



# eContent Licensing

## Copyright Bootcamp

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Joan M Emmet, MLS, JD  
Licensing & Copyright Librarian  
Yale University  
[joan.emmet@yale.edu](mailto:joan.emmet@yale.edu)



# Key Components – The Balancing Act

- **License** = permission to make limited use of copyright holder's exclusive rights: reproduce, derivatives, distribute, perform, display...
  - U.S. Copyright Act of 1976 limitations and exceptions (17 USC §§107-122)
- **Contract/Agreement** = everything else: promises, obligations, representations, warranties, prices, indemnifications, governing law, accessibility, term...



# The License [17 U.S.C. §101, *et seq.*]

**THE LAW MAY GIVETH AND THE LICENSE MAY TAKETH AWAY!**

(though the license can give you *more*)

- Take advantage of the limitations and exceptions permitted by law
  - Use your excellent language skills 🌟
- Enumerate additional uses not covered by law that are typical in academic libraries
  - Coursepacks
  - PDFs in Learning/Course management systems, eReserves
  - MOOCs
  - Digitizing/streaming

# The Contract [U.C.C. Article 2]



- Identifies parties!
- Definitions
  - Authorized Users, sites
  - Some use elements (e.g. course reserves, IRs, content, etc.)
- Assigns roles, rights, obligations, price, & LIABILITY
  - Representations/Warranties/Indemnification
- How changes are made
- Term, Termination, & Post Termination rights/obligations



# Contract Specifics & Red Flags

Necessary/Boilerplate/Deal-Breakers

## NECESSARY

- Parties
- Subject of the license
- Scope/grant of license
- Term
- Signature lines & DATES

## BOILERPLATE (but negotiable)

- Modification
- Confidentiality
- LIMITATION OF WARRANTY
- Merger Clause

## RED FLAGS

- Words of obligation, determiners
  - Will, shall, must, every, all
  - Reps & Warranties
- Indemnification & Liability
- Governing law/venue
  - Notice
- Arbitration
- Seriously Icky or Confusing



# Some Final Words

## Practical Tips

- Convert PDFs to Word to use “Track Changes” function in MS Word.
  - Explain why you need/justify the change in Comments
- Suggest one of the many alternative model licenses available.
- Suggest SERU
- Watch out for invoices that add licensing language.

## What do you want and need?

- Ensure entitlement to all limitations and exceptions allowed by copyright law.
- Important considerations:
  - Accessibility
  - Archiving/Archival rights
  - Authors’ Rights
  - Branding
  - Coursepacks/ereserves
  - CMS/LMS (links or pdfs?)
  - Notice (withdrawal of content/platform migrations)
  - Opt-out language
  - Perpetual rights
  - Streaming/Sharing
  - TDM
  - Usage Data



# Suggested Clause-Copyright



Licensee and Authorized Users may make all use of the Licensed Materials as consistent with the United States Copyright Act of 1976 as amended (17 U.S.C. §101, *et seq.*) including all limitations on and exceptions to the exclusive rights as granted therein.

...

Nothing in this Agreement shall be interpreted to diminish the rights and privileges of the Licensee or Authorized Users with respect to any of the Licensed Materials, including exceptions or limitations to the exclusive rights of copyright owners.



# Modification

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“These Terms and Conditions of Service ... are subject to Change. *In the interest of managing the evolving needs of Institutional Licensees, Authorized Users, and content providers* **[Licensor] reserves the right to modify** these Terms and Conditions, or any aspect of [Content], **at any time**. The most updated these Terms and Conditions of Service ...will be posted on the [Licensor] website. A modification will become effective for an Institutional Licensee **if it does not object** in writing to Licensor within 60 (sixty) days from the time Licensor emails notice of the modification. In the event of such an objection, the Licensee will have the **right to terminate** the Agreement on 30 (thirty) days written notice.”



# Merger Clause

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This Agreement **constitutes the entire agreement of the parties** and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written. No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of Publisher and Licensee.



# Indemnification & Liability

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“Buyer agrees to **indemnify** and **hold the Seller harmless** from and against (i) all loss, damage, harm or injury suffered or incurred by the Seller and (ii) all notices, claims, demands, action, suits or proceedings given, made or initiated against the Seller on account of or arising out of (i) **any transaction contemplated or use by an Authorized User** under the Agreement, or (ii) any default committed by the Buyer of any of its obligations hereunder.”



