
This paper will use a review of relevant copyright and contract laws and literature and of specific examples, to show that ILL at academic libraries is suffering and will continue to suffer under new laws and legal contracts intended to reduce legitimate access to copyrighted materials. With the combined restrictions that publishers advocate, the question is how effective can libraries continue to be to act as the primary agents to provide access to information for the public good. Academic libraries, in particular, have an important educational and research mission that tightening copyright and contractual restrictions may severely damage. This paper will discuss the likely effects of those restrictions and explore possible solutions to ease the problems.

Headings:

College and university libraries-Interlibrary loans

Copyright

Licensing agreements

Uniform Computer Information Transactions Act

Publishers and publishing-Licensing agreements
AN EVALUATION OF HOW COPYRIGHT, LICENSING AGREEMENTS & CONTRACT LAW ARE INTERACTING TO RESTRICT ACADEMIC LIBRARY INTERLIBRARY LOAN ABILITIES

by
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I. **RESEARCH QUESTION**

How is the increasingly wide use of electronic databases, in the place of, and in addition to print materials, interacting with copyright and contract law, and with vendors' use of restrictive licensing agreements, to reduce academic libraries’ ability to provide copyrighted materials to patrons via interlibrary loan without permission of the authors (as authorized by the U.S. Copyright Act), and what should libraries do to advocate for change in copyright and contract law to address these issues?

II. **OPERATIONAL DEFINITIONS**

1. **Academic Libraries**—libraries within the United States that are directly affiliated with an accredited institution of higher education (i.e., a college or university).

2. **Change in Copyright Law**—adjustment of the copyright law to prevent publishers from enforcing clauses that attempt to restrict the rights granted libraries under the library exemptions and fair use provisions of copyright law; the creation of more practical fair-use guidelines for libraries, and reduction of the overall copyright restrictions to comport more with the original intent of the copyright law which is to encourage the dissemination of information.

3. **Consortia**—formal or informal arrangements between libraries to coordinate their collection development activities, with the express or implied understanding that the libraries will share some of those resources or make them available to one another’s patrons.
4. **CONTU Guidelines**—the copyright guidelines concerning interlibrary loan promulgated by the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) and submitted to the United States House and Senate during the process of enacting the 1976 version of the Copyright Act. Congress published those guidelines as part of the conference report (#94-1733) when it passed the Copyright Act into law.

5. **Copyright Law**—the copyright law of the United States of America as contained in the Constitution of the United States (Article 1, § 8, Clause 8), in the United States Code at 17 U.S.C. §101-1332, and in other federal statutes.

6. **Digital/Electronic Database**—a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or digital form such as: CD ROM; floppy disk; and various internet media such as WWW, FTP and Gopher.

7. **Document Delivery**—profit making business of delivering full-text or abstracted versions of specific documents or databases to customers via electronic or physical media.

8. **Fair Use**—provisions of the U.S. Copyright Act, which allow institutions and individuals, under certain conditions, to copy, loan, and distribute copyrighted material without the owner's permission.

9. **Interlibrary Loan** (ILL)—one library providing to another library an original or copy of a specific document or other material requested by a patron of the second library, or requested by the second library to replace a lost or damaged item. In
its broader sense, ILL encompasses situations where a library provides a copy of a specific document or other material to a remote patron, whether or not that patron has indicated an affiliation with another library or its umbrella institution. This definition specifically excludes profit-motivated document delivery.

10. Licensing Agreements (Licenses)—contracts to which customer libraries and, in some cases, their patrons explicitly or implicitly are bound by agreeing expressly in writing, by clicking or checking certain selections of a document, or implicitly by using certain databases and products. The term ‘license agreement’ generally refers to agreements to lease products rather than to purchase them. License agreements include negotiated license agreements, electronic click-wrap agreements, and tangible forms such as shrink-wrap, “box-top” and other print agreements.

11. Uniform Computer Information Transactions Act (UCITA)—a proposed state law designed to make legal treatment of various computer information transactions and contracts uniform throughout the United States. UCITA was drafted by the National Conference of Commissioners on Uniform State Laws and was originally intended to become Article 2B of the Uniform Commercial Code, a model code that the Conference recommends that each state enact.

12. Vendors—publishers of print and electronic databases and materials who sell or lease products to libraries.

13. Publishers—purveyors of copyrighted materials. This definition broadly includes authors, publishers, and other producers of copyrighted works.
III. SIGNIFICANCE OF THE WORK

This work has significance for academic and public libraries everywhere within the United States because it addresses emerging issues concerning library rights and ability to use and distribute material. The fact that library users benefit indirectly from both the creation and distribution of works is significant to all members of society. The primary issues here are the changes in law and vendor practice that may force libraries to reduce interlibrary loan because of unavailability of print resources, the restrictions vendors place on electronic licenses, and additional restrictive laws for which publishers lobby. These issues affect library acquisitions, library use, and the availability to library patrons of library material under the exceptions the United States government has granted to insure the distribution of information for the public good. Academic libraries in particular are concerned that these changes will restrict educational access, thus reducing the educational and research opportunities for students and scholars.

Is this restricted solely to interlibrary loan? If, so, why is that significant? The restrictions threatening libraries are not just restricted to ILL. But, in recent years, interlibrary loan has become a very significant way for libraries to make material available to their patrons. The above mentioned new technologies have been indirectly responsible for increased restrictions, because copyright owners fear the ease and anonymity with which users may infringe their copyrights. But, the same technologies have also brought about a geometric expansion of the volume and variety of material available and necessary to conduct competent research. These issues are particularly significant to academic libraries because they are uniquely vulnerable to the need to provide the widest variety of material and the most significant journals and resources in
their fields to both educate and assist research. Access to a wide variety of ideas and information helps spark advancements and new ideas which in turn spur innovation and productivity within the country. The United States must continue to encourage new ideas and spur new advances if it is to remain a strong nation economically, socially and politically. To further restrict access to information in higher education would also further increase the widening gap between the information haves and have-nots, while greatly increasing the number of have-not individuals and institutions. That translates into a less well educated and less productive nation. Therefore, libraries and ILL in higher education settings are particularly important to all aspects of the well-being of the United States, in other words, the public good.

Many academic libraries have formed consortia arrangements with other libraries to expand the array of resources available for their patrons. But new restrictions found in copyright law, copyright guidelines, and in licensing agreements may negate most if not all of those benefits. This paper will reveal a trend in restricting information that can severely affect scientific and other research at the university level and beyond, which ultimately may negatively impact the viability of the United States in a variety of ways. More importantly, this paper will offer some practical solutions that will help maintain libraries’ unique role in providing access to and distributing information while providing a fair level of protections to copyrighted works, protections designed to continue to encourage creative works.

IV. INTRODUCTION

In recent years, swift advances in technology, particularly computer, facsimile, internet hand-held device and other digital technology, have allowed researchers to
manipulate, copy, and distribute documents and audio and visual works more easily than once could have been imagined. As always, there is a backlash. In response to this development, concerned publishers and authors have organized to protect their interests in authors' works, seeking new ways to protect copyrighted information from any unauthorized distribution and manipulation. Publishers have successfully pushed federal and state lawmakers for more and stricter protections for copyrighted works, and convinced courts to opt for tighter enforcement. One major result has been that Congress has further extended the time-period of federal copyright protection for works from the original 14 years\textsuperscript{ii} under the federal Copyright Act, to 28 years, then to an author’s entire lifetime plus 50 years, and now to 70 years beyond his or her death.\textsuperscript{iii}

Additionally, publishers are pressuring print publication purchasers and database licensees, by demanding that individual and institutional customers accept database licensing agreements that restrict the licensees’ abilities to use the electronic material, and sometimes the print material, as well. For example, some publishers of electronic databases and print matter have required licensees to agree to limit access to both the print and electronic matter to only certain of their patrons (e.g., only students and faculty within a certain university program) or to only on-site use (no interlibrary or other lending, or remote access), as a condition of access to the electronic matter. Sometimes, these 'agreements' take the form of click-wrap, shrink-wrap and box-top electronic 'license' provisions that purport to bind licensees to their terms if the licensee opens or uses the material. The print material that these licenses restrict is often a physical version of the information available electronically. Normally, under the “first sale” doctrine of federal copyright law, libraries or individuals have the right to lend, sell or give original
print material, and to give or sell sound recordings and software, to whomever they choose as long as they originally purchased the material legitimately.\textsuperscript{iv} Section 109 further allows nonprofit libraries and educational institutions to lend, rent or lease computer programs and sound recordings for nonprofit purposes.\textsuperscript{v} But, these provisions are losing their value as emerging licenses and new laws designed to enforce the licenses, such as the Uniform Computer Information Transactions Act (UCITA), strictly limit by contract what copyright law specifically authorizes.

