Non-Disclosure Clauses: the making, breaking, and remaking of relationships

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In academic librarianship, non-disclosure clauses now fill minor but well-choreographed roles in license agreements for electronic resources.¹ Vendors for electronic resources and academic librarians have waged venomous rhetorical battles over non-disclosure clauses.² Association declarations, refusals to comment, public records acts litigation, and clandestine violations of contracts outline the effects of non-disclosure clauses on the relationship between vendors and librarians.³ There is tacit agreement that the purpose of non-disclosure clauses is to keep pricing and packaging structures secret.⁴ Most also seem to agree that pricing is not completely secret; bits and pieces of pricing information can be found in a handful of important collection development publications and vigorous public records request campaigns.⁵ Some vendors confess to and many librarians bemoan the unequal negotiation positions purposefully

⁴ Davis, supra note 2.
⁵ Bergstrom, supra note 3; see Moore & Duggan, supra note 1.
entrenched by information asymmetry in an already slanted-toward-vendors market. Various workarounds diminish some of the effect of non-disclosure clauses but none of the annoyance.

This article discusses the effect of non-disclosure clauses on vendor-library relationships, the purposes of and justifications for non-disclosure clauses, and strategies used to work around them. The literature review discusses how non-disclosure clauses became a fixture in license agreements for electronic database subscriptions. The literature review frames this discussion in terms of the evolution of vendor-library relationships and the current pricing crisis for electronic database subscriptions. The original research considers how librarians conceive of non-disclosure clauses and what efforts librarians have made to weaken their effects. It then discusses the perspective of vendors, as much as could be discerned from short interviews and some scripted refusals to comment. The discussion section contrasts the prominence of non-disclosure clauses with the alternate condemnation and acceptance of them and with commonly used workarounds. The discussion theorizes that non-disclosure clauses severely inconvenience librarians, perhaps with unacceptable financial and collection development consequences, but that vendors are not using non-disclosure clauses effectively enough to justify their continued use. Librarians may or may not deserve the appellation of spineless negotiators, but they are fiercely determined at finding information. Non-disclosure clauses serve little of their intended

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purpose all with the cost of fostering distrust and forestalling a solution to an unsustainable pricing model.

**Literature Review:**

**A. A caveat**

This article draws lessons from the scholarly and professional literature which connects poorly conceived pricing models with the exacerbating effects of non-disclosure clauses. It imports these lessons into a discussion of academic law librarianship. Unfortunately, because of the paucity of information directly addressing the use of non-disclosure clauses among legal subscription database vendors, much of what this article suggests must necessarily come with a caveat: Nothing remarkably similar is perfectly analogous.

**B. How subscription database pricing became the Beast we fear**

i. The *big deal* in academic libraries

In academic librarianship, Elsevier, Springer, Taylor & Francis, and Sage demonstrate behavior in a closed market similar to the legal publishing market populated by Westlaw, LexisNexis, HeinOnline, Bloomberg, and Proquest. In both markets, the few harness the power in negotiations. In this power manifests in pricing and packaging models which create inefficiencies for libraries. The most well-known such package with its corresponding pricing is

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9 Poynder, *supra* note 3; see Marks, *supra* note 8 at 392-397.
the big deal.\(^\text{10}\) The big deal is “where research libraries combine to buy a single all-you-can-eat subscription for a set fee and for a set number of years . . . . This fee is invariably based on the cost of the member institutions’ historical print subscriptions.”\(^\text{11}\) Much of what makes a big deal a big deal comes from its cost efficiency; it is really cheap per article.\(^\text{12}\) It comes in the form of various titles lumped together with few options to sever titles which have less value to libraries and their patrons.\(^\text{13}\) Because buying title-by-title either in print or in online format would amount to much more expense, the big deal packages are historically the best deal possible.\(^\text{14}\) Vendors trying to build a bridge between the print past and the electronic future make breaking up big deals difficult in order insure a revenue stream which compensates for the loss of print sales but also produces profit.\(^\text{15}\)

The literature touching on this intersection between unsustainable pricing models and non-disclosure clauses ranges from discussions about the administrative challenges of negotiations, firm stances against non-disclosure clauses, histories of the big deal and vendor-library relationships, alternative model contracts, alternative pricing models, business rationales from the vendors’ perspective, public records request campaigns, and price ranges gathered from surveys of vendors and librarians.\(^\text{16}\) In all, the literature calls librarians to arms and challenges

\(^{10}\) Poynder, supra note 3; see Carl T. Bergstrom & Theodore C. Bergstrom, The costs and benefits of library site licenses to academic journals, 101 PNAS 897, 899 (2004).
\(^{11}\) Poynder, supra note 3
\(^{12}\) Id.
\(^{13}\) Id.; Bergstrom & Bergstrom, supra note 10; Bergstrom, supra note 1.
\(^{14}\) Poynder, supra note 3.
\(^{15}\) Id.; Darton, supra note 8.
\(^{16}\) Carmelita Pickett, Eliminating Administrative Churn: The “Big Deal” and Database Subscriptions, 37 Serials Librarian 258–261 (2011); Dartmouth College Library, supra note 6; Cornell University Library, supra note 6; Duggan & Moore, supra note 1; Liane Taylor & Eugenia Beh, Model Licenses and License Templates: Present and Future, 66 Serials Librarian 92–95 (2014); Bergstrom & Bergstrom, supra note 10; Darton, supra note 8; Poynder, supra note 3; Oxford University Conference, supra note 7; Plaintiff’s Proposed Findings of Fact, Conclusions of Law, and Permanent Injunction, Elsevier, Inc. v. Washington State University, No. 09-2-00137-3 (Wash. Super. Ct., filed Jun. 11, 2009); Bergstrom, supra note 1; Bergstrom, supra note 3; American Association of Law Libraries,
vendor use of non-disclosure clauses. This article will walk through the constantly changing landscape of how vendors use and justify and librarians perceive and resist non-disclosure clauses.

The big deal came into existence in January 1996 as an effort to curb the exponential price increases of print academic journals, known widely as the serials crisis.\textsuperscript{17} As prices increased an average of 10\% every year and budgets shrank or flattened, more libraries canceled their print subscriptions.\textsuperscript{18} Print prices increased still more as a result. In this environment, the first big deal emerged as a solution.\textsuperscript{19} This solution was a joint project of the U.K. Higher Education Funding Council (HEFCE) and the Associated Press.\textsuperscript{20} The big deal seemed to address several lingering and emerging issues related to the purchasing of academic journals. It was a way to make prices per article the unit of analysis and provided cost efficiency on that measurement.\textsuperscript{21} It allowed vendors to pick up shares of the market they had previously lost as the serials crisis progressed.\textsuperscript{22} It gave vendors a packaging model that fully embraced changing information systems and the demand for online access.\textsuperscript{23} It also gave libraries the means to respond to that demand from their patrons.\textsuperscript{24} HEFCE footed the bill; the Associated Press provided the content in a big deal package with a pricing model that soon became a matter of practice and remains so twenty years later.\textsuperscript{25}

\textsuperscript{17} Poynder, \textit{supra} note 3.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
When the government of the U.K. stopped paying, library consortia filled the licensee role, “a trend led by the U.S. based, OhioLink, the Ontario Academic Research Libraries (OARL) consortium in Canada, and the PICA group of universities in Germany and the Netherlands. In Great Britain, Research Libraries UK (RLUK) later came to play a similar consortial role.”

Vendors based the price on the historical print subscriptions of the licensing institution with an electronic premium between 5% and 15% and an annual fee increase of approximately 6%. The big deal became a global standard, with global impact and no easy alternative. The big deal has since been characterized as a way to manage a crisis which now must itself be managed as a crisis.

