



Teri Gallaway, Associate Commissioner for LOUIS



A Program of the  
BOARD of REGENTS  
State of Louisiana

LOUIS Electronic Resource Licensing Principles: May 2018  
Prepared on behalf of the LOUIS Licensing Workgroup  
Peggy Hoon  
Louisiana State University  
Director of Copyright Policy and Education



## **LOUIS Electronic Resource Licensing Principles**

LOUIS is responsible only for its individual responsibilities under each license as well as for informing its Consortium Members of the terms and conditions of each License. Neither LOUIS nor any Consortium Member is responsible for any breach or default of another Consortium Member.

### **I. Vendor Obligations**

#### **A. Warranties, Indemnification, and Limitation of Liability**

Vendor must warrant both that it has the power and authority to enter into the License and, importantly, that the Content provided does not infringe upon the copyright or other right of any third party. Any limitation on liability imposed by the Vendor must not apply to these warranties. Additionally, the License must not attempt to limit Vendor's maximum liability to the license fee paid in the previous twelve months. Vendors should not be allowed to limit direct damages.

Furthermore, the Vendor should indemnify and hold harmless LOUIS, its Consortium Members and their Authorized Users against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any claims or other damages, awards, and penalties arising from a claim by any third party for actual or alleged infringement of any copyright or other proprietary right.

If Vendor offers such indemnification provisions tied to the Vendor assuming sole control of the conduct and/or settlement of the claim, the relevant Consortium Member must agree to the terms in writing first. Settlement Agreements must not contain admissions of wrongdoing, restrictions imposed on the Consortium Member and other language that might conflict with the Consortium Member's policies and procedures without prior written approval of the Consortium Member.

#### **B. Completeness of Content**

LOUIS and Consortium Members have intentionally selected Vendor's Content to meet the needs of their institutions. If Vendor alters, substitutes, or significantly (>10%) reduces the Content, Notice must be given at least thirty (30) days in advance. If withdrawal renders the Content substantially less useful to the Consortium Members, they may choose to terminate the license and receive a pro rata refund.

#### **C. Server Availability, Performance & Customer Support**

Vendor should provide reasonable assurances regarding the availability and performance of its servers, including redundancy and disaster plans. Servers should be available 24-hours, seven days a week, 98 percent of the time.

Technical support/customer service should be available to provide assistance during standard 8:00 am to 5:00 pm working hours for U.S. Central time.



#### D. Accepted Means of Authentication

The License should not require the use of an authentication system that is a barrier to access by Authorized Users. Access to products should not require individual passwords and/or user ID's, and the Consortium Members must be allowed to use proxy servers to facilitate remote access for Authorized Users.

#### E. ADA Compliant

Vendor shall comply with the Americans with Disabilities Act (ADA) guidelines for textual content by supporting assistive software or devices such as large print interfaces and alternate or pointer interfaces in a manner consistent with the Web Content Accessibility Guidelines published by the World Wide Web Consortium's Web Accessibility Initiative, which may be found at <https://www.w3.org/TR/WCAG21/>

#### F. Renewals

Vendor should provide sufficient Notice, preferably at least 120 days, of renewal deadlines. In the event of a price increase, Consortium Members must have a sufficient time period, preferably at least sixty (60) days, to evaluate the price increase in order to decide whether or not to cancel or renegotiate.

#### G. Archiving

The License should clearly state archival responsibility and should allow LOUIS and/or its Consortium Members to copy data for the purpose of preservation and/or the creation of a usable archival copy. If the License does not permit LOUIS and/or its Consortium Members to make a usable preservation copy, the License should specify who has permanent archival responsibility for the resource, and under what conditions LOUIS and/or its Consortium Members may access or refer users to the archival copy.

#### H. Perpetual Access

Electronic Content represents significant and permanent assets for the Consortium Members. The License should include a nonexclusive, royalty-free perpetual license (that survives any termination) to access and use any Content that was subscribed to during the term of the License or for which a perpetual license fee has been paid. Perpetual access should be in a manner and form substantially equivalent to the means by which access is provided under the License; that is, permanent rights to use the Content for which the Consortium Members have paid, even in the event that a Content is subsequently canceled or removed. LOUIS and the Consortium Members will work with the Vendor to develop a mutually acceptable means for ongoing access to the Content.

Vendor must disclose, at the time of purchase of the Content, if it has not acquired irrevocable perpetual access rights to all Content being sold under a perpetual access license. This includes specifically any Content for which Vendor includes a clause allowing the withdrawal of that Content should Vendor lose the right to include it as a perpetual access purchase.



