The Ownership Delusion

When law libraries "buy" electronic documents, are they getting more, or simply paying more?

by Simon Canick

Not long ago I received an offer for the LexisNexis Congressional Hearings Digital Collections. The retrospective content—nearly 120,000 hearings published between 1824 and 2003, fully searchable and downloadable in PDF format—was quite tempting. Without question it would improve our collection and provide something at once useful and powerful for our students and faculty.

The "discount" price, however, made me cringe: $200,000 plus "a modest fee" of $3,000 per year for use of the LexisNexis interface. Prospective coverage costs an astonishing $33,000 a year, plus another $1,500 for access. I wondered how our budget could accommodate a hit that large. What would we cancel to make it work?

Purchase plus Access

For years librarians have worried about the transition from ownership of physical materials to rental of digital information. Because patrons demand electronic access, we continue to move in that direction. But we feel anxious about the implications for our collections. Ideally we would have the best of both worlds; real ownership and control of digital content.

Now law publishers have seemingly called our bluff. In recent years, a new model has emerged, which I'll call purchase plus access. Libraries pay a lump sum (usually enormous) up-front in order to "buy" the electronic documents, along with a "nominal" charge for continued access and search capability through the vendor's own interface. Primary examples include Gale's *Making of Modern Law* (*MOML*), LexisNexis and Readex versions of the *Serial Set,* LexisNexis' Hearings and CRS modules, and Hein's *Foreign and International Law Research Database* (*FILRD*).

These offers got me thinking about what "ownership" of digital information really means. So last fall, during a LexisNexis presentation of the hearings and CRS modules, I asked, "What happens if we stop paying the access fee?"

The presenters were stumped. "Nobody's asked that before," they said. Evidently they hadn't considered the issue, probably because they assume libraries will never use the files independent of the LexisNexis interface.

For all that money you deserve a better answer, so let's take a closer look. It turns out that it depends on the license. For some databases, when you stop paying the access fee, you're entitled to DVDs or tapes full of image files. In other cases, however, you only get the data if the vendor goes out of business. If you've already bought *MOML* or one of the others, you should re-read the license and see what you really own. If you're considering such a purchase, make sure you carefully review and understand the contract.

Let's say you buy one of these expensive packages and the access fee rises gradually from $2,500 to $10,000 per year. Eventually you may reassess and decide that the increase isn't justifiable. Under the "Only if the vendor's gone out of business" clause, you're forced to continue paying the higher charge or you lose access. In this scenario, you paid the up-front cost for nothing. Even if you get DVDs, you're still in a precarious position.

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> **— Simon Canick**

AALL's *Principles for Licensing Electronic Resources,* number 24, states that "[w]hen permanent use of a resource has been licensed, licensor should provide a usable archival copy of the licensed content, *including any necessary interface*" (emphasis added). Unfortunately, it appears that vendors have gone their own way.

From one purchase agreement, for instance, we learn that "to utilize the Collection(s)…on Customer's server(s) and/or system, Customer will obtain at its cost, all telecommunications and other equipment and software together with all relevant software licenses necessary." Further, the vendor "shall not provide Customer with further support and maintenance necessary to assume the on-going support of the Collection(s)." How many libraries can mount vast quantities of data on a local server, develop a search interface from scratch, and provide satisfactory access to their patrons? Forget about developing a controlled vocabulary in order to provide subject access.

The process is daunting enough to push most of us right back to the vendors. We could shake our fists in frustration, but in the end, we'd pay the $10,000. If we can't use the data, then we haven't bought anything at all.

Who Benefits?

In fact, this looks like a windfall for the vendors. These deals usually include no alternative plan for ordinary rental; instead, if we want the content, we have to pay the lump sum and annual access fees. Let's say the database costs $100,000 (payable in four annual installments of $25,000) plus $2,500 per year for access to the interface. In this scenario, the charge is $27,500 for years one through four. Imagine that in years five through 10 the maintenance fee increases by $500 each year, so year five costs $3,000, year six costs $3,500, and so on. The total outlay in the first 10 years is $135,500.

