Current Issues in Electronic Resource Licensing


Overview

This document is intended to help library professionals consider some of the more common issues that come up in the licenses proposed by vendors of electronic resources. Many of the links and excerpts shared here have been collected in order to ease the use of existing library licensing guidelines authored and utilized by the Library of Congress (The Library of Congress: Terms and Conditions for License of Electronic Resources), the Center for Research Libraries (Liblicense Model License Agreement with Commentary), the California Digital Library, University of California (CDL Model License Revised), and NELLCO Law Library Consortium, Inc. (NELLCO Standard License Agreement).

Even if those arranging licenses on behalf of your institution may not feel as though they have a great deal of leeway in obtaining changes to vendor boilerplate language, they should consider the issues touched upon below when deciding whether the license offered fits in with the institution’s mission and objectives.

A-Z List of Key Licensing Terms

Access (generally)

- **Issue**: Access and authentication systems vary. The most common industry standard for academic institutions, presently, is IP authentication for both onsite and remote access through secure proxy servers. Other access methods include username/password, Shibboleth, and single sign-on (SSO) login methods such as Security Assertion Markup Language (SAML).
- **Tips**: Negotiate the access and authentication systems early in the process and document in a new Schedule accompanying the primary agreement.
- **Selected Sources of Suggested Language**:
  - Liblicense Model License Agreement with Commentary, 4.2 Access and Authentication.
  - NELLCO Standard License Agreement, Authentication of Authorized Users.

Accessibility (ADA)

- **Issue**: Many of the digital resources that libraries license fail to meet the needs of all users, particularly patrons who require assistive technology or have print disabilities.
- **Tips**:
  - Ask vendors to complete a Voluntary Product Accessibility Template (VPAT). Verify this and any other claims pertaining to product accessibility via third-party audit.
All contracts should contain language requiring vendors’ products to meet appropriate accessibility guidelines with limited time periods to cure any access issues that are later discovered.

Libraries should be able to request a contact from each vendor who is knowledgeable about how to effectively navigate the product with assistive technology. These contacts should be made available to both librarians and users who have accessibility questions.

- **Selected sources of suggested language:**
  - NELLCO Standard License Agreement, VI(b): Licensor Performance Obligations
  - Liblicense Model License Agreement with Commentary, 5(e): Performance Obligations

- **Other resources for more information:**
  - Voluntary Product Accessibility Template (VPAT) (database) - Reaching Across Illinois Library System

### Authorized Users

- **Issue:** There are different types of users within an institution who need to use the resource. These users may vary by type of institutions. It is important to be inclusive in defining ‘Authorized Users’.

- **Tips:**
  - Include not only your primary users like faculty and students, but also users who are part of your institution for limited periods or occasional users, such as short term visitors or non-affiliated patrons who are physically present on library premises.
  - As the Liblicense Model License Agreement with Commentary suggests, each institution should tailor their own Authorized Users language based on the types of users they have.

- **Selected sources of suggested language:**
  - Liblicense Model License Agreement with Commentary, Section 3.1: Authorized Users.
  - NELLCO Standard License Agreement, Section III
  - TRLN Licensing Principles and Guidelines, Appendix 1, Authorized Users

### Discovery

- **Issue:** Titles included in platforms and databases should be well-represented for indexing and discovery in library catalogs using the recommended practices of NISO’s Open Discovery Initiative NISO RP-19-2020.

- **Tips:** Remind vendors that discovery is not only an industry standard, but also mutually beneficial and will increase usage statistics of their products.

- **Selected Sources of Suggested Language:**
  - NISO.org includes vendor checklists for data elements
Dispute Resolution & Governing Law

- **Issue:** There can be dispute between licensor and licensee about any of the terms. What method/s shall be used to resolve the dispute and which law will govern in case of legal action? The most common methods specified for dispute resolution are mediation and arbitration. Legal action (trial by judge or jury) is used in case the dispute cannot be resolved with either mediation or arbitration. The Governing Law clause defines which state/government's laws will be applied for resolving disputes. Usually the resource provider will have venue and governing law of their choice.

- **Tips:**
  - Dispute resolution method and governing law will vary for government institutions, academic institutions, and other types of institutions. Government institutions are required by their respective government’s laws to handle any dispute in a certain way. Liblicense editors recommend discussing governing law and venue requirements with general counsel or an appropriate administrator of your institution.
  - One can negotiate to be silent (not specifying the Governing Law in the license) on the Governing Law clause even if it is for a non-governmental entity.

