Never answer a question, other than an offer of marriage, by saying Yes or No.

—Susan Chitty, The Intelligent Woman’s Guide to Good Taste

This chapter supplies answers to questions I have come across in the many seminars and workshops I have taught on digital licensing since 1997. In addition, in anticipation of this book on licensing, librarians from around the world e-mailed me questions they wanted addressed in this book. The questions below are designed to provide some specific answers to your questions, with the hope that the sharing of these questions and answers will help all librarians and content owners involved with digital licensing. In some ways, these questions may repeat various portions of this book, but laying them out in this easy-to-read format may help you learn more about digital licensing.

GENERAL LICENSING QUESTIONS

What would a “perfect” digital license contain?

There is no such thing as a perfect license. Each agreement must reflect the needs and requirements of the two parties involved. Although some model licenses have been developed, each situation is unique, and you must ensure that your license meets the particular needs of your library and the content owner with whom you are entering the license. The “perfect” digital license would be one that sets out terms and conditions which satisfy both the library and content owner.
Are a license and assignment the same thing?
No. A license is mere permission to use content according to specific terms and conditions. An assignment is an outright purchase of the rights to that content. Most content used by libraries is licensed.

Must all licenses be in writing?
They should be. This is not always necessary, but it is a good idea, since it is a good summary of your negotiations and constitutes a single document setting out the terms and conditions of use of content. It also helps in managing multiple digital licenses entered into by libraries. U.S. state law and Canadian provincial law have different requirements regarding when a legal agreement must be in writing.

What if the content owner does not provide you with a written license?
Ask about terms and conditions. Ask the content owner if there is a license with terms and conditions of use set out on his Web site or if he could e-mail or otherwise send you a copy of that license. If a license is not available, ask the content owner if he could set out the terms and conditions of use of the content in a letter to you so that you have a record of the nature of the license.

Does the term “digital licensing” imply that the licensed work is not in the public domain?
Yes. Generally, works that are licensed are protected by copyright. Works in the public domain are no longer protected by copyright; permission or a license is not necessary to use these works.

What if a license is not negotiable?
Most things are negotiable. Other than click-through, Webwrap, or shrinkwrap agreements, most licenses are subject to some discussion and negotiation. If you are faced with a license that does not meet your needs and does not appear to be negotiable, always ask the content owner about the portions of the license that you would like amended and try to open discussions and negotiations to ensure the final license meets your needs. See chapter 6 on negotiating licenses.

Why do some libraries get “deals” on their licenses?
A “deal” would mean that the library is satisfied with the terms and conditions it has negotiated in its license. In order to obtain the best possible
license for your needs, know your library’s needs, and learn to negotiate and communicate with the content owner. A deal may also be perceived as a special price, favorable terms and conditions, discounts based on existing relationships with the content owner, or a convenient length and scope of the license. Negotiating as a group or consortium may sometimes lead to special deals, as may a long-term relationship with a content owner.

Can you cross out parts of a license with which you do not agree?

Many license agreements are negotiable. Even if the agreement does not appear to be negotiable, you may still ask the other party if you may amend any particular clause or clauses. You may “cross out” portions of the license, but both parties should initial those crossed-out portions or any added penciled-in portions when they sign the agreement.

Our legal department will not approve the content owner’s proposed license, but the content owner will not change the offending sections. What should we do?

This is a judgment call. Are you allowed to sign a license with which your legal department does not agree? Is it in your best interests to do so? Carefully examine the reason why your legal department is opposed to the license. Why is the content owner so inflexible about these offending sections? Will these sections be harmful to your library, or to the use of the licensed content? What is the liability of your library for including or omitting certain terms and conditions? Is it possible to obtain the same or similar content from another source? Perhaps the content is available through a consortium, which you could join, with terms your legal department could accept. Failing that, it would be worthwhile looking at your next best option: either finding another product that can at least come close to meeting your information needs, or finding the same one as part of a package with an aggregator, which would likely have different license terms.

Is our library responsible if one of our staff members, who does not have authority to do so, “signs” a click-through agreement to access online content?

It is possible that your library is legally liable for any such contracts. A prudent approach for any library is to ensure that its staff members are fully aware of the library’s rights and obligations with regard to entering into online agreements. Also, it is helpful to inform staff members that they may bear responsibility when online agreements are entered into by a staff member who has no authority from the library to do so.
AIDS IN NEGOTIATING LICENSES

Are there model licenses that can be used in negotiating our library’s license?

