



Site Definitions and Transfer Obligations

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<https://link.mnsu.edu/license1>

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Hi, Before I get started, I'd like to thank Minitex for this opportunity to talk about two rather arcane topics – Site Definitions and Transfer Obligations. My name is Nat Gustafson-Sundell. I'm a Collections Librarian at Minnesota State University Mankato (MNSU), a regional, public, comprehensive university of about 14,000 students. MNSU is distinctive within Minnesota State for several reasons. Although the university is situated in the heart of a rural area, stretching down across southern Minnesota into Iowa and side to side into Wisconsin and South Dakota, the university is home to "students from more than 100 countries ... and is recognized by the Council on Undergraduate Research as one of the top 20 universities in undergraduate research in the United States" (<https://www.mnsu.edu/future-students/international-admissions/>). Mankato also provides numerous graduate study opportunities.

Today, I will talk about site definitions and transfer obligations in licenses, so I'm an "S" in the E-Resource Licensing Spell-it-out series. Actually, my concern is for cost containment, so I suppose I could have been a "C" if I had thought to entitle this presentation "Cost Containment in Journal Agreements," which would probably have been a better title, although I would have needed a longer timeslot. I'm focusing on site definitions and transfer obligations today because these two terms each pose some risk of increased costs, especially in journal agreements. Transfers are also sometimes called Take-overs.

I'm sorry that my slides are text-heavy. I'll be displaying language from licenses for the most part. You can access these slides through the link on the screen "link.mnsu.edu/license1."



Flickr, Champagne Suki,
<https://flic.kr/p/MjZTuf>

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<https://link.mnsu.edu/license1>

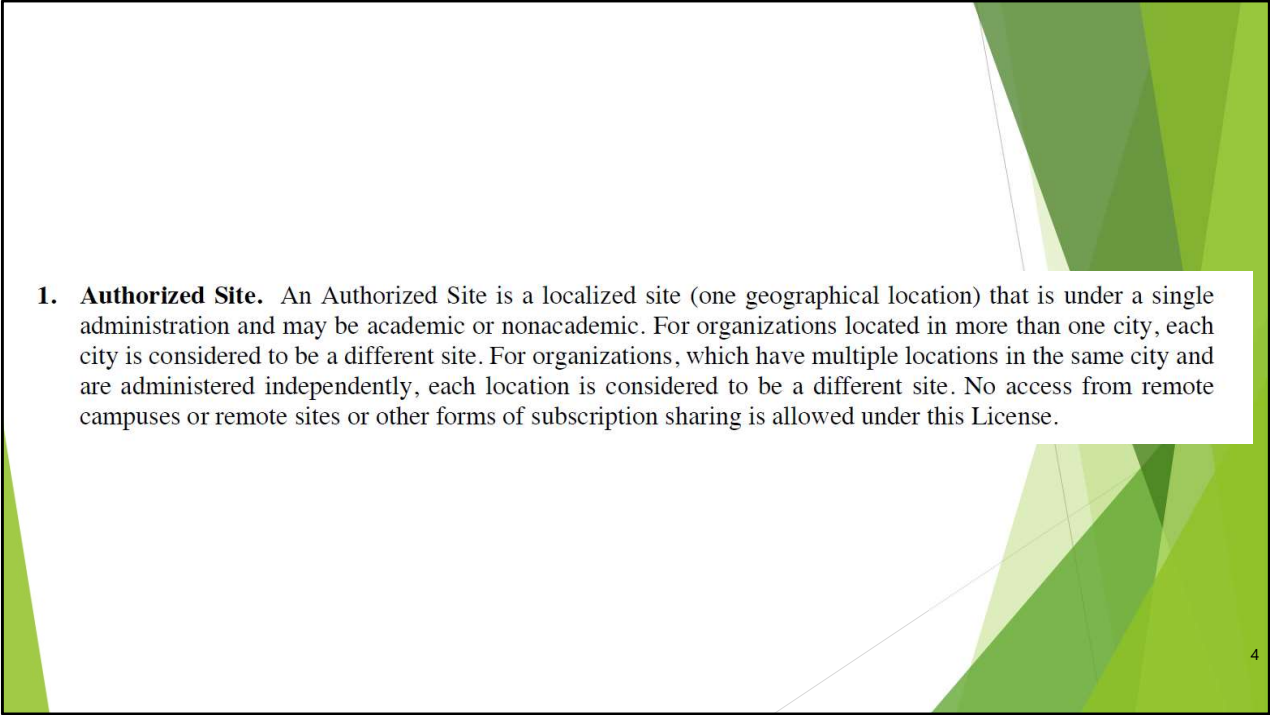
When working on agreements, I have tended to prioritize risk mitigation above-all – so while I’m concerned to ensure all agreements provide for basic rights and none include unusual restrictions, my highest priority has been to ensure any given agreement should not lead to unexpected costs or burdens. Our system counsel addresses a couple of terms that could lead to added costs, as required under Minnesota law, such as indemnification and, less consistently, late fees, but there are other terms that are more immediately threatening which counsel does not address, probably because these are hard to grasp without domain knowledge.

