Licensing Best Practices for
Orbis Cascade Alliance & Member Institutions

Draft for Member Review: June 2020

Purpose

The following set of Licensing Best Practices are intended to provide an overarching framework for the Alliance and its Member Libraries as they engage in both consortial and individual decision-making of licensed resources. We strive towards openness and transparency in our communication with all of our stakeholders and vendors. We reinforce long established norms of collaboration and sharing among libraries and scholars. We seek to maintain our productive communication with our vendors and publisher partners through our open sharing of these practices.

Sections that are designated as "required" are essential to achieving our collective goals of openness and transparency, collaboration and productive communication, and supporting the teaching and research needs of our individual institutions.

Contents

Purpose

Contents

General Notes

Key Definitions

Agreement Terms

Authorized Use/Copyright [Required]

Usage Rights [Required]

Interlibrary Loan [Deal Breaker]

Coursepacks, Electronic Reserve, and Electronic Learning Environments [Required]

Scholarly Sharing

Text and Data Mining [Required for Research Institutions]

Author Rights to Use Their Own Work

Unauthorized Use [Highlighted Liability Clauses are a Required condition]

Usage Data

Accessibility Requirements [Required]
Discovery of Licensed Materials

Open Access Option [Important consideration of institutions with OA campus policies or publishing of OA content]

Transfers of Content from One Licensor to Another

Authentication [Required]

Cost Increases [Required]

Fiscal Exigency/Failure to Appropriate Funds [Required]

Force Majeure

Privacy [Required]

Nondisclosure [Required]

Indemnification [Required]

Governing Law [Required]

General Notes

The language in these best practices is based in part on examples from:

- Big Ten Academic Alliance (BTAA)
- California Digital Library (CDL),
- Canadian Research Knowledge Network
- City University of New York (CUNY)
- Greater Western Library Alliance (GWLA)
- Liblicense Model License Agreement
- Library of Congress
- NELLCO Law Library Consortium
- Ringgold
- SCELC
- University of Washington

Across the board, these best practices recommend against use of **Indefensible Performance Terms**:

- Eliminate terms such as, “ensure,” “best efforts,” “all means available,” “warrant,” or “guarantee.” Use instead “reasonable.”
Key Definitions

**Licensor:** Company/provider/publisher licensing the material and their address/contact information.

**Licensee:** Orbis Cascade Alliance (The Alliance) and/or individual Alliance members and/or non-member affiliates.

**Authorized Users (Allowing each institution to define who is an authorized user):**

All current affiliated full- or part-time students, staff, and faculty of a member institution (whether on a permanent, temporary, contract, or visiting basis), regardless of the physical location of such persons. Authorized Users include those persons who are granted library user privileges according to the policies of the member institution, including but not limited to retired faculty and staff or alumni. Authorized Users also include individual members of the public (walk-in users) while they are physically on the premises of a Member. For the avoidance of doubt, walk-in use is intended for individual users, not as a substitution for a license by another institution.

**Site:**

An institution site is defined as a centrally-administered entity, including a single point of contact for ordering and payment of resources by a given institution. If the Licensee has one or more campuses which are administered centrally by the Licensee, persons affiliated with those campuses will also be considered Authorized Users. However, if a Licensee has one or more campuses which are administered individually, each location may be considered a separate site.
Agreement Terms

Authorized Use/Copyright [Required]
Licensee(s) and Authorized Users may all make use of the Licensed Materials as is consistent with the Fair Use Provisions of United States and international copyright laws.

In the event that any content included in the Licensed Materials is in the public domain or has been issued under a Creative Commons or other open license, Licensor shall not place access, use, or other restrictions on that content beyond those found in the open license, where applicable.

Usage Rights [Required]
Licensee and Authorized Users may electronically display, download, digitally copy, and print a reasonable portion of the Licensed Materials. Licensee and Authorized Users may extract and use, with appropriate credit, excerpts from the Licensed Materials for academic research, scholarship, and other educational purposes, including extraction and manipulation for the purpose of illustration, explanation, example, comment, criticism, teaching, research, and analysis.