# Notice-Lessons from LSU

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If to Licensor:

Name, Street Address, State USA

Any legal notices or other legal documents provided to Licensor at the address provided above shall constitute valid legal service and Licensor expressly waives any further service of process otherwise required under the Hague Convention.

# Icky & Confusing

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- Acknowledgement
  - **Subscriber and its Authorized Users acknowledge** that the Licensed Materials including abstracts are copyright protected and that the sole copyright to the Licensed Material remains w/the Publisher.
- Assignment
  - Licensor reserves the right to assign its rights and obligations of this Agreement without notice or Licensee's consent. Licensee may not assign any rights or obligations of this Agreement without Licensor's prior written consent, and any assignment without Licensor's prior written consent, including any assignment by operation of law, shall be null and void.
- Audits
  - During the term of this Agreement and for a twelve(12) month period thereafter, Licensor shall have the right to monitor Subscriber's access to and usage of the Service(s), in each case to confirm that restrictions on use and access have been observed, **during normal business hours and upon reasonable notice to Subscriber, to audit, examine, and review relevant portions of those records** with respect to and the manner of Subscriber's access to and usage of the Service...
- Injunctive relief or remedies in law or equity for breach
  - Licensee's actual or threatened breach of this paragraph will give the Licensor the right to terminate this Agreement immediately, obtain equitable relief (i.e., obtain an injunction to restrain such disclosure or use, without the requirement of posting a bond), and pursue all other remedies it may have at law or in equity.
- Force Majeure
  - **Except for any obligations to make payments** to the other party hereunder, either party's delay or failure to perform any term or condition of the Agreement as a result of conditions beyond its control such as, but not limited to, wars, invasions, hostilities, terrorist threats or acts, epidemics, strikes, fires, floods, earthquakes, explosions, acts of God, governmental restrictions...shall not be deemed a breach of the Agreement.

## LICENSE REVIEWER CHECKLIST

**License/Agreement/Terms and Conditions/Subscription Agreement.** The wording of the document may change, but where the document includes terms and conditions, that is in essence a license agreement. We have license to use the content in the manner described by the terms and conditions.

### RED FLAGS

#### TERMS:

- All
- Best
- Represents or Warrants
- Shall or Will
- Is obliged
- Responsible

#### CLAUSES:

- **Breach.** What happens if one or the other party breaches the terms? Does the license terminate? Is there a cure period? What happens to our rights to materials post-termination?
- **Changes or Modifications.** No changes should be made to the agreement without the signed approval of both parties.
- **Confidentiality.** Some confidential info should be kept so, other not so much, how to distinguish b/t the two.
- **Dispute Resolution.** We might be able to agree to mediation, but never arbitration.
- **Governing Law/Jurisdiction/Venue.** We can agree to CT or NY in the U.S. On occasion, we'll agree to the UK for foreign entities, but we prefer the U.S. See Joan if you have a foreign law and jurisdiction noted.
- **Indemnification.** Be careful! It is appropriate for the licensor indemnifies us for claims that arise due to infringement of IP of an individual when we're using the materials in compliance with terms of the agreement. We can NEVER indemnify the Licensor for the acts or misdeeds of our users.

### DEAL-BREAKERS

**Arbitration.** We would rather go to court than be subject to arbitration to settle a dispute.

**Audits.** Some vendors want to come on premises to look through our records to ensure that we are using the materials in compliance with the terms. We do not permit audits. They can remotely monitor our usage.

**Indemnification.** Under no circumstances can we indemnify licensor for anything over which we do not have control (e.g. Authorized Users). The caveat is that we presumably have control over staff and faculty as our agents. ANY questions, contact Joan for guidance.

**Unilateral Modification.** We've gone to the trouble of negotiating an agreement, both parties agree, there is no way that any changes can be made by one party, but it happens.

**Impossible Obligations.** "Licensee shall obtain, if applicable, all necessary approvals and consent from Authorized Users for transfers of personal data to Licensor." (from Springer/Nature, absolutely cannot comply)

### MUST HAVE

- **The Parties.** Somewhere, usually preamble, names the parties.
- **Subject of the license.** What are we licensing? A journal or will it apply to all journals?
- **Scope and Grant of the license.** How can we make use of the materials, what are the boundaries?
- **Fair Use Exception.** At a minimum, we'd like to get reference to fair use in there.
- **ILL.** We want this for most stuff, but it may not be available for DBs.
- **Length of time license is in effect (Term).**
- **Merger Clause.** What is embodied in this license is what the parties meant to have and no other promises or obligations that are written or spoken outside of this agreement are invalid.
- **Modifications/Amendments.**
- **Signature Lines.** Generally, signature required for both parties, especially if merger clause.
- **Dates.** V. Important! We need to know when things happen in time!

