

Licensing Digital Content

A Practical Guide
for Librarians

THIRD EDITION

Lesley Ellen Harris

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Introduction

Do I need a written agreement when licensing digital content?

Who is authorized to use the content my library licenses?

What if the license offered to our library is nonnegotiable?

Is electronic archiving allowed under our license?

May I text and data mine the licensed database?

These are a sampling of the many questions that have arisen in the many in-person and online seminars and courses I have been leading on copyright and digital licensing for librarians, information professionals, and others. Similar questions arise again and again. Librarians are frustrated by the lack of access to quick, clear, practical answers and resources to these questions. This book has been written to set out the basics (and beyond) about digital licensing for librarians and other consumers of licensed digital content (i.e., licensees). This book discusses the questions and issues, and challenges and opportunities, that arise when interpreting, negotiating, and entering into digital licenses. My hope is to inform you about the legal use of licensed content, the legal rights and obligations in your license agreements, the role of librarians and other nonlawyers vis-à-vis license agreements, global aspects of digital licensing, negotiating the best license to meet your needs, and the variety of licensing arrangements that can be used. Chapter 7 of this book sets out many specific questions I have been asked at in-person and online seminars, by e-mail, and on Copyrightlaws.com, with answers to help you through the licensing process.

Licensing content is a specialty that seemed to appear out of the blue and, for some libraries, now encompasses the full-time job of at least one librarian. The purpose of this book is to help demystify the licensing process, to provide you with a clear understanding of licensing in the specific context of your library, and through knowledge, to empower you to take an active role in your licensing arrangements. This book is intended for libraries of all types—public, school, government, college and university, and special libraries—and for all sizes—from solo librarians located in one state to librarians in multinational organizations.

Although the information in this book is provided from the perspective of a library, it should be helpful for publishers, vendors, aggregators, and any content owners who license their content to libraries, because it will educate them on the licensing process through a library's eyes. Other users of electronic databases and periodicals, such as archives, museums, governments, educational institutions, and corporations, will also find valuable information in this book when they are licensing digital resources for use in their organizations.

This book is meant as a practical guide; it does not set out a comprehensive review of this area of the law, which may encompass contract law, copyright law, and other areas. Nor should this book be relied upon as providing legal advice. Proper legal consultation should be obtained where necessary.

This book may be read from cover to cover or used as a reference book, consulting sections within the book on an as-needed basis. It is best to get

Terminology

Below are key terms I use throughout this book, which I recommend you become familiar with before reading any further. A full Glossary of licensing related terms and their definitions is at the back of this book.

License. Also, license agreement, agreement, contract.

Licensor. Also, creators, content owners, publisher, vendor, database, information provider (creators, publishers, vendors, aggregator, and others), content provider, electronic information provider.

Licensee. Also, library resource center, educational institution, government department corporation, association.

End-User. Also, patron, employees, consultants, researchers, third party.

Content (works being licensed). Also, electronic content, product, materials, e-books, periodicals, journals, databases, news feeds, electronic information products, encyclopedias, images, website and social media content, electronic resources. ■

an overall picture of licensing digital content and review the contents of the entire book before then using it as a reference book.

As a practical guide, this book provides and refers to various checklists and precedents. Use these by adapting them to fit your particular needs in your specific circumstances. Determine whether the clauses in a checklist are relevant to your situation. Keep in mind that a license agreement that works for one library may not fit the needs of another library. It may not even fit the needs of the same library in two different licensing situations for different digital content.

I began providing information in this area through a few conferences I attended at which I led a seminar on digital licensing. Shortly afterward, I began giving the same seminar through my own company, Copyrightlaws.com, and often in conjunction with various library and other associations, to audiences ranging from six to sixty persons. I have presented this seminar, which I continue to teach today, throughout Canada and the United States, and in London. Since 2002, I have taught the online course Digital Licensing Online on an ongoing basis. I have also been busy writing articles on digital licensing in North American and international library publications and on Copyrightlaws.com (www.copyrightlaws.com). Furthermore, on behalf of my consulting clients and many students, I continue to advocate for use of plain English license agreements; help them interpret license agreements; educate them about licensing content, contracts, and copyright law; develop licensing policies, guidelines, and best practices; and determine and initiate strategies for licensing digital content. These experiences led me to write *Licensing Digital Content*, and to enhance this third edition of it, in order to provide a one-stop source for librarians, information professionals, and other nonlawyers to find practical information on licensing digital content.

