

PRINCIPLES FOR LICENSING ELECTRONIC RESOURCES

*Revised by the Licensing Principles for Electronic Resources Special Committee
Approved by the AALL Executive Board, November 2004*

Introduction

In 1997 the American Association of Law Libraries joined with five other library associations to [draft principles for licensing electronic resources](#). These principles had the dual purpose of guiding libraries in their negotiations for access to electronic resources and informing vendors of electronic products about the licensing issues important in the library context.

In the years since those principles were published, new vendors have entered the marketplace and electronic resources have multiplied. Each new product seems to bring new variations in licensing provisions, so that the process of negotiating license agreements has become increasingly complex. The principles set forth below build on the earlier collaborative work, but they also provide expanded guidance in the areas of access, interlibrary loan, archiving, usage statistics, and dispute resolution. The organization of the document facilitates its use as a checklist for reviewing license agreements, so it is a valuable tool for librarians and vendors alike.

Legal Background

A license is a legal and binding contract between the parties to the license. A contract is "[A]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." [Black's Law Dictionary, 7th edition, 1999.]

License agreements regulating the use of electronic resources govern the relationship between the licensee (the library or user of the content) and the licensor (publisher, vendor or aggregator of the content). In a typical situation, the licensors will present their standard license agreement to the licensee. Because both parties will be bound by the terms therein, each party should review the license carefully and be prepared to negotiate in good faith to reach a satisfactory agreement. If the parties cannot agree on key issues in writing, the license should not be signed. The terms of the final agreement should be committed to writing and neither party should rely on verbal agreements or commitments.

In the area of licensing electronic resources, failure on the part of the licensee to read and understand the terms of the agreement may result in such unintended consequences as:

- the loss of certain rights to uses of the resource that would otherwise be allowed under the law (for example, in the United States, such uses as fair use, interlibrary loan, and other library and educational uses);

- obligations to implement restrictions that are unduly burdensome or create legal risk for the institution;
- sudden termination of the contract due to inappropriate use by a member of the user community;
- unexpected cancellation or renewal notification requirements or automatic renewals and fee increases;
- access restrictions that cannot be supported by your technical or administrative infrastructure

Given the obligations that a contract creates for an institution and the possible liability associated with not meeting those obligations, most institutions will delegate the authority to sign contracts to a specific office or officer within the institution. In many institutions, this signatory authority will reside in the purchasing department, legal counsel's or vice president's office, or the library director's office, although in some institutions, a library staff member may be granted authority for signing license agreements. Nevertheless, library staff will often be responsible for initial review and negotiation of the material terms of the license because they have the most knowledge of the user community and of the resource being acquired. Library staff should be well informed of the uses critical to the library's user community (for example, printing, downloading, and copying).

The following principles are meant to provide guidance to library staff in working with others in the institution and with licensors to create agreements that respect the rights and obligations of both parties.

Principles for Licensing Electronic Resources

Licensing Process

1. A license agreement is a contract between the licensor and the licensee for purchase or use of an information resource by the licensee's authorized users.
2. The practice of licensing electronic resources should be accomplished in good faith by all parties. It is important that the process be carried out as openly as possible to achieve fairness and to develop best practices. A confidentiality or nondisclosure agreement should not be a prerequisite to a license agreement.

License Content

3. A license agreement should be written in clear, non-technical language. Terms that could be ambiguous or subject to interpretation (see *Important Licensing Terms*, below) should be defined within the license.
4. A license agreement should state clearly whether the access rights being acquired by the licensee are for permanent use and ownership of the content or are subscription-based access rights only.
5. A license agreement should state clearly the period of time for which access rights are being acquired.

