



## Checklist for Negotiating License Agreements

This checklist identifies the terms and contractual considerations most likely to be encountered in negotiating a license agreement and, if appropriate, offers license recommendations. In some cases, more detailed considerations are outlined in the *Schedules* section.

This checklist is a modified version of COPPUL's *Checklist for Negotiating License Agreements*, created in April 2013.

### 1. Users

- All current students, faculty and staff (e.g., part--time, full--time, permanent, contract, adjunct, or visiting)
- Retired faculty and staff with Emeritus or equivalent status
- Alumni
- Walk--ins

### 2. Access

- Unlimited or concurrent users
- Remote access
- Authentication methods (e.g., IP ranges, username/password, Shibboleth, proxy server)

### 3. Uses

- Consider specifically referencing Canadian Copyright Act and Fair Dealing.
  - The fair dealing provisions of the Canadian Copyright Act can be modified by a negotiated contract. If a license agreement expressly acknowledges fair dealing or is silent as to how licensed materials may or may not be copied, fair dealing will apply, but if the parties agree to limitations on use that are more restrictive than would otherwise be permitted under copyright law, the licensee cannot later claim broader rights under Canadian law.
- Consider delineating permitted uses.
  - It can be argued that there is no need to list rights in the agreement that are granted under Canadian Copyright law or that setting forth a 'laundry list' of permitted uses, there is a risk of unintentionally losing certain rights that would otherwise be allowed under law. If the agreement must have a permitted uses list,

be careful that terms are broad enough to include all the uses the library patrons are likely to make of the licensed materials.

- Be aware that CONTU Guidelines or Section 108 of US Copyright Law do not apply to Canadian libraries. Consider removing any references.
- In certain circumstances it may be important to negotiate additional uses (e.g., Mash-ups, use in Massive Open Online Courses (MOOCs), data mining, document delivery).

#### **4. Obligations of the Licensor**

- Specify commencement and termination date of contract.
- Quality of service:
  - Server capacity and response time
  - Uninterrupted service
  - Downtime (advance notice, minimum inconvenience)
  - Compensation for non-conformance
- Detailed and accurate content information (e.g., differences from print versions; title lists, coverage periods)
- Notification of content changes and fee adjustment to account for any reduction in usability
- Persistent links to individual items, whether articles or chapters, within the licensed materials using OpenURL or DOI
- World Wide Web Consortium Standards (<http://www.w3.org/Consortium/>)
- Web Accessibility (assistive software or devices consistent with the Web Content Accessibility Guidelines)
- Documentation (end user and librarian)
- Support (end user and librarian)
- Training (end user and librarian)
- COUNTER-compliant usage reports
- MARC records / Metadata
- No click-through agreement

#### **5. Obligations of the Licensee**

- Provide notice of permitted and prohibited uses to authorized users.
- Agree to take reasonable efforts to correct misuse but do not agree to police users or take remedial action that is beyond the institution's authority.

#### **6. Mutual Obligations**

- Confidentiality of personally identifiable user data

#### **7. Renewal of License**

- Consider negotiating that a license automatically terminates unless notice is provided to the vendor to renew for another term.

- Renewal notices should be delivered to the Licensee with sufficient time to evaluate continued need and ensure any price change is reasonable. Consider specifying what constitutes sufficient time for your institution (e.g., at least 90 days).

## **8. Early Termination**

- Both parties should have the right to back out of the license under appropriate and defined circumstances
- In the case of a suspected or alleged breach, the licensee should be notified in writing and given a reasonable cure period before cancellation or litigation is contemplated.
- Consider including a cancellation clause specifying what constitutes reasonable notice for your institution (e.g., at least 90 days).
- Licensee will have a right to a prorated refund if the licensor breaches the contract
- Funding contingency “opt-out” clause

## **9. Post Cancellation Access**

- Perpetual access to paid content either through provider, licensee or third parties (e.g., LOCKSS) .
- Post-cancellation platform maintenance/access fee, if any, should be specified.

## **10. Archiving**

- Perpetual access: specify provisions for long-term access and archiving and identify responsibilities for these. Ideally, third party archiving should be allowed (e.g., Portico, CLOCKSS, LOCKSS, Scholars Portal).
- Subscriptions: specify if access to the licensed material will continue after the subscription period lapses, and under what conditions.

