March 11, 2021

Office of General Counsel

Special Considerations for Software Contracts

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MINNESOTA STATE

Written Contracts Are Necessary

- Clarity, completeness, and common understanding is essential
- Supersedes previous oral discussions or “how we’ve always done it”
- After contract signed, if wish to change it, conversations or e-mails to change the contract are not sufficient.
  - Changes to contracts (amendments) must be in writing and signed by the parties;
- Contract must be signed **before** the parties begin performing duties under the contract
  - Good practice and state law requires
- Good contracts are preventative care: Easier to work out issues before signing contract than to leave things unaddressed or “silent” and risk breaching the contract and/or litigation later.
- With complex software implementation projects, your contract is the only tool you have to ensure timely implementation.

What is a Contract?

- In this training, we use “contract” to mean any agreement or other negotiable document covering a relationship and/or the mutual exchange of promises between Minnesota State (or a campus or department) and a vendor.
- The actual contract may be called something other than “contract” – it may be called an agreement, master agreement, memorandum of understanding, grant agreement, letter agreement, terms of service, terms of use, license, lease, etc.
- Intra-agency agreements are not contracts.

What do we mean by "Software"?

- Enterprise systems
  - D2L
  - NextGen
  - Any CRMs
  - rSchoolToday
- Equipment with associated software
  - Dental equipment
  - Cash registers
- Downloadable software
  - Microsoft Word
  - Photoshop
- Mobile or Desktop Apps
  - Dropbox
  - iPhone/Android Apps
- Websites
  - Facebook, Twitter, LinkedIn
- Web Services
  - Doodle Poll
  - Qualtrics

Software Contract Forms

Paper Agreements

- Signed in ink or Docusign by the Licensor and Licensee

Shrink-Wrap Agreements

- Licensee agrees to the contract by opening the packaging of the software

Click-Through Agreements

- Licensee must affirmatively agree to the license terms by clicking “Yes” on a pop-up on the Licensor’s website
- Most account creation contains a click-through (may not be clear)
- Acknowledgement of terms before proceeding

Browse-Wrap agreements

- Licensee agrees to contract simply by using a website
- No affirmative action is required by the user to agree to the terms other than use
- May not be enforceable

Click Through Agreements for Web Services Are Contracts

- They may not be physically signed, but clicking through is acceptance
- Because they are contracts, we must follow Board policies & System procedures
- Because click-through agreements and EULA/TOS are contracts, they are subject to our contract and purchasing policies regardless of whether the software or app is free
  - Board policy applies to all “legally binding agreement(s)”
- And, only those persons with delegated authority may agree to the terms (see System Procedure 1A.2.2 Delegation of Authority)
  - The person with the delegation of authority should create the accounts/click the “I agree” button.

Anatomy of a Software Contract

Parts of a Software Contract: The License

- Software is code, which is protected by copyright. To use someone else's copyrighted materials you need a license agreement.
- A license agreement governs how you can use the software. You don't own the software, you are paying for permission to use it .
  - Consider who gets the license (department, campus)
  - Any restrictions on the license
  - Is it perpetual or time limited?
  - Seat license or unlimited?

Parts of a Software Contract: License Example

2. SERVICES LICENSE GRANT. As used in this Agreement, the term "Services" refers to those Turnitin's services purchased by Institution from time-to-time pursuant to a Services Pricing Agreement ("SPA"). During the Term and subject to Institution's compliance with the terms and conditions of this Agreement, Turnitin hereby grants to Institution a non-transferable, non-exclusive license to use the following Services solely for its own internal purposes and as contemplated under this Agreement.

a. With respect to Turnitin Feedback Studio (Originality Check, Online Grading, and Peer Review), this license shall extend to instructors employed by the Institution ("Instructors"), but only for their use in classes offered through Institution and provided that Instructors shall be subject to the terms and conditions of this Agreement and shall be bound by its provisions as members of Institution.

b. With respect to the iThenticate, this license shall extend to instructors employed by the Institution, but only for faculty research (i.e., grant proposals, general research, and supplemental course materials) produced in connection with Institution. Institution shall be responsible for ensuring their Instructors comply with the terms of this Agreement. No other license is granted by implication, estoppel or otherwise.

c. With respect to Gradescope, this license shall extend to the right to use, reproduce, distribute, publicly perform, and display Gradescope as set forth herein, and in the SPA.

d. With respect to Authorship Investigate, this license shall extend to instructors employed by the Institution ("Instructors" or "Users"), but only for their use in classes offered through Institution and provided that Instructors shall be subject to the terms and conditions of this Agreement and shall be bound by its provisions as members of Institution.

Institution shall be responsible for ensuring their Instructors and Users comply with the terms of this Agreement. No other license is granted by implication, estoppel or otherwise.

