

Ad Hoc Task Force to Review the Proposed OCLC Policy for Use and Transfer of WorldCat Records

Final Report to the ARL Board
January 30, 2009

I. Introduction

The release of a new “OCLC Policy for Use and Transfer of WorldCat Records” initiated an outpouring of concern in the research library community. ARL directors asked that ARL investigate the policy and its ramifications for the community. In response, the ARL Executive Committee established an Ad Hoc Task Force to review the Policy and identify issues of particular interest to research libraries. [See Appendix A for the task force charge and membership list.]

The task force met several times by conference call in December 2008 and January 2009. Task force members reviewed the Policy and the associated FAQ carefully. Additional information from ARL members and the larger OCLC community was shared for discussion. Report language was circulated to ensure clarity of expression for different points of view. Additional information was gathered regarding terminology of guidelines, policies, and enforceability. [See Appendix B for a Memorandum from Jonathan Band on “Enforceability of OCLC Policy for Use and Transfer of WorldCat Records.”]

This report is organized by first providing a short summary of the new Policy, followed by the task force’s understanding of the intent of, and need for, the new Policy. The report then discusses issues in the policy, reports on our findings regarding the Policy and the process of policy implementation generally, and ends with recommendations to the ARL Board. Our recommendations include that the ARL Board share this report with the OCLC Board of Trustees to offer it for consideration in OCLC's own newly established review process. We also encourage making this report publicly available as a contribution to the broader community discussion of the Policy.

II. Summary of OCLC Policy

OCLC released its new Policy on November 4, 2008. This Policy is intended to replace previously issued “Guidelines for the Use and Transfer of OCLC-Derived Records” (November 16, 1987). In issuing the new Policy, OCLC cited reasons such as improvements in technology and changes in the way libraries obtain and use bibliographic records, protection of the rights of OCLC members and their investment in the WorldCat database, and provision of a means for OCLC to negotiate with prospective partners.

The new Policy is divided into several sections: intent, definitions, use of records, transfer of records, and additional provisions that include termination of the right to use and transfer records if the policy is violated. Modifications to the

policy were made to respond to community concerns and the latest version of the policy is dated November 19, 2008. In addition to the Policy itself, OCLC provides a summary, a 10-page FAQ, and a graphical representation of the Policy on its Web site.

According to the policy, OCLC members and non-OCLC members may use records through a non-exclusive, world-wide, royalty-free right to reproduce and display records for reasonable non-commercial use. Commercial use is prohibited unless there is a separate, written agreement with OCLC.

Under the policy, OCLC members or non-OCLC members may transfer records of their own holdings to other OCLC members or non-OCLC members (defined as libraries, museums, and archives). They may also transfer records if a separate agreement has been made with OCLC to authorize receipt of the records. With the transfer of records, OCLC encourages attribution of the record to WorldCat® through retention of the OCLC number (if any), a link to the Policy (if any), and any other means of attribution in any WorldCat record being transferred. A Record Use Form is needed in case of commercial or possible commercial transfer, and provision of a copy of the Policy to any member or non-member to which the records are transferred. Removing, hiding, deactivating, or obscuring any links to the Policy is discouraged.

MARC field 996 will carry the policy information and as of the effective date of the policy, every record downloaded from WorldCat will automatically contain: 996 \$aOCLCWCRUP \$iUse and transfer of this record is governed by the OCLC® Policy for Use and Transfer of WorldCat® records \$uhttp://purl.org/oclc/wcrup/1.0

A breach of the Policy will result in automatic termination of the rights to use and transfer records. Records are provided “as is” and OCLC does not warrant completeness of the records. OCLC has sole discretion to determine whether use or transfer of records complies with the Policy.

On January 13, 2009, OCLC announced that the OCLC Members Council and the OCLC Board of Trustees will jointly convene a Review Board on Principles of Shared Data Creation and Stewardship to represent the membership and inform OCLC on the principles and best practices for sharing library data. The stated purpose of the Review Board is to discuss the new OCLC Policy with the OCLC membership and larger library community to solicit feedback before the new Policy is implemented. To allow the necessary time for discussion, OCLC has indicated that the Policy now will not be implemented until third quarter 2009.