Yes. However, use these licenses with caution. There are several model licenses developed by various groups. However, caution should be taken when using these licenses, as they will undoubtedly need adaptation to fit your particular circumstances. It may be helpful to refer to more than one of these licenses to benefit from the accumulated knowledge put into creating these models. Chapter 2 discusses various examples of model licenses.

How can licensing principles endorsed by a library association help our library in negotiating our licenses?

You may use them as a checklist. Similar to model licenses, licensing principles can be a helpful guiding source in developing your own library’s licensing policy and in negotiating licenses. However, use these principles with caution and as a checklist, as opposed to following them blindly, and adapt them to meet your particular needs and circumstances.

Is it necessary for our library to have a licensing policy before entering into negotiations?

No. A library licensing policy is not part of the negotiations with content owners and in fact should be kept confidential to your library. The purpose of this policy is to act as an internal guide in setting out a consistent approach for negotiating all licenses. It should be based on a consensus of information from various people and past experiences to help guide you through the negotiation process, setting out goals and bottom lines for your library. In many ways, a licensing policy is developed through the same means as your library’s acquisitions policy. Licensing policies are discussed in chapter 2.

CONTENT-SPECIFIC ISSUES

Are all databases protected by copyright?

No. The current U.S. copyright law requires that a collection of materials or a database involve some creativity in order to obtain copyright protection. Thus, mere skill and labor in compiling a database is not sufficient to acquire copyright protection. Note that in Canada, a database may be protected if compiled with skill, labor, and judgment. At the time of writing this
book, there is ongoing debate in the United States as to what sort of legislation should protect databases that are not protected by copyright law.

Are digital images scanned from nondigital images protected by copyright?
Neither U.S. nor Canadian copyright law is clear on this issue. However, it seems that a “mere” scanning or digitization of an image would not result in a new copyright work. If there is a certain level of skill, effort, and talent involved in the creation of a digital work, then it is possible that there is copyright in the new digital work. Even if there is no copyright in the digital version, one may license the “access” to the digital work.

Are maps protected by licenses?
Check what your license says about including maps. The subject matter protected by your license depends on what you have agreed upon. The license may extend to a database, or to periodical articles. It might include an encyclopedia, or it may refer to maps and charts. You must look at your specific license to see what is covered by it. If you need to use specific content that is not covered by your license, negotiate for the inclusion of that content in your license.

May my library reproduce a photograph that does not have any copyright information stamped on it?
No. The fact that a photograph or other work lacks copyright information does not mean that you may automatically use it. You must seek permission from the owner of that photograph. You may have to be creative to locate the copyright owner or to use a different photograph in which you can clear copyright permission. Note that in Canada, you may apply for an unlocatable copyright owner license from the Copyright Board in cases where you cannot locate the copyright owner. See also http://www.cb-cda.gc.ca/indexe.html.

BEFORE THE NEGOTIATIONS BEGIN

How does a library determine what rights need to be in the license?
Determine what uses of the content will be made, and then ensure that the license reflects these uses. It is best to determine these rights independently of reviewing the license offered to you, in order to ensure that you are meeting your needs and not merely reacting to the offer from the content
owner. Consult various people in your library, from the lawyer to the acquisitions librarian to the reference librarian. You should even consult your patrons where possible.

Is it possible to sample some of the content before we sign the license? This is something you would want to discuss with the content owner. As the popularity of digital content is still growing, it is possible that your patrons may not find certain content helpful in a digital form. In specific circumstances, you may want to “test” this out with them by gaining “test access” to that content before signing a license. You may also wish to test the format of the content to ensure it is compatible with your intended uses.

Does the publisher/distributor/aggregator always own the content being licensed? In some situations, you will license content directly from the owner of the content. However, in many situations, you will be licensing from a publisher, distributor, or aggregator who has rights to license content owned by someone else. In either situation, you should feel comfortable that the licensor does actually have the rights to license the content to you. If you are doubtful of this, look for a different licensor. Also, it is always prudent to include a warranty clause in the license that states something to the effect that the licensor does actually have the rights to license that content to you. (However, do not rely on this—make sure they are trustworthy!)

What does “third-party rights” mean? It means that the content is owned by a third party, or someone other than the publisher, distributor, or aggregator who is licensing the content to you. In this situation, you want to ensure that the publisher, distributor, or aggregator has the rights from the content owner to license that content.