Parts of a Software Contract: Defined Terms

- Any word of phrase that is capitalized throughout the contract is a defined term and has a special meaning
  - May include a definition section or be defined throughout the agreement
- Should be read carefully
  - “Customer Data”
  - “Services”

Parts of a Software Contract: Pricing Terms

- The price paid for the license may be in the software agreement itself or it may be in a separate document (order for, statement of work or purchase order)
  - May be flat fee or annual fee or fee per license
- State law allows Minnesota State to pay for software subscriptions in advance.
  - Use caution in paying for multiple years in advance or paying in advance for software under development
- But any professional services must be paid in arrears (after the work is successfully completed)

Parts of a Software Contract: Pricing Terms

1. Subscribed Materials

The Subscribed Materials and fees are as follows:

Subscribed Materials:	**Initial Term Fee**	**Initial Term Dates**
AccessScience	$xxxx.xx	April 1, 2021 – March 31, 2022
AccessEngineering	$xxxx.xx	April 1, 2021 – March 31, 2022

Software	1 Hudl Platinum Account 1 Sportscode Pro License and 3 Sportscode Pro Review Licenses 1 Coda/iCoda License
Annual Fees	Year One: $x,xxx Year Two: $x,xxx
Payment Terms	• Annual fees will be invoiced upon signature, and annually thereafter. • All payments are due within thirty (30) days of the applicable invoice date.

Parts of Software Contract: Other IP Terms

- Generally reserves all IP in the product for the vendor.

> 8. **Intellectual Property**: Customer acknowledges that, as between Customer and Hobsons, all right, title and interest in the Services, including any and all copyrights, patent rights, trade secrets, trademarks, service marks, trade names and any other statutory or common law intellectual property or other proprietary rights related to the Services are owned by Hobsons and/or Hobsons' subsidiaries, third party licensors, suppliers or vendors. Customer shall obtain no intellectual property ownership regarding the Services and hereby assigns to Hobsons, any enhancement of the Services generated in the course of this Agreement. Customer will not, at any time, do, or omit to do, anything which is likely to prejudice Hobsons' or any of Hobsons' subsidiaries', third party licensors', suppliers' or vendors' ownership of any intellectual property rights in the Services (or any component thereof). Customer will not remove, suppress or modify in any way any proprietary marking, including any trade mark or copyright notice, on or in the Services or on or in any component thereof.

- May also include a license from the user to the company if the product has any user generated content

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Parts of a Software Contract: The Legalese

- Often called “boilerplate” these clauses are actually very important. They address what happens when something goes wrong and who pays to fix any problems that arise.
  - Limitation of Liability Clauses
    - The limitation of liability caps each party’s liability for breach of contract. Is the cap enough? Does it apply to both parties?
  - Warranties or Warranty Disclaimers
    - The vendor’s promise that their product will work and what they will do if it does not. May include an “SLA”
  - Indemnification
    - An indemnification clause requires one party to bear the monetary and defense costs for losses incurred by the other party.
  - Choice of Law & Venue
    - Where will any trial be held and whose laws will control?
  - Arbitration
    - Can a dispute be heard in court? Or will it be arbitrated privately?

Parts of a Software Contract: Limitation of Liability

11. Limitation of Liability.

EXCEPT WITH RESPECT TO DEATH OR PERSONAL INJURY DUE TO THE NEGLIGENCE OF TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, UNDER NO CIRCUMSTANCES AND UNDER NO LEGAL THEORY, TORT, CONTRACT, OR OTHERWISE, SHALL OR ANY OF ITS UNDERLYING SERVICE PROVIDERS, BUSINESS PARTNERS, THIRD PARTY SUPPLIERS AND PROVIDERS, ACCOUNT PROVIDERS, LICENSORS, OFFICERS, DIRECTORS, EMPLOYEES, DISTRIBUTORS OR AGENTS (COLLECTIVELY REFERRED TO FOR PURPOSES OF THIS SECTION AS BE LIABLE TO YOU OR ANY OTHER PERSON FOR ANY MONEY DAMAGES, WHETHER DIRECT, INDIRECT, SPECIAL, INCIDENTAL, COVER, RELIANCE OR CONSEQUENTIAL DAMAGES, EVEN IF SHALL HAVE BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY OTHER PARTY, AND REGARDLESS OF THE FORM OF ACTION (WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE), THE MAXIMUM AGGREGATE LIABILITY OF TO YOU ARISING IN CONNECTION WITH THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNT YOU PAID FOR THE APPLICABLE PRODUCT IN THE 12 MONTHS PRIOR TO THE ACCRUAL OF THE APPLICABLE CLAIM, LESS ANY DAMAGES PREVIOUSLY PAID BY TO YOU IN THAT 12 MONTH PERIOD. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THIS LIMITATION AND EXCLUSION MAY NOT APPLY TO YOU.

Parts of a Software Contract: Limitation of Liability

- Contract Language: “Under no circumstances will the Company be liable for any direct, indirect, incidental, special, exemplary, or consequential damages, personal injury/wrongful death, lost or anticipated profits, lost data, or business interruption, the use or misuse of The Content in any way whatsoever arising out of the use of, or inability to use, The Service, whether or not the Company parties are advised of the possibility of such damages.”
- This means if the Company breaches the contract, it would not pay for damages resulting from that breach.
- Contract Language: “The Company’s maximum liability to Customer for any action arising under this Agreement, regardless of the form of action and whether in tort or contract, shall be limited to the amount of fees paid or payable by Customer from which the claim arose during the six (6) months preceding the claim.”
- This means if the damage happens in month one of a 5 year multi-million dollar contract, the maximum you could get is one month’s worth of fees. Companies will often agree to a higher figure.
- Read the liability language, assess the potential cost to the campus that could result from something gone wrong, and the likelihood of such events.
- Talk to legal counsel if there are risks of IP infringement, bodily injury, a data breach to carve out exceptions to limitations of liability.