With the big deal and electronic access, non-disclosure clauses entered the scene as a way to have more control over negotiations. Consortia and volume spending improved libraries’ negotiation position. Vendors needed more than a stopgap for the serials crisis; they needed to make profit. Enter non-disclosure clauses used to facilitate price discrimination based on what vendors believe is the institution’s willingness to pay, not on the average cost to the vendor to produce and provide the product. “Many contracts [for big deals] include explicit ‘nondisclosure clauses’ that forbid the library to release any information about contractual

26 Id.
27 Id.
28 Id.
29 Bergstrom, supra note 1.
30 Poynder, supra note 3
32 See Bergstrom, supra note 1; Bergstrom & Bergstrom, supra note 10.
terms.”33 With non-disclosure clauses, librarians have difficulty challenging price discrimination.34

The big deal crisis resulted from the inflexible packaging arrangements for what had become an essential product paired with information asymmetry in negotiations.35 The information asymmetry regarding prices requires librarians to involve themselves in difficult investigative work to compare prices.36 Pricing of big deals evolved into vendors charging as much as they possibly could, instead of what would appear to be a reasonable price based on comparisons of deals for peer institutions.37 This model has become unsustainable. The unraveling has already begun: A series of big deal cancellations and tough-minded renegotiations have been occurring since the global economic crisis.38

ii. A big deal that’s not a big deal

Meanwhile in the legal subscription database market, LexisNexis and Westlaw moved to address some of the same problems faced by those dealing with the serials crisis: how to adapt to the demand for electronic access and how to produce a pricing and packaging model with profit-maximizing effect. They produced similar solutions. As of 2012, LexisNexis and Westlaw controlled 90% of the market on legal publishing.39 This reality, however, has a much longer history than the big deal.40 The first customer base for computer-assisted legal research wanted

33 Bergstrom, supra note 1.
34 Id.; Bergstrom & Bergstrom, supra note 10; Ash, supra note 31; Poynder, supra note 3; Darton, supra note 8.
35 Poynder, supra note 3.
36 Bergstrom, supra note 1; see infra A single friend in the business section, pp. 29-30; Moore & Duggan, supra note 1.
37 Poynder, supra note 3.
38 Poynder, supra note 3; Bergstrom, supra note 1.
39 Marks, supra note 8.
40 Id.
the facility of electronic searching to make the unique tasks of legal research more efficient. This was in the late ‘60s and early ‘70s. Westlaw and LexisNexis have competed to produce better quality electronic databases ever since, with some minor waves made by Google Scholar, Bloomberg, Proquest, and HeinOnline. But Westlaw and LexisNexis remain seemingly indispensable. Since 1995, Westlaw and LexisNexis have grown in service but not in customers. Since 2010, these two dominant companies have attempted to fulfill a service vision of becoming more like Google. Bloomberg and HeinOnline have also since then garnered support from the librarian community for their unique products and value-added features, distinguishing them from Westlaw and LexisNexis. Thus, the legal publishing market has two big players and a handful of weak but innovative competitors. These players depend on providing their value-added materials in the most comprehensive, one-stop fashion possible.

Not surprisingly, Westlaw and LexisNexis have pricing models that mimic big deal pricing in volume spending and print substitution aspects. These are companies with dominant market shares who have the goal of serving as one-stop shops for legal research providing the best innovations in electronic database utility available. To achieve the objective of easily connecting interdependent legal materials and updating tools, the legal database subscription market has created its very own kind of big deal with similar consequences. Westlaw, in

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41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
50 Marks, *supra* note 8.
particular, is the company’s direct response to the shift in demand from print to electronic; it is
the effectuation of the business necessity of evolving with demand. These facts make average
cost pricing less likely, although there seems to be more flexibility in constructing bundles which
optimally serve the institutional licensee at the lowest price. This latter fact is offset by the
reality that the cases and statutes with value-added features have become essential tools in legal
research. A librarian can try to do more with less by trimming some database streams to
capture a less expensive subscription price, but, ultimately, a librarian must provide adequate
access to the law to patrons, namely students who need to learn how to pick the right jurisdiction,
to update case law and statutes, and to conduct legislative history research. Much of what
Westlaw and LexisNexis provide cannot simply be cut away without sacrificing access to critical
materials which contextualize or update other materials. It is not so much about waste, as with
big deals, but about limited competition. More than in the big deal arena, price discrimination
facilitated by non-disclosure clauses evolved from a market defined by limited competition, new
electronic access demands, and aggregated resource packaging, rather than a spiraling print
serials crisis. The story of the legal subscription database market is the story of an evolving
market strategy and the essentialization of a particular kind of access and legal research
process.

In the academic library and academic law library, then, one would expect for some trends
to consistently show up and to have similar effects. Non-disclosure clauses appear, often in
boilerplate language, in both worlds. Both sets of vendors seem to have the same motivations and justifications for these clauses. Libraries, legal and academic, seem to have similar responses, acquiesce similarly, and actively work around these clauses. The game seems clearly rigged while non-disclosure clauses exacerbate issues of price discrimination and handicap libraries negotiating for the best value, not just for the best cost-per-unit deal.

C. Fighting the beast

i. Brave academics

This struggle between pricing for profit-maximization and making the most of collection development dollars has provoked a number of responses. Alternative pricing and packaging models are suggested. Efforts to reveal pricing, within and against legal requirements, in a systematic way have emerged. Firm stances against non-disclosure clauses are taken. Illustratively, Pricing Electronic Access to Knowledge (PEAK), a joint project by Elsevier and the University of Michigan begun in 1997, experimented with pricing and packaging models. The big deal started as a British dependent on national government funding. Because the U.S. market consists of universities and colleges which operate with much more financial and

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60 Davis, supra note 1; see infra A single friend in the business, pp. 29-30; see infra Vendor statements, pp. 28-29.
61 Bergstrom, supra note 1; Davis, supra note 1; see infra Anonymous survey, p. 23.
62 Bergstrom, supra note 1; Moore & Duggan, supra note 1; Cornell University, supra note 6.
63 Duggan & Moore, supra note 1; Liane Taylor & Eugenia Beh, Model Licenses and License Templates: Present and Future, 66 Serials Librarian 92–95 (2014); Bergstrom & Bergstrom, supra note 10; Darton, supra note 8; Poynder, supra note 3.
64 Plaintiff’s Proposed Findings of Fact, Conclusions of Law, and Permanent Injunction, Elsevier, Inc. v. Washington State University, No. 09-2-00137-3 (Wash. Super. Ct., filed Jun. 11, 2009); Bergstrom, supra note 1; Bergstrom, supra note 3; American Association of Law Libraries, supra note 16; Svengalis, supra note 16 (2016).
65 Dartmouth College Library, supra note 6; Cornell University Library, supra note 6.
67 Poynder, supra note 3.
structural decentralization, the *big deal* was not the only option considered in the late nineties for the U.S. market.68 Enter PEAK: “a field experiment in which institutions operate [or] participate [in] different price/product models.”69 PEAK tested traditional subscription pricing (unlimited access to Elsevier’s print journal titles in electronic format), per article-per individual pricing, and generalized subscription pricing (bundling for unlimited access to *specific articles* for a license site).70 Eventually, pricing on a bundled resource database became the norm, whether called a *big deal* or Westlaw/LexisNexis.71

Since then other efforts have emerged to manage *big deal* and Westlaw/LexisNexis pricing and packaging. Ted Bergstrom, professor of economics at the University of California, Santa Barbara, calls for librarians to demand average-cost pricing for site licenses or to insist on individual subscriptions in order to force the market to produce average-cost pricing.72 E-pricing, as opposed to pricing based on historical print subscription spending, has been suggested and rejected.73 Rick Anderson, librarian at the University of Utah, commented on Liblicense that: “[T]he unit price gains of the *big deal* [emphasis added] . . . representing a correction to the pricing excesses of an earlier era . . . constitute a new normal, and not some special pricing that only obtains if the deal remains intact.”74 This means that e-pricing based on article-by-article pricing or title-by-title pricing will not disrupt the pricing already in place because those articles and titles will simply be prorated on the basis of the *big deal* price.75 Currently, the practice is not even to prorate when an effort to unbundle is undertaken but to price the journals deemed

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69 Id.
70 Id.
71 Poynder, *supra* note 3; see Arewa, *supra* note 49; Marks, *supra* note 8.
73 Poynder, *supra* note 3.
74 Id.
75 See id.
valuable to approximate the big deal price. In other words, a library can choose to cut a bunch of never-used journals from their bundle but still end up paying the same. The benefit in e-pricing would be the ability to mix and match, to build a collection from the total resources available that best matches the library’s particular mission and patron base. This solution has not gained traction in part because it means lower revenues for vendors.