## HIGHLY DESIRED

- **Accessibility.** Our preferred is level AA criteria of the WCAG 2.0 guidelines.
- **All limitations and exceptions in U.S. Copyright law. [PREFERRED]**
- **Archival/Backup Copies.** For perpetual access or dark archiving.
- **Authors' Rights.** Best with journals/journals DBs.
- **Course packs.**
- **Download. Print copies.**
- **eReserves.**
- **Learning/Course Management Systems.** e.g. Canvas
- **Perpetual Access accommodation.** Because we aren't buying print, we want some assurance that we'll have access post-cancellation. LOCKSS, CLOCKSS, Portico options are good. Solely on licensor platform may cost a lot in which case we'd like to negotiate an alternative getting all the files for our own access and storage.
- **Reuse in publications/presentations.** (Probably a fair use, but it doesn't hurt to name it)
- **Scholarly Sharing.** Collaboration between colleagues, insubstantial amounts.
- **Text/Data Mining.**



## ISSUE SPOTTING EXERCISE—KEY—Copyright Bootcamp 2019 | eContent Licensing

### I. PERMITTED USES

Each Authorized User may:

- Access, search, browse, and view the Subscribed Products;
- Print, download, and store a reasonable portion of individual items from the Subscribed Products for the use of such Authorized User;
- incorporate links to the Subscribed Products on the Subscriber's intranet and internet websites and incorporate links to pdfs of articles, abstracts and book chapters in electronic coursepacks, reserves and course management systems and instructor websites, (provided that the appearance of such links and/or statements accompanying such links will be changed as reasonably requested by Publisher) and printed articles, abstracts and book chapters in printed coursepacks, provided that the downloaded and printed content will carry appropriate acknowledgement of the source, title, author and publisher and the downloaded content is deleted by the end of each semester or trimester in which it is used (with such deletion confirmed in writing to Publisher upon request);
- provide single a reasonable number of print or electronic copies of individual items from the Subscribed Products to other Authorized Users and to third-party colleagues for their scholarly or research use; and
- access, search, browse, view, print, make electronic copies and store for the exclusive use of such Authorized User or, if the Authorized User is a librarian/information specialist, for the exclusive use of another Authorized User certain journal articles and book chapters from the Service that are not subscribed to as part of the Subscribed Products with each twenty-four hour access period for a selected article or chapter, a "Transaction."

The Subscriber may:

- deliver journal articles from Subscribed Titles (as defined herein) and, if any, book chapters from the Subscribed Products to fulfill requests as part of the practice commonly known as "interlibrary loan" from non-commercial other libraries located within the United States, provided that the Subscriber's staff reviews the requests and fulfills the requests are fulfilled in compliance with Section 108 of the U.S. Copyright Law (17 U.S.C. §108) and the Guidelines for the Proviso of Subsection 108(g)(2) (Final Report of the National Commission on New Technological Uses of Copyrighted Works, 1978);
- may extract and index Data from the Published Journal Articles/Published Book Chapters from Authors included in the Subscribed Products to index and store these in perpetuity in the Subscriber's Institutional Repository by implementing the Publisher's APIs as outlined in the use case at: <http://xxxxx...>
- may, in the user interface of the Institutional Repository, publicly display the submitted, accepted manuscript and/or abstracts or Snippets thereof and dynamically display, if via a Publisher API, a first page PDF preview or, subject to the user authentication, the Full PDF of Published Journal Article/Published Book Chapter for which the Subscriber has indexed Data. Abstracts may only be displayed on the abstract records on the Subscriber data's websites, all other services of the Institutional Repository, such as (but not limited to) alerts, e-mail services and API's may only display Snippets but not abstracts.

### II. INDEMNIFICATION

- In the event that Publisher is the subject of a claim, action or legal proceeding due to acts or negligence on the part of the Subscriber or a User in breach of its obligations under this Agreement, the Subscriber shall indemnify and hold Publisher harmless for any prejudice or damage resulting from such claim, action or legal proceeding. Publisher agrees to inform the Subscriber of such claim, action or legal proceeding within a reasonable timeframe after Publisher has received said claim, action or legal proceeding; and
  - [ADD]: provided that Subscriber shall have the right to participate at its own expense with respect to any such claim, action, or proceeding, and that no such claim, action, or proceeding shall be settled without the prior written consent of Subscriber.
- The School/University hereby agrees to fully indemnify Licensor against any losses, damages, costs or other liabilities incurred by Licensor as a result of any a grossly negligent breach of its representations and warranties made herein this Agreement by the School/University, which results in Licensor's Content being used outside of the scope of this Agreement.