III. Policy Intent

OCLC has indicated that the intent of the Policy is to encourage and support the collective investment by libraries in the WorldCat database. According to Larry Alford, Chair of the OCLC Board of Trustees, “Our aim in updating the Policy is to further promote innovative use of WorldCat while maintaining the

comprehensiveness of data and holdings that are at the root of its value. The Policy also encourages the establishment of the provenance of the records that make up WorldCat, both as good practice and to ensure responsible use of those records on behalf of the cooperative with a fair return to libraries by those who would use the records from outside the cooperative.” By stating the intent in such broad terms, OCLC has not made clear to its members the connections between these positive objectives and the limitations on record use specified within the Policy. Members may agree with the stated intent, while disagreeing forcefully with the provisions of the policy, or even with the need for any restrictions to meet these ends.

The task force identified and discussed three separate aspects that the Policy seeks to address.

Sustaining the collective

The Policy forbids use of WorldCat records that “discourages the contribution of bibliographic and holdings data to WorldCat.” The task force agrees that this objective is important, though there will be differences of opinion as to what uses (if any) might actually have such an effect.

On the whole, ARL members, and OCLC members generally, are well served by the unfettered use and re-use of bibliographic records and data. Such use encourages development of innovative services and makes library collections more visible—outcomes that are themselves stated aims of the Policy.

ARL members also derive important benefits from OCLC's bibliographic centrality; i.e., from the fact that a preponderance of libraries have their bibliographic and holdings information in one place. It cannot be assumed that OCLC should maintain that position for all time and at any cost. However, any developments that threaten to erode substantially that centrality should be a concern not only for OCLC but also for ARL. Thus, concerns about potential erosion of library contribution of data to WorldCat is one possibly valid reason for implementing a policy that places restraints on the transfer of WorldCat records, but constrained uses should be limited to those likely to have a serious impact on those contributions.

Protecting the database against competitive commercial uses

Although the Policy does not explicitly state reasons for limiting commercial uses, the definition of “Reasonable Use” excludes use that “substantially replicates the function, purpose and/or size of WorldCat.” The Policy is thus clearly intended to protect against the development of competing services built on WorldCat records.

One reason for concern about the use of WorldCat records to develop competing services is that such development might undermine future member contributions. This consideration has been discussed above.

A second source of concern about the development of competing services is the potential impact on OCLC's revenue sources. In a presentation at a Nylink Forum on January 16, OCLC staff made it clear that OCLC is indeed concerned about this potential effect. In explaining and justifying the Policy, OCLC noted a correlation between the restrictions database providers (including Amazon, Wikipedia, etc.) place on their content and the degree to which their revenues depend on that content (rather than ads, sales, or external funding). OCLC has often stated that it sees the WorldCat database as its strongest asset, and the policy is clearly intended to protect the database's value as a business asset.

At the Nylink Forum it also was suggested that OCLC recognizes a need to move to a different revenue model, one based on providing access services using the WorldCat database rather than on serving as a source of bibliographic records for libraries. OCLC believes that the transition to this model must be gradual and the policy on record use is a necessary protection at present.

If OCLC had articulated these reasons and this vision at the outset, its members (including this task force) would have had a better basis on which to evaluate OCLC's intentions and the wisdom of the policy. While review and assessment of OCLC's business models are beyond the scope of the task force charge, we would encourage exploration of models that enable, rather than restrict, the broad re-use of WorldCat records and data.

Strengthening OCLC's ability to negotiate on behalf of the collective

Another stated reason for the Policy is to give OCLC the ability to negotiate terms for use of records, e.g., with Google, that are more favorable to members' goals than might be the case if an expressed agreement for use was not needed. The Policy makes explicit a process for requesting agreements to use OCLC records.

It is certainly the case that OCLC's ability to provide access to the entire WorldCat database provides a unique opportunity to negotiate terms that will benefit the entire cooperative, either financially or by optimizing the uses made of WorldCat records. It is not clear, however, why OCLC would be better positioned than any member library to negotiate terms for more limited uses of smaller groups of WorldCat records. At a minimum, if OCLC is to be vested with an exclusive right to approve such agreements, the process must operate efficiently and with enough transparency that its benefits are clear to the members.

