

The logo for CENDI, consisting of the letters C, E, N, D, and I in a stylized, outlined font, set against a dark gray rectangular background with a slight gradient.

**License Agreements for
Electronic Products and Services:
*Frequently Asked Questions***

Prepared for
CENDI Publisher Negotiations Task Group



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Purpose and Use of this Document

This document is prepared by the CENDI Publisher Negotiations Task Group in response to a request from CENDI agencies to address the issue of licensing of electronic products. Realizing that it was not in a position to provide guidance for any particular agency, the Task Group developed the concept of a Frequently Asked Questions document (FAQ) that could be used to educate and support librarians and information center staff regarding licensing agreements.

Procurement and licensing is complex and may be situation-based. Therefore, help from both procurement professionals and professional legal counsel is advised. However, it is hoped that this document will serve as a template for the development of agency Office of General Counsel approved model license agreements that can provide more specific guidance for the individual agencies.

Notice of Change

The information presented in this FAQ is subject to changes enacted by U.S. Government policies, legislation and case law. *Direct comments about this document to copyright@dtic.mil.*

CENDI is an interagency cooperative organization composed of the scientific and technical information (STI) managers from the Departments of Agriculture, Commerce, Energy, Education, Defense, the Environmental Protection Agency, Health and Human Services, Interior, and the National Aeronautics and Space Administration (NASA). CENDI's mission is to help improve the productivity of federal science- and technology-based programs through the development and management of effective scientific and technical information support systems. In fulfilling its mission, CENDI member agencies play an important role in helping to strengthen U.S. competitiveness and address science- and technology-based national priorities.

CENDI Publisher Negotiations Task Group

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1.0 INTRODUCTION

Many science-mission agency information centers and libraries use information products from private sources to manage the intellectual capital from the research and development (R&D) efforts of their agencies and to provide the information needed to support agency staff and researchers. The products may include primary databases, secondary databases, journals, books, and reference materials. In the paper environment, the rights and responsibilities of the purchaser and the producer are addressed by copyright law, fair use exceptions, and the “first sale” doctrine. However, in the digital environment, agreements are more often addressed through negotiations and contractual agreements.

This document is intended to provide a template for such an agreement. It is more descriptive than prescriptive, allowing flexibility in negotiations as well as differences in individual situations. It is intended to highlight the issues and areas that should be covered in a license for electronic information products and services. The goal is to meet the requirements and constraints of federal procurement regulations and contractual agreements, while realizing the intellectual capital and rights of the owner. Issues related to consortial contracts are highlighted since this is increasingly the funding method being used by federal information centers and libraries for these types of products.

There is no attempt to standardize wording, since agencies may have their own preferred conventions and procurement practices that apply. These should be discussed with your procurement or general counsel staff. Information owners will also have their own standardized agreements that they will bring to the table.

Section 5.0 includes references to helpful Web sites and documents that will provide more background on the issues identified in this document.

2.0 IS THERE A STANDARD NEGOTIATION PROCESS?

The negotiation process and the degree of flexibility will depend on several factors: the publisher, the size of the procurement, agency practices, information center needs, and the type of product being procured.

2.1 IS THERE STANDARDIZED WORDING FOR LICENSE AGREEMENTS?

Generally, large commercial publishers and well-established learned society publishers will have standard licensing agreements. In nearly every instance, licensors draft these agreements with provisions that are enforceable under the Uniform Commercial Code. As a result, a number of the provisions will be in violation of or conflict with the Federal Acquisition Regulation and other federal law. These should be considered as a starting point and should not be signed without review. It is also appropriate to draft an outline or provide wording for key sections. These drafts will serve as discussion tools, outline the issues quickly, and provide points for consensus and resolution.

The Association of Research Libraries (www.arl.org) and the International Consortium of Library Consortium (<http://www.library.yale.edu/consortia/>) have developed guidelines that can be used to help develop wording in-line with the needs of your agency or federal library.

2.2 WHO SHOULD BE INVOLVED IN THE PROCESS?

The process, of course, begins with the librarian or information center staff who is making the recommendation for procurement. Once the selection decision has been made, procedures will differ by agency, procurement mechanism, and the reporting structure of the requesting unit.

Despite these differences, it is important that key, non-library staff are involved as early in the process as possible. Three key groups include the information technology (IT)/ webmaster staff, procurement staff, and general counsel staff.

IT and Webmaster staff can advise on issues related to technology; for example, establishing criteria for authorized sites, authorizing and authenticating users in an efficient way, and identifying quality of service issues. They may also advise on different mechanisms for handling product branding and trademarks when presenting the product as part of the agency's intranet, extranet, or Internet Web site.

Procurement staff should be consulted on any draft wording, special conditions, or requirements. This is critical if the cost proposal or the terms and conditions from the vendor are valid only for a certain time period, or if special budget timelines are involved, which may require an expedited procurement cycle. Procurement staff can also identify if special procedures are required on the part of the information center staff, such as a sole source justification.

General counsel staff should minimally review the agreement prior to signatures. They will be able to advise as to whether terms and conditions are included that the government cannot agree to. The earlier the counsels are involved, the more likely it is that the process will proceed without any "hitches."

3.0 IS THERE A STANDARD TEMPLATE FOR LICENSING ELECTRONIC RESOURCES?

There is no standard template, though individual publishers generally have standard license agreements, which are often not specific to government agencies. Section 3.0 discusses the sections that often appear in standard publisher licenses from the point of view of the government agencies. The sections are presented in the order in which they appear in most standard licenses. The template is based on a composite of licenses negotiated between several CENDI agencies and a variety of publishers.

