

**COMPLETE FLORIDA PLUS
GUIDELINES
FOR E-RESOURCE LICENSE
AGREEMENTS**

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INTRODUCTION

These guidelines provide a framework for review and negotiation of license agreements for electronic resources licensed by the University of West Florida Board of Trustees on behalf of the Florida Academic Library Services Cooperative and the Complete Florida Plus Program established by Section 1006.73 and 1006.735, Florida Statutes (“UWFCF”) and on behalf of higher education institutions in Florida. Part I details the terms that typically make up the main body of the contract; Part II deals with various schedules and attachments used for laying out terms that do not fit neatly into the main body of the contract; Part III is a standard addendum to be used with all contracts.

As license agreements typically define authorized users and govern how the subscriber may use the licensed content (i.e., interlibrary loan, e-reserves, etc.), it is imperative that agreements negotiated by UWFCF maintain the same resource sharing rights in the electronic environment that they enjoy in the print environment. Following these guidelines will facilitate our ability to protect the rights of our user communities.

The updated guidelines reflect changes in the online licensing environment since their original publication in June 2009. Several additions were made to address the licensing of e-books through packages and demand driven acquisitions programs. Other additions are meant to address the expansion of UWFCF licensing activities from institutions within the State University System (SUS) and the Florida College System (FCS) to other institutions of higher education in Florida, which include the Independent Colleges and Universities of Florida (ICUF).

These Guidelines are for informational purposes only and are not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. No Attorney-Client Relationship is created by use of these Guidelines, and no legal advice is intended. Consultation with applicable counsel for advice on specific legal problems should always be considered.

PART I: Typical clauses in the main body of license agreements

1.1 UWFCF AS LICENSING BODY

The correct way to identify UWFCF in agreements is “the University of West Florida Board of Trustees on behalf of the Florida Academic Library Services Cooperative and the Complete Florida Plus Program established by Section 1006.73 and 1006.735, Florida Statutes.”

For example:

This License Agreement (the “Agreement”) is entered into by and between SAGE Publication, Inc., a Delaware Corporation, located at 2455 Teller Road, Thousand Oaks, California (“Licensor”), and the University of West Florida Board of Trustees, on behalf of the Florida Academic Library Services Cooperative and the Complete Florida Plus

Program established by Section 1006.73 and 1006.735, Florida Statutes, with an address at 1753 West Paul Dirac Drive, Tallahassee, FL 32310 (“Licensee”) on behalf of the participating institutions in [Insert name of appropriate Schedule or Attachment here].

For licenses that extend participation to institutions outside the Florida SUS and FCS, the participating institutions are collectively termed *The Florida Academic Electronic Resource Collaborative*¹. Often, this will be followed by a parenthetical statement such as (“the Consortium”), which will be used throughout the remainder of the contract.

1.2 AUTHENTICATION

Authentication to online resources is typically achieved by IP recognition, but other means of authentication may be required or desired.

Sample clause:

“Access to the licensed content shall be authenticated by the use of Internet Protocol (IP) addresses indicated by the Subscriber on Schedule [] and/or via a federated single sign-on such as Shibboleth.”

1.3 AUTHORIZED USERS

Authorized users should be defined by their affiliation with the university regardless of their geographic location or campus. Users at all geographic locations and/or campuses that report to the university as their administrative head are considered part of a single site. Each library on a multi-library campus will make every effort to negotiate access for patrons according to this definition. All definitions of authorized users should include “walk-in” or “occasional” users.

Sample clause for single institution license:

“Authorized users include those persons affiliated with Licensee as students, faculty, staff, and independent contractors of Licensee and its participating institutions, regardless of the physical location of such persons, as well as walk-in users.”

OR

Sample clause for multiple institution license:

“Authorized Users” shall mean faculty, full-time and part-time students, residents, researchers, employees and independent contractors of Customer affiliated with Customer’s institution as listed on Attachment [] (“Participating Institutions”) and individuals using computer terminals within the library facilities at the Participating Institutions.

¹ This term was formally adopted by the Collaborative Ventures Steering Committee, a joint body of the Florida Center for Library Automation (FLCA) and College Center for Library Automation Advisory Boards (CCLA), on July 20, 2010 and is maintained in use by UWFCF.

1.4 AUTHORIZED SITE

Authorized sites should be defined at the institutional rather than library level. An authorized site should not be geographically based, and should allow for access to all authorized users who have right of entry to the network regardless of their geographic location or campus.

Sample clause:

“The authorized site consists of all geographic locations and/or campuses of the institutions that are identified in the agreement as Participating Institutions. All authorized users who have right of entry to the network are granted access regardless of their physical location. This definition may include institutions with joint-use facilities that reside on a single network.”

If the licensor will not agree to the above sample clause the following may be used in its place:

“An academic institution is all parts of an organization that report to the same Chief Academic Officer or Chief Executive Officer. For multi-campus academic institutions, each organization listed in the Directory of Higher Education is considered a separate institution. Academic law and academic medical libraries may be part of a University if they report either to the same institutional Chief Academic Officer or the Chief Executive Officer, for example, President or Chancellor.”

1.5 AUTHORIZED USES

1.5.1 U.S. Copyright, ILL and Course Reserves

Traditionally, libraries have determined that Sections 107 and 108 of Title 17 of the United States Code (collectively “U.S. Copyright Law” or “copyright law”) provide for the use of copyrighted material for course packs and course reserves. Specific reference to the rights to use materials for interlibrary loan, course packs and course reserves may or not be mentioned as authorized uses within a license agreement. For clarity, specific mention of these uses is preferred. The use of content in Course Management Systems should also be addressed. If interlibrary loan, course packs, or course reserves are not specifically mentioned elsewhere in the agreement, the inclusion of a clause affirming rights according to U.S. Copyright Law assumes retention of these rights, if the library determines that the statutory requirements for fair use or interlibrary loan have been met.

1.5.2 Use in Accordance with U.S. Copyright Law

Contracts for e-resources should maintain the rights to use information according to U.S. Copyright Law. License agreements should be carefully reviewed to ensure that they do not deny rights granted under current copyright law including fair use, educational, and library exemptions.