Interlibrary Loan [Required]
Licensee may fulfill requests, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in accordance with Sections 107 and 108 of the U.S. Copyright Act and interlibrary loan guidelines and practices. Requests may be fulfilled using secure electronic, paper, or intermediated means.

Coursepacks, Electronic Reserve, and Electronic Learning Environments [Required]
License(s) and Authorized Users may incorporate reasonable portions of the Licensed Materials in printed and electronic Course Packs, Electronic Reserve collections, or other educational materials for use of Authorized Users in the course of instruction at a member institution, and/or in electronic learning environments hosted on a secure network, but not for commercial use. Each such item shall carry appropriate
acknowledgement of the source. Coursepacks in alternate formats may also be offered to Authorized Users that require accessible formats.

Licensee(s) may create persistent links to Licensed Materials for access by Authorized Users from within Secure Networks.

**Scholarly Sharing**

Authorized Users may provide, by paper or electronic means, a single copy of an individual document being part of the Licensed Materials to a colleague who is not an Authorized User for Scholarly and Educational Use, but in no case for Commercial Use.

**Text and Data Mining (TDM) [Required for Research Institutions]**

Licensee(s) and Authorized Users may use the Licensed Materials to perform and engage in text and/or data mining activities within the context of scholarship, research, and other educational purposes. Licensee(s) and Authorized Users may 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, Licensee(s), 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, within reasonable limits.

**Author Rights to Use Their Own Work**

Notwithstanding any terms or conditions to the contrary in any author agreement between authors and Licensor, authors who are Authorized Users of Licensee ("Authors") whose work ("Content") is accepted for publication by Licensor during the Term shall retain the non-exclusive, irrevocable, worldwide, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the final published version of 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. Member libraries of the Licensee will be allowed to make these articles available from their respective institutional repository service in perpetuity.
Licensee(s) and Licensor shall cooperate in the implementation of procedures for Licensor to deposit Content into Licensee’s institutional repository, or to make the Content available for Licensee to harvest, as they are developed during the term of this Agreement.

Unauthorized Use [Highlighted Liability Clauses are Required Condition]

Licensee(s) will use reasonable efforts to restrict access to the Licensed Materials to Authorized Users.

Except as specifically provided elsewhere in these Terms, Licensee(s) shall not knowingly permit anyone other than Authorized Users to access the Licensed Materials. Licensee may not remove, obscure or modify any copyright or other notices included in the Licensed Materials.

Licensee(s) may not use the Licensed Materials for commercial purposes, including but not limited to the sale of the Licensed Materials, fee-for-service use of the Licensed Materials; nor may Licensee impose special charges on Authorized Users for use of the Licensed Materials beyond reasonable printing or administrative costs. For the avoidance of doubt, research conducted by Licensee and Authorized Users that is supported by a commercial entity shall not be considered use for commercial purposes.

The Licensee shall not be held liable for any unauthorized uses of Licensed Materials by the Licensee(s’) users or by any Authorized users, and such use shall not be deemed a breach of these Terms. Additionally, Licensor shall not cancel or suspend access to and/or use of Licensed Materials as a result of unauthorized uses without first allowing remediation by the Licensee(s). If either party is aware of any unauthorized uses, that party will promptly notify the other party of such uses and the parties will cooperate to address such unauthorized uses.

Usage Data

Licensor shall provide to Licensee(s) monthly usage statistics for the Licensed Materials. Statistics shall meet or exceed the most recent Project COUNTER Code of Practice Release for individual institutions and for consortia.

