

AAUP 2012

(session description) TACKLING THE UNTHINKABLE: Backlist rights clearance and digitization

How has the need for digital rights changed the shape of the book? Featuring speakers from presses that have undertaken varying processes to clear rights for older books, this session might help you answer some initial philosophical questions and then develop a plan to tackle (or finish) the job. Where do you start? Do you have eBook rights? How do you compensate authors? What about third-party permissions? Who is going to do this? How long will it take? How do you keep track of what you have checked, what you need to check, what you approved, what you rejected?

(Sales & marketing, rights, directors, digital)

I'd like to introduce the panelists:

Kathleen Kornell, Rights & Permissions/Award Manager, University of Illinois Press (bio: Kathleen Kornell holds a M.A. in Art History from Case Western Reserve University in Cleveland, OH. She has been Rights & Permissions/Awards Manager at the University of Illinois Press since 2007.)

Claire Lewis Evans, Editor for Digital and Electronic Publishing, University of Alabama Press (bio: As editor for digital and electronic publishing, Claire Lewis Evans is a key member of The University of Alabama Press's digital publishing team. In addition to many varied digital publishing-related projects undertaken since joining the Press in 2006, she also manages UAP's intellectual property. She holds an M.A. in Communication from Georgia State University.)

I am Laura Young Bost, Rights Manager, University of Texas Press (Laura Young Bost has been the Rights & Permissions Manager at the University of Texas Press since 1997 and a member of the AAUP Copyright Committee since 1999.)

PRESENTATION NOTES:

PART I: FIRST THINGS FIRST

1. What is the first thing? The first thing is your AUTHOR CONTRACTS.

Do the contracts you have for backlist titles grant you enough rights to publish in digital formats? Do they include language like “all publishing rights,” “all formats,” “all media,” “volume rights,” or “book and related forms” or something like that? If a contract is intended to confirm the understanding of both parties, and your contracts were signed before eBooks were even dreamt of, do you and the author have an understanding about new formats? Because interpretation of contract clauses is in the eye of the beholder, you need to think very carefully about this.

As you may know from the recent lawsuit filed by HarperCollins against Open Road Integrated Media (in which Open Road, after contracting directly with the author, issued an eBook of a HarperCollins title), HC claims they have all publishing rights; the author clearly had a different interpretation of their 1971 contract.

One colleague told me this: **OR: Good reason to NOT send amendments:** I was told by our Legal Dept that because our contracts gave us the author's sole and exclusive right, title, and interest in the works, that we were not limited to certain rights, but rather we had the authority to step into the shoes of the author and exercise all the exclusive rights listed in 17 U.S.C. 106. Random House ruling isn't applicable to us as we are the owner, and not merely a licensee.

Here you have to make a choice: you can either proceed with eBooks without a contract amendment or you can decide to send each author an amendment to sign. In the handouts, I've included some examples of contract amendments for e-rights and also language to revise your publishing contracts to include digital rights if you haven't already done this.

You also need to think about aggregated database digital rights and/or disaggregated content, which is the trend in libraries. You need to make sure your contracts address rights for such uses as well as compensation to the author.

My personal view is that the vast majority of our authors would be thrilled if we made their book available in eBook formats. These are scholarly authors that probably are not being courted by eBook companies (like Open Road) for the right to turn their books into eBooks. I have, in cases of high profile or very trade authors or authors with agents, done a contract amendment to authorize us to create eBooks and to set eBook royalties and/or compensation. But for the vast majority of our authors, we proceeded without a contract amendment.

In the HANDOUTS, you will find examples of contract amendments if you choose to send those. You will also find alternative language for digital/electronic rights.

You will also find a sample cover letter to authors explaining why you are sending the amendment.

2. What is the second thing? EBOOK ROYALTIES.

Do your existing contracts provide for a royalty for electronic/digital formats? If not, then you need to decide whether you are going to send amendments to authors that establish an eBook royalty.

As one AAUP colleague noted, when she conferred with their university counsel about this issue, she was told that to arbitrarily set any eBook royalty that the author has not agreed to in writing could be considered a “breach of contract” issue. You need to think very carefully about whether you want to just set a royalty rate or send every author a contract amendment.

Or you could proceed without an amendment, setting an arbitrary royalty rate.

One example of a press that did not send amendments was to set a royalty rate based on the retail price of the eBook (if you set different prices for library eBooks and non-library eBooks)--you could pay the hardcover rate for ebooks sold at a hardcover price (such as the pdf to EBSCO and ebrary); and then pay the paperback rate for ebooks sold at a paperback price.

