

# UC San Diego

## Presentations and Posters

### Title

Licensing East Asian Resources

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# Licensing East Asian Resources

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This presentation is part of a larger project examining license and business term negotiation with East Asian vendors.

It will be a brief overview of licensing basics, as well as documenting some of the key licensing terms that we negotiate, particularly those that we have previously negotiated in our licensing of East Asian Resources here at UCSD.

It is aimed at librarians as well as for vendors who may be in attendance.

This presentation and its bibliography (links to articles referenced) are available on the web, and the link will be provided at the end of the presentation.

## Why licenses?

- Licensing content does not equal ownership
- You can give away all "fair use" rights when signing a license

The realization that "licensing is not ownership" has come to the commercial forefront recently with the re-emergence of ebooks and the introduction of Amazon's Kindle and the Sony Reader. The web site Gizmodo had a recent article about the realization that customers are having that ebooks they have purchased are not subject to the same rights as physical books, in particular, the right to re-sell.

Trisha Davis of Ohio State wrote a great article that chronicles the history of electronic resources and the use of licenses to protect electronic content.

To summarize, the ease of duplication (and the lack of degradation of those copies) resulted in concerns by publishers to create restrictions on use, and this was done through having users pay for the license the right to use content, rather than purchasing the content itself.

A license can contain terms that are much more restrictive than the federal copyright laws and fair use guidelines. And it's possible to sign away these rights (and even obligate yourself to additional responsibilities) when you sign a license, or click through, or even use a resource with posted terms on a website.

These licenses can also explicitly restrict use only to that which is explicitly permitted in the license, while prohibiting (or requiring vendor approval) for any activity not mentioned.

## Obtaining a license for review

- Get it in writing
- Request changes to web-only terms
- Get a copy of the license in English
- Request vendor-signed acknowledgement of changed terms

Many of the points we'll be bringing up today are things to consider when addressing any electronic resource and will also include issues related to negotiating East Asian resources.

Part of the negotiation process should involve asking for a license.

### 1. Get it in writing.

1. If there is no license (web-only terms or signed license), get this confirmation in writing from the vendor (email).
2. If there are restrictions or additional permissions that emerge in discussions with the vendor, also get this in writing
3. There should be a clause in the license itself that requires any changes to be made in writing and signed by both parties.

2. If the license is on the web, first see about getting it changed on the web. Otherwise make an addendum and have it be signed and countersigned with a clause that indicates the signed addendum overrides.

### 3. Get a copy of the English-language license from the vendor

1. Second best - have in-house staff translate, and have the vendor sign the English copy.
2. Another option is to provide a license of your own for review by the vendor (more on this later in the presentation.)

4. Any license that includes changes should be signed both by the institution and by the vendor.

Also watch out for licenses required for trials.

## What we look for

- Can we uphold these terms?
- Do the terms permit uses common in an academic environment?
- Are we legally protected?

1. Ultimately, our main concern is, can we uphold the terms of the license? Is what vendor asks for something that we can do (given technology and current processes)?
  - a. A variation of this, does the license match the product offered - if it is an IP based resource, does it take into consideration issues required to provide access through IP authentication, or are the license restrictions specific towards a locally installed or password environment?
2. Are the license terms written for an educational institution, or is this meant for corporate use?

Many of our recent licensing issues have been a result of this. It may be that the resources have been more corporate in nature, but it is something to be aware of.

*“Educational use: Licensee and Authorized Users may make all use of the Licensed Materials as is consistent with the Fair Use Provisions of United States and international copyright laws. In addition, the Licensed Materials may be used for purposes of research, education or other non-commercial use as follows:” (CDL Model License)*

3. Do any of the terms require the institution to be responsible for situations we cannot control?
  - responsibility for a user's violation of the use
  - responsibility for vendor's right to distribute content

## User definitions and access

- Walk-in users
- Authenticated off-campus access

1. Walk-ins - as a state institution, our charter is not only to serve our students and faculty, but also be a resource for the community by providing access to members of the public present in our libraries. Prohibiting access to IP validated resources for walk-in users is counter to this charge, and also requires a high level of maintenance and overhead for us to maintain.

For example, our public machines do not require a user login, so forbidding access to walk-ins either requires exclusion of library public machines, restricting access to a specific machine, or requiring an approval process for obtaining login information directly from library staff.

*“Walk-ins. Patrons not affiliated with Licensee who are physically present at Licensee’s site(s) (“walk-ins”). (CDL Model License)*

2. Secure remote access for affiliated users – with the increase in home online access, as well as establishment of distance programs, many faculty and students conduct research from their homes and are used to getting access to resources online. We provide off-campus access to users through a secure authentication process, where the user needs a UCSD user name and password to login to our local proxy server, and receives access to the resource.