In addition to addressing site definitions and transfer obligations, I should mention that I also look out for other terms that could lead to added risks or burdens, but today we’ll focus on just these two because they could lead directly to added unbudgeted costs.

Site Definitions

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Let's begin with site definitions. Whether these pose a risk to other institutions depends on whether those institutions provide additional sites for distance education. Site definitions can appear at the beginning of the license, among the definitions, or the library might be asked to list locations in an appendix.

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- 1. Authorized Site.** An Authorized Site is a localized site (one geographical location) that is under a single administration and may be academic or nonacademic. For organizations located in more than one city, each city is considered to be a different site. For organizations, which have multiple locations in the same city and are administered independently, each location is considered to be a different site. No access from remote campuses or remote sites or other forms of subscription sharing is allowed under this License.

On the screen, you can see a particularly egregious version of a site definition: “An Authorized Site is a localized site ... under a single administration. For organizations located in more than one city, each city is considered a different site ... No access from remote campuses or remote sites ... is allowed under this license.”

This definition is from a license proposed in 2020 by the American Physical Society, or APS.

Example 1:

The list prices provided pertain to single-site licenses for academic institutions and hospitals; multi-site rates will be provided on request.

Example 2:

Sorry for the delay in responding. You will only need to check single site. Normally the difference is single site or consortia.

In this case it is single site. You are a single site that purchases through a consortia but in charge of your own license. Please check single site

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Generally speaking, there are two types of agreements, single site and multi-site agreements. Multi-site agreements apply either to consortia or multi-campus systems such as the University of California system or the Minnesota State system. These would typically include fees for each campus or entity on the agreement. Site definitions such as the one I quoted can be found in single site agreements. I think site definitions are basically intended to ensure that no multi-campus systems misrepresent their scope. The problem, however, is that these definitions can be written so aggressively they could be applied in cases where they really are not appropriate.

About Our Program

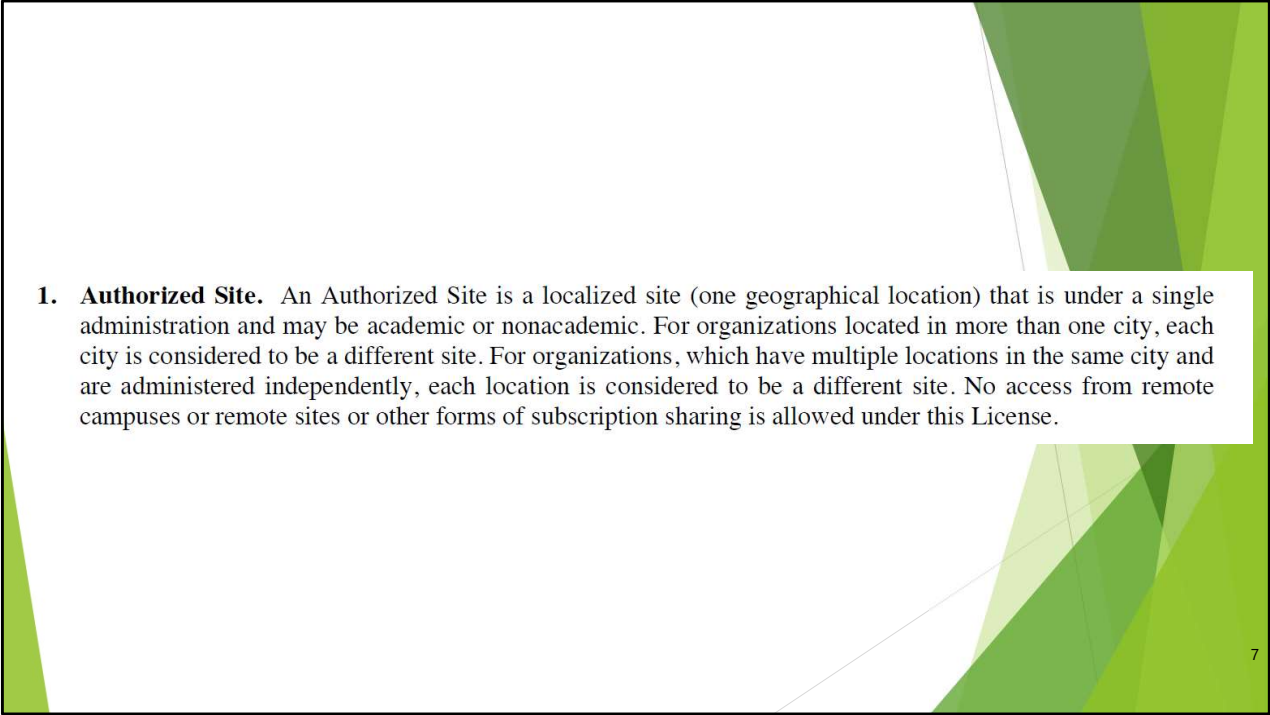
The Iron Range Engineering program strives to educate engineering students by providing the synergistic qualities of technical learning and work on authentic projects with industrial partners. In addition to the development of new engineers, Iron Range Engineering looks to benefit the local, northern Minnesota, community and industries and to address the needs of community college graduates and transfer students.



