

# ACADEMIC CONSORTIA LICENSE

## Commentary and guidance on use

### 1. The first step

- 1.1 Download both the license text and this commentary. You will need both to complete the license. You will need to refer to both documents as you work through the license text, so you may find it helpful to print them out and mark up the license before making changes to the text on your PC.

### 2. General remarks

- 2.1 This license and commentary use American English (e.g. 'center' for 'centre' and 'license' for the noun 'licence'). If you wish to change them, you should use your Spellchecker or Find & Replace function when you have finished.
- 2.2 This license can be used as a guide to negotiation, in order to highlight issues that need discussion and agreement. You may wish to list the issues of substance, and your negotiating position on each, before you start. By all means use the license as an agenda, if you prefer.
- 2.3 The license is designed to provide the words you will need to express the agreement you have reached, once your negotiations have been completed, all the business issues have been resolved. As there are no set solutions to any of the business issues, the text contains optional and alternative wording throughout. Read the text carefully and select the text appropriate for the terms you have negotiated.
- 2.4 The use of words in square brackets - [ ] or { } indicates optional wording that may be included or omitted, or where two or three alternatives are provided for.
- 2.5 Please remember that if you are uncertain about what to do, seek legal advice from a professional.

### 3. 'Tight' or 'informal' consortium?

- 3.1 This license has been drafted with 'tight' consortia in mind - i.e. where the consortium itself is a legal entity with the power to bind members of the consortium by virtue of its status. If the consortium is looser or a more informal association of participants, it is important that each separate member signs the license for itself. There are alternatives in the text to provide for this. It is recognised that the distinction drawn between 'tight' and 'loose/informal' consortia is somewhat simplistic; it is important to ensure that the consortium signatories to the license are entitled to sign on behalf of the consortium and its members. If in doubt, seek formal legal advice.

### 4. Clause by clause commentary: specific points of issue

#### *Clause*

#### *Commentary*

Preliminaries Complete the date and the full names and addresses of the Publisher and the Consortium. If it is an 'informal' consortium, insert the lead contact and add after the address "and Members of the Consortium who are listed in Schedule 1 and who are parties to this License".

- 1.1 **Authorized Users** includes an optional definition of 'walk-in users' at the end, for those restricted to access in the library itself. This may include alumni, local business users or members of the public, and should reflect current library policy. Both parties need to be clear about who has access.

Note that the **Licensed Materials** may include ancillary materials provided by the Publisher to support the journal content in the Licensed Materials. If access and usage of ancillary materials is not to be provided, or is irrelevant to the License, the words within the brackets [ ] should be deleted.

**Members** are bound by the terms of the License as if they had each been signatories. If the Consortium is 'informal', and each Member is to sign the License, delete [if it were].

**Subscription Period** is a definition applicable when the License is modelled on a 'traditional' journal subscription model. If the License is a 'pay-TV' model, where access to the Licensed Materials is for a set period, this should be deleted; in such a case, see clauses 2.2 and 2.3 as well.

- 2.2 This provides two alternatives:
- The first is based on the 'traditional' journal subscription model, giving continuing rights of access to the volumes purchased; the definition of **Subscription Period** and clause 2.3 should be retained.
  - The second is based on access for a period of time to all files - the pay-TV model. If this alternative is chosen, the definition of **Subscription Period** and clause 2.3 may not be applicable; Schedule 2 should also be adjusted.
- 2.3 Applies where the 'traditional' journal subscription model is the basis of the License; select the format for continuing access from the options. The provision for further payment is optional, and the words "[subject to the payment of such fees as the parties may agree]" should be deleted if continuing access is provided free of charge. Note that:
- a) the exception for breach by the Consortium is optional. It reflects the good faith basis of any intellectual property license. It is up to the parties in negotiation to discuss this and agree on its retention or deletion.
  - b) the exception does not operate in the case of bankruptcy or composition with creditors (10.1.3).
  - c) the proviso at the end of 2.3 is optional. It provides for continuing access to Licensed Material published and paid for up to the date of breach, even though the breach is by the Consortium, on the principle that what has been bought should be retained. Retain or delete as appropriate.
- 3.1.1 & 3.1.2 Only apply if the journals are mounted locally - see also 6.1.2 and 10.3.
- 3.1.3 Use the options to reflect the technical solution you have agreed.
- 3.1.5 Will the index provide abstracts? Include or delete as appropriate.
- 3.2.5 Note that US law allows the distribution of single copies to students for teaching purposes under fair use.
- 3.2.6 This sub-clause facilitates the use of individual articles within “collaboratories” or “virtual research environments” for the purposes of scholarly collaboration between scholars and researchers based in different institutions.
- 3.3 These alternatives are drafted to cover the UK, the US and other jurisdictions. You may feel that the third option covers both parties' requirements.
- 4 Three alternatives cover the issue of supplying copies to other libraries:

