

Vertraulichkeitsklausel im Konsortialvertrag mit Elsevier

1 Art. 7.8 ff. des Konsortialvertrags 2011-2013 mit Elsevier lauten wie folgt:

[REDACTED]

[...]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Consortium of Swiss Academic Libraries

[REDACTED]

[REDACTED]

Zusätzlich haben [REDACTED] im ETH-Bereich [REDACTED] sowie die Leiter der Universitätsbibliotheken in der Schweiz die entsprechenden Einzelverträge „Schedule 3“ unterzeichnet und sich damit gleichzeitig zur Einhaltung des Konsortialvertrags (inkl. Vertraulichkeitsklausel!) verpflichtet.

2 Cornell University Library Takes Stand Against Non-Disclosure Agreements¹

"The Cornell University Library announced today that it will no longer sign contracts with publishers that include nondisclosure agreements (NDAs). Such agreements typically prohibit a library from sharing information about the price and terms of licensing agreements for material such as journal subscriptions and databases. NDAs also may govern how content is used and accessed. "Libraries should be able to talk to each other about the details of these contracts. It's as simple as that," Anne R. Kenney, University Librarian, said in a press release. "When contracts are kept secret, institutions cannot negotiate effectively."

¹ Aufgrund eines Hinweises von [REDACTED]: [http://www.libraryjournal.com/lj/communityacademiclibraries/889820-419/cornell university library takes stand.html.csp](http://www.libraryjournal.com/lj/communityacademiclibraries/889820-419/cornell%20university%20library%20takes%20stand.html.csp)

Lack of transparency seen as anticompetitive

Kenney told LJ that the issue has become more pressing given budget constraints and the fact that over half of the library's collection budget this year went toward licensing electronic resources. "I have concerns that range from providing good access to that material, preserving that material over the long haul, and the rising cost of publications in the face of real resource constraints. And I felt the time was right to make a public stand," she said. The rationale for abiding by the confidentiality clauses---that the publishers may be willing to grant a better price in return for secrecy---could have some short-term advantages, Kenney said, but in general the lack of transparency is detrimental to the library and anticompetitive. "Without having a level playing field for understanding the nature of specialized agreement, it's very difficult to get the best price and also the best use of the material," she said. Although much of the focus is on price, access is an equal concern, Kenney said. "For instance, being able to use materials in course reserves, or the kind of limits that might be placed on other uses such as interlibrary loans, those issues become of greater concern as we look at ebooks becoming a bigger piece of the puzzle in the monograph world," Kenney said.

Hoping more publishers will waive NDAs

Public institutions have been able in the past to make some of the licensing terms public because they are subject to freedom of information laws, but Kenney said there is widespread sentiment among private academic libraries that the terms of their contracts should also be public. She noted that universities such as Dartmouth, Brown, Duke, Emory, Johns Hopkins, MIT, NYU, and Columbia have taken a similar stance. "I shared this announcement with them prior to our releasing it, and there was a strong commitment that they shared same position," she said. Kenney said she is grateful to the publishers who recognize they can do business while waiving NDAs, and she made her announcement now hoping that it would help push other publishers to the same realization. According to a statement on the library's website, among the publishers who waive NDAs are the American Institute of Physics (AIP), American Physical Society (APS), ASTM International, American Society for Microbiology (ASM), American Chemical Society (ACS), Bloomberg, Cambridge University Press, EBSCO, Elsevier, IEEE, Institute of Physics (IOP), Knovel, Oxford University Press, ProQuest, Sage, SPIE, Taylor & Francis, and Wiley.