**Commented [EJ1]:** This could be questionable or non-applicable. Ask vendor for clarification.

**Commented [EJ2]:** This is not in the providing staff workflow to ensure that the rule of 5 is being applied. The burden to follow CONTU falls upon the requesting library. We simply prefer not to be responsible for that over which we have no control.

**Commented [EJ3]:** NOTE: State-funded institutions may be prohibited by state law from signing indemnification and confidentiality clauses.

**Formatted**

- ~~The Subscriber shall assume full responsibility and liability for the acts and omissions of its Permitted Users as if such acts or omissions were committed or made by the Subscriber.~~
- ~~The Licensee~~Each party must indemnify, defend and hold ~~harmless Licensor~~the other, its board members, officers, employees and agents from and against any and all claims (including third party claims), demands, actions, suits, expenses (including attorney's fees) and damages (including indirect or consequential loss) resulting in any way ~~from the indemnifying party's gross and negligent breach of its representations and warranties made herein.:~~
  - ~~Licensee's and Licensee's employee's use or reliance on the Asset,~~
  - ~~Any breach of the terms of this License Agreement by the Licensee or any licensee employee, and~~
  - ~~Any other act of Licensee~~

### III. SUBSCRIBER'S OBLIGATIONS

1.1 The Subscriber **represents and warrants** to Publisher that the information set out in the Specific Provisions is complete and accurate, and covenants that all information regarding the ~~use Subscriber~~ of the Service will remain so throughout the term of this Agreement. The ~~subscriber Subscriber~~ also represents and warrants to Publisher that it will use its reasonable efforts to ensure the Subscriber's Users are all authorized by Subscriber and may be, either Students/students, researchers, Professors-professors at the institution, or employees of the library Subscriber, or walk-in users permitted access via campus owned computer terminals.

1.2 The Service may only be accessed from the Subscriber's own ~~premises~~Secure Network, at as described by the IP address provided in the Specific Provisions, ~~unless a mention authorizing remote access is stipulated in said Specific Provisions.~~

1.3 Not knowingly allow access to the Service or to a Document to an unauthorized User. Subscriber will use reasonable efforts to ensure without said Users having have been informed in advance of – and must having agreed to comply with ~~all the Subscriber's obligations~~terms of use as described in this Agreement;

1.4 Use all reasonable means at its disposal to ensure that all Users comply with all of the obligations set out in the present Agreement, ~~the Subscriber being jointly and severally liable for any breach of this Agreement by its Users;~~

- Licensee must keep ~~full and~~ up-to-date records of ~~all its FTE Authorised Users and their access details~~ and provide the publisher with ~~details notice~~ of ~~such material~~ additions, deletions or other alterations to such records, no more frequently than annually, as are necessary to enable the Publisher to provide Authorised Users with access to the Licensed Materials as contemplated by this Licence;
- Licensee must use reasonable efforts to ensure that only Authorized Users are permitted to access the Licensed Materials.
- Licensee shall ensure that access and use must be via a standalone secure network or virtual network within the internet which is accessible only to Authorised Users approved by the Subscriber whose identity is authenticated at the time of log-in and ~~periodically thereafter consistent with current best practice, and~~ whose conduct is subject to regulation by ~~this Licence~~Licensee (Secure Network).
- Licensee shall use all reasonable endeavours to monitor compliance and immediately upon becoming aware of any unauthorised use or other breach, inform the Publisher and take all reasonable and appropriate steps, which may including include disciplinary action, both to ensure that such activity ceases and to prevent any recurrence;

### IV. SCOPE, LICENSED MATERIAL, APPROVED USERS/USES

- ~~If the Licensee is a consumer within the meaning of Section 13 of the German Civil Code (BGB),~~ Licensor will set a reasonable deadline for the consumer to declare his explicit acceptance.

