

# Library Initiatives Standardized Agreement Language

## Introduction

The Big Ten Academic Alliance (BTAA) has developed this document to facilitate negotiations on behalf of its member libraries that require collective license agreements. While our member libraries have developed their own licensing guidelines, this document incorporates language that maybe unique to consortial licensing. This document addresses select topics of particular importance to Big Ten libraries commonly included in licenses. Vendors, publishers, and content providers should incorporate this language into draft and final agreements for the BTAA.

### 1. Preamble Language:

The Big Ten Academic Alliance is an Illinois, not-for-profit organization located at 1819 South Neil Street, Suite D, Champaign, Illinois 61820

### 2. Authorized Users:

- a) The Licensee's full-time and part-time students, including distance learners, regardless of their physical location;
- b) The Licensee's full-time and part-time employees (including faculty, staff, affiliated researchers and independent contractors), regardless of their physical location; and
- c) Patrons not affiliated with the Licensee who are physically present at Licensee's site(s)
- d) If the Licensee has one or more remote sites or campuses which are administered centrally by the Licensee, persons affiliated with those remote sites or campuses will also be considered Authorized Users.
- e) Authorized Users shall have access to the content only through the Licensee's Secure Network and/or from valid IP addresses or other secure authentication methods. The use of proxy servers is permitted as long as any proxy server IP addresses provided limit remote or off- campus access to Authorized Users.

### 3. Governing Law:

This Agreement shall be construed under, and the performance governed by, the laws of the State of Illinois without regard to principles governing conflict of laws.

### 4. Indemnification:

Illinois law provides for contribution among joint tortfeasors whereby each liable party pays its share of damages based on comparative fault. Any liability of the Big Ten Academic Alliance will be subject to the terms of the Big Ten Academic Alliance's insurance policy. The Licensor shall indemnify and hold Licensee and Authorized Users harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party of an alleged infringement of copyright or any other



property right arising out of the use of the Licensed Materials by the Licensee or any Authorized User. Additionally, Licensor agrees that no liability limitation that may appear elsewhere in this Agreement applies to, overrides, or cancels this indemnification.

#### **5. Limitation of Liability:**

Neither party shall be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the use of or the inability to use the Licensed Materials.

#### **6. Fiscal Exigency/Failure to Appropriate Funds:**

Participating members may terminate their participation in the agreement if sufficient funds are not made available by their respective state legislatures or institutional budget processes for the purpose of this program.

#### **7. Price Increases:**

Licensor shall provide Licensee with a price list for all Licensed Materials no less than sixty (60) days prior to the end of the current term.

#### **8. Cancellation Notice Period:**

If the Licensor and the Licensee are unable to agree in advance upon the length of and fees for any renewal term, either party may terminate this Agreement prior to the commencement of any renewal term.

#### **9. Confidentiality:**

Licensor agrees to maintain the confidentiality of any data relating to the usage of the Licensed Materials by any Participating Member Institution and its Authorized Users. Participating Member Institutions agree to maintain the confidentiality of any data relating to the usage of the Licensed Materials by individual Authorized Users. Such data may be used solely for purposes directly related to the Licensed Materials and may only be provided to third parties in aggregate form. Raw usage data, including but not limited to information relating to the identity of specific users and/or uses, shall not be provided to any third party.

The Licensor agrees that no personally identifiable information, including but not limited to log-ins recorded in system logs, IP addresses of patrons accessing the system, saved searches, usernames and passwords, will be shared with third parties, except in response to a subpoena, court order, or other legal requirement. If Licensor is compelled by law or court order to disclose personally identifiable information of Authorized Users, Licensor shall provide the Licensee with adequate prior written notice, so that Licensee or Authorized Users may seek protective orders or other remedies. Licensor will notify Licensee and Authorized Users as soon as is practicable if the Licensor's systems are breached and the confidentiality of personally identifiable information is compromised. Licensee and Licensor shall cooperate in the implementation of security and control protocols and procedures as they are developed during the term of this Agreement.

## 10. Usage Statistics:

Licensors shall provide to Licensee usage statistics for the Licensed Materials. Statistics shall meet or exceed the most recent Project [Counting Online Usage of Networked Electronic Resources \(COUNTER\) Code of Practice Release](#), or prevailing practice, including but not limited to its provisions on customer confidentiality. When a release of a new COUNTER Codes of Practice is issued, Licensor shall comply with the implementation time frame specified by COUNTER to provide use statistics in the new standard format.