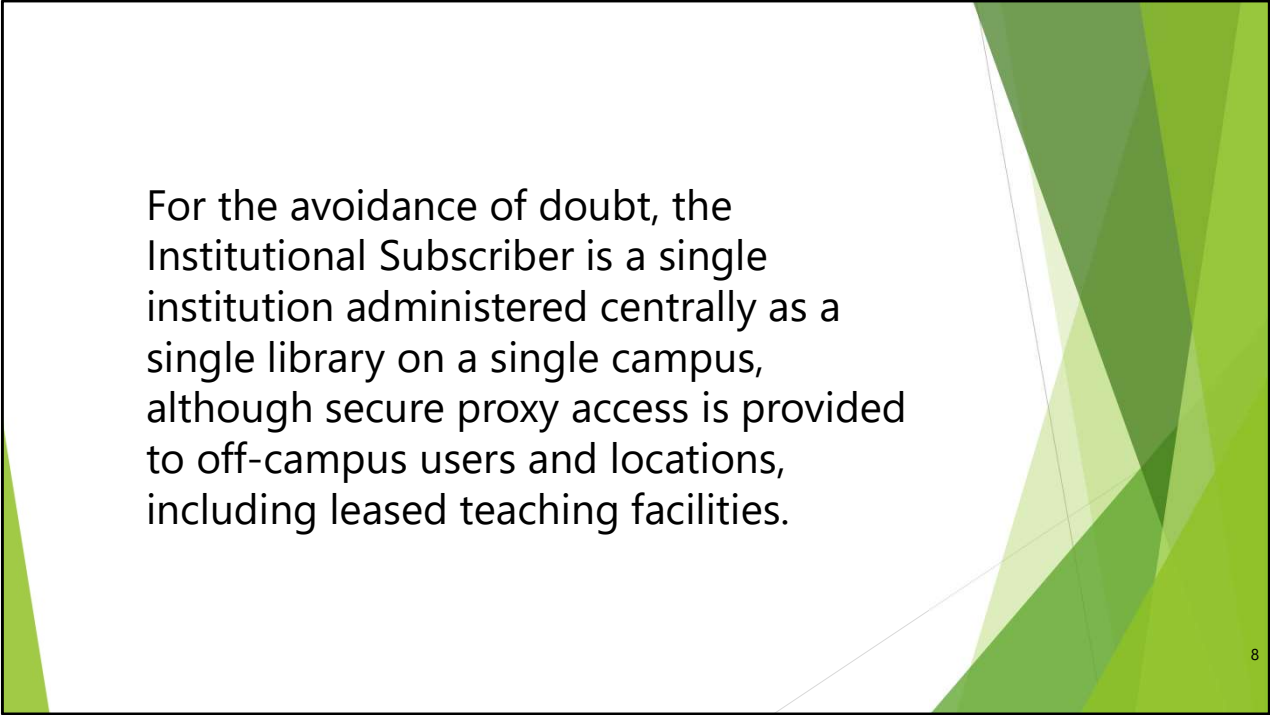
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Let's consider the example of MNSU.

MNSU has a single campus and a single administration, but MNSU also has distance education sites in other cities in Minnesota. These are leased locations, not the property of MNSU. They are provided to support specific programs. So, for example, MNSU leases some space in Virginia, MN to support a small integrated engineering program. The students in this program are registered through the university's single administration, but they attend classes far from Mankato. If the intention of a single site definition is to ensure one fee per entity, then clearly, MNSU's Virginia location is not a separate entity and no additional fees should be charged just because MNSU provides this location. I suspect many other higher educational institutions similarly provide distance ed sites.