Other price-based solutions to this unsustainable way of doing business include threatening to cancel and/or striking hard bargains. For example, in 2003, the California Digital Library, on behalf of the nine campuses of the University of California system, “paid 9% less in 2004 than in 2003 and agreed to annual price increases well below Elsevier’s usual 5%.” In 2008, the California Digital Library bargained for lower price increases than those available through Elsevier’s standard contracts. In 2009, Research Libraries UK (RLUK), whose membership consists of 30 major institutions, including Oxford, Cambridge, and Manchester universities, Imperial College, the London School of Economics, and The British Library, declined to renew Elsevier and Wiley-Blackwell licenses unless a 15% reduction in cost was achieved. No one knows the precise outcome of these negotiations, but many suspect that RLUK successfully negotiated a lower price for their licenses with Elsevier and Wiley-Blackwell, even if not the 15% reduction RLUK hoped for. In its 2010 Study of Subscription Prices for Scholarly Society Journals, Allen Press reported that Georgia Tech, the University of California, San Francisco, Oregon State University, and the University of Nevada, Las Vegas made significant subscription

76 Darton, supra note 8.
77 See Poynder, supra note 3.
78 Id.
79 Bergstrom, supra note 1; Poynder, supra note 3.
80 Bergstrom & Bergstrom, supra note 10.
81 Id.; Poynder, supra note 3.
82 Id.; Poynder, supra note 3.
83 Id.; Poynder, supra note 3.
cancellations.84 “In its 2011 Library Collections and Budgeting Trends Survey, EBSCO Information Services reported that . . . nearly 40% of respondents . . . were likely to break up epackages in favor of individually renewing only those ejournals most frequently accessed. That is, they expected not to renew Big Deals [emphasis added].”85 In January 2010, the University of Washington commented on the struggle to delink important titles from unimportant ones because of big deals; it subsequently lost access to 1,200 Springer journal titles due to lack of funding for its big deal with that vendor.86 The big deal is dying because pricing models currently in effect, and how they are exacerbated by non-disclosure clauses, make paying for big deals unsustainable.87

Many others have called for collective action in the form of posting contracts (including pricing and packaging structures) online.88 A version of this was done by nine South Carolina colleges.89 These nine posted an itemized spending report for the benefit of taxpayers.90 The South Carolina legislature mandated that these nine produce spending reports which “include details on sensitive areas like athletic recruitment, subscriptions, and consulting contracts. The Clemson University’s library, for instance, spent $185,000 in January with Thomas Scientific and $43,000 on ProQuest.”91 Bergstrom, an economics scholar, Philip Davis, an information scholar, and Liane Taylor, an academic librarian, among others, have also advocated for posting

84 Poynder, supra note 3.
85 Id.
86 Id.
87 Id.
88 Taylor & Beh, supra note 16.
90 Id.
91 Id.
contracts online.92 Since 2004, this itemized disclosure solution meant making contracts and their terms publicly accessible online so they could be more easily compared.93

The similar but now dated use of model licenses seems to have had little effect.94 “Five model licenses or model license depositories exist online: LIBLICENSE, the NorthEast Research Libraries’ (NERL) Model License Agreement, the Single Academic Institution License from LicensingModels.org, the California Digital Libraries Standard License Agreement, and the Florida Virtual Campus Guidelines for E-Resource License Agreements. LIBLICENSE was created in 1997 by Ann Okerson and was originally hosted by NERL.”95 Despite these resources, librarians still come away with pricing and packing structures that do not seem obviously justifiable.96

In 2009, the University of Georgia paid about $1.9 million, and the University of Colorado paid about $1.7 million, for the Elsevier Freedom package. By comparison, the University of Wisconsin paid about $1.2 million and the University of Texas about $1.5 million. Wisconsin and Texas have much larger enrollments and produce about twice as many PhDs, but were able to bargain for lower prices than Georgia and Colorado. Similar anomalies are found for other publishers. The University of Virginia pays about $450,000 for its Springer package, whereas Dartmouth pays $480,000, despite the fact that Virginia’s enrollment and number of PhDs are about four times those of Dartmouth. The

92 Bergstrom, supra note 3; Davis, supra note 7 Taylor & Beh, supra note 16.
93 Davis, supra note 92.
94 See Bergstrom, supra note 1.
95 Taylor & Beh, supra note 16.
96 Bergstrom, supra note 1.
University of Arizona pays $108,000 for the Sage package whereas Brigham Young University pays $185,000, although Arizona has a larger enrollment than Brigham Young and produces six times as many PhDs. The University of Kentucky paid about $490,000 and the University of Oklahoma about $500,000 for the Wiley bundle. The University of Illinois and University of California, Los Angeles have enrollments that are nearly twice as large and produce three times as many PhDs, but pay substantially less than Kentucky and Oklahoma for the same bundle.”

Other transparency solutions include public records requests campaigns affecting public universities and the use of a public records request clause to potentially disable a non-disclosure clause. Non-disclosure clauses are not always lightly disregarded, although there is talk among librarians that disregarding non-disclosure clauses happens often. Getting around these non-disclosure clauses legally almost always requires not agreeing to them in the first place or being able to respond to a public records request. Bergstrom has made a decades-long effort to correct the pricing information asymmetry in negotiations for academic journal licensing agreements. Public records request campaigns can lead to disclosure of these contracts, with their pricing and packaging terms unredacted. A number of universities have used this knowledge to develop successful policies against non-disclosure clauses, rejecting any new or renewal subscription licenses which include non-disclosure clauses.

97 Id.
98 See infra Gaining perspective interview, pp. 30-31; Bergstrom, supra note 1.
99 Davis, supra note 2.
100 See Association of Research Libraries, supra note 3.
101 Bergstrom, supra note 3.
102 See Association of Research Libraries, supra note 3; Darton, supra note 8.
103 Dartmouth College Library, supra note 6; Cornell University Library, supra note 6.
Some have called for a restructuring of the entire market by supporting open access initiatives. The concept of open access includes a variety of publishing and pricing structures. But in essence, open access that serves to correct unsustainable pricing includes “the free, immediate, online availability of research articles coupled with the rights to use these articles fully in the digital environment.” In the academic journal market, the idea to make knowledge free to the end-user has several complications. Many open access initiatives use author-payment schemes. Universities and scholar-authors cannot reasonably pay upfront for publication. There is also not a mechanism for controlling prices at this end the market either.

Shared E-Resources Understanding (SERU) supported by the National Information Standards Organization has a decade-long history of acting as a replacement for traditional database subscription licenses. Some librarians see SERU as a way to return to the print environment where every product has an average-cost price and everyone pays the same said price. “SERU is a document of understanding between libraries and publishers that avoids the time, effort, and expense of license negotiation, relying instead on a purchase order and copyright law. The purchase orders spell out the exact content to be purchased, price to be

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104 Open Access, SPARC https://sparcopen.org/openaccess/, (last visited Apr. 24, 2017); Open Access, Elsevier https://www.elsevier.com/about/open-science/open-access (last visited Apr. 24, 2017); see Arewa, supra note 49.
105 See SPARC, supra note 104; Elsevier, supra note 104.
106 SPARC, supra note 104.
107 See Elsevier, supra note 104.
108 See Poynder, supra note 3; Elsevier, supra note 104.
109 See Poynder, supra note 3; infra Gaining perspective interview, pp. 30-31;
110 See Poynder, supra note 3.
112 Id.
113 Id.
paid, time period of access covered, and number of users for the e-resource provided by the publisher to the library.114

ii. Law librarians’ unique struggles

The reasons these solutions do not hold in the legal publishing world is different. While Bergstrom’s call for individual subscriptions might work in theory for academic libraries with big deal problems, it relies on the logic of parceling out big deals for certain titles.115 Materials from Westlaw and LexisNexis can in theory be parceled out but with unacceptable access restrictions and research inefficiencies for patrons.116 In the legal publishing market, one cannot request pricing on a case-by-case model or even a jurisdiction-by-jurisdiction model without sacrificing a great deal of legal knowledge which is necessary to teach due diligence, if not to do due diligence.117 For legal materials, taking hard bargaining stances or threatening to cancel are not typically options because of the essential nature of certain legal materials and the support the value-added features give to research methods which are the measure of due diligence.118

For academic law libraries, much of this work of disclosure and modeling has been in the form of publications constructed from surveys.119 These are the no-longer-published AALL Price Index for Legal Publications and Svengalis’s Legal Information Buyer’s Guide & Reference Manual.120 The AALL Price Index for Legal Publications is a table-based report detailing out the mean cost for various legal publications and the percentage increase over previous years based

114 Id.
115 See Bergstrom & Bergstrom, supra note 10.
116 See Marks, supra note 8; Arewa, supra note 49.
117 See Marks, supra note 8; Arewa, supra note 49.
118 See Marks, supra note 8; Arewa, supra note 49.
119 See American Association of Law Libraries, supra note 16; Svengalis, supra note 16.
120 See American Association of Law Libraries, supra note 16; Svengalis, supra note 16.
on vendors’ voluntary participation in a survey.\textsuperscript{121} The no-longer-published \textit{AALL Price Index for Legal Publications} includes a section on electronic database subscriptions.\textsuperscript{122} The index’s description for the electronic pricing information specifies: “Electronic pricing is based on electronic-only subscriptions. When multiple pricing options were provided, the lowest cost was used for each title.”\textsuperscript{123} Svengalis’s work has sample costs for both LexisNexis and Westlaw and for all computer-assisted legal research vendors.\textsuperscript{124} However, these options often keep the silence intact for pricing and packaging related to LexisNexis and Westlaw because they rely on voluntary disclosures by vendors.\textsuperscript{125}