Libraries, particularly academic libraries, which have long enjoyed special exemptions under the federal Copyright Act, are now seeing those exemptions worn away by legislative and contractual provisions. These provisions have heavily tipped the balance of copyright law in the direction of protecting copyright holders, to the exclusion of providing for widespread distribution of information for the public benefit.

V. **INTERLIBRARY LOAN**

Interlibrary loan is an important method for libraries to provide valuable information to their patrons. Some publishing interests wish to restrict ILL of copyrighted materials because they feel it is a cheap, easy and fast way for libraries to subvert copyright. But, that is actually not true. ILL is a slow, labor intensive, and costly process for libraries, in both personnel and monetary measurements. Each ILL transaction in a research library takes about ten days.\textsuperscript{vi} According to David Ensign, if a library made about five ILL transactions in the same journal or monograph in 1993, it likely would have been better off monetarily in purchasing a subscription to the journal, or purchasing the monograph.\textsuperscript{vii} A survey conducted by a consultant with the Association of Research Libraries estimated that the mean cost of each ILL transaction for research
libraries in 1998 was approximately $28.\textsuperscript{viii} It cost about $18.35 to borrow an item and $9.48 to lend.\textsuperscript{ix}

Interlibrary loan is a last resort for libraries, not an alternative to collection development. However, it is a necessity. Lucretia W. McClure writes:

Borrowing from other libraries is not a substitute for building an adequate collection for use by an institution's primary clientele. An item borrowed for one user stays with that user; it neither enriches the collection nor enhances any other individual's knowledge. It is, however, a necessary avenue for supplying resources not available in a collection, for titles that are out of print and cannot be purchased, or those beyond the scope of a library's subject area. When a library cannot or should not purchase an item, borrowing through ILL may be the answer.\textsuperscript{x}

Some commentators believe that pay-per-view database aggregators, and database vendors make ILL unnecessary.\textsuperscript{xi} There are at least two reasons why that is not the case. Database aggregator and vendor services are money-making concerns. They often choose to include the most popular, most used material in their products. Less used items are often not likely to make enough of a profit to be worth their effort. Libraries themselves generally already have subscriptions for frequently requested items because of the costs and delays involved in ILL. Therefore, there still remains a gap between what aggregators and other product vendors may make available, and the infrequently requested items that libraries need to make available to patrons. This is especially true in academic libraries where students and researchers choose unique research topics and then need a variety of resources to research them. Also, vendors are not obligated to continue providing any titles. Frequently, and sometimes without notice, vendors drop products that are not doing well. If the library accesses that information through an electronic resource license, it cannot make its own archival copies of that information, even if the vendor gives the library forewarning of the cancellation. So there remain gaps in resource availability that ILL must be available to fill.
VI. COPYRIGHT LAW

A. Constitutional Basis for Copyright Law

The U.S. Constitution granted Congress the power to formulate copyright law to provide an incentive to generate new creative works while providing for the widespread dissemination of that work for the benefit of the public. Congress accomplished the first by giving copyright holders exclusive rights to reproduce, distribute, perform, display, or alter their creative works. It attempted to accomplish the latter by initially limiting copyright to a period of 14 years, and later to 28 years with one time renewal rights, and by providing for certain exceptions to copyright holders' exclusive rights.

The current version of federal copyright law is the 1976 Act as amended, and it is codified at 17 U.S.C. §§ 101-1332. The Act places into the author's hands the initial rights to creative works and now covers both published and unpublished works. These exclusive rights are separable and transferable. This means that an author may transfer all or only part of those rights to others. The author or current copyright holder must make any transfer in writing, or it will not be valid. When the copyright holder dies, the retained copyright goes to his or her estate. Both the retained rights and the transferred rights now last for 70 years after an author's death.

B. Stretching Copyright Law

Many published works created before 1964 have lost copyright protection. But, publishers have tried to further extend coverage for works that are no longer copyright protected (i.e., works in the "public domain") by republishing them with the inclusion of new material that does qualify for protection. For example, the publisher may re-publish a classic novel and include a new preface or introduction. The public domain part of the
work is freely copyable, but figuring out just what part of the work is copyright protected and what part is in the public domain may sometimes prove difficult. Moreover, the publisher places a copyright notice on the work that gives the impression that the publisher holds copyright even on the public domain material.

**C. Fair Use**

The result of the lengthened copyright periods and the above mentioned republishing practices is that the majority of works in most library collections fall under some copyright protection. But within copyright law, Congress carved out several exceptions to the exclusive rights of copyright holders. The major exception is “fair use.” In addition to the general fair use exemptions, there are specific provisions that apply to library copying.

Congress refused to define the term ‘fair use’ or to give specific instances of what would qualify. Instead, it provided broad categories of situations that would be likely to fall under fair use. Those categories are: criticism of the work; comment upon the work; news reporting; teaching; scholarship; and research. But, none of those categories is a guarantee of exemption. Even if one’s use seems to fall squarely within one of those categories, one may still be liable for infringement. In each category there are cases in which courts have ruled that the use did not qualify under fair use exceptions. In the case of *Basic Books v. Kinko's*, the plaintiffs sued Kinko's for running a coursepack copying business that catered to university professors. Kinkos printed and sold the coursepacks without getting authorization from any of the copyright holders. The company was over-confident that its use would qualify under the teaching exception in the fair use provisions. The teaching exception reads as follows:
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including . . . teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright . . . \textsuperscript{xxi}

But, Kinkos’ confidence was mislaid. Though the professors used the coursepacks for teaching purposes, Kinko's purpose was purely commercial. Therefore, Kinkos did not qualify under that exception.\textsuperscript{xxii} Another case of mislaid confidence in fair use qualification was that litigated in the \textit{American Geophysical Union v. Texaco} case.\textsuperscript{xxiii} There, Texaco scientists were systematically copying, or having copied, articles from various scientific journals to which the library at the particular research facility subscribed.\textsuperscript{xxiv} Texaco expected to qualify under the research aspect of fair use, but lost its case on appeal. The court ruled that the copying was an impermissible substitute for purchase of the publications.\textsuperscript{xxv}

The Copyright Act gave judges a list of four factors to weigh in determining fair use. They are: purpose of the use; nature of the copyrighted material; substantiality of use; and effect of use. In evaluating the \textit{purpose of the use}, courts consider whether the unauthorized use was commercial or non-commercial in nature. Commercial uses are less likely to be considered fair than are non-commercial uses.\textsuperscript{xxvi} In considering the \textit{nature of the work}, courts evaluate whether it is factual work or creative work. Sometimes, copyright protection is erroneously asserted for a work that does not qualify as inventive. For example, simple database compilations such as standard 'white page' telephone listings do not qualify because there is little or no creativity in simple alphabetic listings of facts.\textsuperscript{xxvii} The \textit{substantiality of use} factor measures how much of the important part of the work an unauthorized user has taken. The less one uses and the more one adds of one's own creative work, the more likely that the use will qualify under fair use. Also important under this factor is whether what was taken, no matter how
small, was the core of the copyright holders work, and whether it was necessary to use a substantial portion of the work in order to effectively achieve the fair use objectives. xxviii

The final factor is the effect of the use on the potential market for or the value of the copyrighted work. In other words, has the unauthorized use damaged the potential market for the copyright holder's work? This factor looks at any possible way that the infringement damages the market, including loss of income or royalties, dilution (taking customers away or over-saturating the market, for example) and tarnishment (making people think negatively of the product or work).

Courts weighing the four factors can produce some surprising results. One oft-mentioned example is that of *Campbell v. Acuff Rose Music*. xxix There the defendant group, 2 Live Crew, recorded a derogatory (and blatant) take-off from the Roy Orberson song "Oh Pretty Woman." The take-off was a commercial success. The plaintiffs seemed to have a very good case, specifically because the unauthorized use was both commercial in nature and because it also tarnished the original work, making it less marketable. The lower courts did rule against the defendants, but the U.S. Supreme Court reversed and remanded the case to the trial court holding that the lower courts erred in taking into consideration only the one factor, the commercial nature of the defendant’s use, without also weighing the other three factors.xxx The Court wrote:

> It was error for the Court of Appeals to conclude that the commercial nature of 2 LiveCrew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. xxxi
In that opinion, a unanimous Supreme Court made it clear that courts may not decide fair use by weighing less than all four factors.\textsuperscript{xxxii}

\section*{D. Section 108--Library Exemptions}

In addition to fair use, there are a number of specific exemptions to the rights of the copyright holder. The provisions in Section 108 specifically apply to library copying.\textsuperscript{xxxiii} Below are discussed the general requirements of the library exception given in Section 108, and the provisions concerning direct copying by libraries for archival purposes, for customers present in the library, for traditional interlibrary loan, and for other remote customers.

Section 108 specifically allows libraries to have made and distributed or archived single copies of works, except in narrow circumstances. These exceptions generally do not apply to musical, pictorial, graphic, audiovisual, or sculptural work. Under Section 108, library reproduction or distribution of a copyright protected work must also not be done for direct or indirect commercial advantage.\textsuperscript{xxxiv} This does not mean that libraries may not charge a fee for providing copies. But it does mean that such fees should only be intended to cover reasonable expenses of providing the copies, rather than to make a profit. Some libraries have formed profit-seeking businesses, providing copies of works to various entities. That type of activity does not qualify for Section 108 protection, but that does not mean that the activity is infringing. It should be fine as long as the library has obtained the proper permissions from the copyright holder or an entity authorized to act on its behalf.

To qualify under Section 108's library exemption provision, a library also must open its collections or archives to the public, or make them available to researchers
beyond those affiliated with the library or "with the institution of which it is a part."xxxv

This requirement means that corporate, government or private libraries that do not allow outsiders to use their collections would be denied this library exception. A third requirement is that the reproduced or distributed works include the notice of copyright, or if the work does not contain a notice, a legend stating that the work may be protected by copyright.xxxvi

Section 108 also permits libraries to make a limit of three archival copies for the library, which it may store with other similar libraries or archives for preservation and security, but not for distribution. This means that a library that has archived another library's material cannot go to those archives for ILL material. Instead, it must make a request to the archiving library that it send copies or originals from its non-archive collection. A library may also make copies to replace a damaged, lost, or stolen work that was part of its collection, or if "the existing format in which the work is stored has become obsolete . . . ", but only after the library has made reasonable efforts to find a fairly priced replacement.xxxvii In the case where libraries use digital copies as archival copies and replacement copies, the library is restricted from making the digital copies available for use outside the premises of the original library. Section 108 also permits the library to provide to a patron of that or another library, upon the patron's request, a single copy or phonorecord of an article, or a small part of other copyrighted work if: that copy becomes the property of the user; the library has no notice that it will be used for anything other than private study, scholarship or research; and the library displays and includes in the order form a copyright warning or notice as prescribed by the Register of
These allowances extend to a whole work, or most of a work, where the library cannot reasonably obtain the requested item at a fair price. Section 108 specifically states that the Act does not impose liability on any library for patrons' unsupervised copying using library equipment as long as the library displays a notice that such copying may be subject to copyright law. But, the Act forbids libraries from engaging in one time multiple copying or systematic single or multiple copying of copyrighted material over time. Section 108 allows interlibrary loan copying so long as the arrangements "do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work." This raises the issue of how much copying is considered "such aggregate quantities," and how is that likely to affect consortia and other formal and informal ILL copying arrangements between libraries? See subsection E below for a discussion of the CONTU guidelines, which suggest severe restrictions to ILL copying.

Lastly, Section 108(h)(2) loosens the Act's prohibitions in the last 20 years of a work's copyright period. It allows digital copying, display and performance of a work for preservation, scholarship, or research if the work is not otherwise "subject to commercial exploitation." This applies only if the library cannot obtain a copy of the work at a reasonable price. Notice from the copyright holder that either the work is being commercial exploited or that it is available at a reasonable price, acts to negate the allowances in this subsection.
**E. The CONTU Guidelines For ILL**

Much of the above mentioned restrictions appear to run contrary the purpose of copyright as stated in Article 1 of the United States Constitution. That purpose is to provide an incentive for new creative works, while providing for the widespread availability of that work for the benefit of the public. Article 1, § 8 reads:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .

Congress has since broadened copyright holders’ rights to such an extent that the underlying intent to promote science and the useful arts may be severely hindered. During the process of enacting the 1976 version of the Copyright Act, Congress appointed the National Commission on New Technological Uses of Copyrighted Works (CONTU) to submit to the House and Senate guidelines for interlibrary loan copying under the Act’s Section 108 “library” exemptions. They are only guidelines or "suggestions," not actual law. Nevertheless, courts generally consider the guidelines to be very persuasive authority because Congress expressly called for their development and included them in the Conference Report. A library that stays within the guidelines is considered safe, but a library that goes beyond that limit does not automatically incur liability. The further beyond the limits one goes, however, the greater the risk.

The CONTU guidelines' most explicit and widely discussed Section 108 provision, referred to as the "Suggestion of Five," recommends a specific ILL request limit of five copies per year, per library from recent journal and monographic titles. The Suggestion of Five is broken down into two separate areas, one for periodicals, and the other for monographic or other materials. The provision concerning periodicals requires that a library limit its ILL requests for copies from the last five years of a
periodical title to a maximum of five article copies per calendar year. The library should be making these ILL requests only when a patron specifically requests an item or if the library is replacing a damaged, lost, or stolen item in the library’s collection. If the library fills a patron request for a copy of Article X from Journal Y, that is one request (assuming it is from the journal's most recent five years of publication). If another patron makes a request for the same article or a different one from the same journal title, and the library requests an ILL to fill that request from the most recent five years of the publication, it counts as a second ILL from that journal. Also, it does not matter if those requests are made to two or more different lending libraries. The requesting library should still limit itself to five requests. Similarly, the CONTU guidelines recommend that libraries limit requests to five requests annually from monographic or other materials published, during the entire life of the copyright.

What happens in the case of periodical articles that are over five years old? The guidelines are silent on that issue. One could assume that ILL copying from such works is allowed, within the bounds of the Section 108 exceptions. But that is not necessarily a valid assumption since CONTU specifically refused to take any position on it. The committee wrote:

The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g) (2) in such case is left to future interpretation.

Along with the Suggestion of Five, CONTU provided mechanisms to encourage and monitor compliance. Additionally, the Copyright Act itself places upon libraries some hard and fast requirements. One is a requirement that the borrowing library post a
warning, in the area where the library fills ILL requests, concerning copyright protection. Also, under the suggested guidelines, the lending library must send or provide the patron with only one copy, and in the case of facsimile transmission, must destroy any additional copy it created to send the facsimile. The borrowing library should also state in writing to the lending library either that its request complies with the CONTU guidelines or that there is another valid reason for the request such as a lost or damaged library copy or an out-of-print title. Additionally, the lending library should fill ILL requests only for institutions that have provided the proper statement of guideline compliance.

The Suggestion of Five also goes hand in hand with requirements that the borrowing library keep records, for three years, of ILL requests it makes. The guidelines did not specify what should be included in those records. But, at minimum, to comply with the guidelines, a library would have to keep track of the date of a request, the requesting patron's name and institutional affiliation, and distinguishing information on the article and serial or monograph being copied from (title, date, volume number, etc.). Also, the records would have to be in journal title order or be searchable or sort-able by title to help monitor whether a library might surpass the guidelines’ suggestions.

Once a library has reached its ILL copy request limit it has several alternatives: in the case of an individual article or item in a collection, the library may seek to copy from other journals or collections that contain the same article or item; the library may order it from an authorized document delivery service like Carl Uncover that pays the royalties to the copyright holder; it may request a copy, or permission to copy from the copyright holder directly or through the Copyright Clearance Center (the largest publication licensing clearinghouse) or other authorized representative; the library may
seek to purchase a back-issue of the publication in which the item is located; or the librarian may try to suggest a comparable alternative item that is available. Keep in mind, the Suggestion of Five limits are concerned only with ILL requests for reproductions of a work, not ILL requests that the physical work itself be sent. Unfortunately, the wear and tear and the out-of-circulation time involved in sending the original item discourages lending libraries from sending many original works, especially journals and other serials. Also, that is not an option at all in the case of electronic data where the library has no physical item to ship.

**F. Consortia Arrangements**

The Copyright Act’s Section 108 (g)(2) provision prohibiting copying "in such aggregate quantities as to substitute for purchase or subscription" to a resource, and the corresponding CONTU provisions, particularly the Suggestion of Five, have major connotations for nascent and currently operating library consortia arrangements. Consortia arrangements have been touted in library literature as a way of expanding or continuing to maintain a level of library material currency without expending additional purchase money, space, and other resources. These arrangements are generally not meant as a way to reduce current library expenditures, but library administrators consider them a reasonable way to ensure better coverage in important subject areas as the number and volume of publications continues to explode. A consortium is usually made up of two or more libraries that may or may not be affiliated. The members sit down together and evaluate their individual library needs. Where the member libraries' resource needs overlap, the libraries may either agree to jointly purchase material that is then shared or have each library concentrate on buying in specific areas with the implicit or express
understanding that the other members will have borrowing and ILL privileges for themselves and their patrons.\textsuperscript{lv}

Despite some obstacles, academic libraries in particular have embraced consortia arrangements as a way of providing important research materials to their university communities--material which they would otherwise not be able to afford because of limited budgets and library shelf space. In discussing consortia arrangements, one writer stated:

\begin{quote}
It has been clear for quite some time that only the largest, most well endowed libraries can even consider comprehensive collection development. For most libraries, collection building to such an extent is no longer feasible or desirable. Instead alternative means must be found to satisfy the needs of clientele.\textsuperscript{lvi}
\end{quote}

Scholars and professors often choose to study, teach and do research at particular institutions based on the institutions' ability to supply such research materials. Researchers depend on the ability of an institution's library to provide that material quickly and efficiently. With consortia agreements, a library can quickly copy and fax a document needed by a scholar at another consortium member institution.

But providing copies under such arrangements runs into two problems. First, such arrangements themselves, and therefore any ILL copying in support of such arrangements are arguably specifically intended to "substitute for actual purchase or subscription" to the material. Law librarian and professor of law David Ensign has made a strong counter-argument to such interpretation.\textsuperscript{lvii} Ensign argues that consortium ILL arrangements are not infringing because (1) the Congressional conference committee report considered an undefined class of interlibrary arrangements non-infringing, and that such class includes consortia arrangements; (2) it is more costly and unacceptably inefficient for libraries to use interlibrary loan than to buy the resource if their patrons
make more than the CONTU allowed five requests from a title; (3) patron requests for items not held by their library rarely exceed the Suggestion of Five safe harbor of Section 108; (4) most if not all of the copying is for the purposes given exemption under the Section 107 fair use provisions, even if it does not qualify for Section 108 exemption.\textsuperscript{lviii} 

But, Ensign’s view has yet to be adopted by a court since nothing dealing with library consortia and copyright has ever been litigated. Thus, providing copies under such agreements, without the copyright holder’s permission could be seen (and is seen by the powerful Association of American Publishers)\textsuperscript{lix} as blatant copyright violation. A second problem with ILL consortia arrangements is that the reason such arrangements are made is that each institution assumes that its own patrons will actually avail themselves of the resources at the other institutions, purchase of which the researcher's library has foregone. In that case, the chances are quite good that a consortia member library will quickly exhaust its Suggestion of Five limits on ILL copying. One alternative then would be to actually ship the original material back and forth between member institutions, causing long and possibly unacceptable delays for researchers who need to access material. The other alternative under these arrangements is to require patrons to shuttle between member libraries to obtain needed materials. Both alternatives make consortia arrangements far less appealing than may warrant their existence. A third alternative is to go back to the idea of using an authorized document delivery service, thus negating the purpose of the ILL arrangement, or to request permission and pay a copyright holder or its representative for all requests or at least those over the Suggestion of Five. This last, however, may involve an administrative nightmare of record keeping and delays that most libraries will find difficult or impossible to handle. Further, many libraries would
have to require that individual patrons pay royalty fees for ILL borrowing beyond the Suggestion of Five.

**G. Copyright Infringement Penalties**

What are the penalties for copyright infringement, and why should librarians be concerned? Although libraries may seem like unlikely targets, publishing concerns have often chosen to make litigation examples of organizations that carelessly or openly violate their copyrights. One example is the case of *Williams & Wilkins v. United States*, a case decided before institution of the 1976 revisions to the Act (which added Section 108). In that case, the plaintiffs sued claiming that the National Library of Medicine (NLM) and the National Institute of Health (NIH) violated the plaintiffs' copyrights by providing large scale journal copying. NIH had provided copies only for its staff. But, about 12% of NLM's filled copy requests were from outside organizations, some of which were commercial concerns. NLM provided the copies to those outside organizations for a fee. The U.S. Supreme Court affirmed the Court of Claims decision that the copying qualified under the general fair use provisions of the Copyright Act, largely because each library's purpose was non-profit and intended to advance scientific research, and also because the libraries had put in place strict limitations on duplication. But, that final decision came only after years of expensive litigation. Also, the decision was affirmed by a Supreme Court that was split four to four. That equal split decreases the precedential value of the opinion.

Another well-publicized example is the *American Geophysical Union v. Texaco* case. There the plaintiffs sued Texaco because of the company’s policy of circulating a limited number of journal originals among its scientists, who then made
copies for their own use. One scientist named in the suit had regularly made copies to archive for his future use. The plaintiffs knew that this was a widespread practice among research organizations. They chose to make an example of the Texaco scientists in an attempt to end a growing tide of such activities in numerous research organizations. The court agreed that Texaco had violated the plaintiffs' copyrights. The court held that Texaco's and the scientists' intent was commercial and held that the copying adversely affected the market for those scientific journals.\textsuperscript{lxiv}

The penalties for copyright violation vary depending on the circumstances and severity of damage. Persons harmed by infringement most frequently turn to civil lawsuits for damages as the tool of choice against infringement, especially favoring suits for statutory damages. There are, however, other penalties for copyright infringement. The government may also bring a criminal action against an infringer, though the Digital Millennium Copyright Act recently exempted non-profit libraries and educational institutions,\textsuperscript{lxv} but did not mention librarians. Chapter 5 of the Copyright Act lists the various penalties for infringement.\textsuperscript{lxvi}

They include:

§ 502. Injunctions--Forcing the infringer to stop [or start] doing something.

§ 503. Impounding and disposition of infringing articles.

§ 504. Damages and profits--Payment of an amount of money based on how much the copyright holder was damaged or based on how much the infringer profited.

§ 505. Costs and attorney's fees--Costs of the lawsuit or other legal action.
§ 506. Criminal--Criminal penalties are only for willful (deliberate and/or knowing) infringement. Willfulness may be presumed where the copyright holder has informed the alleged infringer of the violation and the latter entity continues to use the copyrighted item in violation of the copyright holder's exclusive right. Criminal penalties vary with the level of infringement. The amount involved must be $1,000 or more. Courts may sentence an infringer to federal prison for up to 10 years (3 tiers of guilt provide for imprisonment of: up to 3 years, up to 5 years, or up to 10 years, depending on severity of the crime). Additionally, or alternatively the court may impose fines of up to $150,000 for willful infringement (up to $200,000 for organizations) and up to $30,000 for infringement that was not held to be willful. The 11th Amendment to the United States Constitution immunizes state agencies, including state universities, from suits for damages, but those agencies are still subject to injunctions, and individuals in those institutions may still be liable for damages or criminal penalties.