3.1 CONTRACT PARTIES (LICENSEE AND LICENSOR)

Publishers and procurement offices may have standard preambles. Generally, this establishes the parties of the agreement and certifies that these parties have the right to establish such a contract for the products or services that are described in the body of the contract. When dealing with a

consortium, it is critical that the parties be identified as having been authorized on behalf of the other users, or that all the users be identified as parties to the contract.

The preamble establishes who is the Licensor (the vendor that provides the product for license) and who is the Licensee (the government agency that is licensing the product). These terms can then be used unambiguously throughout the remainder of the document.

Possible wording might include:

*THIS AGREEMENT is between _____ [government agency]
 “Licensee” and _____ [vendor] _____, “Licensor”, a firm
 incorporated in the state/country of _____, operating at the
 following address for the purposes of this agreement: _____
 _____.*

3.2 DEFINITIONS

Definitions are not required in a license, but they may be helpful in cases where terms will be used throughout the document or where they may be ambiguous. It is beneficial to define terms such as “product”, “site”, and “user”, particularly when these are used as part of the pricing structure or usage limitations. Definitions should always be included if the agreement is not the standard agreement for either the vendor or the government agency.

Sample definitions include:

- a. *“Authorized site” means Licensee’s work site, and includes remote locations.*
- b. *“Authorized user” means all full- and part-time employees of Licensee, including those at remote locations, contractors working within the scope of their employment for Licensee, and Licensee’s agents, students, patrons, and the following: _____ [list additional]_____.*

(Note: If the system is publicly available, the term User may be substituted with a general definition of the type of user who is likely to use the Product)

- c. *“Product” means the licensed electronic publication/information service including, if applicable, accompanying software. The product is named _____.*
- d. *“Internet site” means Licensee’s site on the World Wide Web located at _____.*
- e. *“Updates” means a revised computer data/software Product. Updates do not include any options or future products that licensor develops and/or licenses separately.*

Of particular concern in the electronic environment are the definitions of “authorized site” and “authorized user”, since the pricing structure generally depends on either one or a combination of these factors. When defining authorized site, it is important to consider both facilities and geography. The definition should consider whether the products would/should be available to remote locations, which may have different local area networks, computer systems, and IP addresses. At home and travel use should also be considered.

Authorized users can be defined by authorized site, by job description (grade, classification, exempt or non-exempt), or individually. A proxy server may be needed to address this issue and to provide authorized access to consultants, contractors, or grantees. The extent of system users should be considered well before the negotiation process begins and the government agency should consider where compromises can be made. Depending on the pricing structure and the security requirements of the vendor, the government agency may need to consider various ways to provide secure access based on IP addresses, user ID and password, smart cards, etc.

3.3 WHAT THE VENDOR WILL PROVIDE

3.3.1 Rights to the Product

In the license agreement, the vendor grants rights to the government agency under the terms and conditions detailed in the body of the agreement. The specific product should be defined, especially if there are multiple products, versions, or editions that could be confused.

3.3.2 Updates

If the product is a serial item, such as an electronic journal that will be updated periodically, the license may reference these updates and give information about their provision. Generally, providers will not specify the frequency with which these updates are to occur. The library may want to propose wording that requires updates “in a timely fashion” or “in agreement with the providers’ normal publication schedule” in order to provide the basis for claims of reimbursement, if expected updates are not received.

Possible wording might include:

Licensee will receive whatever updates to the Product are issued during the period of this agreement and thereafter, if the agreement is extended.

In this case, there may be resulting requirements placed on the government agency. For example, if updates are complete replacements and not incremental, there is the question of the disposal of the information that has been received in the previous installments. Some vendors may specifically require that the outdated material be returned or destroyed. The vendor may also want to include wording to guarantee that the outdated material will not be sold or given to someone else.

Possible wording might include:

Upon receipt of updated material, Licensee shall cease use of the outdated material and promptly return it to the Licensor or destroy it, as agreed. Licensee will not transfer superceded Products to any other party. If Licensee fails to return or destroy material as required, Licensee may be denied any and all future updates, in addition to having imposed by Licensor limitations on any other rights hereunder.

3.3.3 Changes

The vendor may change the product in the future based on market needs, improvements, user requests, distribution technology changes, or changes to the providers' production and distribution mechanisms. Wording may require that the government agency be forewarned of these changes. If there are particular situations that would cause the product to be unusable by the government agency, they should be identified. The government agency may also specify how much advance notice is necessary. If the product ceases, the vendor should guarantee a statement for some level of refund if there has been a prepayment or deposit of any kind (see [FAQ Section 3.12 Term, Termination and Renewal](#)).

Possible wording might include:

Licensor shall have the right, in the sole exercise of its discretion, to make changes to the Product, including, without limitation, ceasing normal production or distribution of any or all of the Product, including any Updates. In the event the Licensor ceases to produce or distribute a Product, this Agreement shall terminate as to such Product, and Licensee shall be entitled to a pro rata refund of any prepaid fees attributable to the particular Product.

3.3.4 Corrections (Including Retractions and Errata)

Particularly in the case of reference databases and scientific journals in critical areas such as healthcare, it is important to consider retractions and errata. These may be handled as routine updates (if the replacements are provided for) or they may be handled as separate files (having different record structures that tie back to the erroneous information). This is less of an issue, if the product is only being accessed and not re-hosted by the government agency. However, it may still be important to receive notice of these changes in order to alert users of the information who may have received the erroneous information as a result of previous uses of the product.

Possible wording might include:

In the event that Licensor discovers a critical or significant error or omission in the Product's information provided under this Agreement, the Licensor will notify Licensee in writing or through provision of corrected information.

The agreement may also require that the government agency respond to receipt of these corrections, since the vendor may be concerned about erroneous information being attributed to its product.

