

PUBLIC LIBRARY LICENSE

Commentary and guidance on use

1. The first step

- 1.1 Download both the license text and this commentary. You will need both in order 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. Clause by clause commentary: specific points of issue

Clause *Commentary*

Preliminaries Complete the date and the full names and addresses of the parties.

- 1.1 The wording in the definition of **Library Staff** provides optional wording for access from outside the Library Premises themselves, for instance, if their offices are based in another non-library building; if this is not required, delete it. **Patrons** are restricted to access in the library itself. These may include, 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.

Subscription Period is defined with reference to the “traditional” journal subscription model.

Text Mining is included in the definitions. If it is irrelevant to the License, it should be deleted, and clause 3.2.3 should be deleted at the same time.

- 2.3 The ‘traditional’ journal subscription model is the basis of the License; continuing access is provided free of charge. Note the exception for breach by the Licensee:
a) the exception does not operate in the case of bankruptcy or composition with creditors (9.1.3).
b) 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 Licensee, on the principle that what has been bought should be retained.
- 3.1.1 & 3.1.2 Only apply if the journals are mounted locally – see also 5.1.2 and 9.3.
- 3.2.3 If text mining is irrelevant or unwanted, delete this sub-clause.
- 3.3 This is drafted to cover the UK, the US and other jurisdictions.
- 4 Three alternatives cover the issue of supplying copies to other libraries (inter-library loan):
- 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 Licensee is 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.
- 6.2.1 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.
- 6.2.2 This clause addresses the issue of availability – before print or on the print publication date. Select the appropriate wording and specify the number of days where {XX} appears.
- 6.3 This clause covers temporary non-performance by the Publisher; it is optional.
- 6.4 Select one of the two alternatives in the second part of the clause to reflect what has been agreed as a consequence of withdrawal.
- 6.5 This clause commits the Publisher to assume some 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 6.4 should be replaced or amended as appropriate.
- 6.6 This clause deals with usage data. Ensure that both parties are clear on which one is assuming responsibility for collecting the 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. If there is no Agent involved in representing the Consortium, delete the words referring to the Agent in [].
- 6.7 This clause is a standard provision that the materials are supplied ‘as is’. Under US law, it **MUST BE PRINTED IN UPPER CASE**.

- 6.8 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, as is typical of public libraries, such a clause may be unacceptable for constitutional reasons; many public institutions 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**.
- 7.1.5 Note that this clause requires libraries to pass to the Publisher only the information necessary to activate access under the License, and no more.
- 7.2 The first part of this clause, which is within square brackets [], is an indemnity clause, and is optional, as it may not be lawful in some countries or states that preclude public institutions giving indemnities (as with 6.7 above). In any case, under US law, it **MUST BE PRINTED IN UPPER CASE**.
- 7.3 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 or 60 days of receipt of invoice. If payment is not a condition of the License coming into effect, delete the relevant words in [].
- 9.1-9.4 The intention behind sub-clauses 9.1.1 to 9.1.4 is to define when automatic termination takes place in the case of serious breach. In 9.1.1 select 30 or 60 days as the period in which non-payment has to be rectified.
- 9.3 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 Licensee wilfully fails to pay the Fee (9.1.1) 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.
- 10.1 This is an important 'boilerplate' provision. Neither party can rely on any statements made by the other unless they are included in this licence. It is included because it makes both the publisher and the library explicitly record every aspect of the licence, so that there is clarity if any issue arises between them afterwards.
- 10.8 The vexed question of jurisdiction! Some public institutions are legally unable to agree to any other jurisdiction but their own country or state. There are two points to note:
- 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 public libraries, 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.

Schedule 1 Complete with all the details requested, title by title.

Schedule 2 This is important in order to provide access to users at all the library premises or branches, while preventing unauthorised access.

Version 4.0

Oct 6 2009