The equivalent of open access in the legal publishing market is exemplified by the Uniform Electronic Legal Materials Act (UELMA) and vendor-neutral citation methods.\textsuperscript{126} UELMA, for example, deals with establishing standards for the authenticity, preservation, and authority of legal materials that have been made available online, increasingly in order to provide free access to the public.\textsuperscript{127} For the legal publishing market, the free access to end-users initiatives are complicated by the law itself.\textsuperscript{128} Westlaw and LexisNexis provide value-added service, not just content.\textsuperscript{129} Vendor-neutral citations work well to make the law more accessible and usable for pro se patrons for example, but lawyers and law students still need to do due diligence that meets professional ethics standards.\textsuperscript{130} That is often not possible without using

\textsuperscript{121} American Association of Law Libraries, \textit{supra} note 16.
\textsuperscript{122} \textit{Id}.
\textsuperscript{123} \textit{Id}.
\textsuperscript{124} Svengalis, \textit{supra} note 16.
\textsuperscript{125} \textit{S}ee American Association of Law Libraries, \textit{supra} note 16; Svengalis, \textit{supra} note 16; \textit{infra} A single friend in the business section, pp. 29-30.
\textsuperscript{127} \textit{Id}.
\textsuperscript{128} \textit{S}ee Greenleaf, \textit{supra} note 126; Marks, \textit{supra} note 8; Arewa, \textit{supra} note 49.
\textsuperscript{129} \textit{S}ee Marks, \textit{supra} note 8; Arewa, \textit{supra} note 49.
\textsuperscript{130} \textit{S}ee Marks, \textit{supra} note 8; Arewa, \textit{supra} note 49.
traditional research techniques embodied in the Keycite and Sherpardizing systems. Also, information systems built for efficiency are not the purview of governments, making UELMA a great effort at reclaiming legal publications for the democratic public, but a poor substitute for time-constrained case law searching, precedent updating, and secondary-primary legal resource linking. What UELMA and neutral citation systems do is increase competition in the legal publishing market for the content. Now the content is not inextricably linked to the value-added features as it once was.

Framed by the current database subscription pricing crisis and the exacerbation of that crisis by information asymmetry, this literature review motivated the following original research. It produced questions about why librarians acquiesce to non-disclosure clauses, why vendors think they are necessary although it seems much more business savvy to simply explain the rational basis for prices, and why the fragmented and oscillating efforts to correct the pricing crisis and to work around non-disclosure clauses have largely failed to accomplish these goals. The next section explains the steps taken to explore these questions.

**Methodology:**

**A. Initial inquiry**

The aim of the original research for this article was to detail explicitly the effects of non-disclosure clauses on the relationships between vendors and law librarians, and more specifically on actual negotiation strategies for each side. An effort was made to incorporate both vendor and

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131 See Marks, supra note 8; Arewa, supra note 49.
132 See Greenleaf, supra note 126; Marks, supra note 8; Arewa, supra note 49.
133 See Greenleaf, supra note 126; Arewa, supra note 49.
law librarian perspectives. The first phase of the original research began with an inquiry into the form of non-disclosure clauses currently in effect. One-hundred and fifty law libraries were contacted and asked to contribute a copy of the non-disclosure clauses currently in effect for subscription database license agreements to which they are a party. Law librarians were also offered the choice to contribute to the conversation by drafting a non-disclosure clause representative of the many they have likely seen in their career. Sixteen law libraries responded with either copies of non-disclosure clauses currently in effect or an example drafted by a law librarian as representative of a typical non-disclosure clause. This step was taken to see what the actual end results of negotiations have been and to get a sense for how many libraries end up signing license agreements with non-disclosure clauses. See Appendix A for a copy of the e-mail sent.

B. Anonymous survey

An anonymous survey was then designed for law librarians through the use of SurveyMonkey. SurveyMonkey structured the anonymity by allowing for the use of a URL linking a responder directly to the survey. The URL was sent via e-mail to law librarians selected to participate. The survey targeted law librarians whose position title or description in their law library’s staff directory indicated that they had primary responsibility for electronic resources. If no such person appeared to have primary responsibility for electronic resources, the survey was sent to the law library director.

Seventy-five law librarians were contacted; twelve responded to the survey. A sixteen-percent response rate is rather disappointing. However, it should also be remarked that, as shown in Appendix B where the reader will find a copy of the questions asked, some librarians may
have declined to respond because of the sensitive nature of the topic. Many law librarians are well-versed in contract law. Some may have felt that their obligations under the non-disclosure clauses currently governing their relationship with certain vendors prohibited their participation. Some may have felt that talking, even anonymously, about negotiation strategies used to work around non-disclosure clauses would impair their working relationships and/or their negotiation position. Those who did not analyze the questions as working against their established relationships or contractual obligations with subscription database vendors would likely have felt freer to respond.

This reality could have introduced a number of biases into the results. Those who felt freer to respond might be more likely to have resisted non-disclosure clauses in the past. They also may overrepresent law librarians who have successfully resisted non-disclosure clauses. They may overrepresent law librarians who are stronger negotiators or less risk-adverse. Those with this history may also be generally less convinced by a vendor’s business rationale or justification for the use of non-disclosure clauses. All that said, the results show great variation in opinion, perspective, and strategy among law librarians as individuals wrestling with negotiations and the practice of including non-disclosure clauses in license agreements. This diversity along with the low response rate make this survey better as an illustration of the range of reflections and approaches taken by law librarians in dealing with vendors than as a representative sample of what law librarians think generally.

C. Vendor perspective

In order to gain the vendors’ perspective, e-mails were sent requesting assistance from the University of Washington Gallagher Law Library’s vendor representatives. The e-mail
explained that this research concerns the business rationale for and perceived effect on pricing of non-disclosure clauses. The e-mail expressed an interest in presenting a balanced perspective and the need to understand the vendor’s position in a hypothetical but realistic negotiation. The e-mail did not specify how the information would be gathered, leaving it up to the vendor’s representative to respond before such discussion about the form and method of information collection began. This was to encourage vendors’ representatives to propose whatever form or method of information giving they preferred. A copy of this e-mail is in Appendix A.

Three of the four vendor representatives initially approached remained silent. The fourth was willing to help but was subsequently unavailable. Westlaw, LexisNexis, and Bloomberg were approached a second time through a contact at the University of Washington School of Law. LexisNexis failed to respond again and was not contacted again. Westlaw declined politely to discuss non-disclosure clauses because of the relationship those clauses have with pricing. Pricing “is highly regulated and because of that we do not discuss pricing or contract negotiation policies outside the company.” A Bloomberg representative kindly offered a brief interview provided this article makes note of the fact that his opinions do not represent the opinions or policies of Bloomberg or any other institutional entity. HeinOnline contributed a couple of written statements regarding their firm policy against the use of non-disclosure clauses.

D. Reconciling discrepancies and contextualization

The Collection Analysis and Strategy (CAS) Department at the University of Washington was contacted for an interview to help contextualize the original research results and some of the conflicting information found in the literature review research. An hour and a half unstructured interview was conducted with three members of the CAS team responsible for the negotiation of
some of the University of Washington Libraries’ electronic resource contracts. This team does not represent the University of Washington School of Law in negotiations for legal subscription database licenses. However, they were able to offer valuable perspective on standards of practice, the prioritization for removal of non-disclosure clauses from license agreements, and how non-disclosure clauses are situated as a bargaining chip against other contract terms.

Research:

A. Form of non-disclosure clauses

From the inquiry about the form of non-disclosure clauses, the research found that these clauses typically include boilerplate language to the effect of prohibiting the disclosure of any terms or conditions of the agreement. Some also prohibit disclosing any information regarding negotiations. In addition to shutting down straight-forward disclosures, some non-disclosure clauses require silence regarding anything concerning terms, conditions, or negotiations. In other words, for those who are risk-averse, it is a fair interpretation that a librarian agreeing to such a clause would not be able to talk about negotiation strategies or philosophies or hint at the effects of, perspectives on, or any information which in any way relates to the terms and conditions of the agreement. Pricing is explicitly defined as a term of the agreement which should be considered confidential information and proprietary. Many of these non-disclosure clauses also require that if information is disclosed in an effort to comply with the law or legal or administrative process, the disclosing party should inform the other party of the disclosure. The disclosing party should also inform the receiving party of the confidential nature of the information. All information not formally requested should be redacted. The only saving grace for these non-disclosure clauses is that they allow one to respond to legal or administrative
process. Interestingly, none of these non-disclosure clauses seemed to include the public records request qualification so often seen attached to non-disclosure clauses for other academic libraries. Although, this may be implied by the allowance for responding appropriately to legal obligations.

