Including Library Principles in Licenses

Legal Language Without a Legal Degree

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ABSTRACT: Libraries should be amending the licenses received from vendors for electronic resources to reflect library principles. The *ASERL Eleven* list of licensing principles seeks to provide rationale and example language for 11 important library values. These statements and samples of legal language are discussed. This list is just one of many resources that librarians can use to negotiate better and more helpful terms in agreements, and further sources are given.

INTRODUCTION: WHY THIS PRESENTATION?

I first learned that libraries can edit the licenses presented by vendors at an Atla workshop nearly 20 years ago, taught by the incomparable Kevin Smith. It was a revelation that libraries should ask—no, demand—changes to licenses, to be sure the library was getting the terms that best fit their situation. Early on, I physically redlined and wrote in the terms we wanted or needed. I work for a state-supported university; they have some very specific requirements. When vendors began refusing some of the changes, I met with someone in the General Counsels' Office who advised me to do the best I could and calculate the risks the library was willing to accept. This was back in the early days when the library signed all the library-related licenses; those times are past. Later, the university began requiring a Mandatory Addendum be attached to all licenses, but no one was really checking if the vendor was agreeing to those terms. Now, all University licenses and contracts are signed by one Vice President, and vendors that do not accept the Mandatory Addendum do not get our business.

But all these legal maneuvers by the University and General Counsel have to do with specific business practices, warranties and

liabilities, and not really with the terms of use specific to library resources. Librarians should be looking out for the terms that preserve and even expand the long-standing values we believe in: broad fair use, access to sharing and new research methods, user privacy, and transparency about costs. Many different entities, very large libraries and their consortia, have been working on these terms and sharing them for a decade or more. NISO published SERU, a basic, bare-bones license template, in 2015, with the hope that it could act as an open model that vendors and libraries could agree on without any negotiation. California Digital Library and the Big Ten Alliance have extensive websites explaining the values libraries should be advocating for in their licenses of electronic resources. The Canadian Research Knowledge Network (CRKN/RCDR) also has a very helpful website.

WHY THIS LIST OF LIBRARY PRINCIPLES?

Our library at the University of Mississippi is a member of ASERL (Association of Southeastern Research Libraries), and I served on the drafting team for the *ASERL Eleven*, a list of principles for amending licenses received from vendors for electronic resources (ASERL 2022). The drafting team talked for a long time about why we wanted to create another licensing guide, and we narrowed it down to two primary reasons. We wanted to make clear that the changes we were asking for to our licenses were not arbitrary; they were connected to library values. And we wanted to give specific examples for acceptable language to support those values. The drafting team included very experienced licensing librarians, with at least one lawyer evaluating the statements and suggested language. We wanted small libraries without those resources or colleagues to be able to request firm, quality language from their vendors.

HOW DID WE BUILD THIS LIST?

The task force started with the principles. The group brainstormed the common, important, long-standing values of librarianship, grouped principles together, and considered which ones were still missing. We tried to get the list down to the top ten, but we had to compromise at eleven. Then we mined all the great resources created by other

libraries and consortia to find examples of statements and licensing language already existing. We borrowed, mixed and matched, and edited to represent what we thought were contemporary and vital statements of values. Our value statements use terms like "ASERL seeks to," "ASERL believes," and "ASERL affirms." We tried very hard to put our values into positive statements, explaining why each principle was important to our mission as libraries. In the end, we alphabetized the principles, not imposing a hierarchy on the relative importance of each principle.

WHAT BASICS ARE ASSUMED IN THE *ASERL ELEVEN*?

First, the group assumed that each library would know and work within their own state's or institution's requirements for contracts. I mentioned that Mississippi has a Mandatory Addendum to all University Contracts. Most of the points of that Addendum do not apply to library resources, but I am required to attach it anyway. It outlines the relevant state laws and university policies that the library and the vendor must follow.

The *ASERL Eleven* does not tackle *liability or warranty* language. Libraries should not be liable for the actions of their patrons, but they should take reasonable actions to ensure sure patrons understand proper use of resources. Our library is not allowed to make any warranties.

The *ASERL Eleven* does not include language about *authentication methods or who qualifies as users*. Each library should make these terms match the technology and policy of their institution.

