



# LEGAL ISSUES



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## Legally Speaking – That Word Doesn’t Mean What You Think It Means: Antitrust Edition

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There’s nothing like a strangely-aggressive policy change to make me want to take a deep dive into an area of law that I know little about. In October of last year, the American Association of Law Libraries introduced a new Antitrust Compliance Policy.<sup>1</sup> This policy was full of expansive language about prohibited activities, and its announcement was accompanied by two unrecorded informational webinars with a guest speaker from the Association’s outside counsel. The gist seemed to be: the first rule of Fight Club is, don’t talk about our vendors.

Suggested new problem activities ran the gamut from boycotting vendors to simply expressing negative opinions about vendor products on association-run forums or listservs. The policy included an explicit instruction not to engage in pricing or cost discussions of any kind on association platforms. The Annual Salary Survey was called into question. Increasingly detailed and incredulous questions about potentially prohibited activities abounded during the webinars, synthesized by the diplomatic interventions of the moderators. In short, the new policy seems to prohibit nearly every useful member activity of the association. So I had to ask myself: what drove this change?<sup>2</sup>

Enter the Department of Justice and the Federal Trade Commission. In February of 2023, the Department of Justice announced the withdrawal of a long-standing set of agency guidance documents that had created a so-called “safety zone” for certain information-sharing activities that might otherwise appear to trigger scrutiny for anti-competitive practices.<sup>3</sup> Primarily, but not exclusively, this allowed organizations to participate in market surveys with three objective criteria: 1) Data is collected by a third party; 2) Information is more than three months old; and 3) Information is sufficiently anonymized in the aggregate.<sup>4</sup> There were three documents that provided guidance on these practices over time: Antitrust Enforcement Policy Statements Issued for Health Care Industry (1993), Statements of Antitrust Enforcement Policy in Health Care (1996), and Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011).<sup>5</sup> You might be noticing one strange commonality amongst all of these documents: they’re explicitly targeted at the healthcare industry.

So how did their withdrawal set off a reaction in a library professional association? Despite the healthcare-targeted nature of the original guidance, “practitioners have

long viewed the Guidance as broadly addressing the exchange of information through third parties” and the “FTC has described the Guidance as providing a ‘safety zone’ for data exchanges (regardless of industry).”<sup>6</sup> Because companies, including companies who are increasingly themselves members of professional associations, have “commonly participated in third-party surveys regarding historical labor conditions including wage and hiring surveys,”<sup>7</sup> the threat of the Guidance withdrawal is implicit.

It all seems to come down to the “dramatically increased civil and criminal enforcement activity” of the DOJ and FTC in recent years.<sup>8</sup> President Biden’s FTC chair appointee, Lina Khan, is described by news organizations as having “steered the agency to its most aggressive antitrust enforcement in decades” and the DOJ is described as also having increased enforcement.<sup>9</sup> And yet, it is the DOJ who led the charge in revoking the previous guidance — the FTC took another five months to issue a similar withdrawal.<sup>10</sup>

Professional associations are rightfully wary of litigious threats from the mega-corporations who participate in their organizations in the dual capacity of members and vendors,<sup>11</sup> and of the threat of overzealous enforcement of antitrust law. But it is still the law of the land, regardless of agency guidance, that “exchange of price data and other information among competitors does not invariably have anticompetitive effects” and is therefore not a per se violation of the *Sherman Act*.<sup>12</sup> But all of these information-sharing activities seem far different from the grasping many-tentacled Standard Oil of antitrust’s origins. So it makes me wonder: how did antitrust law get here, to this point where it feels as if it is being wielded to protect the trade secrets (if you believe that pricing can ever be a trade secret)<sup>13</sup> and business interests of corporations rather than the right to competitive markets and pricing for the members of the professional associations who deal with them?

The greatest enforcement concern tends to be against economic boycotts. The history of the *Sherman Act* begins with the efforts to dismantle the “trusts” of the late 19th and early 20th centuries, but despite the way the law has been deployed over the years, early debates surrounding the *Sherman Act* and related antitrust proposals indicated that there was a recognized

benefit to allowing “labor combinations,” or trade unions, to similarly consolidate power.<sup>14</sup> Under U.S. antitrust law, there is a difference between the objective of unions to organize for “self-protection” and the objective of members of a professional association to organize in order to force corporations to take more favorable actions.