Parts of a Software Contract: Disclaimer of Warranties

We work hard to provide the best Products we can and to specify clear guidelines for everyone who uses them. Our Products, however, are provided "as is," and we make no guarantees that they always will be safe, secure, or error-free, or that they will function without disruptions, delays, or imperfections. To the extent permitted by law, we also DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share (including offensive, inappropriate, obscene, unlawful, and other objectionable content).

Parts of a Software Contract: Warranty Disclaimers

- The Software is provided to you "AS IS" and we make no guarantees it will function.
- This means that if the Software malfunctions, the vendor is not responsible.
- Assess the risk of damage caused by a software malfunction, and the likelihood of a malfunction.
- Also assess the risk of disruption to your business if you cannot use the software, and the likelihood that could happen.

Parts of a Software Contract: Warranties

10. **Warranties**. Jamf represents and warrants to Customer that (a) it owns or has the right to license the Software and provide access to the Hosted Services; (b) the Software and Hosted Services shall substantially conform to the description thereof in the Documentation, (c) the Services shall be performed in a professional and workman-like manner, consistent with industry standards and (d) the Software and Services are provided free of viruses, malware or other malicious or destructive programs or features. These warranties are void if the Software and/or a Service is modified, combined with other product or services or used other than as provided in the Documentation or as expressly approved by Jamf in writing. Any claim made under any warranty shall be made within one year of the transaction or occurrence giving rise to such warranty.

- It owns the software it is licensing
- The software will conform to the documentation
- Services will be performed in a workmanlike manner
- Software is virus free
- Void if the software is modified and must be claimed within a year if the occurrence (not discovery)

Parts of a Software Contract: Warranties

- No downgrade in functionality
- Compliance with applicable laws
- The software will not infringe on any patent or copyright
- Maintains an information security process with safeguards appropriate for the sensitivity of the information
- The software will be free of material or hidden defects

Parts of a Software Contract: Accessibility Standards

- Can be styled as a warranty:
  - “Vendor represents and warrants that deliverables and services comply with Web Content Accessibility Guidelines (WCAG) Version 2.0 Level AA, and agrees to provide written documentation verifying accessibility, to promptly respond to and resolve accessibility complaints received from University, and to indemnify and hold the University harmless in the event of claims arising from inaccessibility.”
- Or as an obligation:
  - Vendor’s services 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 (WCAG) Version 2.0 Level AA. Vendor shall provide Minnesota State with a completed Voluntary Product Accessibility Template (VPAT) to detail compliance with the federal Section 508 standards. In the event that Vendor's web sites are not compliant, Minnesota State may demand that the Vendor promptly make modifications that will make the sites Accessibility compliant; in addition, in such an event, Minnesota Stateshall have right to modify or copy the site material in order to make it useable for Authorized Users.

Parts of a Software Contract: Indemnities

Indemnification is a contractual agreement made between two parties, in which one party agrees to pay for potential losses or damages caused by the other party.

Hold Harmless: a type of indemnity provision or clause that requires one party to fully protect the other party from a claim asserted by another. This may also include payment of costs and/or attorneys fees.

Both are prohibited by law:

- The Minnesota Constitution (Article XI, § 1) states that no money may be paid out of the treasury except as pursuant to an appropriation.
- Minnesota Statutes § 16A.15, subd. 3 prohibits any incurrence of an obligation without an encumbrance against an appropriation.
- Minnesota Statutes §16A.138 statues that it is unlawful to incur any indebtedness of any nature on behalf of the state until an appropriation has been made by the legislature.
- An indemnity is a promise of an indeterminate amount of money for an indeterminate reason at an undetermined time in the future.

Parts of a Software Contract: Choice of Law and Venue

- Minnesota State contracts provide that Minnesota law governs the contract and interpretation.
  - This is important to preserve our statutory immunity for certain claims.
- If the other party is outside Minnesota or is another state, tribal or federal entity and wants its law to apply, legal counsel can assist in negotiating or providing additional contract language.
- Venue for litigation of a contract (preferred): “Venue for all legal proceedings arising out of this contract, or breach thereof, shall be in the state or federal court with competent jurisdiction in Ramsey County, Minnesota.”

Parts of a Software Contract
Data Ownership & Security

- Who owns what data & what can be done with it
- What laws and security practices apply to certain data
  - Must have direct control of educational records under FERPA
  - Be wary of defined terms
- Where data can be stored
- How you can export your data at the end of a contract

Parts of a Software Contract Confidentiality Clauses

- Often, a Contractor will ask that Minnesota State promise to maintain the confidentiality of Contractor's materials or even the terms of the contract itself.
- We can only protect data that is classified as private, confidential or protected nonpublic under the MGDPA.
- That includes "Trade Secret Information" as defined in Minn. Stat. § 13.37, subd. 1 (b)
  - But the terms of an agreement and/or pricing are not trade secrets.