Possible wording might include:

Licensee will use its best efforts to promptly remove any erroneous data, include any omitted data, and otherwise correct the error on the Internet Site, and notify its users of the corrected Product by placing a message regarding the correction on the Internet Site or otherwise informing users.

3.3.5 Technical Support

If the vendor has agreed to provide help desk, documentation, or technical support for installation, this should be included in the contract along with measures of performance (for example, 24x7x365 service) and any schedules for delivery that have been mutually agreed upon.

3.3.6 Usage Statistics

The government agency may include wording that requires the vendor to report usage if the vendor is hosting the information product. The collection and retention of usage and statistics and user demographics must be carefully balanced with privacy issues, particularly if the use of “cookies” is being considered (see Office of Management and Budget [OMB] Memo dated June 2000¹). Other metrics and evaluation techniques, such as online intercept surveys, may also be included in the license agreement. For a discussion of various metrics and evaluation techniques and issues see “Evaluating our Web Presence: Challenges, Metrics, Results”, a summary of the symposium sponsored by CENDI and the National Library of Medicine, April 17, 2001 (link to be provided when the document becomes available on the CENDI Web site; currently in approval process).

The government agency should also consider specifying what the vendor may or may not do with the information gathered and with whom the information can be shared. For example, the government agency may want to restrict the vendor’s right to use the information collected for marketing purposes or it’s right to sell or share the information with third parties.

Possible wording might include:

Licensor must provide the Licensee with aggregated usage statistics via an electronic report on a monthly basis. The statistics must include the number of unique users by domain. Licensor agrees to maintain such security and transaction tracking software during the term of this Agreement. The Licensor may not use these statistics for marketing purposes or give, sell, or otherwise transfer them to any third-party, without the consent of the Licensee.

3.4 WHAT THE GOVERNMENT AGENCY CAN DO WITH THE PRODUCT

This is one of the most important sections of an agreement in an electronic environment. Where multiple users can use a single electronic copy, publishers use this section to identify the terms of distribution and use of the product on the part of the agency. Since this is a licensing situation,

¹ <http://www.cio.gov/Documents/m%5F00%5F13%5Fprivacy%5Fpolicies%2Ehtml>

the first sale doctrine does not apply and any use of the product needs to be spelled out in the agreement. Generally, the following section would outline not only what can be done with the product but what cannot be done under the terms of the contract. If the licensee is a library, it should pay particular attention to any limitations in the license that restricts its use of the intellectual property that is otherwise granted to it under Section 108 of the Copyright Law of the United States of America (Title 17 of the United States Code).

3.4.1 Offering of the Product

This section describes how the government agency will offer the product. Generally, there are two options: 1) as a computer-assisted data retrieval service, or 2) as online access. In the first case, the agency is loading (re-hosting) the product internally and providing the service to the user. In the second case, the government agency is simply providing online access to the product, which is hosted by the vendor or a third party.

Based on the mode of access and the role being played by the agency, certain actions may be appropriate.

Possible wording might include:

Licensee agrees, during the term of this Agreement, to offer [1) a computer-assisted data-retrieval service, or 2) online access] that enables Users to access the Product. Solely in the course of offering the Product to Users in accordance with rights granted pursuant to Section 2, Licensor hereby grants to Licensee a nonexclusive right to the following actions.

The following types of actions should be considered when drafting or reviewing an agreement:

3.4.2 Downloading and Storing

Downloading means copying part of or all of the database and storing it on a local system. This may result from caching or in order to create other products or provide other services. The transient or permanent nature of the storage will depend on the particular activity. For example, a transient copy is needed to print or redistribute via a network. Permanent storage would be required for permanent archiving.

3.4.3 Distribution and Redistribution (electronic or paper)

Distribution and redistribution covers areas such as reproduction of the database content and search results. If the users include librarians or information specialists retrieving materials for others, the agreement should cover needs of the reference desk or interlibrary loan. The interlibrary loan permissions may be broad, essentially any patron requesting through another library. However, many federal libraries and information centers have limited resources and, therefore, provide limited interlibrary loan depending on their own policies. They may provide interlibrary loan only to other libraries within their agencies or departments, only serve other federal libraries, or, if they are members of OCLC, they may operate in a quid pro quo

environment for interlibrary loan with other OCLC members. In any case, the limitations should be carefully considered, particularly if there will be no paper copy of the material from which interlibrary loan could be serviced.

Possible wording might include:

Licensee is granted permission to reproduce limited portions of the database and to redistribute the results of searches among the permitted class of users, and to perform interlibrary loan of materials from the database in accordance with U.S. copyright law and the Commission on New Technical Uses (CONTU) guidelines, which shall apply to both analog and digital copying and redistribution.

3.4.4 Transmitting

Transmission includes both transferring the data over a network for routine Internet communication and other specialty communications. For example, if the Ariel interlibrary loan system is used, special provision may need to be made for digital fax transmission. Some agreements may limit fax to the transmission from a paper copy. If this type of restriction is included in the agreement, the government agency will need to print out the item in order to transmit it via fax. Transmitting the item via e-mail should also be considered.

3.4.5 Displaying

Display should be specifically addressed if the government agency is providing access to the vendor's site and redisplaying the content in frames or otherwise converting the content to change the look and feel of the interface.

3.4.6 Incorporation into Other Products

If the government agency plans to incorporate items from the vendor's product into its own products, special agreement wording will be necessary. This may be the case if the government agency produces a secondary database and wants to be able to incorporate selected citations from the vendor's product into that database. Key issues that arise include copyright (particularly since the remainder of the database may be a government work and, therefore, non-copyrightable). Acknowledgment or copyright notices may be required on the extracted items. The right to modify, reformat, or otherwise alter the content received also will need to be addressed.