While reading this book, keep in mind that digital technology is continually changing and this may affect the way we license works in the digital environment. As such, any discussions of relevant licensing terms and conditions in your licenses should be carefully reviewed in light of the most up-to-date technological and legal developments, and in light of your own circumstances. For instance, a library licensing an electronic database would have different concerns than a library licensing a photograph for posting on its own website, just as a solo librarian licensing an electronic journal would have different concerns than a librarian in a global company licensing the same journal.

Last Word

My final introductory comment is to have fun. Digital licensing is a fun area because it is still relatively new and allows for creative and flexible solutions. When you work out an agreement that is satisfactory to both involved parties, it can be a very rewarding experience. Keep in mind that you will be contributing to what one day may evolve into an industry standard in the digital licensing world—a standard that we all strive for while trying to understand this complex and convoluted area of law.

Happy licensing!

I am always interested in hearing your suggestions about licensing. I may be reached at www.copyrightlaws.com, and you may post comments about this book and licensing in general at www.copyrightlaws.com.

Note to Canadian and Other Non-U.S. Readers

Because this book is published by the American Library Association, some readers may assume that it is intended solely for an American audience. Let's correct that misimpression.

Digital licensing by its very nature implies global or worldwide licensing. This could mean that the content owner is based in one country and the library in a different country. Or it may mean that both the content owner and the library are in the same country, but the patrons or end-users of the licensed content are temporarily or permanently based in a different country. There are many variations on these scenarios that could further illustrate the nature of global licensing.

This book reflects the global nature of licensing. In some situations, there will be discussions of country-specific issues. For example, in the United States, certain institutions have specific requirements that must appear in all licenses. Another example is moral rights that exist to some extent in the United States, more so in Canada and the United Kingdom, and very strongly in European Union countries. Further, fair use is a U.S. principle, whereas fair dealing is used in the copyright statutes of many other countries, including Canada and the United Kingdom. Other discussions in this book deal with these global issues, such as the portions in chapter 2 on international copyright law, the parts in chapter 4 on authorized users and authorized sites, and the sections in chapter 5 on governing law.

No matter where your library or organization is based, where the content provider is based, and where your patrons or end-users are accessing the licensed content, you will soon find that interpreting and negotiating your digital licenses must take into account global issues.

Quick-Starter Tips for a Successful Agreement

This book is full of tips to help you ensure your license agreements work for you. However, for those looking for a “crash course,” the following are ten basic points you should always follow when negotiating digital licenses.

1. *Avoid oral licenses.* Although not always mandatory, use written agreements. Your written license is a summary of the terms and conditions of use of the licensed content and will be used for interpretation purposes by you and others in your library throughout the duration of the license.
2. *Before reading any license agreement offered to you, write down on a blank piece of paper the “must-haves” for this license arrangement.* If offered a written license, carefully read the license from beginning to end before mentally or actively marking necessary amendments to the agreement (based on your “must-have” list). Another way of focusing on your “must-haves” is to think about what is the heart of the agreement for you—it is this heart or reason on which you want to focus your negotiations and license terms and conditions.
3. *Understand your obligations.* Before signing on the dotted line, make sure you understand and are comfortable with the obligations the license demands of you. Do not base your agreement on any oral representations. If you see a clause you do not like, but the other party tells you not to worry because it will never be enforced, get that clause removed. Make sure you can live up to any obligations in the agreement. When in doubt, ask questions, lots of questions.
4. *Cover all issues.* Do not avoid inserting any relevant issues in the agreement because you think those issues might “scare off” the other party. It is best to put everything on the table at the

- beginning and to avoid disputes in the future. Be honest and direct and negotiate in good faith.
5. *Avoid legal language.* Simple, nonlegalistic language is the best approach. You want wording that is clear to the two parties signing the agreement, and to anyone who needs to interpret or apply that agreement later. Defining any ambiguous or new technical words can help provide clarity.
 6. *Use consistent words and terms.* Do not use the word “content” in one clause, “material” in another clause, and then “publication” in a third clause. Pick the best word or term and stick to it.
 7. *Make sure the license works for you before you sign it.* At the very least, make sure the content is properly defined, and all the relevant users can use the licensed content in the manner they need and in the locations (including virtual locations) they need to use it.
 8. *Each license agreement is unique.* A license agreement that works for one library may not fit the needs of another library. It may not even fit the needs of the same library in two different licensing situations for different digital content.
 9. *Know when to walk away.* And do walk away when a license will not work for you or negotiations are going nowhere. Or at least take a healthy break before returning to the license or negotiations to see if you can work out a win-win arrangement.
 10. *Be creative, patient, and flexible.* And be positive, progressive, and productive in your licensing arrangements.

