the Joint Information Systems Committee (JISC), and has grown rapidly from 0.5 FTE to ± 3.0 FTE. Unlike many other European countries, there was hardly any central funding available for the development of the Digital Library. Both the initiative and the budget were resourced by the universities and their libraries themselves, with only a rather modest and temporary subsidy from SURF, which is also financed largely by the universities themselves.

Since the 1980s, the Dutch Government has taken a policy of non-intervention in university affairs. This gives universities a lot of room to set their own agenda and invent their own solutions, but at the same time it means that government cannot be addressed for extra funding.

Open access

Discussions within consortia have been dominated lately by 'open access' (OA). This term brings widely differing ways of publishing scientific output under one umbrella. Attention is rarely paid to these differences, but they are of the utmost importance. The only feature that all these forms have in common is that the user does not have to pay for gaining access to this content. The underlying structures, however, are quite different.

Preprint servers, for instance, make available documents that have been gathered by researchers themselves. The status of these documents is different from traditional scientific publications, and often vague; they include 'definite' publications, but also 'work-in-progress'.

There are also the institutional repositories (IRs), established by universities and research institutes that assemble their own scholarly output. The status of these publications is not immediately clear; parts of them have been, or are going to be, published in scholarly journals. In addition there are the digital journals that universities, faculties and departments publish themselves, sometimes in co-operation with other partners. Finally there are 'ordinary' journals, by 'normal' publishers, either commercial or not-for-profit, that operate using the 'author pays' model or other upfront payment models.

Research continues in all areas, but it is far too early to conclude whether or not open access will be a viable alternative to traditional ways of publishing. Recently, the data of a large group of American universities has been analysed[1] to find out if open access, where universities would have to pay for the publication of their output, would be a profitable alternative to having to pay for access to these journals. For the vast majority of these universities open access turned out to be more expensive, in many cases even a far more expensive solution than the traditional subscription model. This was certainly the case for the large research universities, such as Harvard and MIT, but smaller universities with a modest research output seemed to gain from the model. It is quite predictable that the same is true for other countries including those in North-Western Europe as they contribute a relatively large part of the worldwide supply of scholarly articles.

Until now the larger scientific publishers have reacted rather reluctantly to the challenges of open access, although some of them, such as Oxford University Press and Springer, initiated courageous experiments. Open access could be an interesting opportunity, even for commercial publishers, as long as they hold control over titles in which every researcher wants to be published. They may be able to control the price at that end of the market and make large profits as they did in the traditional market.

Publishers and authors

Many librarians wonder why researchers continue to offer their articles to big scientific publishers, when at the same time they complain about the high price of scientific journals and subscriptions. The answer

is rather easy – because their chance for eternal glory (and a nice career) depends on these publishers. Furthermore, publishers have been very successful in serving and facilitating these researchers' strong commitment to their disciplines and to their colleagues all over the world, some for several hundred years.

As long as publishers take good care of the needs of their authors, their editors and their referees, their path will be strewn with roses. It is difficult to imagine who else will be able to take over the valuable role of the publishers for authors: definitely not the universities, that researchers tend to see as nasty bureaucracies, whose main goal is to hamper their beautiful projects, and to steal or at least to restrict their copyrights.

Copyright

This is another issue which librarians can talk about forever! Usually authors have to transfer their copyright to publishers, who thereby gain an exclusive right to publish a specific piece of information, and to be paid for the usage of it. Many universities try to gain at least some control over the rights of this output, which has been produced within their time and with their money.

Patents do not seem to cause major problems, however, in the case of scientific articles; this raises heated discussions on academic freedom and in some authors arouses scepticism and mistrust towards employers. Librarians try to convince authors within their institutions to reserve at least the right to make their articles available through institutional repositories. One of the many problems here is that only a few researchers show any interest in copyright issues: they do not earn their money by selling their output, but by publishing it in the highest valued journal. That is how they got their job, will earn promotion, gain fellowships, enlist PhD students and obtain research grants. Copyright is an issue for publishers, for librarians and for copyright lawyers – but not for many authors.

Print and electronic

The digitization of scientific information has caused a revolution in the scholarly information chain. Production went digital 10 to 15 years ago. However, the real change only took place when the *distribution* and *consumption* of this information was digitized. Digital supply of information to the end-user and, more importantly, the digital distribution of information via networks, meant a fundamental breakthrough in the nature of information as a product, not only because information from that moment onward was unrestricted to the user, but also because the user could share the same product with all other users, anywhere in the wide world (web).

Physical distribution of a product has been replaced by virtual distribution, the availability and the quality of which are no longer influenced by usage. It is no miracle that users quickly and massively adapted to digital consumption of information. Availability and functionality of digital resources are incomparably superior to analogue, printed information. In fact the functionality of printed information compared to digital information is so poor that it can only survive by being digitized. This is why large-scale programmes are being initiated (for instance by Google) to digitize existing information in print format.

Until now, libraries have hesitated about making a complete transition or migration to 'e-only' because of uncertainties about the long-term sustainability of digital objects. They are now overcoming their reluctance rather quickly (as their users have done already), mainly for financial reasons. Due to library policies, in The Netherlands the publications of many scientific publishers are no longer available in print format – unless they have been deposited in the Royal Library. But the Royal Library is also moving towards e-only, even for its deposits.

Big deals

'Big deals' are addictive, and that is precisely why some librarians do not like them; addictive in a sense that we librarians no longer have to choose which titles we do and do not want. In general all titles in a portfolio get used eventually, especially when you take a whole consortium into consideration. The spread and the intensity of usage can vary widely. Recent (non-published) research in The Netherlands, carried out on behalf of UKB, Elsevier and Springer, revealed that the '20/80 law' applies: 20% of the titles represent 80% of the usage. This implies that in a portfolio such as Elsevier's, covering some 1,500 current titles, hundreds of titles meet a usage of no more than 100 hits per year and less. At the University of Amsterdam, in 2004 about 300 Elsevier titles got less than 10 hits, another 200 less than 25 hits, and another 200 less than 50 hits. Almost 1,000 titles ended with less than 100 downloads in a 12-month period. These 1,000 titles, however, represented no more than 10% of total usage.

Nevertheless, librarians are hesitating to give up the big deals. One good reason for it is that the alternatives are rather unattractive in terms of value for money. Publishers with which UKB has been negotiating licences will reward pursued continuation of the big deal agreement without exception. Big deals imply administrative convenience for publishers too, while at the same time leaving intermediaries out and ensuring stable cash flow. Publishers can effectively control their costs, and because giving more access does not increase their outgoings it is simple and attractive to seduce libraries into accepting maximum spend levels. Furthermore, they do not have alternative business models. Under these circumstances publishers do agree with lower spend levels for libraries, but the consequences of that in terms of access are much more severe than is justified by the financial savings that can be made.

In the Elsevier case, Dutch libraries have been given the choice of a 0% option; libraries could opt for a 0% price rise over three years (instead of paying a price cap per year) matched by a decrease in access to titles, essentially the 1,000 (or more) rarely used titles mentioned above. However, these titles may still be of interest for some users within the community, so it is tempting to choose to pay the price cap again, especially as since the 1990s we have become used to much higher price increases anyway. And that was what happened: after long and sometimes painful negotiations, after much discussion and not without vehement differences of opinion, UKB decided to renew the big deal.

Licences

It was suggested earlier that a digital document is something completely and fundamentally different from a printed document. Likewise, licensing is something completely and fundamentally different from purchasing a book or a print subscription. When you buy a book, you get a physical product in return, which generally has a fixed price regardless of who the customer is. This also applies to other services such as security or cleaning: whoever buys a service is paying more or less the same price. The supplier of the service charges more when delivering more.

This very simple mechanism does not apply to information services. Widely differing institutions for higher education nowadays get the same service at widely differing prices. Neither librarians nor publishers have found convincing models to make prices for the same product flexible in a fair and justifiable way for different types of customer. In reality the price of licences is still based on historic spending levels of at least six or seven years ago. So these prices are still reflecting a product which has now fundamentally changed.