Possible wording might include:

Licensee shall have the right to modify, reformat, alter, revise, paraphrase, or omit all or any portion of the Product or otherwise change the material comprising the Product in any manner. Licensee shall be prohibited from incorporating the Product or any portion thereof in other Licensee products or services except as agreed to in writing by the parties. Licensee shall be prohibited from providing a product that contains material incorporated from that of the Licensor to the Licensor's

competitors or to an international entity where the copyright may not be enforceable. Licensee shall not be considered to be an “owner of a copy” and shall not have rights granted under 17 USC § 117 to make adaptations of the Product and software components of the Product, except as may be granted by the license.

3.5 USE OF THE PRODUCT BY AGENCY USERS

There is generally a distinction made between what the administrators of the system (or the library or information center staff) can do with the product and what authorized users can do. Generally, vendors are seeking to limit usage to that which is performed in the normal course of non-commercial activities.

Possible wording might include:

Authorize Users to access and use the Product in connection with their normal non-commercial activities, including creating on-line and off-line printouts or downloads of insubstantial portions of information retrieved from the Product.

It is also important to indicate how the government agency will inform authorized users of the types of uses that are allowed. For example, the agreement might include wording such as “licensee will display notices as required, but will have no technical means of determining what portion of the Product might be downloaded.”

3.6 MARKETING

In the case of federal scientific and technical information programs, there may be outreach activities that involve the announcement of the licensed product. In this case, the vendor may choose to include wording that describes the government agency’s responsibilities with regard to such activities in relation to the vendor’s product.

Possible wording might include:

In marketing the Internet Site, Licensee shall: 1) avoid deceptive, misleading, or unethical practices that may be detrimental to Licensor or to the Product, including inappropriate hypertext links to other sites on the Internet or the juxtaposition of advertising or other materials that are likely to create or are intended to create the impression that Licensor endorses the goods or services of a third party or that a third party endorses the goods or services of the Licensor; 2) not make any representations, warranties, or guarantees on behalf of Licensor to the Users concerning the Product; 3) comply with all applicable U.S. Federal laws and regulations, provided that they do not conflict with applicable U.S. Federal law, in performing its duties with respect to the Product; and 4) use reasonable efforts to promote and market the Internet Site to Users, as permitted under this Agreement.

3.7 INTELLECTUAL PROPERTY

3.7.1 Copyright

A license agreement does not transfer copyright from the owner. The agreement may include specific statements about this. In addition, there may be requirements that a copyright notice, generally specified by the vendor, be included and where it should be displayed. This may extend to promotional material or to materials (documents, citations, etc.) when they are printed from the product.

Possible wording might include:

The following copyright and trademark notice showing the appropriate year for the Product, as applicable, shall appear in a conspicuous manner on the first main screen of access to the Product.

[insert text of notice]

The foregoing notice shall also appear conspicuously on all printed materials from the Internet Site, in training products, or promotional materials that include or describe the Product.

3.7.2 Use of Trademarks

When making products available via the intranet or Internet, agencies may use the logos of the vendor to identify the products being provided. However, these trademarks are still the intellectual property of the vendor. The vendor and government agency may choose to be explicit about how and when the trademarks may be used in the agency's environment.

Possible wording might include:

During the term of this Agreement, Licensee is granted a limited, nontransferable right to use Licensor's trademarks and logo solely in support of Licensee's display of the Product on the Internet Site. Licensor must review and approve any contemplated use of the trademarks and logos prior to their use in connection with the Internet Site. Licensee shall use the trademarks and logos in a manner consistent with good trademark practice, exercising no less than a reasonable standard of care in using and protecting such trademarks and logos. Licensee shall not alter the logos or trademarks, nor shall Licensee affix the logos or trademarks to products other than _____ . Licensee shall have the right to use its own copyrights, trademarks and logo on the Internet Site, provided that in doing so, Licensee does not: 1) remove or obscure Licensor's proprietary logos or trademarks; or 2) affix its logos or trademarks in a way confusing to the Users (with regard to the origin of the Product). Licensee shall not create or use any trademark, service mark, trade name or logo identical or similar to any Licensor trademark.

3.7.3 Notification of Intellectual Property Rights Breach

As part of a good faith agreement, the vendor may require that the government agency inform the vendor if it suspects that copyright or intellectual property rights have been breached.

Possible wording might include:

Licensee will immediately notify Licensor if it becomes aware or suspects that any third party is wrongfully using any of the Product or any variation of the Product, in whole or in part, or any of Licensor's intellectual property rights, including, but not limited to, trademarks, copyrights and patents.

3.8 WARRANTIES ON THE PART OF THE VENDOR

This section describes what the vendor agrees to ensure.

3.8.1 Online System Reliability

While continuity and quality of service is important, it is also important to realize that there are reasonable cases where service cannot be provided. These should be stated. It is also important in the networked environment to realize that when the access is being provided via the Internet, quality of service is also at the mercy of the open public Internet service providers and a host of other factors come into play.

Possible wording might include:

Licensor shall use reasonable efforts to provide continuous availability of the online database subject to periodic unavailability due to maintenance of the server(s), the installation or testing of software, and the loading of data and downtime related to equipment or service outside of control of the Licensor. Problems should be communicated to the Licensee within two hours.

If the material is being re-hosted by the government agency, the vendor may include similar wording regarding the availability of access to its service with reasonable quality of service. This is particularly important if the vendor believes that its reputation may be at risk, if users attribute poor service quality to the vendor when the problem is with the agency's system.

3.8.2 Replacement of Media

If any part of the product, software or documentation is provided on a fixed medium such as a CD-ROM, a clause may be included requiring prompt replacement.