Acceptable license agreements will recognize these rights, including 17 USC Section 107 – “Limitations on exclusive rights: Fair Use,” and 17 USC Section 108 – “Limitations on exclusive rights: reproduction by library and archives.” According to copyright law, use of a copyrighted work may be made in appropriate situations for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research. Many license agreements limit use of licensed content to research, scholarship and teaching. Such agreements should be reworded to include *all uses* in compliance with U.S. Copyright Law.

Sample clause:

A typical standard clause regarding rights of use might read:

“The Publisher agrees to grant to the Consortium the non-exclusive and non-transferrable right to give Authorized Users access to the Licensed Materials via a Secure Network for the purposes of research, teaching and private study.”

This clause should be modified to read:

“The Publisher agrees to grant to the Consortium the non-exclusive and non-transferrable right to give Authorized Users access to the Licensed Materials via a Secure Network for the purposes of research, teaching, private study, *and other uses in accordance with U.S. Copyright Law*, including fair use and library reproduction rights.”

Alternatively, the previous clause can stand as originally written if this additional clause is present in or added to the contract:

“Nothing in this License shall in any way exclude, modify, or affect any of the Consortium’s or any Member’s statutory rights under U.S. Copyright Law.”

1.5.3 Interlibrary Loan

Although interlibrary loan (ILL) falls within copyright law in compliance with 17 USC Section 108, "Limitations on exclusive rights: Reproduction by libraries and archives", ILL is frequently addressed in an independent clause within the license agreement. ILL is an integral part of library resource sharing activities on a national and global level. It is imperative that libraries retain these rights wherever possible. The right to transfer interlibrary loan materials in electronic format is preferable to that of print. This right is particularly important to preserve for journal and magazine content, but is of increasing import as e-books begin to proliferate in libraries.

In ILL clauses, references to the provision of data or statistics on ILL use, references to type of library, and references to geographic limitations to ILL (e.g., ILL to U.S. only) should be removed.

Sample clause:

“Licensee may supply through interlibrary loan a copy of an individual document being

part of the Licensed Materials by post, fax or secure electronic transmission for the purposes of non-commercial use. Specifically, copies may be made in compliance with Section 108 of the U.S. Copyright Act.”

If the licensor will not agree to the above sample clause the following may be used in its place:

“Licensee may use licensed content for interlibrary loan in compliance with Section 108 of the United States Copyright Law (17 USC Section 108, “Limitations on exclusive rights: Reproduction by libraries and archives”). Licensee may fulfill in print or image form interlibrary loan requests from institutions that do not have access to the Licensed Materials. Such requests may be fulfilled by the Institution printing a copy of the item and providing that print copy, or a photocopy or facsimile transmission thereof, to the requesting party or by using an automated Interlibrary Loan system providing that it supplies digital images only.”

1.5.4 ILL and e-books

The loaning of e-book chapters rather than the entire work was the norm for many years, but the trend is slowing shifting to loaning the entire work. Ideally, negotiations should try to secure the broadest sharing rights possible.

Sample clause:

“Participating libraries may supply through Interlibrary Loan (ILL) e-book content, including loans of entire works, by post, fax or secure electronic transmission. Specifically, copies may be made in compliance with Section 108 of the U.S. Copyright Act and the limitation of the [Vendor] system.”

1.5.5 Scholarly Sharing

Clauses addressing scholarly sharing are meant to facilitate the sharing of information between researchers who are doing scholarly work in collaboration with colleagues from different institutions.

Sample Clause:

“Authorized Users may make and transmit single electronic copies of individual items of content to research colleagues located outside the institution of the Participating Institution, solely for the purpose of non-commercial, scholarly collaboration.”

1.5.6 Use of Content in Support of Courses and Instruction

Use of content in support of courses and instruction may be covered in a single clause or by multiple clauses for each separate activity. Often a single clause covers only one or two aspects of use of content for course and instructional support. In this case, clauses can usually be easily modified to cover all necessary uses:

Sample clause:

“Licensee and Authorized Users may use a reasonable portion of the Licensed Materials in the preparation of print or electronic course packs, course reserves or other educational materials as well as within secure course management or other secure educational platforms.”

If the licensor will not agree to the above sample clause the following may be used in its place:

“Participating Institutions may incorporate parts of Licensed Materials in print and electronic course packs, electronic reserves collections, course management systems and other secure platforms for the use of Authorized Users in the course of instruction. Each such item shall carry appropriate acknowledgement of the source. Participating Institutions will make reasonable efforts to ensure that copies of electronic items are deleted when no longer in use for such purpose. Course packs in non-electronic non-print perceptible form, such as, audio or Braille, may also be offered to Authorized Users who, in the reasonable opinion of the Member, are visually impaired.”

1.5.7 Text and Data Mining (TDM)

Text and Data Mining (TDM) is the use of automated tools and techniques to process large amounts of digital content in order to identify relationships. This research technique is of increasing importance in the academic sphere. How authorized users are able to access licensed content for TDM purposes varies by content provider, and the terms of the agreement need to address the method or process of gaining access. Inclusion of TDM rights may not be appropriate for all content types, but should be included in journal and e-book licenses and some database licenses.

Sample clause for copies of licensed materials:

Authorized Users may use the Licensed Materials to perform and engage in text and/or data mining activities for academic research, scholarship, and other educational purposes and may utilize and share the results of text and/or data mining in their scholarly work and make the results available for use by others, so long as the purpose is not to create a product for use by third parties that would substitute for the Licensed Materials. Licensor will, upon receipt of written request, cooperate with Licensee and Authorized Users as reasonably necessary in making the Licensed Materials available in a manner and form most useful to the Authorized User. Licensor shall provide to Licensee, upon request, copies of the Licensed Materials for text and data mining purposes without any extra fees. Requests should be directed to [INSERT CONTACT INFORMATION HERE]

Sample clause for API access to licensed materials:

Authorized Users may access the text and data mining service online via an API [INSERT LINK TO API ACCESS/CONTACT INFORMATION HERE] to continuously and automatically extract and index and/or process information from the Subscribed Products to which the [Subscriber| Licensee] separately subscribes and load and integrate the results (the “TDM Output”) on a [Subscriber| Licensee]’s text-mining system for access and use by Authorized Users; and distribute the TDM Output externally, which may include a few lines of query-dependent text of individual full text articles or book chapters which shall be up to a maximum length of 200 characters surrounding and including the text entity matched (“Snippets”) or bibliographic metadata. Where Snippets and/or bibliographic metadata are distributed, they should be accompanied by a DOI link that points back to the individual full text article or book chapter.

