WHAT’S A REASONABLE ROYALTY RATE?  
THE WHAT, WHY AND HOW OF PATENT AND TECHNOLOGY LICENSING RESEARCH  
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Part I  
Introduction to Technology Licensing
Introduction to Technology Licensing

- What is the “Licensed Technology”?
- Who is the Licensee?
- What is the “Field of Use”?
- How does Licensee plan to use the Licensed Technology?
- Exclusive versus Non-Exclusive
- Licensee’s “Milestones”

Introduction to Technology Licensing, cont.

- Royalties and other considerations
- Improvements
- IP Representations and Warranties

Part II

What is the “Licensed Technology”? 
What is the Licensed Technology?

- Intellectual Property that can be licensed includes:
  - Patents
  - Copyrights
  - Trademarks
  - Trade Secrets/"Know How"

What is the Licensed Technology?

- Should precisely identify exact components of Licensed Technology that will be licensed to Licensee
- For patents:
  - Make Invention
  - Use Invention
  - Sell Invention
- For copyrights:
  - Copy/reproduce Work
  - Distribute Work
  - Make derivatives of Work

What is the Licensed Technology?

- In addition to a patented invention, may include:
  - Licensor’s Technology in pending patent applications
  - Other Licensor “know how” that Licensee needs in order to properly use the patented Technology
  - Software programs
  - Databases
  - Written materials, such as manuals
  - Other "confidential info" of Licensor
Locating Licensing Agreement Information

- PUBLIC companies reveal licensing agreements in SEC Filings
- PRIVATE companies announce the good news of a Licensing Agreement in:
  - Press Releases
  - Annual Reports
  - General Business News

File 16 – Gale Group PROMT has an “EC” (Event Code) field

Strategic Alliances - EC=380
Alliances, Partnerships - EC=389

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? e ec=380 (Expand EC= 380)
E2       86         EC=370 PATENTS & COPYRIGHTS
E3   226915     EC=380 STRATEGIC ALLIANCES
E4      155        EC=380 STRATEGIC ALLIANCES
E5   104096     EC=389 ALLIANCES, PARTNERSHIPS
E6      308        EC=389 ALLIANCES, PARTNERSHIPS
E7    16988       EC=390 NONMANUFACTURING TECHNOLOGY
E8       23         EC=390 NONMANUFACTURING TECHNOLOGY

? s e3:e6
S1     331349   EC=’380’:EC=’389 ALLIANCES, PARTNERSHIPS’
S2    1210186   S S1 OR LICEN?/TI,TX

Some Techniques for Finding Licensing Information, Licensing Information, cont.

Total Nutraceutical Solutions Licenses Pulsed UV Light Patent from the Penn State Research Foundation.

June 9 , 2010
Language: English Record Type: Fulltext
Record Title:  - Newswire ; Trade
Word Count: 800

Text: STEVENSON, Wash. - Rapid Generation of Vitamin D2 from Mushrooms Using Pulsed UV Light
STEVENSON, Wash. -- Total Nutraceutical Solutions, Inc. (TNS) (OTCBB:TNUS), announced today that the company has acquired from The Penn State Research Foundation (PSRF) an exclusive license agreement on the invention (the “Invention”) entitled “Methods and Compositions for Improving the Nutritional Content of Mushrooms and Fungi.” This invention is covered by the United States Patent Application No. 12/386,810, filed on April 23, 2009 and is also derived from U.S. Provisional Patent Application No. 61/047,268, filed on April 22, 2008, and names Robert Beelman and Michael Kalaras as co-inventors.
Certicom Launches Intellectual Property Licensing Business New initiative focused on increasing ECC adoption and generating significant IP revenue

PR Newswire

Wednesday, March 10, 2004 T12:00:00Z

Journal Code: PR
Language: ENGLISH
Record Type: FULLTEXT
Word Count: 1,050

Text:

...constrained environments. Certicom products and services are currently licensed to more than 300 customers including
Motorola, Oracle, Research In Motion, Terayon, Texas Instruments and XM Radio. Founded in 1985, Certicom is...