- **Selected sources of suggested language:**
  - [Liblicense Model License Agreement with Commentary](#), Section 7. Dispute Resolution and 10.2 Governing Law
  - [The Library of Congress: Terms and Conditions for License of Electronic Resources](#), Section IX.A. Dispute Resolution & Section IX.D. Governing Law
  - [NELLCO Standard License Agreement](#), Section XV. Governing Law & Section XVI. Dispute Resolution.

Interlibrary Loan

- **Issue:** Libraries rely on interlibrary loans to provide users with access to a broader range of materials than they have collected themselves. Typically these materials will be outside the scope of the borrowing library’s collection, or too expensive for the borrowing library to subscribe to. Libraries do not want to lose the range of interlibrary loan activity that print-era guidelines and practices allowed for, so that the switch to electronic provision of information does not entail a reduction in users’ access to that information. The importance of this issue for law libraries has become even more pointed as a result of pandemic-fueled changes in collecting from print to e-books.

- **Tip:** Remind vendors that interlibrary loan is a library standard, but also mutually beneficial and will increase usage statistics of their product.

- **Selected sources of suggested language:**
  - [NELLCO Standard License Agreement](#), Section III: k. Interlibrary Loan
Licensee Performance Obligations

- **Issue:** From *Liblicense: Licensing Digital Content*: “The licensee’s core obligation under the agreement is to use digital information subject to the terms contained in the agreement. There may be additional specific obligations on libraries, including informing authorized users of the terms of the license agreement and, more specifically, the uses of the information are permitted and prohibited. These clauses should be considered carefully. Libraries should be wary of clauses which impose onerous responsibilities to monitor usage of the materials. While librarians should do what they can to inform users of restrictions on use of the authorized materials and stop unauthorized use when it is discovered, they should not obligate themselves to police their users or promise to take remedial action against unauthorized use that is beyond their authority.

Other licensee obligations will depend on the means by which the library or its users gain access to the licensed materials. Where access is through passwords and/or usernames, the licensor will often request that the library inform its users of their obligation not to divulge the passwords to unauthorized users and that the library itself maintain the confidentiality of the passwords it uses to access the materials. Again, these provisions should be analyzed carefully to ensure that the library does not undertake unreasonable monitoring or policing responsibilities.”

- **Tips:** Negotiate for the following:
  - Provision of Notice of License Terms to Authorized Users. Licensee will include a notice linked from its e-resources portal that users of licensed electronic resources generally may not:
    - Permit anyone other than authorized users to use the licensed materials.
    - Modify or create a derivative work of the licensed materials without the permission of the licensor.
    - Remove, obscure or modify any copyright or other notices included in the licensed materials.
    - Use the licensed materials for commercial purposes, including but not limited to the sale of the licensed materials.
    - Reproduce or redistribute licensed materials in bulk or in a systematic way.
    - Post content or items from the licensed materials to a social networking site.
    - Users are individually responsible for compliance with these terms.
  - Protection from Unauthorized Use. Licensee shall implement reasonable procedures to restrict access to the Licensed Materials to Authorized Users.
  - Maintaining Confidentiality of Access Passwords. Licensee shall use reasonable efforts to maintain the confidentiality of any institutional passwords provided by Licensor.

- **Selected Sources of Suggested Language:**
  - *The Library of Congress: Terms and Conditions for License of Electronic Resources*, V.B. Licensee Performance Obligations
  - *Liblicense Model License Agreement with Commentary*, 2b and 5. Performance Obligations
  - *NELLCO Standard License Agreement*, VII. Licensee Performance Obligations
Licensor Performance Obligations

- **Issue:** From **Liblicense Model License Agreement with Commentary:** “At bottom, licenses are about the transfer of information from a licensor for use by a licensee and authorized users. The licensor’s core obligation is to provide digital materials in a usable form to the licensee. Often licensors make no express representations concerning their obligations under the agreement other than the obligation to “provide the licensed materials to the licensee” or to “provide licensee with access to the licensed materials”. To the extent that license agreements contain any statements about the licensor’s performance obligations, such statements are often included in clauses relating to the scope of the licensee’s authorized use of the materials. It is in the interests of both licensors and licensees that the agreement expressly provides adequate details concerning the performance obligations of the licensor.”