Parts of a Software Contract: The Term

- The “Term” is the length of the contract. It should have a start and an end date.
- The Term should not auto-renew.
  - Encumbrance may not be in place
  - May exceed 5 years allowed by Board policy
  - May exceed dollar threshold for RFP
- Sometimes the MSA can last indefinitely, and the Term is a function of the order form.
  - Must exercise caution to stay within Board Policy limits.

Parts of a Software Contract: Termination Clauses

- Who can terminate? Is it mutual?
- For what reasons?
  - For cause (breach)? Is there a notice period?
  - Convenience?
  - Bankruptcy?
  - If a third party provider terminates a sublicense?
- What happens at termination?
  - Access disabled?
  - Date returned?
  - What payments are due?

Parts of a Software Contract: Termination Clauses

Termination and Suspension. Either party may terminate this LSA or an ordering document if the other party materially breaches the Agreement and fails to cure the breach within 30 days after receiving notice of the breach. Either party may terminate this Agreement immediately upon notice if the other party (i) files a voluntary petition for bankruptcy or a petition or answer seeking reorganization; (ii) has filed against it an involuntary petition for bankruptcy that has not been dismissed within sixty (60) days of the date of filing; (iii) makes an assignment for the benefit of creditors; or (iv) applies for or consents to the appointment of a receiver, trustee or liquidator for substantially all of its assets or such a receiver, trustee or liquidator is appointed for the other party. Upon providing advance written notice to Customer, Vendor may suspend Customer's access to the Services if Customer is in breach of the Agreement and the suspension will continue for as long as reasonably necessary for Customer to remedy the breach. Any such suspension will not relieve Customer from its obligation to pay Vendor in respect of the Services. If all ordering documents under this LSA have expired or been terminated, then either party may terminate this LSA for convenience by providing written notice to the other party.

Effect of Termination. Termination of this LSA or an ordering document will not relieve Customer from its obligation to pay Vendor any fees stated in an ordering document, excluding termination by Customer for Vendor's uncured material breach of this LSA. If Customer terminates this LSA or an ordering document because of Vendor's uncured material breach, Vendor will refund a pro-rata share of any pre-paid fees under the applicable ordering document. Customer will notify Customer Users that their access to the applicable Services has terminated and Vendor may remove or discard all content that Customer uploaded or otherwise made available to Vendor in accordance with Vendor's DPA and policies. Termination of an ordering document does not terminate this LSA; however, termination of this LSA will result in the immediate termination of all ordering documents. The provisions of this LSA that by their nature extend beyond the termination of this LSA will survive termination.

Parts of a Software Contract: The End-User License Agreement

- Also a license, but a EULA is agreed to between the end-user and the vendor
  - It is often a click through agreement.
- May also be called Terms of Use or Terms and Conditions
- Faculty and students may be agreeing to EULAs in their individual capacity.
- By choosing software with EULAs, we may be requiring our faculty, staff, and students to enter into contracts with vendors that affects' their rights personally
  - May have to give up IP rights
  - May have to privacy implications
- Some vendors allow us to accept the responsibility for our end-users

Parts of a Software Contract: The Privacy Policy

- A legal statement disclosing how the vendor collects, stores and uses the personal information it collects from users
- Is often embedded as a URL
- Needs to be subject to the terms of the main contract
- Be wary if the vendor can change the privacy policy at any time
  - At least get notice in advance and opportunity to terminate
  - Consider how will you manage notices?

Parts of a Software Contract: Service Level Agreement

- The SLA is usually an attachment to the license agreement or main contract
- It defines the performance metrics the vendor is expected to meet
  - Defines what “availability” is
  - Percent of uptime or minutes of downtime per month or per year
  - When unscheduled downtime can occur
  - Expected response time for different severity levels of outages
  - Responsiveness of support (may be tiered)
  - Credits or other remedies for not meeting expectations

Parts of a Software Contract: SLA

When Scheduled Downtime will occur on a regular basis:	Purpose of Scheduled Downtime:	Maximum Duration of Scheduled Downtime:
Each Weekend	system maintenance	2 hours
Each Weekend	database maintenance	1 hours
Once per calendar month	application/OS maintenance	6 hours
Once per calendar quarter	system maintenance/upgrades	3 hours per server

Credits Against Fees: In the event Unscheduled Downtime occurs, Customer will be entitled to credits against its subsequent payment obligations according to the following:

The network of computers will have a guaranteed aggregate average uptime of 99.7% over the course of three (3) months. This does not include scheduled downtime for maintenance on servers, which will be minimal, and necessary. This also does not include mass-network problems such as major backbone problems.

For every 1.0% of Unscheduled Downtime below the Service Standard that Company experiences during a calendar month, a credit of 5% of 1/12th of Customer's annual Fees paid by Customer will be credited to Customer's account, up to a maximum of 50% of 1/12 of the applicable annual Fees paid by Customer.