Event Names:
- LICENSING
- MOTOROLA

Biovail enters into licence agreement with Kyowa Hakko Kirin

Biovail Corp announced that its subsidiary, Biovail Laboratories International SB Ltd, has entered into a licence agreement with Kyowa Hakko Kirin Co Ltd (Kyowa Hakko Kirin). Biovail Laboratories International SB Ltd (BLS), a subsidiary of Biovail Corp, has acquired the US rights to a...
Finding Licensing Agreements in SEC Filings, cont.

EXAMPLES from:

WEST’S Business Citator – A Company Research/Due Diligence tool

Researching Patent Licensing Agreements

- Federal securities laws require public companies to disclose material information to the investing public. This requirement applies to material agreements and contracts, such as patent licensing agreements. The disclosure can be:
- A disclosure of the agreement(s) filed as a material exhibit to an SEC Form 10-Q.
- The existence of a patent licensing agreement(s) in an SEC Form (10-K, 8-K, S-3, etc.)
- Both of the above

Search LEXIS SEC records for existing licensing agreements:

Example:
Legal>Area of Law – By Topic>Securities>Search SEC Filings> Exhibit 10. Material Contracts
Search strategy: Allcaps(patent license agreement) and (company names)
SEC Filings tend to have the title of the document in CAPITAL LETTERS. Use “FOCUS” to locate a patent or trademark mentioned in the license agreement.
Example:
EDGAR Online, FORGENT NETWORKS INC, EXHIBIT TYPE: EXHIBIT 10 - MATERIAL CONTRACTS, FILING DATE: June 14, 2007
SETTLEMENT AND PATENT LICENSE AGREEMENT
This Settlement and Patent License Agreement (“Agreement”) is entered into as of April...

Finding Licensing Agreements in SEC Filings, cont.

Searching for Licensing of a Specific Patent:

- Search West’s Business Citator using a patent number “near” the word “patent” near “license”.
- Search LEXIS SEC records using patent number. Since the patent will appear with commas in the text of the document, enter - 6,086,697
- USE proximity connectors in DIALOG news files: S 6(686697) to find mention of a specific patent number
- Search DIALOG File 123 CLAIMS
  Includes “ASSIGNMENT OF PATENT LICENSE” and other “Licensing” news in the “Reassignment Kind” RK= field.
- Search patent in INPADOC. Check in “Legal Status portion”
Finding Licensing Agreements in SEC Filings, cont.

Researching Patent Licensing Agreements

• When you know the patent number – Search 1
  – Center: LIVEDGAR
  – Database: Global Search
  – Text: 6,218,930 w/10 patent w/10 licens*

• This type of search will retrieve documents where the drafter clusters the patent number and the licensing agreement language close together, often in the beginning sections of the agreement.

Researching Patent Licensing Agreements

• When you know the patent number – Search 2
  – Center: LIVEDGAR
  – Database: Global Search
  – Text: whereas w/100 patent w/10 licens* w/10 own* and patent no D595,484

• This type of search will retrieve documents where the subject of the license agreement, the specific patent number, is referenced separately within the body or appendix of an agreement(s).

Locating licensing opportunities

Dialog’s File 345 has a status “Patent available for license or sale”

Dialog’s File 9 has “Concept Term” for “Patent License”

Dialog’s File 6: NTIS has “Subject Heading” code for:
GOVERNMENT INVENTIONS FOR LICENSING
NTIS contains US published applications prior to 2001

Part III

Who is the Licensee?
Who is the Licensee?

**Licensor’s Viewpoint:**
- Wants to precisely identify entities that will be “Licensee”
- Licensor has right to limit the use of its Licensed Technology to known entities that will be bound by terms of the License Agreement
- This issue is important to Licensor because:
  - Some Licensees mistakenly assume they can share license rights with the Licensee’s subsidiaries/affiliates or even third party contractors

Who is the Licensee, cont.