IV. Issues Raised by the Policy

Broad Issues

It does not appear that OCLC's intent in issuing the new Policy is to substantially reduce the allowed uses of WorldCat records as compared to those permitted by the older guidelines. However, by focusing attention on the issues surrounding

use of WorldCat records, OCLC also has brought to the surface philosophical and practical differences that were less visible, or less consciously held, while the older guidelines were either passively accepted or tacitly ignored. The strength and breadth of these differences within the Membership warrant formal consideration within OCLC's governance structures.

Problematic concepts

The task force questions whether any policy that aims to limit the re-use of individual records or portions of bibliographic data within records can be effectively and fairly applied in the modern bibliographic environment. Bibliographic records and data may now pass through many systems in the course of their useful life, and be modified and enhanced many times by different actors. Acknowledging and fairly compensating the contributions of all parties is difficult at best. If each system owner were to assert control over all subsequent uses at a micro level, the exchanges necessary for effective use of bibliographic information would be seriously impeded. To the extent that any restraints are needed, they must focus on wholesale, deliberate redistributions of records.

Two provisions of the announced Policy are particularly problematic in this regard.

First, the Policy states that it applies to “data extracted from a WorldCat record.” Taken literally, this provision is equally impossible to comply with or to enforce. To do so would require marking and tracking separately each piece of data (however one might define that) present in the WorldCat record at time of transfer, and imposing controls on that element’s subsequent use. This is presumably not the Policy’s intent—though it is worth noting that OCLC staff seem unaware of this provision and unable to explain its intended meaning.

Most probably, the intent is to limit the exchange of such substantial portions of a WorldCat record as to be functionally equivalent to the exchange of the record itself. If that is so, a better approach would be to adapt the language in the definition of Reasonable Use, that is, to apply the policy to data extracts that substantially replicate the function or purpose of WorldCat Records.

Second, the Policy seeks to allow members a greater degree of freedom over their own contributions by setting different terms for the use and transfer of “Original Cataloging.” However, Original Cataloging is defined in such a limited way as to stand in contrast to OCLC’s own stated vision for the creation and maintenance of bibliographic data, in which the original record creator may contribute only a relatively small part of a record’s ultimate value. This problem is likely to prove intractable. No system could effectively assign rights to each contributor. However, OCLC might consider whether extending this provision to cover records modified by the library, as well as its Original Cataloging, would be likely to have any serious negative impact.

Inconsistencies between the Policy and FAQ

The Policy is intended to incorporate the content of the corresponding FAQ, and indeed such a document can play a useful role in policy interpretation as new circumstances arise. No policy can be explicit as to all current and potential future applications. However, the basic intent of the policy should be clear enough to allow all parties a broadly consistent understanding of its meaning without extensive reliance on external documentation. At present, the Policy and the explanatory FAQ seem to be distinctly at odds in several respects, e.g., in the allowed or prohibited uses of Z39.50. Such basic inconsistencies need to be resolved if the policy is to be credible and effective.

Application to future services

It is not clear what OCLC means by, “This Policy may also govern the Use and Transfer of WorldCat bibliographic data available through other services to the extent determined by OCLC.” This clause may be intended to refer to other services OCLC itself may offer that make use of data extracted from WorldCat, such as WorldCat Identities, the Copyright Evidence Registry, the WorldCat API, and similar future offerings. If so, such services should be governed by separate terms and conditions, not by the policy for use and transfer of WorldCat records. The concept of “WorldCat bibliographic data” is so vague that its application to other services will not be transparent.

Conflicting agreements

Some government agencies have raised a number of concerns, some of which are unique to the US federal government. First, similar to the reaction of others in the community, the lack of process and consultation with the federal library community remains a deep-seated concern. This poses a particular problem for federal libraries as the contract between FEDLINK and OCLC does not expire until September 30, 2009, the close of the federal fiscal year. As a consequence, federal libraries participating in this contractual arrangement cannot agree to new terms in the proposed Policy prior to a new contract negotiation.

Application to downstream uses

The Policy seeks to bind downstream users (those who receive WorldCat records indirectly, rather than directly from OCLC) to the terms of the Policy, and encourages OCLC members and non-OCLC members to convey this provision by including an explicit copy of, or link to, the Policy with any transfer of WorldCat records. This provision raises several concerns.