*“IP Addresses. Authorized Users shall be identified and authenticated by the use of Internet Protocol (“IP”) addresses provided by Licensee to Licensor. The use of proxy servers is permitted as long as any proxy server IP addresses provided limit remote or off-campus access to Authorized Users.” (CDL Model License)*

## Institutional use of resource

- ILL
- Coursepacks
- Reserves

Institutional Use - what can we as an institution permit

1. For journals and collections of material, we want the ability to provide ILL in a manner similar to how we provide ILL with print materials. At a minimum, we want the ability to use ARIEL (a method by which the materials are printed, rescanned and sent as a time-limited PDF to the requesting user). An unacceptable license prohibits ILL altogether or restricts ILL to be performed by post or fax.

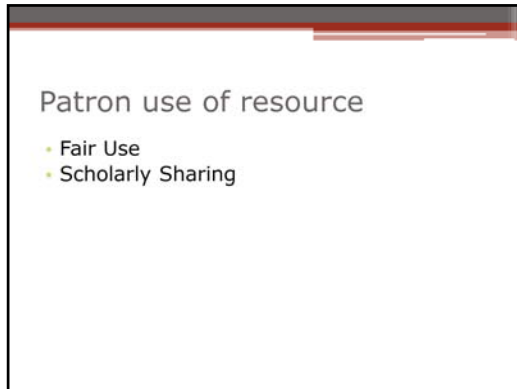
*“Interlibrary Loan. Using secure electronic, paper, or intermediated means such as Ariel, Licensee may fulfill occasional requests from other institutions, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in compliance with Section 108 of the United States Copyright Law (17 USC §108, “Limitations on exclusive rights: Reproduction by libraries and archives”) and the Guidelines for the Proviso of Subsection 108(2g)(2) prepared by the National Commission on New Technological Uses of Copyrighted Works.” (CDL Model License)*

2. The ability to print content and include with coursepacks. This does not eliminate the need to get copyright clearance for use in the coursepack, but permits the use of the electronic content in generating the printout.

*“Course Packs. Licensee and Authorized Users may use a reasonable portion of the Licensed Materials in the preparation of Course Packs or other educational materials.” (CDL Model License)*

3. At a minimum, we require the ability to link to the resource from our electronic reserves system.

*“Course Reserves (Print and Electronic). Licensee and Authorized Users may use a reasonable portion of the Licensed Materials for use in connection with specific courses of instruction offered by the University of California, San Diego.” (CDL Model License)*



It is our obligation is to communicate these terms to our users and provide them with the information they need. We do have methods in place for investigating alleged “breaches” of activity, and follow up on those promptly and within a time limit.

Note that a license is an agreement between the vendor and the institution, not the individual users. When negotiating the license, we focus on that we as the institution we can control (for instance, communicating the use terms to the users and investigating potential violations of the terms).

*“Provision of Notice of License Terms to Authorized Users. Licensee shall make reasonable efforts to provide Authorized Users with appropriate notice of the terms and conditions under which access to the Licensed Materials is granted under this Agreement including, in particular, any limitations on access or use of the Licensed Materials as set forth in this Agreement.” (CDL)*

1. We're not going to go into an in-depth overview of Fair Use, but have provided a link to the excellent University of Texas system tutorial. In a nutshell, fair use is a "four factor test" to determine if you need to seek additional permissions to use a copyrighted work beyond that which is granted by US copyright law. As we stated before, it is likely that a license's terms restrict use beyond what is permitted by copyright law. One suggestion to make the license terms more consistent with user expectations is to add a clause permitting activity in line with Fair Use and international copyright laws, explicitly permitting use in the context of research, education and non-commercial use.

*“Educational use: Licensee and Authorized Users may make all use of the Licensed Materials as is consistent with the Fair Use Provisions of United States and international copyright laws. In addition, the Licensed Materials may be used for purposes of research, education or other non-commercial use as follows:” (CDL Model License)*

2. Many research projects involve scholars from multiple institutions working together. Scholarly sharing is the ability for users to share small amounts of content with users at other institutions as part of the academic research process. (\*\* I consider this like "authorized user-initiated ILL" where there may be content that an authorized user wants to send to someone on their research team.)

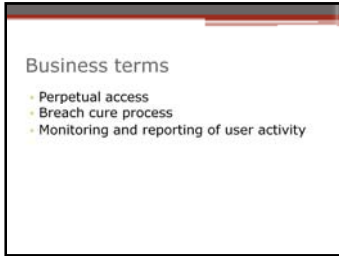
*“Scholarly Sharing. Authorized Users may transmit to a third party in hard copy or electronically, minimal, insubstantial amounts of the Licensed Materials for personal use or scholarly, educational, or scientific research or professional use but in no case for resale or commercial purposes.” (CDL Model License)*

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Questions:

If there are questions regarding what is fair use, say that's outside of the scope of this talk and point them to the website which has links to two great tutorials (Stanford and University of Texas), or





1. Perpetual access for items purchased as one time purchase of static material, and for years subscribed for journal runs. Our general principle is to negotiate for perpetual rights to access the content as we had at the time of licensing using a "mutually agreed upon" format or instrument and the right to use a third party archive, such as Portico.

