

# LICENSING PRIVACY: VIEWS FROM LIBRARY LEADERSHIP

A REPORT BY DANIELLE COOPER, ASSOCIATE DIRECTOR, ITHAKA S+R

JULY 2021

This report is a component of the Licensing Privacy project. This project was made possible in part by a grant from The Andrew W. Mellon Foundation. The views, findings, conclusions, or recommendations expressed in this report do not necessarily represent those of The Andrew W. Mellon Foundation. Additional information about the project is available at the project website: <https://publish.illinois.edu/licensingprivacy/>.

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## BACKGROUND

The goal of the Licensing Privacy project is to improve how academic libraries leverage license language to advocate for patron privacy. Licenses and the negotiations surrounding them are integral to protecting library patron privacy. Most notably, these licenses determine whether, how, and to what ends, vendors can collect data on patrons, how libraries and their patrons are informed about this data collection, and how this data is or is not shared with the library for its own use.

As part of the Licensing Privacy project, Danielle Cooper at Ithaka S+R conducted eight semi-structured interviews with library leaders about how privacy concerns inform their negotiations and agreements with vendors. Two exploratory interviews with librarians who support license negotiations, such as by “close reading” of terms, were also conducted in this phase to better understand how privacy-related decisions are delegated and to inform the planning for subsequent interviews. This report summarizes the findings from the interviews and identifies next steps. The interview process and list of participants is in Appendix 1 and the interview guide is in Appendix 2.

## FINDINGS

There are a series of privacy-related interventions via licensing terms that are well known, even among leaders who have delegated much of the day-to-day work on this to others. We detail those interventions below. Beyond those strategies is the reality that privacy generally does not and arguably cannot take precedence over the main priorities of managing pricing and ensuring user access when negotiating licenses. Goals around privacy-related interventions during negotiations are therefore typically modest and result in relatively little friction when negotiating with vendors. Vendors are typically expected to engage in self-monitoring and ensure compliance with little ongoing review or audit by libraries. Library policies around privacy help inform licensing language but ultimately, they are most successful insofar as they spark a culture of dialogue around privacy within the library rather than lead to any specific intervention.

## PRIVACY IN THE PRIORITY STACK

The interviewees represented a range of perspectives on the extent to which, and how, protecting patron privacy should be a priority for academic libraries. However, even the staunchest proponents recognized that the issue does not take precedence when negotiating licenses. They confirmed that pricing and preventing disruptions to access are generally top priority. This reflects expectations across the university that the library provides what faculty want for themselves and their students, and the subsequent pressure the library faces when it does not. The major exception to this is negotiations with vendors of certain digital tools and platforms where the marketplace is more competitive and therefore there is more flexibility among vendor choice versus content for which there is typically a single provider. Another variable is the size of the vendor and the extent to which higher education is their core business, as smaller vendors or those that are oriented towards other markets are less equipped to handle more tailored demands.

Given this environment, **the gains that can be made for patron privacy through licensing language are usually modest: adjustments are made on a license-by-license basis after the main work of negotiating around price and access is resolved.** These privacy-related wins in licensing language were framed as “low-hanging fruit” that were either anticipated to not lead to significant push back from the vendor or reflected a necessary compromise position by the library. Most notably, while several interviewees expressed concern about the growing number of vendor offerings requiring library patrons to create personal accounts, the majority stated that they would not outright reject these account requirements. Instead, in negotiations they seek to create mechanisms that ensure patrons actively consent to any terms associated with account creation and/or to insert language asserting that the terms to which the library previously agreed take precedence.

## EXPERIENCES NEGOTIATING

Given that most interviewees framed their goals for securing privacy-related terms in licenses as modest and incremental, it is perhaps unsurprising that they also generally reported that their experiences negotiating for these terms were relatively frictionless. This is especially true when negotiating renewals, as language can become obsolete as it carries over and updates are relatively normal in the course of negotiations. Some also highlighted that vendors expect their customers to negotiate and therefore libraries must view all licensing language, including that related to privacy, as the vendor’s opening move. However, others characterized this stance by vendors as challenging because of the onus on libraries to remain ever vigilant as vendor privacy terms change, which they also observed as happening with increasing frequency.