In an earlier version of the Policy, libraries were required, rather than encouraged, to explicitly identify WorldCat as the source for each record transferred, and to include a link to the Policy in all WorldCat records. Such requirements would be unacceptable to many libraries, and even if accepted would place an unnecessary and burdensome obligation on OCLC members and

non-OCLC members. In any future version of the Policy, compliance with these provisions should not be a requirement.

The attempt to bind downstream users to the terms of the Policy appears to be of doubtful legal function. This provision has some features in common with the Creative Commons Attribution–Noncommercial–Share Alike license. However, Creative Commons licenses define allowed uses of work that is protected by copyright, and are thus not an applicable model for WorldCat records. (See Appendix B for further comment on the legal framework of this issue.)

This provision may be particularly problematic as it applies to records created by federal agencies, or through grants requiring unrestricted access to work products. For example, many federal agencies have agreements with search engines to crawl agency Web sites. Agencies reviewing the OCLC Policy have interpreted the new Policy to require that search engines engage in a separate agreement with OCLC if the search engine crawls federal Web sites. Similarly, some federal agencies expressed related concerns about the impact of the Policy on recipients of federal grants, e.g., digitization grants for the US Newspaper Program.

V. Findings

The task force began its work with intent to focus mainly on the content of the policy document rather than on the process of its introduction, a process already widely acknowledged as flawed. In the course of our analyses and discussions, we came to the conclusion that in the context of the collective endeavor necessary to create and maintain the WorldCat database, process and content are inextricably intertwined.

The collective activity of shared cataloging is a source of deep pride and success in libraries in the U. S. and around the world. OCLC was created as, and is viewed as, a membership organization formed for the purpose of enabling this collective activity. The OCLC Web site states, “OCLC and its member libraries cooperatively produce and maintain WorldCat—the OCLC Online Union Catalog.” It characterizes membership as “a cooperative venture.... Together OCLC and its member libraries make up the world’s largest consortium.” OCLC further notes that those libraries contributing all current cataloging and holdings are “governing members.” Members view WorldCat as a collective enterprise, not as a product that they license for use.

These strongly held views and commitment to purpose were evident in the discussions that led to the 1987 “Guidelines for the Use and Transfer of OCLC-Derived Records.” These guidelines were developed as an alternative to allowing OCLC to copyright the database, and were formed after extensive and profound discussions with the membership regarding record ownership and use. Since the new Policy has been introduced as a modernization of and replacement for the guidelines, the task force sought clarification regarding the legal nature

and enforceability of such documents. The excellent explanation by Jonathan Band is included in this report as Appendix B.

Band's explanation indicates that both are intended as contracts, and describes the various forms and gradations that can characterize a contract as "bilateral" or "unilateral." The new Policy is clearly intended as a unilateral contract, unilaterally imposed on any entity using records from the WorldCat database, including member libraries. While the 1987 guidelines have also served as a unilateral contract—and have much substance in common with the new Policy—the OCLC-member community has not perceived them as such. The guidelines are both less "unilateral," in that they grew from a known and more open process of debate, and less "legalistic" in language. With the enormous environmental and technological changes that have occurred in the 22 years (a generation) since the guidelines were introduced, the major differences in tone and language between the guidelines and the new Policy, and a number of significant differences in substance between the two documents, the new Policy cannot be viewed as a mere update describing already accepted practices. The member community has seen the introduction of the new Policy as a fundamental change in the nature of the relationship between OCLC and its member libraries. In the eyes of the community, the guidelines expressed a mutual social contract, and the new Policy represents an authoritarian, unilaterally imposed legal restriction.

Given that "together OCLC and its member libraries make up the world's largest consortium" (emphasis ours) and that the substance and nature of the new Policy is so significant, it comes as no surprise that the membership has responded negatively to the introduction of a unilateral contract by OCLC as a *fait accompli*. While this can be viewed simply as an unfortunate misstep in process, the task force has come to believe that without thoughtful, substantive community engagement in policy development, there cannot be an operationally effective policy for the use and transfer of WorldCat records. There are at least two reasons:

1. Libraries' compliance with the new contract is dependent upon libraries' acceptance and behavior (the social contract) more than it is dependent upon enforceability. Wide community engagement and member library "buy-in" are essential to achieving this acceptance and behavior.
2. The Policy addresses issues that are so complex and so embedded in diverse past, present, and future practices, that wide input is necessary to identify issues and formulate workable approaches to them.