Usage data should be made available on-demand via a web-based portal and accessible via SUSHI. Usage data for any given month should be made available no later than the 28th of the following month.
Accessibility Requirements [Required]

Licensor shall comply with the Americans with Disabilities Act (ADA) and sections 504 and 508 of the Rehabilitation Act; and State Laws regarding accessibility, by supporting assistive software or devices in compliance with guidelines such as Web Content Accessibility Guidelines(WCAG) 2.1, Level AA or higher. For the avoidance of doubt the most current WCAG guidelines must be utilized. http://www.w3.org/WAI/guid-tech.html

If the licensed product or any of its contents does not comply with applicable law(s), the Licensee will request that the Licensor make needed accessibility modifications to support Authorized Users and/or provide accessibility modifications within an agreed upon implementation schedule. Should the Licensor decline to make such modifications, Licensee(s) may alter or modify the Licensed Materials as necessary to provide an equivalent level of access to Authorized Users with disabilities.

Upon request, the Licensor shall provide to Licensee a current completed Voluntary Product Accessibility Template (VPAT) to declare and explain the degree to which the Licensor’s product conforms to applicable accessibility standards.

Licensor shall indemnify, defend, and hold the University, the respective State, and their respective Trustees, Employees, agents, and servants harmless for any fines, penalties, expenses, or awards related to any claims related to failure to maintain ADA compliance, including attorneys’ fees, and requests for accommodations."

Discovery of Licensed Materials

Licensor shall make the Licensed Materials available through Licensee’s Discovery Service System(s) for indexing and discovery purposes. Licensor shall provide to Licensee’s discovery service vendors on an ongoing and timely basis the citation and complete descriptive metadata (including all subject headings, abstracts, and keywords), and full-text content necessary to facilitate optimal discovery and accessibility of the content for the benefit of Licensee and Authorized Users. Discovery Service Systems are defined as user interface and search systems for discovering and displaying content from local, database and web-based sources.

Persistent Linking. Licensor will comply with the most current version of the OpenURL standard (ANSI/NISO Z39.88), and will provide a mechanism for persistent links to content and allow for third party link checking mechanisms to be used.
Open Access Option [Important consideration regarding institutional OA policies or publishing of OA content]

In the event that Licensor offers an open access option to its authors, Licensor will report to Licensee(s) [annually] the number of works (such as articles) published under the open access option by all authors, and the number and list of the works by title with full citations by authors at the Licensee’s institution.

Licensor will enter into good faith discussions with Licensee concerning mechanisms by which the open access publication fees received by Licensor can offset the fees paid by Licensee and other subscribers of Licensed Materials, with a goal of reducing such fees in proportion to the revenue received through such open access publication fees.

Transfers of Content from One Licensor to Another

In cases where content transfers from one scholarly Licensor to another, the rights of access provided by an original Licensor to Licensee(s), especially to post cancelled content, will be honored by the current Licensor.

Authentication [Required]

Authorized users shall be identified and authenticated by the use of Internet Protocol (IP) addresses provided by licensee to licensor.

The use of proxy servers is permitted as long as any proxy server IP addresses provided limit remote or off-campus access to Authorized Users [only].

Licensor will use reasonable efforts to provide authentication methods that conform to current industry standards, and will cooperate with Licensee in the implementation of new authentication protocols and procedures as they are developed during the term of this Agreement.

No modification to access of resources will be made without first a thirty (30) day announcement of the proposed changes to be made and a reasonable response time allowed for a Licensee to agree and adopt the new access mode employed.

The Licensor will notify the Licensee(s) at least ninety (90) days in advance of any anticipated specification change applicable to the Licensed Materials. If the changes render the Licensed Materials less useful in a material respect to the Licensee(s), the Licensee(s) may within thirty (30) days of such notice treat changes as a breach of this License.
Cost Increases [Required]

Notification of price increases:

Regardless of price increase amount, Licensor is expected to provide Licensee with a price list for all Licensed Materials no less than 30 days prior to the end of the current term.

- If Licensor is increasing costs by more than 2% for a multi-year deal, they must provide Licensee with a price list for all Licensed Materials no less than 90 days prior to the end of the current term.
  -OR-
- If Licensor is increasing costs by more than 2% for an annual year deal, they must provide Licensee(s) with a price list for all Licensed Materials no less than 45 days prior to the end of the current term.