6. A license agreement, along with any appendices, addendums or attachments, should comprise the whole of the agreement between the parties. Neither party should rely on verbal assurances or understandings. All agreed terms should be incorporated into the written agreement.
7. A license agreement should not require the licensee to adhere to unspecified terms in a separate agreement between the licensor and a third party (such as a publisher or other copyright holder) unless the terms are fully reiterated in the current license or fully disclosed and agreed to by the licensee.
8. The terms of a license should be considered fixed at the time the license is signed by both parties. If the terms are subject to change (for example, scope of coverage or method of access), the agreement should require the licensor or licensee to notify the other party in writing in a timely and reasonable fashion of any such changes before they are implemented, and permit either party to terminate the agreement if the changes are not acceptable.
9. A license agreement should state the financial relationship, if any, between the electronic resource being licensed and any equivalent publications in other formats.

Authorized Use

10. A license agreement should not require authorized users to enter into independent agreements with licensor through the use of click-through agreements. Authorized users are governed by the terms of the license between the licensee and licensor.
11. A license agreement should clearly state the permitted uses of the electronic resource. The licensee should make clear to the licensor those uses critical to its particular users including, but not limited to, printing, downloading, copying, electronic reserves, and the development of coursepacks.
12. The licensee should be responsible for establishing policies that create an environment in which authorized users make appropriate use of licensed resources and for carrying out due process when it appears that a use may violate the agreement.
13. A license agreement should not hold the licensee liable for unauthorized uses of the licensed resource by its users, as long as the licensee has implemented reasonable and appropriate methods to notify its user community of use restrictions.
14. A license agreement should require the licensor to give the licensee notice of any suspected or alleged license violations that come to the attention of the licensor and allow a reasonable time for the licensee to investigate and take corrective action, if appropriate.

Access

15. A license agreement should specify the means of authentication and access to the electronic content that are available to authorized users.
16. A license agreement should not require the use of an authentication system that creates an unnecessary barrier to access by authorized users.
17. A license agreement should recognize the affiliation of users with a given library or institution, regardless of users' physical location and should allow for routine remote access to licensed electronic information resources.
18. A license agreement should fairly recognize those access enforcement obligations that the licensee is able to implement without unreasonable burden. Enforcement must not violate the privacy and confidentiality of authorized users. The licensee should be willing to undertake reasonable and appropriate methods to enforce the terms of access to a licensed resource.

Copyright and Intellectual Property

19. A license agreement should recognize and not restrict, abrogate or circumvent the rights of the licensee or its user community permitted under copyright law, including but not limited to the fair use provisions of Section 107 of the U.S. Copyright Act (17 U.S.C 107) and the interlibrary loan provisions of Section 108 of the U.S. Copyright Act (17 U.S.C. 108).
20. Most national laws provide for exceptions to the exclusive rights of owners in favor of the public interest. When the parties to a license agreement are from outside of the U.S. any such exceptions in the relevant national law should remain intact in the terms of the agreement.
21. A license agreement should not limit the rights of the licensee to use public domain content in any way, even when such content is included as part of the licensor's proprietary resource.
22. A license agreement should recognize the intellectual property rights of the licensee, the licensor and any relevant third-party.
23. A license agreement should require the licensor to defend, indemnify, and hold the licensee harmless from any action based on a claim that use of the resource in accordance with the license infringes any patent, copyright, trade-mark, or trade secret of any third party.

Archiving

24. When permanent use of a resource has been licensed, licensor should provide a usable archival copy of the licensed content, including any necessary interface. The license should specify the conditions under which the licensee may access or refer users to the archival copy.
25. When subscription-based or renewable use of a resource has been licensed, a license agreement should specify what, if any, access to the licensed material would continue to be available after the subscription period lapses.

26. A license agreement should specify who has permanent archival responsibility for the licensed content.

Statistics/Privacy

27. A license agreement should describe the usage statistics collected or generated by the licensor or any third parties, and the means available for the licensee to access those statistics.
28. The routine collection of use data by either party to a license agreement should be predicated upon disclosure of such collection activities to the other party and must respect laws and institutional policies regarding confidentiality and privacy.