Licensors shall not provide Licensee's usage statistics in any form to any third party without the Licensee's written authorization, unless the third party owns rights in the Licensed Materials. In all cases, the disclosure of such data shall fully protect the anonymity of individual users and the confidentiality of their searches, and will comply with all applicable privacy laws. The Licensor shall not disclose or sell usage data or information about the Licensee or its Authorized Users without the Licensee's written permission.

## 11. Accessibility Compliance:

### United States:

Licensors shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large print interfaces, text-to-speech output, voice-activated input, refreshable braille displays, and alternate keyboard or pointer interfaces, in a manner consistent with the Web Accessibility Initiative Web Content Accessibility Guidelines 2.1 AA (<http://www.w3.org/WAI/guid-tech.html>). Licensor shall ensure that product maintenance and upgrades are implemented in a manner that does not compromise product accessibility. Licensor shall provide to Licensee a current, accurate completed Voluntary Product Accessibility Template (VPAT) to demonstrate compliance with accessibility standards (<https://www.itic.org/policy/accessibility>). If the product does not comply, the Licensor shall adapt the Licensed Materials in a timely manner and at no cost to the Licensee in order to comply with applicable law. Nothing in this Agreement shall limit the Licensee or any end user from making lawful, noninfringing uses to facilitate access to the Licensed Materials by users who have disabilities. For the avoidance of doubt, the Licensor authorizes such uses.

### International:

Licensors shall support accessibility for people with disabilities by providing a product that is compatible with assistive software or devices such as large print interfaces, text-to-speech output, voice-activated input, refreshable braille displays, and alternate keyboard or pointer interfaces, in a manner consistent with the Web Accessibility Initiative Web Content Accessibility Guidelines 2.1 AA (<http://www.w3.org/WAI/guid-tech.html>). Licensor understands and acknowledges that Licensee is obligated to comply with the United States' Americans with Disabilities Act (ADA). Licensor shall ensure that product maintenance and upgrades are implemented in a manner that does not compromise product accessibility. Licensor shall provide to Licensee a current, accurate completed Voluntary Product Accessibility Template (VPAT) to demonstrate compliance with relevant accessibility standards (EN 301 549, WCAG,

or Section 508): <https://www.itic.org/policy/accessibility>. If the product does not comply, the Licensor shall adapt the Licensed Materials in a timely manner and at no cost to the Licensee in order to comply with applicable law. Nothing in this Agreement shall limit the Licensee or any end user from making lawful, noninfringing uses to facilitate access to the Licensed Materials by users who have disabilities. For the avoidance of doubt, the Licensor authorizes such uses.

## **12. Institutional Repository Deposit:**

Big Ten libraries will download or otherwise receive from publisher PDF versions of articles written by their corresponding university faculty or students, including those co-authored with researchers from other institutions, and make them available in a public section of an institutional repository service. These downloads will include accompanying metadata to facilitate organization and access.

Future downloads, for the purpose of keeping the holdings of BTAA-authored papers current, will happen on a scheduled basis to be mutually agreed upon.

Member libraries will be allowed to make these articles available from its institutional repository service in perpetuity.

## **13. Notice of Click-Through License Terms or Other Means of Passive Assent:**

In the event that Licensor requires Authorized Users to agree to terms relating to the use of the Licensed Materials before permitting Authorized Users to gain access to the Licensed Materials (commonly referred to as "click-through" licenses), or otherwise attempts to impose such terms on Authorized Users through mere use or viewing of the Licensed Materials, Licensor shall provide Licensee with notice of and an opportunity to comment on such terms prior to their implementation. In no event shall such terms materially differ from the provisions of this Agreement. In the event of any conflict between such terms and this Agreement, the terms of this Agreement shall prevail.

## **14. Open Access Option:**

In the event that Licensor offers an open access option to its authors, Licensor agrees to annually review the number of open access articles published in the Licensed Materials under the open access option. For all Licensed Materials in which such articles are published, Licensor will share with Licensee the number of articles published under the open access option by all authors, and number of articles and citations by authors at Licensee's institution, listed by journal title. Licensor will enter into good faith discussions with Licensee concerning mechanisms by which open access publication fees can offset the subscription fees paid by Licensee and other subscribers of Licensed Materials, with a goal of reducing subscription fees in proportion to the revenue received through such open access publication fees.