B. Anonymous survey – twelve individuals

The anonymous survey conducted via SurveyMonkey produced results that did not reveal any dominate trends. Law librarians were first asked if their library had ever refused to accept a non-disclosure clause as part of a database license agreement with Westlaw, LexisNexis, Proquest, or Bloomberg. Seven law librarians (58%) replied that they had not ever refused to accept a non-disclosure clause as part of such an agreement with any of the named vendors. One of those seven added that he or she had to have it altered, but did not refuse to accept it. Five law librarians (42%) replied that they had refused to accept a non-disclosure clause as part of such an agreement.

Next, the five law librarians who said they had refused to accept a non-disclosure clause were asked if they had successfully kept the non-disclosure clause out of the agreement. Two replied, “No.” Two replied, “Yes.” The last of the five added, “We have been able to add a carve-out for applicable laws and regulation that apply to us as a public institution.”

A range of responses surfaced when asked, if their library accepted non-disclosure clauses as a matter of practice, whether this practice exists:

1) because of not wanting to make concessions
2) because of no public records act or other legal requirement making the NDC unworkable in the long term

3) because of no peer library having found a way around them

4) because NDCs make good business sense for the vendors and healthy vendors mean better resources for the library in the long term or

5) other, please specify

Three responded that no public records act or other legal requirement is available to use as a workaround. Two replied that they don’t have any examples of comparable libraries successfully rejecting non-disclosure clauses.

A total of eight, a strong majority, selected “other” as their response and provided a great deal of perceptive information. Please note, the survey was designed to allow respondents to select as many answers to this question as applied. Therefore, some of the comments are elaborations on the answers already provided. Nonetheless, all but one respondent answered this question. One respondent touched on the administrative churn related to negotiating these agreements: “We are a lean staff and fighting over these clauses takes time. We often just sign to keep the process moving.” Another responded positively, “most don't even ask us for them anymore.” Another librarian had this to say: “It's quite simple: I don't respect that term of the agreement.” Another said succinctly, “We do not sigh NDCs.” Another with a clear sense of the stakes involved and the balancing of interests which result from negotiations said: “We are trying to move away from signing confidentiality clause as a policy. it has worked with many small publishers, but large publishers do not allow that and we could not walk out, because most of the time the content is not available elsewhere and our institution does not require us to not sign
confidentiality clause. We are a private university law school.” A law librarian with a broad perspective on the issues stated: “I have found they protect both parties - the vendor and the library, with adjusts in the contract -- per the university.” One librarian contributed an assessment of how terms are prioritized in negotiations: “NDCs have no bearing on our purchasing decisions - we are more concerned with negotiating cost than negotiating NDCs.” Finally, another said simply, “See above.” This librarian was able to account for state public records acts by qualifying the non-disclosure clause such that the non-disclosure clause would not operate against public records requests.

When asked what level of success different strategies for rejecting non-disclosure agreements achieved, law librarians were asked to rate the levels of success according to the following descriptors:

1) This strategy was successful and required no further negotiation/concessions
2) This strategy was successful but required extensive negotiation/concessions
3) This strategy was not successful
4) other, please specify.

With regard to using the strategy of notifying the vendor that a public records act makes non-disclosure clauses ineffective, two librarians said that this strategy was successful with no further negotiation/concessions. Two librarians selected “other” and offered the following explanations. First, “[w]e are a private law school.” The implication is that this strategy is not available to them. The second librarian offering an “other” response said: “Add language as above that makes the NDC clearly ineffective.”
With regard to using the strategy of rejecting a non-disclosure clause on the basis of university/law school policy, two librarians responded that this strategy led to success without further negotiation/concessions. One confirmed that, although eventually successful, this strategy required extensive negotiations/concessions. Two stated that this strategy did not end in successful rejection of the non-disclosure clause.

With regard to using the strategy of rejecting a non-disclosure clause on the basis of library administration policy, two librarians testified that this strategy was not successful. One librarian contributed this “other” response: “It was successful with some small publishers and had to do some negotiation.”

With regard to using the strategy of rejecting a non-disclosure clause on the basis that such clauses unfairly disadvantage libraries and produce market inefficiencies, one librarian responded that this strategy was not successful. The eleven other respondents skipped this question.

Next, law librarians responding to this survey were asked to name which vendors do not ask for non-disclosure clauses. Four librarians specified that LexisNexis does not ask them to sign agreements with non-disclosure clauses. Three librarians said this of Westlaw. Five librarians said this of Bloomberg. All six librarians answering this question said that Proquest does not ask for non-disclosure clauses.

To gauge how persuasive some of the reasons purportedly justifying non-disclosure clauses are, the final question asked law librarians to select any of the following which supported the claim that non-disclosure clauses make good business sense. The reasons given were:
1) All libraries, their missions and their patron bases, are unique and require unique database subscription deals

2) NDCs allow better deals for less well funded libraries by keeping better funded libraries in a pricing range which helps compensate

3) other, please specify.

Two librarians concluded that all libraries require unique database subscription deals. One librarian concluded that less well funded libraries are able to get better deals because non-disclosure clauses help vendors price discriminate in the smaller libraries’ favor. Four librarians contributed “other” responses: 1) “Not sure.”; 2) “Each library is responsible for its own budget and special accommodations can assist those in difficult financial situations.”; 3) “I don't believe NDCs are necessary.”; and 4) “Non-disclosure clauses are irrelevant to us because of being part of a large public institution. We try to get the very best prices we can without ever thinking about NDCs. The small number of law publishers and vendors and the limitations of budget for us make negotiation and discounts almost moot. They have us over a barrel any way you look at it.”

C. Vendor statements

LexisNexis, Westlaw, Proquest, Bloomberg, and HeinOnline representatives were asked to comment on the use and utility of non-disclosure clauses. LexisNexis failed to respond to all inquiries. Westlaw responded after several attempts with a politely worded e-mail. The boilerplate language for non-disclosure clauses for Westlaw claim that pricing and packaging terms fall within the legal definition of proprietary information. In their e-mail response to the inquiry about non-disclosure clauses and their business rationale, Westlaw predictably declined to comment on pricing, non-disclosure clauses, and negotiation policies. Proquest engaged in the
conversation but, unfortunately, the representative became unavailable before sufficient information could be gathered. Bloomberg’s representative contributed to the conversation most extensively and that interview research, therefore, merits its own section below. HeinOnline responded succinctly but helpfully via e-mail: “Combined, [I and my colleague] have signed hundreds of agreements. . . . Hein-Library: These would be HeinOnline license agreements and borrowing agreements. Never have we required a non-disclosure clause since we believe in doing business openly and transparently. . . . While other vendors typically include them in their agreements with libraries, it’s typically to prevent libraries from talking to each other and determining how much above, or below the market price each is paying. Our policy of openness and transparency doesn’t require non-disclosures from our side.”

D. A single friend in the business

A Bloomberg representative volunteered to speak on non-disclosure clauses, their use, and the justifications for them. This representative only asked that this article make note of the fact that he has served both on the vendor- and the library-side of subscription database licensing agreements. He also asked that this article include the disclaimer that he does not speak for Bloomberg or in the capacity of a Bloomberg representative. He communicated his hope that readers consider his comments as personal opinions.

This librarian-turned-vendor representative expressed general animosity toward non-disclosure clauses. However, he also confirmed that publishers use them for very specific reasons which help publishers meet the end goal of maximizing profits. He communicated that the main purpose of non-disclosure clauses is to increase the negotiation power of vendors. They are meant to control information about pricing and packaging in a way that creates information
asymmetry. He confirmed that non-disclosure clauses sometimes have the additional purpose of keeping negotiation costs reasonable. Longer negotiations cost money - publishers are committed to maximizing their revenue. He did also express that if librarians generally knew the terms and pricing of different contracts the world of information about legal publishing would become more confusing yet. He explained that Bloomberg allows for significant slicing of materials such that each library can package their subscription in very specific, concrete ways to meet their individualized missions and subject focus. He shared that the non-disclosure clause used by Bloomberg is boilerplate and is not customized from library-to-library. When asked about the effects of non-disclosure clauses and profit-maximization as the penultimate end goal in library-vendor relationships, he expressed the thought that the amount of redlining in negotiations with libraries is ridiculous. The implication might be that there is ample back-and-forth. Ultimately, he expressed the opinion that non-disclosure clauses are largely ineffective for concealing pricing. He listed several of the commonly known collection development publications which reveal pricing either through vendor or library surveys. He communicated that Bloomberg does typically participate in surveys, but did not wish to speak disparagingly about the practices of other vendors who are known for not participating in these surveys. He also confirmed that publishers generally know that librarians know what they are not supposed to know (i.e. if librarians do their homework, and they do, they have a rough idea of whether they are getting a good or bad price). He shared that non-disclosure clauses operate more effectively to hide packaging models, which is also useful for publishers to keep secret.