A significant variable in the negotiation dynamic between libraries and vendors is whether the library is part of a public institution, and therefore, what position state law takes on privacy protections. Another variable is whether the license is being negotiated for an individual library, or on behalf of a group of libraries, such as through a state system or consortial relationship. But there are no hard and fast rules here. For example, being beholden to state requirements should technically make negotiations simpler because there are certain terms that must always be struck down. However, the drawback to this is that many states have outdated policies and/or their blanket terms are overly draconian, making it challenging for libraries to advocate for the

specific, more progressive privacy-related terms they would prefer. In contrast, several interviewees highlighted the more progressive approach of GDPR, emphasizing how progressive government policy can be an effective way to advocate for privacy.

## THE ROLE OF LIBRARY POLICY

The interviewees emphasized that successful licensing processes, including how language related to privacy is included in the terms, involve delegation and cooperation among those in the library. A major consideration when crafting policy is the ideological orientation of the library related to privacy and, by extension, how hardline or a specific the approach taken.

Some interviewees in this study saw library policy as an opportunity to take a specific stance related to privacy in vendor negotiations, while others highlighted that their libraries had dialed back the prescriptiveness of their policies in recent years. This shift also reflects how the library's own engagement with usage data is growing.

Library policies are valuable when they empower library staff to make decisions. Creating a culture of shared buy-in and ownership, especially among liaisons, is especially important to this work. However, carving out the time and resources to regularly and meaningfully revisit the privacy policy the library crafted can be incredibly challenging given the many competing priorities of the library. The issue of privacy on campus also extends beyond the library; working with other units and centralized leadership can also be challenging. One strategy employed by several interviewees was to develop a task force on privacy that engaged those with different capacities across the library, and ideally also those beyond the library.

A common theme among interviewees who position patron privacy as a strong priority was that library policies, and their aims, must have a wider target than licensing language to be effective. In other words, library policies related to privacy are especially valuable if they foster broader attention to privacy-related issues, leading to the issue being embedded into a range of library discussions and decisions. Some of the libraries featured in this study leverage the privacy policies posted to their website as an opportunity to assert specific values, educate patrons about privacy issues, or model the practice of transparent data use disclosure.

## EXAMPLES OF SPECIFIC INTERVENTIONS

While the interviewees emphasized that many aspects of privacy terms are delegated to others in the library, system, or consortia, they could point to common strategies taken to assert patron privacy rights through licensing interventions. Their responses coalesced around several key tactics, reflecting the relative ubiquity of those approaches:

1. Resist signing non-disclosure agreements (NDAs). This is an important tactic for private universities. Public universities often automatically strike NDAs due to their public reporting mandates.
2. Clarify which terms are being consented to. The boilerplate licensing language often defaults to granting consent to the vendor's privacy terms as stated on their website, even if the vendor later changes those terms, without providing notice to the library. The vendor may insist that that flexibility in their policies allows them to be more responsive to emerging privacy threats. The counterstrategy is to insist on language that states that the library consented to specific privacy terms at the point of signing

and, if new terms are posted, it is the responsibility of the vendor to notify the library about the changes and seek consent. Otherwise, the terms from the original agreement must be honored.

3. Assert who can consent to the terms. Most interviewees were concerned about how vendors are increasingly pushing patrons to create individual accounts to experience the full benefits of their platforms. This is problematic because it positions the patron, not the library, as the “user” agreeing to terms with the vendor. Given that patrons may have no choice but to create an account to complete their work at the university, some interviewees highlighted that it may not be possible for patrons to actively consent to privacy terms insisted on by the vendors as part of creating an account, even if guardrails are put into place towards that. Licensing language can intervene when it asserts that the privacy terms specified in the library contract supersede any terms that the vendor requests patrons consent to when signing up for an individual account.
4. Clarify when and how user data can be shared. Vendors may try to assert that data collected from library patrons can be shared with other third parties in the event that their company is acquired by them. One method to push back is to develop language in agreements that states that the vendor can only disclose such data to the acquiring company on the condition that the acquiring company is still bound by the original agreement with the library for how it is retained, used, and shared.
5. Require notification in the event of a data breach. A number of interviewees cited GDPR for resetting vendor expectations about notifying the library in the event of a data breach. Within licensing language, the common approach is to require that the library, not only the patron, be notified by the vendor.

