Library License

Ania Wieckowski, Managing Editor, HBR Press, Rebecca Seger, Director, Institutional Sales, Americas, Oxford University Press, Maureen Sullivan, and core team member Caroline Nolan

On April 5th, an amazing group experts from across the library, copyright, and publishing spaces came together to discuss Library License for the afternoon. The head of the ALA, Maureen Sullivan, Jennifer Urban and Jason Schultz, leading experts on copyright, both from Berkeley, representatives from Oxford University, University of Michigan and MIT Press, and New York Times Best-Selling Author William Martin were all in attendance. But the event was a success beyond its convening power. We learned an immense amount about the idea and have refined it soup to nuts. This recrafted Library License proposal (attached) has been sent along to Dan Cohen and John Palfrey of DPLA and are setting up a meeting for the

coming weeks.

I sent the following thoughts to a couple members of the Library Lab Team after the event. These were the primary lessons learned from the event:

- The constituencies represented were more enthusiastic than we could have hoped, with the exception of the best-selling novelist who nevertheless had some positive ideas about how to get people like

Chris Bavitz, core team member, David Weinger expertly moderating, Matthew Battles, author, Margy Avery, Senior Acquisitions Editor, MIT Press

Stuart Shieber

Margy Avery and Jason Schultz, Professor, Berkeley Law School, Co-Director, Samuelson Clinic showing their LL pride

- We came away very excited about the possibility of having the ALA partner with the DPLA. Maureen Sullivan was at the meeting and is very interested in this. She was very enthusiastic about the project as a whole.

- The entire team has also been very encouraged by Dan Cohen's sustained engagement with the LL project since we've invited him to the event. He mentioned it in his talk at NYU on Thursday, has provided some great conceptual feedback, as well as reporting on his own on the ground Library License advocacy in conversations with NYU Press and others.

In summary, Library Lab's support and the amazing work of the Library License team has taken this project from nebulous idea into drafted legal language, an explanatory Library License website at www.libraryli-cense.org with a custom contract builder, and a community of interested individuals. This is the final report for this phase of

him interested. Seeing the common cause among the attendees was sort of thrilling. More in-copyright e-books for libraries, FTW!

- The discussion burst its seams, but one clear consequence was that more of the value of the Library License than we thought will come from the intermediary that handles the distribution of LL'ed titles. This inverts our thinking, in a really useful way. There was some very exciting discussion about what this intermediary could do. (We continue to think that the DPLA is the natural intermediary.)

Carrie Russell, Director - Program on Public Access to Information, ALA

Library License project. The next steps are networking and marketing. Getting Library License out in the wild and testing its viability. Our Fingers are crossed. We'll be passing along updates to Library Lab and OSC as they come in.

With Gratitude,

The Library License Team
Chris Bavitz, Dalia Topelson, Caroline Nolan, David O'Brien, David Weinberger, Jeff Goldenson

Shana Kimball, foreground, Head, Publishing Services, Outreach & Strategic Development, M Publishing (University of Michigan)

Chris Bavitz, core team member, David Weinger expertly moderating, Matthew Battles, author, Margy Avery, MIT Press

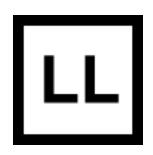*Wiiliam Martin, New York Times Best-Selling author of ten novels and Caroline Nolan*

Maureen Sullivan, President, ALA in conversation with Jennifer Urban, Co-Director, Samuelson Clinic, Berkeley Law School between sessions

Library License Workshop

DRAFT Meeting Report
May 7, 2013

DRAFT Workshop Report: Library License

May 7, 2013

I.   Introduction

On April 5, 2013, the [Harvard Library Innovation Lab](#) and the [Berkman Center for Internet & Society](#) jointly convened a group of participants, including authors, lawyers, librarians, publishers, scholars, technologists, and other experts, for a private workshop to discuss the [Library License](#) project under the Chatham House Rule.

Library License is a working concept to increase the availability of e-books in libraries. At this early stage, the project envisions using a simple agreement between an author and her or his publisher where every public and school library will be allowed to distribute one electronic copy of that work through an intermediary distributor or a distribution platform after a work has passed an agreed-upon threshold. The threshold, for example, could be triggered when sales have dropped below a certain level, a substantially new edition has come out, or a certain number of years have passed.

During the workshop, the Library License project team presented participants with a draft license agreement and an early sketch of how the idea might work in practice. Participants were invited to share their insights on the form, use, and potential of the Library License as well as on its potential barriers, challenges, and next steps. Conversations throughout the event were rich and informative, and touched upon many interrelated topics. This document highlights a selection of central discussion points, questions, and potential next steps raised by participants at the event, loosely organized around four themes: stakeholder perspectives, the form and mechanics of the license, technology and logistics considerations, and community outreach.