## **15. Authorized Uses:**

The Licensee and the Authorized Users may access or use the Licensed Materials in ways that are consistent with this Agreement's terms and conditions and the Fair Use Provision of

United States copyright law and international law. Additionally, the Licensee and Authorized Users may access or use the Licensed Materials for the following purposes:

- a) Electronic Reserves and Course Management Systems. Licensee and Authorized Users may use a reasonable portion of the Licensed Materials for use in connection with specific courses of instruction offered by Licensee or its parent institution.
- b) Education and Teaching. Licensee and Authorized Users may extract or use content contained in the Licensed Materials for educational, scientific, or research purposes, including extraction and manipulation of information or images for the purpose of illustration, explanation, example, comment, criticism, teaching, research, or analysis.
- c) Electronic Links. Licensee may provide password- or proxy-protected hyperlinks from the Licensor's Web page(s) or Web site(s) to the Licensed Materials. Licensee may make reasonable changes in the appearance of such links, or in statements accompanying such links as Licensor reasonably requests such changes.
- d) Scholarly Sharing. Authorized Users may transmit to a third party colleague in hard copy or electronically, minimal, insubstantial amounts of the Licensed Materials for personal, scholarly, educational, scientific, or research uses. In addition, Authorized Users have the right to use, with appropriate credit, figures, tables and brief excerpts from the Licensed Materials in the Authorized User's own scientific, scholarly and educational works. Licensee is not permitted to resell such information for any purpose, under any circumstances.
- e) Interlibrary Loan. Using secure electronic, paper, or intermediated means, Licensee may fulfill occasional requests from other non-participating institutions, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in compliance with Section 108 of the United States Copyright Law (17 USC §108, "Limitations on exclusive rights: Reproduction by libraries and archives"). Electronic books are among the Licensed Materials governed by this provision, and regardless of statutory provisions or interpretation, requests for whole eBooks may be fulfilled by the Licensee. For the avoidance of doubt, the Licensor authorizes such uses.
- f) Text Mining. Authorized Users may use the licensed material to perform and engage in text mining/data mining activities for academic research, scholarship, and other educational purposes, and to utilize and share the outputs of text and data mining in their scholarly work. Licensor will cooperate with Licensee and Authorized Users in making the Licensed Materials available in a manner and form most useful to the Authorized User. Any Licensor fees for provision of copies will be on a time and materials basis only.

#### **16. Breach Cure Period:**

In the event of a material breach of any of its obligations under this Agreement, Licensee shall have the right to remedy the breach within thirty (30) days upon receipt of written notice from Licensor. Licensee, promptly upon becoming aware of any unauthorized use of the Licensed Materials, inform Licensor and take appropriate steps to end such activity and to prevent any recurrence.

In the event of any unauthorized use of the Licensed Materials, Licensor may suspend the access and/or require that the licensee suspend the access from where the unauthorized use occurred upon notice to the Licensee. The Licensee will not be liable for unauthorized use of the Licensed Materials by an Authorized users provided that the unauthorized use did not result from the Licensee's own negligence or willful misconduct and that the Licensee did not permit such unauthorized use to continue after having actual notice thereof. If a Licensee fails to remedy such a breach within the period of thirty (30) days, Licensor may (at its option) terminate this Agreement upon written notice to the Licensee.

In the event of a material breach of this Agreement by Licensor, which breach is not remedied within thirty (30) days' notice by Licensee that such breach has occurred, Licensee reserves the right to terminate this Agreement. At that time, Licensor shall immediately refund the license fee pro-rated to the term of the subscription.

Should a significant portion of the Licensed Materials be deleted or removed from access, Licensor will notify Licensee immediately. Licensee will have at least ten (10) days from receipt of notification to cancel the Agreement and request a pro-rated refund of the license fee.

#### **17. Termination:**

In the event that the Licensor terminates this Agreement for reasons other than the Licensee's material breach of this Agreement, the Licensee shall be entitled to a refund of any fees or pro-rata portion thereof paid by the Licensee for any remaining period of the Agreement from the date of termination.