E. Gaining perspective interview
Because the literature review showed such a good-guy-bad-buy dynamic and the original research showed individual law librarians and vendors taking a much more nuanced approach, this article incorporates information from an interview done for the purpose of gaining perspective and reconciling and contextualizing these findings. Three members of the team for the Collection Analysis and Strategy (CAS) Department at the University of Washington agreed to speak on vendor-library relationships and the role of non-disclosure clauses in defining those relationships. Please note that the following account of the 90-minute conversation with the CAS team represents the views of a team, not of individuals. As much as possible this synthesis comes from what appeared to be shared opinions and general practices. This synthesis is of course open to the possibility of misinterpretation on the part of the interviewer.

The CAS team shared that non-disclosure clauses appear often and that CAS prioritizes pushing back whenever a non-disclosure clause shows up in a license agreement. Typically, when they do push back, the end result is a qualification of the non-disclosure clause to account for Washington State public records law. The effort to try to avoid non-disclosure clauses is considered alongside what it takes to deal with more problematic clauses. The CAS team specified that choice of law/venue clauses and indemnity clauses put the University of Washington at risk. Getting rid of those types of clauses is prioritized over getting rid of non-disclosure clauses. There is generally no panic regarding non-disclosure clauses; they are avoided if possible and respect for state law is always accounted for. Although it would be better to have a world without non-disclosure clauses, the CAS team knows the pricing for certain publishers for several peer institutions because public records campaigns have improved the information environment. The CAS team expressed an interest in equalizing the playing field by eliminating non-disclosure clauses. The CAS team also shared that vendors do seem committed
to using non-disclosure clauses; vendors generally do not give in to a request to have the non-disclosure clause removed. Vendors do, however, accommodate a public records request qualification. Ultimately, the CAS team expressed that non-disclosure clauses cause annoyance, awkwardness, and a little disbelief. The unspoken rationale for non-disclosure clauses is to allow vendors to price discriminate, although the CAS team confirmed that vendors do not openly confess this. Vendors rationalize non-disclosure clauses by claiming that they protect proprietary information. At this, the CAS team expressed disbelief that any proprietary information appears in the typical subscription database licensing agreement.

Discussion:

A. Strategies for getting around non-disclosure clauses and other unsustainables

i. Legislative mandates and mediation

One example of legislatures mandating disclosure comes from South Carolina as mentioned in the literature review. These efforts signify a public policy concern that non-disclosure clauses, specifically when used to protect pricing and packaging information, have a dimension of unfairness that is recognized by the democratic majority. Although contract law does not register the same indignation and non-disclosure clauses have a time-honored place as economic tools for protecting both proprietary information and information which otherwise provides a competitive advantage, legislatures should defend intellectual freedom, transparent government, and public tax dollars by prohibiting the use of non-disclosure clauses which protect pricing information. With a legislated prohibition against the use of such clauses, libraries which

134 Keller, supra note 89.
135 Keller, supra note 89; see Campbell, supra note 7.
136 Lipinski, supra note 59 at 427.
are part of a public university system will be better able to manage negotiations without spending a great deal of time and effort working around non-disclosure clauses. The legislature should act as an intermediary between vendors and publicly supported libraries so that libraries, legal and academic, can spend tax dollars responsibly and fully in view of the taxpayers.

This is the most promising avenue for correcting the information asymmetry involved in subscription database negotiations and for discouraging the use of non-disclosure clauses. This is evident from what it took for Bergstrom to successfully break down the barriers to pricing information for big deal licenses. Bergstrom had to rely on public records acts to get the information he needed to articulate the economic impact of big deal pricing because vendors so rarely disclose that information voluntarily and librarians are perpetually silenced.137 In short, the public must force the government to intercede through legislation explicitly prohibiting non-disclosure clauses relating to pricing information or making that pricing information disclosable through public records requests.

The legislature can claim prerogative for this kind of review based on the same kinds of concerns that brought about consumer protection laws: promoting fair dealing for efficient business transactions, preventing waste, and moderating the abusiveness inherent in business relationships in which one party holds the power. It behooves librarians to lobby for greater information to better protect tax revenue from waste and to better insulate the management of public goods from the encroachment of profit-maximizing objectives. Librarians should focus this effort on calling for the end of non-disclosure clauses which prevent pricing information from being discovered. Let the vendors keep non-disclosure clauses to protect information which

137 See Bergstrom, supra note 1.
they create and manage, not all information that could conceivably increase their profit or benefit them in negotiations. Vendors should only have the prerogative to use non-disclosure clauses to protect information that the democratic public recognizes as having been earned. At the very least, vendors should not have the prerogative to use non-disclosure clauses for the purpose of getting the upper hand in negotiations with a public entity.

ii. Public records acts qualifications

Another method that sets librarians up for a potential solution involves the use of public records acts qualifications. As public records acts caselaw has clarified the required treatment of contracts with public entities, particularly in the context of public university libraries, public records acts qualifications have redefined the relationship between librarians and vendors. A public records act qualification will specify that the library will abide by the non-disclosure clause only to the extent that state law, including the state public records act, allows. It is a way of carving out an exception which nullifies non-disclosure clauses in the case of a public records request for disclosure. From talking to CAS at the University of Washington and from the survey of law librarians, these safeguards against liability protect a library that receives a public records act request relating to the pricing or packaging terms of license agreements. They also send a message to the vendors that the democratic public does not consider this information protectable. While adding these qualifications to non-disclosure clauses is an indirect and insufficient solution on its own, it does put the vendor on notice and make complying with public records request much more efficient.

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139 See supra Gaining perspective interview, pp. 30-31.
140 Id.
iii. Cancellations and unbundling

The apocalyptic approach of cancelling or unbundling big deals seems to have gained favor. Without a means to advocate for average cost pricing and with pricing based on historical use plus whatever premium vendors think libraries can survive, one defeating choice left to librarians is to say no to the service in order to say no to the contract. Taking this action condemns both pricing and packaging structures that are unsustainable and non-disclosure clauses that create information asymmetry. A less extreme version of this is trimming down databases into more efficient, manageable, relevant combinations of resources. This is an option that vendors can offer more frequently to improve the relationship between vendors and librarians. Pricing has to have more to do with the cost of producing and providing the service plus a reasonable profit than charging just as much as the library can bear today.

The death of a business partner in negotiations not only means less revenue but can signal an unmanageable future crisis. It may be that vendors have a sufficiently strong advantage that the loss of one library, even a well-established research library, or consortium will not mean the immediate unviability of their pricing and packaging models. However, the longer this continues the more unsustainable it becomes and the more frequently librarians will feel that the only option available is to bargain for less and less and eventually nothing. That is bad business practice. It is in the interest of vendors to seriously consider the position of libraries, all libraries, not just public academic libraries.

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141 See Poynder, supra note 3; Bergstrom, supra note 1.
142 See Poynder, supra note 3; Bergstrom, supra note 1; Darton, supra note 8.
143 See Poynder, supra note 3; Bergstrom, supra note 1.
144 See Arewa, supra note; supra A single friend in the business, pp. 29-30.
Although the public, the government, and librarians have a role to play in demanding openness in pricing, vendors too have an interest in encouraging openness and transparency. Not simply for the sake of fairness or even to improve relationships, but to remain relevant for libraries, vendors should think long-term and strategically about the difference between profit-maximization contract-to-contract and profit-maximization across the life of a business. They cannot possibly believe that the mix of public and private funds available to academic libraries is endless. There does not appear to be a pricing solution to the bundled resource pricing crisis on the horizon. The solution to the current pricing crisis requires restructuring relationships, transparency in negotiations, and greater effort to understand one’s business partners.