ARL opposes confidentiality agreements

Cornell belongs to the North East Research Libraries Consortium (NERL), which comprises 28 large ARL libraries and 80 smaller ones. The consortium is actively committed to removing NDA clauses from consortial licenses whenever possible, Ann Okerson, NERL's director and an associate university librarian at Yale, told LJ. "At NERL, we negotiate on behalf of our members, who are able to opt in or out of any negotiated contracts. So if, for example, non-disclosure can't be negotiated away, it's up to individual members whether or not they will proceed with a licensed resource," she said. "Some library members, such as Cornell, feel particularly strongly about NDA clauses; others may be unwilling to lose an essential licensed resource for their readers." In 2009, The Association of Research Libraries adopted a resolution that urged its members not to sign agreements that included confidentiality or nondisclosure clauses, and it encouraged members to share this information among themselves, with the exception of trade secrets or proprietary details. "Columbia University supports and practices the no-NDA policy adopted at Cornell," James G. Neal, Columbia's university librarian and chairman of the ARL Scholarly Communication Steering Committee when the resolution was adopted, told LJ. "We see the transparency of these publisher agreements and the ability to share and discuss licensing terms with colleague institutions as very important." The International Coalition of Library Consortia (ICOLC) also has taken the position that nondisclosure language should not be required for any licensing agreement. "Especially in this difficult budget climate, libraries have to look incredibly closely at how they spend their money," said John M. Saylor, associate university librarian at Cornell. "The Library moved ahead with the decision only after the faculty library board and the Provost offered their full support, because the academic community understands the importance of this kind of openness." As a result of the new policy, Cornell has deferred renewal on one contract until the NDA clause is removed and foregone another publication because the publisher would not remove the clause, according to the library's press release.

3 Zu der an der Bereichssitzung aufgeworfenen Frage der Rechtsverbindlichkeit der Vertraulichkeitsklausel (vgl. dazu Beilage 1)

Die Argumentationsweise im oben zitierten Artikel erscheint aus folgenden Gründen nicht weiterführend:

- Gemäss Art. 7.11 des Konsortialvertrags ist schweizerisches Recht auf den Konsortialvertrag anwendbar. Nach schweizerischem Recht sind Vertraulichkeitsklauseln in Verträgen nicht nur erlaubt, sondern allgemein üblich (vgl. so auch in den AGB ETH-Bereich!).
- Sollte nach schweizerischem Wettbewerbsrecht tatsächlich die Möglichkeit bestehen, sich gegen eine Vertraulichkeitsklausel zu wehren, so müsste zuerst ein solches Verfahren eingeleitet werden, und

erst dann könnte allenfalls gegen den Willen von Elsevier der Vertrag offengelegt werden. Dies wäre aber schon aus Zeitgründen nicht praktikabel (2014 wird ein neuer Konsortialvertrag abgeschlossen!).

- Das Bundesgesetz über das **Öffentlichkeitsprinzip** hilft nicht weiter; ein privatrechtlicher Vertrag ist kein amtliches Dokument. Zudem geht es beim Öffentlichkeitsprinzip darum, Dritten Einsicht in amtliche Dokumente zu gewähren, und nicht darum, einem Vertragspartner zu erlauben, sich von einer durch ihn unterzeichneten Vertraulichkeitsklausel zu distanzieren.

4 Risiken bei Missachtung der Vertraulichkeitsklausel

- Schadenersatzklage Elsevier gegen eine Institution des ETH-Bereichs wegen Vertragsverletzung (z.B. durch Weiterleitung des Vertrags an ETH-Rat zwecks Einholung einer Expertise bei einem Dritten);
- Reputationsrisiko (ETH-Rat bzw. Institutionen verletzen vertragliche Vertraulichkeitsklauseln und halten sich nicht an schriftliche Abmachungen);
- Ev. strafrechtliche Konsequenzen?

5 Fazit

Von einer Weiterleitung des Konsortialvertrags an einen von den Institutionen vorgeschlagenen Experten **ohne vorgängige schriftliche Einwilligung von Elsevier** ist **dringend abzuraten**.

Der Vollständigkeit ist darauf hinzuweisen, dass der Konsortialvertrag nicht zwischen dem ETH-Rat und Elsevier abgeschlossen wurde, somit der ETH-Rat eigentlich nicht zuständig ist für die Einholung des Einverständnisses von Elsevier mit der Weiterleitung des Vertrags an einen Experten. Aufgrund der besonderen Umstände (vgl. insb. die Nachfrage von ██████████, Elsevier, an den Präsidenten des ETH-Rates betr. die Zufriedenheit des ETH-Bereichs mit den Leistungen von Elsevier, und aufgrund der Tatsache, dass gegebenenfalls der ETH-Rat die Expertise in Auftrag geben soll, erscheint es trotzdem sinnvoll, dass der Präsident ETH-Rat eine entsprechende Anfrage an Elsevier macht.