Further the TDM Output should include a Creative Commons proprietary notice in the following form:

“Some rights reserved. This work is distributed under the terms of the CC-BY-NC -Attribution - NonCommercial- 4.0, which permits non-commercial use, distribution, and reproduction in any medium, provided the original author and source are credited.”

Text and data mining services online may be accessed by vendors or other third parties retained by the Subscriber only with the express written permission of [LICENSOR] and for the index and/or process information purposes of the Subscriber.

1.5.8 Commercial Use

Most license agreements prohibit the licensee or its users from charging a fee to access the licensed content. Provisions that specifically prohibit the direct resale of licensed content are not controversial, but the agreement should make clear that charging administrative fees to cover the costs of making permitted copies is not prohibited. Where restrictions for commercial use appear in a license agreement, they should be supplemented with an additional clarifying clause:

Sample clause:

“For the avoidance of doubt, charging administrative fees to cover the costs of making permitted copies is not prohibited. Use by the Consortium or a Member or by an Authorized User of the Licensed Materials in the course of research funded by a commercial organization, is not Commercial Use.”

1.5.9 Browser Sharing in the Online Reference Environment

Software for providing online or “virtual” reference services often allow the service provider to access the browser of the remote patron and thus the licensed content despite their status an unauthorized user. The clause below permits such access:

Sample clause:

“Staff at non-affiliated libraries who are participating in collaborative digital reference services may access the licensed materials via browser sharing software in order to assist Authorized Users who are legitimately allowed access to the licensed material.”

1.5.10 Perpetual Access

Unless otherwise agreed, subscribing institutions should retain access to the digital version of the subscribed content either from the publisher’s site, from a copy maintained by the subscribing institution, or from a third party archive. Any accompanying fees should be stated in the Fee Schedule.

Sample Clause:

“Perpetual access to the full text will be provided by the Publisher either by continuing online access via the Publisher’s server or by supplying the electronic files to each subscribing Institution in an electronic medium mutually agreed between the parties. Continuing archival access and use is subject to the terms and conditions of the expired License.

1.5.11 Archival Access/Backup copy

Long-term considerations are vital and should be given attention in any license agreement. The rights to archival access, the ability to create an archival and back-up copy, and the methodology by which that might be accomplished should be negotiated for all leased and perpetually licensed resources. Any accompanying fees should be stated in the Fee Schedule.

Sample clause:

“On termination of this License, Licensor shall provide continuing access for Licensee to that part of the Licensed Material which was published or added to the Licensed Material within or prior to the Subscription Period, either from Licensor’s servers, from a third party’s server, or by supplying electronic files to the Licensee, as mutually agreed. The terms governing access to this material (for clarification this excludes payment obligations) shall be those in effect at the termination of the license.”

OR

“If the Licensor ceases to hold the publication rights of any of the Licensed Works and is no longer able to provide access, the Licensor shall ensure that continuing access is provided either: by the new publisher of the relevant Licensed Work; or through Portico, CLOCKSS, or a similar third party archive and in such case the Licensor shall provide all relevant details of the Licensee to the third party in order to enable access to the third party archive by the Licensee. Such access will be subject to Licensee fulfilling the third party’s terms and condition for access; or by providing the Licensee with an electronic

copy of the relevant licensed Works for the purpose of local hosting by the Licensee.”

Sample clause for LOCKSS/CLOCKSS/Portico participation:

“Publisher acknowledges that Licensee and Participating Institutions may participate in archiving systems such as LOCKSS, CLOCKSS, and Portico. Licensee may perpetually use these systems to archive and restore the Licensed Materials, so long as Licensee’s use is otherwise consistent with this Agreement.”

If the publisher is not yet a LOCKSS participant:

“Publisher agrees to participate in the LOCKSS Program (www.lockss.org) and will contact the Licensee to enable LOCKSS preservation for Licensed content within the first six months of this contract. Publisher agrees that the Participating Institutions using the LOCKSS system may make Licensed Materials available to other LOCKSS system participants who indicate a right to those Licensed Materials.”

1.6 LICENSOR RESPONSIBILITIES

1.6.1 Privacy

Vendors should be in general compliance with privacy laws, including but not limited to FERPA, available at: <<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> >. Licenses should specify Licensor must uphold the confidentiality of individual users. Under no circumstances may user data be reused or sold to third parties without permission from the Licensee.

Sample clause:

“Licensor shall not, without the prior written consent of Customer, transfer any personal information of any Authorized Users to any non-affiliated third party or use it for any purpose except as is necessary to perform the Services in compliance with applicable laws and regulations, including, the Health Insurance Portability and Accountability Act (“HIPAA”), the Health Information Technology for Economic and Clinical Health Act (“HITECH”), the Family Educational Rights and Privacy Act (“FERPA”), and Florida Statutes §817.5681.”

1.6.2 Quality of Service

It is recommended that licenses have a statement that requires the vendor to compensate the library for significant downtimes. The license should always include contact information for help with problems and requirement of notification of scheduled maintenance.

Sample clause:

“Licensor shall use reasonable efforts to provide continuous service twenty-four (24) hours a day, seven (7) days a week. Scheduled downtime will be performed at a time to minimize inconvenience to Licensee and its Authorized Users. Licensor shall notify Licensee in a timely manner of all instances of system unavailability that occur outside the Licensor’s normal maintenance window and use reasonable efforts to provide advance notice of hardware or software changes that may affect system performance.”

OR

“Licensor shall use reasonable efforts to ensure that the Licensor server or servers have sufficient capacity and rate of connectivity to provide the Customer and its Authorized Users with a quality of service comparable to the highest current standard in the on-line information provision industry. If the Services fail to operate in conformance with the terms of this Agreement, the Customer shall immediately notify Licensor, and Licensor shall promptly use reasonable efforts to restore access to the Services as soon as possible. In the event that the Licensor fails to repair the nonconformity in a reasonable time, the Licensor shall reimburse the Customer in an amount that the nonconformity is proportional to the total fees owed by the Customer under this Agreement.”

OR

“Licensor warrants to Customer that the Services and all technical support and maintenance will be delivered and provided in a professional, competent and timely manner and free of material bugs, errors and defects in design, access, use and operation.”