Other Contract Terminology

Contract Terminology: "Attachments"

- May be called Attachments, Exhibits, Appendices, Annexes or Schedules
- Information that could have been included in the body of the contract but was instead moved elsewhere for convenience or clarity
- Frequently used to describe details of responsibilities or other matters too lengthy or complex for the contract
  - Sometimes done with EULAs/TOS if using our template
  - Can be a URL (a website containing terms)
- Must be referred to in the main contract so that the attachment is made a part of the whole, e.g.: "Exhibit A, attached herein, and is incorporated by reference in its entirety as part of this Agreement" or "in the form of Exhibit A".
- AVOID attaching Vendor's proposal or contract and incorporating it by reference without consulting legal counsel.
  - Language may conflict
  - It may not reflect what we negotiated
  - May include terms that Minnesota State is prohibited by law from agreeing to

Contract Terminology: "Addendum"

- When parties want to add or modify terms before entering into a contract
  - A superseding Addendum is drafted
    - "the parties agree that if any of the following terms and conditions are in conflict with the terms and conditions of the Agreement the following terms and conditions will prevail"
  - Will reference the proposed contract and state how it is changed
  - May delete, modify, add, or supplement a proposed contract
- Most often used when signing a vendor's contract form (e.g., software contract addendum)
- Needs to be signed and dated by representatives of both parties needed for validity at the same time the contract is signed
- Part of the original contract from the start
- Needs to be an attachment

How to “Attach” Things to Your Contract

- Label the attachment and be consistent in your labels (Exhibit, Schedule, etc.)
- Actually reference the attachment in the contract
- “Exhibit A, is attached hereto, and is incorporated by reference in its entirety as part of this Agreement” or “Order Form in the form of Exhibit A” (Sarah: add addendum example)
- Attach only necessary documents (don’t attach correspondence, proposal responses, or other documents that aren’t part of the contract)

Contract Terminology: "Statement of Work (SOW)"

- Document(s) that are attached to the final contract that list the specifics of the work, deliverables, locations, timelines, pricing, acceptance criteria and other requirements of a contractor in performing specific work. A very detailed "duties" section.
- In most cases, a statement of work is accompanied by a separate (master) agreement or other governing document that contains the legal terms as well as other business terms that will govern the transaction
  - E.g., a campus contract for a software license may have an SOW for the professional services piece of implementation and training.
- SOWs can also be used in place of an order form or work order when placing an order against an existing contract.
  - E.g., the system office has a master contract for a wide variety of forensic services – a campus may use an SOW to engage a vendor for a specific project
- Should be reviewed by legal counsel and incorporated by reference into to the contract
- Like the contract, it should be understandable to someone not involved in the project

Contract Terminology: "Order Form" or "Work Order"

- Often used when a contract allows but does not require the purchase of a good or service. The Work Order is the order for services placed against an existing contract (often on an intermittent basis).
- Frequently seen with software vendors who use a stock contract with all clients, but quantities, term and pricing will be specific to your institution on the Order Form
- You must treat ordering documents as a separate contract.
- Unless an order form is identical in terminology to an exhibit to an approved contract, it must be reviewed by system legal counsel in order to remove and include certain provisions in accordance with Minnesota law, and Federal law, and system policies.

A Cautionary Tale About Order Forms

- Minnesota State entered into a system-wide master software contract in 2016 with favorable provisions to us, from which campuses could place an order.
- A sample order form was negotiated at the time of the master contract, but it was not incorporated into the master by reference.
- In 2019, the vendor sent campuses order forms for renewal that said:
  - "The Order Form is governed by the [Vendor's] Solutions Agreement and applicable terms and conditions in the Online Terms and Conditions Center and by signing this form you agree to these terms."
- Some campuses sent their Order Form to OGC for editing and some did not. The above language was replaced with:
  - "The Order Form is governed by [Vendor's] Solutions Agreement as revised and signed by the parties on June 13, 2016 and attached hereto."
- Now in 2020, are some campuses bound by different terms?
- You must ensure you are using an approved Order Form!

Contract Terminology: Integration Clause

- Also called “Entire agreement” clause
- Used to make sure that there aren’t other documents or oral agreements that are also part of the contract.
- Usually lists all the pieces that make up the contract.
- This Agreement, together with Terms of Service and Privacy Policy, constitutes and contains the entire agreement of the parties with respect to the subject matter hereto. No modification or amendment of this Agreement shall be valid unless documented in writing or electronic communication signed by persons have sufficient authority to bind the parties hereto. This Agreement cancels, supersedes and revokes all prior negotiations, representations and agreements between the parties, whether oral or written, relating to the subject matter of this Agreement, including without limitation, any non-disclosure agreements.

Contract Terminology: Order of Preference

- Often combined with the integration clause
- When multiple documents make up a contract, they may contain conflicting provisions. It is important to include language to guide which provision controls.
- Example: In the event of any conflict or inconsistency among the following documents, the order of precedence shall be: (1) the body of this Agreement; (2) any exhibit, schedule or addendum to this Agreement, (3) the applicable Order Form, and (4) the Documentation.

