FUNDAMENTALS OF LICENSING ELECTRONIC RESOURCES

Part 1 of the six-part series: Licensing Electronic Resources to Serve the Library’s Mission

Hosted by ALCTS, Association for Library Collections and Technical Services
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Indiana University
Bloomington, Indiana
WHY DO WE LICENSE LIBRARY CONTENT?
TYPES OF LICENSE AGREEMENTS

• Non-Negotiated
  • Manifest Assent
  • Click Through
  • Shrink-wrap

• Negotiated
NON-NEGOTIATED LICENSE AGREEMENTS

IMPORTANT NOTICE ABOUT YOUR RIGHTS – PLEASE READ

ARBITRATION AGREEMENT

THIS ARBITRATION AGREEMENT (“AGREEMENT”) SHALL GOVERN THE MANNER BY WHICH ANY CLAIMS REGARDING THE PRODUCT YOU PURCHASE FROM US SHALL BE RESOLVED. THIS AGREEMENT SETS FORTH IMPORTANT LEGAL RIGHTS, RIGHTS TO A JURY TRIAL, AND THE WAIVER OF RIGHTS TO A JURY TRIAL. YOU SHOULD READ THIS AGREEMENT CAREFULLY.

BY ORDERING A PRODUCT FROM US, YOU UNDERSTAND AND AGREE THAT ANY DISPUTE BETWEEN US CONCERNING SUCH PRODUCT SHALL BE SETTLED BY BINDING INDIVIDUAL ARBITRATION IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT, AND AS SUCH YOU WAIVE YOUR RIGHT TO A JURY TRIAL. YOU ALSO WAIVE YOUR RIGHT TO PARTICIPATE IN OR REPRESENT A CLASS OF CONSUMERS IN SUCH DISPUTES IF YOU DO NOT AGREE WITH THESE TERMS, YOU MUST RETURN THE PRODUCT WITHIN THIRTY (30) DAYS OF YOUR RECEIPT OF THE PRODUCT.

1. RESOLUTION BY BINDING ARBITRATION. Any claims or dispute between you and us, or any of our subsidiaries or affiliates, arising out of or relating to in any way to the Product or this Agreement shall be resolved through final, binding arbitration. This arbitration obligation applies regardless of whether the claim or dispute is based on contract, tort, personal injury, product liability, negligence, violation of a statute, or any other legal theory. You agree to arbitrate and agree that you waive your right to bring a lawsuit based on such claims or disputes and to have such lawsuit resolved by a judge or jury.

2. WAIVER OF CLASS PARTICIPATION. All arbitrations under this Agreement shall be conducted on an individual (and not a class-wide) basis, and an arbitrator shall have no authority to award class-wide relief. You acknowledge and agree that this Agreement specifically prohibits you from representing information as a representative of others, or in any arbitration or other proceeding brought by or on behalf of any other person. You also acknowledge and agree that you are giving up your right to serve as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants in any lawsuit filed against us or against any third party.

3. ARBITRATION PROCEDURES.
   A. Before commencing any arbitration proceedings under this Agreement, you must first present the claim or dispute to us by calling our Representative toll free at 1-800-423-4038 and providing all required information. You may be required to provide as with a written statement setting forth the nature of your claim or dispute. We shall have forty-five (45) days from the receipt of such call (or written statement) to reject or such claim or dispute (“Resolution Period”). If your claim or dispute is not resolved within the Resolution Period, you may commence arbitration proceedings in accordance with the terms of this Agreement.
   B. The arbitration of any claim or dispute under this Agreement shall be conducted pursuant to the American Arbitration Association’s (“AAA”) United States Commercial

Despite Resolution Procedures and Supplementary Procedures for Consumer-Related Disputes. These rules and procedures are available by calling the AAA or by visiting its web site at www.adr.org.

- C. The arbitrator shall not conduct class arbitration, that is, the arbitrator shall not allow you to serve as a representative, as a private attorney general, or in any representative capacity for others in the arbitration.
- D. The arbitration of any claim or dispute under this Agreement shall be conducted in the New York County, New York State.

