Copyright Bootcamp
JAN 10, 2019

Joan M Emmet, MLS, JD
Licensing & Copyright Librarian
Yale University
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 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**
- 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

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Notice-Lessons from LSU

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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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  - *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

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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 an 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.**
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 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 libraries located within the United States, provided that the Subscriber’s staff reviews the requests and fulfills the request, 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...
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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.
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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:

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b. Any breach of the terms of this License Agreement by the Licensee or any licensee employee, and
c. Any other act of Licensee

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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;

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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 (Secure Network).

Licensee must 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;

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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.

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.
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Advertisements
Authors’ Rights
Branding
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Notice
Opt Out Clause
Platform Migration
Termination
Text/Data Mining
User Data Collection Transparency
Warranties

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

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Rev. 03/27/2018 2
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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.

**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.

LIBLEICENSE 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:
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 and may 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, upon receipt of written request, 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. Licensor shall provide to Licensee, upon request, copies of the Licensed Materials for text and data mining purposes without any extra fees.

**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.

**Warranties:**
Generally vendors do not provide any warranty, product comes “as is.” However, they should have the requisite authority and right to license the content to us.

Licensor warrants that it has the right to license the rights granted under this Agreement to use Licensed Materials, that it has obtained any and all necessary permissions from third parties to license the Licensed Materials, and that use of the Licensed Materials by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright of any third party. (see also: Indemnification)

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)