



*American Association of Law Libraries*

MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

Comments of the American Association of Law Libraries

To the Federal Trade Commission

Regarding the Prenotification Negative Option Rule Review  
Matter No. P064202

October 8, 2009

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The American Association of Law Libraries (AALL) is a nonprofit educational organization with nearly 5,000 members nationwide who respond to the information needs of legislators, judges, and other public officials, corporations and small businesses, law professors and students, attorneys and members of the general public. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

We submit the following comments regarding the Federal Trade Commission's Prenotification Negative Option Rule Review, Matter No. P064202, as announced in the Federal Register on May 14, 2009 (74 FR 22720). In addition, we would like to express our gratitude to the Commission for extending the deadline for comments to October 13, 2009, allowing us time to gather additional information from our membership.

## **Background**

The Prenotification Negative Option Rule currently serves to protect consumers from unwanted merchandise when they join a subscription club, such as those for books or CDs. The Rule has successfully protected consumers from unfair publisher practices. However, the current Rule is written to protect the interests of the private consumer only. AALL believes that the Rule should be expanded to include institutional consumers, such as law libraries, and that it should be strengthened.

AALL members work in academic, firm, state, court and county law libraries throughout the United States. Law libraries serve legislators, judges, and other public officials, corporations and small businesses, law professors and students, attorneys and members of the general public. Our nation's law libraries are the largest consumers of print and electronic legal publications. Law libraries staffed with professional law librarians account for a significant percentage of the \$5 billion spent on legal materials annually.<sup>1</sup>

Law libraries subscribe to materials that are shipped by agreement between the institution and a publisher. Law libraries are unique in that most of their collections are serial in nature, meaning that the titles they receive are regularly updated by replacement pages, supplements, pocket-parts, new editions and other means. This is necessary to ensure that customers of our libraries have access to the most current laws, regulations and analytical materials.

Generally, law libraries receive these materials through continuity plans, subscriptions, and standing orders placed with a publisher. Typically, incoming mail is received by the library, sorted, opened and date stamped. New loose-leaf updates, regardless of format, are checked-in, processed, cataloged and then filed in the existing title. This process is usually done by library staff that lack the expertise to distinguish between ordered and unordered, unwanted materials.

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<sup>1</sup> Svengalis, Kendall F. *Legal Information Buyer's Guide and Reference Manual*, 2009, p.5

The serial nature of law library collections is such that libraries regularly receive from legal publishers unanticipated materials that have not explicitly been ordered, are unwanted, and result in significant costs to the library. Identifying and processing these unordered and unwanted materials consumes a great deal of staff time. If they are identified by library staff as unwanted, they are returned to the publisher. But if they are not identified as unwanted during processing, they are added to the collection and the library will likely continue to receive unordered, unwanted updates thereby incurring needless costs to the library and financial benefits to the publisher.

The current Prenotification Negative Option Rule has offered some protection to consumers from receiving unwanted materials when they participate in automatic shipment plans such as found for books and CDs. AALL believes strongly that the current Prenotification Negative Option Rule should be expanded to include protection for institutional consumers, such as law libraries, so that we may be better able to control the growth and cost of our library collections.

## **Response to Questions [74 FR 22720]**

In response to the specific questions related to the notice and comment request regarding the Prenotification Negative Option Rule, AALL would like to respond to the following that are most relevant to the relationships between law libraries and legal publishers.

### **1) Is there continuing need for the Rule as currently promulgated? Why or why not?**

There is a crucial need for the Rule to remain in place because it has successfully protected individual consumers from unfair publisher practices. The Prenotification Negative Option Rule protects consumers by requiring book, CD or video clubs to give the consumer information about their plans, clearly and conspicuously, in any promotional materials that consumers can use to enroll. Additionally, the company must tell the consumer the minimum purchase obligation; how and when the consumer may cancel a membership; how many announcements and rejection forms a consumer will receive each year; how to reject merchandise; the deadline for returning the rejection form; and whether billing charges include postage and handling.

### **3) What modifications, if any, should the Commission make to the Rule to increase its benefits to consumers?**

**First**, AALL believes that the Rule should be expanded to include law libraries as institutional consumers needing the same protections afforded to individual consumers.

Serious publisher violations take place every day as a result of unfair publishing practices regarding the shipping of unordered, unwanted materials to law libraries. Recent settlements for unfair publishing practices by the Florida Attorney General with Thompson Publishing and LexisNexis/Matthew Bender demonstrate a continuing and compelling need for monitoring the legal publishing industry.

