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**NEGOTIATING AND COMPLYING WITH ELECTRONIC DATABASE LICENSE AGREEMENTS**

With electronic database licenses, there are terms you want and terms you need, and plenty has been written about both. For example, AALL’s *Principles for Licensing Electronic Resources* provides exceptional guidance—all incredibly useful for someone learning the ropes. (These principles are currently under revision, with the Library Procurement Process Improvements Task Force paying particular attention to new developments in vendor licensing practices and recommending model language for basic licensing provisions.) Similarly, Duncan Alford’s *Negotiating and Analyzing Electronic License Agreements* provides useful point-by-point insights into license terms.

But gaining an awareness of licensing concepts and securing access to scores of resources for the cheapest price possible are not necessarily the only end goals. Instead, getting “favorable” license terms (i.e., a great deal) is really only meaningful if your institution is able to comply with the license terms. Evaluating whether you can comply with license terms requires that you understand your patrons’ needs and expectations when using online databases.

Amazingly, the actual “cost” in terms of dollars can be less important than obtaining terms and conditions with which you can comply. Consider, for example, the following:

- You must get reasonable and permissible uses and restrictions into your vendor contracts. If you have a signed contract with unreasonable language, you will not be able to comply.
- Contracts often require that customers (i.e., law firms and law schools) both communicate and comply with permissible uses. Remember, the end user—typically a lawyer or law student—is not necessarily the entity facing a legal risk if he or she violates the terms of the license.

Two programs held at recent AALL Annual Meetings, Getting to Yes for Your Library: Negotiating Vendor Contracts in Your Favor (featuring Clare D’Agostino, Loretta Orndorff, Connie Smith, Scott Schwartz, and Jane Baugh) and Walking the Tightrope: Licensed Data Access and Restrictions (featuring Loretta Orndorff, Linda-Jean Schneider, Regina L. Smith, and Scott Schwartz), tackled specific licensing terms and provided insight into the process of handling electronic database licenses in law firms. Inspired by these programs, the authors incorporate tips and tricks from the programs as part of a broader conversation about understanding your library users so that you can effectively implement license compliance strategies.

Why understanding your users’ expectations can make all the difference

By Ingrid Mattson and Linda-Jean Schneider
• Contracts usually have clauses that allow vendors to audit the use of the content (e.g., they often inform customers that they will monitor the use of login information through IP addresses), so simply hoping noncompliance will go unnoticed is not a good approach.

In other words, the database license will not exist in a vacuum. It should be a document you can turn to when a patron has a question about why he or she does not have access to certain content or cannot log in to a database remotely. When reading through license terms, ask yourself: "Will this work for my patrons? Will they be able to access and use the resources in the way they expect?"

Understanding Your Patrons
Lawyers and law students have different needs and expectations with respect to online legal research; as a result, different license terms may come up as more or less significant when you are negotiating an agreement. At the same time, law students will likely become lawyers one day, so it is important for academic law librarians to also understand a bit about law firm library patrons to encourage good research habits and equip law students with much-in-demand "practice skills." Present-day law students are often described as digital natives. Consequently, they expect research resources to be instantaneously available on any device, regardless of whether or not they are on campus. Moreover, a quick and easy solution for research needs is expected, so if accessing a database requires multiple login steps and tricks to get to the resources depending on a variety of factors (e.g., where the student is located or what computer the student is using), the database will not likely be utilized regardless of the quality of the content. Additionally, paywalls (online barriers to access content without a paid subscription) may be a foreign concept when it comes to research because Google, Bing, and the like are often viewed as free online databases rather than search engines. As a result, students may not appreciate use restrictions on what they can do with the content they find through search engines, and thus are not typically considering what they can and cannot do with their research through legal databases. Attorneys often have similar access expectations. They want to meet their clients' needs and expectations as quickly and efficiently as possible. For example, attorneys may ask:

• The flexibility to incorporate as much or as little of the data they retrieve in a search to do their work without the hassle of guessing at what is an "insubstantial" amount
• To store full reports/cases from the vendor's data on their own document management system for as long as necessary for their litigation or transaction
• To communicate all of the available data to their clients rather than engaging in a lengthy analysis to determine how much data use goes beyond the scope of the license
• To attach entire reports (not limited portions) from vendor information to email and other communications to clients and colleagues.