II.   Understanding the Stakeholder Groups

Participants agreed that the Library License model must have broad appeal and buy-in from all constituents. Throughout the workshop, participants offered their take on the needs and interests of various stakeholder groups. Key topics from discussion were the potential challenges and incentives to participation from the perspectives of three stakeholder groups: authors, publishers, and libraries.

A.   Authors

A key concern for authors is ensuring that they have sufficient ownership and control of their work to maintain their livelihood. Many authors are already facing uncertainty from the shifting landscape in the publishing industry, and they may fear that a project like Library License would detract from sales.

Some participants voiced concerns that authors, particularly those that create mass-market trade publications, would be less inclined to participate in Library License because it may potentially impact their financial proceeds from these future retail sales or other revenue channels. Authors may be troubled by the sheer size of the endeavor and lack of downstream use control, which would make several thousand digital copies available for consumption through libraries. Moreover, the Library License agreement grants perpetual (though non-exclusive) rights to libraries, which leaves authors unable to extract their works from the Library License system.

On the other hand, some participants felt that authors may be motivated to participate in Library License for altruistic reasons, or if participation yields demonstrable benefits. Participants recommended that the Library License project team consider tailoring its messaging to better suit potential segments of authors, perhaps based around on the underlying principles that motivate particular authors (e.g., trade authors, non-trade authors, academics, etc). One idea for incentivizing participation that was briefly discussed is if e-book "donations" to Library License could be tax deductible – that is, when a Library License threshold is triggered it is treated as a donation. However, the legality of this was unclear to the participants and would need to be investigated in more detail.

Another problem is that the "out of print" concept has not been translated from traditional print publishing agreements to e-book publishing agreements, because e-books are not constrained by supply limitations in the same manner as books in print. E-books do not require new print runs and do not incur the same overhead expenses associated with print publishing. They can be sold long past the original date of publication and still generate revenue with nominal marginal cost. A related but distinct issue for authors is that they typically do not have the same "reversion right" options in e-book publishing agreements. In the past, these options permitted authors to reclaim their copyright interests in their work when it was deemed "out of print" under the terms of the publishing agreement. Although this may have little bearing on an author's willingness to offer his or her work to a project like Library License, it may have a substantial effect on an author's legal ability to authorize such distributions of their work. Many publishers now continue to hold exclusive rights to e-book distribution for longer than print distribution. This tips the balance of bargaining power towards publishers, potentially causing problems for authors who seek to include their already-published works in Library License.

Participants helpfully identified a potential opportunity related to authors of older print works that have been deemed out-of-print by their publishers. Library License could educate authors about the existence of rights reversion options in their contracts. In exchange for participating, Library License could offer to help these authors exercise these options and digitize their print books into e-book formats.

B. *Publishers*

Similar to authors, participants noted that publishers will be primarily concerned that their participation in Library License will have a negative impact on revenue, since older e-books are not subject to going out-of-print and do not the increase the marginal costs of doing business if they are continuously offered for sale by publishers.

The economics of the publishing industry are undergoing tectonic shifts. Although e-books are gaining popularity, the majority publishers still maintain business divisions that are focused on the publishing and distributing print books. The result, according to participants, is that publishers face increasing pressures to do more with shrinking human resources; and, as a consequence, any increases to overhead costs (e.g., time or financial burden) associated with monitoring individual book titles part of the Library License program would be an untenable barrier to participation. Another complicating factor is that certain publishers rely heavily upon libraries to be a key revenue stream. Some participants noted specifically that libraries are the sales backbone of "mid-list" titles. If libraries are no longer purchasing these titles because they believe they will someday be available through Library License, sales might immediately suffer.

Many commentators noted that having empirical data that clarifies the financial impact of making a title available through Library License on sales revenue would be beneficial. The general understanding of participants is that such research has yet to be conducted or has not been made public. Another related next step would be if Library License would be willing to share circulation statistics on how titles are being used in libraries. On the other hand, libraries are very cautious about sharing information related to patron reading habits, and may not be willing to participate in such a program.

Library License could also develop incentive programs or internal systems aimed at easing the overhead burdens or impact on revenue streams for publishers. Some smaller publishers may be interested in participating if Library License could help digitize older in-print books. Some libraries have implemented "buy-it-now" buttons on their websites that direct patrons who are waiting for copies of popular e-books to retail websites to purchase e-books. These are gaining popularity with certain publishers and may offer another incentive to participation. Tax deductions or similar financial incentives, such as a one-time "freeing fee" along the lines of Gluejar's model, could also be options.