## **11. Representation and Warranties**

- Procure all necessary representations and warranties, including the licensor’s guarantee of the rights and permissions to license the digital information.
- Explicit description of content that falls outside of the licensor’s standard rights and permissions
- Compensation for non-conformance

## **12. Indemnification**

- Do not agree to indemnify the licensor for anything. Rather, the licensor should indemnify the licensee from certain claims, specifically for claims of copyright infringement related to the licensed content.
- Remedies
- No limitation on the monetary amount for which the publisher will indemnify the library.
  - Copyright infringement claims can be very expensive, even if no liability is found. Licensor typically limits the amount of compensation to be equal to the

license fee. The license fee would likely not be sufficient to cover the library's legal costs. It is very difficult/impossible to get licensor to agree to no monetary limitation.

- No time limit for making a claim

### **13. Restricted Functionality**

- Any limitations to use and functionality should not create an undue burden on the user and should not infringe on permitted use as defined in the agreement.
- Text and images should have very few restrictions on printing
- The file itself should be easy to use and access (e.g., each page should not be a separate file)
- Navigation between chapters should be easy
- No DRM restrictions that would interfere with the ability to download or copy under Fair Dealing.

### **14. Dispute Resolution**

- The license should provide for mediation or alternative dispute resolution which are less expensive and time-consuming than court litigation.
- Do not agree to a binding arbitration provision that would prevent the licensee from seeking a remedy in a court of law, if necessary.

### **15. Governing Law**

- Be aware of agreements that state jurisdiction is outside of Canada. If the licensor will not agree, then request to delete this clause.

### **16. Assignment**

- Prior written consent by either party should be required.
- Although the need for the licensee to assign the agreement to another entity is unusual, the licensee should ensure that a provision is included in the agreement.

### **17. Non-Disclosure Statements**

- Strike out any non-disclosure language, particularly language that would preclude sharing pricing and other significant terms and conditions with other consortia.

### **18. Notices**

- In writing and signed by both parties
- Delivery (registered mail, fax, or email)

### **19. Integration**

- Assert that the agreement in hand represents the entire agreement between the parties

## 20. Amendments

- No modification unless signed by both parties.
  - 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 (e.g., 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.

## 21. Force Majeure

- Address Force Majeure and consider specifying that server failures, software glitches, or disputes with copyright owners do not constitute Force Majeure.
  - Force Majeure literally means “greater force”. These clauses excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract (e.g., natural disasters, wars, labour disputes, etc.)

## 22. Schedules

This is the place to give very specific listings of items covered in the license. It is easier to modify a schedule than the whole contract, should any need for change arise.

### a. Content

- Title lists and coverage years including clear statements about embargo periods
- Effective date/Subscription period: Is the license granting permanent use of the content or access rights only for a defined period of time?
- Licensor should supply KBART compliant and up-to-date title lists to designated link resolver service providers (e.g., GODOT, Summon, Ex Libris).

### b. Access and Accessibility

- Remote access to authorized users
- Authentication mechanisms
- Platform independent
- Display formats (XML, HTML, PDF, SGML)
- User navigation and tools
- Offline reading options
- Ability to migrate locally hosted content to new formats
- Indexing and linking capabilities (e.g., integration with ILS and discovery systems)
- Alternative access formats for persons with disabilities
- Appropriate metadata (MARC records, URLs, etc.)
- Allows fair use of information, including ILL, as per Fair Dealing exceptions

**c. Pricing**

- One-time Purchase / Annual or Multi-Year Lease
- List price
- Consortium discounts
- Multi-year pricing
- Annual hosting fee
- Renewal price cap
- New subscribers allowed with prorated pricing
- Currency (CAD, USD, etc)
- Central invoicing
- Applicable taxes

**d. Usage Statistics**

- COUNTER compliant
- Delivery mechanism
- Frequency
- Granularity
- Consortia summaries and individual institution statistics
- Supports SUSHI

**e. Access to Archive**

- Post subscription
- Post vendor/publisher change
- Participation in archive services (Portico, LOCKSS, Scholars Portal)
- Participation in Transfer Protocols

**f. MARC Records / Other Metadata Options**

- Availability
- Cost
- Process for downloading
- Cataloguing standard (e.g., AACR2, RDA, etc.)

**g. Training**

- Access to training materials
- Online documentation (webinars, user guides, etc)

**h. Customer Service**

- Technical support available electronically and via toll-free telephone number
- Turn-around time for technical queries