Director of Library Services Loretta Orndorff of Cozen O’Connor in Philadelphia speaks to a financial concern for law firms: “[T]here is the argument that [compliance with licenses] comes down to money. If the restrictions are too onerous and people cannot follow [them], the firm is in peril of a costly suit. If the restrictions are too onerous and the attorneys follow the rules, then the firm is paying for a service and not getting that value. We really need to be able to get the service we need and are paying for.” Regardless of any practical differences, one thing law students and attorneys share is the need to complete work as efficiently as possible, and they do not want to be bogged down by all of the rules (i.e., license terms the law firm or school has negotiated with a vendor).

Critical License Terms
In the not-so-distant past, a print subscription and renewal might only involve a single sheet of paper or even simply a single invoice. For better or worse, the current process to provide access to digital content has evolved into an elaborate, lengthy, seemingly endless negotiation. One could say that it requires not only "nerves of steel" and an inscrutable poker face but the dexterity of a high-wire aerial artist as the librarian/negotiator attempts to balance the requirements of the licensing agreement with the needs of the end user.

The land mines in this landscape end up being the phrases and terminology crafted as part of the initial agreements. Therefore, that language must be drafted to facilitate—not hinder—compliance. As Scott Schwartz, an attorney panelist on a recent AALL program on digital licensing, emphasized, a signed contract is enforceable, and contract language should be commercially reasonable. The following examples illustrate key language associated with negotiating a license with which your law firm or academic library can comply:

• Unhelpful: Contract language that states that customer/user will ensure compliance with the permissible uses. The term "ensure" implies being able to guarantee compliance without exception.
• Helpful: Contract language that states that customer/user will use commercially reasonable efforts to ensure compliance with the permissible uses. Requiring commercially reasonable efforts softens your commitment to the vendor.
• Helpful: Users must protect their login and password information—not sharing is permitted! This restriction can actually help the librarian or other contract manager manage passwords and users. It may also make monitoring (and therefore compliance) easier.

Note that some of the challenge in crafting a contract with which you can comply is sometimes a matter of drafting language that reflects the reality of how your patrons are using the online databases. As difficult as it may be to negotiate favorable terms, it may actually be simpler than attempting to change the behaviors of a senior partner or 1L law student! Here are additional drafting tips:

• Try to change and soften any absolute and constraining language. "The licensor has the right to audit licensee's use and to assess additional costs if abuse of the license is suspected." Try adding the sentence, "The parties agree to negotiate any adjustments resulting from such usage in good faith," to lessen the impact of any penalties you may face for noncompliance. The latter phrase should be standard in almost every agreement as a way to renegotiate and provide the opportunity to review and discuss the specific terms and conditions.

• Watch for unreasonable time restrictions, such as a 90-day notification window at renewal time. A statement such as "User must notify the vendor 90 days prior to renewal of the agreement—or amendment—if they do not wish to renew," or (even worse) an automatic renewal and billing to a credit card can result in unwanted surprises. If some manner of time restriction must be included in the agreement, propose language that allows some breathing room, such as the phrase “in good faith,” or permits the library to adjust the newly imposed obligation in terms of the new contract terms.

• Many obligations imposed by the "license" may be in various other documents incorporated by reference. It can be difficult to actually identify all of the...
documents (which are binding) that may have bearing on your use of the database. These documents include, but are not limited to, the master agreement, all subsequent amendments, pricing schedules (and any correspondence which may refer to annual increases in those schedules), terms and conditions posted on the database website or on a linked website, privacy policies, and any fine print buried in the text of the invoices. Be aware that it may be possible to avoid having those ancillary documents (i.e., those related documents that do not get signed) and their accompanying obligations changed without your knowledge. Orndorff relates, “I have recently [had] some success locking down the ‘related ancillary documents’ to the version in existence at the date of signing.” Librarians at both law firms and law schools should also anticipate patrons encountering “click-through” agreements and website terms of use, which users may ignore at the peril of the library or firm. These agreements may impose hidden and unexpected terms, costs, and deadlines, as well as grant permissions to a vendor. For example, a vendor may assert that changes agreed to in these documents can be implemented without notice to you or that use of the service after a change constitutes automatic agreement by the user.