The task force did not address *governing law or dispute resolution*. These are details where each library should follow the requirements of their state or institution. For example, my state requires that all agreements be governed by the laws of Mississippi and that all methods of dispute resolution be available. For most vendors, changing these two points is not a problem, but occasionally the vendor will add language about who pays the costs of adjudicating disputes in a location that isn't their preference. Alternatively, the license can be silent on these matters, leaving them to be negotiated if there is a question later.

The last point not on the values list is *mutual agreement to changes*. I highly recommend including language requiring mutually signed addenda for any changes to the terms of the agreement. This point can be difficult for "clickthrough" licenses, or when the library is agreeing to terms of use posted on a website. If you cannot get signed agreement to the terms, you can ask that notice be given of any substantial changes before they come into effect.

WHAT IS COVERED IN THE *ASERL ELEVEN*?

1. Accessibility

ASERL seeks to ensure equitable access to information as a core ethical commitment, as well as a legal obligation.

The Library Accessibility Alliance (LAA) had already done great work on model accessibility language, and the ASERL task force didn't think we could improve it. The model language includes examples for both US ADA-compliance and language that is more appropriate for non-US institutions. Both versions include provisions for libraries to adapt non-compliant resources to the needs of the patron. The LAA website is provided in the guidelines (ASERL 2022, 4).

2. Author Rights Retention

ASERL seeks to protect the rights of authors. Content licenses should make clear that vendors will not require affiliated authors to waive licensing or deposit policies, mandates associated with institutional policy, funder policy, or other sources.

All of us in the ASERL task force could cite examples of researchers not realizing that they could also change the author agreements presented by publishers and that they, the authors, did not have to sign away their self-archiving and depository rights. Including language about author rights tries to preserve the right of researchers to be able to use the institution's repository, if there is one, now and in the future.

3. Confidentiality and Non-disclosure Statements

ASERL believes libraries should have the right to share pricing and contract information with interested parties to promote transparency and collaboration.

One of the dirty secrets of electronic resource licensing is that every library pays a different amount, depending on multiple factors: historic pricing, quantity of content purchased or subscribed, and ability of the librarian to negotiate in convincing business terms. Vendors and publishers may intend non-disclosure agreements (NDAs) to keep competitors from learning about their business practices, but the NDAs also keep a very collaborative profession from sharing information about pricing and favorable terms of use with each other. Librarians should ask to have these provisions removed—but fair warning, I've had fifty-fifty success with getting them removed. The University's contract office was only concerned that the provision allowed the transparency required by state law, and so far they have not backed up the library's concerns about this matter.

4. Content Retention / Post-Termination Access

ASERL believes libraries must provide consistent, reliable access to resources for faculty and students to support their scholarly and research activities over the long term. Content licenses should provide perpetual access rights to licensed content wherever possible. If hosting fees are required, these amounts should be strictly defined and limited as much as possible.

This point is becoming less of an issue, especially for electronic journals, and it is another instance where the task force found model language in the LibLicense model agreement that said all we wanted.

Libraries should ask about post-termination access (PTA) for every new resource; it isn't always available, depending on the type of resource. Be sure you understand how PTA is provided: hosted on the vendor site or delivered in an alternate format for the library to host locally. If the vendor is hosting the content, be sure you understand what, if any, ongoing fees are required for that hosting. If several different resources are hosted on the same platform, ask for a cap on all the fees: not over a certain dollar amount per year, or not over a specific dollar amount total over all years.

5. Digital Rights Management

ASERL believes Digital Rights Management (DRM) makes licensed resources less useful for library users, limiting their lawful scholarly activities by controlling when, where, and how they can consult licensed resources. Content licenses should forgo DRM restrictions in favor of usability, regardless of the platform through which content is provided.

DRM refers to the restrictions vendors put on how and how much electronic content can be used: pages downloaded or printed, ability to post via pdf, ability to share with colleagues or other libraries, how many authorized users can access the content simultaneously, etc. All these restrictions make the library's electronic collections less user-friendly and more confusing. At a panel presentation at Atla Annual last year, we heard various publishers say the different platforms control DRM. The platforms and (usually book) vendors claim that the publishers make those decisions. One method for addressing this issue is to prefer purchasing ebooks and content from publishers and platforms that provide DRM-free content.