1.6.3 Usage Statistics

Collection and analysis of data on the usage of the licensed Materials assist both the Vendor and the Consortium and its Members to understand the impact of the license. Licensor should provide usage statistics in monthly data reports that consist of both composite use data for the Consortium and itemized data for individual institutions. Licensor should use best efforts to provide the Licensee with COUNTER-compliant usage statistics (<http://www.projectcounter.org>). Reject any language that restricts use of usage data reports to internal use only.

Sample clause for UWFCF licenses:

“Licensor must provide both composite use data for the system-wide UWFCF use and itemized data for individual campuses, on a monthly basis. Use data should be at the level of detail required for objective evaluation of both product performance and satisfaction of user needs, including title-by-title use of journals and provide information in compliance with the most recent release of COUNTER or other recognized international standard.”

Sample clause for individual institutions:

“Licensor must provide use data on a monthly basis. Use data should be at the level of detail required for objective evaluation of both product performance and satisfaction of user needs, including title-by-title use of journals. Providers should make usage data available in compliance with COUNTER or other recognized international standard.”

1.6.3a Collection by third party

New services are emerging that provide assistance with the collection and management of usage

statistics. Use of these services requires that third parties have the right and ability to access and collect usage statistics data.

Sample clause:

“The Publisher shall provide to the Licensee or facilitate the collection and provision to the Licensee and the Publisher by the Licensee [or by the Agent] of such usage data on the number [of titles] [of abstracts and] of articles downloaded, by journal title, on [a monthly] [a quarterly] [an annual] basis for the Publisher’s and the Licensee’s private internal use only. Such usage data shall be compiled in a manner consistent with applicable privacy [and data protection] laws [and as may be agreed between the parties from time to time], and the anonymity of individual users and the confidentiality of their searches shall be fully protected. In the case that the Publisher assigns its rights to another party, the Licensee may at its discretion require the assignee either to keep such usage information confidential or to destroy it.”

OR

“The Publisher and the Licensee shall both be permitted to enable a third party on their behalf to collect and distribute usage data to them. Such usage information shall be compiled in a manner consistent with the applicable privacy laws, and the anonymity of individual users and the confidentiality of their searches shall be fully protected. In the case that either party assigns its rights to another party, the other party may at its discretion require the assignee either to keep such usage information confidential or to destroy it.”

1.6.4 Withdrawn Materials

The license should include written notification and pro rata refund in the event that more than a certain percentage of the content is withdrawn.

Sample clause:

“Licensor reserves the right to withdraw from the Licensed Materials any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory or unlawful. Licensor shall give written notice to the Licensee of such withdrawal no later than thirty (30) days following the removal of any item pursuant to this section. If such withdrawal renders the Licensed Materials less useful to Licensee or its Authorized Users in Licensee’s sole reasonable discretion, Licensor shall give Licensee an equitable reduction in the total Fees owed by Licensee under this Agreement, and promptly refund any prepaid amounts related to them. In that case, Licensee may terminate this Agreement and Licensor shall refund all prepaid amounts.”

1.6.5 ADA Compliance

Licenses should require the publisher/vendor to present its data in a form designed to comply with the American Disabilities Act.

Sample clauses:

“Licensor shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large-print interfaces, text-to-speech output, refreshable braille displays, voice-activated input, and alternate keyboard or pointer interfaces in a manner consistent with the latest Web Content Accessibility Guidelines published by the World Wide Web Consortium’s Web Accessibility Initiative. Licensor shall provide Licensee current completed Voluntary Product Accessibility Template (VPAT) to detail compliance with the federal Section 508 standards. In the event that the Licensed Materials are not Accessibility compliant, the Licensee may demand that the Licensor promptly make modifications that will make the Licensed Materials Accessibility compliant; in addition, in such an event, the Licensee shall have right to modify or copy the Licensed Materials in order to make it useable for Authorized Users.”

1.7 LICENSEE RESPONSIBILITIES

1.7.1 Notifying users of authorized uses

Licenses often include a clause that requires the Licensee to make reasonable efforts to notify authorized users of conditions or restrictions on use of materials. Licensors request this because authorized users are not parties to the license agreement, and thus may not be aware of permitted or prohibited uses. This is generally acceptable, although language that mandates the Licensee to make authorized users aware without language qualifying that such action be of “reasonable efforts” should be modified to do so.

Sample clause:

“Licensee shall use reasonable efforts to provide Authorized Users with appropriate notice of the terms and conditions under which access to the Licensed Materials is granted under this Agreement including, in particular, any limitations on access or use of the Licensed Materials as set forth in this Agreement.”

1.7.2 Discipline

In general, any references to regulating and disciplining authorized users who breach the terms of use should be removed from the license.

Sample clause:

“Licensee will use reasonable efforts to inform users of the terms of use of this agreement.”

1.7.3 Confidentiality of Licensing Terms

Strike any obligations to keep license terms or fees confidential. If you are not able to strike, make sure to have the right to release the agreement if required by law, including Florida public records laws.

Sample Clause:

“Licensee is subject to Chapter 119 of the Florida Statutes, commonly known as the Florida Public Records Law. The Agreement, this Addendum, and any related documents and/or correspondence shall also become a public record subject to the Public Records Law, regardless of any confidentiality provision outlined in the Agreement. Licensee may respond to public records requests without providing Vendor any notice.”

1.8 MUTUAL OBLIGATIONS

1.8.1 Breach

Many agreements have clauses that state how unauthorized use of or access to licensed content will be handled. These clauses should not require libraries to take on onerous responsibilities to monitor users.

Sample clause:

“Customer is responsible for taking reasonable measures to ensure the security and integrity of the Service, to ensure that access to and use of the Service is limited to Authorized Users and to prevent access by unauthorized persons to the Service. Customer shall promptly notify Licensor of any unauthorized access or use of which it becomes aware and cooperate with Licensor in any investigation thereof.”

1.8.2 Modification to Terms

Modifications to Agreements without advance written notice and consent is not acceptable. Clauses similar to the one below should be present in all contracts. Beware of cross-references to policies or other terms that are published on licensor web sites. Licensors should not be permitted to modify the terms of those cross-referenced documents without notice and consent.

Sample clause:

“Any changes to this Agreement must be made in writing and must be signed by authorized representatives of both parties.”