When to License

A wise man hears one word and understands two.

—Yiddish proverb

The digital revolution has resulted in an important, and sometimes daunting, change in the way libraries, museums, archives, educational institutions, and other nonprofit and for-profit organizations procure, access, share, and store information available for their own use and for use by their patrons. In the pre-Internet and pre-electronic days, libraries and organizations regularly purchased print copies of materials for their use and collections. Libraries owned physical copies of these materials. We are now witnessing a revolution in how information and content is acquired, stored, shared, and accessed. With this revolution comes a new set of administrative and legal issues that librarians and other nonlawyers must face, which some say is a Pandora's box. No longer are librarians focused on copyright law issues like photocopying in their libraries, or whether showing a video constitutes a public performance. Librarians, information professionals, and other nonlawyers have become negotiators and interpreters of legal agreements that open the door to a wide variety of electronic content for their patrons and organizations. Licensing electronic content is now an expected part of collections management and content acquisition, especially as more and more collections and research materials budgets are dedicated to serials, databases, and other materials available only in a digital format. Many librarians and other nonlawyers are already involved with licensing electronic or digital information, and many others will become more involved in this process in the near future.

Licensing electronic content rather than physical ownership of print copies raises a whole series of issues not previously experienced by librarians. Unlike signing a purchase order for a new print book or print periodical, licensing digital content often involves negotiating a license agreement or

contract with the owner of the digital content for use in a library. At the very least, it involves understanding and interpreting such agreements, whether they are negotiated by a consortium on your library's behalf, are nonnegotiable, or are individually negotiated by your library. But when do you need a written license, and how does the process begin? What terms and conditions are in the best interests of your library or organization? What do these terms and conditions mean?

When Does Licensing Come into Play?

Licensing comes into play when you want to use electronic or digital content such as a database or periodical, or when someone wants to use such content owned by your library or organization. It may begin with a telephone call, an e-mail, a postal mail letter (commonly referred to as "snail mail"), an order form, a visit to a website, or when you are offered a written license agreement by a publisher or vendor.

Consumer/Licensee

As a consumer of content, you need a license agreement whenever you "use" the content of others. For example, you want to use someone else's photograph on your website, or you want to access an online database or periodical. "Use" in this context, and in this book, includes many different concepts or rights that are set out in domestic or national copyright statutes in the United States and in countries around the world, and in international instruments such as copyright treaties. Among these rights are the right to reproduce or publish in digital or print form, transmit over the Internet, and perform the work in public. "Use" also refers to access to, and the using of, content that is protected by copyright and is not in the public domain.

The term "licensing" may also refer to the contractual arrangement of accessing public domain content. In this context, licensing provides access to that content and may be the only way to legally access that public domain content, at least in that particular format (e.g., a database).

As a library or consumer of copyrighted materials, you may be involved in many situations in which you need to access electronic or digital content and to license that content. You may need to license

- an online subscription to a journal or database
- content compiled by an aggregator such as LexisNexis
- an encyclopedia or other collections of content
- financial information, stock market sources, and news feeds
- computer software, CDs, and DVDs
- still images, including photographs, illustrations, and digitized slides
- moving images, including film clips, documentaries, and other videos
- nondigital content which you scan or digitize yourself (including text, still and moving images, and music)
- content for your website, intranet, or social media site

Generally, libraries and archives see themselves as consumers or licensees, using the content of others. However, more frequently libraries and all sorts of organizations are licensing the content they, and their employees, create and own, and are therefore also licensors. This is especially true as intellectual property (IP) continues to grow as a valuable asset and owners of that IP are more likely to value and protect those assets, and also exploit and publish them and possibly earn money by doing so, thereby enhancing their reputation as the owner of that IP.

Content Owner/Licensor

As a content owner, you require a license agreement whenever someone else “uses” your content. Content that you might own includes photographs and other images, presentations, reports, manuscripts, audio recordings, computer software, and audiovisual works. As an owner of content, you may be involved in some of these possible scenarios:

Licensing a handful of works to be used in association with works by other creators. For instance, licensing three photographs from your library’s collection for use in a website or on social media with other photographs, text, animation, and so on.

Licensing content owned by your organization that would constitute all of the works to appear in a new digital product. For example, your library might license digital rights to its manuscript collection for use

by a developer who would then create a DVD of manuscripts owned by your library.