Quantifying the windfall is challenging, because we don't know what the same vendors would have charged for access only. But based on experience with databases like *LexisNexis Congressional* and *HeinOnline,* let's assume $7,500 for the first year and $500 more each year thereafter. Over the same 10-year period we'd pay $97,500. That's $38,000 less for the vendors. Even if the total outlay over 10 years is an identical $135,500, vendors benefit from "selling" content because so much of the money comes up front.

To be fair, some libraries may benefit from arrangements featuring big lump-sum payments. In fact, one vendor promoting an ownership plus access product told me that it created this pricing plan because libraries *asked for it.* Here's the argument: academic libraries sometimes end a fiscal year with a pool of unspent, one-time money. A lump sum payment to buy a large electronic back-file might suit their needs better than starting up a bunch of new, traditional subscriptions because they may not have the money to maintain them next year.

While this may be true for some very large, affluent libraries, it doesn't completely pass the sniff test. After all, payment plans ("you don't have to pay the whole $100,000 now—choose our flexible, four-year payment option!") are common, and the acquisitions librarians with whom I've discussed the matter generally see these charges as impossible to accommodate without massive cuts to other parts of their collections.

Surely we can agree, however, that genuine ownership of digital files is worth more than renting access, so paying extra makes sense. But how *much* extra? In other words, what is ownership of information worth? I'm unaware of any process to help one make such a judgment. Is your gut instinct good enough? Shouldn't your ability (or lack thereof) to make the files available to patrons without using the vendor's interface affect your analysis?

Consider also how, by moving customers to this sort of pricing scheme, vendors create a kind of "sticker shock" effect, whereby our initial horror is replaced gradually by resignation and then acceptance. You might recoil when The Police charge $300 for a concert ticket, but next year you'll hardly notice when Pearl Jam raises its prices from $40 to $60. Similarly the $10,000 database that once seemed vastly overpriced now looks reasonable as you become used to seeing six-figure invoices. The stretching of our expectations to accommodate $100,000+ databases has already begun.

The ABA Likes Ownership!

One benefit of ownership is our ability to report more volumes to the American Bar Association (ABA). In fact, starting with its 2007 questionnaire, the ABA memorialized a distinction between ownership and access with respect to electronic resources.

> Questions 3 and 6 make the distinction between ownership and control over an electronic title which the library has purchased or over which it has otherwise assumed responsibility (Question 3) and access to electronic resources which are licensed or linked to by the library but over which the library has no control… (Question 6)

Here the ABA has announced an enhanced status for electronic resources that are "owned" and "controlled," notwithstanding the fact that the packages in question offer neither of those, at least not in the conventional sense. But the distinction is important because "electronic titles (owned)" are part of academic law libraries' volume counts, and volume count still represents a portion of the formula used by *U.S. News and World Report* to produce its law school rankings, according to Theodore P. Seto's, "Understanding the *U.S. News* Law School Rankings" (http://ssrn.com/abstract=937017).

So the ABA's definitional change adds an incentive to academic law libraries that feel pressure from their deans to increase title counts. But will the dean care enough to supplement the library's budget in order to buy an electronic package? When I suggested as much at a recent NELLCO acquisitions meeting, the reaction was sarcastic laughter. Most of us understand that we need to find the means within our already-tight budgets.