Termination/Renewal

29. A license agreement should clearly state the terms and conditions for renewal.
30. A license agreement should provide termination/renewal rights that are appropriate to each party.
31. A license agreement should specify the financial obligations of both parties in the event that either party terminates the license.
32. Automatic renewal should not be assumed in the absence of specific licensing language.

Dispute Resolution

33. A license agreement should allow for the use of alternative dispute resolution to resolve any conflicts that may arise in relationship to the agreement.
34. A license agreement should state the choice of law and choice of venue by which the parties will be governed in the event of a dispute.

Warranties/Quality of Service

35. A license agreement should state the warranties extended by the licensor to the licensee with respect to the licensed content.
36. A license agreement should state the limitations on warranties between the licensee and licensor.
37. A license agreement should state the terms of compensation between licensee and licensor in the event that the licensed materials are unavailable for use by licensee and licensee's authorized users for any period that exceeds customary downtime for scheduled maintenance and server upgrades.

APPENDICES

A. Important Licensing Terms

Because a license is a contract between the parties, the terms used within a license will affect the rights and responsibilities of both the licensee and licensor. Therefore, care should be taken to insure that the terms used are clearly understood by both parties. Definitions should be spelled out within the license and should clarify any terms that may be unclear or ambiguous. Remember that if a conflict over terms should arise later, a third party might be called upon to interpret the license. Therefore, it is in the best interest of both parties to address any concerns or uncertainties in advance.

The following is a non-exhaustive list of terms that are important to the process of licensing electronic resources. The terms are not defined herein as definitions may vary from instance to instance. Not all terms will appear in every license, but those involved in licensing should be familiar with this terminology. Because of the pace of change in the world of electronic resources, licensing practitioners should also stay abreast of new and evolving lingo and terms of art. It is the responsibility of the licensee to be sure that any of these terms used in a license to which they are a party are clearly defined within the license. Terms should also be used consistently within a license, even when their use may appear redundant.

TERMS

archive
archival copy
authorized use (user)
authentication
backup copy
cached copy
choice of law
choice of venue
commercial use
concurrent use (user)
coursepack
electronic reserves
force majeure
indemnity
institution
interlibrary loan
IP (internet protocol) address
licensee
licensor
local access
local area network
mirror site
network
perpetual access

proxy server
public access
remote access
Section 508 (Rehabilitation Act)
Section 107 (Copyright Act)
Section 108 (Copyright Act)
secure network
server
simultaneous use (user)
site
site license
subscription period/term
termination
third party
unauthorized use (user)
usage data
walk-in patron
web-based proxy
wide area network
virtual private network (vpn)

B. Resources on Licensing

Alford, Duncan. "Negotiating and Analyzing Electronic License Agreements," *Law Library Journal* 94 (Fall 2002): 621-644.

Harris, Lesley Ellen. *Licensing Digital Content: A Practical Guide for Librarians*. Chicago: American Library Association, 2002.

Hilts, Paul. "Digital Rights Management," *Columbia Guide to Digital Publishing*, ed. William E. Kasdorf. New York: Columbia University Press, 2003.

International Coalition of Library Consortia (ICOLC). *Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information*. Dec. 2001 (available at <http://www.library.yale.edu/consortia/2001currentpractices.htm>).

International Coalition of Library Consortia (ICOLC). *Guidelines for Statistical Measures of Usage of Web-Based Information Resources*. Dec. 2001 (available at <http://www.library.yale.edu/consortia/2001webstats.htm>).

International Federation of Library Associations and Institutions (IFLA). *Licensing Principles*, 2001 (available at <http://www.ifla.org/V/ebpb/copy.htm>).

Jewell, Timothy. *Selection and Preservation of Commercially Available Electronic Resources: Issues and Practices*. Washington, D.C.: Digital Library Federation, 2001.

Suber, Peter. "Removing the Barriers to Research: An Introduction to Open Access for Librarians," *College & Research Libraries News* 64 (Feb. 2003): 92-94.

Yale University Library. *Licensing Digital Information, Liblicense Website*, 2003 (available at <http://www.library.yale.edu/~llicense/index.shtml>).