Licensing works for “relicensing” purposes. For instance, you might license the rights to digitize your organization’s newsletter to one company, which will then relicense these rights to DVD producers, website owners, educational institutions, corporations, and others.

The focus in this book is generally from the perspective of a library or other organization licensing the content of others. However, if you are licensing your own content, you will go through the same procedure as a user of content, and you may use the same licensing checklists as provided in chapters 4 and 5 and as summarized in appendix C, although you will have to approach the issues from a different perspective in order to protect your library or organization’s interest from the interests of a content owner.

Other Agreements

Aside from licenses for using digital content, there are other agreements you may need in the digital world, including the following:

- Website and social media terms and conditions of use
- Privacy policy or release
- Website, blog, or other development agreements
- Photograph/image releases
- Electronic mailing list, blog, wiki, or Twitter and other social media agreements with employees and others who post messages and comments
- Click-through or web-wrap agreement for online computer software and content

Although these agreements may not be content licensing agreements per se, many of the clauses discussed in this book are helpful when entering into such agreements.

Negotiable and Nonnegotiable Licenses

License agreements may be negotiable or nonnegotiable. A negotiable agreement is one where the parties to the agreement discuss and agree

upon what terms and conditions should be included in the agreement. When licensing digital content for use in your library or organization, you will be able to negotiate with the content provider various terms and conditions in the agreement, such as the price of the content and who may use that content.

A nonnegotiable agreement is one where the terms and conditions in the agreement are set forth by one party and must be accepted by the other party if they want the goods or services supplied. For example, you may find a nonnegotiable agreement when purchasing computer software online. A company like Microsoft sets out the terms and conditions of use of its software. If you want to purchase and use its software, generally you must accept the terms and conditions of its agreement. You accept these terms before downloading the software from the Internet, and you agree to them by pressing the “I Agree” button on a standard license.

However, some licenses that appear to be nonnegotiable are often negotiable. For example, if a vendor offers you a seemingly standard license for an electronic journal, and that license does not meet your library’s needs, ask for changes in the license to reflect your needs. Always contact the content owner should you need to discuss terms and conditions that make a license (even one that appears to be nonnegotiable) more workable for your circumstances. Chapter 6 deals with negotiation issues and tips relating to license agreements.

Understanding the Concept of Electronic Materials

One of the major changes in acquiring electronic content, as opposed to print journals, is that in many circumstances, libraries and organizations now pay for content they never physically acquire. For instance, a library pays for an online journal that it may never see in a print form (other than perhaps printed from its own printer). What the library is paying for is access to that online journal, not physical ownership of something it can place on its physical bookshelves. In addition, the scope of that access or use of the online journal may be more limited or perhaps a bit different than the use of the print journal. For instance, it is not necessary to obtain permission (as set out in the terms and conditions of the license) to browse through a print journal, but permission may be necessary to access online content or to share an article with a colleague.

Libraries are very concerned about having access to archives of digital content. Whereas a print book may be kept and accessed from a bookshelf indefinitely, access to digital content has a defined duration. This is further discussed in various parts of this book.

Furthermore, although print publishers are concerned about their works being photocopied, electronic publishers may feel even more threatened since it is so quick, easy, and inexpensive to make an exact copy of an electronic work. It is arguable that controlling and monitoring electronic works is therefore a larger problem in the electronic world than in the print world. In this regard, in addition to copyright laws, technologies such as encryption, password-protected access, watermarking, and the use of PDF files are sometimes used to ensure authorized uses only. DRM, or digital rights management, is described in chapter 3.

In addition, the types of uses requested by libraries and their patrons are different with digital content than print materials. For instance, in the academic world, print course materials often include excerpts from articles. With electronic library reserves and course materials available online and in course management systems, it is becoming more commonplace for entire articles—and not just excerpts—to be part of these electronic collections. Many publishers are not opposed to this, provided they are fairly compensated and there are some “controls” in place to protect against further or unauthorized copies being made.

Five Key Licensing Concerns

Given the relative newness of licensing content in a digital form, libraries and content providers have several concerns and needs that should be taken into account in any discussions or negotiations of license agreements. Throughout the licensing process, both parties should keep in mind that the license they sign should be a “win-win” situation. Although at times it may seem like each party has opposite interests, they are both aiming toward the same goal—fair access at a fair fee. For a library, “fair” may mean use according to its needs. For a publisher or other content owner, “fair” may mean controlled access for authorized uses. For both parties, “fair” would also relate to the fee being paid for the content.