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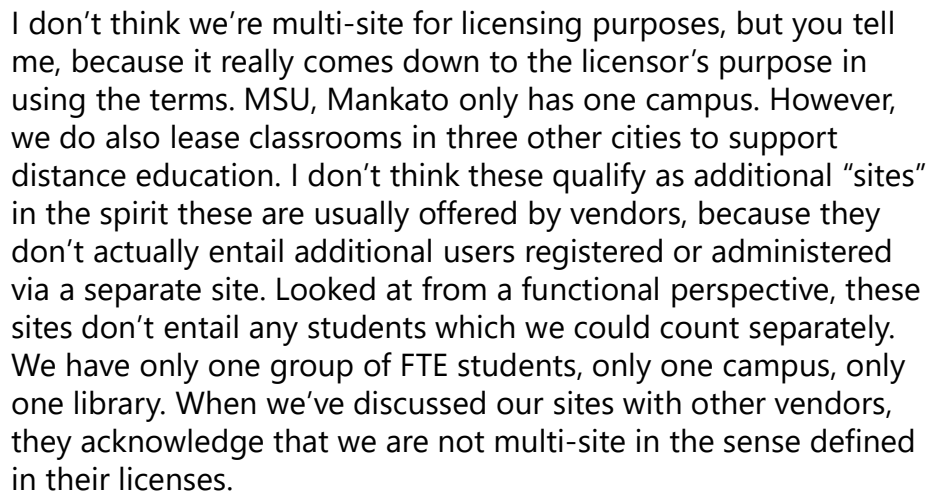
Faced with a site definition like the one provided by APS, I see basically four options which I'll list in order of preference. (1) We can try to revise the definition, (2) We can take steps so that we conform to the agreement technically, (3) We can refuse the agreement and the subscription, or (4) We can move to a multi-site agreement and pay more money, even though we don't actually have separate groups of users and we certainly don't have more money.



For the avoidance of doubt, the Institutional Subscriber is a single institution administered centrally as a single library on a single campus, although secure proxy access is provided to off-campus users and locations, including leased teaching facilities.

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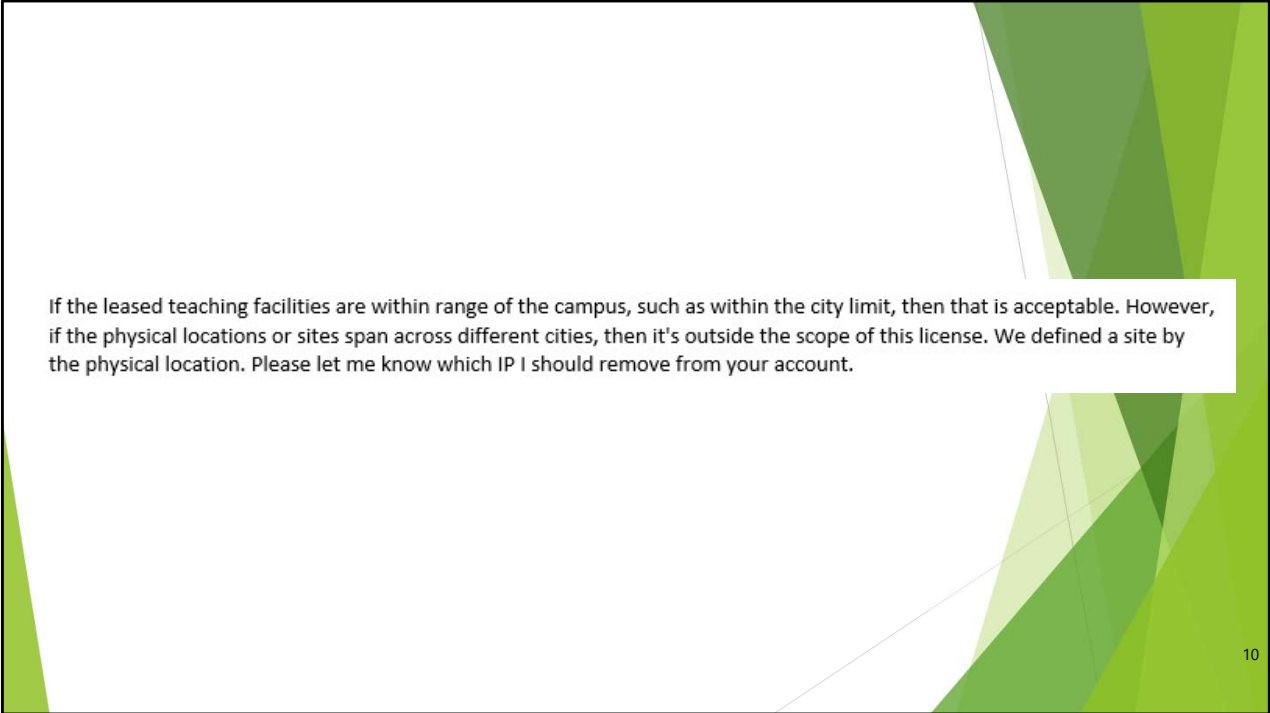
We have been successful re-negotiating the site definition in most cases, sometimes after a little back and forth. Whenever I see these definitions, I try to strike any language that we can't accept. I also propose adding the sentence on the screen so that there is no confusion later on. "For the avoidance of doubt, the Subscriber is a single institution administered centrally as a single library on a single campus, although secure proxy access is provided to off-campus users and locations, including leased teaching facilities."



I don't think we're multi-site for licensing purposes, but you tell me, because it really comes down to the licensor's purpose in using the terms. MSU, Mankato only has one campus. However, we do also lease classrooms in three other cities to support distance education. I don't think these qualify as additional "sites" in the spirit these are usually offered by vendors, because they don't actually entail additional users registered or administered via a separate site. Looked at from a functional perspective, these sites don't entail any students which we could count separately. We have only one group of FTE students, only one campus, only one library. When we've discussed our sites with other vendors, they acknowledge that we are not multi-site in the sense defined in their licenses.

