2E Licensing Electronic Resources: Spotting Issues in e-Content Licenses

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Copyright Bootcamp
Day 2

Spotting Issues in e-Content Licenses
Licenses are legal agreements

Copyright holder grants permission to do something OR prohibits grantee from doing something associated w/copyright holder’s exclusive rights.

• License terms prevail over copyright law.

License represents binding contract-offer/acceptance/consideration.

Misrepresentation amounts to fraud and is potentially actionable.
NECESSARY Clauses

Define the parties

Scope/grant of license
  • Non-exclusive perpetual right to use/access

Subject of license
  • What is being licensed
  • Fees

Term & termination
  • How/when can agreement be terminated
  • What do you get at the end of the day

Signature Lines (BOTH Parties)
DESIRABLE Clauses

ALL uses as permitted by U.S. Copyright Law (§§107-122)

Uses not covered by an exception in copyright law
  • When in doubt—express the desired use

Accessibility assurances (Licenser obligations)

Text/Data mining uses

Authors’ rights

Perpetual rights or access only

Broad Authorized User definition

Silent on “Sites” or broad definition

Merger clause (entire agreement)
RED FLAGS

BIG BITS

**Indemnification/Liability**
Audits
Overly restrictive uses
Governing law/jurisdiction
Arbitration
Changes to terms at will
  • Reference to online posted terms
  • Acceptance by use of materials
Sites

SMALLER BITS

• Mandatory terms
  • Will/shall/must/all
• Assignment (one-sided)
• No licensor indemnification
• Terms geared toward corporate licensees
Indemnification & Liability

- Indemnification = making the damaged party whole
- Indemnify ONLY for representations and warranties (obligations/promises)
  - These are things over which you have control
    - Employees, staff, agents BUT NOT STUDENTS
    - Beware terms identifying students as agents of Licensee
    - “Reasonable efforts” mitigate “mandatory” obligations

Audits

- Potential for invasive searching of systems/privacy violations
- Cannot control all use/misuse
- If not removable, narrow the scope, no permitted access to systems
Issue Spotting Exercise!

1. Read the license agreement handed out—~15 min.
2. Discuss and pick out 2 or 3 issues (both in the agreement or missing from it)—10-15 min.
3. Choose spokesperson from your group.
4. Full group discussion on issues found—15-20 min.
5. Final Q & A—what terms have you found challenging in your own reviews?