**Licensee’s Viewpoint:**
- Particularly with “worldwide exclusive” license rights:
  - need greater flexibility to create “subsidiaries” and other “affiliates” overseas to effectively commercialize the Licensed Technology.
- Not realistic to get Licensor’s prior written consent before using every “affiliate” entity

Corporate Intelligence

**Corporate Tree info for Public Companies:**
- SEC Filings provide lists of subsidiaries – see Exhibit 21
- D&B Worldbase – Who Owns Whom
- Secretary of State records provide current entity name and History of name changes or mergers
- Hoover’s Handbook of Private Companies
- Hoovers online – sometimes available through your local public library portal
- Corporate Affiliations or Gale Group’s Company Intelligence File
- News sources
- Company’s own website
- Annual Report
- Local Business journals – www.bizjournals.com

For more guidance, see:
http://toby.library.ubc.ca/subjects/subjpage2.cfm?id=435
http://library.usu.edu/instruct/presentations/PrivateCompa
nyInformation.ppt
Part IV

What is the “Field of Use”?

What is the Field of Use, cont.

- Will Licensee be permitted to use the Licensed Technology for all possible uses?
  - Or, will Licensee be limited to a certain “field of use?”

- **Licensor’s Viewpoint:**
  - This is an important issue since Licensor may want to license the Licensed Technology to another licensee in other fields of use
  - Or Licensor may want to reserve certain uses for itself.

What is the Field of Use, cont.

- **Licensee’s Viewpoint:**
  - Broader “field of use” gives Licensee greater freedom to operate
  - Broader “field of use” avoids potential confusion in future

- Any prohibitions on Licensee’s use of the Licensed Technology even within the “field of use”?
  - For example:
    - Only specific Licensee “sites” at which Licensed Technology can be practiced
    - Only specific employees of Licensee can use the Licensed Technology
    - Only for “internal research” by Licensee
Field of Use

Some REFERENCES for describing (or understanding) the technology being licensed:

- Molecular Biology and Biotechnology, A Comprehensive Desk Reference, Robert A. Meyers, editor, VCH Publishers
- Van Nostrand’s Scientific Encyclopedia, Glen D. Considine, editor, John Wiley & Sons
- Hawley’s Condensed Chemical Dictionary, Richard J. Lewis, John Wiley & Sons
- Handbook of Industrial Chemical Additives, Michael and Irene Ahr, VCH Publishers
- The Computer Desktop Encyclopedia, Allen Freiman, Artech
- The NEW Way Things Work, David Poulson with Neil Ardley, Houghton Mifflin Co. (for a quick “visual” on rocket engines, etc.)

Part V

How Does Licensee Plan to Use the Licensed Technology?

Licensee’s Viewpoint:

- Licensee must clarify how it will use Licensed Technology
  - Will Licensee only use Licensed Technology “internally” to make a final product for use by end users?
  - Or, will end users need access to Licensed Technology?
- Licensees often assume they can automatically sublicense their rights to a third party
  - Licensee’s attitude—the terms and conditions of License were negotiated based on the financial and commercial status of Licensee and not upon an unknown sub-licensee
  - Licensee should disclose to Licensor any intent by Licensee to engage a third party to manufacture, distribute or sell products containing the Licensed Technology
  - Thus, Licensor wants to know scope of any sub-licensee’s rights (i.e., simply to manufacture, simply to distribute, etc.)
How Does Licensee Plan to Use the Licensed Technology?, cont.

Licensee’s Viewpoint:

- Licensee still needs to do:
  - Substantial additional R&D
  - Extensive marketing
  - Regulatory approvals in USA and overseas

- Thus, difficult at this "early stage" to expect Licensee to precisely know:
  - Full commercial utility and potential of Licensed Technology
  - What other partners (i.e., subcontractors, manufacturers, distributors, etc...) will be needed to effectively commercialize the Licensed Technology

D&B record on the designated licensee to determine:

- Financial ability to commercialize product
- Headquarters and subsidiary locations

Annual Report:

- Goals and Initiatives
- Existing licensing ventures
- R&D activities
- Marketing activities
- Growth forecast

Morningstar for performance ratings

Market Watch for Analyst Estimates

Licensee Company Intelligence

Part VI

Exclusive Versus Non-Exclusive License and Territory
Exclusive/Non-Exclusive License and Territory

- **Issue:** Does Licensee want exclusive License to make, sell or otherwise use the Licensed Technology in specific territories?