In 2008, the Attorney General of Florida worked with Thompson Publishing to stop the unfair practice of sending unordered and related books to law libraries throughout the United States. The Assurance of Voluntary Compliance (Attachment 1) found that law libraries of all types were shipped unordered and unwanted materials. As seen in Attachment 2, the HR Answer Book was sent as part of an automatic update program. The notice looks like an invoice and the order information is in small print in the lower right corner. This unfair practice created confusion and increased the workload in every library, regardless of type. In the Thompson Publishing settlement, Thompson Publishing agreed to change the way it ships, bills and markets merchandise to libraries when using a Negative Option Plan. AALL supports the specifics of the Florida Thompson settlement and we believe that the terms under the Agreement should apply to all legal publishers.

Specifically, as agreed to in the Florida Thompson settlement, we believe that legal publishers should not:

- send unordered book unless they are clearly marked as such;
- send invoices for unordered books, or dunning notices;
- send deceptive notices that resemble invoices;
- command payment or return of unordered books;
- take payment of an invoice as an enrollment in an automatic shipment plan;
- send renewal notices prior to 180 days of expiration of a subscription;
- continue telemarketing if the consumer has asked not to be called.

We also believe, as agreed to in the Florida Thompson settlement, that legal publishers should:

- disclose that acceptance of the product would enroll the library in a plan to receive related material;
- provide the right to cancel;
- mail an announcement prior to shipment;
- have a visible customer service number on all correspondence and on their Web site.

Law libraries have benefited from the specific Thompson Publishing practice changes listed above by having the opportunity, for example, to not receive orders disguised as invoices or receive unordered materials. These changes in the practices of Thompson Publishing have resulted in substantial cost savings to law libraries nationwide.

In 2009, the Attorney General of Florida also negotiated a settlement with LexisNexis/Matthew Bender stemming from their practice of shipping unordered books to members of the Florida Bar Association (Attachment 3). The settlement (Attachment 4) led to nationwide changes in the way Lexis/Nexis ships unordered merchandise.

Although the Rule as applied to the individual consumer was in effect at the time, two known publishers unfairly billed customers for books they did not anticipate, order or want. The Rule must remain in place and must be redefined to prevent unfair practices that publishers are known to employ with both individual and institutional consumers.

AALL believes that the Rule is essential. We strongly urge that the conditions stipulated in the Florida Attorney General's Settlements be incorporated into the Rule and that the unfair practice of sending unordered materials to libraries be defined as unlawful. Law libraries do not want materials they have not explicitly ordered.

**Second**, AALL believes that the current Rule should be expanded to also include online subscriptions and digital materials for individual and institutional consumers. We believe that it is crucial to have the Rule extended to electronic resources since more legal vendors employ the Negative Option approach to the sale of goods and services online, making the impact of these unfair practices even greater on law library consumers.

The exponential growth of online and digital resources is having a profound effect on law libraries in terms of costs and licensing agreements. It is not uncommon for a print subscription, freely routed to multiple individuals, to change to an online email with access limited to a single user. It is clear that e-books, podcasts and "apps" are in our immediate future. Therefore it is essential that these new formats be included in the Rule, and that the Rule allow for new formats as they evolve.

For example, consumers may be offered a trial subscription to an e-book service. After a specified period, the trial automatically converts to a monthly charge on their credit card. This could also happen with trial subscriptions to libraries, with the monthly charge appearing on the library's established account.

**Third**, AALL believes that print and online materials obtained through Negative Option Plans should have an *expiration date*, which should be a period of no more than five years.

Negative Option Plan material should have an expiration date, after which time the terms need to be clearly and conspicuously disclosed to the consumer *again* and affirmatively accepted by the consumer *again*. Otherwise, the agreement is lapsed. This protects the institutional consumer, where staff turnover occurs regularly and new staff may be unaware of existing negative option agreements.

Further, material received under initial negative option should come with terms that are clearly and conspicuously marked.

**Fourth**, AALL believes that an expanded Prenotification Negative Option Rule that includes institutional consumers should provide for a 90-day period for the return of goods when an unordered, unwanted item is shipped to a law library. That length of time is needed for the assessment and return of unsolicited merchandise by the library.

##### **5) What significant costs has the Rule imposed on consumers? What evidence supports the asserted costs?**

Here's a typical scenario in a law library when unordered material is received. Generally it takes a staff person about 30 minutes to determine why the item was received, if it was ordered, how it got there, how the package was addressed, and whether or not it was misdirected. If the staff person questions the receipt of the item, he/she makes notes and

takes the item to the supervising librarian. The average cost in non-professional staff time for 30 minutes is approximately \$10. The supervising librarian may spend another 30 minutes reviewing the item, making phone calls, disputing charges and dealing with a vendor. The average cost in professional staff time is approximately \$18.