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When I am asked for an explanation, I provide a brief, friendly response, such as what you see on the screen. "I don't think we're multi-site for licensing purposes, but you tell me, because it really comes down to the licensor's purpose in using the terms. MSU, Mankato only has one campus. However, we do also lease classrooms in three other cities to support distance education. I don't think these qualify as additional "sites" in the spirit these are usually offered by vendors, because they don't actually entail additional users registered or administered via a separate site. Looked at from a functional perspective, these sites don't entail any students which we could count separately. We have only one group of FTE students, only one campus, only one library. When we've discussed our sites with other vendors, they acknowledge that we are not multi-site in the sense defined in their licenses"



If the leased teaching facilities are within range of the campus, such as within the city limit, then that is acceptable. However, if the physical locations or sites span across different cities, then it's outside the scope of this license. We defined a site by the physical location. Please let me know which IP I should remove from your account.

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In just two cases, the vendor has refused to negotiate the definition. One of these vendors was APS. When APS refused to negotiate, I took two steps, I communicated to the vendor rep that we would accept the definition and we would comply by removing the IPs for the distance ed sites. This was deemed acceptable. In consultation with our library's Journals Review Committee, I also eventually cut back on our subscriptions with APS. The decision was driven primarily by other factors, but I do always note problem licenses and these do factor into our cancellation decisions.

Example 1:

Authorized sites of the Licensee	Campus License for Minnesota State University, Mankato and its distance education locations.
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Example 2:

**SCHEDULE B:
AUTHORIZED SITES**

A. Name and physical address(es) of Authorized Site(s) of Licensee:

Minnesota State University, Mankato and any locations leased for the purpose of supporting distance education

9700 France Avenue South, Bloomington, MN 55431

7700 France Avenue South, Suite 360, Edina, MN 55435

1001 Chestnut Street West, Virginia, MN 55792

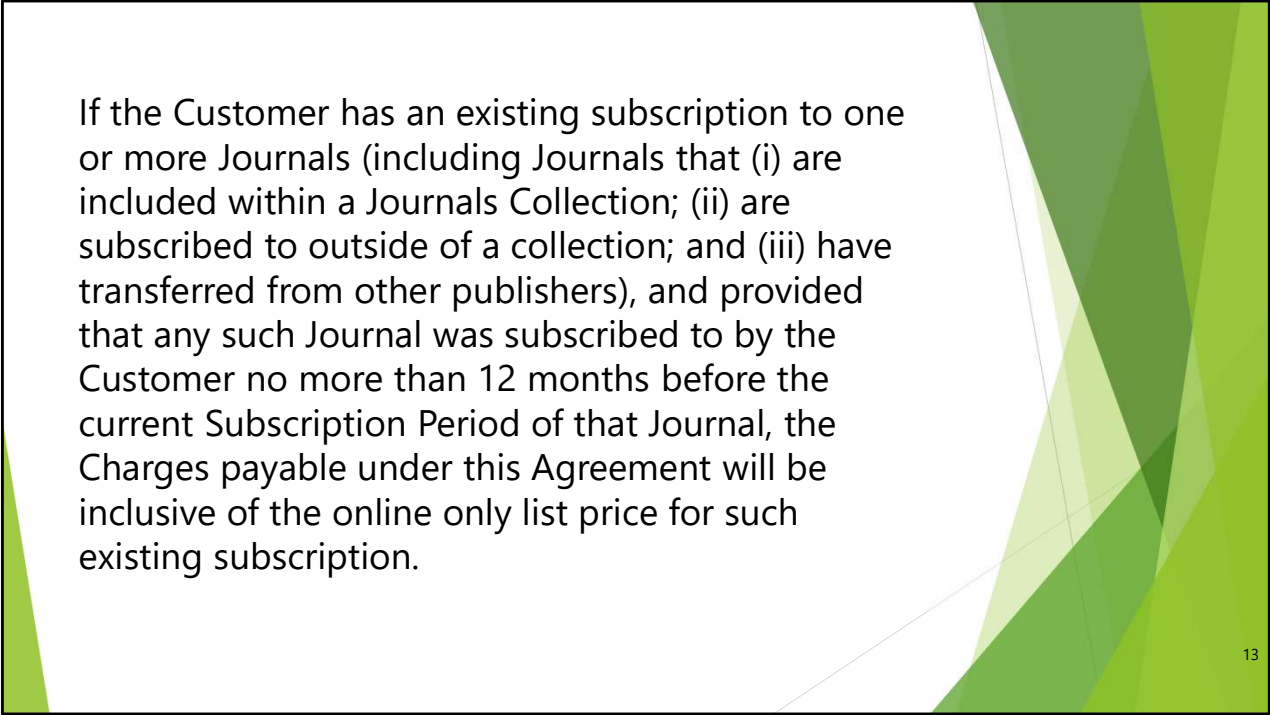
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We are also often asked to list our locations in appendices to licenses. I prefer not to list each distance ed location for two reasons. In the first place, I don't want the vendor to form a mistaken assumption about these locations – that is, I don't want them to come back and claim we should pay more because we have listed multiple sites. In the second place, I don't want to have to update these appendices if our list of distance ed locations changes. That said, some vendors do insist we list each location, in which case we comply, but we still try to note that these are distance ed sites, as you can see in the second example on the screen.