VII. LICENSING RESTRICTIONS
One important additional way that libraries increasingly find their hands tied concerning copying and other use of materials is through licensing agreements. Electronic resources are quickly replacing print resources in libraries. Electronic resources are generally more flexible, take up less space, and, in some case, can be used on a pay-as-needed basis. Libraries are shifting to electronic resources both by choice and by necessity as many vendors make resources available solely in electronic form. These resources are most often provided under access contracts called licenses. Use of licensing contracts is drastically changing the dynamics of the library/vendor relationship. Instead of libraries owning physical copies of resources, as was generally
the case with print resources, they now rent access to electronic data. The terms of license contracts govern use of the data by libraries and their patrons. These contracts can often impose much more severely restrictive rules on copying, displaying or distributing material, or even distributing information about material, than the copyright law does.

Libraries have several major problems with many of these licensing agreements. Those problems relate to how much the contract truly is a meeting of the minds between the licensor and the licensee, and how much the agreements restrict patron access to and use of those resources. First, increasingly many of these agreements or parts of the agreements come in the form of box-top, shrink-wrap, and click-wrap agreements. These are contracts located on the outside or inside of a product’s box, or which may appear on certain screens or website pages of a product when the licensee or patron loads it. The terms are usually take-it-or-leave-it, and are not negotiated between the parties. Nevertheless, these agreements purport to bind the user or the institution to terms to which neither may be willing or legally allowed to agree. Secondly, many publication vendors, having exclusive rights to certain important databases, are creating standard contracts and are refusing to negotiate their terms partially because they want to eliminate the costs of contract negotiation. Also, some of the contract terms unnecessarily block a library’s access to material when a vendor discontinues certain publications even though the library wants to continue making the material available. This may be the case even when the library has an interest in preserving the material for future scholarship and education, and where the vendor cannot or will not guarantee that it will continue to preserve that information.
When a library has signed a license agreement, the legal issue often becomes one of contract breach rather than copyright infringement. Unlike copyright, which is governed by federal law, license contracts are governed by state law. The provisions of the contract determine which state's law applies. Where the contract is ambiguous on that issue, a court will decide what law applies by using the venue and conflict of law provisions of the state where the court sits. The law that a court applies must be that of a state that has some kind of substantial connection to the contract. Unfortunately for licensee libraries, it may not be the law of the state in which the licensee used the product or even the state where the licensee signed (or ostensibly agreed to) the contract. In some cases, the entire litigation or arbitration, should it come to that, could be conducted in a far away state, at great expense and loss of resources for the library, often because the license agreement designated that state.

The terms of a license contract can also give away rights licensees have under copyright law. That has become yet another factor that library administrators must carefully monitor and for which they should provide training and guidelines to staff. This monitoring may be becoming an overwhelming burden on library personnel and resources as more and more publishers make their materials available exclusively or primarily in licensed electronic format, and as many publishers insert click-wrap and shrink-wrap contracts into their databases and other materials. Just as important is the fact that, as libraries shift to majority-electronic collections, the standard provisions of most of the contracts for these materials generally prohibit ILL or any distribution of copies of the database materials. This would virtually eliminate ILL as vendors eschew print publication for cheaper, more easily enhanced, and license controlled
electronic media. Where vendors provide both print and electronic material, the license may also limit patron access to and prohibit ILL of the print resource, despite the copyright fair use and library exemptions.

Libraries also object to several other practices manifest in these contracts. Often vendors charge for these licenses based on the number of people in the library’s patron population, regardless of whether most of that population is likely to use the resource. Libraries also rarely can get comparison figures on usage or costs from other institutions that use vendors’ licensed products, because the license contracts typically have non-disclosure clauses, prohibiting institutions from disclosing the terms to which they and the vendor agreed. This also makes it hard for libraries to work together in ILL consortia arrangements because they cannot reveal information about their vendor licenses that might help them fairly evaluate and distribute the benefits and costs among member institutions. Additionally, the licenses frequently prohibit libraries from providing off-site access to their material or restrict access to only a small subsection of a library’s user population. These restrictions ignore the growing population of distance learners at universities and colleges, and implicitly prohibit ILL. Vendors also may extend licenses to cover print material. Particularly, where licenses attempt to tie sale of a print version of a resource to license of an electronic version, the license may also require libraries to restrict patron access to the print materials. As this practice becomes more prevalent, libraries will be able to fill few, if any remote patron or ILL requests for material.
Some standard clauses also restrict licensees from criticizing the product, reverse engineering the product or revealing information about the product, even where any of the above may be necessary to teach researchers and students about the resource or to maintain the resource. One big effect of such clauses is that they prohibit independent, objective abstracting, indexing, and evaluation of the materials in these resources. Thus, prospective customers and users of a product can rely only on the biased claims of the product vendor to evaluate whether the resource is the best for their needs. Patrons have always relied on librarians to point them to the best available resources for their needs, and it is often library and information professionals who provide objective abstracting and indexing of information products. Such licenses would enforce the equivalent of a gag order on library and information professionals, stopping them from providing their evaluation of the pros and cons of a particular resource or suggesting one resource over another. In the ILL context, if librarians cannot share information about the resources they have, how will other libraries know of the existence of or how to locate certain databases and materials that might be helpful to their patrons?

License contracts also may or may not reveal the vendors’ use of “time-bombs” or other self-help or automatic restraint mechanisms used to disable a licensee’s access. Vendors have used self-help mechanisms in the event the license is not continued, or if the vendor believes the licensee is somehow misusing the product, or if the vendor believes the licensee has a delinquent account. Such self-help is often automatically triggered and is susceptible to vendor error, discontinuation of titles, and slow processing of accounts. While such matters are straightened out, libraries and patrons suddenly, often without notice, find themselves resource-less. At the opposite extreme, standard
database bundling contracts often charge libraries for material they already are paying for through another database package. That is something libraries can ill afford considering universally tight library budgets.

Finally, terms of some contracts often bind the licensee to terms added after contract formation. Some license contracts, particularly those for electronic databases, have clauses allowing the vendor to change the terms of the license from time to time, with or without prior notice to licensees. Some of those provisions do not require vendors to directly notify licensees. Thus, licensees must periodically monitor vendor websites, and software and product packages at their own initiative, to determine if the contract has changed. This is a very disturbing possibility because it means that libraries may suddenly be bound to terms to which they should not or cannot legally agree. For instance, a state university may accept a contract that meets its needs and which its legal counsel has determined conforms to state agency rules and laws. Later, the vendor could amend the contract through some print, click-on, or posted terms that it either sends with its software products or adds to one of its web pages. For example the amendment may have the licensee indemnifying the vendor/licensor for certain actions or damages. Under that state’s laws, a state agency may not be allowed to indemnify anyone. If the vendor makes an amendment without giving any or enough notice, the university could be in for a huge legal mess. At the very least, the library may have to pull the resource before the amendment takes effect, leaving its patrons without access until the library can work out a compromise with the vendor or have its legal counsel review the changes.