1.9 LEGAL ISSUES

1.9.1 Governing Law and Jurisdiction

Governing law and venue provisions determine which state’s law will govern interpretation of the contract and where suits must be filed. Because parties (and their lawyers) are more familiar with the laws of their home state, it is desirable to have the home state law apply to any dispute involving the agreement. Venue is important to avoid the expense of traveling to a foreign jurisdiction and of hiring local counsel in the other jurisdiction. For libraries that are part of a state institution, there are often compelling reasons to insist that the institution’s state law applies. This is true of Florida. All contracts should be modified to assert Florida as the

governing law and venue. If a Licensor does not agree, consult with your Office of General Counsel.

1.9.2 Website user agreements

Occasionally e-resource vendors require the authorized user to agree to terms at the time they log on. Many provide an opportunity for users to register so they can customize use of the site. In either case, it is useful to include a clause in the written license that specifies that the signed agreement held with the Licensor supersedes the website user agreement.

Sample clause:

“Customer acknowledges and agrees that Customer and its Authorized Users agree to and are bound by all of the terms of the Website’s Registered User Agreement dated [_____] that can be found at [_____].

Authorized Users may also register individually for the Service online at the Website. The terms of this Agreement supersede any terms of the Registered User Agreement that conflict or are ambiguous or inconsistent. Any terms in the Registered User Agreement that materially differ from the terms of this Agreement or that obligate a party to any additional material obligations or subject a party to any material limitations not expressly provided in this Agreement have no effect.”

1.9.3 Indemnification, Hold Harmless, Warranties & Disclaimers, &Liability

1.9.3a: Indemnification

Licenses often have indemnification clauses. The Licensee should not agree to indemnify unless permitted by Florida law and the Licensee's institutional regulations, policies, and guidelines. Always consult with your institution's Office of General Counsel regarding indemnification clauses. If these clauses are in an agreement, the best course of action is to attach a license agreement addendum that includes standard clauses that eliminate or limit such clauses accordingly. (See the attached standard addendum presented in this document.) If a Licensor does not agree, consult with your Office of General Counsel.

1.9.3b: Warranties and Disclaimers

The warranty should indicate the Licensor either is the content owner of the electronic works being licensed or that the Licensor has the legal right to offer the content. It is recommended to include a clause that the Licensor guarantees that the Licensor will continue to have the rights through the duration of the license, along with any renewals. Beware of language stating the Licensor disclaims all warranties and try to negotiate these provisions out of the agreement. There are also some instances where performance standards are addressed in this section, instead of a separate section. It is acceptable to incorporate language from Quality of Service, 1.6.2.

Licensors will often disclaim specific warranties in specific terms pertaining to the accuracy of content, so make sure quality of service is addressed in the agreement. Commercial law requires disclaimers of warranties to be conspicuous, either in bold or capital letters to bring to the Licensee’s attention. Disclaimers of Warranty should be reviewed carefully and in comparison with claims made by the vendor outside of the contract.

Sample Clause:

Licensor warrants that it has all necessary legal and equitable rights, permissions, and clearances to license the Licensed Materials to the Licensee or the purposes outlined in this Agreement, and that use of the Service by Authorized Users in accordance with the terms of this Agreement shall not infringe the copyright or other rights of any third party. Neither party shall be liable for any indirect, special, incidental, punitive or consequential damages, that arises from the use of the Licensed Materials, or the inability to use the Licensed Materials.

Licensor warrants it has the experience and is qualified to perform the tasks involved with providing the Licensed Materials in an efficient and timely manner. Licensor warrants that the Licensed Materials will perform substantially as documented on Licensor's public websites.

1.9.3c: Limitation of Liability

Liability issues may arise in the case where a licensee is signing an agreement on behalf of multiple participating institutions. In this case, it is prudent to include a clause that details the liability of the contracting body and participating institutions.

Sample Clause:

“Licensee is entering into this Agreement for the benefit of itself and a group of libraries, which are hereinafter referred to as the “Participating Institutions.” Licensor agrees that while the Licensee is the entity signing this Agreement, the Licensee and each Participating Institution will only be liable for their own acts and obligations under this Agreement, including, without limitation, their share of the fees as set forth on Attachment []. Licensor agrees that neither the Licensee nor any of the Participating Institutions is liable for any acts or omissions of each other and that the Licensor shall look solely to each Participating Institution individually for its obligations and liabilities under this Agreement and for each Participating Institution's payment of its share of fees as set forth on Attachment []. Furthermore, if any one of the Participating Institutions is in default or breach hereunder, the default or breach shall only affect the defaulting Participating Institution and this Agreement shall remain in full force for all other Participating Institutions as if no default or breach occurred.”

1.10 RENEWAL AND TERMINATION

1.10.1 Termination

The licensor should not have a unilateral right to terminate a license without giving adequate notice to the licensee. If termination occurs because of a suspected breach, the licensee should be given adequate time to cure the breach. A pro-rata refund should be given to the licensee when termination is not caused because of a breach by the licensee.

Sample clause:

“Either party may terminate this license for material breach of the agreement by the other with written notice in paper or electronic form (with verified receipt). Prior to termination, the offending party will have thirty (30) days to cure the breach. If the Licensor is the breaching party and the License is subsequently terminated, Licensor shall make a pro rata refund of the Fee to the Licensee, taking into account the remaining unexpired portion of the Subscription Period.”

1.10.2 Early Termination Due to Insufficient Budgetary Allotment from Parent Institution/Government

Sample Clause:

Financial obligations of any Florida entity under the Contract shall be subject to and contingent upon the availability of funds appropriated by the Florida Legislature or otherwise lawfully expendable for the purpose of the Contract for the current and future periods. The applicable entity shall provide notice to the Vendor of the non-availability of such funds and the intent to terminate the Contract. Upon receipt of such notice by Vendor, Vendor shall be entitled to payment only for those services performed prior to the date notice is received. The determination of whether funds are available shall be made in the sole discretion of the state entity. Termination by one Subscriber does not affect the Agreement or an Order(s) with respect to other Subscribers.

PART II: Schedules and Attachments

Schedules and Attachments are useful for laying out terms of the contract that do not fit neatly into the main body of the contract. Common uses in UWFCF contracts include fee schedules, lists of participating libraries, lists of licensed materials, invoicing instructions, and contact information.

