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

Joan M. Emmet

Yale University, joan.emmet@yale.edu

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Copyright Bootcamp Day 2

Spotting Issues in e-Content Licenses

Copyright Bootcamp-D
Dec. 2 & 16, 2015
Joan M Emmet
License & Copyright Li
Yale University

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 (Licensor 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?