



Negotiating licenses for electronic resources

International Agency for Research on Cancer
Lyon, France

Teresa Lee
Knowledge Manager
leet@iarc.fr

[International Agency for Research on Cancer](http://www.iarc.fr)



Workshop agenda

Licensing language (Technical)

Internal processes and workflows (Tactical)

Negotiation best practices (Strategic)

Negotiating price

Consortial negotiation

Case studies

Licensing language

License = permission that grants rights to do something, without which the action would be illegal

= also known as license agreement, agreement, contract

List as many clauses or elements of a license for e-resources as you can think of.

Digital licensing clauses checklist

- Preamble
- Parties to the agreement
- Definitions
- Content Covered by the Agreement
- Rights Granted/License
- Sublicenses
- Interlibrary Loan
- Fair Use, Fair Dealing, Creative Commons, and Open Access
- E-Rights
- Usage or Authorized Uses
- Usage Restrictions
- License Fee/Payment
- Licensor Obligations
- Delivery and Continuing Access to the Licensed Content
- Support and Documentation
- Licensee Obligations
- Monitoring Use
- Moral Rights
- Credits
- Territory
- Authorized Users
- Authorized Site
- Copyright Ownership
- Duration of Grant of Rights (Term of Agreement)
- Automatic Renewal
- Termination
- Archiving and Perpetual Access
- Disclaimers
- Warranties
- Indemnity and Limitation of Liability

Checklist continued: boilerplate clauses

- Alternative Dispute Resolution (ADR)
- Amendments
- Binding Effect
- Confidential Information
- Currency
- Entire Agreement
- Force Majeure
- Governing Law
- Independent Parties
- Interpretation
- Notice
- Remedies
- Severability
- Signature
- Survival
- Transferability or Assignment
- Waiver

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Digital licensing language

COPPUL checklist
(COPPUL – a Canadian regional consortium)

LIBLICENSE model licenses

(also LIBLICENSE listserv)

SERU: Shared Electronic Resource Understanding



Checklist for Negotiating License Agreements

This checklist provides a tool to identify the most common terms and contractual obligations that are likely to be encountered in negotiating a license agreement and to help safeguard that important aspects are not forgotten or overlooked. Provisions that might be important to include in certain unique circumstances and are not part of the generic COPPUL Model License are also listed.

1. Users

- All current students, faculty and staff (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 user
- Remote access
- Secure network
- Authentication

3. Uses

- Specifically reference Fair Dealing. It's important to keep in mind that the fair dealing provisions of the Copyright Act can be modified by a negotiated contract. If a

Potential pitfalls (from legal counsel point of view)

- Monitoring Use: Library held accountable for user behavior
- Indemnity: library agrees to indemnify the vendor
- Change without notice
- Governing law
- Additional terms brought in by reference

Potential pitfalls (from librarian point of view)

- Authorized users, esp. terms re: multi-sites, including hospitals and clinical faculty
- Unreasonably restrictive on uses: more restrictive than what Fair Dealing/Fair Use would allow
- Perpetual/post-cancellation access
- Serials "moving wall"
- Dual hosting
- E-book rental models

Licensing language: key points

- Make sure you understand *all* of the language and that the definitions make sense to you. Definitions should be applied clearly and consistently.
- If you don't understand, consult someone in your organization, or ask the vendor.
- Beware of licenses that bring in other terms *by reference*. You are essentially agreeing to these terms.
- Some licenses are very difficult to negotiate by virtue of their delivery mechanism (shrink-wrap/click through). If in doubt, pursue clarification *before* clicking through and using the e-resource.

Internal processes and workflows

- Define roles and responsibilities: Whose job is it to negotiate licenses in your institution? To sign licenses? To deal with vendors? To represent your organization in consortia?
- Determine needs of your many stakeholders
- Develop a relationship with and set up access to legal counsel: What are the licensing dealbreakers? What to do when vendors unwilling to bend?
- Develop relationship with vendors, consortia and other negotiation partners.
- Clarify licensing principles: Formulate a licensing policy and related policies.
- Strengthen internal workflows and procedures re: e-resources lifecycle.

What are the biggest internal challenges you currently face when it comes to e-resources licensing?

Negotiation best practices

- A list of dos and don'ts that I rely on
- Based on experience, on well-known books about negotiation, such as *Getting to Yes*, and on a business school course on negotiating

What are the negotiation strategies that you live by?

1. Do your homework



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- Clarify on your own goals
- Figure out your **BATNA**
- Ensure the necessary internal negotiations are completed
- Gather and analyse data:
 - COUNTER statistics, cost/use, turnaways
 - Historical cost information
 - Analysis of comparative e-resources
 - User feedback
 - Troubleshooting logs
 - Organizational data such as FTE, Carnegie Classification, total library budget, trends data
 - Industry information
- Develop a project management plan if necessary.

2. Strengthen your BATNA



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- **BATNA** = best alternative to a negotiated agreement
- Getting to Yes (Ch. 6): "Developing your BATNA thus not only enables you to determine what is minimally acceptable agreement, it will probably raise that minimum."
- Never Split (Appendix Section 1): "The problem is that BATNA tricks negotiators into aiming low."

Which view of BATNA do you subscribe to?