*"Notwithstanding anything else in this Agreement, Licensor hereby grants to Licensee a nonexclusive, royalty-free, perpetual license to use any Licensed Materials that were accessible during the term of this Agreement. Such use shall be in accordance with the provisions of this Agreement, which provisions shall survive any termination of this Agreement. The means by which Licensee shall have access to such Licensed Materials shall be in a manner and form substantially equivalent to the means by which access is provided under this Agreement."* (CDL Model License)

2. In the case of suspicious user activity, we ask for (at minimum) a 30 day breach cure period and ask that only the offending IP be disabled while we're investigating the report.

*"Breach Cure: In the event that either party believes that the other materially has breached any obligations under this Agreement, or if Licensor believes that Licensee has exceeded the scope of the License, such party shall so notify the breaching party in writing. The breaching party shall have sixty (60) days from the receipt of notice to cure the alleged breach and to notify the non-breaching party in writing that cure has been effected. If the breach is not cured within the sixty (60) day period, the non-breaching party shall have the right to terminate the Agreement without further notice."* (CDL Model License)

*"Protection from Unauthorized Use. Licensee shall use reasonable efforts to protect the Licensed Materials from any use that is not permitted under this Agreement. In the event of any unauthorized use of the Licensed Materials by an Authorized User, (a) Licensor may terminate such Authorized User's access to the Licensed Materials, (b) Licensor may terminate the access of the Internet Protocol ("IP") address(es) from which such unauthorized use occurred, and/or (c) Licensee shall terminate such Authorized User's access to the Licensed Materials upon Licensor's request. Licensor shall take none of the steps described in this paragraph without first providing a sixty (60) day notice to Licensee and cooperation with the Licensee to avoid recurrence of any unauthorized use."* (CDL Model License)

3. Any language that would require us to monitor how our users use the information, or report on ILL usage, is outside of what we normally collect.

## Legal requirements

- Indemnification / Warranty
- Jurisdiction

These are areas that often have to be modified for the individual institution's standards.

1. The Indemnification and Warranty sections cover the issue of damages for what the both the vendor and the institution have agreed in the license. In particular, we're looking for two things: 1. a statement guaranteeing that the vendor has the copyright ownership or has licensed the materials for distribution, and will protect us in the case an author sues and a 2. mutual indemnification clause, which ensures that each party will take responsibility and resolve any violations to what they've warranted.

*"Licensor warrants that it has the right to license the rights granted under this Agreement to use Licensed Materials, that it has obtained any and all necessary permissions from third parties to license the Licensed Materials, and that use of the Licensed Materials by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright of any third party."* (CDL Model License)

*"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, which arise from any claim by any third party of an alleged infringement of copyright or any other property right arising out of the use of the Licensed Materials by the Licensee or any Authorized User. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION."*

*Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims."* (CDL Model License)

2. Jurisdiction – change to California or remain silent. For us as a state institution, we cannot agree to a jurisdiction outside of our state.

## Making licensing easier

- Stock license text
- Shared E-Resource Understanding (SERU)

License negotiation is a time-intensive process, and requires a lot of effort on both the parts of the institutions and the vendors. There are a couple of suggestions for making this process easier, and particularly in the case of a vendor that may not have an English language license,

1. UCSD participates as part of the California Digital Library, a partner to the UC campus libraries that works to license resources on behalf of all UC campuses. They have established guidelines and a model license that has been adopted by vendors with good success.

2. The Shared E-Resource Understanding project (SERU) was a committee organized by the NISO (National Information Standards Organization) to create a "no-license" standard, primarily targeted at smaller vendors to provide a mechanism for licensing resources to an understood set of terms based on "best practices" and common expected use of electronic resources by referencing copyright law.

## Conclusion

- Contract terms override copyright law
- Informal agreements should be codified
- Awareness of common issues aides in understanding
  
- Our goals are the same: provide access to users while protecting vendor intellectual property

1. Contract terms supersede copyright law - this is important for working with vendors and for communicating with users. Get informal changes and exceptions in writing where possible, signed by both the vendor and institution.

2. These common issues aren't an exhaustive list of issues, but highlights main areas of concern and areas that are commonly negotiated in licenses, this should aide in understanding your institutions process of license negotiation, as well as raising the awareness of vendors.

3. Ultimately, both vendors and institutions are working towards the same goal - providing patron access to useful information while educating users to responsible and legal use of electronic materials.

## For more information

- [www.negentropy.net/?p=5](http://www.negentropy.net/?p=5)

This presentation, as well as links to referenced materials are located on the following web page.