Possible wording might include:

Licensor shall promptly replace at no cost to the Licensee all or part of the Product that is defective or does not conform with this agreement, provided that the Licensee

gives the Licensor written notice of the nonconformity, defect, or damage within sixty (60) days after Licensee's receipt of the copy. Without such notice, Licensor shall make replacement at the Licensor's replacement cost.

3.8.3 Comparable Pricing

Vendor warrants that the price offered is the lowest for comparable service for a comparable group of licensees.

3.8.4 Compliance with Section 508

Following the passage of PL 105-220 in August 1998², which amended the Electronic and Information Regulations, Section 508 of 29 U.S.C. 794d, information products and technologies must be equally accessible by government employees with disabilities as by their non-disabled colleagues. Examples of compliance include text only versions of graphics so that audio can be created from the text, avoidance of certain colors, alternative navigation mechanisms, etc. Guidance is available from the Access Board at www.access-board.gov.

Possible wording might include:

Licensor represents and warrants that its Product is in compliance with 29 U.S.C. 794d § 508.

3.8.5 Third Party Property

The vendor may warrant that it has the right to grant rights to the government agency without infringing the intellectual property rights of others; for example, authors or other publishers in the case of secondary databases. The vendor may also include statements that ensure that the copyright and intellectual property rights remain those of the vendor and are not rights that are transferred by this agreement.

Possible wording might include:

Licensor represents and warrants that it has the right to grant this license and that use of the Product in accordance with the terms of this agreement will not infringe the intellectual property or other rights of any third party. The copyright and other proprietary rights in the Product remain the sole and exclusive property of the Licensor or third-party owner, as appropriate.

3.8.6 Disclaimer of Warranties

License agreements almost always include a disclaimer of warranties. Warranties are guarantees, and they are included throughout the agreement; e.g., a warranty that nothing in the database violates the rights of a third party. However, a special section is included that disclaims

² <http://www.cio.gov/Documents/section%5F508%5Faugust%5F1998%2Ehtml>

all other warranties. Several examples are provided in *Guide to Database Distribution* (Bremner, 1994).

Possible wording might include:

DISCLAIMER. Except for the express warranties stated in this agreement, the database is provided on an “as is” basis and licensor disclaims any and all other warranties of any kind, expressed or implied, including, without limitation, warranties of merchantability or fitness for a particular purpose.

3.8.7 Limitation of Liability

The liability of the vendor may also be limited under contract.

Possible wording might include:

[Vendor] will not be liable to subscriber or any user or third party for any indirect, special, or consequential damages, whether based upon a claim or action of contract, warranty, negligence, strict liability or other tort, breach of any statutory duty, indemnity of contribution, or otherwise arising out of the agreement.

3.9 WARRANTIES AND INDEMNIFICATION ON THE PART OF THE GOVERNMENT AGENCY

Most standard agreements for products or services will have a standard indemnification clause. However, an agreement that includes such a clause cannot be signed by the government or any official or contractor on the government’s behalf. The Anti-Deficiency Act, 31 U.S.C. § 1341³ and the Adequacy of Appropriations Act, 41 U.S.C. § 11⁴ preclude employees from committing the government to such open-ended liability. If questions arise in this regard, the general counsel staff should be consulted.

3.10 TRACKING AND RECORD KEEPING REQUIRED OF THE GOVERNMENT AGENCY

Vendors may include wording that requires the government agency to implement security or tracking software, to keep records, and to report on usage. However, the need for monitoring to ensure compliance with the terms of the agreement must be carefully balanced with privacy issues. Persistent cookies to track customer usage are not allowed on government sites. If cookies are used by the product to which the library or information center links, this should be identified and discussed with the general counsel. It may require special approval by the Department Secretary per the OMB Memo dated June 2000² regarding privacy. Similarly, issues such as online intercept surveys should be carefully considered, and minimally, the vendor should be required to inform the government agency that this type of evaluation will include users who access the vendor’s site under this agreement.

³ <http://www4.law.cornell.edu/uscode/31/1341.html>

⁴ <http://www4.law.cornell.edu/uscode/41/11.html>

If information concerning usage is provided to the vendor under the agreement, the government agency may want to restrict the types of use to which that data may be put. For example, it may want to restrict the vendor's right to use it for marketing purposes or to sell or share it with third parties.

Generally, if the information is to be collected by the government agency and then provided to the vendor, it should be roll-up information that is devoid of all personal information, including user name, e-mail, passwords, etc.

Possible wording might include:

Licensee may load the Product on the Internet site server(s) only after Licensee implements adequate security and transaction tracking software to fulfill its obligations under this Agreement and within the constraints of OMB regulations and guidelines regarding privacy. Licensee agrees to maintain such security and transaction tracking software during the term of this Agreement.

3.11 PROPRIETARY RIGHTS AND CONFIDENTIALITY

The vendor may ask that some information be treated as confidential or proprietary. However, the government must follow certain rules for determination of what is confidential or proprietary. These are included in the Freedom of Information Act (FOIA) 5 USC § 552(b) Exemption 4⁵. While the information may be treated as proprietary, FOIA requires that appropriate procedures be followed before access to others can be denied on this basis.

Possible wording might include:

Each party herein agrees that it has no ownership interest in or right to use the Proprietary/Confidential Information of the other, except in accordance with the terms of this Agreement. Each party acknowledges that it may disclose Proprietary/Confidential Information to the other in the performance of this Agreement. The party receiving the Proprietary/Confidential Information shall: 1) maintain it in strict confidence and take all reasonable steps to prevent its disclosure to third parties, except to the extent necessary to carry out the purposes of this Agreement, in which case, these confidentiality restrictions shall be imposed upon the third parties to whom the disclosures are made; 2) use at least the same degree of care as it uses in maintaining the secrecy of its own Proprietary/Confidential Information (but no less than a reasonable degree of care); and 3) prevent the removal of any proprietary, confidential, or copyright notices placed on the Proprietary/Confidential Information.