Are all or any of these provisions valid? The law is very unclear right now. The overshadowing question is whether a click-wrap or shrink-wrap contract is binding.
some consider these types of contracts to be electronic versions of what are termed contracts of adhesion. contracts of adhesion are standardized, take-it-or-leave-it consumer contracts for goods or services, with one party (usually the drafter of the contract) having much stronger bargaining position than the other. courts were once very reluctant to enforce shrink-wrap agreements because of this. in 1988, in vault corp. v. quaid, the fifth circuit court of appeals rejected the litigated sections of a shrink-wrap agreement because its license terms and the provisions of the louisiana law enabling the license terms conflicted with federal copyright law. the court wrote:

the provision in louisiana's license act, which permits a software producer to prohibit the adaptation of its licensed computer program by decompilation or disassembly, conflicts with the rights of computer program owners under § 117 [of the copyright act] and clearly "touches upon an area" of federal copyright law. for this reason, and the reasons set forth by the district court, we hold that at least this provision of louisiana's license act is preempted by federal law, and thus that the restriction in vault's license agreement against decompilation or disassembly is unenforceable.

other courts have come to opposite conclusions, however. most courts no longer reject click-wrap and shrink-wrap agreements out-of-hand. they routinely look for a point at which the consumer acted to accept the offer of goods under that agreement. a court may then also look at whether the terms the consumer agreed to are unconscionable or against public policy. in 1991, in step-saver data systems v. wyse, the united states court of appeals for the third circuit ruled for the first time that a shrink-wrap agreement that arrived with a computer software product, after the parties had already made a verbal agreement, was part of the enforceable agreement. but, the court held that terms in the shrink-wrap agreement that substantially altered the terms of the original agreement between the parties, were not incorporated. in arizona retail systems v. software link, a later case involving the same software vendor, a u.s. district court held the first of several shrink-wrap agreements involved in a series of sales was
enforceable while some later ones were not because the customer had been fully aware of the terms of the first license but had not had an opportunity to read the other license terms before a contract was formed. The licensee in this case had numerous problems with the software, despite representations the licensor had made claiming that the software would be compatible with the licensee’s computer system. The license provisions in the shrink-wrap agreement disclaimed any warranty except for actual defect in the disk. The court’s ruling held the licensee to that and the other terms of the initial shrink-wrap license.

In *ProCD, Inc v. Zeidenberg*, the Seventh Circuit Court of Appeals addressed the question of whether terms of a shrink-wrap agreement that was inside the box (and therefore readable only after purchase) and which prohibited copying factual material were enforceable. Judge Easterbrook wrote:

> Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. 908 F. Supp. 640 (W.D. Wis. 1996). . . we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

The federal law to which the court referred in the *ProCD* opinion is federal copyright law. The U.S. Supreme court has held that the Copyright Act denies protection to factual material. Easterbrook’s opinion, therefore, held that does not preclude protection under contract law. In other words, the terms of the contract could eliminate the copyright law protections.

Easterbrook ruled again on shrink-wrap contract enforceability in *Hill v. Gateway*, a class action suit brought by consumer computer purchasers to invalidate, the arbitration clause and all other terms in Gateway’s inside-the-box license. The
arbitration clause purported to take effect if the purchaser kept the product more than 30 days. The Hills had kept the computer over 30 days, but argued that the arbitration clause was not prominent. Judge Easterbrook held that the license constituted a valid enforceable agreement, and that the arbitration clause did not need to be prominently displayed.

Courts have also touched upon the validity of click-wrap agreements. In *Hotmail v. Van Money Pie*, an unreported 1998 decision by the United States District Court for the Northern District of California, the court issued a restraining order holding the defendants to the terms of a click-on website agreement which prohibited users from sending mass emails (spam) through Hotmail’s service. Other issues in the case included criminal falsification and trademark infringement. Among other things, the defendants used falsified Hotmail accounts and used the Hotmail logo to send out mass pornographic emails. In this decision concerning the request for preliminary injunction, the trademark and falsification issues were the primary issues, but the court also noted that the plaintiffs were likely to prevail on the breach of contract claim. The court wrote:

> The evidence supports a finding that plaintiff will likely prevail on its breach of contract claim and that there are at least serious questions going to the merits of this claim in that plaintiff has presented evidence of the following: that defendants obtained a number of Hotmail mailboxes and access to Hotmail's services; that in so doing defendants agreed to abide by Hotmail's Terms of Service which prohibit using a Hotmail account for purposes of sending spam and/or pornography; that defendants breached their contract with Hotmail by using Hotmail's services to facilitate sending spam and/or pornography; that Hotmail complied with the conditions of the contract except those from which its performance was excused; and that if defendants are not enjoined they will continue to create such accounts in violation of the Terms of Service.

Here the court did not definitively rule that the click-wrap agreement was valid, but it suggested that the plaintiff was likely to prevail on the issue of the contract, thus the court assumed its validity. Other courts have touched on the issue of click-wrap agreements but have not tackled the issue head-on. The results have been mixed. One recent
unreported case in the U.S. District Court for the Central District of California, 
*Ticketmaster v. Tickets.com*, xcii also discussed whether copyright law preempts state laws governing licenses. This court concluded that the Copyright Act preempted state law claims under the contract that come “within the general scope of copyright.” xciii The court held that the plaintiff’s claims for unjust enrichment and the plaintiff’s claims under the contract provisions prohibiting licensees from copying, misappropriation, and trespass were preempted by the Copyright Act. But the court also concluded that the contract provision prohibiting commercial use of the plaintiff’s website was “possibly not preempted,” and that other contract claims and the tortious interference with prospective business advantage claim were not preempted. xciv

VIII. CONFLUENCE OF COPYRIGHT LAW AND LICENSE RESTRICTIONS-UCITA AND OTHER PROPOSED LAWS.

The discussion above touches upon some types of license agreements and provisions that libraries find troublesome. The discussion shows that currently the enforceability of some of those license terms, particularly certain shrink-wrap and click-wrap agreements, is questionable. Courts have returned mixed results, largely dependent on the specific circumstances of each situation and upon the court’s interpretation of the scope of the Copyright Act. Generally, the question for courts is not whether a shrink-wrap or click-wrap license can ever be binding, but rather under what circumstances its provisions become binding. Often a court focuses on how prominently displayed the provisions are, whether the agreement allows the consumer an opportunity to withdraw or to return the product and get a full refund, and whether the consumer could access the product without viewing the license or acting to assent to its terms. xcv UCITA, which is
discussed below, was drafted in hopes of bringing consistency to jurisdictional treatment of those agreements.

**A. UCITA**

UCITA is the Uniform Computer Information Transactions Act, a mammoth model state law initially considered by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The ALI is a group composed of legal scholars, academics and specialists. The NCCUSL is a group that is made up of more than 300 lawyers, judges, and law professors. Each of the fifty states, as well as the District of Columbia, Puerto Rico, and the US Virgin Islands, appoints members to NCCUSL. ALI and NCCUSL are each highly regarded and the two groups usually work together to draft each new version of the Uniform Commercial Code (UCC), a set of model commerce laws. The states sponsor this work and every state has then adopted the UCC, most without significant modification. The UCC attempts to make interstate commerce easier by making commerce laws consistent from state to state. ALI and NCCUSL originally worked to draft UCITA as the new Article 2B of the UCC (UCC2B). They intended the inchoate UCC2B to create standard rules for business-to-business, and business-to-consumer transactions in the computer and electronic realm. But, because of serious concerns about the proposed law, ALI withdrew its support for the article. Nevertheless, NCCUSL went on to submit the controversial law to the states as a uniform state law, the proposed UCITA. The most recent version of UCITA, submitted on September 29, 2000 (now with revisions dated January 13-14, 2001), may be found at the NCCUSL uniform laws website and spans 194 pages. It is an extremely complex act. Many business, professional and consumer
groups, including prominent library associations, attorneys general of twenty six states, law professors, software developers, insurance companies, magazine and newspaper publishers, and entertainment trade associations are voicing strong opposition to UCITA for a number of reasons.

**B. UCITA Provisions that Have Impact on Libraries**

The major reasons libraries and many of the other groups oppose UCITA is because it validates the egregious license agreement terms discussed above and allows license terms to override copyright fair use, library exemptions, and other Copyright Act provisions. UCITA definitively validates click-wrap and shrink-wrap contracts, allowing exceptions only in extreme, unconscionable situations. It also allows contract terms to override the Copyright Act’s protections including the fair use and library exemptions. As noted above in Section VII (License Restrictions), the enforceability of many license provisions to which libraries object remains questionable. Only a small number of jurisdictions have dealt with these issues and at least two refused to have the opinions officially reported. Generally, courts avoid having opinions published when they do not want the opinion to have precedential value. Below is a discussion of the provisions libraries find most calamitous.