- the first allows electronic files to be used to generate paper copies for supply to other libraries. Note the optional limitation to the country in which the Consortium and its Members are based; this should be included or deleted as appropriate.
  - The second allows copies to be sent electronically as well as on paper. The same optional limitation to the country of supply is in { } brackets and should be included or deleted as appropriate.
  - The third prohibits the supply of copies to other libraries using the electronic files under the License.
- 5 There are two alternatives covering course pack and electronic reserve / Virtual Learning Environment usage. Delete the inappropriate clause, and ensure you deal with the other optional words in the selected clause.
- 7.2.1 The License should specify which authentication method is to be used: IP address, Athens (the UK authentication system, which has been adopted in other countries), or Shibboleth; ensure that Schedule 1 is also completed accordingly. Select the notice period required - or any alternative you may have negotiated.
- 7.2.2 This clause addresses the issue of availability - before print, on the print publication date, or within an agreed period of the print publication date. Select the appropriate wording and specify the number of days where {XX} appears.
- 7.3 This clause covers non-performance by the Publisher; it is optional.
- 7.4 Select one of the two alternatives in the second part of the clause to reflect what has been agreed as a consequence of withdrawal.
- 7.5 This (optional) clause commits the Publisher to assume responsibility for archiving - i.e. long-term preservation of the Licensed Materials. If the Publisher has more specific detailed arrangements and it is agreed that these should be recorded in the License, then the wording of 7.5 should be replaced or amended as appropriate.
- 7.6 This clause deals with usage data. Select the appropriate alternatives on the nature of the data and the frequency of its provision. Ensure that the parties are clear on where the responsibility lies for collecting such data and, if necessary, adjust the text accordingly. The reference to 'data protection' laws applies in the European Union and certain other jurisdictions - not the USA; delete if appropriate.
- 7.7 This clause is a standard provision that the materials are supplied 'as is'. Under US law, it **MUST BE PRINTED IN UPPER CASE**.
- 7.8 This clause limits the Publisher's liability to the value of the license, and disclaims liability for consequential or indirect loss. This sort of limitation is a common device in commercial contracts. However, if this license is being made with a public institution, such a clause may be unacceptable for constitutional reasons; many public institutions, including universities, in many US states are legally unable to accept such limitations. Check on the position. In any case, under US law, it **MUST BE PRINTED IN UPPER CASE**.
- 8.1.3 If access is controlled by IP address, delete.
- 8.1.4 Note that this clause requires libraries to pass to the Publisher only the information necessary to activate access under the License, and no more.

- 8.2 This indemnity clause is optional, as it may not be lawful in some countries or states that preclude public institutions giving indemnities (as with 7.7 above). In any case, under US law, it **MUST BE PRINTED IN UPPER CASE**.
- 8.3 Select whether the renewal Fee is payable 30 or 60 days before or within 30 or 60 days of the start of the Subscription period, or simply within 30 days of receipt of invoice. If payment is not a condition of the License coming into effect, delete the words in [ ].
- 10.1.1-4 The intention behind sub-clauses 10.1.1-10.1.4 is to define when automatic termination takes place in the case of serious breach. In 10.1.1, select 30 or 60 days as the period in which non-payment has to be rectified.
- 10.3 The second part of the clause in brackets should be deleted except where the Licensed Materials are to be mounted locally. Note that the consequences are:
- a) in the case of breach by the Publisher, continuing access is maintained under clause 2.3, and the Publisher must refund the 'unused' balance of the Fee.
  - b) If the Consortium wilfully fails to pay the Fee (10.1.1) or is in 'wilful, material and persistent' breach, access to the Licensed Material ceases on termination, unless the parties agree that access to Material published and paid for up to the time of breach shall continue (as set out in the optional proviso at the end of 2.3. For a breach to trigger automatic termination, it must be deliberate and serious.
- 11.1 This is an important 'boilerplate' provision. Neither party can rely on any statements made by the other unless they are included in this license. It is included because it makes both the publisher and the library explicitly record every aspect of the license, so that there is clarity if any issue arises between them afterwards.
- 11.4 Note the words relating to best endeavours in brackets [ ], which are optional. Retaining or deleting them depends on the 'strength' of the Publisher's undertaking and what is practical when a journal title changes hands - sometimes because the society that owns it changes publisher.
- 11.9 The vexed question of jurisdiction! Some public institutions are legally unable to agree to any other jurisdiction but their own country or state. Note that it is optional.
- a. Where both the Publisher and the Licensee are based in the same state or country, this provision is superfluous as that state's or country's laws will apply automatically. The clause can then be deleted;
  - b. Where the Publisher and the Licensee are based in different states, or provinces or countries, **IT IS IMPORTANT** to specify the jurisdiction. This avoids argument over which law should apply in the case of a dispute that can lead to preliminary litigation to establish which jurisdiction, or set of legal rules applies to the dispute. Note that many public institutions, including universities, cannot accept any jurisdiction other than their own. It has become generally accepted that, if this is an issue, the Licensee's jurisdiction should apply.
  - c. It should be noted that many international organizations cannot accept the particular jurisdiction of any state. They are established under international treaties and cannot accept or 'favor' any particular jurisdiction. Examples include the United Nations and its agencies (WHO, UNSECO, FAO etc), OECD, Asian Development Bank, IMF etc). Only in such cases should this jurisdiction clause be deleted.

- Signature      If the Consortium itself is a legal entity and empowered to sign for and bind all the Members, delete signature provision for Members. If it is a loose or informal consortium, Members should sign, and the signature section should be replicated and completed by each Member.
- Schedule 1      Complete with the details requested for each Member of the Consortium.
- Schedule 2      Complete with all the details requested, title by title, and include the access method.
- Schedule 3      This is important in relation to walk-in users who enjoy access within Members' libraries but not remotely.

*Version 4.0*

*Oct 6 2009*