## ENSURING COMPLIANCE

Licensing terms are successful only insofar as they are honored; however, ensuring compliance is incredibly challenging for libraries due to the monitoring complexities and lack of recourse. None of the libraries included in this study have specific, proactive, or systematic staffing mechanisms in place to monitor vendor compliance with licensing terms related to. One library in the study uses web crawlers to flag any changes to privacy terms posted on vendor websites between negotiations but, of course, that does not capture if the vendor is violating those terms.

Therefore, compliance issues surface primarily in an ad hoc fashion. Consortial agreements can be beneficial in this regard because there are more library staff to potentially notice and surface these issues. Compliance monitoring, especially as it relates to single sign-on, would ideally need to involve staff in other campus units with security responsibilities.

In this environment the libraries rely mainly on the renewal process to review how privacy terms change over time. Keeping generally up to date on privacy-related trends and tracking developments in the library licensing space is a helpful strategy. Most notably, one library included in the study takes the proactive approach of tracking which terms are priority for realignment with their privacy policies in the next negotiation round. Between negotiations there is little compliance monitoring or audit. The interviewees recognized that a major drawback to relying on licensing language to protect patron privacy is that any changes to the terms for an individual library ultimately make it more challenging for vendors to track their compliance generally.

## REFLECTIONS AND NEXT STEPS

The findings from this phase of the Licensing Privacy project provide this reminder: While licensing language has a narrow utility in relation to larger library strategies around privacy advocacy, this language – and the underlying policies that inform it – is still important insofar as it creates a sense of shared awareness and ownership and empowers staff to make independent decisions.

Given that new privacy terms are perceived to be proliferating, a major challenge in developing model language is that it becomes quickly out of date, which suggests a less static approach, such as through something closer to wiki format, may be helpful. Another possibility would be to adopt a model for language closer to Creative Commons for the terms themselves, where the terms change over time, but are referred to with a static version number. These more flexible strategies would be helpful for ensuring that issues related to new terms are addressed quickly, and in capturing strategies for developing terms related to new contract types. For example, there is a dearth of model language related to the emerging genre of transformative agreements. Additional interviews with those who closely read and negotiate licenses would help to further refine the needs in this area and surface others.

With the reality that licensing language has a narrow utility when advocating for privacy in library contexts, it is important that libraries who want to advance this work also attend to other strategies. Some libraries included in this study are leveraging their privacy policies, as communicated on their websites, as another avenue into this work. It may be valuable to do further research that surfaces and analyzes examples from this genre.

## APPENDICES

### APPENDIX 1: INTERVIEW PROCESS AND LIST OF PARTICIPANTS

Following input from the Licensing Privacy advisory group, the majority of the interviewees were selected by Lisa Janicke Hinchliffe and Danielle Cooper to capture a variety of positions on the issue of patron privacy, and among institution types. Several interviewees were identified through chain referral. Notes were taken during the interviews. Participants were given the opportunity to review and revise those notes. Interviewees were also given the opportunity to review the report prior to publication. We thank the interviewees for their participation:

- Kristin Antelman, University of California, Santa Barbara
- Sara Bahnmaier, University of Michigan
- Gerald R. Beasley, Cornell University
- Joni Blake and Nora Dethloff (co-interviewed), Greater Western Library Alliance
- Brandon Butler, University of Virginia
- Mimi Calter, Stanford University
- Ellen Dubinsky, University of Arizona
- Tim McGeary, Duke University
- Ken Varnum, University of Michigan
- Sarah Shreeves, University of Arizona

### APPENDIX 2: SEMI-STRUCTURED INTERVIEW GUIDES

The interview guide for library leaders was developed by Lisa Janicke Hinchliffe and Danielle Cooper. During the process of conducting the interviews with library leaders, we determined that it would also be valuable for the project to pursue additional research conducted with librarians who support negotiations. Danielle Cooper designed an additional interview guide to pilot that approach.