This difference has played out in several major cases involving professional associations over the years. When the Superior Court Trial Lawyers Association tried to boycott the District of Columbia over inadequate compensation related to indigent defense provided under the *DC Criminal Justice Act* in 1983, the Court of Appeals for the DC Circuit found that the activism of the association might be subject to First Amendment protection.<sup>15</sup> However, the Supreme Court disagreed, pointing out that “every concerted refusal to do business with a potential customer or supplier has an expressive component” and that creating an exception from the per se antitrust laws based on this common element would “create a gaping hole in the fabric of those laws.”<sup>16</sup> As such, the boycott was a “naked restraint of price” and a per se violation.<sup>17</sup>

In 1982, in finding that a nonprofit trade association could be liable for treble damages for the actions of its agents, the U.S. Supreme Court was particularly interested in the fact that a competitor used the association’s internal procedures to injure the business of the plaintiff corporation.<sup>18</sup> In the dissent, however, three Justices disagreed that encouraging “plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefited from the violation [would] facilitate proper antitrust enforcement.”<sup>19</sup> At the same time, the potential for “anticompetitive activity” is great when “many of [the organization’s] officials are associated with members of the industries regulated” by that same organization’s codes.<sup>20</sup>

The anti-competitive power of standard-setting organizations was explored again with the American Bar Association in 1995, when the FTC alleged that “law school accreditation program[s] [were] controlled by law school faculty, who were using the ABA’s power over accreditation to force law schools to inflate faculty salaries and benefits.”<sup>21</sup> The result was a consent decree that, among other things, prohibited the ABA from collecting salary

data and using it in setting accreditation standards. While law school faculty arguably intended their efforts to advocate for better compensation, the courts have found that these efforts are anti-competitive price-fixing when the member collective leverages its accreditation powers in order to achieve its goals.

What strikes me the most about the timing of these professional association cases and the original issuance of the DOJ and FTC guidance documents creating safe zones for certain information-sharing activities is that the guidance came after. And yet, the cases that came before largely did not arise because of the kinds of information-sharing shielded by the guidance. From conversations with librarians who are members of other, much larger, library associations, and particularly one with more complex legal structures and more involved lobbying activities, I gather that the antitrust conversations are not so grim elsewhere in libraryland.<sup>22</sup> So I come back once again to the question: why this powerful reaction now to the revocation of the guidance?

I suspect that the heart of the matter is an institutional and corporate reaction to a robust and rejuvenated labor movement,<sup>23</sup> and to the growing use of economic boycotts to put pressure on institutions and governments.<sup>24</sup> Unions and boycotts make every C-suite nervous, whether they’re in a nonprofit or a Fortune 500.

I have three thoughts in conclusion. The first is that professional associations are not labor unions, and we can’t (and sometimes shouldn’t) rely on them to support us in advocating for fair wages. We need a different solution.<sup>25</sup> The second is that a professional or trade association is most likely to be a “walking conspiracy” when competitors occupy a dual role as members and vendors — which is perhaps a dual role we should not encourage or allow in our professional associations.<sup>26</sup> And the third is that if the antitrust and defamation threats have reached the point where professionals can’t engage in frank discussions about products and services crucial to their business purposes, then we need to have a conversation about whether professional associations have been effectively reduced to social clubs — and whether we might just need an Anti-SLAPP for Anti-TRUST.