Contracts negotiated by FALSC where the participating institutions are financially responsible for any portion of the associated fees should include a schedule for each participating institution. This schedule should include a detailed schedule of fees related to the institution and require each institution's authorized signatory to agree to the terms of the contract as a whole.

2.1 Referencing Schedules and Attachments

When using schedules and attachments, reference them at the appropriate place in the main body of the contract. For example, the definition of "Licensed Materials" in a contract may be stated with reference to the appropriate schedule:

"Licensed Materials" means the electronic material set forth in Schedule 1 to this License that may be revised by the parties from time to time."

2.2 Schedule of Licensed Materials

This schedule should provide a detailed list of the content that is licensed and provide terms for licensor to provide updated content listings if/when content is updated or altered.

2.2.1 Schedule of licensed materials for e-journal contracts

For e-journal contracts, the schedule should list all individual journals with, at minimum, their title, ISSN, and accessible years/volumes. If the list will change from year to year, the contract should make some provision for updating the schedule.

The contract should also require that the publisher supply on an annual basis a KBART file or Excel spreadsheet of the journals under contract for that year complete with ISSN, journal title, holdings accessible under the contract including volume number, issue number, and date of first or holdings range for use in Knowledgebase systems.

2.2.2 Schedule of licensed materials for e-book contracts

Many e-books licenses are for a discrete set of content. For e-book contracts, the list of titles purchased should be given with, as a minimum, their title and ISBN.

Defining the licensed content for Demand Driven Acquisitions (DDA), Evidence Based Acquisition (EBA), or other use driven acquisitions plans is problematic, as the final list of purchased titles is unknown at the time the contract is set. One way to handle this is to provide a placeholder schedule. For example:

"Attachment 1: Licensed Content

E-books on the [Provider’s Name] platform selected through a demand driven acquisition process as detailed in this Agreement comprise the licensed content. Lists of purchased titles will be appended to this Agreement monthly/quarterly/yearly (select timeframe that best fits the structure of the plan).”

In some cases, not all the e-books will be published and accessible at the point of licensing, the license should indicate what compensation the licensee is due should the licensor not publish all the titles promised.

Sample clause:

The Fee is based on the inclusion of the estimated number of titles to be published in the eBook Packages. If the total sum of the eBooks in the eBook Packages acquired under this license contains less than 97% of the estimated titles of the eBook Packages in total, Licensor may offer Licensee either (1) a discount on any future acquisition of an eBook package or any other online product in the amount according to the shortfall, or (2) access to an additional online product not presently licensed to Licensee.

2.3 Fee Schedules

Fee schedules should detail all aspects of the terms related to pricing, including whether institutions will be invoiced by their chosen billing agent, directly by the vendor/publisher, or by FALSC. This is essential to understanding how the contract costs were initially established or how they may change over the course of the contract.

2.3.1 Fee schedules for e-journal contracts

For e-journal contracts, the following should be addressed in the fee schedule as appropriate:

- Fees due at time contract is set
- Annual price cap or price increase
- Calculation for base fee
- Access fees
- Fees for transfer titles
- Fees for newly launched journals Deductions for deleted titles
- Discounts for other products licensed by individual libraries, including print
- Invoice by date
- Hosting fees for perpetual access and/or archiving of content
- Tokens (number, use of, and limit)
- Any additional negotiated fees, products, or benefits of the contract

2.3.2 Fee schedules for database contracts

- Fees per product due at the time contract is set
- Annual price cap or price increase
- Number of simultaneous users able to access content
- Hosting fees for perpetual access and/or archiving of content

2.3.3 Fee schedules for e-book contracts

Fee schedules for e-book contracts will differ whether they are for one-time purchase of static collections or ongoing purchases under a DDA program.

2.3.3a: *One-time E-book purchases*

Fee schedules for one-time purchase of ebook packages should include, as appropriate:

- Price of purchase
- Platform fees
- Fees for MARC records
- Fees for classroom use or course reserves
- Miscellaneous service fees
- Number of simultaneous users able to access content
- Hosting fees for perpetual and/or archiving of content

2.3.3b: *Demand/Evidence based e-book purchase Programs*

Fee schedules for demand driven or evidence based programs, e.g. DDA & EBA, should include:

- Pricing structure of program
- Access and Selection time frame
- Rights & Restrictions
- Discounts
- Deposit amount
- Materials included or parameters (publishers/publication years/etc..) for inclusion
- Multiplication factors
- Purchase trigger event
- Platform fees
- Fees for MARC records
- Fees for classroom use or course reserves
- Miscellaneous service fees
- Number of simultaneous users able to access content
- Hosting fees for perpetual and/or archiving of content
- Term and termination
- Usage statistics

2.4 Schedule of Participating Institutions

Including a schedule of participating institutions is increasingly important as the SUS based contracts expand to include institutions within the Independent Colleges and Universities of Florida (ICUF) and the Florida College System (FCS). This schedule at a minimum lists the participating institutions and may include contact information and IP ranges for each.

**NOTE: This is the original addendum in the 2013 Guidelines.
Need official, updated Addendum from FALSC/FLVC**

PART III: Standard Addendum

The addendum on the following pages is provided as an example for these types of agreement.

ADDENDUM to LICENSE AGREEMENT

**Florida Virtual
Campus (UWFCF)**
(Date)

University of West Florida/FALSC/Complete Florida Contract Addendum

This Addendum (“Addendum”) is a part of the attached contract between the University of West Florida Board of Trustees, a public body corporate acting on behalf of the Florida Academic Library Services Cooperative and the Complete Florida Plus Program established by Section 1006.73 and 1006.735, Florida Statutes, hereinafter referred to as "UWFCF", and _____, hereinafter referred to as "Vendor." This Addendum provides additional terms to the attached _____ (“Contract”).