4. COSTS. All administrative expenses of the arbitration proceedings commenced under this Agreement shall be as follows:
   a. If the claim or dispute that is the subject of the arbitration proceedings is less than five thousand dollars (US $5,000), your financial responsibility for the administrative costs shall not exceed two thousand dollars (US $2,000).
   b. If the claim or dispute that is the subject of the arbitration proceedings is between five thousand dollars (US $5,000) and fifty thousand dollars (US $50,000), your financial responsibility for administrative costs shall not exceed three thousand dollars (US $3,000).
   c. If the claim or dispute that is the subject of the arbitration proceedings exceeds fifty thousand dollars (US $50,000), your financial responsibility for administrative costs shall be in accordance with the Schedule of Fees provided by the AAA.
   d. Each party shall pay the fees and costs of its own counsel, experts and witnesses.

5. SMALL CLAIMS. If a claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration. Any dispute that cannot be arbitrated within the jurisdiction of a small claims court shall be resolved by binding arbitration as described in this Agreement. Any appeal of a judgment from a small claims court shall be resolved by binding arbitration under the terms of this Agreement.

6. SEVERABILITY. If any provision of this Agreement is held to be unlawful, unenforceable or void, such provision will be ineffective only to the extent that it is found unlawful, unenforceable or void, and the remainder of the provision and all other provisions shall remain fully enforceable.

Endnote:
230 5th Avenue
New York, NY 10010

Hosted by ALCTS, Association for Library Collections and Technical Services
NEGOTIATED LICENSE AGREEMENTS
This License Agreement, along with any schedules or attachments (the “Agreement”), is made effective as of [enter date] (the “Effective Date”) between [enter publisher’s official corporate name, street address, city, state, postal code, and country] (the “Licensor”) and [enter licensing institution’s official corporate or entity name, street address, city, state, postal code, and country] (the “Licensee”).

In consideration of the mutual promises this Agreement contains, and other valuable and sufficient consideration, the Licensor and Licensee agree as follows:
1. **DEFINITIONS**

1.1 In this Licence, the following terms shall have the following meanings:

**Agent**
A third party appointed from time to time by the Licensee to act on the Licensee’s behalf, who may undertake any or all of the obligations of the Licensee under this Licence, as agreed between the Licensee and the Agent.

**Authorised Users**
Current faculty members, enrolled post-graduate and undergraduate students, current staff members and contract personnel directly involved in educational and research activities of the Licensee who have been issued by the Licensee with a password or other currently valid authentication, and walk-in users who are permitted to use the Licensee’s library or information service and access the Secure Network but only from computer terminals within the Licensed Site.

**Commercial Use**
Use for the purposes of monetary reward (whether by or for the Licensee or an Authorised User) by means of sale.
1. GRANT OF LICENSE

1.1. Nature of Materials. The materials that are the subject of this Agreement are set forth in Schedule 1 (the “Licensed Materials”). [Liblicense editors suggest that materials be described in a separate Schedule attached to the main Agreement. A template for Schedule 1 is provided for this purpose. Materials should be described with reasonable specificity, including distinguishing between purchased content, content under subscription, and content that is merely made accessible, particularly as these distinctions relate to perpetual rights in Section 8.]

1.2. Grant of License. Licensor grants to Licensee non-exclusive, [perpetual], worldwide access to and use of the Licensed Materials, and the right to provide the Licensed Materials to Authorized Users (which are defined in Section 3, below) in accordance with this Agreement’s terms and conditions. [If the Agreement does not include perpetual rights to the Licensed Materials, the word “perpetual” should be omitted.]

1.3 Ownership of Intellectual Property. Nothing in this Agreement shall be interpreted to transfer ownership of any copyright, trademarks or service marks from the Licensor or its suppliers to the Licensee or Authorized Users.

Licensor will include copyright, trademark and other notices in the Licensed Materials only where applicable, and all works protected by copyright will have a copyright notice displayed to clearly distinguish any copyright in the compilation from any copyright in the underlying works.
3.2 Authorized Uses. The Licensee and Authorized Users may access or use the Licensed Materials for the following purposes:

a. Usage Rights. Licensee and Authorized Users may electronically display, download, digitally copy, and print a reasonable portion of the Licensed Materials. Licensee may charge a reasonable fee to recover costs of copying or printing portions of Licensed Materials for Authorized Users.

b. Interlibrary Loan. Licensee may fulfill requests from other libraries, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in accordance with Sections 107 and 108 of the U.S. Copyright Act. Requests may be fulfilled using electronic, paper, or intermediated means.