I’ll see you off-list. 🌻

## Endnotes

1. American Association of Law Libraries, Antitrust Compliance Policy (Sept. 25, 2023), <https://www.aallnet.org/about-us/what-we-do/policies/antitrust-compliance-policy/> (membership required).
2. Spoilers: This is relevant to anyone who belongs to a professional association.
3. William T. McEnroe et al, "DOJ's Rescission of Longstanding Guidance Creates Uncertainty for Market Benchmarking Activities," *LawFlash: Morgan Lewis*, February 7, 2023, <https://www.morganlewis.com/pubs/2023/02/dojs-rescission-of-longstanding-guidance-creates-uncertainty-for-market-benchmarking-activities>.
4. Sheldon Klein, "Don't Ask, Don't Tell? The Antitrust Risk of Conducting and Participating in Market Surveys Increase," *Client Alerts: Butzel*, February 13, 2023, <https://www.butzel.com/alert-dont-ask-dont-tell-the-antitrust-risk-of-conducting-and-participating-in-market-surveys-increase>.
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6. McEnroe, "DOJ's Rescission of Longstanding Guidance."
7. McEnroe, "DOJ's Rescission of Longstanding Guidance."
8. "DOJ Withdraws 'Out of Date' Antitrust Enforcement Guidance Relating to Healthcare Providers," McGuireWoods, February 8, 2023, <https://www.mcguirewoods.com/client-resources/alerts/2023/2/doj-withdraws-out-date-antitrust-enforcement-guidance-relating-healthcare-providers/>.
9. Jim Tankersley, "An Emboldened F.T.C. Bolsters Biden's Efforts to Address Inflation," *New York Times*, February 27, 2024, <https://www.nytimes.com/2024/02/27/us/politics/biden-ftc-competition-mergers.html>.
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11. SPARC's Landscape Analysis Report from 2019 is an eye-opening introduction to the impact of corporate business models and acquisitions on a contracting academic publishing market. Claudio Aspesi et al. "SPARC Landscape Analysis," March 29, 2019, <https://doi.org/10.31229/osf.io/58yhb>.
12. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, at n.16 (1978), available at <https://supreme.justia.com/cases/federal/us/438/422/>.
13. Neal F. Weinrich, "When Is Pricing Information a Trade Secret," February 17, 2014, <https://www.bfvlaw.com/when-is-pricing-information-a-trade-secret/>.
14. As said Henry D. Clayton of Clayton Act fame: "A mere organization for self-protection is not a trust and is not contrary to good government," and "You cannot treat labor as a mere commodity." 33 Cong. Rec. Appx. 333 (1900) (speech of Rep. Henry D. Clayton).
15. *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 411 (1990), available at <https://supreme.justia.com/cases/federal/us/493/411/>. (hereinafter *Trial Lawyers*).
16. *Trial Lawyers*, at 431-32.
17. *Trial Lawyers*, at 412.
18. *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982), available at <https://supreme.justia.com/cases/federal/us/456/556/>. (hereinafter *Hydrolevel*).
19. *Hydrolevel*, at 591.
20. *Hydrolevel*, at 571.
21. "Recent Enforcement Actions By The Antitrust Division Against Trade Associations," U.S. Department of Justice, December 31, 1969, <https://www.justice.gov/atr/speech/recent-enforcement-actions-antitrust-division-against-trade-associations>.
22. The somewhat dated but publicly available ALA Legal Framework, by comparison, devotes one paragraph to antitrust, and only briefly alludes to information-sharing risks in a 2008 update. See "ALA Legal Framework: Twenty Questions," American Library Association, 2006, <https://www.ala.org/ala/ourassociation/governingdocs/legalguidelines/legalframework/alalegalframework.htm> and "ALA Legal Framework: Twenty questions and answers," American Library Association, last updated March 12, 2008, <https://www.ala.org/aboutala/mleader/factsheets/legalframework>.
23. Wyatt Grantham-Phillips, "Labor Movements Are Seeing Historic Victories This Year. Can Unions Keep Up The Momentum?" *PBS News Hour*, October 11, 2023, <https://www.pbs.org/newshour/economy/labor-movements-are-seeing-historic-victories-this-year-can-unions-keep-up-the-momentum>.
24. Make Me Smart, "Boycotts, Buycotts and the Rise of Consumer Activism," March 12, 2024, <https://www.marketplace.org/shows/make-me-smart/boycotts-buycotts-and-the-rise-of-consumer-activism/>.
25. And perhaps that solution is as simple as the public Google Sheet, a tool wielded with great effect during the #MeToo movement and in sharing salaries in professions where pay parity is a constant battle. See, Tanya Basu, "How Google Docs Became the Social Media of the Resistance," June 6, 2020, <https://www.technologyreview.com/2020/06/06/1002546/google-docs-social-media-resistance/>.
26. The caveat to this is that, increasingly, even librarians are competitors, particularly those of us caught in the corporatization of higher ed.