What the big deal made obvious is that cost efficiency on an article unit basis improved a situation marked by unsustainable pricing increases.145 Now that librarians across a range of institutions and consortial arrangements must prioritize value, not just cost, vendors have a business incentive to respond appropriately to these evolving market conditions. In sum, there is more to this standoff between vendors and librarians than rhetoric and moral judgements. Also at stake are the business relationship consequences of lack of transparency and pricing based on relative advantage in negotiations. Vendors can argue that secrecy of pricing and packaging models increases efficiency by reducing the time and staff involved in negotiations and by allowing different libraries with different missions and patron bases more options without hurting the vendors’ profit objectives. However, this argument conceals a more basic fact: that similar libraries with similar packages are not charged similarly.146 This means that at some level the pricing and packaging models being offered to academic libraries are not justified by the

145 Poynder, supra note 3.
146 Bergstrom, supra note 1.
product’s value or the effort made to make it available or by differences between libraries.\footnote{See Bergstrom, supra note 1.} The image of big business with insufficient market competition charging more for a product than their product’s value justifies damages relationships. As much as it is in the interest of libraries that their business partners do well, so it is with vendors. At some point, vendors will have to start justifying prices at the negotiations stage, not with passably, theoretically logical arguments, but on the concrete basis of their product’s value and the effort put into making it available.

iv. Open access

Open access, as conceived in a way that makes it a partial remedy for unsustainable pricing structures, condemns using print subscription rules in a digital environment.\footnote{SPARC, supra note 104.} As discussed in the literature review, the big deal arose in the midst of a print serials crisis and was priced using a model that was meant to protect print subscription revenues.\footnote{See Poynder, supra note 3.} It is partially the fault of historical pricing that electronic database subscriptions do not adequately provide for unbundling.\footnote{Id.} The big deal is a system built on top of a vendor-library relationship dominated by print resources.\footnote{Id.} It is also a system without rules germane to its own structure.\footnote{SPARC, supra note 104.} Open access takes advantage of this reality and promotes a digital pricing scheme purposefully fitted to a digital world: free.\footnote{Id.} “Paying for access to journals makes sense in the world of print publishing, where providing articles to each reader requires the production of physical copies of articles, but in the online world, with distribution as wide as the internet's reach, it makes much
less sense.”  However, barriers exist which make open access an unfavorable option for some scholars. Open access has morphed to include versions in which the scholar pays to be published, called gold open access. Because open access sometimes does not do much more than transfer the cost of production from a publisher to a scholar, a systemic reform of unsustainable pricing models through an open access revolution is unlikely.

What is notable about open access is its philosophical underpinnings. Beyond the idea that legacy print publishers charge exorbitant prices for subscription database access, open access comes from a sentiment about what the public should own. Open access builds out from the idea that government funded research belongs to the public and, therefore, should be freely available to the public. Of course, it extends beyond this idea to embrace a form of access that includes free access based on the unreasonableness of charging anything at all. But at the heart of open access is an idea that comes from the same forces driving public records acts and contract disclosure legislation. That is, information and the knowledge which is its foundation does not belong to legacy print publishers. They were once paid for their contributions in making research more available, easier to find; now they are paid because the market allows them to demand the highest possible price, irrespective of a library’s ability to

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156 Elsevier, supra note 104.
157 Van Noorden, supra note 155.
158 See Arewa, supra note 49.
159 Id.
160 PLOS, supra note 154; SPARC, supra note 104.
162 PLOS, supra note 154; SPARC, supra note 104.
163 See Marks, supra note 8.
pay.\textsuperscript{164} This is the well from which springs the revolution; it just happens to have more effectiveness in the form of public records acts and legislature mandated disclosures.

\textbf{B. Considering these strategies for academic law libraries}

Law librarians have been surprisingly docile compared to academic librarians in the fight against non-disclosure clauses. Although we have lessons to learn from academic librarians and their efforts keep publishers honest, law librarians do have fewer effective tools.

\textit{i. Because the law says so}

The most effective strategy employed by academic librarians is indubitably public records disclosure qualifications. Even better are the opportunities provided by legislature mandated disclosures. These strategies allowed Bergstrom to uncover pricing models which could not be justified.\textsuperscript{165} It also made transparency the rule, rather than the exception in South Carolina.\textsuperscript{166} However, even if all law libraries knew what pricing pertained to their particular package of Westlaw or LexisNexis databases, Westlaw and LexisNexis still contribute indispensably to legal education. The real issue in academic legal publishing is lack of competition which, exacerbated by non-disclosure clauses, cannot be overcome without infrastructural change.\textsuperscript{167} Nonetheless, law libraries can still work actively against non-disclosure clauses as peer academic libraries have and, by doing so, knock down one pillar of the unsustainable pricing model.

\textsuperscript{164} See id.; Bergstrom, supra note 1; Poynder, supra note 3; Darton, supra note 8.
\textsuperscript{165} Bergstrom, supra note 1.
\textsuperscript{166} Keller, supra note 89.
\textsuperscript{167} Ash, supra note 31; see Marks, supra note 8.
ii. Educational mission

LexisNexis and Westlaw, along with their weak but innovative competitors, offer unique contributions to the legal education of aspiring lawyers. Aspiring lawyers have to be taught how to find current law that is relevant to their case and in the right jurisdiction. This requires access to law that is not current, not relevant and from the wrong jurisdiction. It is not enough to say this marker makes this law good for a case because the markers shift with different facts. A lawyer must practice comparing different cases, different statutes, different regulations, and different legislative acts in order to get a sense for what will satisfy the requirements of what makes “good law” for a range of different factual situations. The widest world of law possible is the best training ground.

iii. Due diligence

Another benefit offered by legal databases which does not really have a corollary in the academic journal world is due diligence. Legal materials are not just useful to compare against each other in the legal education context, but they are interdependent. Secondary sources linked to primary sources assist with comprehension, which ultimately contributes to better logic. But especially important is the concept of teaching students to do due diligence. Law

\[^{168}\text{Marks, supra note 8; see Arewa, supra note 49.}\]
\[^{169}\text{See Arewa, supra note 49.}\]
\[^{170}\text{See id.}\]
\[^{171}\text{Id.}\]
\[^{172}\text{See id.}\]
\[^{173}\text{Id.; Marks, supra note 8.}\]
\[^{174}\text{See Arewa, supra note 49; Marks, supra note 8.}\]
\[^{175}\text{See Arewa, supra note 49; Marks, supra note 8.}\]
students have to learn to update cases, not just from trial to appeal but back and forth through remands and changes of venue and across jurisdictions when the law is unsettled.\textsuperscript{176}

iv. What the public should own

The idea that the public should own certain kinds of information undergirds the philosophy behind public records acts, legislature mandated disclosures, and open access initiatives.\textsuperscript{177} Sometimes the idea applies to pricing and packaging terms and sometimes it applies to content.\textsuperscript{178} These tools work around non-disclosure clauses. In the legal publishing market, this idea comes in the form of UELMA and neutral citations.\textsuperscript{179} These are connected to non-disclosure clauses. When content is free, license agreements for that type of content have to demonstrate value which justifies the price.\textsuperscript{180} The free access information movement as manifest in the legal publishing world generally increases competition.\textsuperscript{181} Many will opt for a government website, especially as online statutes and caselaw become citable, over LexisNexis and Westlaw.\textsuperscript{182}

What LexisNexis and Westlaw offer in terms of value-added features, such as annotated codes and electronic finding aids, will keep them at the head of the pack but librarians will have more reason to shrink from negotiation practices that impose information asymmetry in favor of vendors.\textsuperscript{183} Although open access initiatives, like UELMA, neutral citation, free law databases, are more of a win for public patrons and pro se litigants, they create expectations about what

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{176}] Arewa, supra note 49; Marks, supra note 8.
\item[\textsuperscript{177}] See SPARC, supra note 104; Spending Transparency, Clemson University, https://transpend.app.clemson.edu/ (last visited May 16, 2017); The Reporters’ Committee for Freedom of the Press, supra note 161.
\item[\textsuperscript{178}] Compare Clemson University, supra note 177, with SPARC, supra note 104.
\item[\textsuperscript{179}] Greenleaf, supra note 126.
\item[\textsuperscript{180}] See Arewa, supra note 49; David Hall, Google, Westlaw, LexisNexis and Open Access: How the Demand for Free Legal Research Will Change the Legal Profession, 2012 Syracuse Sci. & Tech. L. Rep. 119.
\item[\textsuperscript{181}] Arewa, supra note 49.
\item[\textsuperscript{182}] See id.
\item[\textsuperscript{183}] See Hall, supra note 180.
\end{enumerate}
\end{footnotesize}
LexisNexis and Westlaw should not own. This creates an incentive for value-added vendors to begin justifying pricing and package models based on the value of each database stream and the features each stream adds to information which is free and freely citable. This all holds of course only if vendors start to think more critically about what UELMA and neutral citation mean for law schools, law librarians, and students who have no more money to spend on pricing and packing models that do not offer commensurate value. Ultimately, LexisNexis and Westlaw will remain important contributors to legal education for reasons of teaching due diligence that meets professional standards.