**Licensor’s Viewpoint:**
- Generally, Licensor should not grant exclusive rights (i.e. a “worldwide License”) unless Licensee can demonstrate it has capacity to maximize the commercialization of the Licensed Technology in that territory
- Otherwise, Licensor will not achieve maximum potential royalties

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Exclusive/Non-Exclusive License and Territory, cont.

- Thus, Licensor should require Licensee to explain its business plan for maximizing commercialization of the Licensed Technology in order to justify an exclusive license
- Also, Licensor should “reserve rights” if it needs to use Licensed Technology in the exclusive territory

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Licensee’s Viewpoint:
- Licensee deserves exclusivity because Licensee will be required to expend substantial money, time and resources for:
  - Substantial additional R & D
  - Extensive marketing
  - Regulatory approvals in USA and overseas
- Anything less than “exclusivity” takes away Licensee’s incentive to spend such money, time and resources
Part VII

Licensee’s Milestones

Licensee’s “Milestones”

Licensor’s Viewpoint:
• Minimum levels of performance should be established for exclusive and non-exclusive Licensees (often called “Milestones”)
• An exclusive Licensee should have particularly strict Milestones since it is granted significant rights
• Licensor must understand Licensee’s business plan for commercializing Licensed Technology to establish reasonable performance standards for Licensee
• Milestones may be in terms of:
  – minimum “Sales”
  – capturing a percentage of market share
  – minimum Royalties

Licensee’s “Milestones,” cont.

• Licensor usually wants Licensee, at a minimum, to use “best efforts” to commercialize Licensed Technology
• If a Licensee cannot meet the Milestones, Licensor often wants right to:
  – Terminate the License
  – With regard to exclusive Licensees, either termination or convert into non-exclusive License
Licensee’s “Milestones,” cont.

Licensee’s Viewpoint:
- Because Licensee still must do
  - substantial R & D
  - extensive marketing
  - regulatory approval in USA and overseas,
it is premature to formulate meaningful monetary or
market share “Milestones”
- Licensee may be agreeable to Milestones that
  address:
  - dates for regulatory approval
  - dates for first commercial product

Licensee’s “Milestones,” cont.

- Licensee may also be agreeable to
general duty to use:
  - “good faith” efforts or
  - “commercially reasonable” efforts

Licensee’s “Milestones,” cont.

RESEARCHING PROGRESS of PRODUCT to MARKET:
(Dependent upon licensee’s “reasonable effort” agreement)
- Search press releases for news
- Search DIALOG OneSearch grouping – PRODANN
  for new product announcements or agreements
- If not yet patented, set up a watch for newly published
  applications.
- Check for patent applications filed in other countries
- Search trademark databases for newly filed trademarks
- Search copyright database by owner name
- If a drug - check periodically for FDA approval in Orange Book
  http://www.accessdata.fda.gov/scripts/cder/ob/default.cfm
PANASONIC, Seacaucus, N.J., has entered into a licensing agreement with Procter & Gamble, Cincinnati, Ohio, to manufacturer and sell a new line of hair dryers in North America using P&G’s Pantene Pro-V trademark. The ionic technology hair dryers begin shipping to mass-market retailers this fall.
Royalties and Other Consideration

- The Royalties that Licensee will pay
  Licensor can be structured in many ways:
  - "Upfront Royalties" (similar to a "down
    payment")
  - "Ongoing Royalties" that often are a percentage
    of "net sales" of products containing the Licensed
    Technology
  - Could require Licensee to pay "minimum"
    ongoing royalties regardless of the level of sales
  - Licensor could obtain an "equity interest"
    in the Licensee

Royalties and Other Considerations, cont.