For any Content sold under the representation that LOUIS was acquiring perpetual access ownership and access rights that is later withdrawn by Vendor because Vendor lost the right to continue to provide perpetual access, Vendor shall provide a full refund of all monies paid for that Content.

Additionally, any terms and conditions of use of perpetual access Content shall expire when any particular Content enters the public domain.

## II. Individual Consortium Member Obligations

### A. Warranties, Indemnification, and Irreparable Harm

LOUIS and the Consortium Members shall not warrant, promise, or ensure anything other than the having authority to enter into the License.

Consortium Members shall not acknowledge anything for which they have no independent knowledge. For example, Consortium Members cannot acknowledge that the Vendor and/or its suppliers hold the copyright to all Content under the License.

Neither LOUIS nor its Consortium Members can agree to indemnify or hold harmless any Vendor for any reason.

Consortium Members cannot and shall not agree to clauses entitling the Vendor to irreparable damages and automatic injunctive relief.

### B. Responsibilities regarding Authorized Users and Vendor Content

Consortium Members cannot warrant, ensure, or guarantee that Authorized Users will abide by the terms and conditions of the License and will not accept legal responsibility for their behavior, other than employees acting within the scope of their employment. There are no measures, reasonable or otherwise, that can be undertaken that will prospectively control user behavior

However, Consortium Members can agree to the following:

- Consortium Members will use reasonable efforts to inform their Authorized Users of the terms and conditions of the License.
- Consortium Members will use reasonable efforts to limit access to the Content to their Authorized Users. Consortium Members do not and cannot monitor or police Authorized Users.
- Consortium Members will respond promptly and appropriately upon information indicating that there is either unauthorized access and/or unauthorized use of the Content. Consortium Members will use reasonable measures to remedy the situation but must always act according to their institution's policies and procedures. Consortium Members will, in good faith, use reasonable measures to avoid a repeat of the problem but cannot ensure that it will never happen again. Furthermore, Consortium Members cannot agree to protect the Vendor's Content.



### C. Payments

Generally speaking, payments will be delivered to the Vendor no later than forty-five (45) days after receipt of invoice, inspection and approval of Vendor's Content.

As public/state entities, Consortium Members are exempt from paying taxes and do not pay late fees.

## III. Mutual Clauses

### A. Jurisdiction and Venue

The laws of the State of Louisiana govern LOUIS licenses. Any provision that purports to locate jurisdiction and venue outside the State of Louisiana must be amended to establish jurisdiction in Louisiana. The Vendor must specifically agree to submit to the personal jurisdiction of the State & Federal courts of Louisiana with respect to any legal proceedings that may arise in connection with the License, its interpretation and/or potential breach.

Silence as to jurisdiction is unacceptable unless the Vendor is a state entity of another state and similarly prohibited from consenting to a foreign jurisdiction.

### B. Integration Clause

All significant points of clarification, whether given orally, by email and/or via track changes, during the negotiation phase of the License must be memorialized in the actual language of the License itself at the time it is fully executed.

### C. Notice and Opportunity to Cure

The receipt of a Notice often starts a timeframe within which a particular activity must occur with attendant consequences if it does not. LOUIS and its Consortium Members will only accept legal Notices pursuant to the License provided by written or electronic mail message with confirmed receipt. Faxes and assumption of regular mail delivery and receipt without confirmation are not accepted.♦♦

The Notice provision must also specifically provide that any legal Notices or other legal documents provided to the designated contact constitutes valid legal service for all matters associated with or arising from the license.

If an alleged breach of the License is suspected, e.g., excessive downloading or a breach by the Vendor itself, proper Notice must be given. The breaching party must have a thirty (30) day time period within which to cure the alleged breach before any termination of the License can occur.

### D. Confidentiality/NDA Clauses

LOUIS, as a state created and governed entity, shall not agree to any Licenses containing non-disclosure clauses or confidentiality clauses that prohibit the



disclosure of License terms with the exception of non-public financial terms, all of which are subject to the Louisiana Public Records statute, LA RS 44.1.

#### E. Dispute Resolution

In the event of any dispute, the parties agree to use reasonable good faith efforts for a reasonable period of time to resolve the dispute. If such efforts fail, the parties may choose to mediate the dispute in Louisiana, but shall not agree to mandatory arbitration measures.

#### F. Termination

The conditions under which the License can be terminated must be clear and unambiguous. Termination clauses must be mutual, that is, all parties to the License must have equivalent termination rights.