Transfer Obligations

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Ok, so let's pivot to transfer obligations. These are commonly found in package agreements with the biggest journal publishers, usually in an appendix and unnamed.

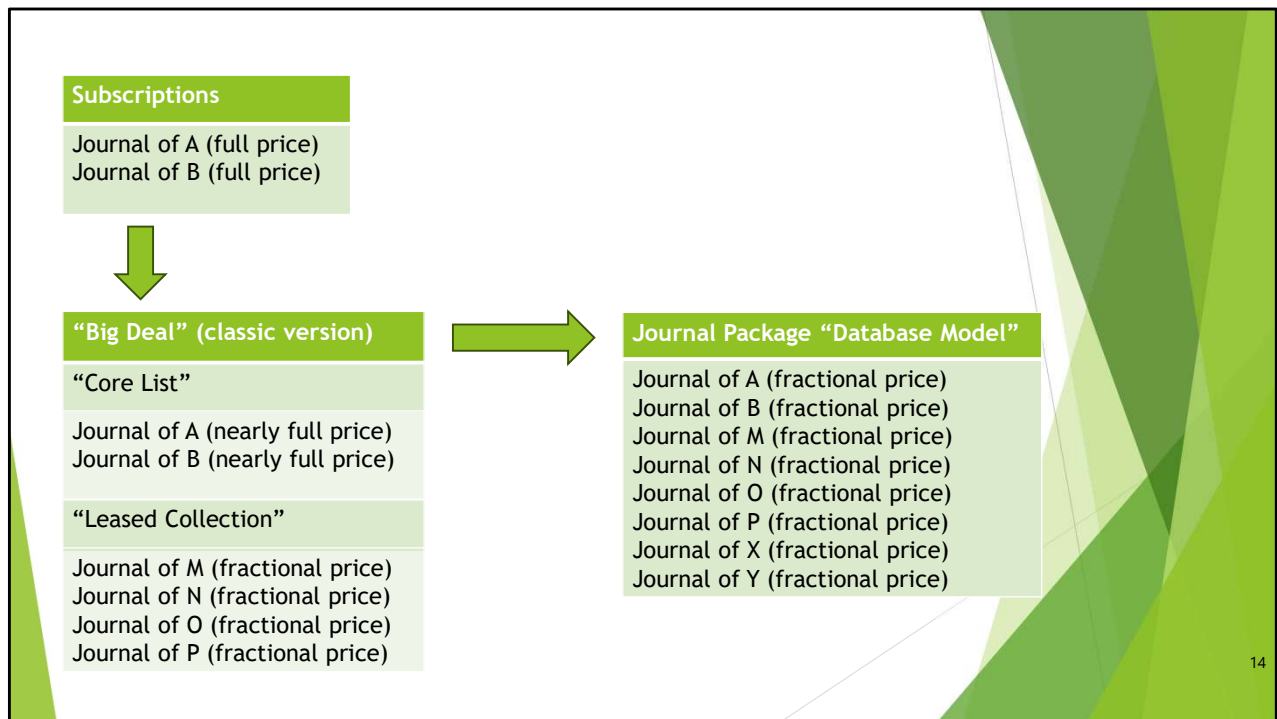


If the Customer has an existing subscription to one or more Journals (including Journals that (i) are included within a Journals Collection; (ii) are subscribed to outside of a collection; and (iii) have transferred from other publishers), and provided that any such Journal was subscribed to by the Customer no more than 12 months before the current Subscription Period of that Journal, the Charges payable under this Agreement will be inclusive of the online only list price for such existing subscription.

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On the screen, you can see an example of a transfer obligation. “If the Customer has an existing subscription to one or more Journals ... transferred from other publishers, and provided that any such Journal was subscribed to by the Customer no more than 12 months before the current Subscription Period of that Journal, the Charges payable under this Agreement will be inclusive of the online only list price for such existing subscription.”