C. Libraries

According to participants, libraries would be enthusiastic about the prospect of Library License if the distribution system can be easily integrated into libraries' existing systems. Modern practices have shifted libraries away from title-by-title acquisitions. New models, such as "demand-drive acquisition" and "approval purchasing," are now commonly used by libraries to tie the acquisitions process to actual patron demand and automatically acquire new titles within a related series of publications according to library-set parameters. Patrons can view entire catalogs across multiple publishers, and the library will not be charged until a patron attempts to borrow a title that is not already in the library's collection. While these systems have helped streamline the library acquisitions process, they do not position libraries to acquire materials that are available for free or under open licenses. In addition, the number of layers between content and users coupled with the vast number of isolated digital distribution systems in use have also added substantial complexity to circulation management and acquisitions at libraries.

In order to be useful for the broadest range of libraries, participants recommended that the Library License team carefully consider the design of its distribution platform so that it is maximally interoperable with the existing lending systems in use at libraries. This includes

potentially integrating with systems that are used commercially as well as those that are used for open lending models like Internet Archive's Open Library.

III.   The Draft License

Participants raised a number of questions about the form and mechanics of specific provisions within the draft license. Discussions centered on how the draft license interacts with the statutory limitations in the Copyright Act, Digital Rights Management (DRM) technologies, and how it might be improved to better serve the interests of libraries, authors, and publishers. Whether the license agreement is the proper focus for implementing Library License was also a central discussion point in this theme.

A.   Limitations in the Copyright Act

Some participants were concerned that the license does not expressly permit libraries to make uses of Library License works that rely upon limitations under the Copyright Act. Specifically, this encompasses activities that implicate fair use, first sale, and the special exceptions afforded to libraries in Section 108, which enable libraries to archive, curate, and serve the needs of their patrons more effectively. Perhaps the next iteration of the license could provide some clarity on these questions.

Participants also questioned whether the use of an irrevocable, perpetual license was desirable, since it may put libraries in a disadvantageous situation when a title has entered the public domain but the copy in their possession remains subject to the terms of the license. Moreover, the lack of a termination clause or mutual "escape hatch" may be unattractive for authors and publishers who may want more flexibility to test Library License experimentally before committing indefinitely. Libraries, on the other hand, may find the sudden removal of a title from their collection logistically complex, particularly if libraries are responsible for removing titles, and in some cases libraries may interpret removal of content as unwelcome censorship.

B.   DRM

As a threshold matter, the Library License team will need to give careful consideration to whether the distribution system uses DRM. In recognition of the fact that the majority of e-books distributors use DRM, the draft license shared with workshop participants contained a requirement that any titles distributed by the Library License system must be protected by DRM. According to some participants, the use of DRM would help incentivize authors and publishers to participate in Library License – since DRM provides a mechanism for controlling access to digital works, and offers some measure of assurance that works are not being unlawfully copied and distributed. However, a growing number of publishers are beginning to distribute e-books without DRM – a trend that has also taken hold in the music industry.

Other participants, in contrast, were concerned that the use of DRM may prove to be problematic for libraries, since circumventing DRM is an unlawful act under the Copyright Act. Without the legal ability to shift the format of works, libraries would not be able to curate and archive titles

or offer titles to patrons in different formats. Similarly, DRM may inhibit the ability of libraries to lawfully make fair uses or exercise other limitations in the Copyright Act.

C.   Costs of Licensing

A number of participants noted that using a contract like the draft license may add costs for publisher and authors. The goal of using a standardized license or contract rider was to simplify the process and reduce the amount of time spent negotiating the terms of a publishing contract. However, some publishers and authors may still be inclined to retain legal counsel to review and integrate each Library License rider into their existing business models, which would add costs and overhead. Participants commented that engaging publishers and authors in discussions about the potential business and legal risks at issue in the license may be helpful in refining the draft license agreement further.

D.   Libraries as Parties to the License

Participants questioned when, if at all, libraries might be involved in the Library License negotiation process as a second or third party to the license agreement. Some participants felt it was unnecessary for libraries to be involved, while others felt that they should be engaged early on in the Library License process, in order to ensure their needs are being met.

Alternatively, one participant proposed that the license agreement could be structured so that the agreement is between authors and libraries, rather than authors and publishers. By approaching the stakeholders in this manner, the negotiation process might be more efficient since publishers would not be involved. However, participants also pointed out that authors often do not have sufficient rights by contract to make these decisions after a publishing agreement has already been signed, so this structure would be most useful for authors who have not yet signed a contract with a publisher or with those authors who in fact hold distribution rights to their e-books.