# Questions & Answers – Copyright Column

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**QUESTION FROM A GRADUATE PROGRAM LIBRARIAN:** *Many of our dissertation and thesis writers always have questions about whether they should “get copyright” by registering for copyright as part of a formalized process with the U.S. Copyright Office. They are also curious about the “proper” copyright notice. What should I advise these writers about registration and notice? Do they have to register to get copyright and deposit a copy of their work?*

**ANSWER:** This is a very common question — and especially from students who are writing now and planning to publish their work formally as a thesis or dissertation. The good news is that copyright applies automatically whenever a work is original and is fixed in tangible form. It does not require registration. Under the law, the “owner” of the copyright is the creator, and there is no formal registration required for the thesis and dissertation writers to “get copyright.” However, the U.S. Copyright Office does encourage registration of your work through a series of legal and policy-based incentives.

First, registration establishes a legal claim to copyright with the Copyright Office. After you go through the registration process, a certificate of registration is awarded to the creator. This document creates a verifiable public record of the significant facts about the work, including: the title, the author, information about the claimant or copyright owner (they could be different), the year of creation, and any additional information which can include information about whether the work is published, has been previously registered, or includes preexisting material.

Second, registration is a prerequisite to filing a copyright infringement claim in a federal court. So, while an author may be considered the creator of the work under the automatic protection of the law, the author cannot enforce their rights as the owner unless they register with the Copyright Office. This registration serves as prima facie evidence that your copyright is valid, the certificate is accurate, and when registration is made prior to infringement or within three months after publication of a work, a copyright owner is eligible for statutory damages, attorneys’ fees, and costs. These categories of damages and fees are some of the costliest portions of copyright litigation. Statutory damages can reach into the hundreds of thousands in fines per infringement. And attorney’s fees and court costs, depending on the size and scope of the litigation, can range from thousands to, potentially, millions, if the case is taken on through trial, appeal, and other courts.

Third, registration of an author’s work also permits a copyright owner to share the work’s information with the U.S. Customs and Border Protection (CBP). CBP is a part of the Department of Homeland Security and is an administrative agency with law enforcement powers that allow for search, seizure, and arrest. However, it also has a special authority to make substantive determinations regarding infringement of copyrights pursuant to the *Copyright Act of 1976* and the *Digital Millennium Copyright Act (DMCA) of 1998*. This authority is what enables the CBP to monitor the U.S. border for any potential pirated and infringing copies of an author’s work. If the CBP determines that items coming over the border are clearly illegal infringements of a

protected and registered U.S. work, the infringing items are subject to seizure, forfeiture, and, possibly, destruction.

The critical component of all these advantages offered by the U.S. Copyright Office is the registration. Fortunately, registration can be made at any time within the life of the copyright. A basic application for copyright registration can be filed by the author or owner of an exclusive right in a work, the owner of all exclusive rights, or an agent on behalf of an author or owner. All that is required is a form, a fee, and a copy (or copies) of the work being registered and deposited with the Copyright Office.

As far as deposit, we covered a portion of this in a previous column, but it is worth revisiting here. The United States Court of Appeals for the District of Columbia Circuit ruled a portion of the Copyright Act was constitutional in a copyright case on mandatory deposit. The case, *Valancourt Books v. Garland*, addressed the constitutionality of Section 407 of the *Copyright Act*, which mandates the deposit of copies or phonorecords for the Library of Congress.

*Valancourt Books*, a print-on-demand publisher specializing in rare fiction, found itself at odds with the Copyright Office when asked to deposit copies of several hundred books under Section 407. *Valancourt* had argued that the deposit requirement imposed undue financial burden and constituted a violation of the Takings Clause of the Fifth Amendment.

The crux of the case rested on whether the mandatory deposit requirement, particularly as applied to a print-on-demand publisher like *Valancourt*, was constitutional. Section 407 of the *Copyright Act* requires the owner of copyright work published in the U.S. to deposit two complete copies of the best edition of each copyrighted work with the Library of Congress. Failure to make a deposit could result in fines. However, failure to deposit does not result in any loss of copyright protection (copyright protection in a work is generally automatic the moment the work is creative and fixed).