Of particular significance in the digital environment, is Item 3 in the above proposed wording. The removal of proprietary and copyright notices that have been placed on digital information is specifically prohibited by the Digital Millennium Copyright Act.⁶

⁵ <http://www.usdoj.gov/04foia/foiastat.htm>

⁶ <http://www.loc.gov/copyright/legislation/hr2281.pdf>

Neither party herein shall have any obligation concerning any portion of the Proprietary/Confidential Information of the other which: 1) is publicly known prior to or after disclosure other than through acts or omissions attributable to the recipient or its employees or representatives; 2) as demonstrated by prior written records, already known to the recipient at the time of disclosure; 3) is disclosed in good faith to the recipient by a third party having a lawful right to do so; or 4) is required to be disclosed by the receiving party by applicable law or legal process, provided that the receiving party shall immediately notify the other party so that it can take steps to prevent its disclosure.

3.12 TERM, TERMINATION AND RENEWAL

The contract will specify the length of the contract, what will happen upon termination and the procedures for renewal. The termination will cover regular termination, based on expiration of the agreement, or early termination because of breach of contract or other events. Written notification that procedures, such as deletion of the product from the agency's computer, may be required as part of the termination.

TERM This license shall begin on the date of the last signature on this agreement or _____ and shall be valid until _____.

Unless provided otherwise in the FAR clauses in this agreement, in the event that either party believes the other has materially breached any obligations under this agreement, that party shall so notify the breaching party in writing. The breaching party shall have sixty (60) days from receipt of this 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 this agreement without further notice.

Within ten (10) days after the termination of this agreement, whether by expiration of its term or pursuant to a specific provision, Licensee shall erase the Licensor's data and software from all tapes, disk files and computer memory and shall destroy all copies in Licensee's possession or return them to Licensor, except as provided for archival copying.

OR

Upon expiration or termination of a Product (or the Agreement as a whole), all of Licensee's licenses, including without limitation rights to reproduce and use the applicable Product, shall immediately cease and Licensee shall disengage all User's ability to use the Product as soon as reasonably possible. Licensee shall immediately delete the applicable Product from its computers, and destroy all copies thereof. No copies of the applicable Product, or any information contained, may be retained by Licensee following such expiration or termination. Written confirmation that these procedures have been followed must be sent to the Licensor.

OR

Upon termination of this agreement, Licensee may retain one copy of any CD-ROM, diskette or other fixed media database for archival purposes. This archival copy of the Product does not entitle the Licensee to any updates of the material.

3.13 TECHNICAL COMMUNICATION

Minimally, the contract should establish the key points of contact for technical issues (not necessarily the same person as for contract issues). Rather than listing personal names, which may change over time, position titles are recommended.

Possible wording might include:

Licensee and Licensor shall designate technical liaisons for each party, who shall be the primary contact for technical questions and issues that may arise.

Licensee Technical Point of Contact: [position title]

Licensor Technical Point of Contact: [position title]

The actual name and contact information can be handled by a notification between the two organizations.

3.14 GENERAL TERMS AND CONDITIONS

3.14.1 Relationship of the Agreement to Other Agreements

Generally, the agreement is identified as the only agreement applying to the licensing of this particular product. However, if others apply, they should be referenced here. It could also be noted if this agreement supersedes any other written or oral agreement or understandings that may have existed prior to this agreement.

Possible wording might include:

This agreement contains the entire agreement of the parties as to herein licensed use of the database and supersedes any and all written or oral prior agreements and understandings.

3.14.2 Amendments and Modifications

The agreement may also state how the agreement can be amended or modified. Generally, the requirement is that this be done in writing and by mutual agreement of both parties. This might differ in a consortium situation.

Possible wording may include:

This agreement may only be amended or modified by mutual agreement of the parties in writing.

3.14.3 Relationship of the Parties

Depending on the type of relationship being anticipated by the agreement, and particularly in cases where the government agency is re-hosting the vendor's product, the independence of the parties may be stated.

Possible wording might include:

In all matters relating to this Agreement, the Parties shall act independently and not as agents. Neither party will represent that it has any authority to assume or create any obligation, express or implied, on behalf of the other party, not to represent the other party as agent, employee or in any other capacity.

3.14.4 Governing Laws

Contracts are generally governed by state law. Therefore, standard agreements will establish the state under which adjudication of disputes would be conducted. This is generally the state in which the vendor is headquartered. However, in the case of the federal government, the jurisdiction must be the U.S. federal courts.

Possible wording might include:

This agreement shall be governed and construed in accordance with the laws of the state of _____. The federal or state courts of the United States located in _____ shall have jurisdiction to hear any dispute under this agreement.

3.14.5 Force Majeure

This clause routinely handles problems of delays or failures due to forces beyond the control of either party. Generally, notice is required and the requirements for termination under these circumstances are specified.

Possible wording may include:

Neither party shall be liable to the other for failure or delay in the performance of a required obligation if such failure or delay is caused by strike, riot, fire, flood, natural disaster, or other similar cause beyond its control. The nonperforming party shall provide to the other party written notice of the event of force majeure within thirty (30) days of the occurrence of such event. Either party may terminate this Agreement if such event of force majeure continues for a period of ninety (90) days.

3.14.6 Notifications and Communications

The agreement may also include administrative details such as points of contact for the contract or specifics on how notices should be sent (i.e., certified mail) to another party or address, copies, and the effective dates of any notice. In the current Internet environment, the issue of whether e-mail will be treated as a communication of record should be addressed. If certain digital signatures or a Public Key Infrastructure is to be used, this should be included in the agreement.