If the item is determined to be unordered and unwanted, it is often returned to the vendor at additional cost to the library. A staff person must then locate a proper size box, photocopy the paperwork, prepare and affix a label, and deliver it to office services. Assuming this can all be done in 15 minutes, the combined cost in staff time and postage is approximately \$13 per item. Therefore, the total approximate cost to handle *one unordered item* is \$41 per library. If this same item were to be sent to half of the 1900 law libraries nationwide, the costs associated with this publishing practice *for just one unwanted item* is approximately \$32,800.

When an unwanted, unordered publication is added to the collection of a law library, it is inadvertently paid for. If the item is regularly updated, those costs will continue indefinitely. The impact on a library's budget is ongoing and far greater than the \$41 it would have cost to return the item. These costs greatly impact the budgets of law offices throughout the country that do not have professional librarians or staff to monitor the receipt of unauthorized shipments of legal materials and return them to the publisher.

The Thompson Publishing settlement referred to earlier is just one example of why this practice should be regulated by the Commission. The unordered title noted in the Florida settlement, *Human Resources Answer Book*, was shipped to libraries in 2006 at a cost of \$149 plus tax and shipping (Attachment 2). This initial cost would be followed by ongoing subscription charges in *all* subsequent years, making this a very lucrative practice for the publisher.

**6) What modifications, if any, should be made to the Rule to reduce the costs imposed on consumers?**

AALL proposes that the Rule be changed to include additions to existing sets, tangentially related items, continuity plans and trial conversions. These items should not be shipped by a legal publisher unless specifically requested by the law library. As noted above, the receipt of unordered, unwanted items imposes substantial costs to the law library in terms of staff time, resources, postage and the unwitting acceptance of unordered items that often results in ongoing costs for updates or replacements.

We believe that trial conversions should be included in the Prenotification Rule. A trial conversion is when a trial subscription to a serial publication automatically converts to a purchase after a specific period of time. After the free subscription period ends, the publisher sends an order for a 12-month subscription which looks exactly like an invoice. Payment of the invoice constitutes an order, making it an unexpected and unintended acquisition. If trial conversions were covered by the Prenotification Rule, clear and conspicuous language noting the subscription terms would be required before the order could be placed.

We also believe that continuity plans should be included in the Prenotification Rule. A continuity plan is when consumers receive regular shipments of merchandise until they cancel the agreement. However, in law libraries it is not uncommon for publishers to send a pamphlet with detailed explanations of a recent legislative act as part of an existing subscription (Attachment 5). These “special” issues are not included in the cost of the original subscription and may be priced as high as \$100 *per item*. Since the pamphlet is supposedly “part” of the subscription, the subscribing library will also get subsequent year pamphlets, making it an unexpected, unintended and expensive ongoing acquisition. Another continuity plan problem occurs when a law library subscribes to a multi-volume title on a specific topic. Additional volumes published in related areas are frequently sent to the library without notice. If these new additions are not caught by staff during the initial processing, they add to the size and cost of the set.

There is no such thing as a no cost return. However, these costs would be reduced if a notice were required on the *outside of the package* indicating that the item was not ordered. This would prevent an unknowing non-professional staff from opening and processing unordered items, thereby saving the time and costs needed to repackage and return the material. Libraries could then institute a policy for the processing of newly received materials that states:

*If a package is received with the Notice “Unordered Merchandise” under the mailing label- do not open or process, and return to publisher.*

**14) Should the Rule define “clearly and conspicuously,” given that it requires marketers to make certain disclosures clearly and conspicuously? If so, why and how? If not, why not?**

AALL believes that the Rule should define what constitutes "clearly and conspicuously" when disclosing the terms of the plan. The terms of any Prenotification Negative Option Plan must be clearly and conspicuously present in a format that is easy to read and in a prominent location on the invoice, purchase order or other documentation. It should be easy for the individual or institutional consumer to find and read the proposed terms of agreement before making a decision to purchase. For example, note the small print in the lower right corner of the Thompson invoice which ties the customer to an automatic update program, simply by purchasing the unordered title (Attachment 2).

We believe the Rule should also define what constitutes "acceptance" on the part of the consumer. Individual or institutional consumers are entitled to actively accept the proposed terms before they make a purchase. Acceptance should require an active step to indicate agreement with the terms and conditions of all Negative Option Plans. One should not be bound by terms just because an individual or law library purchased a related item or received an unsolicited subscription.