The next two points (alphabetically) have become pretty standard for electronic resources licenses; there isn't much debate about these practices being allowed. The ASERL task force still felt it was important to reiterate the overarching library principle: Fair use protects the reasonable use of content, even if the library does not "sign" a license, and contracts should never reduce fair use.

6. E-reserves/Course packets

ASERL affirms the principle of fair use which protects the use of reasonable amounts of content in e-reserves and course packs, even absent a license. Fair use rights should be enhanced, not reduced, when libraries pay for access.

The suggested language does not limit the format of the content available to be compiled in the e-reserves or course packs.

7. Interlibrary Loan

ASERL affirms that interlibrary loan (ILL) is a core library function, which ensures that library users who occasionally need resources

held at other libraries can request these resources through their home institutions. Content licenses should permit ILL to the full extent permitted by US copyright law. Content licenses should not include numerical limits on ILL.

The example language for ILL also removes restrictions on *how* ILL is fulfilled. Libraries should be able to use whatever technology is available to them to fulfill legal requests, without worrying about use restrictions from the license. The other principle supported in this language is keeping vendors from adding restrictions to content that was intentionally published without restrictions via OA or Creative Commons. The language also includes formats that are difficult to share: data, audio/video, electronic archives. The task force wanted to keep the option open for when sharing of these formats is technologically possible.

The next two principles are linked to each other and to other principles. Example language isn't provided for either principle, but the task force wanted to express the values inherent in them.

8. Price and Cost Transparency

As with the NDA principle, ASERL believes libraries need meaningful information about vendor products and prices to make well-informed decisions. Vendors should provide prices in simple, clear terms that enable comparison across products, across vendors, and across institutions.

Libraries need to control costs. While avoiding non-disclosure clauses is an important step, so are clear, understandable, transparent pricing structures and subscription alternatives. When vendors present complicated packages with varied pricing, it is difficult for libraries to compare products across different vendors, but also sometimes for similar products from the same vendor.

9. Support for Open Access

ASERL seeks agreements that promote open access (OA) to research in ways consistent with these broader licensing principles. Libraries should resist the inequities and dysfunctions associated with subscriptions.

The taskforce did not want to specify which models for OA were acceptable, but we did want to frame agreements that include OA within the broader values. We believe that libraries should be supportive of OA, but librarians should not accept just any method of providing OA. These principles were written just as the trend for Transformative Agreements (TAs) was taking off, and even then some libraries and consortia were beginning to question the wisdom of libraries blindly funding APCs (article processing charges), without any requirements on the vendor side to explain how much APCs cost and how those costs are set. TAs have the potential to replicate the publishing inequities of subscriptions.

10. Text and Data Mining

ASERL affirms that fair use protects text and data mining (TDM). The right to read also includes the right to perform computational analysis. Content licenses should provide support for computational uses of licensed content, without unreasonable restrictions.

The mantra in the task force for this principle was "TDM is Fair Use." Full stop. The suggested language does recognize that some TDM projects will need specially-prepared data sets, and vendors should be allowed to recover the costs of preparing that data. But the form of the data should be controlled by the user, not by the vendor.

Finally, the longest suggested language paragraph.

11. User Privacy and Data Security

ASERL affirms that library user data should only be used to enable the provision of licensed content and services. Any sharing of user data should require prior notice and user consent. Vendors should be barred from using data about library users' research activities as part of surveillance products.

Library users should not be required to register and create personal accounts in order to use resources the library provides, and if users do choose to create personalized accounts, the vendors should not be reselling personal information, including use patterns of specific users. There are instances when the government can subpoena usage information from vendors, but vendors should not be selling or providing wholesale search and use data to other

parties. The list was written in the context of the 2021 reports about LexisNexis and U.S. Immigration and Customs Enforcement (ICE), and we recognized the abuse possible of our users' search patterns being resold to other agencies.

WHAT ALREADY NEEDS UPDATING?