The Parties to the attached Contract and this Addendum, in consideration of the mutual covenants and stipulations set in the Contract and this Addendum, agree as follows:

1. In the event of inconsistency between the Contract and this Addendum, the terms of this Addendum shall govern.
2. The Contract, this Addendum, and all matters relating to them are governed by the laws of the State of Florida. Any provisions in the Contract in conflict with such laws shall be void and of no effect. Any actions arising out of the Contract and/or this Addendum shall be brought exclusively in the state or federal courts located in Escambia County, Florida.
3. All payments made by UWFCF under the Contract shall be made pursuant to University Regulation UWF/REG 6.003-Prompt Payment, which requires that payment of an invoice shall be made not later than forty (40) days after receipt of an acceptable invoice and receipt, inspection and acceptance of the goods and/or services provided in accordance with the terms and conditions of the purchase order/contract. Failure to provide payment within 40 days may result in the paying of interest at a rate as set by Florida law. A Vendor Ombudsman has been established by UWFCF and the duties of this individual include acting as an advocate for vendors who may be experiencing problems in obtaining timely payment(s). UWFCF’s Vendor Ombudsman may be contacted at (850) 474-2636.
4. The Vendor agrees that bills and invoices for fees or other compensation for services or expenses shall cite the Contract and shall be submitted in detail sufficient for a proper pre-audit and post-audit. Each bill or invoice must clearly identify the services, portion of services, and expenses for which compensation is sought. Payment will be tendered only for services or the portion of services completed prior to the submission of the bill or invoice, or for expenses incurred prior to such submission.
5. Financial obligations of any Florida entity under the Contract shall be subject to and contingent upon the availability of funds appropriated by the Florida Legislature or otherwise lawfully expendable for

the purpose of the Contract for the current and future periods. The applicable entity shall provide notice to the Vendor of the non-availability of such funds and the intent to terminate the Contract. Upon receipt of such notice by Vendor, Vendor shall be entitled to payment only for those services performed prior to the date notice is received. The determination of whether funds are available shall be made in the sole discretion of the state entity.

6. All payments of expenses for travel, lodging, or meal expenses must comply with section 112.061 of the Florida Statutes.
7. Each party assumes any and all liabilities, actions, damages, suits, proceedings, and judgments from claims arising or resulting from, or attributable to, the negligent acts or omissions of that party and its officers, employees and other agents while acting within the course and scope of their employment or agency. Nothing contained in the Contract shall be construed or interpreted as denying UWFCF or other Florida state entity any remedy or defense available under the laws of the State of Florida; the consent of UWFCF or other Florida state entity to be sued; or a waiver of sovereign immunity of UWFCF or other Florida state entity beyond the waiver provided in section 768.28 (effective 2018) of the Florida Statutes. Vendor also assumes such risk with respect to the negligent acts or omissions of persons subcontracting with Vendor or otherwise acting or engaged to act at the instance of Vendor in furtherance of Vendor's obligations under the Contract. If any part of products or services delivered by the Vendor pursuant to the Contract is protected by the patent, copyright, trademark, or other intellectual property right of a third party, Vendor agrees to defend, indemnify and hold harmless UWFCF or other Florida state entity from and against any claim, loss, cost and/or expense UWFCF or other Florida state entity incurs based on a claim that use of the Vendor's products or services infringes the intellectual property rights of a third party.
8. Vendor warrants that the product(s) furnished by the Vendor under the Contract do not infringe or violate any patent, copyright, trade secret, or any other proprietary right of any third party. The Vendor agrees to indemnify and defend at its own expense any liability or claim by a third party against UWFCF involving a patent, copyright, trade secret, or proprietary right violation concerning the product(s), including attorneys' fees, court costs, costs of appeals, expenses and any damages finally awarded against the UWFCF with respect to the liability or claim. The Vendor shall notify UWFCF in writing within a reasonable time after UWFCF first receives any notice of the liability or claim. If an injunction or order is obtained against UWFCF's use of any product(s) or if in the Vendor's opinion the product(s) is likely to become the subject of a claim of infringement or violation of a copyright, trade secret or other propriety right of a third party, the Vendor shall at its expense (a) procure for UWFCF the right to continue using the product(s); (b) at no additional cost to UWFCF, replace or modify the product(s) so that it becomes non- infringing, but only if the modification or replacement does not adversely affect the specifications of the product(s) or its use by UWFCF; or (c) if neither (a) nor (b) above is practical, the Vendor shall remove the product(s) from the Vendor and shall issue a credit for the product(s) to UWFCF. Thereafter any license for the product(s) involved is canceled.
9. The Vendor shall ensure that the Vendor's server or servers have sufficient capacity and rate of connectivity to provide UWFCF and its authorized users with a quality of service comparable to current standards in the on-line information provision industry in UWFCF's locale. If the licensed product(s) fail to operate in conformance with the terms of the Contract, UWFCF shall immediately notify the Vendor, and the Vendor shall promptly restore access to the licensed product(s) as soon as possible. If Vendor fails to repair the nonconformity in a reasonable time, the Vendor shall reimburse UWFCF in an amount that the nonconformity is proportional to the total fees owed by UWFCF under the Contract.
10. UWFCF, as a public body corporate of the State of Florida, is entitled to the benefits of sovereign immunity coextensive therewith, including immunities from taxation.