E.   Library License as a Distribution Infrastructure

Many participants noted that effectuating the mission of Library License as a license generation tool for authors and publishers may be too complex to gain critical mass. As an alternative, one participant suggested inverting the presentation of the Library License concept. Rather than positioning the concept around a standardized license to be used in a negotiation, the project could focus instead on developing a centralized distribution system where anyone could inject a book under certain terms. In this context, Library License would be acting closer to a rights clearinghouse and distributor of works, which could alleviate many burdens on publishers and authors while providing libraries with access to a centrally-distributed digital collection.

IV.   Technology and Logistical Considerations

Workshop conversations also touched on the characteristics of the technology platform for distributing works using Library License and the network of organizations and partners that

would be necessary to make the concept work. Since Library License has not yet partnered with an existing platform or developed its own prototype, much of the conversations in this vein were questions and comments to consider as the project explores options.

A.   *Technical and Logistical Burdens*

The digital collections systems currently in use at libraries are unwieldy, fragmented, and often incapable of being integrated together. This exacerbates a frustration mentioned in a previous section: libraries often lack the tools to easily acquire freely available digital materials and easily integrate them into their collections. Participants noted that creating a robust and interoperable distribution system is not only necessary to incent participation by lowering technical barriers for libraries, but also a key opportunity for Library License to contribute value to the complex landscape of digital collections acquisitions and management.

According to participants, publishers and authors will likely be concerned about the technical and logistical burdens needed to make Library License work. Given that most publishers are already overburdened with managing their existing business, they will likely not want to participate in Library License if it burdens them with conducting piecemeal auditing on a title-by-title basis to determine if a threshold trigger has been reached. Moreover, most authors and publishers would not likely be inclined to invest any time or financial resources into digitizing or formatting works into an appropriate format for Library License. To address these concerns, participants suggested that Library License should develop a burden-free audit system (e.g., technical or organizational) for monitoring the trigger thresholds, and consider offering simple options for digitizing and formatting works.

B.   *Distribution Platform Characteristics*

Although it is unclear at this stage whether Library License will partner with an existing intermediary e-book distributor or develop its own distribution platform, the technical characteristics of this system are important factors to consider, especially in terms of constituent needs and potential barriers to implementation. The following bullet points are representative of key questions raised by participants for a hypothetical distribution platform.

- Will distribution be accomplished through an existing intermediary or a Library License controlled platform?
- Will the distribution platform be centralized or decentralized?
- How will Library License content be delivered to patrons (e.g., streaming or downloadable content)?
- What formats, metadata standards, and related data conventions will the platform use?
- How will the technology used interact with the license agreement? With the Copyright Act? With library activities like archiving and format shifting?
- How to engineer the platform so it is easily scalable and interoperable?

C. *Alternative Technical Approaches*

Several participants noted that an alternative approach to a centralized distribution platform is for Library License to serve as a rights clearinghouse. Metadata could be used to enable access or to designate digital copies as part of Library License, either in lieu of or complementary to a DRM wrapper. According to participants, several organizations have implemented or are exploring similar methods for providing access to works. These models may merit further investigation as models or strategic partnerships for Library License.

V. Community Outreach and Engagement

The final portion of the workshop was dedicated to discussing from whom the Library License team should seek feedback next and how the team should position the concept to these organizations. Participants had a number of recommendations for organizations working on similar ideas, including trade associations and other institutions.

Several participants recommended that the project team develop and refine narratives that clearly communicate the potential benefits of the Library License system and are tailored to specific constituencies. These stories will aim to stimulate dialogue, with the ultimate goals of informing the project's potential options and identifying key sticking points and opportunities. Additionally, participants recommended reaching out to organizations who are working on similar ideas to better understand the existing landscape and forge strategic partnerships.

A. *Key Constituents*

Participants agreed that Library License should prioritize engaging the following stakeholders:

- Authors, including trade and non-trade
- Libraries and librarians
- Literary agents
- Publishers
- Public interest and advocacy groups
- Trade associations

A number of public interest groups and trade associations are relevant to the Library License's topical focus. In terms of priority, participants noted that the Authors Guild, the Association of American Publishers (AAP), Association of American University Presses (AAUP) should be at the top of this list. Other industry trade and advocacy associations that the project team should engage include the American Library Association (ALA), Association of Research Libraries (ARL), Medical Library Association (MLA), and the American Historical Association (AHA).

B.   *Organizations Working to Solve Similar Problems*

Several organizations, including non-profits, libraries, and private businesses, are actively seeking to develop solutions similar to the Library License model. Many libraries, for example, are still trying to purchase – as opposed to licensing – e-books and some have found alternative methods for managing their material distributions. Other organizations, like HathiTrust, the Digital Public Library of America (DPLA), Internet Archive's Open Library, Gluejar, and Knowledge Unlatched are approaching facets of the same problem from different angles.

The Library License project team should catalog the existing landscape of organizations and solutions that are being pursued in this field, and form strategic partnerships where appropriate.