- Subject to the terms of this Agreement, Licensor hereby grants to the School/University a non exclusive, non-transferable, non sub-licensable license to allow the Readers to: (a) read, download a reasonable portion, share with colleagues Content for internal business use, personal use and for research, educational, teaching and current awareness purposes; and (b) use the Content in accordance with the Usage Rights (attached hereto), which apply equally to the Readers' use of the Content via both the Licensor Website and the Third Party Channels (and any other platform which Licensor expressly permits under this Agreement ).
- For the purpose of this License, Authorized Users are ~~(i) current members of the Subscriber's faculty, (ii) library staff of Subscriber, (iii) and students who are currently studying at the Subscriber's institutions~~ authorized ID holders authenticated by Licensee who may be faculty, staff, researchers, students, and independent contractors. Members of the public visiting the library may only access the Licensed Material from computer terminals within the Subscriber's library premises.
- Permitted User means any individual ~~at the location~~ set out in the Order Form ("Location") who is authorized by the Subscriber to access the Content and use the information and who ~~is either may be~~ an employee of the Subscriber including faculty, administrative staff, librarians and visiting scholars or individuals currently enrolled as students of Subscriber, but excluding ~~development and endowment offices~~, alumni of Subscriber or students using the Service in their capacity as an intern for a corporate organization. The Subscriber assumes responsibility for any acts or omissions by such user which would constitute a breach or default under this Agreement.

#### V. TERM, TERMINATION, FORCE MAJEURE, OTHER TERMS

- On termination of this Licence by Publisher for cause, as specified in clauses 15.2.2 and 15.2.3, the Licensee shall immediately cease to distribute, or make available, the current Licensed Materials to Authorised Users, ~~and shall return to the Publisher or provide certification of destruction of all Licensed Materials. Licensor shall provide Licensee with either perpetual online access to the Licensed Materials that were available up to the date of breach or in the alternative, a copy of the Licensed Materials up to date of breach in machine-readable, mutually acceptable format. Post termination use shall be subject to the terms of this Agreement~~
- ~~Except in respect of a payment obligation, neither~~ Neither party will be held liable for any failure to perform any obligation to the other due to a Force Majeure Event provided the affected party notifies the other party in writing of the Force Majeure Event, the date on which the Force Majeure Event started and the effects of the Force Majeure Event on its ability to perform its obligations under this Agreement as soon as reasonably possible after the start of the Force Majeure Event. The affected party shall make ~~all~~ reasonable endeavours to mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement.
- ~~In addition to the terms contained in this Licence, if and to the extent that the Licensee or their Authorised Users access the Licensed Materials via the Online Services, Licensee acknowledges that use of the Licensed Materials shall also be subject to the Online Service Terms and Conditions of Use (the "Online Terms"). The Online Terms can be viewed at https://anylibraryresources/termsfuse and that by accessing and using the Licensed Materials, Licensee acknowledges that they will be accepting and agreeing to be bound by them.~~

**Commented [EJ4]:** Perhaps in some form of writing, if force majeure exists, writing might come in a variety of missives, perhaps clarify or leave it at the affected party notifies the other party (maybe a phone call?)

**Commented [EJ5]:** Unacceptable. The terms of THIS Agreement count and supersede any online terms which can be changed at will. Avoid incorporating by reference any online terms. Only reference may be for benefit of users and do not apply whatsoever to Licensee.

#### VI. MODIFICATION

- ~~Publisher reserves the right to update or modify this Document according to changes made to the Service.~~
- This Agreement may be amended by ~~the Licensor~~ mutual written agreement, in its sole discretion, ~~provided that the Licensor will use reasonable endeavors such that the Licensee will have~~ shall notify Licensee thirty-sixty (30/60) days' prior written notice of any such proposed amendment and the Licensee ~~will have the option to terminate this Agreement by delivery to the Licensor of a written notice of the Licensee's election to terminate this Agreement received by the Licensor within sixty (60) days of receipt of such notice~~ may negotiate said terms

to the mutual satisfaction of both parties;

- ~~In the event that the Client's scope of use exceeds the limits set out in the Order Form (such as the number of instruments) Publisher shall be entitled to charge additional Charges for the excess use at the rates set out in the Order Form or at the then current Publisher pricing, whichever is greater. Where Users (i) receive information that is not included in the relevant Service; (ii) receive Information included in the Service but outside of the terms granted herein; (iii) receive any real-time matching information from an application; or (iv) receive Excluded Data, Client shall pay a premium declared access or terminal fee ("Desktop Charge") for each applicable User, except where Client is already paying a Desktop Charge in respect to that User for a Service that includes the same information.~~
- Publisher reserves the right to alter, modify, or discontinue the Services and any portions or configurations thereof from time to time ~~without notice~~. Publisher shall provide no less than sixty (60) days' notice of Such such alterations and/or modifications that may include addition or withdrawal of feature and/or data or changes in instructions and/or documentation. Changes that make the Service less useful to the Licensee will result in a credit commensurate with the value of the loss or at its option, Licensee may terminate and receive a refund of the unused portion of its subscription.