These kinds of terms come into play when a publisher acquires a journal from another publisher. Of course, when publishers acquire journals, the price they pay is based, at least in part, on the number of existing subscribers to the journal – so it makes sense for publishers to try to retain those subscribers. These terms are intended to protect the publisher as they invest in journal acquisitions. These terms can also be helpful for libraries. Journal transfers can lead to dropped subscriptions, so transfer obligations can help ensure seamless transitions. In the past, I considered these terms in a generally positive, or at least a neutral light, although they did occasionally lead to problems. For example, there were occasions when our library cancelled a sub, but we found out in the following year that we were obligated to re-start the subscription because a different publisher – a publisher with a license including one of these terms – had acquired the journal. These were always unpleasant surprises, because the journals were no longer budgeted.



About a year or two ago, because of the changing nature of our library’s journal deals, I realized that these transfer obligations could be potentially disastrous going forward. In the past, it was fairly easy to determine what was a subscription and what wasn’t, even in big deals. Over the past couple of years, though, there has been a movement to adopt a database model among some publishers. Under this model, there is no distinction between subscribed and leased titles. Instead, all or nearly all of the publisher’s journals are included in the deal, usually at substantially discounted rates, and none are subscribed titles. I wondered, What would happen as the journals in these database model packages were transferred to other publishers not utilizing a database model? In the worst-case scenario, the library would be obligated to pick up any of these journals upon transfer, and worse, the cost could increase substantially if they went from a fractional price to a full price.

If the Customer has an existing subscription to one or more Journals (including Journals that (i) are included within a Journals Collection; (ii) are subscribed to outside of a collection; and (iii) have transferred from other publishers), with the exception of Journals that were included in another publisher's Collection at a discounted price, and provided that any such Journal was subscribed to by the Customer no more than 12 months before the current Subscription Period of that Journal, the Charges payable under this Agreement will be inclusive of the online only list price for such existing subscription.

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I realized it was imperative for me to start re-negotiating these terms to avoid adding any new unbudgeted expenses. One publisher offered a rather elegant solution, from my perspective, although it took several exchanges for them to get to it.

On the screen, you can see how a single sentence clause solves my concern. Basically, the new clause states that any transfers that were previously discounted in other deals are excluded from the transfer obligation.

This revised term has already proven its value. This year, it helped us prevent the unintentional adds of 4 journals transferred from a database model to our deal with this publisher.

Should Publisher later identify Subscriptions held by the Licensee after the signing of this Agreement, Publisher reserves the right to invoice the Licensee for these Subscriptions (“Transferable Subscriptions”). This also applies to duplicate Subscriptions held at any other Licensed Premises if set out in Schedule 3, and therefore covered by this Agreement, or future transferable Subscriptions that were previously held from other Publishers that we have acquired and form part of the Licensee’s existing holdings. For Transferable Subscriptions, Publisher agrees that pricing on a per title basis will not increase by more than ten (10) percent above the price charged Licensee by the transferring publisher. Transferable Subscriptions are defined as individually priced subscriptions as paid by the Licensee in the year immediately preceding the transfer to Publisher.

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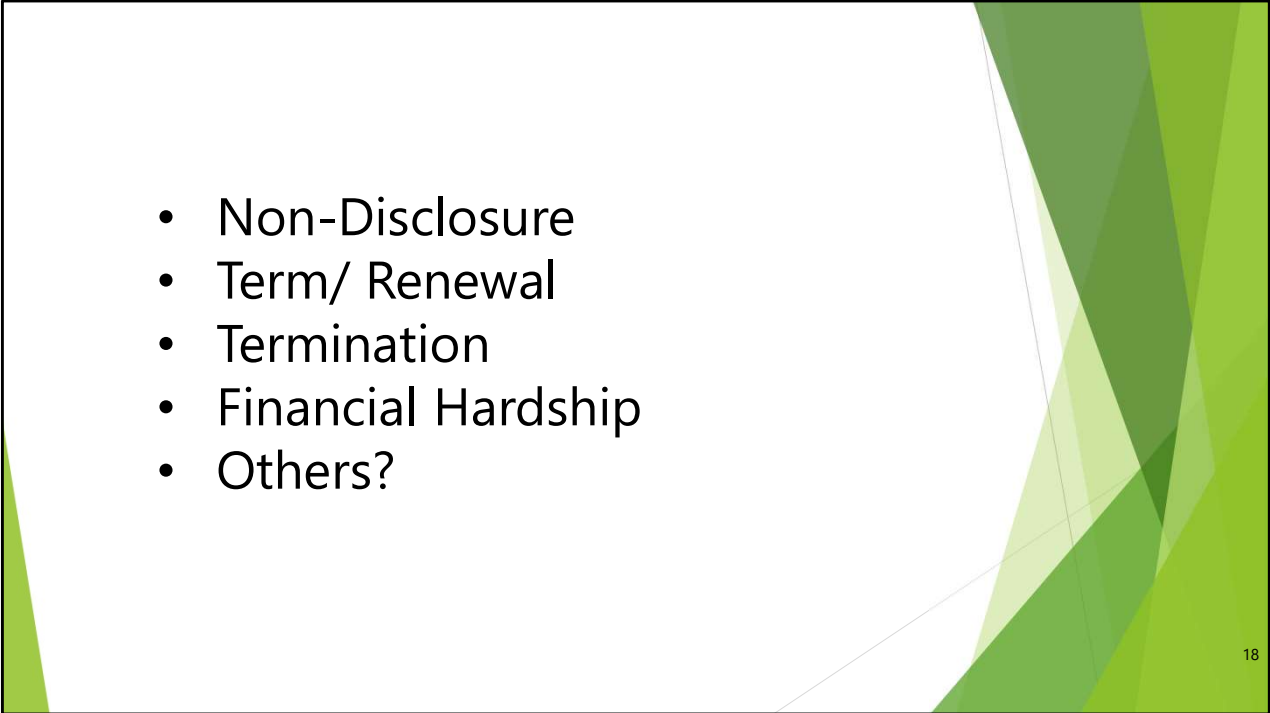
In another case, which was actually the first of this kind I negotiated, the language was a little more verbose. “For Transferable Subscriptions, Publisher agrees that pricing on a per title basis will not increase by more than ten (10) percent above the price charged Licensee by the transferring publisher. Transferable Subscriptions are defined as individually priced subscriptions as paid by the Licensee in the year immediately preceding the transfer to Publisher.”