11. All notices allowed or required to be served on the Vendor or UWFCF shall be served by registered or certified mail, return receipt requested to the appropriate address on the purchase order.
12. In the course of providing services during the term of the Contract, Vendor may have access to student education records that are subject to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g, et seq. and the regulations promulgated there under. Such information is considered confidential and must therefore be protected. To the extent that Vendor has access to "education records" under this contract, it is deemed a "school official," as each of these terms are defined under FERPA. Vendor agrees that it shall not use education records for any purpose other than in the performance of this contract. Except as required by law, Vendor shall not disclose or share education records with any third party unless permitted by the terms of the contract or to subcontractors who have agreed to maintain the confidentiality of the education records to the same extent required of Vendor under this contract. Vendor shall not, without the prior written consent of UWFCF and consent of the applicable authorized user, transfer any personal information of any authorized users to any non-affiliated third party or use it for any purpose except as is necessary to perform the contracted services in compliance with applicable laws and regulations, including, the Health Insurance Portability and Accountability Act ("HIPAA"), the Health Information Technology for Economic and Clinical Health Act ("HITECH"), FERPA, and Florida law.
13. The Vendor is an independent contractor pursuant to Florida law. The Vendor assumes full responsibility for completion of the services as provided in the attached Contract. It is understood and agreed that nothing contained in the Contract or this Addendum that is intended, or should be construed, as creating or establishing the relationship of partners between the parties, or constituting Vendor as the agent or representative of UWFCF for any purpose in any manner whatsoever. The Vendor is not authorized to bind UWFCF to any contracts or other obligations. The Vendor shall not expressly or impliedly represent to any party that Vendor and UWFCF are partners or that Vendor is the agent or representative of UWFCF for any purpose or in any manner whatsoever.
14. Failure to exercise or delay in exercising any right, power or remedy accruing to UWFCF on any breach or default of Vendor shall not impair any such right, power or remedy, or be construed as a waiver of any such breach or default or of any other breach or default occurring.
15. All documents submitted as part of Vendor's offer are incorporated by this reference. The Contract and this Addendum embodies the entire agreement of the parties, and there are no other representations, promises, agreements, conditions or understandings, either oral or written between UWFCF and Vendor other than as set in the Contract and this Addendum. UWFCF acknowledges and agrees its authorized users may register individually for the services provided by the Vendor under this Contract online. The terms of this Addendum supersede any terms of the authorized user agreements that conflict or are ambiguous or inconsistent. Any terms in authorized user agreement that materially differ from the terms of this Addendum or that obligate a party to any additional material obligations or subject a party to any material limitations not expressly provided in the Contract or this Addendum have no effect.
16. The Contract and this Addendum may be executed by electronic or facsimile means and in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.
17. The parties acknowledge that UWFCF and other Florida state entities are subject to Florida's Public Records law, Chapter 119, Florida Statutes, which requires access to its records, subject to certain limitations. The Vendor agrees to allow public access to all records, documents, papers, letters or other material subject to the provision of the Florida Public Records law and made or received in conjunction with the Contract. Refusal by the Vendor to allow such public access will be grounds for immediate cancellation of the Contract by the University.

18. The failure of the Vendor to comply with the provisions set forth in this Addendum shall constitute a default and breach of the Contract which UWFCF may enforce the default in accordance with the provisions set forth in the Contract.
19. Nothing in the Contract shall in any way exclude, modify, or affect any of UWFCF or any other Florida state entity's statutory rights under U.S. copyright law. UWFCF and authorized users may use a reasonable portion of licensed materials in the preparation of course packs, course reserves or other educational materials as well as within secure course management or other secure educational platforms. Authorized users identified in the Contract may use licensed material to perform and engage in text or data mining activities for academic research and other educational purposes, and incorporate text or data mining output into presentations and other forms of scholarly communication, and disseminate text or data mining output in the context of an authorized user's own scholarly productivity. Staff at non-affiliated libraries who are participating in collaborative digital reference services may access the licensed materials via browser sharing software in order to assist authorized users who are legitimately allowed access to the licensed material.
20. The Vendor agrees to provide both composite use data for the system-wide UWFCF use and itemized data for individual campuses, on a monthly basis. Use data should be at the level of detail required for objective evaluation of both product performance and satisfaction of user needs, including title-by-title use of journals and provide information in compliance with the most recent release of COUNTER or other recognized international standard.
21. Vendor may withdraw from licensed materials provided under the Contract any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory or unlawful. The Vendor shall give written notice to UWFCF of such withdrawal no later than thirty (30) days following the removal of any item pursuant to this section. If such withdrawal renders the licensed materials less useful to UWFCF or its authorized users in UWFCF's sole reasonable discretion, Vendor shall provide UWFCF with an equitable reduction in the total fees owed under the Contract, and promptly refund any related prepaid amounts. In such case, UWFCF may terminate the Contract and the Vendor shall refund all prepaid amounts.
22. Vendor is prohibited from using funds provided under the Contract for the purpose of lobbying the Florida Legislature or any official, officer, commission, board, authority, council, committee, or department of the executive branch or the judicial branch of the Florida state government.
23. Vendor shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large-print interfaces, text-to-speech output, refreshable braille displays, voice-activated input, and alternate keyboard or pointer interfaces in a manner consistent with the Web Content Accessibility Guidelines published by the World Wide Web Consortium's Web Accessibility Initiative. Vendor shall provide current completed Voluntary Product Accessibility Template (VPAT) to detail compliance with the federal Section 508 standards. In the event that materials licensed under the Contract are not accessibility compliant, UWFCF may demand the Vendor to promptly make modifications that will make the licensed materials accessibility compliant; in addition, in such an event, UWFCF or other Florida state entity shall have right to modify or copy the licensed materials in order to make it useable for authorized users.
24. UWFCF is entering into the Contract for the benefit of itself and a group of Florida state libraries, which are hereinafter referred to as "Participating Institutions." The Vendor agrees that while UWFCF is the entity signing the Contract, UWFCF and each Participating Institution will only be liable for their own acts and obligations under the Contract, including, without limitation, their share of the fees as set forth in the Contract. Vendor agrees that neither UWFCF nor any of the Participating Institutions is liable for any acts or omissions of each other and that the Vendor shall look solely to each Participating Institution individually for its obligations and liabilities under the Contract and for each Participating Institution's payment of its share of fees as set forth in the Contract. Furthermore, if any one of the Participating Institutions is in default or breach hereunder,

the default or breach shall only affect the defaulting Participating Institution and the Contract shall remain in full force for all other Participating Institutions as if no default or breach occurred.

- 25. This Addendum and the Contract represents the entire agreement between UWFCF and Participating Institutions (including all employees and other identified End Users) and the Vendor. In the event that Vendor subsequently enters into terms of use agreements or other similar agreements, policies or understandings, whether on the Vendor's purchase order, website, click-through, verbal or in writing, with UWFCF or Participating Institution's employees or other End Users, such agreements shall be null, void and without effect, and the terms of this Addendum and the Contract shall apply. UWFCF and Participating Institutions will not be bound to any other terms and conditions set forth in any documents, agreements or policies unless such terms and conditions are also set forth in this Addendum and the Contract. The Vendor may not unilaterally change any term or condition of this Addendum and the Contract.
- 26. The Vendor shall ensure that all personal data is properly collected, stored, processed, secured, archived or destroyed in compliance with Federal, State and applicable international privacy laws, such as the EU General Data Protection Regulation 2016/679 (GDPR).

LICENSEE: The University of West Florida

Signed by: _____

Name: _____

_____ Title: _____

_____ Date: _____

LICENSOR: _____

Signed by:

Name _____

: _____

Title: _____

Date: _____