**Commented [EJ6]:** NOTE: we do not want to pay for any service we don't subscribe. Any option that allows users to exceed the scope of the agreement should be suppressed.

#### VII. BONUS CLAUSES

- Information regarding Client's interests in specific materials is Client's Confidential Information. **However, Company shall own all data regarding a Client's search history and selection, and may publish research reports or otherwise disclose aggregated/anonymized information** regarding industry or material trends in other publications or to other clients, but may not be used in any way for marketing purposes or contact of individuals.
- ~~All of Licensor's rights and remedies set forth in this Agreement or otherwise conferred upon or reserved to Licensor are cumulative and not exclusive of any other rights or remedies which Licensor otherwise has or would have under this Agreement or otherwise, and may be exercised singularly, successively, or together at the sole discretion of Licensor as often as occasion may arise or as may be deemed expedient. [NOTE: this clause seems to be a way to extract more money for even the slightest infringement. If we were to accept a version of it, it should be made bilateral, applying to both parties, not just the Licensor.~~

**Commented [EJ7]:** This requires further clarification. Some data we can't prevent the publisher from collecting, but should never relate to any personally identifiable information.

## SUGGESTED CLAUSES for ERESOURCE LICENSES

<a href="#">Accessibility</a>	<a href="#">Fair Use</a>	<a href="#">Opt Out Clause</a>
<a href="#">Added Rights</a>	<a href="#">Governing Law</a>	<a href="#">Platform Migration</a>
<a href="#">Advertisements</a>	<a href="#">Indemnification</a>	<a href="#">Termination</a>
<a href="#">Authors' Rights</a>	<a href="#">Jurisdiction</a>	<a href="#">Text/Data Mining</a>
<a href="#">Branding</a>	<a href="#">Notice</a>	<a href="#">User Data Collection Transparency</a>
		<a href="#">Warranties</a>

### Accessibility:

Accessibility. Licensor shall provide Licensed Materials in compliance with the Level AA criteria of the Web Content Accessibilities Guidelines (WCAG) 2.0 as published by the World Wide Web Consortium's Web Accessibility Initiative, which may be found at: <http://www.w3.org/WAI/WCAG20/quickref/>

*If vendor is neither compliant nor willing to become compliant:*

### (Last resort if no agreement to ADA or VPAT)

Licensor shall explore and take reasonable steps to provide Licensed Materials in compliance with the Level AA criteria of the Web Content Accessibilities Guidelines (WCAG) 2.0 as published by the World Wide Web Consortium's Web Accessibility Initiative in a timely manner. Where Licensor is unable or unwilling to become compliant, the Licensor shall indemnify and hold Licensee harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party or Authorized User of an alleged infringement of such compliance with regard to Licensor's provision of Licensed Materials. Licensor shall have the sole right to defend such claims at its own expense. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION.

Compliance with section 508 of the Rehabilitation Act of 1973 (as amended). Licensor shall comply with and provide Licensee with a copy of Licensor's completed [Voluntary Product Accessibility Template](#) (VPAT) form which follows Section 508 ([29 U.S.C. 794d](#)) standards as applied to the Licensed Materials.

### (NEW 8/29/16) Added Rights:

Rights that aren't necessarily covered under the U.S. Copyright Act within a limitation or exception.

[Authors' Rights](#) (see below)

Course and Learning Management Systems. Licensee and Authorized Users may make limited digital copies of Licensed Materials for posting to a closed specific course or learning management system that is accessible only by registered course participants for teaching and learning purposes.

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

Course Reserves (Print and Electronic). Licensee and Authorized Users may use a reasonable portion of the Licensed Materials for use in connection with specific courses of instruction offered by Licensee and/or its parent institution.

Scholarly Sharing. Authorized Users may transmit to a third party colleague in hard copy or electronically, minimal, insubstantial amounts of the Licensed Materials for personal use or scholarly, educational, or scientific research or professional use but in no case for resale. In addition, Authorized Users have the right to use, with appropriate credit, figures, tables, and brief excerpts from the Licensed Materials in the Authorized User's own scientific, scholarly, and educational works.