Among other things, UCITA would definitively validate take-it-or-leave-it click-wrap and shrink-wrap (mass-market) licenses. As noted above, such mass-market agreements are becoming more prevalent because vendors use them to cut down on the cost of negotiating licenses. Also, many smaller libraries are purchasing off-the-shelf items that may contain such contracts or add-ons to contract. Such contracts or add-ons may be hidden inside a sealed box, or slipped into the pages of a book. They may appear
in the introductory material after software is loaded or be posted somewhere on a website. They also may appear in inserts and new postings presented with updates to products long after the parties made their original agreement. Vendors may not have to give licensees any prior warning of such changes. This UCITA provision relieves vendors of the responsibility to negotiate terms and relieves them of the responsibility to make sure the consumer is aware of the terms to which he or she is agreeing. Conversely, it places a back breaking burden on libraries and individual consumers, requiring them to be hawkishly vigilant for any and every possible addition or change to a license contract.\textsuperscript{cvii} Such vigilance would require libraries to keep specialists and contract experts (preferably contract attorneys) on staff to continuously monitor and evaluate changes and to attempt to negotiate compromises with vendors. Very few academic, or even private or corporate libraries have the personnel and monetary resources to engage the services they would need to conduct such ongoing scrutiny.

UCITA also validates clauses that disclaim state imposed implied warranties. Those warranties, such as the warranties of merchantability and fitness for a particular purpose are designed to protect consumers. An implied warranty of merchantability means that a product must: (1) pass without objection in the trade under the contract description; (2) be fit for the ordinary purposes for which such goods are used; (3) be adequately contained, packaged, and labeled; and (4) conform to the promises or affirmations of fact made on the container or label.\textsuperscript{cviii} A warranty of fitness for a particular purpose attaches where a vendor/seller, at the time of contract, “has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgement to select or furnish suitable goods.”\textsuperscript{cix} Under UCITA one could go to a vendor
of complex or custom products and explain to the vendor what one’s needs are. The vendor could make claims that he or she has a product that does exactly what one needs. The vendor can then use an inside-the-box license contract to deny any responsibility, and one would only find out when one got the product home. If the product does not do what the vendor claimed one will have no recourse. This places unreasonable burden on licensee to discover defects during an often brief evaluation before purchase. Worse yet, a vendor can sell something that its package claims will do something that ordinary products of that type should be able to do. But if it does not, one will not have recourse if there is a disclaimer enclosed. For example, one might buy a computer with software that is represented as having word processing and spreadsheet programs. If one gets it home and then finds that the software is defective and neither the word processing nor spreadsheet application is accessible, the vendor might already have disclaim liability in a contract enclosed in the box with the computer. UCITA also allows disclaimers limiting the implied warranty of non-infringement to United States uses only.\textsuperscript{cxi} This means that the vendor can knowingly or negligently provide copyrighted material for which it does not have international right to license.

Additionally, UCITA allows vendors to threaten disruption of licensee’s critical systems through electronic "self-help" (a.k.a. automatic restraints).\textsuperscript{cxi} Automatic restraints are sub-programs or other applications designed to disable a licensee’s access to a vendor’s product. Vendors use automatic restraints to prevent access when the vendor believes the licensee is misusing the product or has not paid its account. Automatic restraints may be included with products without the licensee’s knowledge and may disrupt service unexpectedly because of product malfunction, vendor mistake, or certain
contract disputes between vendor and licensee. Libraries may not know of a problem until the staff or a patron tries to access critical material. Such disruption, without notice, can be devastating to a library, while vendors would be minimally burdened if they were required to abide by specific notice rules.

Most disturbing, for library professionals, UCITA allows contract terms, even non-negotiated click-wrap and shrink-wrap terms, to override the fair use and library exemptions, as well as other Copyright Act provisions. These exemptions include the right to copy material under certain circumstances, the right to criticize work, the right to provide factual material from a work, and the right to use portions of a work for educational and research purposes. Congress enacted the fair use and library exemptions in the interest of the public good. Without these protections, libraries will be severely restricted from being able to provide many basic services that benefit their communities. These include providing remote and simultaneous patron access, lending materials to patrons of that or another library, providing evaluative information concerning resources, collaborative collection development, and ILL. UCITA will gravely affect ILL as more and more resources become available merely electronically, through standard license agreements, or from vendors with so much market power that they refuse to negotiate terms. UCITA will increase the number of such agreements because it enables vendors to generate changes to contracts without negotiating the changes with the licensees. Academic libraries, particularly, will be hard hit because they need to have and provide access to as wide a variety of resources as possible in order to adequately educate U.S. university and college students. If college and university libraries don’t have that ability,
our higher education system will inevitably suffer, and so will our country’s competitiveness politically, socially, intellectually and economically.

Carol Ebbinghouse writes giving a good vision of the burden libraries might soon endure under the UCC2B [UCITA] regime. Here she envisions the processing of incoming library materials:

Examine the outside and inside of each package for shrink-wrap contracts. Open the books, look for any slip of paper over, around, under, or stuck within a hook (sic) that might conceivably constitute a license. Shake them to discover any 'crack open' (the book-equivalent of shrink-wrap or click-wrap) contract that might reside inside. Check the title page and verso for any limitations on the use or disposal of each hook (sic). Check the box as well. Identify contracts that stipulate the library cannot lend book(s) to its patrons, cannot interlibrary loan to another library, and/or cannot permit photocopying.

Separate the packages with contracts from the packages with no apparent contracts and send them in two separate piles to the staff attorneys. Staff attorneys will read each written contract to determine whether the license prohibits copying, lending to other libraries, lending to patrons, archiving, etc. Where there is no enclosed contract, the attorneys will install the CD-ROM, software, floppy disk, video cassette or other media into an appropriate machine to search for ("click-wrap") license terms. License terms for some products only display after insertion of a disk into a floppy or CD-ROM drive or upon an attempt to load the disk content onto a hard drive, etc. Staff attorneys must verify which contracts will bind the library regarding permitted and impermissible uses of the product. NOTE: Sometime[s] the screen will say something like "To accept the terms of the license 'click here'" without revealing the terms of the license on the screen. The attorneys will carefully find where to click to locate the terms, print them, read them, and evaluate them before deciding whether to "click" acceptance, to consult with the librarians, or to return the product.

NOTE: Even those items to which the library has ongoing subscriptions need to have the terms reviewed by the staff attorneys each time an update arrives, because all contracts are modifiable by new terms in the next package's wrapping.

Academic libraries often get frequent (daily, weekly, monthly, and quarterly) updates to products. Academic law libraries, for example, need to get weekly or monthly updates because the nature of the legal profession requires that researchers have the most recent judicial decisions, statutes, agency rules, etc. It would be fantasy to assume that most libraries, which are notoriously held to shoestring budgets, could afford the ongoing services of staff attorneys or license experts to monitor these matters. But any library that fails to monitor licensing contracts under UCITA puts itself at serious legal risk. Currently, UCITA has only been passed in two states, but Arizona, Oklahoma, Delaware,
and Texas are scheduled to take it up in their current legislative sessions. NCCUSL is also approaching other states, asking them to do the same. Also, UCITA is not the only proposed law that can have major impact upon ILL and other library activities. Even now other laws, some consumer friendly and some harmful, that could have an impact on library access are working their way toward Congressional and state assembly vote.

IX. **WHAT LIBRARIANS CAN DO**

Library professionals need to:

1. Educate themselves about current and pending laws affecting library abilities to give patrons access to materials. Professional organizations, including the American Library Association (ALA), the American Association of Law Libraries (AALL), the Association of Research Libraries (ARL) and their regional and specialized affiliates frequently provide symposia, teleconference, email, print and website tutorials, discussions and information on copyright, licensing and other issues affecting libraries.

2. Make sure they and their staffs have guidelines and training in how to avoid infringement and how to avoid committing to onerous licensing terms; provide periodic formal training and monitoring; provide print instructions for situations where staff may come across such licenses, and warn of the dangers of click-wrap and shrink-wrap agreements; give staff clear information about procedures and about whom to contact with questions or concerns.