In many cases, these Section 407 deposits also satisfy the copyright registration deposit requirement under Section 408 if the depositor includes the copyright registration form and filing fee.

The court held that the Copyright Office’s demands for physical copies of works under Section 407 of the *Copyright Act* is an unconstitutional taking of property in violation of the Fifth Amendment. However, the Court noted that its decision did not evaluate the constitutionality of Section 407 as enforced through requests for electronic copies of works.

**QUESTION FROM A REFERENCE LIBRARIAN:** *A few large international publishers have updated their websites with revised copyright statements at the bottom of their webpages, explicitly “reserving rights” and preventing actions like text*



**& data mining and artificial intelligence training. Do these statements at the bottom of the webpages change the fair use case for these activities?**

**ANSWER:** First, let's be clear: These statements at the bottom of a website exist within the purview of contract law (or licensing "Terms of Use"). So, before we get to the fair use aspect of the question, a discussion about the principles of contract law that will help guide the analysis to this question.

Broadly speaking, contract law is about enforcing promises. A contract is a promise or a set of promises, which the law recognizes as a sort of "duty" and provides remedies when that promise is breached. A license is a legal interest created by a rightsholder that grants use-privileges to a non-rightsholder. In other words, a license is a type of contract — it is a "contract not to sue." (Therefore, we'll occasionally use the terms "license" and "contract" interchangeably.)

As you can imagine, contract and licensing agreements can determine what a user can do within legal bounds, including text and data mining with AI-based tools. However, this depends on whether the contract or license is valid in the first place. Whether a contract or license is valid depends on how it's entered into. Two key aspects of this are "acceptance" and "mutuality."

"Acceptance" means that when one party offers a contract, the offer must be clearly accepted by the other party — either through words, actions, or the performing the obligations as called for in the contract. "Mutuality" is a "meeting of the minds" between the contracting parties. In other words, the contracting parties must have understood and agreed to the basic substance and terms of the contract.

With these principles in mind, let's take a look at the language that sits at the bottom of a webpage, known as "browse-wrap licenses," that are at issue here. A browse-wrap license is a type of non-negotiable, unilateral contract where explicit agreement was not obtained. This is a very different kind of license than the standard negotiated vendor license that libraries work with all the time. Browse-wrap licenses are typically a fixed display of the terms and conditions (or "Terms of Service/Use") for using the webpage or the resource, usually found through a hyperlink or language in the footer of the page. This indicates to the user that by using the resource, they are bound by those terms.

These browse-wrap agreements may be valid (and therefore enforceable), but only if there was acceptance or mutuality (a "meeting of the minds"). A study by two law professors in 2019 found that 99% of the 500 most popular U.S. websites had terms of service written as equally complex as an academic journal article, which makes them possibly inaccessible to most humans. (Uri Benoliel & Shmuel I. Becher, "The Duty to Read the Unreadable," 60 B.C. L. Rev. 2255 (2019))

How can someone "accept" a contract if they do not understand it?

However, acceptance and mutuality may be fairly implied based on the user's conduct after the user is put on actual or reasonable notice that their access or use is subject to these terms and conditions. An example of such conduct could be continued access to or use of the website, database, or service; or, the conduct could be that the user downloaded the product.

A strategic question to ask for on-campus projects involving TDM or AI training is: How will you access the material necessary for the use? Answers will vary. Some access will certainly be via a library-licensed resource, which is sometimes part of institutional-wide access. Other access might be through an individual subscription containing an agreement that you clicked on in order to access the material. And some access might be through public-facing websites featuring terms of use. Each of these examples have varying implications for whether a valid contract exists. But simply because the owner of the website puts language at the bottom of their website, does not mean that the language is binding.

Now, the very core of the fair use doctrine is such that the user does not need permission from a rightsholder to make fair use of a work. A license or contract is inherently a set of permissions or restrictions. While the nature of the licensed content can change the fair use analysis based on the characteristics of the work, the fact that it is licensed does not in itself change the fundamental four-factor analysis that exists under the fair use statute.

The revised copyright statements at the bottom of websites do not inherently change the fair use case for TDM and AI activities, because those statements operate within the realm of contract law. 🌳