- Particularly if Royalties are based on
  sales of products by Licensee:
  - Licensor usually requires “auditing”
    rights to allow Licensor to monitor
    Licensee’s compliance with terms of
    License Agreement

What’s a Reasonable Royalty Rate?

Some factors for determining royalty rates for a PATENT:
- Strength and analysis of the patent
- R&D costs
- Cost of potential litigation
- Scope of the license
- Legal costs in negotiating the agreement
- Comparable rates of other licensed IP

(A comprehensive list of factors was outlined by a district court judge in Georgia
Pacific v. U.S. Plywood, 318 F. Supp. 1116)

Some factors involved in determining royalty rates for a BRAND
- Market analysis
- Strength of brand and your competition
- Growth of the market
- Brand’s market share

Most serious licensors are familiar enough with the
industry to determine royalty rates or they seek
professional consultants to help determine rates
Selected Print Resources:

- Licensing Royalty Rates, Gregory Battles, Charles W. Grimes, Aspen
- Fundamentals of Intellectual Property Valuation: A Primer for Identifying and Determining Value, by Wes Anson, American Bar Association

Royalty Rate Data Sources, cont.

- Association of University Transfer Technology- AUTM
  http://www.autm.net/Home.htm
- LES – Licensing Executive Society & Les Nouvelle newsletter
  (Survey info for members/subscribers only)
  http://www.lesi.org/Article/Home.html
- News and business databases
- Recent Federal Circuit decisions such as ResQNet.com v. Lansa may mean that royalty rates MAY BE CONFIDENTIAL NO LONGER.
- In 2 subsequent cases, Tyco Healthcare v. E-Z-EM, and DataTreasury v. Wells Fargo (E.Dist. TX) the courts permitted discovery of prior settlement negotiations and admitted settlements at trial.

SOME FEE-BASED ROYALTY RATE DATABASES

- RoyaltyStat - http://www.royaltystat.com/ is a subscription database of publicly available agreements. You can search by keyword, agreement type or SIC code to find comparable royalty rates and the full-text of the agreement. Annual subscription is $4,500 with some restrictions.
- ktMine - http://ktmine.com/TemplateLayout2.aspx?guid=PoQ97IZQ is a subscription database that allows you to “mine” royalty rates from the publicly available documents that it searches. They provide results summaries and source documents. kMetal will do a search for you or you can buy 2 day ($500) or 5 day ($1000) access to agreement summaries, full agreement text and analysis tools.
- Royalty Connection - Invotex Group http://www.royaltyconnection.com/ provides access to royalty and licensing information for patents and trade secrets. They specialize in the information on technology acquired from partnership, joint venture, licensing, acquisition, and other agreements in the past 10 years. Once you register, searching is free. You pay $35 for a “transaction”.
Part IX

Improvements

- Does Licensee have right to develop "improvements," or "derivatives" of, or other enhancements to, the Licensed Technology (collectively "Improvements")?
- Who owns Improvements?

Licensee's Viewpoint:

- "Improvements" to Licensed Technology made by Licensee:
  - Licensee should own these because Licensee would not have access or right to use the Licensed Technology but for the License Agreement
  - What about Licensee's right to use these Improvements?
  - Licensee often agrees to "incorporate" these into the License Agreement
Improvements, cont.

Licensor’s Viewpoint (cont.)