The task force applauds OCLC's recent announcement of delayed policy implementation and the creation of a Review Board on Principles of Shared Data Creation and Stewardship. We hope that the Review Board will consider its timeline and process, as well as its recommendations on policy issues, in light of the analyses and findings of this report. We believe that, using as a base the

work done to date on the proposed policy and the issues it raises, a fresh start to policy determination and articulation is desirable.

Community acceptance

Contribution and maintenance of records in the collective database is dependent upon the behavior of participating libraries. There are thousands of diverse participants and an ever-changing variety of activities and opportunities that participants may see as appropriate and beneficial to institutional self-interest. Overall these behaviors cannot be dictated and enforced, but must stem from shared values and practice. Making these values and practices explicit and explicitly agreed-to is important to ensuring that collective interests are served. The task force agrees that a policy regarding record use is desirable and necessary, even if that policy were to stipulate no constraints on record sharing.

There is not, and will not be, a universal viewpoint on all issues that are covered by a policy. There is not unanimity within the task force on the core issue: while the majority of members believe that it is desirable to have a policy that limits large-scale redistribution of records that could be harmful to the collective, it is not a unanimous view even within the small membership of the task force. But it is realistic to aim for consensus on a policy, i.e., agreement to follow a policy even though it is not identical in all ways to one's individual, or even institutional, views. Certainly a process for member input and engagement is necessary for such consensus.

Another essential prerequisite for consensus is community understanding of the intent and content of the policy. As currently written, the Policy fails to gain this understanding. For too many in the member library community its legalistic language has proven difficult to interpret, offensive in tone, and confusing about scope and intent. The current document focuses on what libraries cannot do without sufficient attention to the actual wide scope of "reasonable use" and has thus been widely interpreted as more restrictive than it actually is. The extensive FAQs that have been written since the introduction of the policy provide guidance in language that needs to be incorporated into the policy itself.

Equally important, the tone of the current document obfuscates the constructive aspects of its intent, making it even more difficult to interpret. Earlier in this report we note the need to clarify intent beyond vague mission statements and link it conceptually to the policy. An expression of clarified intent should become part of the policy statement, for example through "whereas" statements at the beginning of the document. Framing the policy as a legal agreement may be a necessity to achieve its goals, but that necessity and the reasons for it must be made much clearer if member libraries are to be confident that OCLC is using the policy to serve their best interests.

Another key factor in community consensus is to ensure that the policy is a living document, responsive to new environments, technologies, and circumstances. For example, it will not be possible to put all interpretations of Reasonable Use into the document (as new situations will inevitably appear), but

the document should be linked to an up-to-date FAQ, one that will likely require community review and discussion from time to time. Also, the current policy creates what is intended to be an efficient process to achieve agreements for uses that fall beyond the definitions of “reasonable” or “non-commercial” use. As may be necessary for operational efficiency, this process cedes all decision making on license agreements to OCLC staff. But these agreements necessarily amount to policy making, and, as with the FAQs, it is important to create an ongoing process of community review and interpretation that will ensure continuing consensus about how and whether the collective is being preserved.

Complexity of issues and diverse input

As discussed in the previous section on Issues Raised by the Policy, today’s (and tomorrow’s) environment raises many layers of complexity in interpretation and practice. While no policy statement/contract will ever be a perfect document, it does need to be effective in accomplishing its goals and readily applied in an operational environment. The ARL task force has identified several issues that need to be clarified and re-worked to make the current policy operational; doubtless a broader community review will identify more. These issues need to be clarified and resolved in the next iteration of the proposed policy. And once the policy is implemented and tested, more issues may arise; an ongoing process of review and revision will be needed.

Similarly, the policy needs to be operational in conjunction with specific other bilateral agreements that institutions may have with OCLC and with third parties. And in the case of federal and some other governmental libraries, the policy must work in conjunction with legal and regulatory obligations. While it may be possible to say that such agreements and obligations override the policy, it is preferable to give the community time to analyze the implications and compatibility of these agreements and suggest approaches or revisions to the policy. To be accepted with consensus, the policy should be viewed as compatible with, rather than potentially at odds with, an overall context of libraries’ record use and transfer and their special obligations.