Possible wording might include:

Any notice provided in this agreement shall be sent by personal delivery or by certified mail, postage prepaid, to the other party at its address set forth herein or such other address as shall have been communicated in writing to the other, and shall be effective as of its personal delivery or mailing date, as the case may be. The party sending such notices shall also provide a copy to

3.15 FEES AND PAYMENTS

Fees and payment schedules may be included in the contract. Alternatively, these may be handled by an invoice and purchase order, which may be attached to the contract and referenced as an attachment, if desired or necessary.

3.16 FEDERAL ACQUISITION REGULATION CLAUSES

All procurement in the Executive Branch is governed by either the Federal Acquisition Regulations (FAR)⁷ or the Defense Federal Acquisition Regulations (DFARS).⁸ The contract should incorporate or reference the appropriate clauses. This may be done in one of two ways. One way is through a general clause such as:

In the event any language in this agreement conflicts with the FAR [or DFARS] clause provisions, the FAR [or DFARS] provisions shall govern.

Alternatively, the FAR or DFARS clauses may actually be referenced as follows:

All of the terms and conditions set forth in this agreement are governed by the language of the following Federal Acquisition Regulation (FAR) clauses: FAR 52.233-1, Disputes; FAR 52-249-2, Termination for the Convenience of the Government (Fixed-Price); and FAR 52-249-8, Default (Fixed Price Supply and Service).

⁷ <http://www.arnet.gov/far/>

⁸ <http://www.acq.osd.mil/dp/dars/dfars.html>

4.0 REFERENCES

OMB Memo M-00-13; June 22, 2000; Privacy Policies and Data Collection on Federal Web Sites; Memorandum For The Heads Of Executive Departments And Agencies; Jacob J. Lew, OMB Director

¹<http://www.cio.gov/Documents/m%5F00%5F13%5Fprivacy%5Fpolicies%2Ehtml>

Public Law: 105-220 (08/07/98) (b) Electronic and Information Technology Regulations, Section 508 (29 U.S.C. 794d) ELECTRONIC AND INFORMATION TECHNOLOGY

²<http://www.cio.gov/Documents/section%5F508%5Faugust%5F1998%2Ehtml>

The Anti-Deficiency Act, 31 U.S.C. § 1341

³<http://www4.law.cornell.edu/uscode/31/1341.html>

Adequacy of Appropriations Act, 41 U.S.C. § 11

⁴<http://www4.law.cornell.edu/uscode/41/11.html>

Freedom of Information Act (FOIA) 5 USC § 552(b) Exemption 4

⁵<http://www.usdoj.gov/04foia/foiastat.htm>

Digital Millennium Copyright Act

⁶<http://www.loc.gov/copyright/legislation/hr2281.pdf>

Federal Acquisition Regulations (FAR)

⁷<http://www.arnet.gov/far/>

Defense Federal Acquisition Regulations (DFARS)

⁸<http://www.acq.osd.mil/dp/dars/dfars.html>

Association of Research Libraries

<http://www.arl.org>

Bremner, Joseph P. "Guide to Database Distribution, Second Edition." (Philadelphia, PA: National Federation of Abstracting and Information Service), 1994.

Federal Library and Information Center Committee (FLICC).

<http://www.loc.gov/flicc/>

FEDLINK Member Handbook – FY2000, Services, Section II.1 Electronic Information Retrieval Services.

<http://www.loc.gov/flicc//mhb/mhbsec2.html#1>

International Consortium of Library Consortium (ICOLC)

<http://www.library.yale.edu/consortia/>

Okerson, Ann S., et al., "Lib-License: Licensing Digital Information".

<http://www.library.yale.edu/~llicense/index.shtml>.

Appendices

**Checklists Of License Provisions
From The National Library Of Medicine
For Acquiring Copyrighted Information In Electronic Format**

APPENDIX A
6027-1 NATIONAL LIBRARY OF MEDICINE
ACQUIRING COPYRIGHTED INFORMATION IN ELECTRONIC FORMAT

CHECKLIST OF LICENSE PROVISIONS

Title of Material Under Review:

Publisher of Material Under Review:

Date of Review:

Reviewer Name:

Business Issues:

(1)	Are there any provisions that pose a liability upon the user?	Yes <input type="checkbox"/> No <input type="checkbox"/>
N.B. If "Yes," these provisions are unacceptable.		
(2)	Are there any provisions that raise an issue involving potential legal problems?	Yes <input type="checkbox"/> No <input type="checkbox"/>
N.B. If "Yes," these provisions should be reviewed by legal counsel.		
(3)	a. Are there any warranty provisions?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. If answer above was "Yes," are the warranty provisions acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(4)	Is the term of the license clearly stated and acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(5)	a. Is a termination provision included?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. If answer above was "Yes," is the termination provision acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
N.B. Any provision that allows the licensor to unilaterally terminate the agreement without regard to Contract Disputes Act procedures, including any provision limiting the Government's rights under a termination, is unacceptable since it conflicts with the Federal Acquisition Regulation disputes and termination clauses of the acquisition. Examples of such provisions include those that (1) allow the licensor to terminate the agreement should the Government fail to pay the license fees or other amounts when due, (2) state that termination for any reason would not affect the amount due or paid to the licensor, and (3) limit the Government's remedy should the Government be dissatisfied with the licensed product.		
(6)	Are there any provisions that violate the Antideficiency Act?	Yes <input type="checkbox"/> No <input type="checkbox"/>
N.B. Any provision that obligates the Government to pay amounts in addition to the stated contract price violates the Antideficiency Act and must be removed because such provisions commit the Government to a future expenditure of funds for which no appropriations have been made. Examples of such impermissible provisions include those that (1) require the Government to pay taxes not included in the negotiated price, (2) allow for automatic renewal of annual licenses for which the Government has to pay, (3) require the Government to indemnify or hold the owner of the copyrighted information harmless in the event of certain lawsuits by third parties, and (4) require the Government to agree to represent the licensor, or pay attorneys fees and expenses, in litigation.		