If you do decide to send the amendments, then make sure it covers all of the rights you will need (both in single unit format and in aggregated databases since disaggregation is the trend) as well as payment rates for “sales” and for “licenses.” This also means you need to decide what is a “sale” and what is a “subsidiary rights license” for digital content.

Or you could decide to make the amendment all-inclusive and offer a single payment rate for all digital uses, including aggregate use in databases, sales of individual eBooks, chapter sales, pay-per-view uses, short term loans, Apps, and other future developments.

See HANDOUTS for sample royalty clauses.

3. What do you tell authors? DO YOU SEND INFORMATION LETTERS IF YOU ARE NOT SENDING AMENDMENTS? See HANDOUTS for sample letters.

4. What is fourth? PERMISSIONS

I am not going to say much about permissions because that is an entire session (or workshop or meeting, for that matter) in and of itself. But Kathleen and Claire will discuss permissions in more detail.

Do the permissions you have for third-party content allow for digital editions? What about permissions from years or decades ago?

If you determine that a permission needs to be re-cleared, who is going to do that? The Press or the author? If an additional fee is asked for, who is going to pay for that? Establish your rules before you start.

There have been a couple of recent discussions on AAUP-R about “how does one interpret grant-of-permission terms?” (GRANT-OF-PERMISSION TERMS) Specifically, “one-time” and “one-edition” and print run or time limitations. (ONE-TIME, ONE-EDITION, PRINT RUN, TIME LIMITATION) There are also public domain (PUBLIC DOMAIN), and “fair use” (FAIR USE) to consider. What do those actually mean? How do you handle those? If you re-clear permissions, of course try to get the permission for no additional fee. Some of the arguments you can use are: eBooks are really only a different “binding,” a permission fee has already been paid, lifetime eBook sales are usually very low (especially for scholarly books), and/or you are a non-profit publisher.

5. What is fifth? WHERE TO START ON YOUR BACKLIST?

We started with the books that were currently in print.

Then we did a second round of books that were out of print but that we still held publishing rights to and that we were bringing back into print via POD.

I am not going to go into much detail about this since Kathleen took our “team” approach and improved upon it—she will talk about what they did at Illinois.

Texas’s general instructions and checklist are in the HANDOUTS.

PART II: GETTING THERE

Okay, now that you have decided what you are going to do about contracts, royalties/compensation, where to start, and permissions, how do you go about it? Who is going to do this? How long will it take? You have to decide how you are going to break down the task—some might choose to go alphabetically, or start with newer books first and work backwards (maybe by season), or by subject area. But it is important to decide before you start how you are going to approach this. Otherwise, you are going to miss things.

TEAM GOOGLE: In 2010, our then Marketing Manger, Dave Hamrick (now Director at Texas), came up with the brilliant idea of asking all staffers to pitch in and help. He was aware of how long it was taking one or two people to check contracts, permissions, and books (no doubt after listening to me mumble a lot...)—and being anxious to move more quickly into more eBooks, he proposed an ALL HANDS ON DECK approach. We called it TEAM GOOGLE because we were in the process of signing an agreement with Google Editions and we wanted to make as many of our in-print books available as eBooks as possible.

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CONTRACTS DATABASE:

We have a Filemaker contracts database that summarizes our contracts. It was established in the early 1990s and contains information for almost all of our existing contracts. We initially entered information from new contracts and, over the years, have added information from older contracts. It has been extremely useful in checking contracts for backlist.

I have included a summary in the HANDOUTS.

PRESSWIDE DATABASE: Database tracking of what you have checked (contracts), what you still need to check (contracts), what has been approved (contracts), what has been rejected (contracts). (SHOW NTF PAGE) There is a session this afternoon WRANGLING AUTHOR PERMISSIONS that will cover this in greater detail, and I highly recommend you attend it.

We created a layout in our press-wide database called Non-Traditional Formats (NTF) that had fields for what was "live" in Google Book Search as well as fields for the various eBook vendors we work with. We selected one non-library vendor (Kindle) and designated one field to note whether it was "rejected" (contract or permissions issues) or "approved"--if the field was blank, it meant the title had not been checked. The status also then automatically applied to other eBook vendors.

I have included examples of a few titles in the HANDOUTS. I will now turn the panel over to Kathleen Kornell of Illinois.