- **Tips:** Negotiate for the following:
  - Availability of Licensed Materials
  - Documentation
  - Support
  - Training
  - Quality of Service
  - Notification of Modifications of Licensed Materials
  - Completeness of Content
  - Notice of “Click-Through” License Terms or Other Means of Passive Assent
  - Compliance with Americans with Disabilities Act
  - Persistent Links
  - Withdrawal of Licensed Materials
  - Usage Data
  - Confidentiality of Personally Identifiable Information
  - Discovery.

- **Selected Sources of Suggested Language:**
  - The Library of Congress: Terms and Conditions for License of Electronic Resources, V. Performance Obligations

Mutual Performance Obligations

- **Issue:** From **Liblicense Model License Agreement with Commentary:** “Some obligations under a licensing agreement for digital information fall equally on both publishers and library licensees. An important mutual obligation is ensuring the confidentiality of user data. Both parties should want to protect the identity of users and how the information is used from outside parties. Publishers and libraries may also have an interest in collecting and disseminating aggregate information concerning the use of the licensed materials. This section provides language to satisfy both goals. Another common interest is ensuring that only the library and its patrons have access to licensed digital information. Especially during long term agreements, the parties may want to provide a means for libraries and digital information providers to work together in implementing new security protocols without having to renegotiate or amend the agreement.”

- **Tip:** The licensor should not assign responsibility to the licensee to monitor patrons’ usage or go beyond reasonable efforts (such as guaranteeing secure, commercially available authentication methods) to police activity of potential illegal uses or breaching activities.
Renewal

- **Issue:** Many contracts provide for automatic renewal under the same terms and conditions, provided that all parties have the right to terminate by giving notice. This means that doing nothing causes the contract to renew. Most licensees have many license agreements, each with differing termination dates. Unless licensees develop procedures to track termination dates and automatic renewal provisions, they are likely to end up with unwanted renewals. Generally, licensors can monitor approaching termination dates and give their licensees adequate notice that their contract will be renewed unless the licensor receives written notice otherwise.

- **Tips:** Modifying a clause to require the licensor to give notice of impending renewal would be preferable to turning the typical clause around to require the licensee to give notice in order to renew the contract. Most database and software users understandably resist this burden.

Privacy

- **Issue:** Privacy of users should be protected by the license language.
- **Tips:** Ensure that users know what personally identifiable information is transmitted to and stored by the vendor, and how that information is used.

**Selected Sources of Suggested Language:**

- Liblicense Model License Agreement with Commentary, 5.3. Mutual Performance Obligations
- NELLCO Standard License Agreement, V. Mutual Performance Obligations

**Preservation**

- **Issue:** Increasingly, legal publishers are abandoning printing in favor of selling digital access. Likewise, libraries continue to cancel print in favor of digital access to control costs. Research libraries have historically endeavored to keep earlier editions for historical research and legal citation purposes, but as print is retired, if legal publishers do not keep earlier editions of their secondary resources on their platforms, access to historical legal publication will no longer be available.

- **Tips:** Talk to your vendors about archiving their secondary sources on their platforms both prospectively and retrospectively and emphasize the importance of preservation.

**Selected Sources of Suggested Language:**


**Privacy**

- **Issue:** Privacy of users should be protected by the license language.
- **Tips:** Ensure that users know what personally identifiable information is transmitted to and stored by the vendor, and how that information is used.

**Selected sources of suggested language:**

- NELLCO Standard License Agreement, XX(1)(b): Confidentiality of User Data. Licensee's Confidential Information are any passwords or other user-identifiable information used by Licensee's users in accessing or registering for access to Licensor's product, all Server Logs compiled by Licensor that refer to Licensee or Licensee's users, and any data compiled by Licensor, automatically or otherwise, relating to usage of Licensed Materials by individual Authorized Users. Licensor shall hold the Licensee's Confidential Information in confidence...
and shall not disclose such Confidential Information to third parties nor use the Licensee’s Confidential Information for any purpose other than as necessary to perform under this Agreement and shall take adequate security measures to prevent unauthorized access to the Confidential Information. Raw usage data, including but not limited to information relating to the identity of specific users and/or uses, shall not be provided to any third party. Upon termination or expiration of this Agreement, Licensor shall return or destroy all of Licensee’s Confidential Information.