(7)	Are there any provisions providing that the license will be interpreted in accordance with the laws of a particular state?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<p>N.B. Any provision essentially stating that the license agreement constitutes the entire agreement between the licensee and licensor, that the license agreement is a final expression of the agreement between the parties, or that the license agreement supersedes all prior agreements between the parties (including all oral and written proposals), is unacceptable. The terms and conditions and FAR clauses of the acquisition govern and cannot be superseded by a license agreement.</p> <p>N.B. If “Yes,” then the license must be amended by adding: “to the extent that they do not conflict with Federal law.”</p>		
(8)	Does the agreement contain an “Entire Agreement” provision?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(9)	Does the agreement contain a provision affecting sovereign immunity?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<p>N.B. Any provision that permits the licensor the right to seek injunctive relief against the Government’s breach of an agreement is unacceptable since it could result in the Government waiving its sovereign immunity. Such provisions should be deleted or made subject to the disputes clause of the acquisition.</p>		
(10)	Has consideration been given to the use of FAR clause 52.227_19, Commercial Computer Software __ Restricted Rights, which provides the Government specified rights to use, reproduce, and disclose software containing copyrighted information?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(11)	<p>a. Does the acquisition involve a mass market license (required as part of an employee’s official duties)?</p> <p>b. If answer above was “Yes,” have the terms and conditions of the mass market license been reviewed?</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
(12)	Is there any other provisions that conflict with the Federal Acquisition Regulation (FAR)?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<p>N.B. Any other provision that conflicts with the FAR is unacceptable. Examples are provisions that (1) unduly limit the Government’s rights in data, (2) limit the Government’s warranties thereby conflicting with the FAR warranty clause of the acquisition, and (3) make delivery contingent upon some future date or event thereby conflicting with the delivery requirements of the acquisition.</p>		
(13)	Has a determination been made that the price is fair and reasonable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<p>N.B. A determination that the price is fair and reasonable must be made by the Contracting Officer prior to award.</p>		

APPENDIX B
6027-1 NATIONAL LIBRARY OF MEDICINE
ACQUIRING COPYRIGHTED INFORMATION IN ELECTRONIC FORMAT

CHECKLIST OF LICENSE PROVISIONS

Title of Material Under Review:
Publisher of Material Under Review:
Date of Review:
Reviewer Name:

Technical Issues:

[Note: In the following questions, if Part "a." is checked "No," then you should proceed to the next question.]

(1)	a. Is the license purpose clearly stated?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Is the license purpose, as stated, acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(2)	Are the parties to the license clearly defined as the National Library of Medicine and the holder of the copyrighted material?	
(3)	a. Is the definition of those authorized to use the information ("User") clearly stated to include NLM's authorized agents, NLM's on-site and off-site patrons, and NLM staff?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Is the statement of "User" acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(4)	a. Are there any limitations on the number of users?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations on users acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(5)	a. Are there any limitations on fair use of the information otherwise provided under copyright law?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations on fair use acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(6)	a. Are there restrictions on the rights of users?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the restrictions on users' rights acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(7)	a. Are there any limitations on interlibrary loans?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations on interlibrary loans acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(8)	a. Are there any restrictions on archiving rights?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the restrictions on archiving rights acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(9)	a. Are there any limitations for on-line access?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations pertaining to on-line access acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(10)	a. Are there any limitations on accessing the information?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations on information access acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(11)	a. Are there any limitations on the locations where the information can be accessed?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Are the limitations on access locations acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>
(12)	a. If a "site" license, is the definition of "site" clearly written? (For example, the definition may include on_site facilities as well as off_site locations.)	Yes <input type="checkbox"/> No <input type="checkbox"/>
	b. Is the site definition acceptable?	Yes <input type="checkbox"/> No <input type="checkbox"/>

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| (13) | a. Are there limitations on downloading and copying information? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Are the downloading and copying limitations acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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- | | | |
|------|---|--|
| (14) | a. Is there a clear statement concerning receipt of any revisions to the information? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Is the revision receipt statement acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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- | | | |
|------|---|--|
| (15) | a. Are there any limitations on the user's right to enhance or reformat the copyrighted data? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Are the limitations on enhancement or reformat rights acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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- | | | |
|------|---|--|
| (16) | a. Is there a clear statement of any actions required to be taken by NLM to preclude unauthorized access? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Is the statement of required NLM actions to preclude unauthorized access acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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|------|---|--|
| (17) | a. Is there a clear statement of requirements for safeguarding the information? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Is the statement of requirements for safeguarding information acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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- (18) Are there provisions that include a claim to copyright of information that can't be copyrighted under the law (e.g., materials created by the U.S. government or by its employees as part of their official duties)? Yes No
- N.B. If "Yes," then these provisions must not be accepted.**
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- | | | |
|------|--|--|
| (19) | a. Are there any requirements that would not safeguard the confidentiality of a user's identity and the materials the person accessed? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Are the requirements acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
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- | | | |
|------|--|--|
| (20) | a. Is there a clear statement of the disposition of copyrighted information after expiration of the license? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| | b. Is the statement acceptable? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
-
- (21) Has the program area's License Review Official coordinated a review of the license terms and conditions with the other NLM program areas? Yes No