C. How much do we really know?

i. Pricing publications

A couple of well-known collection development publications have long aided law librarians in comparing prices. The AALL Price Index for Legal Publications once alleviated the information asymmetry but is no longer available. The problem was that AALL Price Index for Legal Publications relied on voluntary disclosures by vendors. Svengalis’s Legal Information Buyer’s Guide & Reference Manual still offers updated information on sample costs for Westlaw and LexisNexis and for other important computer-assisted legal research vendors. But the Svengalis sample pricing for LexisNexis and Westlaw is only useful in negotiations

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184 See id.
185 Id.
186 Id.
187 See supra A single friend in the business section, pp. 29-30.
188 American Association of Law Libraries, supra note 16.
189 Id.
190 Svengalis, supra note 16.
where the price is well above what can reasonably be expected. The Svengalis publication, however, is the best source of information currently available to law librarians.\textsuperscript{191}

\textbf{ii. Vendor intent}

It is not always clear what vendors have in mind when they use non-disclosure clauses. The silence from LexisNexis and the e-mail “decline to comment” from Westlaw exemplify this reality.\textsuperscript{192} Although HeinOnline did not offer much information, HeinOnline did specify that it would not engage in tactics which silenced libraries.\textsuperscript{193} HeinOnline’s policy of preserving the transparency between libraries and the vendor was framed by HeinOnline’s belief that other vendors use non-disclosure clauses to keep pricing secret.\textsuperscript{194} But comments about the intent of competitors may or may not reveal actual intent. The librarian-turned-vendor-representative from Bloomberg communicated that non-disclosure clauses have multiple uses including to disguise the pricing that different institutions are able to negotiate.\textsuperscript{195} None of this vendor representative’s perspective is official however.\textsuperscript{196} The CAS team’s thoughts on this issue are that vendors do not confess that pricing is the reason for non-disclosure clauses but everyone knows that is the intent.\textsuperscript{197} It is also true that Elsevier’s David Tempest confessed that confidentiality exists to prevent price comparison at an Oxford University conference on 21\textsuperscript{st} century science scholarship.\textsuperscript{198} HeinOnline’s comments as well as the perspectives of the CAS team and the Bloomberg representative suggest that what happens between vendors and academic libraries

\textsuperscript{192} \textit{Supra} Vendor Statements, pp. 28-29.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Oxford University Conference, supra} note 7.
also happened between vendors and law libraries. As Tempest put it, “And the use, and the cost per use has been dropping dramatically, year on year. . . . [W]e have this level of confidentiality . . . Otherwise everybody would drive down, drive down, drive drive drive, and that would mean that . . . [The last part is drowned in the laughter of the audience.]”

D. Negotiating relationships

All of this is to say, vendors hold fast to the idea that non-disclosure clauses will improve negotiations and the market for them. As far as anyone can tell, non-disclosure clauses exist to hide pricing and packaging models and avoid situations in which like customers demand like treatment. From public records request campaigns to adding public records qualifications to the non-disclosure boilerplate, from threatening to or actually cancelling databases to vendor surveys for pricing publications, from open access initiatives to legislature mandated disclosure, librarians and those who care about the cost of information have diligently and for years struggled against non-disclosure clauses. Although the aforementioned efforts only do so much to counter the exacerbating effects on pricing, what seems clear from the history of vendor-library relationships and the surveys conducted for this article is that librarians and the public have come to an impasse with vendors. The system is breaking because libraries do not have endless funds to spend on products whose value is not explicitly linked to their price. There

199 Id.
200 Id.; see Vendor Statements, supra pp. 28-29.
201 See Vendor Statements, supra pp. 28-29; Gaining Perspective, supra pp. 30-31.
202 Dartmouth College Library, supra note 6; Cornell University Library, supra note 6; Duggan & Moore, supra note 1; Taylor & Beh, supra note 16; Bergstrom & Bergstrom, supra note 10; Darton, supra note 8; Poynder, supra note 3; Oxford University Conference, supra note 7; Bergstrom, supra note 1; Bergstrom, supra note 3; American Association of Law Libraries, supra note 16; Svengalis, supra note 16.
is a disconnect between what libraries can spend and the price of the products vendors currently offer.

**Conclusion:**

Legislative mandates and public records acts hold the most promise for working around non-disclosure clauses. Both these efforts have served to get around non-disclosure clauses on policy rationale that alone would justify ending the use of non-disclosure clauses. It makes little sense to allow vendors to use non-disclosure clauses and then operate workarounds based on the logic that pricing and packaging information, at least for public academic libraries, should not be secret. Non-disclosure clauses are symptomatic of a power imbalance which perpetuates unsustainable pricing models. The current practice may soon result in dire consequences. Disrupting these unsustainable pricing models, therefore, requires a more honest business model that goes far beyond eliminating non-disclosure clauses. In the meantime, law librarians should challenge the use of non-disclosure clauses by advocating for disclosure mandates from their state legislature and by trading public records requests and then depositing the results in an online public forum. These efforts will perhaps begin the necessary process of transforming the legal publishing market.
Appendix A

E-mail to law libraries asking for non-disclosure clauses

Dear [law library director/electronic resources librarian]

I am working on a capstone project for my law MLIS degree at the University of Washington. This project will analyze the impact of non-disclosure clauses on law librarians' ability to effectively negotiate license agreements for subscription databases.

I am asking for your assistance to gather non-disclosure clauses currently in effect (or recently in effect). If you feel comfortable contributing, please reply with a copy of the most recent non-disclosure clauses found in your library's license agreements for subscription databases. I am asking only for the non-disclosure clauses, not any other terms or provisions.

If you do not feel comfortable sharing or do not have a license agreement affected by a non-disclosure clause, please consider drafting a non-disclosure clause representative of the many you have likely come across in your career.

Please indicate whether the non-disclosure clauses you have contributed are drafted by you, someone else associated with your library or some other party.

Thank you for the time you have taken to read and consider this request. Any help you can offer is much appreciated. Please also feel free to reach out with any questions or suggestions you might have.

Cheers,
Hannah Doenges, J.D.
Law MLIS Candidate
Marian Gould Gallagher Law Library
William H. Gates Hall | L172
Box 353025 | Seattle, WA 98195-3025

E-mail to vendors

Hi [vendor representative]:

I am earning a master's in library and information sciences with a specialization in law. My capstone is due this May. I have chosen to explore the business utility of non-disclosure clauses in subscription database license agreements. Specifically, I am interested in the business rationale and the perceived effect on pricing. I am really hoping to provide a balanced perspective and, therefore, would like to interview representatives from the major legal database vendors.

Do you know anyone working on [vendor name] license agreements who would be interested in contributing to this conversation? If so, would you be so kind as to connect us via e-mail?
Much thanks in advance.

Cheers,
Hannah Doenges, J.D.
Law MLIS Candidate
Marian Gould Gallagher Law Library
William H. Gates Hall | L172
Box 353025 | Seattle, WA 98195-3025
Appendix B

Anonymous survey which received twelve responses

1. Has your library ever refused to accept a non-disclosure clause (NDC) as part of a database license agreement with LexisNexis, Westlaw, Proquest, or Bloomberg?

2. If you answered yes to question 1, were you successful in having the NDC left out of the agreement?

3. If your library signs NDCs as a matter of practice, please check all that apply:
   a. Because we don’t want to make concessions
   b. Because there is no public records act or other legal requirement making the NDC unworkable in the long term
   c. Because no library comparable to mine seems to have found a way around them
   d. Because NDCs make good business sense for the vendors; healthy vendors mean better resources for the library in the long term
   e. Other (please specify)

4. If applicable, what level of success have you had avoiding NDCs with this strategy:
   Won’t agree to an NDC because state public records act would eventually make it obsolete
   1. This strategy was successful and required no further negotiation/concessions.
   2. This strategy was successful but required extensive negotiation/concessions.
   3. This strategy was not successful.
   4. Other (please specify)

5. If applicable, what level of success have you had avoiding NDCs with this strategy:
   Won’t agree to an NDC because it is against university/law school policy
   1. This strategy was successful and required no further negotiation/concessions.
   2. This strategy was successful but required extensive negotiation/concessions.
   3. This strategy was not successful.
   4. Other (please specify)

6. If applicable, what level of success have you had avoiding NDCs with this strategy:
   Won’t agree to an NDC because it is against library administration policy
1. This strategy was successful and required no further negotiation/concessions.
2. This strategy was successful but required extensive negotiation/concessions.
3. This strategy was not successful.
4. Other (please specify)

7. If applicable, what level of success have you had avoiding NDCs with this strategy:

Won’t agree to an NDC because it creates an unfair disadvantage for law librarians as a profession and market inefficiencies

1. This strategy was successful and required no further negotiation/concessions.
2. This strategy was successful but required extensive negotiation/concessions.
3. This strategy was not successful.
4. Other (please specify)

8. These vendors do not ask us to sign NDCs:

LexisNexis
Westlaw
Bloomberg
Proquest

9. Which, if any, of the above strategies would you be willing to try if the chance of success were 50/50 and minimal concessions were required?

10. For which of the following reasons, if any, do you think NDCs make good business sense? Check all that apply.

   a. All libraries, their missions and their patron bases, are unique and require unique database subscriptions deals
   b. NDCs allow better deals for less well funded libraries by keeping better funded libraries in a pricing range which helps compensate
   c. Other (please specify)