#### FOR LIBRARY LEADERS

1. What is your library's position on how user data collection and privacy is framed in license agreements?
2. How has that manifested in the library's negotiations?
  - a. Any examples of what this language around patron data collection typically looks like in your library's agreements, and the extent to which the library has developed a specific approach to reviewing/countering that language?
  - b. To what extent/how are compliance terms built into that language by the library or the vendor? [e.g. financial penalties for breaking terms; procedure for notifying users in the event of non-compliance]

- c. What have the library's experiences like negotiating with the vendor around these issues? [e.g. whether/how the vendor is willing to accommodate these requests; tactics that have been particularly successful or not]
  - d. Has the attention to language or the tenor of negotiations around this issue evolved over time? (e.g. responsiveness from vendors, pressure from the library)
  - e. How does your library's stance on the representation of patron privacy in license agreements relate to the priority areas that your library typically focuses on during these negotiations (e.g. price, "up time")?
3. I'd like to turn our attention now to how the library approaches vendor compliance with licensing terms related to privacy.
    - a. Does your library have a process for regularly monitoring compliance? What are the challenges and opportunities of developing such a process?
    - b. Does your library have a process in place for dealing with non-compliance? Any examples of how that has worked in practice?
    - c. Considering your library's experiences with monitoring and addressing compliance issues, what do you think is necessary to ensure a more successful relationship between agreed language and vendor practices?
  4. How does your library's stance on the representation of patron privacy in license agreements relate to your library's position on patron privacy more widely?
    - a. To what extent do you see this as an area of focus for your library?
    - b. For those who do not see this as an area of focus: What do you anticipate it would take for this to become an area of greater focus for your library?
  5. Beyond the discussions and policies developed within your library, has there been anything or anyone else in particular who has contributed to your perspective and approach to addressing patron privacy during license negotiations?
  6. What information would be useful to your library as you navigate these issues in your library?
  7. Given what you know about the project, is there anything else you think it would be helpful to share with me about your library's experiences or perspectives?
  8. Who else should I talk to?

## FOR LIBRARIANS SUPPORTING LICENSING NEGOTIATIONS

1. Walk me through the role you play in licensing negotiations at the library and how that relates to the work of others at the library that also contribute to these activities. [E.g. who is responsible for setting the strategy, how/when is it determined who at the library needs to get involved].
  - a. Can you give me examples of some licenses you've worked on in the past few years and how any terms related to privacy surfaced during those negotiations?

- b. What was the strategy for handling them and how does that relate to your library's stance on other priority areas during negotiations (e.g. price, "up time")?
  - c. How does your library's stance on the representation of patron privacy in license agreements relate to your library's position on patron privacy more widely?
  - d. Are you involved at all in monitoring compliance once privacy terms are put into place? Any recent examples when compliance issues have surfaced (and by extension enforced), in the past few years?
2. Moving beyond specific recent examples, I'd like to turn our attention to any more general procedures you and the library have in place for developing privacy terms in licensing agreements.
- a. Is there language related to patron data collection that you regularly look out for/insert into the library's agreements? If yes, please provide an overview.
  - b. To what extent has the library developed a specific approach to reviewing/countering that language?
  - c. To what extent/how are compliance terms built into that language by the library or the vendor? [e.g. financial penalties for breaking terms; procedure for notifying users in the event of non-compliance]; Does your library have a process in place for dealing with non-compliance?
  - d. From your perspective, what have the library's experiences generally been like negotiating with the vendor around these issues? [e.g. whether/how the vendor is willing to accommodate these requests; tactics that have been particularly successful or not]
  - e. From your perspective, has the attention to language or the tenor of negotiations around this issue evolved over time? (e.g. responsiveness from vendors, pressure from the library)
3. I'd like to now turn to a series of questions that reflect on what can be most productive in this space moving forward.
- a. Beyond the discussions and policies developed within your library, has there been anything or anyone else in particular who has contributed to your perspective and approach to addressing patron privacy during license negotiations?
  - b. Considering your library's experiences with monitoring and addressing compliance issues, what do you think is necessary to ensure a more successful relationship between agreed language and vendor practices?
  - c. What information would be useful to your library as you navigate these issues in your library?
  - d. Given what you know about the project, is there anything else you think it would be helpful to share with me about your library's experiences or perspectives? Who else should I talk to?