3. Librarians should get involved in the committees and organizations that decide these issues. For instance, the Working Group on Interlibrary Loan (WGIL) was a subgroup of the Fair Use Conference, a group charged with finding common
ground and developing guidelines for the fair use of information and resources in the digital environment for libraries and educational institutions. This conference included representatives from numerous groups concerned about fair use including: publishers, librarians, authors, photographers, government agencies, scholars, and software engineers. By 1998, the WGIL group had largely failed in its task of creating a consensus set of guidelines for fair use, but had there been no representatives from libraries, they might well have adopted guidelines detrimental to libraries’ interests.

4. Librarians should study the methods of groups and states that have successfully implemented library-friendly legislation or defeated harmful legislation. Also, they must try to learn from the mistakes of those who were unsuccessful.

5. Individual librarians must lobby legislators and use their influence as voters and as members of strong organizations and groups to encourage legislators to consider more library friendly legislation and to defeat harmful legislation.

6. Librarians and library users should form or join groups specifically dedicated to combating detrimental laws like UCITA, and groups dedicated to working together with vendors and publishers to find a happier medium. This is not an all-or-nothing fight. Where they are outnumbered, librarians can still make their voices heard to modify prospective laws to reduce detrimental effects or provide exceptions and exemptions for libraries.

7. Patrons are also important in this arena, and they should be kept informed about the services the library provides and about threats to that service. Library newsletters can inform patrons of services and librarian activism on their behalf.
Even better, librarians can keep an eye out for various forums at which they can address some of their patron groups (e.g., liaison committees, faculty meetings, subject related symposia).

8. If possible, a library should retain experienced database contract negotiators to work on their library’s or consortia’s behalf, particularly for material that is crucially important to their institution’s mission. They need to make clear what terms are a priority and which terms are deal-breakers for the institution.

X. CONCLUSION

Librarians must be conscious of the many changes in both copyright and contract law and in the practices of contract formation that are becoming entrenched through strong efforts by the publishing industry. These can have and already are having sudden and creeping impact on libraries’ abilities to provide services through ILL. Though the copyright law offers general and specific exceptions in its fair use and library copying provisions, state laws in combination with the provisions of express and implied contracts can wipe away those protections. This is especially true as more states consider adopting UCITA, which allows enforcement of shrink-wrap and click-wrap type contracts. Although they seldom target libraries, copyright holders have a right to sue or have criminal charges brought if they can argue that an organization or individual is infringing their copyrights. Vendors may also sue for breach of contract where a library or someone affiliated with the library may have used the resources beyond what the library’s contract terms permit.

Library professionals also need to raise awareness among staff and patrons to guard against either group’s acting to unintentionally bind the library, its patrons, the
umbrella institution, or all three to unacceptable contract terms. Many copyright holders and contract licensors are affiliated with powerful publishing organizations, and they have been known to make litigation examples of alleged copyright and contract violators. Academic library professionals also need to work together to educate themselves, and to educate lawmakers, the public, and the publishing industry, about their concerns. This should help encourage productive dialog and prevent reactive measures from reducing libraries to useless anachronisms. Librarians should also work together through library associations and other coalitions to form strategies to avoid being liable for infringement or having the libraries' hands tied to the point where they cannot effectively serve their patrons.

Both copyright law and electronic commerce law are in a state of constant flux as they attempt to keep up with quickly changing technologies. As recently as October 28, 1998, the Digital Millennium Copyright Act amended and added several provisions to the Copyright Act. New bills are even now working their way toward Congressional consideration. On the state level, the more ominous UCITA legislation has already been passed by Maryland and Virginia and is being considered by several other states. In New York the state attorney general and other legislators have recognized the dangers UCITA presents to consumers and they prepared and introduced a draft bill that will protect New York State consumers from UCITA. The new bill, A07902, introduced into the N.Y. State Assembly on March 27, 2001, by Rep. Helene Weinstein, may be a good model for other states. It “provides that computer information transaction contracts shall be interpreted according to NYS law where at least one party to the contract is a NYS resident or has its principle place of business in NYS and may be
voidable by any party and unenforceable as against public policy.\textsuperscript{xxviii} Iowa has already passed a law designed to protect its citizens from UCITA.\textsuperscript{xxiv} Library professionals must keep abreast of recent and proposed changes in the law and adjust their strategies and practices accordingly. Flexibility and fair, thorough analysis will go a long way toward making the case for less restrictive policies and rules.
ENDNOTES

iii Id. § 302.
iv Id. § 109.


xi U.S. Const., art. I, § 8, cl. 8.

xii See Laura N. Gasaway, When Works Pass Into the Public Domain, at


xv See American Geophysical Union v. Texaco, 60 F.3d 913 (2d. Cir), superseding 37 F.3d 881 (2nd Cir. 1995).


xxix See American Geophysical Union v. Texaco, 60 F.3d 913 (2d. Cir), superseding 37 F.3d 881 (2nd Cir. 1995).


xxxv Id. § 108(a)(1).
xxxv Id. §108(a)(2).
xxxvi Id. § 108 (a)(3).
See id. § 108(c).

See id. § 108(d).

See id. § 108(e).

See id. § 108(f)(1).

See id. § 108(g)(1).

See id. § 108(g)(2).

See id. § 108(h).


See Laura N. Gasaway and Sarah K. Wiant, Libraries and Copyright (1994 Special Libraries Assoc.)


See note from Professor Laura N. Gasaway, Director and Professor of Law, University of North Carolina. On file with the author.


Pamela Bluh, Acquisitions for a New Century, 88 LAW LIBRARY JOURNAL 90, 93.


Id. 160-167.


Id. 1354.

Williams & Wilkins Co. v. United States, 420 U.S. 376, 376 (1975).

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Id. 922, 926-931.

17 U.S.C. § 1204(b)

See 17 U.S.C § 502-506.


Id. § 506. See also 18 U.S.C § 3571.

U.S. CONST. amend. XI.


See *Id.* at 337.


*Id.* 270.


*Id.* 105-106.

Id. 106.


*Id.* 764.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir 1996).

*Id.* 1148-1149.


*Id.* at 1150.


*Id.* 16.

*Id.* 16-17.


*Id.* at 10 (citing 17 U.S.C. § 301(a)).

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*Id.*

*Id.* 1.

*Id.*

*Id.*


*Id.*

*Id.*


*Id.*

*Id.*


*Id.*

*Id.* at 637.


*Id.* at 637.


Id.

Carol Ebbinghouse, UCC2B: The Impact on Information Professionals. 6 SEARCHER at 24.

Id. 24.

See Margret Johnson, UCITA on Legislative Agenda in Four States, available at http://www.infoworld.com/articles/hn/xml/01/01/25/010125hnucita.xml, visited 4/19/01.

Id.


See Electronic Commerce Enhancement Act of 2001, 107th CONGRESS, 1st Session H. R. 524, directing the National Institute of Standards and Technology to assist small and medium-sized manufacturers and other such businesses to successfully integrate and utilize electronic commerce technologies and business practices. See also See N.Y.S. Assembly bill A07902 summary, available at http://assembly.state.ny.us/leg/?bn=A07902, an act to make all computer transaction contracts involving NYS residents subject to NY law. See also NY State Assembly bill A.7242, entitled “AN ACT to amend the executive law, in relation to discriminatory practices of publishers and manufacturers of instructional materials for students attending college.” Requiring publishers and manufacturers of instructional materials for students to provide electronic copies of such material for use by disabled persons. Available at http://assembly.state.ny.us/leg/?bn=A07242.


See Margret Johnson, supra.

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See N.Y.S. Assembly bill A07902 summary, forwarded to the author on 4/17/2001, on file with the author.

See UCITA SUMMARY AND IMPLICATIONS FOR LIBRARIES AND HIGHER EDUCATION, available at http://www.arl.org/info/frn/copy/ucitasum.html, visited 4/19/2001. See Iowa General Assembly bill, HB2205, as it was passed into law at http://www.legis.state.ia.us/GA/78GA/Legislation/HF/02200/HF02205/Current.html, visited 4/22/2001. Section 554D.104 subsection 4 of HB 2205 makes choice of law provisions of any computer information transaction agreement voidable when the agreement involves a resident of Iowa and the choice of law provision seeks to subject that resident to the laws of a jurisdiction that has UCITA in force. But, that protective section of the law is scheduled to expire effective July 1, 2001.
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