DEFINING WORDS IN LICENSES

How do we know what words mean in our existing licenses? Check your licenses for a definitions section which defines terminology for the purposes of that particular license. Sometimes there is no specific section for definitions, and words are instead defined throughout the license when they first appear.
Where can we find definitions of words that we need to include in the definition section of our license?

There are some technology dictionaries that might be helpful, but because you want to define the words for the specific purposes of your license, it is best to ask library staff, including any technology-related persons, how to define the terms for your purposes. Sometimes the definitions will have to be negotiated with the content owner, since different meanings given to different words can affect the terms and conditions of the license.

Is there a definition of “commercial use”?

There is no single definition of the term “commercial use.” It is up to the content owner and the library to define “commercial use” in a manner that meets the needs of the license. This may be negotiable.

Does “personal use” in a license include an individual researcher who is paid $30 an hour for his or her research?

There is no set definition of “personal use.” For each license, “personal use” should be defined to meet the needs of that particular license and arrangement.

FAIR USE AND INTERLIBRARY LOAN

Is fair use/fair dealing applicable when content is subject to a license agreement?

If the agreement does not mention fair use/fair dealing, then fair use/fair dealing is still applicable. However, the license may limit the scope of fair use/fair dealing. This is something you may wish to discuss with the content owner. See chapters 3 and 4 for more information.

Our publisher has included in our license exclusions to fair use, which they have always allowed for print documents. What should we do?

If you would like fair use to apply to the licensed content, then you must let the publisher know this. Ask them why they are excluding fair use, and try to come to a middle ground on how you may include fair use in a manner with which the publisher is comfortable.

May a license prohibit interlibrary loans?

Yes. A license may prohibit interlibrary loans. However, this may be a point of negotiation.
Why does the same publisher allow interlibrary loans for a print copy of a journal, but not for an electronic copy?

Many publishers are concerned that electronic copies of content will be distributed further than their intended audience. For instance, if one library electronically lends a journal to another library, the publisher may have little control over who else may access the electronic copy. Unlike distributing print journals, an electronic journal can instantaneously be e-mailed to hundreds and thousands of people around the world in seconds. In some situations, publishers will allow a print copy of an electronic article to be loaned to another library, but the same article in an electronic form may not be loaned. This is something you will need to address in your license.

AUTHORIZED SITES

Can a library patron in Australia legally access content from our U.S.-based library?

If your library is providing access to patrons outside your own country, or if patrons from your library may access the content while outside the country, you will need to address this in your license and ensure that the authorized users and authorized site clauses allow for this.

We are a countywide system with ten locations spread throughout a very large county. However, we provide service to our libraries through one location. Would a license agreement cover our entire system?

Your license agreements should reflect the fact that your service is provided through one library, but that users of the digital content may be from any of the ten libraries in the county. This should be an explicit clause or be defined in the license. You want to make sure that the content owner knows and agrees with the ways in which the content is used by your patrons.

AUTHORIZED USERS

If I negotiate a license for thirty professionals in our company, will their support staff and researchers also have access to that content?

No. It is very important that all authorized users are specified in your license. Before signing the license, ensure that you know who will be accessing the licensed content and try to define them in the license.
Are “walk-in users” able to have access to content licensed for our educational institution?

Only if they are defined as “authorized users” in the license. If your library has a number of “walk-in users” who will want to access the digital content, then you should negotiate for their specific inclusion in the license.

In an academic library, are alumni allowed access under a license?

This is something that you would have to negotiate. Alumni may be covered by a clause allowing the general public to access the licensed content. However, if specific users such as faculty, students, etc., are set out as authorized users, then you will have to specifically include alumni as authorized users.

How do you ensure that a licensee includes the licensor’s copyright notice when a licensee accesses the licensed content?

This may be included in the license agreement. It is not uncommon to see a clause that states something to the effect that a copyright notice in the name of the licensor must be included whenever the content is used, i.e., displayed, published, reproduced, etc.

We have content we licensed directly from copyright holders that we are now sublicensing to an online database publisher. Do we need to obtain any additional permissions to sublicense the content?

Unless your initial license with the content holders included the right to sublicense that content to a third party such as an online database publisher, you will require additional rights to do this.

**RECORD-KEEPING**

May publishers require record-keeping of the use of licensed content?

Publishers may request record-keeping of who is accessing the licensed content, when, for how long, and what amount or portion of the content is being accessed. However, a library should be very cautious in agreeing to record-keeping in any detail. This is in part due to the invasion of privacy, and also in part because of the expense and time involved in such record-keeping. If the content owner is asking for unreasonable record-keeping, try to negotiate less onerous record-keeping.

Why do publishers need record-keeping of the use of licensed content?

Publishers frequently have to report on the use of the licensed content to the
original content holder. Be creative in discussing and working with publishers to find procedures used to track and report on licensed uses. There are many ways in which procedures can meet the library’s need for confidentiality, as well as meeting the publisher’s need for accountability. Your library and the publisher need to come to a satisfactory arrangement for reporting licensed uses.

*How do we protect the names of our users or patrons?*
Your library may want to include a clause in the license that states something to the effect that it will not disclose specific names of users of the licensed content.

**FREQUENTLY NEGOTIATED AREAS**

*How can our library avoid entering into the same license year after year?*
You can negotiate a license for a longer duration of time than one year. Alternatively, you may negotiate a clause for automatic renewal upon certain circumstances so that if the license is working well, you do not need to renegotiate it each year.

*What if the content owner wants a higher fee for the content than my library can afford?*
If you cannot negotiate a lower fee for the electronic content, try the strategy of narrowing the terms and conditions of use for that lower fee you are offering. For instance, try to restrict the number of users that will have access to the content. Reduce the number of years to be covered in the license.

*If a license does not mention “electronic archiving,” would this be allowed?*
It depends on the wording of the grant of rights clause. You must carefully review the grant of rights to see whether electronic archiving is either specifically or implicitly included. If implicitly included, you may want to specifically include mention of this use of the content.

*If a licensee wishes to reproduce or republish in print form content for which only a digital license has been obtained, is this permissible under the digital license?*
Generally, a digital license will only provide permission for digital uses of the specified content. Unless the license also permits print uses, you may need to include a clause relating to print uses.
WARRANTIES AND INDEMNITIES

Can your warranty and indemnity protect you from a content holder who does not really hold the rights to the content being licensed?

It is always best to enter into any licenses or negotiations with content owners whom you trust. If you are suspicious that the content owner does not own some or all of the rights being licensed, it is best to terminate your negotiations and to find and work with a more trustworthy content owner. Although a warranty and indemnity may protect you to some degree, they can be expensive to enforce, and the content owner may not in fact have the funds to indemnify you against any losses or legal fees resulting from using content that belongs to another party.

ISSUES AFTER SIGNING THE LICENSE

What if the content is not available throughout the duration of the license?

This is something you should consider before signing the license. Ask the content owner for some guarantee as to the length of downtime for maintenance, etc., and for either a reduction in the license fee or an extension in the license to compensate for downtime beyond this amount. You should consider a clause in your license to get out of the contract obligations or at least obtain a reduction of license fees should the content not be available throughout the duration of the license.

What if our library needs a right that is not included in the license, for instance, the right of a patron to e-mail herself a copy of an article from a licensed database?

If the right is not specifically included in the license, or cannot be interpreted as an authorized use in other rights granted or permitted uses, then the patron is unable to e-mail the article to herself. If necessary, you may be able to amend the license with the content owner, or to include this right when the license is renewed.

How does a library know if its license will automatically renew?

This is something that would have to be addressed in the license. If the license does not deal with automatic renewal, then the license will not automatically renew at the time of expiration. If you would like automatic renewal, negotiate this in your license.
Does the content owner or the library have the onus to renew the license?

Either party may approach the other about renewing the license. It is a good idea for a library to keep a database of licenses and their renewal dates. This way, you can ensure you have ongoing access to licensed content and that agreements are renewed prior to their expiration date.

Can our library archive licensed content and provide access to it after the license has expired?

That would depend on what your license states. If this is not addressed in your license, then you should not be making archive copies or providing access to these copies after the expiration of the license. Having access to previously licensed content is an issue that is controversial and is difficult to address in a license. It is the subject of much discussion among libraries and publishers, and these discussions are well worth following.

YOUR QUESTIONS AND ANSWERS

As you proceed through various negotiations, you will find that the same questions unique to your situation arise again and again. It may be helpful to keep a list of these questions and answers and include them in your licensing policy. Do not forget to update the list on a regular basis.