c. Course Reserves. Licensee and Authorized Users may use the Licensed Materials for print and electronic reserve readings in connection with specific courses of instruction offered by Licensee.

d. Coursepacks. Licensee and Authorized Users may use a reasonable portion of the Licensed Materials in the preparation of coursepacks or other educational materials.

e. Electronic Links. Licensee and Authorized Users may provide hyperlinks from the Licensee’s and Authorized Users’ web page(s) or web site(s) to individual units of content within the Licensed Materials.
• **PROHIBITED USES**

• Neither the Licensee nor Authorised users may:

  • remove or alter the authors’ names or the Publisher’s copyright notices as they appear in the Licensed Materials

  • systematically make print or electronic copies of multiple extracts of the Licensed Materials for any purpose

  • post or distribute any part of the Licensed Material on any electronic network, including without limitation the Internet and the World Wide Web
9. WARRANTIES AND INDEMNIFICATION

9.1 Warranties. The Licensor warrants it has all necessary legal and equitable rights, permissions, and clearances to license the Licensed Materials to the Licensee for the purposes outlined in this Agreement, and that use of the Licensed Materials by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright or other rights of any third party.

Licensor shall indemnify and hold harmless the Licensee and any Authorized Users for any losses, claims, damages, awards, penalties, or injuries they incur (including reasonable attorney’s fees) which arise from any third party claim that alleges contract breach, copyright infringement, or other intellectual property infringement arising from the Licensee’s or an Authorized User’s use of or access to the Licensed Materials in accordance with the terms of this Agreement. Additionally, Licensor agrees that no liability limitation that may appear elsewhere in this Agreement applies to, overrides, or cancels this indemnification.

Licensor warrants that any physical object or medium that contains the Licensed Materials will be free from defects for a period of [enter time period] from delivery.

9.2 Warranty Disclaimers. Notwithstanding anything else in this Agreement, neither party shall be liable for any indirect, special, incidental, punitive, or consequential damages, including loss of data, business interruption, or loss of profits that arises from the use of the Licensed Materials, or inability to use the Licensed Materials.
10. MISCELLANEOUS PROVISIONS

10.1 Assignment and Transfer. Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party except as otherwise provided in Section 5.1(l) Transfer or Acquisition of Titles. Neither party to this Agreement may unreasonably withhold or delay such written consent.

10.2 Governing Law. This Agreement shall be interpreted and construed according to, and governed by, the laws of [enter venue convenient to Licensor and Licensee], without regard to its conflict of laws rules. The federal or state courts located in [enter venue convenient to Licensor and Licensee] shall have jurisdiction to hear any dispute under this Agreement. (For state institutions, the governing law and venue may be determined by policy, statute or the state’s constitution. Liblicense/editors recommend discussing governing law and venue requirements with your general counsel or an appropriate administrator.)

10.3 Force Majeure. Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control, including Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections, labor strikes, and/or any other cause beyond the reasonable control of the party whose performance is affected.

http://liblicense.crl.edu/
KNOW YOUR INSTITUTION

• Terms that are required
• Terms that are preferred
• Terms to be omitted
• Terms to be amended
Indiana University Libraries

Modal Licensing Parameters for
Electronic Resources with Domestic Providers

The following licensing parameters are to be consulted and applied when negotiating and amending electronic resources license agreements for Indiana University Libraries. License language that is preferred, prohibited or should be amended is indicated as well as language that should be included in electronic resources license agreements when specific conditions or situations are encountered.

Preferred Language

- Language indicating that the Licensor indemnifies the Licensee
- Language indicating the following Authorized Uses: Display, Digitally Copy, Print Copy, Course Packs, Course Reserve/Electronic Reserve, Electronic Link, Scholarly Sharing, Inter-Library Loan (ILL)
- Language indicating the archival of content within LOCKSS, CLOCKSS or Portico
Language to Strike

- Any language requiring the payment of Tax [a copy of the Indiana University tax exemption certificate may be supplied]
- Any language indicating the assessment of late fees
- Any language requiring the Licensee to indemnify the Licenser
- Any language requiring Confidentiality/Non-disclosure of terms of license or pricing terms
- Any language requiring binding arbitration, or the decision of an “independent expert” for dispute resolution
- Any language indicating that Interlibrary Loan requests be fulfilled “within the same country as the Licensee”, or otherwise limiting international ILL
- Any language granting the licensor permission to perform an “audit” of our systems to verify compliance of the terms of the agreement.
Language to be Amended (if applicable)