#### **18. Licensor Performance Obligations:**

- a) Persistent Links: where applicable, Licensor will provide and maintain persistent links to individual items within the Licensed Materials and make these available to Licensee. Licensor's support for persistent linking shall include the ability to resolve in-bound and out-bound links using the OpenURL standard (ANSI/NISO Z39.88).
- b) Platform migrations: Licensor shall give notice to the Licensee that content will be moving to a new platform no less than sixty (60) days before the migration commences. The Licensor will provide the Licensee with a migration timeline and, where possible, a preview environment. Licensor shall use reasonable efforts to provide continuous service throughout any platform migrations, ensuring that Licensee does not lose access to content.
- c) Quality of Service: Licensor shall use reasonable efforts to ensure that the Licensor's server or servers have sufficient capacity and rate of connectivity to provide the Licensee and Authorized Users with a quality of service comparable to current standards in the scholarly information provision industry in the Licensee's locale.
- d) Licensor shall use reasonable efforts to provide continuous service seven (7) days a week with an average of 99% up-time per month. The 1% down-time includes periodic unavailability due to maintenance of the server(s), the installation or testing of software, the loading of additional Licensed materials as they become available, and downtime

related to the failure of equipment or services outside the control of Licensor, including but not limited to public or private telecommunications services or internet nodes or facilities. Scheduled down-time will be performed at a time to minimize inconvenience to Licensee and their 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 effort to provide advance notice of hardware or software changes that may affect system performance.

- e) If the Licensed Materials fail to operate in conformance with the terms of this Agreement, Licensee shall immediately notify Licensor, and Licensor shall promptly use reasonable efforts to restore access to the Licensed Materials as soon as possible. In the event that Licensor fails to repair the nonconformity in a reasonable time, Licensor shall reimburse Licensee in an amount that the nonconformity is proportional to the total Fees owed by Licensee under this Agreement.
- f) Support: Licensor will offer activation or install support, including assisting with the implementation of any Licensor software. Licensor will offer reasonable levels of continuing support to assist Licensee in use of the Licensed Materials. Licensor will make its personnel available during the business hours of the Licensee's time zone by email, phone or fax for feedback, problem-solving, or general questions.

#### **19. Assignment and Transfer:**

Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party. Neither party to this Agreement may unreasonably withhold or delay such written consent.

#### **20. Transfer of Titles:**

If any portion of the Licensed Materials are transferred to or acquired from another party, Licensor shall use best efforts to ensure that Licensee does not lose access to content as a result of the transfer or acquisition and that any archival and perpetual access rights that have been granted shall be honored whether the Licensor is acting as the transferring or acquiring party. Licensor agrees to communicate with the other party to exchange such relevant payment and rights information. For journal titles, Licensor will use best efforts to comply with the Transfer Code of Practice.

#### **21. Notices:**

Licensor shall notify the licensee in writing of any changes to the content, design and delivery of the Licensed Materials, breach of Licensor systems, and of any changes to the Terms and Conditions of this service.

#### **22. Post Cancellation Access/Perpetual Access:**

- a) Except for termination for cause, Licensor hereby grants to Licensee a nonexclusive, royalty-free, perpetual license to use any Licensed Materials that the Licensee subscribed to during Agreement's duration. The means by which Licensee shall have

access to such Licensed Materials shall be in a manner and form substantially equivalent to the means by which access is provided under this Agreement. Licensor may allow a third party to provide continued access to the Licensed Materials without additional expenditures by the Licensee.

- b) The Licensor shall allow the Licensee to participate in the archiving of one complete copy of the Licensed Materials, and to use such archived Licensed Materials in the event the Licensor discontinues or suspends selling or licensing the Licensed Materials. Such use shall be in accordance with the provisions of this Agreement, which provisions shall survive any termination of this Agreement. Licensed Materials may be made available to any Big Ten Library participants who have a right to those Licensed Materials.
- c) Licensor acknowledges that Licensee may engage the services of third-party trusted archives and/or participate in collaborative archiving endeavors to exercise Licensee's rights under this Agreement. Licensee agrees to cooperate with such archiving entities and/or initiatives as reasonably necessary to make the Licensed Materials available for archiving purposes. Licensee may perpetually use the third-party trusted system to access or store the Licensed Materials, so long as Licensee's use is otherwise consistent with this Agreement.

**23. Signature Block:**

BIG TEN ACADEMIC ALLIANCE

Keith Marshall, Executive Director

Date: