Licences and their negotiation

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Professor Charles Oppenheim led a lucid and surprisingly entertaining seminar on the complex and potentially very dry topic of licences for electronic information resources.

Although he is not a lawyer, Professor Oppenheim has an in-depth knowledge of the topic developed from within academia and from working for and with a number of leading players in the electronic publishing industry. He is an experienced negotiator and a well-known authority on copyright. He has published widely on the legal issues surrounding information work, and is a member of the Legal Advisory Board of the European Commission.

With a wry presentation style, spliced throughout with anecdotes (often examples of "what not to do") from his own experiences negotiating within the corporate world, Charles looked at the core function of licences and their main features, as well has covering key issues pertinent to developing successful negotiation skills.

The session included a balanced mix of presentation and discussion.

A group exercise finding anomalies within a composite contract, constructed from clauses and terms that have actually been used in genuine licences, brought home to those of us dealing with licences the level of attention we need to pay to the wording of a licence when thinking about its implications. For example:

- Is the terminology used with the licence precisely and fairly defined within the appropriate section of the licence?
- Are there contradictions between different clauses or in the way terms are used within the licence?
- For multi-site and dispersed organisations, is what is meant by 'site' appropriate to your needs?
- Clarification of who may use the resource, particularly in regard to walk-in users and people associated with your organisation but who are not strictly part of it. This has aspect has recently taken on particular resonance for public libraries.
- Is it clear what is meant by 'commercial use'?
- Can the terms of compliance be reasonably policed or adhered to, particularly regarding control over what users do with the material they obtain from a resource. Phrases

such "best endeavours" or "all reasonable efforts" may be more suitable than "ensure".

- Perpetual access. Are your needs for access to content after the licence ceases adequately met?
- Do confidentiality stipulations take into account freedom of Information obligations on public bodies?
- Is it clear which governing law applies to the contract? Given the international nature of e-publishing, this may well be the law of a US state, rather than that of the United Kingdom.
- Could the terms of the licence be construed as an opt-out from protection by statutory rights? There should be a clause clearly stating that statuary rights and general copyright are protected.

The Nesli module licence, www.nesli2.ac.uk, is suggested as exemplar to look at for guidance.

Discussion of important factors when negotiating included understanding where the vendor is coming from, and what they wish to get out of the deal. Background research into the company and, if possible, the particular individuals you are dealing with can be invaluable.

As with all such events, there were opportunities for interesting informal discussions with other delegates. The point was raised that information professionals are often on the back foot when it comes to hard negotiation as we are not always in a position to walk away from a deal. Pressures from users, academic staff, or the need to be able to search particular resources for due diligence requirements, restrict our ability to say 'no'.

In the academic environment JISC and national and regional consortia assist greatly with joint deals for widely used services, and it was suggested that organisations requiring specialist resources could try working together more closely in order to get better deals.

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