In asking the FTC to expand the Rule to include online goods and services because of the impact on costs and benefits for individual and law library consumers, we urge you to adopt the following principles. They are included among [“The 12 Principles for Fair Commerce in Software and Other Digital Products”](#) (Attachment 6) that were developed

and endorsed by members of Americans for Fair Electronic Transactions (AFFECT), of which AALL was a founding member. We believe that the following principles are relevant to requirements that should be covered by the Prenotification Rule for digital products:

**“CUSTOMERS ARE ENTITLED TO READILY FIND, REVIEW AND UNDERSTAND PROPOSED TERMS WHEN THEY SHOP.**

In a healthy digital marketplace, it should be easy for you to find and read a product’s proposed terms of agreement before making a decision to buy it. This is particularly important so that you can compare one product with another. You should be informed in plain and conspicuous language of all aspects of the proposed deal that might influence your purchase decision.”

**“CUSTOMERS ARE ENTITLED TO ACTIVELY ACCEPT PROPOSED TERMS BEFORE THEY MAKE THE DEAL.**

Real acceptance requires you to take an active step to indicate agreement to the terms that become part of the deal. You should not be bound by terms just because you visit a website, open a box containing a product or install a product that you already bought. Even if the terms are available somewhere on the website, inside the box, or on some file in the software, you should be bound by those terms only if you actively and unambiguously indicate your acceptance of them. ...”

## **20) Do current or impending changes in technology affect whether and how the Rule should be modified?**

Absolutely. As we have already stated under Questions 3, section 2, there is much greater potential for deceptive practices for electronic products and services than for print. Because the growing trend in legal publishing is moving from print to electronic publications with online subscriptions, clear rules are needed to protect both individual and institutional consumers from unfair practices. Electronic subscriptions often have terms that differ substantively from print subscriptions.

Further, consumers have become immune to pop-ups and check boxes that require a click to proceed. When an individual consumer or law library is agreeing to be bound by terms that have a fiscal impact, the indication of agreement should at the very least be a multi-step process rather than a simple one-click type of transaction.

Because law libraries, like individual consumers and small businesses, increasingly are making purchases online, rather than by regular mail, over the phone, or in person, the Rule needs to address the impact of online ordering. AALL believes that law library consumers need to have a multi-step process that requires affirmative acceptance of the terms along with a time limit for the subscription when purchasing online, rather than a simple one-click type of transaction.

## **Conclusion**

The American Association of Law Librarians, a non-profit, educational association, represents the interests of thousands of law libraries throughout the country. We urge the continued enforcement of the Prenotification Negative Option Rule and we ask that it be

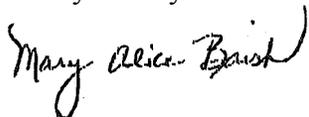
extended to include institutional consumers. We also ask that it incorporate the important protections for law libraries, such as those found in the Florida Attorney General settlements with LexisNexis and Thompson Publishing.

AALL further believes that:

- the current Rule should be expanded to include online subscriptions and digital materials for individual and institutional consumers;
- print and online materials obtained through negative option plans should have an *expiration date*, which should be a period of no more than five years;
- an expanded Prenotification Negative Option Rule that includes institutional consumers should provide for a 90-day period for the return of goods when an unordered, unwanted item is shipped to a law library;
- the Rule should be changed to include additions to existing sets, tangentially related items, continuity plans and trial conversions; and,
- law library consumers need to have a multi-step process that requires affirmative acceptance of the terms along with a time limit for the subscription when purchasing online, rather than a simple one-click type of transaction.

We are grateful to the Commission for the opportunity to comment on the Prenotification Negative Option Rule and we welcome any questions you might have. We look forward to working with you to strengthen the Rule to protect the needs of our nation's law libraries.

Thank you very much.



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## **ATTACHMENTS**

Attachment 1 : Thompson Publishing Group Assurance of Voluntary Compliance, L07-3-1159.

Attachment 2 : Thompson Invoice

Attachment 3 : LexisNexis Invoice

Attachment 4 : Matthew Bender and Company, and Reed Elsevier Inc d/b/a LexisNexis Assurance of Voluntary Compliance, L08-3-1128.

Attachment 5 : Thomson West Invoice

Attachment 6 : Americans for Fair Electronic Transactions (AFFECT), “The 12 Principles for Fair Commerce in Software and Other Digital Products.”