### Advertisements:

Licensors shall not place advertising on website pages or services on which the Licensed Materials covered under this Agreement are made available. For the avoidance of doubt, this restriction does not include advertising that is part of the content itself such as ads found within journals, magazines, archival, or primary source material, etc.

### **Authors' Rights:**

#### Example 1 (2011) Most like ARL definition:

Authors' Rights to Use Their Own Work. Notwithstanding any terms or conditions to the contrary in any author agreement between Authors and Licensor, Authors affiliated with Licensee whose work ("Content") is accepted for publication within the Licensed Materials shall retain the non-exclusive, irrevocable, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the Content in institutional, subject-based, national or other open repositories or archives (including the author's own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.

For the avoidance of doubt, it is the intent of the parties to this agreement that Authors are third party beneficiaries of this provision of the Agreement.

#### Definitions.

Content. Any version (with the **exception of the .pdf version formatted in the publisher's layout and bearing the publisher's trademark**) of any work by an author affiliated with Licensee that is published in the Licensed Materials.

Scholarly and educational purposes. Purposes encompassing teaching, research, and institutional needs, including but not limited to the right to (a) use, reproduce, distribute, perform, and display the Content in connection with teaching, conference presentations, and lectures; (b) make full use of the Content in future research and publications; (c) republish, update or revise the Content in whole or in part for later publication; (d) meet requirements and conditions of research grants or publishing subventions provided by government agencies or non-profit foundations, and; (e) grant to the Author's employing institution some or all of the foregoing rights, as well as permission to use the Content in connection with administrative activities such as accreditation, mandated reports to state or federal governments, and similar purposes. In all cases, the Author and/or the Author's employing institution will be expected to provide proper citation to the published version.

Repositories or archives. Open-access digital repository services such as those provided by the Author's employing institution, an academic consortium, a discipline-based entity, or a governmental funding agency, provided that the archived version is not the .pdf version formatted with the publisher's layout and trademark.

#### Example 2 (2011):

Authors' Rights to Use Their Own Work. Notwithstanding any terms or conditions to the contrary in any author agreement between Authors and Licensor, Authors whose works are created while in the employment of a Participating Member Institution and supported by such Participating Member Institution and whose submitted version of their work ("Content") is accepted for publication within the Licensed Materials shall retain the non-exclusive, irrevocable, royalty-free right to use their submitted version of their work (Content) for scholarly and educational purposes, including self-archiving or depositing the Content in their respective Participating Member Institution's institutional, subject-based, national or other open repositories or archive (including the author's own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.

For the avoidance of doubt, it is the intent of the parties to this agreement that Authors are third party beneficiaries of this provision of the Agreement.



## Definitions.

Content. The **submitted version** (Content) of a work by an author affiliated with Licensee that is published in the Licensed Materials.

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### Example 3 (2011):

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To clarify that the content and services subject to this Agreement are made available to Authorized Users by Licensee, Licensors will provide Licensee the option to brand the Licensors' platform in a format equal or greater in prominence to Licensors' own marks, with the name of Licensee, including text, logos, or other branding marks at Licensee's discretion.

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### **Governing Law:**

If private institution, check with your general counsel's office, otherwise probably the state in which your institution is located will be preferred. For publicly funded institutions, most states mandate that the governing law must be in the state in which the institution is located.

This License shall be governed by and construed in accordance with state of XState law; the parties agree that any dispute arising out of or in connection with this License will be subject to and within the jurisdiction of the courts of XState.

**NOTE:** In general, we will not accept arbitration clauses, though we may accept mediation. Check with your office of general counsel.

**Indemnification:**

Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims.

**NOTE:** Under NO circumstances can we indemnify the Licensor for misdeeds of our Authorized Users. (see also [Warranties](#)) We can ONLY indemnify the Licensor for what we represent and warrant within the Agreement (as long as we don't represent or warrant anything that we don't have control over.)

**PREFERRED:** The Licensor shall indemnify and hold Licensee and Authorized Users harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party of an alleged infringement of copyright or any other property right arising out of the use of the Licensed Materials by the Licensee or any Authorized User in accordance with the terms of this Agreement. This indemnity shall survive the termination of this agreement. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION.