Licensor further agrees that Fee increases in subsequent years of the terms of the License shall not exceed 2% over the preceding year’s Fee.

Fiscal Exigency/Failure to Appropriate Funds [Required]

Participating members may terminate their participation in the agreement if sufficient funds are not made available by their respective institutions for the purpose of this agreement. In the event of such financial circumstances, Licensee agrees to notify Licensor of the intent to terminate the Agreement as soon as is reasonably possible, but in any case, no less than 90 days prior to the next payment date. In the event of such termination the Licensee shall maintain its perpetual right to materials licensed under the subscription periods for which it has fully paid.

In the case of reduced budgets during the fiscal year, or funding otherwise becoming not legally available, including but not limited to any given institution’s budget remaining flat, participant Institution(s) may request mitigation of a multiyear agreement for the remaining years of the Term without prejudice against other member sites.

Force Majeure

Neither party shall be liable for damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to war, strikes, fires, floods, pandemics, acts of God, governmental restrictions, power failures, or damage or destruction of any network facilities or
servers, insurrections, and/or any other cause beyond the reasonable control of the party whose performance is affected.

Neither party shall be liable for any failure or delay in performance under this Agreement (including delay in the payment of money due and payable hereunder) to the extent said failures or delays are proximately caused by causes mentioned above that are beyond that party’s reasonable control and occurring without its fault or negligence, including, without limitation, failure of suppliers, subcontractors, and carriers, or party to substantially meet its performance obligations under this Agreement, provided that, as a condition to the claim of nonliability, the party experiencing the difficulty shall give the other prompt written notice, with full details following the occurrence of the cause relied upon. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

Privacy [Required]

Licensor shall not, without the prior written consent of the Licensee(s) transfer any personal information of any Authorized Users to any non-affiliated third party or use it for any purpose except as is necessary to perform the Services in compliance with applicable State & Federal laws and institutional regulations, including the Family Educational Rights and Privacy Act ("FERPA").

Licensor agrees to maintain the confidentiality of any personal identification data relating to the usage of the Licensed Materials by Licensee(s) and its Authorized Users. Such data may be used solely for purposes directly related to the Licensed Materials and may only be provided to third parties in aggregate form. 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. Vendor will maintain current data security management practices that follow established standards and will notify Licensee in the event of any data breach occurring.

Nondisclosure (NDA) [Required]

Nondisclosure agreements (or NDAs) preclude the ability to achieve fairness and openness in the electronic resources acquisition process. Because confidentiality clauses prevent libraries from communicating with others about pricing and the terms and conditions of use, vendors should not restrict us from sharing information with our stakeholders and colleagues.

Orbis Cascade Alliance will not enter into vendor contracts that require nondisclosure of pricing information or other information that does not constitute a trade secret. The Alliance endorses, therefore, the position of the Association of Research Libraries that its member libraries should not sign (or accept new or revised) agreements that include confidentiality or nondisclosure clauses.
Since the Alliance includes many public institutions, we have an obligation to our representative States for transparency in our collections spending. We are therefore unable to sign agreements that restrict the public dissemination of terms, including, but not limited to, pricing details.

The Alliance will share upon request information contained in these agreements (save for trade secrets or proprietary technical details).

**Indemnification** [Required]

[Alliance preference is to strike indemnification clauses completely. If this clause must remain according to a Licensor’s legal team, make sure it covers both Licensee and Licensor, as follows.]

The Licensor shall indemnify and hold harmless the Licensee(s) and Authorized Users for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney’s fees, that arise from any third party claim that alleges copyright infringement or other intellectual property infringement arising from the use of the Licensed Materials by the Licensee or any Authorized User. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION. This Section shall survive the termination of this Agreement.

**Governing Law** [Required]

*The Orbis Cascade Alliance cannot accept a governing law clause due to the fact we cover three States at this point and usually has this struck from the agreement.*

This Agreement shall be interpreted and construed according to, and governed by, the laws of [enter venue convenient to Licensor and Licensee(s)].