Concordant with Section 3.2(b) of the AALL Guide to Fair Business Practices for Legal Publishers and Section 10 of the Principles for Licensing Electronic Resources, insist on including language in the license specifying that written notice must always be sent to the administrator or manager of the account for any proposed changes, and failure to send written notice will render any such terms unenforceable.

Law firms often encounter terms that can be particularly onerous or even impossible from a compliance perspective:

• **Unhelpful:** A full report cannot be shared with other law firm employees. This phrase is unrealistic based on attorney behaviors, and the phrasing is too absolute.

• **Helpful:** Contract language that states that a report can be shared with other firm employees and in substantially portions of a data record can be shared with third parties, e.g., clients. This language is more flexible and is much more likely to result in compliance.

• **Unhelpful:** Any requirement that all vendor data must be purged from customer’s document management system or other online storage service. Try to soften this requirement, as it is practically impossible to know where all possible instances of vendor data may be stored. (See attorneys’ needs and expectations listed at the beginning of this article!)

• **Helpful:** Any excerpt of vendor data the user desires to share must contain specific information crediting the vendor. This is reasonable and is often the major concession a user is asked to make if he or she wishes to use the resource only once or purely for educational or demonstration purposes.

Law schools have their own unique scenarios that require terms that clearly reflect the ways the law library intends to make electronic research resources available. Emily Janoski-Haehlen, associate dean for law library services and assistant professor of law at the Valparaiso Law Library, explains that extending access to those who are not members of the law school community requires careful consideration and planning. If your law school is part of a larger university, Janoski-Haehlen recommends contacting the person who negotiates electronic licenses on behalf of the main campus libraries to ensure that you do not unintentionally purchase access to the same databases. Also, keep in mind that just because the same person in the university system signs all of the libraries’ agreements does not mean that person is managing or monitoring the agreements. As AALL’s Principles for Licensing Electronic Resources puts it, “Most institutions will delegate the authority to sign contracts to a specific office or officer within the institution . . . . Nevertheless, library staff will often be responsible for initial review and negotiation of the material terms of the license because they have the most knowledge of the user community and of the resource being acquired.”

Collaborating with your campus colleagues will enable you to compare license terms in the event you do have overlapping agreements. To the extent the terms conflict, you may consider not allowing law students access to the main campus database and vice versa at the risk of violating the terms of one or both agreements.

Regardless of the type of library in which you work, do not be afraid to walk away from a negotiation. Though rare, declining to enter an agreement may be essential and the wisest course in some circumstances. For example, if you are an academic librarian and encounter a license drafted by an Australian-based entity accustomed to working with law firms, the license (and perhaps even the database) may simply not be the best fit for your institution. If the license terms are so far from the operating reality of your library, compliance may be practically impossible.
vendor that you are using commercially reasonable efforts to communicate the rules for use. In addition, ERM software can also block sites that have limited access or make recommendations for available alternative sites (i.e., sites that you have permission to access without limitation).

- **Librarian participation in practice group meetings, clinic meetings, and faculty meetings.** If there are particular online resources that routinely challenge user compliance (as monitored by an effective ERM tool), the announcements can be made as part of regular department meetings or as part of the group’s intranet page. For law schools with clinics, law librarians can meet with students and clinicians to cover any particular compliance issues at the start of each semester or quarter.

- **In the law firm setting, make compliance part of the firm’s technology policy, subject to annual renewal on the part of firm employees.** Every employee will be required to sign this policy, which spells out the terms of agreement when using online services.