This revision is more verbose because it reflects two approaches. The first sentence was added by the publisher, while I added the second sentence. My concern with the publisher’s initial revision was that we would still be obligated to take on any transfers from a database model, so I added language to ensure we didn’t have to take these on.

If Licensee subscribes to one or more journals from a third-party publisher which are acquired by Licensor during the Term (the "Take-Over Journals"), the Take-Over Journals may be added, by mutual consent, to this License Agreement after expiration of Licensee's subscription with the third-party publisher, to the extent Licensor's acquired rights in the Take-Over Journals permit. The current year list price of the Take-Over Journals will be added to the License Fee. Licensor will notify Licensee of intended inclusion of Take-Over Journals in this License Agreement; Licensee may elect to ~~exclude~~ include one or more of the Take-Over Journals from this License Agreement by notifying Licensor within 4 weeks after the date of Licensor's notice to Licensee.

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In yet another case, for a license still being negotiated, I simply flipped a term. In this case, the publisher had already started with a more flexible approach to transfers, but I still thought it was important to ensure that any transfers would be handled as opt-ins instead of opt-outs.

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- Non-Disclosure
 - Term/ Renewal
 - Termination
 - Financial Hardship
 - Others?

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As I mentioned toward the beginning of this talk, my highest priority for licenses is to mitigate risks or burdens, especially to pursue cost containment. There are other terms that can add risk or increase burdens on the library. For example, for the past 3-4 years, I have prioritized the removal or revision of non-disclosure terms. Non-disclosure terms can make it more difficult or more dangerous for the library to share information across campus or elsewhere. I also prioritize terms that would limit the library's ability to respond to budget emergencies. Among these terms, I'd highlight termination and financial hardship. In my view, it's very important to try to ensure that expensive deals, especially, include a safety hatch.

Add: Customer may terminate the License Agreement immediately upon written notice to Licensor if, after the first anniversary date of this Agreement sufficient funds are not provided or allotted in the library budget by the appropriate body in Customer's institution to enable Customer to continue its expenditure hereunder for a forthcoming contract year, provided that: (a) the Dean of the Customer's library must provide a written statement to the Licensor in which the Dean confirms a flat or decreased budget allocation to the library journal budget compared with the previous year: (b) Customer must notify Licensor of its intent to terminate due to insufficient funding at least two (2) months prior to the first anniversary date of this Agreement, and the same applies for terminations for the subsequent contract years. Any termination under this clause will become effective on the 1st of January of the next calendar year.

Explanation: The costs of journals inflate each year. If the budget is flat or decreased, the library will not be able to pay for some resources. Most agreements include a 'financial hardship' clause, such as this one, to address the possibility we may not be able to pay for the services under this agreement. All large journal package licenses must include a financial hardship clause in case of emergency. None can have more favorable terms than others, because the decision to cancel depends on curricular need, not license bias.

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My focus on financial hardship clauses is pretty new. On the screen, you can see a recent revision request I submitted to our university contract coordinator. I think it's important to try to enforce consistency across financial hardship terms, because otherwise these could bias cancellation decisions. We should never cancel an agreement because of license bias – our cancellation decisions should always be driven by analytics, so that our cuts are rationally selected to cause the least pain for our academic programs.

I haven't yet negotiated enough of these clauses to have a great sense of the best language or arguments, but I'd be interested in learning from others who've worked on this.

Thank you!

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[https://libguides.mnsu.edu/
collection-analysis/research](https://libguides.mnsu.edu/collection-analysis/research)

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Thank you for bearing with me. You can reach me at gustan2@mnsu.edu if you'd like to talk. If you'd like more information about our library's work on collections, licensing, or collection analysis, you can find references at libguides.mnsu.edu/collection-analysis/research.