A related issue is that of the international comparison. In an ever more international and transparent market, it becomes even harder to explain why prices differ so widely between institutions in different countries with more or less the same scholarly traditions and with more or less the same economic capacity. So, compared to The Netherlands, Finland is paying relatively more for their Elsevier licence, and Belgium relatively less. (Allegedly, Belgium used to order fewer journal subscriptions in the past.) In the long run these differences are not sustainable or justifiable.

Negotiation

In the past, librarians were not used to negotiating prices: publishers just dictated, or rather, announced the price, as well as the price increase of a subscription, and librarians just decided to subscribe or not. They could accommodate price increases by cancelling subscriptions, which they did to such an extent that, in the end, even publishers got alarmed – but not to such an extent that they were able to balance their spending on journals during the 1980s and 1990s. More of their budget has been spent on journals at the expense of monographs, the existence of which is now under serious threat in many fields of study. This sounds worse than it is, because the scholarly community seems to have chosen the international scientific journal as its most favourable means of communication and dissemination. In short, the scientific journal has become more important, and therefore we should not be surprised when this is reflected in the spending behaviour of librarians.

   With digital journals gaining ground and being offered to the libraries with different business options, librarians have found themselves at the negotiating table, not only to negotiate the price of the licence, but also other conditions, such as archival rights, cross access fees, e-access fees, full access fees (baptized by Elsevier, with a subtle sense of humour, as 'Freedom Collection'), document delivery, consortium discounts, e-only discounts, usage in course packs and even copyright. Licensing principles have cleared much of the ground for these negotiations and have brought better understanding between publishers and librarians. Checklists have been developed, e.g. by the European Bureau of Library, Information and Documentation Associations (EBLIDA), to help inexperienced librarians to assess offers from publishers, or even to develop their own model licences.

   It is not easy for librarians to learn how to handle the negotiation process, especially within a consortium context. The real weak spot is that they seldom have a clear mandate and commitment from their membership. A diversity of libraries shows a diversity of perspectives and financial capacities. Above that, the governance of the institutions in which the libraries are based can differ greatly, and it often is no easy task to come to an understanding with the faculty librarians or their like within one single institution. One librarian has commented that they deal better with publishers than with their own constituency! One issue is that participants who are not dealing directly with the negotiation do not always have a clear understanding of what is at stake at the negotiating table and they do not always have a realistic view of the possible outcome of the process. Therefore, negotiating on behalf of a consortium can easily deteriorate into vigorous disagreement within consortia rather than leading to agreement with publishers.

Cost division

Sooner or later many consortia will meet tensions related to cost divisions. After all, all members have access to the same content, but pay different prices for it. The contribution of each member usually depends on the historic printed portfolio of that institution. The more this point of reference fades on the horizon, the less the current distribution of costs is felt as just and fair, especially by those who feel that they are paying someone else's share. This is why, all over the world, librarians worry about which parameters should be used to generate a fair division of costs within a consortium. This puts the consortium to the test rather severely, because when dividing existing costs in a new way, inevitably there are not only winners, but also losers. Discussions about the best model are usually highly influenced by the monetary consequences for each of the participants. In order for the negotiations to proceed effectively it is importance to have, in advance, a proper understanding about the division of the costs that will result from the negotiations. Frequently used criteria are:

- the size of the institution, in terms of students or employees, or both
- the nature of the institution: university, polytechnic, research institute, hospital, etc.
- actual usage
- financial capacity/turnover
- historic spending levels.

It can be extremely difficult to reach a balanced sharing of the costs, especially when the consortium covers a great number of heterogeneous institutions. Should a university pay twice or maybe even ten (or fifty) times as much as a polytechnic? Even when the consortium is much more homogeneous, consisting entirely of research universities for example, it can be hard to find the right solution.

UKB happens to be such a homogeneous consortium. While preparing a new round of negotiations in the second half of 2004, UKB developed a model that attempts to offer a sort of ultimate justice: by this model each institution is charged according to the value that a specific portfolio has for that specific institution. In short, the model works as follows:

1. Each portfolio is divided into seven disciplinary areas: science, medicine, law, economics, health care, social studies and humanities, roughly reflecting the division in faculties at most universities.
2. The value of each discipline within the portfolio is determined by adding the list prices of all titles within that discipline.
3. The nature and character of each institution is determined: e.g. does it have a medical school, a law school or a business school?
4. Finally, the share of each institution within each discipline is determined in terms of student numbers.

