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Michael Rodriguez, "Wrangling Services Contracts in Libraries" (2016). *Proceedings of the Charleston Library Conference*.
<http://dx.doi.org/10.5703/1288284316487>

Wrangling Services Contracts in Libraries

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Abstract

As more and more academic libraries outsource information technology services and enter into cooperative consortial schemes with other organizations, librarians push into a minefield of contractual negotiations, obligations, and liabilities more complicated and consequential than the typical e-resource licenses is. A poorly wordsmithed license may result in loss of access to journals, whereas becoming entangled in troubled consortia, watching an essential technology go offline during finals week, or getting audited by a vendor without contractual safeguards or recourse can produce much greater financial and administrative burdens. This concurrent session was a crash course in negotiating service contracts favorable to libraries, focusing on legal language and ramifications rather than traditional interlibrary loan or course reserve clauses. Coverage included contract terms to incorporate or avoid, guidance on wordsmithing vendor contracts, and excerpts from real-world contracts that participants could visualize and workshop during the presentation. Attendees gained a clearer understanding of how to maximize value on investment and limit jeopardy on contracted services for their libraries.

Introduction

As licensed electronic resources comprise the majority of library collections, e-resources and acquisitions librarians tend to be familiar with typical license principles and terms for e-resources, even if they are not directly involved in negotiating those agreements. Librarians are used to negotiating licenses to allow for interlibrary loan, course reserves, post-cancellation rights, and other library-specific terms, but as more and more libraries outsource information technology services, enter into cooperative consortial schemes, and engage in other high-stakes activities newer to their realm, librarians venture into a minefield of contractual negotiations, obligations, and liabilities more complicated and consequential than the average content license. A poorly wordsmithed content license may lead to loss of access to e-journals without recourse, whereas becoming entangled in troubled consortia, watching an essential technology go offline during finals week, or getting audited by a vendor can produce vaster financial and administrative burdens. The risk of such outcomes is elevated because librarians commonly lack expertise with software-as-a-service contracts, sales agreements, title transfers, warranties, end-user license agreements, and other contract types and provisions not specific to libraries. This presentation presents 15 common problematic contract clauses and excerpts real-world contracts, lightly edited for brevity and anonymity and not subject to any nondisclosure agreements, to illustrate risks and how to ameliorate those risks.

Liability

Liability and indemnification are potentially the most consequential contract provisions. "You shall indemnify us against any claims or losses, including reasonable attorneys' fees, arising in whole or in part from any violation by you," states one contract. Another asseverates that the library "assumes full responsibility for all use of the Products by its Authorized Users." Such language is unacceptable because libraries cannot guarantee to ensure compliance with the contract by each and every end user. Taking responsibility for any potential future violations essentially gives vendors license to sue. Agreeing to indemnify vendors affirms the library's fiscal liability in case of breach. Instead, libraries should agree to "make reasonable efforts to ensure that Authorized Users will use the Products according to the terms of this Agreement." Such "reasonable" or "good-faith" efforts are useful phrases. Add that "Authorized Users are not party to this Agreement" to ensure that violations committed by end users are not the library's responsibility. Specifying that "the Provider acknowledges that Customer cannot monitor, control, or proactively enforce the behavior of Authorized Users" also reduces the library's risk.

Related concerns include jurisdiction and governing law. Connecticut requires that any court cases or disputes take place in Connecticut and be governed by Connecticut law, as opposed to the laws of Texas or Delaware, which are more business-friendly and are too geographically distant for the state's lawyers to prosecute a cost-effective case.

Nondisclosure

Deceptively phrased by many vendor contracts as “confidentiality,” a nondisclosure agreement (NDA) requires library customers to keep secret “information regarding the other Party that is confidential or proprietary in nature, including but not limited to information concerning its business, processes, donors or funders, administration and related offices, software, marketing, pricing, formulas, customers, suppliers, vendors, operations, and finances,” so an open-ended nondisclosure clause is unacceptably broad. First and at least, write into the contract “except as required by law or court order,” as public institutions must comply with any public records mandates. Second, ensure that the confidentiality clause governs both parties, so that vendors are not allowed to sell or disclose information on the library’s procurement or other processes to third parties. Third, ensure that the NDA expires after a specified period of time or when the contract ends. Fourth, require vendors to specify exactly what information should be kept secret. Limit nondisclosure to only the contract, the pricing, or specified sections in the contract (except as required by law). Finally, strike any mention of financial penalties should the library violate any such NDAs. Push back against the very notion of nondisclosure.

Exclusivity

Exclusivity clauses require the library to transact business only with that one vendor in a particular area. For example, a library might agree to “sell surplus equipment exclusively to us during the term of this agreement.” Exclusivity provisions might generously allow libraries to “offer such equipment for sale to other parties”—but only “in the event that we elect not to purchase [specified surplus equipment] from you.” Exclusivity clauses are unacceptable. Strike them and insert the pocket phrase “intentionally omitted.”