In the event termination is anticipated as a result of a suspected material breach, the breaching party must be given 15 days written Notice with a thirty (30) day opportunity to cure prior to termination. Actions constituting a material breach shall be unambiguously defined and/or identified.

If the License is terminated because the Vendor has substantially altered, substituted or reduced the Content in such a way that it no longer is useful to the Consortium Members, the Vendor shall immediately provide a pro rata refund of any fees or portion paid for but not received.

Licenses must permit a Consortium Member to terminate without penalty if sufficient content acquisitions funds are not allocated to enable the Consortium Member, in the exercise of its reasonable administrative discretion, to continue the License. Individual Consortium Members shall be able to amend their License with locally mandated language for termination for non-appropriation of funds from their own institutions.

#### G. Mutual Force Majeure

All Licenses must contain a mutual force majeure clause.

#### H. Confidentiality of User Data

The confidentiality of individual users must be maintained. User data should not be reused or sold to third parties without permission and only then in aggregate form. Vendors collecting user data shall use reasonable endeavors to ensure that any usage reports are compliant with the most recent release of the COUNTER Code of Practice for Journals and Databases (available at [http://www.projectcounter.org/code\\_practice.html](http://www.projectcounter.org/code_practice.html)).

### IV. General Clauses

#### A. Authorized Users

Authorized Users shall include all faculty, staff, students, and registered patrons affiliated with Consortium Members, regardless of location, and all on-premises



users. Incidental, walk-in use by non-affiliated users must be permitted. Licenses are expected to permit access by unlimited simultaneous users.

Authorized Users may not be a party to the license. LOUIS and/or the Consortium Members cannot take responsibility for the actions of Authorized Users (unless those users are employees acting within the scope of employment) or any other third party.

## B. Authorized Uses

### General

Authorized Uses must allow for teaching/educational, research, and scholarly uses, not just private or internal uses. The Consortium Members are educational institutions and require Content that permits such activities by these institutions and their Authorized Users.

### ••Expected Permitted Uses/Fair Use Provision

All Licenses must specifically acknowledge and not restrict or abrogate the rights of Consortium Members or their Authorized Users permitted under copyright law, including, but not limited to, 17 U.S.C. Section 107, the Fair Use Provision. Those uses include, but are not limited to, displaying, printing, downloading, and copying.

The License should provide for Interlibrary Loan (ILL) by electronic means and in accordance with 17 U.S.C. Section 108 of the copyright law. As the lending library, the Consortium Member is under no obligation to monitor or track a requesting library's activities.

The License should not restrict ordinary educational teaching uses such as print or electronic course reserves, print or electronic copies for classroom instruction and use of reasonable portions in online course management systems. The ability to link to the Content must not be prohibited or restricted and, furthermore, does not need to be affirmatively granted, as this is already permitted under copyright law.

Additionally, Licenses that allow for scholarly sharing are preferred. Scholarly sharing allows Authorized Users to transmit to a third party individual in hard copy or electronically, minimal portions of the Content for personal, scholarly, educational use, or scientific research but not for commercial purposes.

Specifically, Licenses must contain a statement that affirmatively declares that "Notwithstanding any permitted or prohibited uses, nothing in the License shall limit the rights of the Consortium Members or their Authorized Users to exercise rights pursuant to the U.S. Copyright Act including, but not limited to, Sections 107 and 108."

## C. License Posting

LOUIS may post redacted copies of all Licenses on a LOUIS web site. The purpose of the web site is to help Consortium Members and their Authorized Users understand and comply with the terms and conditions specified in each License.



#### D. Website Terms & Conditions and End User Terms

Vendor and/or publisher website terms and conditions should not be incorporated by reference into the License. Such additional website terms and conditions can be additional and unknown terms can change without notice, and are presumed ratified by further use of the Content. Instead, all terms and conditions must be attached and fixed at the time of execution of the License. The License may only be amended in writing and signed by all parties. ••

The Vendor and/or its associated publishers should not cause Authorized Users to enter into a potentially binding agreement with the publisher (e.g., a “click-through” license) independent of the License as a condition of use of the Content.

#### E. No Abrogation of Legal Rights

Clauses whose purpose is to limit, alter or abrogate existing law and/or legal rights must be deleted. Examples of such clauses include altering the statute of limitations for contract law disputes, forfeiting the right to a jury trial, and eliminating the presumption that ambiguities in a license are to be resolved against the drafter of the license.

**Adopted by LOUIS Executive Board May 3, 2018**

Portions of these principles are based on and incorporated with permission of the California Digital Library available at <https://www.cdlib.org/gateways/vendors/checklist.html>.