Modifications to Integration Clauses/Order of Preference

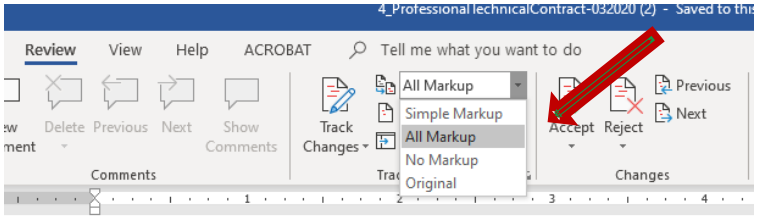
- We generally want the negotiated agreement to be controlling, and not an order form that might be filled out later.
- We may try to use these clauses to make EULAs not applicable:
  - This Agreement is the entire agreement between University (including University employees, students, and other end users) and VENDOR. In the event that VENDOR enters into terms of use agreements or other agreements or understandings, whether electronic, clickthrough, verbal or in writing, with University employees, students, or other end users, such agreements shall be null, void and without effect, and the terms of this Agreement shall apply.

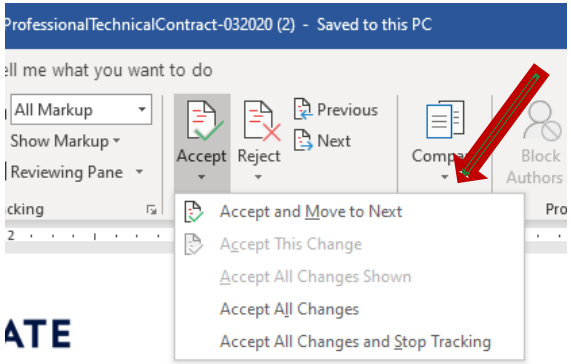
Contract Terminology: "Amendment"

- Common for parties to want to make changes to an existing contract
  - Fix errors
  - Address new circumstances
  - Change the deal terms (price or length)
- Must be done before the agreement expires (or else you need to do a new agreement)
- Might also be called an "Extension" or "Modification" agreement
- Use Amendment Template but contact OGC if you have questions

Contract Terminology: “Redlines”

- Using the track changes feature of Word to show what is proposed to be added/deleted from a contract.
  - To see track changes in Word: Review > Track Changes > All Markup
- All changes should be accepted before a contract is signed.
  - To accept changes in Word: Review > Accept > “Accept All Change and Stop Tracking”
- You are responsible for comparing the version uploaded for signature in Marketplace against what legal counsel has approved to ensure no hidden changes were made by the vendor.





Using the Software Addendum

The Software Contract Addendum

Software Contract Addendum

The following terms and conditions are incorporated into and form a part of the agreement, Terms & Conditions of Use, to which they are attached (the "Agreement") for all purposes. "Minnesota State" means the State of Minnesota through the Board of Trustees of the Minnesota State Colleges and Universities on behalf of _____and "Vendor" means _____, with its principal place of business at _____.

1. **Conflict.** Any terms in the Agreement which purport to modify or are in conflict with the terms of this Addendum are hereby deleted, and replaced with the terms in this Addendum. Vendor expressly acknowledges that the terms of this Addendum supersede the terms of any Agreement which this Addendum accompanies or to which it is attached; and expressly acknowledges that no agreement, or understanding, oral or written, which purports to modify the terms of this Addendum, whether contained in Vendor's prior or subsequent receipts, invoices, quotations, order confirmations, purchase orders, shipping forms, or any other documents, shall be binding on Minnesota State.

2. **Term; No Automatic Renewals**. The term of the Agreement shall be for the term stated in the Agreement itself. However, if no term is stated in the Agreement, the Agreement shall expire one (1) year from the date of the Agreement or purchase order, whichever is later. Any reference to any automatic renewals in the Agreement is hereby deleted in its entirety, and the parties expressly acknowledge that the Agreement is for one term only, and does not automatically renew itself for successive terms. All renewals must be in writing and agreed to by both parties. Notwithstanding anything contained in the Agreement to the contrary, either party may terminate the Agreement upon thirty (30) days written notice to the other.

3. **No License.** Minnesota State does not grant Vendor any license to use its logos or trademarks in any sales promotion work, advertising, or any form of publicity.

4. **Ownership of Works.** All information provided by Minnesota State or its users belongs exclusively to Minnesota State or its users, and you will respect that ownership. Minnesota State shall retain all rights, title, and interest in any content, data, or intellectual property provided or supplied by Minnesota State hereunder.

5. **Assignment**. Nothing in this Agreement shall be construed to permit the assignment by any party of any rights or obligations hereunder, and such assignment is expressly prohibited without the prior written consent of Minnesota State. No such assignment or transfer shall relieve the non-Minnesota State party from its obligations and liabilities under the Agreement.

6. **Governing Law, Venue.** This Agreement, and amendments and supplements thereto, shall be governed by the laws of the State of Minnesota. Venue for all legal proceedings arising out of this contract, or breach thereof, shall be in the state or federal court with competent jurisdiction in Ramsey County, Minnesota.

7. **Limitations on Liability**. Notwithstanding anything contained in the Agreement to the contrary, no limitations on liability on the part of Vendor shall apply to any claims for compensatory damages to real or tangible personal property or to third party claims for death or bodily injury asserted against Vendor directly or by way of contribution to the extent such property damage, death or bodily injury was proximately caused by the negligence or willful misconduct of Vendor or its employees or agents. Notwithstanding anything contained in the Agreement to the contrary, nothing in the Agreement shall limit Vendor's liability to Minnesota State or any third parties as a result of Vendor's breach of the agreement, or Vendor's own negligence or willful misconduct.

8. **Intellectual Property Infringement.** Vendor represents and warrants that its software and any related systems

The Software Contract Addendum

- OGC has been piloting an addendum for use with vendor software contracts.
- Like all addenda, it is to be signed at the same time as the contract and kept with the contract.
- For low-risk, low-dollar value (under $10,000) contracts for established software.
- Not for contracts that include professional services, customized software, or implementation.

The Software Contract Addendum

- Disclaims the most common problem areas that can encountered in a software contract.
  - No automatic renewals
  - Minnesota law & venue
  - No limits on liability
  - Vendor warranty of non-infringement
  - No indemnification
  - Compliance with MGDPA and FERPA
  - No arbitration
  - No non-compete clauses
  - Robust data security language

The Software Contract Addendum

- May be used in place of legal review if the vendor will sign it unchanged.
- If the vendor wants to red-line the addendum, OGC must review those changes.

Board Policies and Procedure

Guiding Policies

Delegation of Authority, System Procedure 1A.2.2

- The formal conveyance from one person to another of the authority to bind Minnesota State Colleges and Universities, the system office or a college or university to a legally enforceable obligation.
- Only those persons with delegated authority may sign contracts or click through to agree to terms of service.
- The “[d]elegation of authority requires ongoing compliance with applicable statutes, rules and board policies” System Procedure 1A.2.2

Guiding Policies

Board Policy 5.14. Contracts and Procurement.

- Part 3, Subpart B. Contract form approval.
  - Any contract or other legally binding agreement, including grant agreements, or memorandums of understanding/ agreement that create legally binding obligations and responsibilities, that does not adhere to system approved contract templates must be approved in advance by the office of general counsel or attorney general's office.
- System Approved Templates
  - General: http://www.finance.mnscu.edu/contracts-purchasing/contracts/forms/index.html

Guiding Policies

System Procedure 5.14.2 Consultant, Professional or Technical Services, and Income Contracts

- Part 2. Contracting Authority. Contracts requiring vice chancellor-chief financial officer approval include consecutive single- year contracts with the same entity and contracts with amendments which, when added together, exceed $100,000.
- Part 3. Contract Preparation. Contracts must be prepared on forms approved by the system office to assure that they include all state-required contract language. Any modification of forms approved by the system office or the use of a non-system office form requires the review by system legal counsel and approval of the vice chancellor-chief financial officer. System legal counsel includes either the Minnesota State Colleges and Universities General Counsel or the Minnesota Attorney General's Office.

Guiding Policies

System Procedure 5.14.2 Consultant, Professional or Technical Services, and Income Contracts

- Part 4. Encumbrance. Funds must be encumbered prior to making an obligation. An authorized employee shall certify that the accounting system shows sufficient allotment or encumbrance balance in the fund, allotment, or appropriation to meet it. College, university, and system office administration must assure proper authorization is on file for employees charged with encumbering funds. An expenditure or obligation authorized or incurred prior to encumbering funds is in violation of state law and ineligible for payment until made valid and is in violation of Minn. Stat. § 16A15, Subd. 3. An employee authorizing or making the payment, or taking part in it, may be liable to the State for the amount paid. A knowing violation of Minn. Stat. § 16A.15, Subd. 3, is just cause for the employee's removal. The State cannot agree to indemnify third parties or hold them harmless (Minn. Stat. § 16A.138; Minn. Const. Art. XI, Sec. 1).

Guiding Policies

Board Policy 5.14. Contracts and Procurement.

- Subpart D. Five year limit. Contracts, including real property leases, shall not exceed five years, including renewals, unless a longer period is otherwise provided for by law, or approved by the board for contracts subject to approval under Subpart C, or by the chancellor or the chancellor's designee.

System Procedures 5.14.2 and 5.14.5

- Purchasing contracts of any value with a term in excess of five years require approval by the vice chancellor-chief financial officer.

Guiding Policies

IT Risk Assessment

- Complete the Software Contract Review Questionnaire before submitting a contract for legal review
- Form is available on the OGC's Contracts page https://minnstate.edu/system/ogc/contracts.html
- Will eventually be a web form for better searchability
- Allows us to assess the risk of software and add appropriate clauses
  - E.g., PCI clauses if the vendor takes credit card payments or data security clauses if the vendor has access to educational records

Sharing Private Data with SAAS & Cloud Vendors

Duty To Protect Private Data

FERPA

- Personally Identifiable Information in Education Records is Private

MGDPA (aka the Data Practices Act)

- Echoes FERPA in protecting educational data. Minn. Stat. 13.32
- Personnel data is private, unless one of several categories. Minn. Stat. 13.43
- Donor gift data is private. Minn. Stat. 13.792
- Data that are not public must only be accessible to persons whose work assignment reasonably requires access to the data. Minn. Stat. 13.05, subd. 5

FERPA Protects “Education Records”

The Family Educational Rights and Privacy Act of 1974 (the Buckley Amendment)

- Gives students the right to inspect and review their own “education records”
- Seek amendment of their "education records” and
- Control the disclosure of their "education records" to others
  - FERPA requires that, in general, colleges and universities must have written permission from students in order to release non-public, personally identifiable information from a student’s “education record.”