Alternatives and Missed Opportunities

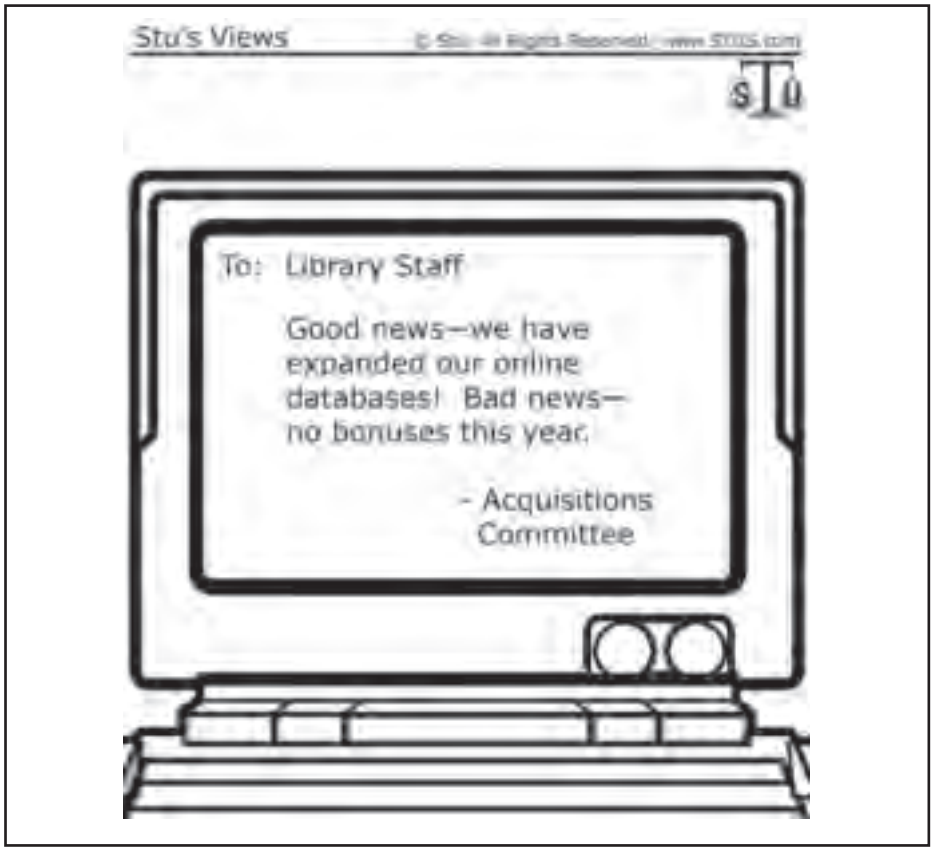
Now consider the potential impact of the new wave of free, Web-based digital libraries, most notably the Google Book Project (http://books.google.com). Others include Microsoft's Live Search Books (http://books.live.com) and the Open Content Alliance (http://opencontentalliance.org). We know that five major research libraries (Harvard University, New York Public Library, Stanford University, University of Michigan, and University of Oxford) have partnered with Google to digitize their collections. These libraries hold virtually all of the materials that we're now rushing to buy from LexisNexis, Thomson Gale, Readex, and Hein. The digitization process continues, but already you can find many of the titles from *Making of Modern Law* on Google Books.

So can we wait for Google to make these ownership plans obsolete? Google's not telling. Seeking alternatives to the *Serial Set* versions from Readex and LexisNexis, I e-mailed Google to ask whether we should expect the program to focus more on government documents in the near future. Google's response: "As you noted, we have partnered with major research libraries that have an extensive collection of U.S. Government documents…As our program expands, we would like to make more government documents publicly available." That's not much to go on, but it's probably safe to assume that this content will continue to trickle into the database in the coming months and years.

As it stands, the ownership trend is dispiriting because it's a reminder of what we could have done on our own. Take the *Serial Set,* which many academic libraries hold in paper or microform. Couldn't we have joined forces to create our own digital collection? Imagine if 100 academic libraries had spent $30,000 each to digitize the series, a fraction of the amount charged by Readex and LexisNexis. Would that $3 million have delivered a usable, searchable version of the *Serial Set*? I suspect the answer is yes. But with so many libraries already invested in the LexisNexis and Readex versions, it's probably too late to move forward.

It might be more realistic to push vendors to join Portico (http://portico.org) or to consider a cooperative arrangement like Lots of Copies Keep Stuff Safe (LOCKSS) (http://lockss.org). Portico is an archiving service designed to provide perpetual access to electronic journals in the event that their publishers cease to do so. To date, 46 publishers have agreed to commit more than 6,000 journals to the Portico archive.

LOCKSS has a similar aim, but decentralizes the archival function. Using



this approach, libraries download open-source LOCKSS software and host the electronic data locally. Unfortunately most of the databases I've described in this article feature government documents and monographs, so they aren't covered by those e-journal archiving services. To date, law publishers have not been active in either LOCKSS or Portico.

Any solution to this problem starts with awareness by librarians. We should think harder before jumping at the ownership offers on the table. The premise that they offer something fundamentally different (namely ownership instead of rental of digital information) appears to be a mirage. We remain beholden to the vendors—the essential difference is the astronomical price increase. In exchange, all we have is a receipt and the hope that we'll never need to use the files we bought. ■

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