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EDBs

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Are All Your EDBs in Order?

by William M. Hannay, J.D. (Schiff Hardin & Waite, Chicago, Illinois)

The recent American Library Association meeting in New Orleans included a panel discussion on issues arising out of the acquisition of electronic databases ("EDBs"). This author was one of the panelists, discussing legal aspects of EDB acquisitions, in particular the need to understand and respond to boilerplate "license agreements." (For a fuller understanding of these issues, the reader is encouraged to read the complete text of my presentation, which includes a discussion of recent cases and detailed examples and negotiating questions and which will be published in the proceedings along with the presentations of the other panelists.

License agreements start with the protections already afforded the publisher under the copyright laws, but then go beyond those federal protections and seek to create new ones. Acquisitions librarians should keep in mind three basic rules as they struggle through the process of acquiring access to electronics databases. Those rules are as follows:

• "Don't sign anything you don't understand!"

• "Don't sign anything you don't like!"

• "Don't go through the ordeal alone!"

The Negotiating Context

It is important for librarians to recognize that the license agreement itself is the source of many of the publisher's rights. Copyright in a database or CDROM exists — to whatever extent it exists — independently of the license agreement. By using such an agreement, however, the publisher can create "new" rights for itself. Thus, the success of a publisher in obtaining additional rights is a function of its success in negotiating with *each of its customers*. As with any type of negotiation, the ultimate success of a library in negotiating modifications to a license agreement is a function of a number of variables. One variable is the human element — the skill, knowledge, persistence and persuasiveness — of each side's negotiators. Another factor — perhaps the most determinative — is just how badly one side or the other wants to

close the deal. With this background, let us now turn to the three rules mentioned earlier.

"Don't sign anything you don't understand!"

Acquisitions librarians need to become more knowledgeable and sophisticated in their understanding of the license agreements that they are being asked to sign. As with any legal document, the librarian should read and understand the license agreement *before* signing his or her name "on the dotted line." This does not mean that librarians need to become lawyers, nor does it mean they need to grind their way through abstruse treatises on the law of sales. But it does mean that librarians ought to spend some time talking to purchasing agents or lawyers (see Point III below) and reading some of the currently-available materials on the topic of acquiring EDBs and CDROMs. Two chapters from Bruce and Katina Strauch's 1990 book, *Legal and Ethical Issues in Acquisitions*, should be required reading: Joyce Ogburn's article on "The Legalities of Acquiring Software for an Academic Library" and Meta Nissley's "Taking License: Librarians, Publishers and the New Media."

"Don't sign anything you don't like!"

Keep in mind what was said earlier about the source of many of the publisher's rights: they do not exist unless the librarian agrees to them. When the library receives a "boilerplate" license agreement, the acquisitions librarian should strike out, edit or supplement the form to suit the library's needs. Such changes may be accepted by the vendor without a fight. If the publisher does object, you will simply have to negotiate it out. But such negotiations can succeed. For example, insisting upon a provision giving the library rights to non-current annual versions (backfiles) of CDROM databases makes sense for libraries that have invested substantial sums in the databases and may wish to step off the subscription treadmill at some point. Achieving such a change in the contract, however, will depend upon the

factors and dynamics of negotiating that were discussed earlier.

Another alternative for acquisitions librarians to consider is drafting and printing a standardized purchase order form that includes language on the back which sets out relevant terms that the library desires. Depending on how a particular transaction goes forward, the library's language may end up being the terms of the contract. In the commercial world, this is referred to as "the battle of the forms."

Don't go through the ordeal alone!

The EDB acquisition process should involve more than just the acquisition librarian. The stakes involved in acquiring EDBs are much higher than traditional print media, both in acquisition dollars and in uncertainties about future use and retention. First, contact your institution's attorney (or find one who is willing to help on a reasonable fee basis or *pro bono publico* basis). Ask the attorney to go over the text of several license agreements with you — line by line — and to explain the applicable law. Second, try to involve your library director or other administrator if you need added clout in the negotiations. Finally, work with other libraries to form purchasing groups or acquisition consortia. Two heads may or may not be better than one, but two voices are definitely louder than one. Try holding joint negotiating sessions between one vendor and representatives of several prospective or current library customers. Remember, there is both safety and influence in numbers.

Ed note: I harassed Karen Muller who yielded up this information — There are at least two task forces of ALCTS exploring aspects of this issue. They are the AV Committee's Producer/Distributor Subcommittee and PVLRL's newly formed Electronic Publishing Licensing Agreements Subcommittee chaired by Tricia Davis at Ohio State University. The Proceedings Bill refers to will be published as part of the ALCTS Papers on Library Technical Services and Collections Services. Exact date of publication is not yet set. ☛