3. Master listening

- Getting to Yes: Listen for **“interests,”** i.e. the why behind **“positional bargaining”**
- Never Split (Ch. 1): “Tactical empathy... This is listening as martial art, balancing... emotional intelligence and the assertive skills or influence.”
- Negotiate in a team. Assign someone specifically to listen/note-take.
- Never Split (Ch. 2): “The fact that the FBI has come to that conclusion [the need for multiple listeners], I tell them, should be a wake up call. It’s really not that easy to listen well.”



“World Bank/IMF 2009 Annual Meetings. World Bank President Zoellick and IMF Managing Director Strauss-Kahn meet with CSO/NGO representatives” by World Bank Photo Collection is licensed under [CC BY-NC-ND 2.0](https://creativecommons.org/licenses/by-nc-nd/2.0/)

4. Resist rushing



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- Resist the pressure of arbitrary deadlines
- Never Split (Ch. 6): "What good negotiators do is force themselves to resist this urge [deadline anxiety] and take advantage of it in others."
- Never Split (Ch. 6): "Moore [professor at Haas School of Business, UC Berkeley] discovered that when negotiators tell their counterparts about their deadline, they get better deals."
- Early planning is critical so that you don't buckle to your own deadlines.
- Licenses often stipulate cancellation notices of 30 or 60 days to the vendor.

5. Manage emotions

- Theirs and yours
- Don't be needy and/or desperate
- Getting to Yes (Ch. 1):
"Be soft on the people, hard on the problem."
- Librarian's Guide (Ch. 6), quoting Bernard Margolis:
"Don't demean their perspectives. Don't demean their products and services."
- "Politely relentless" and "relentlessly polite"



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6. Cultivate relationships

- Don't begin a discussion with pricing
- Relationship vs. bargaining
- Librarians' Guide (Ch. 6): "Walking away requires the support of internal personnel and external constituencies, communication among those groups is crucial."
- Never Split (Ch. 10): "the emphasis through the book is that the adversary is the situation and that the person that you appear to be in conflict with is actually your partner."



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7. Don't name price first



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- Never begin the discussion with issue of pricing
- Never Split (Ch. 6): "The tendency to be anchored by extreme numbers is a psychological quirk known as the 'anchor and adjustment effect.'"
- Avoid being the first one to name a price
- *Caveat: only be the first to name a price range if you have excellent knowledge
- Librarians' Guide (Ch. 2): pricing models should be "transparent, rational, fair"
- Resist the vendor question that attempts to find out how much you can afford

Negotiating price

What are creative approaches you have used (or can think of now) to realize a cost benefit beyond simply a reduction in price?

Beyond the bottom line

- Access to more titles/services for the same price?
- Title or product substitutions for greater value?
- Change in access conditions for the same price? Same price for more seats, or more sites?
- Multi-year commitment in exchange for lower starting price and/or lower annual increases?
- Up front commitment to spend a certain amount by a certain time?
- Timing spending so that it coincides with fiscal deadlines?
- Consolidate subscriptions or find ways to reduce administrative burden?
- Can the library provide a service in exchange for better pricing? For e.g., with a new product, can the subject librarian for the relevant area help gather feedback or organize user testing?
- Vendor training or other services outside of what is normally expected?
- Removal of access and/or other fees on top of subscriptions?
- An extended trial period possible?
- Delaying a technology upgrade?

Consortial negotiation

PROS	CONS
Efficiency of centralization; Centralized licensing and invoicing	Can be slow; Bureaucracy of consortium itself; Added complexity of negotiation
Greater bargaining power if consortium has significant share of vendor's market	Not all vendors work with consortia; Loss of flexibility flexibility over local budget; Price vulnerability depending on number of members who may exit a deal
Relying on negotiating expertise of consortium	Interests not always aligned; Needs of whole may override needs of individual members

SPARC Big Deal Cancellation Tracking

Table compiled from Ashmore B, Grogg JE, Weddle J. The power and pitfalls of consortial negotiation. The librarian's guide to negotiation : winning strategies for the digital age. Medford, New Jersey: Information Today, Inc.; 2012.

Negotiation across cultures

Koreans tend to be energetic conversationalists who seek to close deals quickly, occasionally stretching the truth.



Richard Lewis Communications

From: Goudreau J. 23 fascinating diagrams reveal how to negotiate with people around the world. Business Insider. 2015 August 14. Available at: <http://www.businessinsider.fr/us/how-to-negotiate-around-the-world-2015-8>. <Accessed 2018 August 24>

Case study 1: One EBSCO setting to rule them all

PROBLEM: Struggle amongst subject librarians to set EBSCO databases to 'ideal' setting

- Clarity and perceived fairness of process
- Engagement of the right people
- Listening
- Camaraderie + common purpose
- No time pressure, no cost pressure

Case study 2: E-book platform switch

PROBLEM: Moving several highly used e-book titles from dissatisfactory aggregator platform to publisher platforms

- Excellent working relationship with the subject librarian
- Commitment on each side to doing the work
- Detailed plan + project management
- Analysis of the constraints and risks
- Early planning = adequate time

Case study 3: Expanding access to HINARI

PROBLEM: WHO Libraries were supporting HINARI program and their own, much smaller set of subscriptions with limited resources

- Preparation + clear plan
- Detailed analysis of the interests of all the stakeholders; various options; BATNA
- Plenty of time
- Expert negotiator who had strong relationships with the stakeholders

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