Using this model the contribution of each institution for a specific portfolio can be calculated. All universities that have a medical school contribute to the costs of the medical part of the portfolio, corresponding with that university's relative share in numbers of medical students. For example, if medical journals in ScienceDirect cover 30% of the costs of the whole database, the institutions with medical schools are charged for that part of the bill – if the University of Amsterdam lists 20% of medical students in The Netherlands, it pays 20% of this 30%, and so on. Universities that do not have a medical school do not contribute to this part of the bill. The overall bill for a university in a specific portfolio will be calculated by adding up the shares of that university in all disciplinary areas. By doing so, the model takes into account the nature of a specific portfolio as well as the characteristics of a specific institution. It was decided to introduce the turnover of the universities as another parameter, as this more or less reflects the 'buying power' of an institution. It takes several years to facilitate the transition from the one model (historic spending) to the other.

Although this model has gained a lot of support between UKB members, it is still hard to make it work. As was stated above, there are always losers who have to go back to their faculty deans and their boards with bad news. Unfortunately, the model works out the same way for most big deals, with the same universities always turning out to be on the losing side! Although it is true that those universities gain most from the big deals, that does not redress the balance.

To be effective as a negotiator it really helps to have an agreement about cost division within your own institution, in advance. You should also agree on strategy before sitting at the negotiating table. Here too, heterogeneity can cause problems: the priorities of a polytechnic are quite different from those of a research university. A heterogeneous consortium is less likely to find a one-size-fits-all solution, consequently more complex options have to be explored and developed. This becomes even worse when a consortium feels obliged to walk away from a big deal. In terms of access the 'all or nothing' arrangements of big deals generally benefit the smallest institutions most. They are therefore resistant to change that will make them lose this advantage. Larger institutions find it hard to walk away from big deals too. They have to find new business models, not only with publishers but among themselves. In addition, when leaving the big deal they have to handle substantial administration issues regarding changes to the library catalogue. The 'orderly retreat'[2] from big deals is not that easy.

Usage

What terrific usage statistics there are nowadays! In the past it was rather difficult to make sense of the deluge of data we received. But now Project COUNTER makes a difference. Librarians and publishers have seldom co-operated so closely, and it does work – at least on the data level. Now we must translate this into useful information.

Libraries are confronted with some remarkable phenomena, which they do not have readymade explanations for. The most intriguing is that while usage was expected to increase while users were getting used to the system, this usage has continued to go up for much longer than predicted. Increasing ease and functionality play a powerful role here, for both libraries and publishers. Users get accustomed to clicking on every single piece of information that comes their way. Quadrupling of usage over three or four years is not uncommon, while the number of users does not increase and users do not spend less time on other important things like eating, sleeping and lovemaking. Until this increase levels out, it is risky for libraries to enter into usage-based business with publishers. Confronting users with the costs in order to initiate some negative incentive for accessing information is not a way forward that librarians feel happy with. Therefore usage statistics can only be used in a comparative way, and even then one should be careful. Every library will encounter one user who downloads a whole database 'just in case'. In addition, one runs the risk of punishing libraries that have done a good job in enhancing their performance. The best advice therefore is to keep away from usage-based pricing models.

Publishers and librarians

In the past, life was easy. Publishers had little to do with librarians. Their new products and titles were presented during events like the UK Serials Group (UKSG) Annual Conference and Exhibition, the rest was for the agents and the serials librarian. There were hardly any negotiations between publishers and libraries and what went on between publishers and agents was a well-kept secret.

The first electronic products too had a rather fixed price; CD ROMs for stand-alone use were sold, but not negotiated. Only when universities began networking electronic content over their campus systems did negotiations become necessary. The price of a product was varied, depending on the nature and the size of an institution and the number of sites that institution occupied, for instance.