- Authorized Users should be defined as: Faculty, staff, students and walk-in users

- Any language limiting walk-in users to computer terminals within the library building should be amended to “physically present within the library”

- Any obligations on the part of Licensee with regard to notifying, monitoring or otherwise ensuring the compliance of authorized users must be subject to the Licensee’s best or “reasonable efforts”

- Any breach/cure period indicated by the content provider must be at least 30 days or more

- Governing Law and Jurisdiction must be the State of Indiana; Language on governing law may be rescinded entirely by mutual agreement of Licensee/Licensor

- Any Interlibrary Loan language that specifies “print only” lending allowed, should be amended to read “Secure Electronic Transmission” allowed.

- Any Interlibrary Loan language that specifies that a specific method of transmission (such as Ariel) must be used should be amended to read “Secure Electronic Transmission”
GETTING TO WHERE YOU WANT TO BE
XV. Indemnities

The Licensee agrees to indemnify the Licensor from all damages, liabilities, costs, charges and expenses, including reasonable attorneys' fees, that the Licensor, their employees, and authorized representatives may incur as a result of either: (i) the User’s breach of these Terms of Use or (ii) material entered into the Website with the use of the User’s username or password. This indemnity shall survive the termination of this Agreement.

XVI. Assignment and Transfer

Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

XVII. Governing Law

This Agreement shall be interpreted and construed according to, and governed by, the laws of New York, excluding any such laws that might direct the application of the laws of another jurisdiction. The federal or state courts located in New York shall have jurisdiction to hear any dispute under this Agreement.
Dear Mr. Smith,

Thank you for the attached license agreement for XYZ resource. Indiana University Libraries would like to request the following changes to this agreement:

-Section XV, Indemnities: Please strike this section, as Indiana University Libraries is unable to accept indemnity terms.

-Section XVII. Governing Law: Please amend governing law and jurisdiction to the State of Indiana.

Please let me know if there are any questions about these requested changes, and thank you in advance for your assistance.

Best,

Lori Duggan  
Head, Electronic Resources Acquisitions  
Indiana University  
Bloomington, Indiana  
lbadger@indiana.edu  
812-856-3184
WHEN YOUR REQUESTS ARE NOT ACCEPTED

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WHEN YOUR CHANGES ARE ACCEPTED

https://www.creditdebitpro.com/
EXECUTING THE LICENSE
SHARED ELECTRONIC RESOURCE UNDERSTANDING (SERU)

https://www.niso.org/standards-committees/seru
CURRENT TRENDS IN LICENSING

• Text and Data Mining

• Accessibility

• Licensing with International Providers
j. Text and Data Mining. Authorized Users may use the Licensed Materials to perform and engage in text and/or data mining activities for academic research, scholarship, and other educational purposes, utilize and share the results of text and/or data mining in their scholarly work, and make the results available for use by others, so long as the purpose is not to create a product for use by third parties that would substitute for the Licensed Materials. Licensor will cooperate with Licensee and Authorized Users as reasonably necessary in making the Licensed Materials available in a manner and form most useful to the Authorized User. If Licensee or Authorized Users request the Licensor to deliver or otherwise prepare copies of the Licensed Materials for text and data mining purposes, any fees charged by Licensor shall be solely for preparing and delivering such copies on a time and materials basis.

http://liblicense.crl.edu/licensing-information/model-license/
ACCESSIBILITY

e. Disabilities Compliance. Licensor shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large print interfaces, text-to-speech output, voice-activated input, refreshable braille displays, and alternate keyboard or pointer interfaces, in a manner consistent with the Web Accessibility Initiative Web Content Accessibility Guidelines. Licensor shall provide to Licensee a current completed Voluntary Product Accessibility Template (VPAT) to demonstrate compliance with the federal Section 508 standards. If the product does not comply, the Licensee has the right to adapt the Licensed Materials in order to comply with federal and state law.
INTERNATIONAL CONTENT PROVIDERS

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QUESTIONS?

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