Warranties

Notably, the warranties section in most vendor contracts affirms the absence of most warranties. “The software is provided ‘as is,’” most contracts note, “and is exclusive of any warranty, whether express or implied, including without limitation, any

warranties of merchantability, fitness for a particular purpose, or noninfringement.” This language is ubiquitous—similar clauses exist even in open-source licenses—so libraries may not be able to convince vendors to strike such clauses. What libraries can do is to obligate vendors to explain what their product actually does and how it is designed to be used. Specifically, libraries should require vendors to provide written service level agreements and documentation, add those documents to contracts in the form of appendices, and incorporate them by reference into contracts. Oblige vendors to be specific and hold them to their specificity. Always require vendors to warranty noninfringement and to indemnify the library if any software components infringe on a third-party’s copyright.

Accountability

The goal of warranties is to hold vendors accountable for the promises they have made. A vendor might promise to “use reasonable efforts to ensure the systems are available during 98% of the term of this agreement,” but one year is 8,760 hours, so 2% downtime totals 175 hours—and no promises that this downtime would not fall during finals week. Instead, require vendors to “use commercially reasonable efforts to ensure the systems are up 99.9% of the time.” Specifying *commercially* reasonable strengthens the uptime requirements because this phrase benchmarks the vendor’s efforts with those of other companies with similar products or services, for example, EBSCO versus ProQuest. Vendors may calculate downtimes to “exclude outages due to scheduled or emergency maintenance.” Again, this means that if a system goes down unexpectedly, all the time spent bringing the system back online is, contractually, not considered downtime. Finally, most vendor contracts omit financial incentives for vendors to comply with the terms therein, leaving customers with little recourse but to “suck it up” or “walk away.” To avoid this scenario, libraries should negotiate accountability clauses similar to the following: “In the event that [Vendor] fails to meet the Uptime Commitment for any rolling three-month period, [Library] shall receive a refund of the Fees for the impacted Systems paid during those three months.” The refund can be prorated as a percentage of the fees paid per year.

Memberships

Librarians bandy terms such as “consortium” and “membership” in ways that ignore the general legal understanding of what those terms truly mean. Outside the library world, members of consortia go into business together and create shared liabilities (debts) and other obligations, but in the library world, consortial members do not generally take on each other’s obligations—consortia are understood to be informal alliances of libraries. Courts might disagree. To minimize liability, libraries should avoid becoming “members” of any “consortium” and instead rewrite contracts to replace “membership agreement” with “participation agreement.” Consider adding the following clause to such contracts: “The [Library] reserves the right to terminate its participation in the Program at any time and for any reason by providing written notice of such termination to the Program Sponsor. Effective immediately upon such termination, the [Library] shall cease to have any obligation or liability to the Program or any of its member institutions. Under no circumstances shall the University be held liable or responsible for any obligation of the Program, the Program Sponsor, or any of their respective member institutions.”

Terms of Use

Terms of use, clickwrap agreements, and end-user license agreements are distinct from contracts insofar as they are not formally negotiated and signed documents but rather are online forms that one clicks “accept” or that one accepts by mere use of the service. Typically, the vendor “reserves the right to change, modify, add, or remove portions of these Terms of Use of this Software at any time,” with or without a notice or comment period for customers. What’s more, “Licensee’s continued use of the Software following the posting of any changes will mean that Licensee has accepted the changes.” If the library does not have the option of walking away, being presented with institutionally binding clickwraps or terms of use should lead it to negotiate a formal signed license that explicitly supersedes any terms of use for both the library and end users.

Enforceability

Contracts are not always formal signed documents. Parties can enter into legally binding and

enforceable agreements verbally or through e-mail. Even when a memorandum of understanding (MOU) is stated to be nonbinding, if intended to be binding or if phrased in such a way as to be interpreted to be contractual, the parties can make a legal case that the terms are in fact binding, so a nuanced way may need to be found to terminate the library’s obligations under the memorandum. A typical MOU states that “the parties agree to hold the designated items for 15 years from the year of commitment. Retention commitments survive membership.” Rewrite such memoranda to make clear that they form operating guidelines rather than binding commitments. If a total rewrite is not feasible, add strong, specific language to the effect that “this memorandum is not a contract or an agreement to enter into a contract. This memorandum is nonbinding to all parties and no liability may arise from this memorandum to any parties thereto.”

Right to Audit

Do not give vendors a right to audit—to inspect the library’s security arrangements or to demand complete documentation and proof of compliance. “During the Term of this Agreement and for one year thereafter,” a typical audit clause reads, “You shall keep and maintain clear, accurate, and complete books and records. In the event that such audit identifies underpayment of 5% or more, you shall reimburse us for the cost of such audit.” Any such clause should be “intentionally omitted.” Let the vendor get a court order if they want to audit the library’s compliance with the contract.

Data Rights

Retain copyright (ownership) over any data loaded or entered into a system or software. “Data” in this context is not only personally identifiable information such as names and Social Security numbers but also usage patterns, search inputs, IP addresses, original metadata, and more. Contracts may contain a clause granting the vendor “a perpetual, worldwide, royalty-free license to use the Data for any business purpose, including but not limited to developing system enhancements and new products.” The unacceptable phrases in that clause are “perpetual” (no customer opt-out or withdrawal option) and “any business purpose” (no limitations on reuse). Rather than accept such permissive language, state exactly in which ways

vendors are allowed to use the library's and users' data. Vendors may not "sell or disclose any of the Data to third parties or use the Data for any purpose, without [Library's] express written permission or as required by law."