Nowadays, publishers have to maintain whole sales departments to manage their contacts and contracts with libraries. Both parties had to get used to this new situation and these new relationships, and actually we are still not where we ought to be. Publishers often have little knowledge about their customers because data about customers and their behaviour was previously always in the hands of agents. Until now discussions between publishers and libraries have been highly complicated because libraries still hold print items (processed by agents) alongside electronic ones, a real administrative nightmare. Once the digital format becomes the priority, agents are usually set aside by both librarians and publishers. Agents have not been very successful in finding a proper role in the world of licences and consortia, which is the main reason that many consortia have chosen to handle their own business with publishers. It is not easy and we can look back with nostalgia at those simpler times.

Changes have hit the libraries as well; priority in purchasing decisions has shifted from independent departmental librarians and serials librarians to purchasing committees and university librarians, or even to consortia and their licensing offices. Unfortunately, the money still has to be provided from budgets held further down the institutional ladder, not a strong basis for decisive and effective negotiating.

Librarians are not good negotiators by birth, their role is often confusing and they are faced with:

■ no clear mandate
■ conflicts of interests within the library
■ financial restrictions if not mid-term budget cuts
■ a rather amorphous product
■ a choice between all and nothing.

Publishers are still not well equipped for dealing with libraries and consortia. Their focus is on authors and editors and referees, on agents and competitors, rather than on their customers – the libraries. Their internal financial models after all these years of digitization still reflect the world of printed journals and title-by-title subscriptions. Sometimes they act on behalf of learned societies, many of which have not made themselves familiar with anything other than printed journals. In addition, they have to take into account individual subscribers who may cancel their subscription once the library gives them easy and

free access, manage the loss of advertisements that do not perform well in digitized publications and cope with new customers that in the past had just a few subscriptions, but are now getting unrestricted access to all these wonderful titles and databases.

This is the world we're living in … make the best of it!

Web sites of organizations included

UKB	http://www.ukb.nl/
Gemeinsamer Bibliotheksverbund (GBV)	http://www.gbv.de/vgm/
International Coalition of Library Consortia (ICOLC)	http://www.library.yale.edu/consortia/
SURF	http://www.surf.nl/home/
Joint Information Systems Committee (JISC)	http://www.jisc.ac.uk/
Oxford University Press	http://www.oup.co.uk/
Springer	http://www.springer.de/
Google	http://www.google.com
Royal Library (Koninklijke Bibliotheek – KB)	http://www.kb.nl/
Elsevier	http://www.elsevier.com/
University of Amsterdam (Universiteit van Amsterdam)	http://www.uva.nl/
European Bureau of Library, Information and Documentation Associations (EBLIDA)	http://www.eblida.org/
Project COUNTER	http://www.projectcounter.org/
UK Serials Group (UKSG)	http://www.uksg.org/

References

1. Davies, P. M. *et al*, *Report of the CUL Task Force on Open Access Publishing* presented to the Cornell University Library Management Team, 9 August 2004. Available at:
    http://hdl.handle.net/1813/193

2. Gatten, J. and Sanville, T., An orderly retreat from the Big Deal: is it possible for consortia? *D-Lib Magazine*, 10(10), 2004. Available at :
    http://www.dlib.org/dlib/october04/gatten/10gatten.html

The author is greatly indebted to Graham Stone from The University of Bolton for editing the original draft so skilfully.

■ **Nol Verhagen**
E-mail: A.J.H.A.Verhagen@uva.nl

Correspondence address:
University of Amsterdam
Singel 425
1012 WP Amsterdam
The Netherlands

Biographical note

Nol Verhagen was born in 1948. He started his career as a teacher in a secondary school. After six years of teaching, he became a university administrator at Tilburg University. In 1990 he was appointed Director of the humanities faculty at the University of Amsterdam and, in 1997, he became librarian of that university. He has developed special interests in the fields of copyright and licensing, is a member of IFLA's Committee on Copyright and other Legal Matters (CLM) and a member of the European branch of ICOLC. Currently he is also chair of UKB, the Dutch Research Libraries consortium. In this capacity he has acquired ample experience and some expertise in negotiating with scientific publishers.