- **In the academic setting, create an effective online research guide.** Online research guides can explain any electronic database restrictions and instruct patrons on how to access each database. This is particularly important in the academic setting where you may have a variety of patron groups, including law students, faculty, alumni, undergraduate and graduate students, and public patrons. Navigating access depending on whether a patron is on or off campus can be particularly tricky. One useful example is the guide *Important Information About Access to Databases*, created by Donna Gulnac, director of access and information services at University of California, Los Angeles Hugh and Hazel Darling Law Library. The guide and a link to it can be provided in orientation materials, or it could be provided as part of any legal research session.

- **Training any library staff that will frequently access electronic databases.** Interlibrary loan staff, library interns, student workers, and faculty research assistants who may download and email material from electronic databases should be trained on any rules of compliance in your license agreements. Including the training material and rules in internal procedural manuals can also convey to vendors that you have communicated compliance rules effectively.

In the event you are contacted by a vendor who believes your library or firm is not in compliance with license terms, grab a copy of the license, reacquaint yourself with it, and respond quickly. Vendors can be willing to work with you to clear up any issues, but delaying a response will not resolve the issue. If, for example, your academic library has licensed a database for campus-wide use and another university department begins heavily using the database in a way neither you nor the vendor anticipated, communication among all of the parties involved can result in an arrangement that enables you to maintain a good working relationship with the vendor. Similarly, in the firm setting, if the license restricts users’ access to one electronic device at a time and an attorney logs in to his or her account at home after inadvertently failing to log out at the office, quickly addressing a vendor’s concerns of password abuse can ensure the user is not cut off from essential resources on the eve of trial and that your relationship with the vendor is preserved.

### The Long View

Ultimately, the patron is the same whether he or she is a law student or an attorney—it is simply time that differentiates the two groups. Law librarians negotiating electronic database licenses are agreeing to terms based on the behaviors and expectations of a third party, so law librarians must know how their patrons expect to use online databases in order to negotiate licenses with which the library can comply. Dialogue between law firm and academic librarians is one way to develop a more nuanced understanding of patron needs when it comes to online databases.

Law firm librarians should continue honing their negotiation skills, building a relationship with the managing attorney (if any) who will be signing agreements on behalf of the firm, and communicating often with attorneys in the firm to understand their research expectations and needs. Particularly with newer attorneys, it is not a matter of learning which research resources they prefer because they have not necessarily developed preferences for much beyond Westlaw or Lexis after leaving law school. Instead, keeping apprised of the ways academic law libraries are incorporating new technology and ways to access research (e.g., apps) will give you a better sense of the issues that may arise as you negotiate licenses for new forms of content.

Academic law librarians should build relationships with law firm librarians to develop a better understanding of the research realities their law students will face upon graduation. Law students often have the freedom to cut and paste, copy and send, or download and email a vast array of materials from online databases. Once in practice, however, these approaches may not be an option. It is not simply a matter of teaching law students good research habits—good research ethics and information practices are essential as well. Framing these lessons in the guise of helping law students develop a professional image and demeanor that may increase chances of employment is one way to get students’ attention.

Myriad resources are available to help you develop your negotiation acumen, and AALL resources, such as the Fair Business Practices Revisions Task Force, Library Procurement Process Improvements Task Force, and Committee on Relations with Information Vendors (CRIV), are updating and continuing to publish invaluable resources to help you build that skill set. At the end of the day, however, understanding your patrons and their research needs is the key to negotiating a license with which you can comply. Stated succinctly in AALL’s *Principles for Licensing Electronic Resources*, “Library staff should be well informed of the uses critical to the library’s user community.”

Fortunately, within law schools and firms, librarians are often experts at tackling these challenges. Librarians have extensive experience dealing with copyright law, electronic databases, and other complex issues and have developed significant expertise in negotiation. They are also the most knowledgeable about how users want to use the data, how vendors allow the use of the data, and how to facilitate the proper use of the content so compliance is possible. Within their institutions, they most thoroughly understand how the rules work, how attorneys and law students want to use the product, and what vendors need, and they have the savvy to push for the contracting language that will satisfy all parties. According to Orndoff, “No one else is in a better position to vet and negotiate digital licenses for online access.”

Reference

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