These principles were written and edited in 2021, for release in 2022. Two years later, the principles still apply, but the situations for application have already expanded. I have already mentioned Transformative Agreements as part of the support of Open Access. The task force considered making a statement about TAs and how to make them support library values, but we decided the principle was broad enough for each library to make their own policies and decisions about which models of supporting OA works for their situation. I would encourage libraries to outline for themselves what values they want to see supported in their agreements around OA and evaluate each offer or model against those values.

The other elephant challenging the licenses for electronic resources is Artificial Intelligence (AI). As we can tell from the presentations at this year's Atla Annual, AI is expanding even faster than TDM was five years ago, and while the two are related, I have seen at least one vendor taking peremptory action to exclude use of AI tools on their content. Granted, it was a major international science publisher who was already developing their own AI tool and clearly wanted to disable potential competitors using their product to build competing tools. The International Coalition of Library Consortia has produced a thorough statement about AI and electronic resource licenses, but for sample language, our state-side group looked to the language publicly posted by CRKN:

> ... Authorized Users may not use the Subscribed Products in combination with an artificial intelligence tool to:
>
> (i) Create a competing commercial product or service for use by third parties;
>
> (ii) Adversely disrupt the functionality of the Subscribed Products; or
>
> (iii) Reproduce or redistribute the Subscribed Products to third party artificial intelligence tools, except to the extent limited portions of the Subscribed Products are used for research purposes (including to train an algorithm) in

> a closed or self-hosted environment solely for use by the Authorized Users, to ensure such use does not train the algorithm of a third party artificial intelligence tool (other than for the creation of prompts or queries) and does not result in the third party provider of such artificial intelligence tools retaining any residual portions of the Subscribed Products.
>
> … Authorized Users may only use artificial intelligence tools as permitted in this Agreement in combination with the Subscribed Products if such artificial intelligence tools incorporate reasonable security.
>
> [The Vendor] and the Subscriber both acknowledge the unique challenges and complexities around the emerging artificial intelligence technologies and LLMs and agree to mutually support each other in developing policies and protocols for both parties' benefit. If there are existing, or if during the term of this Agreement the government adopts mandatory laws regarding artificial intelligence in research, such law shall prevail to the extent of any inconsistency with this Agreement. (Canadian Research Knowledge Network, 2024, 2–3).

There are a few parts of this language I particularly like. It protects various uses of AI (training an algorithm and creating prompts) for research while protecting the functionality of the product; and it provides protection for the vendor as well as for the researcher. This second set of paragraphs also limits the enforcement of these AI provisions to "reasonable security", requiring researchers to be aware of how the products are interacting with AI, but not requiring special programs to protect the data. And they keep the dialog around use of AI open for further adaptation. Time will tell if this language is broadly acceptable in the electronic resources marketplace.

WHERE ELSE TO SEEK EXAMPLES OF STRONG LICENSING LANGUAGE?

Here is a short list of helpful websites and groups that provide examples and statements around library values in licensing language.

- California Digital Library Standard License: *https://cdlib.org/services/collections/licensed/toolkit/*
- Canadian Research Knowledge Network (CRKN/RCDR): *https://www.crkn-rcdr.ca/en/model-license*
- NorthEast Research Libraries Consortium (NERL): *https://nerl.org/wp-content/uploads/2021/03/NERLModelLicense-_61019_a.pdf*
- LibLicense Model License Agreement (2014):

https://liblicense.crl.edu/licensing-information/model-license/

The *ASERL Eleven* document has a longer list of resources that we looked at during our work. ASERL also has a License Review Team, volunteers that will read through licenses for other libraries and make recommendations about changes that should be requested. The LibLicense listserv is another resource where knowledgeable and experienced librarians will answer questions about licensing terms. Librarianship is a collaborative profession; if you have questions or concerns about any terms vendors are presenting, there are multiple places to reach out for help.

REFERENCES

ASERL Licensing Principles Drafting Group. 2022. *The ASERL Eleven: Recommended Principles and Terms for Electronic Resource Agreements*. Volume 1 (Spring). Association of Southeastern Research Libraries. *https://www.aserl.org/wp-content/uploads/2022/02/2022-02_ASERL_Licensing_Principles_v1-0.pdf*

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