VI. Summary of Recommendations

The task force recommends that ARL share our full report with the OCLC Board and new Review Board, and also with the wider community. The following summarizes the recommendations that this report intends for OCLC, but this summary should not be interpreted without reading our full report.

1. OCLC needs to develop a new policy regarding the transfer and use of WorldCat records that results from a wide community review of issues; from member library engagement that builds understanding and consensus; and from a careful, widely discussed exploration of how the policy will achieve articulated goals, including whether or how restraints in record sharing may be needed. The currently proposed policy does not meet these criteria.

2. The policy needs to be written in a manner that can be understood and accepted by the community (e.g., as were the prior guidelines). This includes using a positive tone, a full description of Reasonable Use, and a consistent integration with FAQs that will need to be linked to, and thus incorporated in, the policy.
3. The policy statement should include explicit and specific explanation of its intent and how it carries out that intent.
4. Before a policy is implemented, member libraries need an opportunity to analyze how it impacts their operating environments, existing third-party or other agreements, and legal or regulatory environments and resolve implementation questions raised by that review. Specific issues that need more analysis and development in the current proposed policy include: its application to “data extracted from a WorldCat record,” a possible broader definition of Original Cataloging, inconsistencies between the policy and the FAQs (e.g., in allowable uses of Z39.50), the definition of “commercial” use, and the concept of binding downstream users to a separate license. The process for developing the policy with community engagement may uncover additional issues that require more analysis in order to make the policy operational.
5. The policy addressing the use and transfer of WorldCat Records should not apply to records from other OCLC services that make use of WorldCat data, such as Identities. Separate policies should be developed for these services.
6. Recognizing that the policy will be a living document applied in a changing environment, there needs to be a member-community process for ongoing periodic review of applications and interpretations of the policy, e.g., through the work of a continuing review board. Agreements (and denials of agreements) for uses of records, such as those made (or denied) for commercial use, are also integral to the interpretation of how WorldCat records should be used and transferred. Information on these agreements and decisions should be incorporated into the review process.

Ad Hoc Task Force to Review the Proposed OCLC Policy for Use and Transfer of WorldCat Records

Charge

The Ad Hoc Task Force is charged with reviewing and analyzing the recently announced proposed OCLC Policy for Use and Transfer of WorldCat Records. The Ad Hoc Task Force is to identify and evaluate the issues of interest to research libraries in the new Policy.

The Ad Hoc Task Force will provide a white paper by January 16, 2009.

Composition

The Ad Hoc Task Force will include up to six members. The chair and at least one other member of the Ad Hoc Task Force should be directors, with the remaining members being staff from libraries who have the appropriate expertise.

Staff Liaisons: Prue Adler and Julia Blixrud

Timeframe

The Ad Hoc Task Force will produce a report by January 16, 2009. Additional work will be considered only if circumstances warrant further consideration of the Policy. The task force report will be provided to the ARL Board of Directors.

Resources

The Ad Hoc Task Force will need a low level of ARL staff support to assist in the ongoing deliberations. Staff include Prue Adler and Julia Blixrud.

Membership

Carol Mandel, New York University, Co-Chair
Bob Wolven, Columbia University, Co-Chair
Judith Nadler, University of Chicago
Erin Stalberg, North Carolina State University
John Wilkin, University of Michigan
Roberta J. Winjum, Vanderbilt University

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MEMORANDUM

To: Prue Adler

From: Jonathan Band

Date: December 29, 2008 **File: 01-01**

Re: Enforceability of OCLC Policy for Use and Transfer of WorldCat Records

The library community has many questions about the new OCLC Policy for Use and Transfer of WorldCat Records, particularly concerning its enforceability. This memorandum briefly discusses issues relating the enforceability of the Policy.

Currently, OCLC has guidelines in place for the use of WorldCat records, which OCLC is replacing with the Policy. There is no legal significance in the change of labels from “guidelines” to “policy.” A set of rules established by a non-governmental body is binding on a third party only if the third party agrees to them – in other words, only if a valid contract has been formed between the parties.