- **Other resources for more information:**
  - [Data Privacy and Library User Surveillance](https://library.libguides.com) (LibGuide) - University of Arizona Libraries

**Scholarly Sharing**

- **Issue:** Collaborative work between Authorized Users at the Licensee’s institution and others outside the institution may need to involve sharing access to licensed materials.
- **Tips:** Notify faculty of their ability to use certain electronic resources collaboratively PROVIDED they send canned notice (provided by library and taken from the language of the license) of restrictions on that use.
- **Selected sources of suggested language:**
  - NELLCO Standard License Agreement, Section III: j. Scholarly Sharing
  - Liblicense Model License Agreement with Commentary, Section 3.2 (g): Scholarly Sharing
  - CDL Model License Revised, Section IV: Scholarly Sharing
  - The Library of Congress: Terms and Conditions for License of Electronic Resources, Section III (B) (6): Scholarly Sharing

**Terms Incorporated into each Schedule and Purchase Order**

- **Issue:** Terms Incorporated into each Schedule and Purchase Order: The parties acknowledge and agree that these Terms are automatically incorporated into and made a part of each Purchase Order and each Schedule. In the event of any conflict between the provisions of these Terms and the provisions of any Purchase Order or Schedule, the provisions of these Terms shall control.
- **Tip:** Make sure the license you sign is the agreement that prevails even if it deviates from other Terms and Conditions that appear on the product’s website.
- **Selected sources of suggested language:**
  - The Library of Congress: Terms and Conditions for License of Electronic Resources, Section II (B): Terms Incorporated into each Schedule and Purchase Order

**Text & Data Mining**

- **Issue:** Authorized User may, for research purposes, want to use the data contained in a licensed resource in a way that involves manipulation that would normally be blocked by the publisher in their efforts to disallow systematic reproduction of the resource which could (a) damage the market for the resource, and (b) slow down the responsiveness of the system for other licensees or other Authorized Users.
• **Tips:** Communicate to faculty that bulk delivery of copied data from licensed resources for manipulation in the service of scholarly research and communication may be available for a fee and may require negotiation and agreement with the publisher. Be ready in advance with policy on payment source(s) for such fees.

• **Selected sources of suggested language:**
  - [NELLCO Standard License Agreement](#), Section III: g. Text and Data Mining
  - [Liblicense Model License Agreement with Commentary](#), Section 3.2 (j): Text and Data Mining
  - [CDL Model License Revised](#), Section IV: Text and Data Mining
  - [The Library of Congress: Terms and Conditions for License of Electronic Resources](#), Section III (B)(8): Text and Data Mining

**Usage Statistics**

• **Issue:** Libraries need to know how and how much a resource is being used in order to make an informed decision about the renewal, increasing access in case of too limited a user license (as evidenced by turnaways), or if there are any discovery issues.

• **Tips:**
  - Ask for explanation of usage metrics (e.g. how the page view was counted) if the usage is not COUNTER-compliant. Same term can be interpreted differently by different providers or conversely different terms can be used for the same type of information (e.g. sessions and log-ins can mean the same thing).
  - If you subscribe to multiple products on the same platform, usage statistics are separated by products (e.g. if multiple libraries are subscribed separately on HeinOnline, the usage statistics should be for individual libraries and not just a composite usage for the entire HeinOnline platform; unfortunately, Hein and many others do not do it yet.)
  - Both title-level and collection-level usage data should be provided for e-journal and e-book materials purchased as packages or collections (from TRLN Licensing Principles and Guidelines D.4.)
  - Inquire about the process of receiving usage statistics—such as SUSHI Protocol, pushing usage to your email, running usage on providers’ platforms or asking providers’ customer service representatives.
  - Remind vendors that low usage stats help librarians to know when they should promote a valuable, but under-utilized resource.

• **Selected sources of suggested language:**
  - [Liblicense Model License Agreement with Commentary](#), Section 5.1.q. Usage Statistics
  - [NELLCO Standard License Agreement](#), Section VI.d. Usage Statistics
  - [The Library of Congress: Terms and Conditions for License of Electronic Resources](#), Section V.A.15 & 16 Statistics (Includes Statistics Disclosure)

**List of Resources**

- **Voluntary Product Accessibility Templates (VPAT)**, Reaching Across Illinois Library System (n.d.).