NASIGuide: License Negotiation 101

by Rick Anderson
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What is a license agreement?

A license agreement is a contract that you negotiate with a publisher or vendor before finalizing the purchase of an online product. It details the provider's responsibilities and your own, as well as defining the ways in which your patrons may use the product.

Librarians usually negotiate the terms of license agreements, but the agreement itself is usually signed either by a division head, the library director, or someone with administrative oversight of the library. If you are involved with license negotiation at your institution, you'll obviously need to be sure you know who will be taking the final responsibility for the terms of those licenses.

We already have copyright law - why do we need license agreements?

Copyright law doesn't actually offer the owners of intellectual property very much protection, or much recourse in the event of piracy. In the print realm, what really protected copyright holders was the fact that wholesale piracy was both difficult and expensive, and rarely worth the effort - imagine photocopying and redistributing a 300-page novel, or a year's worth of a scientific journal. Sure, it could be done, but it wasn't going to be done very often. In the online world, however, you can copy a book or a run of journals with ridiculous ease, and then redistribute it to thousands of people with a few mouseclicks. This makes publishers understandably nervous about selling libraries online access to their products, and makes them want protection that copyright law alone can't give.

Not only do license agreements protect providers - they also protect libraries, though they are usually written in such a way as to give much more attention to the provider's risks than to the library's. That's why it's important to read license agreements very carefully and make sure that you change those terms you can't agree to.

What terms should I watch out for in a license agreement?

Space doesn't permit complete coverage of all possible problem terms, but here are what I call the Seven License Terms of Death - terms that you should never agree to in a license:

Indemnification. Never agree to indemnify the provider against claims of damage brought by third parties. To do so would basically turn your library into a legal insurance policy for the vendor -- you'd be saying that if, for example, one of your students redistributed content from a database illegally, and the original author of that content sued the database provider, you'd take the provider's place in court.

Library responsibility for user behavior. Agree to inform users of usage restrictions and to work with the provider to resolve the problem when a user breaches the terms of the license; never agree, however, that the library can be held legally responsible for the behavior of its patrons.

Unreasonable termination rights. Many licenses will say that any breach of the license terms on the part of the library is grounds for immediate termination of the agreement by the provider. What the license should say instead is that a material breach of the license terms by the library may lead to termination of the agreement by the provider, if the library is not able to remedy the breach within a reasonable period of time (ideally 30 days, but certainly no fewer than 7).

Jurisdiction. Never agree that the license will be interpreted according to the rules of a state (or country!) other than your own, or that any applicable court action would be brought in another jurisdiction. Either change the jurisdiction clause to reflect your own juridiction (preferred) or let the license remain silent on the question of jurisdiction (acceptable).

Complete disclaimers of warranty. Always read this section very, very carefully (it's often printed entirely in capital letters). Most of the time, it will say that the provider is under no obligation to provide a working product. Since you're paying for the product up front, this language will usually need to be changed. Add a sentence that reads something like this: Notwithstanding the foregoing, Licensor represents and warrants that the Licensed Product will perform in a manner broadly adhering to its advertised characteristics. Should it fail to do so, and should Licensor fail to remedy such failure within 30 days of notice by Licensee, Licensee shall have the right to terminate this Agreement and shall be entitled to a refund prorated to the term remaining.

Unilateral alteration of terms. It should go without saying that, once the license is signed, neither party should have the right to alter the license's terms without the written consent of the other. But read carefully -- some licenses actually say that the provider has the right to change terms unilaterally, sometimes without even telling the library. Obviously, you should never agree to that.

Confidentiality. If at all possible, avoid agreeing to license language that requires you to keep the terms of the license or pricing of the product confidential. Such terms are a competitive convenience for the provider, but offer the library no benefit whatsoever. When a colleague at another library contacts you to ask "Were you able to get Vendor X to change the disclaimer of warranty?", you don't want to have to say "I'm sorry, but I can't tell you that."

What if the vendor won't change a necessary term?

In some cases, your library will be bound by institutional regulations or local laws that make it impossible for you to agree to certain terms. In those cases, if the provider won't agree to adjust the terms, you'll have no choice but to say "No, thanks" to the product.

More often, though, you'll find yourself in a position where you're being asked to agree to a term that is unacceptable rather than legally impossible. In that situation, if the vendor refuses to change the term, you'll have to ask yourself some hard questions about the product. How unacceptable is the term? How much risk of real harm is there? How necessary is the product -- is it one that your patrons rely on when doing their work, or is it one that you think they would probably like to have? Can the product be purchased from another vendor? (Often the answer is no, but once in a while it will be possible to get the same product elsewhere from a more reasonable provider.)

Unfortunately, there's no single perfect answer to this particular question. Your options will vary from situation to situation.

What if the vendor won't negotiate the license terms at all?

Remember that a license is a binding contract -- if you can't agree to the terms, you must not sign the agreement. Don't let yourself be lured into signing an unacceptable agreement by a sales rep who says "Don't worry, we don't really enforce these terms; I just have to get your signature so the folks in the home office will process the order." The license means what it says, and you'll be legally bound by the terms to which you agree. Don't sign it unless you can live with the terms.

For more information:

Archived license negotiation webinars by the Consortium of Academic and Research Libraries in Illinois: **http://www.carli.illinois.edu/products-services/eres/eres-webinars**

Model license agreements by John Cox Associates: **http://www.licensingmodels.com**

David Whelan: "Negotiating Electronic Content Licenses" **http://ofaolain.com/blog/2011/03/26/negotiating-electronic-content-licenses/**