Contracts can take many forms. On one extreme are negotiated or bilateral contracts, where after discussion the parties agree on the mutual obligations, and the parties’ assent to the contract’s terms is manifested by signatures. On the other extreme are implied contracts, where a court infers the existence of a contract based on the parties’ conduct over time. In between these extremes are unilateral

contracts, where one party establishes terms, and the other party manifests its assent through its conduct. “Browse-wrap” licenses on websites are examples of unilateral contracts. They typically state, “by using our website, you agree to the following terms and conditions.” The user’s use of the website is the manifestation of her assent to website operator’s terms. A “click-wrap” agreement, where the user clicks on an icon to manifest his assent, lies on the spectrum between a unilateral and a bilateral contract; the party actually assents to the contract by clicking on the “I agree” button, rather than just manifesting his assent by his conduct.

When courts review unilateral contracts, they typically confront two sets of questions. First, was a contract ever formed? Did the licensee even know of the licensor’s terms, so that there was a “meeting of the minds” with respect to the contract, and did the licensee act in a manner that assented to the contract’s terms? Second, assuming that a contract came into existence, are the contract’s specific terms enforceable? Was there unequal bargaining strength, did the licensee act under duress, and are the terms against public policy? This second set of issues usually comes into play only in consumer contracts, *e.g.*, a user’s contract with a cell phone provider.

The new OCLC Policy is drafted in a manner that appears to reflect OCLC’s intent to create a unilateral contract with users of WorldCat records. For example, E.7. provides that “[t]his Policy is the final, complete and exclusive statement of the agreement of the parties with respect to the subject matter hereof.” E.1. states that “[t]he rights to Use and Transfer WorldCat Records afforded by this Policy shall automatically terminate upon any breach of this Policy.” C.1. provides that “[e]ach

OCLC Member and Non-OCLC member may Use WorldCat records in accordance with this policy.” C.3.a. states that the “[u]se of WordCat Records authorized by this policy is limited to Reasonable Use....” D.1.a. provides that “an OCLC Member or a Non-OLCL Member may Transfer WorldCat Records of its own Holdings to other OCLC Members and Non-OCLC Members For Use in accordance with this Policy.”

The Policy is less clear on precisely what conduct triggers assent to the Policy’s terms. The Policy defines its subject matter, WorldCat records, as “bibliographic records[s] obtained directly from WorldCat through the use of an OCLC product or service.” B.3.a. This suggests that a court might conclude that if a library obtains a bibliographic record directly from WorldCat through the use of an OCLC product or service after the Policy takes effect, the library has agreed to abide by the Policy with respect to that record. In other words, a court might regard the library’s accessing the record from OCLC as a manifestation of assent to the Policy with respect to that record. On the other hand, if a library does not access any records from OCLC after the Policy takes effect, the Policy should not apply to any WorldCat records already in the library’s possession, because the library never agreed to the Policy.

More ambiguous is the status of WorldCat records already in the library’s possession if the library obtains a record from OCLC after the Policy takes effect. As discussed above, the Policy arguably applies to the new record obtained from OCLC. But does it also apply to all the records already in the library’s possession? Can OCLC via the Policy reach back to these previously obtained records? If the library agrees to such a reach-back, then it certainly can occur. But the Policy does not

seem to address this issue directly, and the library could argue that it has not agreed to a reach-back.

The Policy also attempts to “stick” to WorldCat records that have been obtained from OCLC. A WorldCat record is defined as including a bibliographic record that is derived from WorldCat by the party from whom the record is received. In other words, if a library obtains a record from WorldCat, and subsequently transfers that record to a company, the Policy states that it applies to the record in the company’s possession. However, unless the company agrees to the Policy, it cannot be bound by the policy. While a court might view the library’s obtaining of the record directly from OCLC as manifesting the library’s assent to the Policy, a court probably would not treat the company’s obtaining of the record from the library as a manifestation of the company’s assent to the Policy.

To be sure, under D.1.b., the library can transfer the record to the company only if the company enters into an agreement with OCLC. But if the library breaches the Policy by transferring the record to a company that has not entered into an agreement by OCLC, OCLC has recourse only against the library, not the company. The Policy attempts to emulate the “stickiness” of Creative Commons licenses, where downstream users must follow the license terms established by the author. The stickiness of the Creative Commons license derives from the fact that copyright adheres to a work as it passes from person to person. Here, by contrast, an individual record is unlikely to contain copyrightable expression. However, if the library obtains from OCLC a large enough set of records that reflects expressive selection, coordination, and arrangement, and the library transfers that set of

records to a company, copyright would restrict the company's use of the set of records.