**NOTE:** Where the Licensor is willing to indemnify us (Your institution is the indemnified party), many will also put in something to the effect that they indemnify us so long as they can **take control over the defense or settlement** of the dispute. We do not want to give up that control and should replace that kind of language with:

*Provided, however, that XInstitution (or Licensee) shall have the right to participate at its own expense with respect to any such claim, action, or proceeding and that no such claim, action, or proceeding shall be settled without the prior written consent of XInstitution.*

**Jurisdiction:**

As noted with governing law, jurisdiction/venue should be in the same state(or county of the state) as Governing Law.

**Notice:**

After the U.S. addresses for 'regular' notices, add:

Any legal notices or other legal documents provided to Licensor as provided above shall constitute valid legal service and Licensor expressly waives any further service of process otherwise required under The Hague Convention.

(or you can put in whatever [international convention](#) you think you might be pulled into)

**Opt-Out Clause:**

Version 1:

Licensor acknowledges that the ability Licensee to participate in the Agreement is subject to and contingent upon the availability of funds appropriated by the institutional budget processes. Licensee shall make good faith efforts to obtain the funding to meet its obligations as set forth in this Agreement.

Licensee may terminate its participation in this Agreement only at the start of a subscription term (i.e. January 1) by giving Licensor notification in writing no less than sixty (60) (or 30) days prior to the start of that subscription calendar year.

Version 2:

Licensee reserves the right to terminate this Agreement within thirty (30) days of release of its budget for fiscal period (July 1, 20XX - June 30, 20XX) or for succeeding years to the extent concurrent with the term of hereof if such budget results in a loss of substantially all of the financial support from which Subscriber intended to satisfy its payment obligations hereunder, provided that (i) such termination is motivated by Licensee's good faith belief that its budgetary allotment for university library acquisitions is insufficient to satisfy Licensee's obligations hereunder; and (ii) alternative sources of funding are not reasonably available or expected to become available at the time Licensee's payment obligation attaches. In such circumstances, this Agreement will terminate as of the end of the calendar subscription year for which Licensee had paid in full the License Fee and all other fees and charges due under this Agreement.

**Platform Migration:**

Platform migrations. Licensor shall give notice to the Licensee that content will be moving to a new platform no less than sixty (60) days before the migration commences. The Licensor will provide the Licensee with a migration timeline and, where possible, a preview environment. Licensor shall use reasonable efforts to provide continuous service throughout any platform migrations, ensuring that Licensee does not lose access to content.

**Termination:**

(If vendor terminates due to breach and we weren't able to cure it, we want to ensure that we maintain our perpetual access rights (where applicable) to the content to which we had access before the date of the breach. The language on this will vary depending on the type of resource.)

Upon termination for cause, Licensor shall provide Licensee with either perpetual online access to the Licensed Materials that were available up to the date of the breach or in the alternative, a copy of Licensed Materials accessible up to date of breach in machine-readable, mutually-acceptable format. Post termination use shall be subject to the terms of this Agreement.

**Text/Data Mining:**

OLD but still good:

Text Mining. Authorized Users may use the licensed material to perform and engage in text mining /data mining activities for legitimate academic research and other educational purposes.

UPDATE burden on provider to give us the raw data (possible vendor provides on cost recovery basis):

Text/Data Mining. Licensor shall provide either online at its web site, through a third party service (such as LOCKSS, CLOCKSS, or Portico), or to Licensee one full copy of the Licensed Materials in raw data format. The raw data may be used by Authorized Users to perform text and/or data mining functions and algorithms for legitimate academic research and other educational purposes in accordance with the terms of this Agreement.

**LIBLICENSE version:**

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.

**CDL version:**

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**User Data Collection Transparency:**

Licensor may require users to create accounts or profiles to take advantage of personalized features of the Subscribed Products. Licensor shall, in addition to linked associated terms of service and privacy language, provide a short, clear and obvious statement at the location of the user click-through acceptance that references how users' data is collected and the purposes of its use made by Licensor. Users are not required to create accounts or profiles to make all use the Subscribed Content including all features, except for those that are personalized.

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We must be CAREFUL about what we represent and warrant in the license. Generally, we warrant that we have the authority to enter into the agreement and represent that we'll use **reasonable efforts** to do one thing or another (e.g. inform Authorized Users that they must or must not). If we are asked to indemnify the Licensor, we can only indemnify them for grossly negligent breach of our representations and warranties in the license, so be sure we do not represent or warrant for anything over which we do not have control. (See also: [Indemnification](#))