Licensing in a Globalized Information Environment: Pitfalls in Licensing Terms and Conditions

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Understanding Licenses

• **Non-Negotiated (mass-market/consumer):** cloud computing, iTunes; shrink, click or browse-wrap.

• **Negotiated:** database and service vendor contracts.

• **Risk-Shifting:** Warranty disclaimers, damage limitations, and indemnifications.

• **Problematic:** Formation, change in terms and conditions, change in content/service and notice.

• **Increased Obligations:** e.g., content destruction.

• **Decreased Use Rights:** data mining and e-sharing.

• **Other Rights:** Privacy (monitor/report); Speech.
Service Disclaimers

• From Amazon Web Service agreement, incorporated into its Cloud Service TOS (Terms of Service): “WE NOR ANY OF OUR AFFILIATES OR LICENSORS WILL BE RESPONSIBLE FOR… ALTERATION OF, OR THE DELETION, DESTRUCTION, DAMAGE, LOSS OR FAILURE TO STORE ANY OF YOUR CONTENT OR OTHER DATA.”

• Dropbox: “THE SERVICES AND SOFTWARE ARE PROVIDED ‘AS IS’, AT YOUR OWN RISK, WITHOUT EXPRESS OR IMPLIED WARRANTY OR CONDITION OF ANY KIND.”
Product Disclaimers

- **CAUTION**: Nature Academic: “No oral or written information or advice given by any representative of the licensor or by anyone else shall create any warranties.”

- **CAUTION**: “[A]ll content, products and services … are provided ‘as is’ and without warranties or representations of any kind (express, implied, and statutory, including but not limited to the warranties of title and noninfringement and the implied warranties of merchantability and fitness for a particular purpose) all of which Elsevier *disclaims to the fullest extent permitted by law.””
Warranty of Non-infringement

- ACCEPTABLE?: “Springer warrants that it will use commercial reasonable efforts in its production of media for delivery…to the Licensee…to the best of its knowledge, use by Licensee… pursuant to the terms and conditions … will not infringe [] rights of third parties.”

- ACCEPTABLE: “Licensor [Greenwood Press] represents and warrants that it has the right and authority to make Licensed Materials available pursuant to these terms and conditions and that providing the Licensed Materials to Licensee does not infringe upon any copyrights, patent, trade secret, or other proprietary right of any third person.”
Indemnification

• “Subscriber agrees to indemnify OVID from and defend at its own expense...against any and all claims ...arising out of or related to Authorized Users use of the Products or any materials provided hereunder.”

• Accessible Archive: “The Licensor shall indemnify and hold Licensee and Authorized Users harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney’s fees...infringement of copyright or any other property right arising out of the use of the Licensed Materials ... in accordance with the terms of this Agreement... indemnity shall survive the termination of this agreement.”
Limits on Remedy

• **CAUTION**: Cloud Drive: “Any dispute or claim arising from or relating to the Agreement or the Service is subject to the **binding arbitration** … You agree to those terms by entering into the Agreement or using the Service.”

• **CAUTION**: Dropbox: “**AGGREGATE LIABILITY FOR ALL CLAIMS RELATING TO THE SERVICES MORE THAN THE GREATER OF $20 OR THE AMOUNTS PAID BY YOU TO DROPBOX FOR THE PAST THREE MONTHS OF THE SERVICES IN QUESTION**…Some states do not allow the types of disclaimers in this paragraph, so they may not apply to you.”
Use Equals Assent

• **NO**: iCloud: “IT IS IMPORTANT THAT YOU READ AND UNDERSTAND THE FOLLOWING TERMS. BY CLICKING ‘AGREE,’ YOU ARE AGREEING THAT THESE TERMS WILL APPLY IF YOU CHOOSE TO ACCESS OR USE THE SERVICE.”

• **YES**: OpenDrive: “By using our services you consent to our collection and use of your personal information as described in this Privacy Policy.”
Change in Terms

• “Gartner reserves the right to change the terms and conditions applicable to use of the Products...changes shall be effective immediately upon notice ... placed on the website. Use of the Products after notice shall be deemed to be acceptance by User of such changes.”

• ARTstor license “may be amended from time to time.” Changes that “materially conflict” with existing terms: 30 days notice via electronic form. If the licensee objects, the licensor will “use all reasonable efforts to agree upon mutually acceptable language.”
Change in Content

• ALLOWED, EFFECTIVE NOTICE?: “ProQuest will announce any substantial additions, deletions or modifications of information, databases, materials, capabilities or service with the Products on its electronic mailing list service.”

• ALLOWED WITH NOTICE: “BioOne reserves the right at any time to withdraw … any item or part of an item for which it no longer retains the right to publish or which it has reasonable grounds to believe infringes copyright or is unlawful [e.g., defamatory]. BioOne shall give notice to the Licensee of such withdrawal.”
Cessation of Service Issues

• BioOne: “interruption or suspension of service lasting more than 72 consecutive hours, the Licensee’s contract will be extended by an equal number of hours.”
  – A database that is down from lunch until dinner M, W, and F every day of the year would not trigger a credit under this provision.

• Nature: “Licensor may suspend the provision of the Licensed Material [] with immediate effect on written notice without liability if the Licensor believes the Licensed Material is being used in a manner that contravenes the provisions of this Agreement…”
Obligations and Restrictions

• POSSIBLE OR IMPOSSIBLE?: CSA Illumina: “In the event the license granted under this agreement is terminated you shall disable all Products in your possession. This includes the destruction of any CD-ROMs, FTP databases or any software as well as any downloaded copies retrieved from the Products.”

• NO DATA-MINING: “automated searches …are not permitted … Data mining is prohibited.”

• NO E-ILL (Nature Academic): “reproduce single copies…in hard copy print form for distribution.”
Monitoring and Enforcement

• Nature (academic): “The Licensee \textit{shall} put into place \textit{reasonable procedures to monitor} the \textit{compliance} with the terms and conditions of this Agreement by the Authorized Users.”

• Bowker’s Books in Print: “Subscriber will exercise \textit{reasonable efforts} to \textit{inform} Authorized \textit{Users of the restrictions} on the use of the Products and Content and to \textit{enforce such restrictions}.”

• Amazon Kindle (and other e-reader issues).
**Reporting!**

- “Use *reasonable efforts* to ensure that *Authorized Users are made aware* of and undertake to abide by the terms and conditions ... and immediately *on becoming aware of any unauthorized user or other breach, inform* BioOne ...”

- “Licensee[] *shall notify* JSTOR of any [] unpermitted uses ... and *shall cooperate with* JSTOR in resolving problems or unpermitted use.”

Loss of Speech Rights

• Nature (corporate): Licensee may not “undertake any activity which may have a damaging effect on the Licensor’s ability to achieve revenue through selling and marketing the Licensed Material.”

• Springer: “Neither party shall disclose the terms and conditions or the subject matter of this Agreement ... without the prior written consent of the other.”
Avoiding Pitfalls: Dos and Don’ts

- **Do…:**
  - Receive **notice** of changes to material T&C,
  - Obtain **notice** prior to suspension or termination,
  - Retain use rights during service; post-service right to store and use **content**, 
  - Acquire **refund** right if terminated or suspended, and
  - Secure **warranty** of non-infringement.

- **Do Not…** (A Wish List)
  - **Indemnify** the service or content provider,
  - Agree that **use** of service equates to “**assent**”,
  - Be unaware of the impact of **waivers** and **disclaimers**, 
  - Be left without effective remedy or recourse, and
  - Undertake obligations that compromise **privacy** or **speech** rights.
Questions and Answers
now or later . . .
THANK YOU!

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