Data Retention and Security

Institutional and user data must be contractually secure from capture or loss. Require vendors to disclose their data security measures in place—not only standard measures such as front-facing HTTPS and hashed and salted passwords but also checks in place at data storage facilities to prevent unauthorized persons from walking up to the servers and exporting confidential data into a portable device. Mandate that the vendor hold any of its subsidiaries or contractors to the same contractual standards. Ask to know exactly how frequently, and exactly how, the vendor backs up customer data. Require that local copies of these backups be provided on request or when the contract ends, if applicable. Do not accept generic statements from vendors such as "we are committed to keeping your data safe and secure." Insist on specific commitments within a period of time: "We will send you all your Data in an agreed-upon format at no additional fees on termination of this Agreement. All copies, including backup copies, of your Data that are hosted by us will be backed up on a continual basis and stored in secure facilities per industry standards. Backups of your Data will be provided to you in industry-standard formats on a quarterly basis (every third month). All of your Data hosted by us or our subsidiaries or agents will be destroyed within 30 days of the termination of this Agreement and the successful transfer of all your Data to you." That should do it.

User Privacy

Ensure that library contracts address the privacy of end users and staff. Contracts should require vendors not to "sell or disclose patron information to third parties without your express permission or as required by law." Vendors should provide thorough privacy policies that libraries should incorporate into contracts, by reference or preferably as an appendix not to be modified without the library's written permission. Libraries should negotiate changes to the policy as appropriate. Regarding Family Educational Rights

and Privacy Act (FERPA) and Health Insurance Portability and Accountability Act (HIPAA) privacy laws, "we comply with applicable FERPA guidelines" or similar language is too vague to pass muster. Most schools and universities have mandatory language that must be incorporated into any contracts involving FERPA or HIPAA compliance. Speak with the university's compliance department to learn those rules. Abide by them.

Transfer of Title

The point at which ownership transfers from seller to customer is particularly important for shipments of physical supplies, such as books, computers, and furniture. Suppliers' contracts commonly stipulate that "title to Products shall pass to Customer on payment in full." This provision makes sense at first glance, but its effect is to waive or obfuscate vendor responsibility for supplies lost, damaged, or delayed in shipment or delivered in poor working condition. If the library has already paid the invoice, then it already owns the product and hence is the entity that must seek redress from U.S. Postal Service (USPS) or other agency responsible for shipping problems. Put that onerous duty on the vendor by stipulating that "the title to Products shall pass to Customer on receipt and acceptance by Customer of the Products in agreed-upon condition and working order."

Nondisparagement

Contractual prohibitions on slighting or censuring other parties threaten intellectual freedom. Nondisparagement clauses show up mostly in end-user license agreements (EULAs) but also sometimes in institutional contracts. For example, the treaty organization behind a well-known open access repository affirms that it "retains all rights to prosecute, to the fullest extent of the law, any use of its Works in a manner that falsifies, misrepresents, disparages or fraudulently uses the Works, or disparages or harms the reputation of the [Publisher]." Another nonprofit publisher's contract threatens to terminate access to its publications should "we believe in good faith that the conduct of Authorized Users is harmful to our interests, the publications on this site, other subscribers, or other users." The optimal responses to such provisions is to strike the nondisparagement clause or walk away.

Force Majeure

Most contracts include a force majeure clause, and rightfully so, because force majeure exempts the parties from their contractual obligations in the event of natural disasters, wars, and other acts of God not within the reasonable control of the parties. However, even this boilerplate clause carries risks for customers. Here is a typical example: “We shall not be responsible for failures of our obligations under this Agreement to the extent that such failure is due to causes beyond our control, including but not limited to acts of God, war, acts of any government or agency, fire, explosions, epidemics, strikes, delivery services, lockouts, severe weather conditions, transportation delays, or delay of suppliers or subcontractors.” Contrary to this statement, any subcontractor delays and lockouts are, in fact, under the vendor’s control—no one forces a company to lock out its unionized

employees or hire unreliable subcontractors. Be careful not to enable the vendor to duck out of its contractual obligations by claiming force majeure.

Resources

Excellent general resources for understanding and wordsmithing contracts include *The Librarian’s Legal Companion for Licensing Information Resources and Services* by Tomas Lipinski (Chicago: American Library Association, 2013), *The Tech Contracts Handbook: Software Licenses and Technology Services Agreements for Lawyers and Businesspeople* by David W. Tollen (Chicago: American Bar Association, 2011), and *Contracts: The Essential Business Desk Reference* by Richard Stim (Berkeley, CA: NOLO, 2016). Also, the LIBLICENSE Model License Agreement (<http://liblicense.crl.edu/>) is a useful template. All these readings ground practitioners in both library and private sector practices.