Education Records

Education records are those records that are:

- (a) directly related to a student and
- (b) maintained by an educational institution or a person acting for such agency or institution (20 USC 1232g(a)(4)(A))

"Maintained" is not defined in statute, regulations, or agency guidance.

- "The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'" *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002).

Education Records

Include almost everything we maintain about students

Most individually identifiable data about students and applicants in *any tangible* form – *wherever located* – is an "education record" and therefore private.

- Applications, Transcripts, Exams, Grades
- Class schedules
- Photographs
- Everything in ISRS
- StarIDs and email addresses (unless directory data)
- Metadata and log files

FERPA Allows Limited Disclosure Without Consent To "School Officials"

A 'School Official' is a contractor, consultant, volunteer, or other party to whom an … institution has outsourced institutional services or functions may be considered a school official … provided that the outside party:

- Performs an institutional service or function for which the agency or institution would otherwise use employees;
- Is under the direct control of the college/university with respect to the use and maintenance of education records; and
- Is subject to the requirements … governing the use and re-disclosure of personally identifiable information from education records.
- Must also meets the criteria in the annual FERPA notice for being a school official with a legitimate interest in the education records.

Unexpected FERPA Complications With SAAS / Cloud Services

Creating, transmitting or storing information private education records using a third-party application or cloud service triggers FERPA, as that act is a “release” of the student’s record to a third party.

Problematic consumer examples:

- Using Dropbox to send a graded paper back to a student
- Emailing through your Yahoo-mail about student participation
- Requiring students to submit data through a Google form
- Registering students for an activity through a third-party service like EventBrite
- Tracking grades using an iPad app
- Syncing non-directory student data stored on a smartphone address book with iCloud or Google contacts.

Solution? Have institutional or enterprise contracts in place before sharing/storing private data.

What is a Data Breach?

MGPDA section 13.055

- "Breach of the security of the data" means unauthorized acquisition of data maintained by a government entity that compromises the security and classification of the data. Good faith acquisition of or access to government data by an employee, contractor, or agent of a government entity for the purposes of the entity is not a breach of the security of the data, if the government data is not provided to or viewable by an unauthorized person, or accessed for a purpose not described in the procedures required by section 13.05, subdivision 5. For purposes of this paragraph, data maintained by a government entity includes data maintained by a person under a contract with the government entity that provides for the acquisition of or access to the data by an employee, contractor, or agent of the government entity.
  - "Unauthorized acquisition" means that a person has obtained, accessed, or viewed government data without the informed consent of the individuals who are the subjects of the data or statutory authority and with the intent to use the data for nongovernmental purposes.
  - "Unauthorized person" means any person who accesses government data without a work assignment that reasonably requires access, or regardless of the person's work assignment, for a purpose not described in the procedures required by section 13.05, subdivision 5.

Suspected Breach Protocol

Operating Instruction 5.23.1.13 Breach Notification

- Under revision

Campus to notify system office IT security (if suspected breach involves IT systems) or OGC

- Vice versa if the system office receives a report
- Containment is top priority

Notify OGC

- Not every event is a breach

Suspected Breach Protocol cont'd

Depending on size and scope of the breach

- Alert campus and system office communications
- Draft crisis communications, if warranted
- Notify appropriate cabinet officials on campus, chancellor, and board chairs
- Other remediation measures (password resets, etc.)

Notify the legislative auditor

After the incident is contained and investigated

- Draft official breach notification letters
- Draft investigative report

Consider Data Breaches When Contracting with Cloud Providers

When considering contracts with 3rd parties to perform services that include handling of non-public data (collection, transmission, cloud storage – especially electronic)

Consult with OGC/AGO for appropriate security terms beginning with the RFP language

- Responsibility ($$$) for Notification
- Coordination of information

General Contract Best Practices

Understand the Contract

Read the Agreement

- Don’t forward to OGC before reading
- College/university must review for essential elements, prohibited provisions, practicality and business decisions

Do you have the entire agreement?

- SOWs
- Privacy policies
- EULAS or TOU
- Anything else linked to in the document

Understand the obligations the campus is assuming

- Can you hold up your end of the bargain?

Consult with System Office IT Security

- Can add additional protections if we understand where there may be security concerns.

Best practices: Help Us Help You

What does the software do?

- Help us understand it, so that we can anticipate the risks

Do you have a contact at the Vendor?

- Will they negotiate? Don't assume that a provision suggested by a party can't be changed or modified

Do they have a "government" version?

- Have they worked with other state agencies?

Is another campus already using the vendor?

- Not automatically approved to use again
- Track down the contract for us (no central database or list)

Get a Word version of everything that makes up the agreement

Best practices: Timing

Plan accordingly

- expect the best and plan for the worst

Use system templates and forms when possible

Allow time for negotiation

Not every contract can be an emergency

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