The following are five key elements libraries and organizations should aim for when licensing digital works. These elements may act as basic

underlying principles upon which a license may be based. Specific details based on these principles are discussed throughout this book.

1. Ease of access to the works being sought (e.g., easy online retrieval or download)
2. “One-stop” transactions where no additional permission, payments, or clearances are required once the library or organization has paid for the licensed content
3. Clear definitions of what uses are permitted and what uses are not permitted, by whom and where
4. Access beyond the termination of the license agreement (where necessary)
5. Liability or responsibility regarding the use of licensed content by employees, researchers, patrons, and the public. For instance, how far must a library go to ensure that a researcher is using an article from an electronic publisher according to the terms and conditions of the license agreement?

The Relationship between Print and Electronic Subscriptions

Some journals distinguish their print publications from their electronic publications in terms of subscriber access and fees. Others permit certain electronic access with a print subscription. We are seeing many journals that now only publish electronically. Any of the following scenarios are possible:

- Only print subscribers have access to electronic content.
 - The library may have to pay an additional fee for the e-content, or
 - The e-content may be “free” and considered part of the print subscription
- Print and electronic subscriptions are dealt with separately, that is, whether or not the library has a print subscription, it pays the same price for the e-content as a library that only subscribes to the e-content.
- Library/institutional subscribers may access online content; individual subscribers may not (and may only have access to print journals).

- Timing of access to electronic publications
 - same time as print publications
 - prior to print publication
 - after print publication
 - archives only
- Publisher only offers electronic versions (and no print version).
- Access to electronic versions may be
 - full access to all electronic content
 - access to certain electronic content
 - separate pricing for different content, that is, paying separately for current works and works in archives

Differences in Electronic and Print Versions

Where content owners offer both a print and electronic version of a periodical or other content, the electronic and print versions may not be identical. The digital version may not have the illustrations, photographs, diagrams, and so on that appear in the print version, and some digital versions are only text. Further, the digital version may only contain portions of the text from the print version. On the other hand, the digital version might be interactive, more easily searchable, and contain flash animations not found in the print version. A digital version created from a print version may contain errors, including spelling errors. This can happen when the digital version is scanned from the print version using optical character recognition.

Other considerations to take into account in acquiring either a print or electronic version of content is that often an otherwise expensive e-version may be significantly less expensive if you also have a print version. Also, some publishers require you to subscribe to the print version in order to be able to use or subscribe to the electronic version. These are things you may wish to inquire about prior to licensing digital content.

When you have a print version of a book or periodical subscription, you own that physical copy (though not the copyright in it) and you may store that book or periodical where you wish. They may be stored on a public shelf in your library for consultation and borrowing, or they may be stored with reference materials for on-site consultation only. Electronic content is stored in a different manner than print content. You may have a CD or DVD that

stores all of the content, the content may be accessible on a computer terminal in your library, or the content may be available online from the publisher's server. When online, that content may only be accessible through a library computer terminal, or it may also be made remotely accessible for specified people or for the public. These are all important issues to consider when licensing digital content, and they are issues we will discuss throughout this book.

Are There Industry Standards in Licenses?

Digital license agreements, in general, were initially a hybrid of computer software, book publishing, and film agreements. However, they are now a "breed in themselves," and we are beginning to see common issues and trends emerge, many of which are discussed in this book.

There is no industry standard for licensing content by libraries and organizations. Although there are some consistencies between license agreements, most are distinct and unique from one another, and from licensed content to licensed content. There may be similarities in structure, definitions, and terms and conditions addressed in various licenses, but **each license must be examined and evaluated on its own, according to its own unique circumstances.**

The reasons for a lack of industry standards in this area include the fact that licensing digital content is still relatively new, technology itself is constantly changing, and so is the manner in which we access, use, share, and store digital content. Equally important is the fact that every library, even two similar libraries, may have different needs and therefore may require different license agreements. In addition, each licensed content may require a different arrangement that is then reflected in its licensing terms and conditions. This is all due to the needs of researchers, instructors, and patrons; different available technologies; and the nature of the licensed content; as well as business and legal reasons (i.e., different lawyers may have different opinions, different libraries may have different copyright, acquisition, and privacy policies, and profit and nonprofit organizations may have different approaches to licensing). Also, different institutions may have different obligations and regulations when entering into license agreements (or any other types of agreements).

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