• "Improvements" to Licensed Technology made by Licensor:
  – these should be OUTSIDE scope of “Licensed Technology”
  – Licensee needs separate license to use these types of Improvements
  – Otherwise “patent creep”

Licensee’s Viewpoint:

• “Improvements” to Licensed Technology made by Licensee:
  – Licensee should retain ownership due to substantial money, time and resources it has spent on additional R & D
  – What about Licensor’s right to use these Improvements?
    ▪ Licensee often resists granting Licensor many rights other than giving the Licensor a non-commercial internal research license
    ▪ Why? Licensee does not want Improvements to get to its competitors

• “Improvements” to Licensed Technology made by Licensor:
  – Licensee usually wants some “right of first refusal” to gain licensing rights to use these Improvements
  – Why:
    ▪ These Improvements will enhance Licensee’s ability to maximize the commercialization of the core Licensed Technology
**Part X**

**Intellectual Property Representations and Warranties**

Licensee’s Viewpoint:
- Licensee needs some "assurances" that Licensor either "owns" or "controls" all IP rights in the Licensed Technology.
- Licensee also wants "assurances" it will not be sued for patent, trademark or copyright infringement as a result of using the Licensed Technology.

Licensee’s Viewpoint, cont.
- Licensee’s main concern relates to "who owns the patent rights":
  - General rule under US Patent Law: Inventor (i.e., researcher) is deemed "Owner".
  - Thus, as general rule, Inventor(s) must "assign" to employer, in writing, the invention to transfer ownership.
  - Signed writing
  - Need specifically to identify the invention.
- Without a signed written assignment of patentable invention:
  - Employee retains ownership of invention
  - Employer may only get "shop rights" (royalty-free license).
Licensee’s Viewpoint, cont.:
- If inventor is not employee but third party contractor
  - Absent a signed written agreement to the contrary, third party retains ownership of invention
  - No “Shop Rights”

Licensor’s Viewpoint, cont.:
- Licensor is typically reluctant to give broad IP representations and warranties (and the supporting indemnification).
- Licensor will strongly resist giving a representation and warrant regarding the patent’s validity
- Thus, a Licensor usually wants to give “minimal” representations and warranties related to:
  - IP ownership
  - Potential infringement by using Licensed Technology

DEFINITIONS:
- LICENSING is the sale of a license to use
- ASSIGNMENT is the act of transferring property, interest or rights
- PTO ASSIGNMENT RECORDS:
  - Records transfer of property to another entity
  - Change (or correction) of name
  - Bank liens

Who Owns the Patent:
- Assignee search at USPTO website will determine ownership
  http://assignments.uspto.gov/assignments/?db=pat
- Original assignment documents can be obtained from the “Assignment Branch” at the USPTO.
- Assignment documents have Reel/Frame numbers for locating on the microfiche

Who Owns the Trademark:
- Look up the trademark in the TARR system using serial or registration number
  http://tarr.uspto.gov/
- For “history of ownership”, click on “Assignment Information”

Caution: When a UCC or lien is up or paid, no reporting to PTO

Who Owns the Copyright:
- You don’t have to register a copyright to have it protected.
- Always check for UCC filings!
DUE DILIGENCE FOR PATENTS:

- Establish legal status of the patent:
  - Are the maintenance fees all paid?
  - Has the patent been involved in any litigation and been found invalid or infringing?
  - Is this patent still in force? Determine natural “life” of the patent.
  - Adverse Decisions - any BPAI actions?
  - Any disclaimers or dedications which place the patent in the public domain?
  - Certificates of correction make minor changes or corrections to the patent
  - Check for any assignment of previous patent numbers

- Establish the current owner of the patent:
  - Has the patent been reassigned? (See USPTO Assignment Database)

- Are there “pending” offspring of this patent? (Check Continuity data on PAIR)

- Any post-issuance activity:
  - Application for reexamination
  - Application for reissue

- Is this patent protected in another country? INPADOC or Esp@cenet

SOME SOURCES TO SEARCH FOR THE ABOVE INFORMATION:

- CLAIMS/Current Patent Legal Status (Dialog File 123 – see Bluesheet)
- Lexis
  - Shepardize the patent
- Westlaw
  - Keycite the patent
- USPTO:
  - Public PAIR
  - Rassignment database
  - Interference decisions
  - LitAlert to check for any patent litigation filed
  - Courtlink to check for any patent litigation filed
  - Esp@cenet, INPADOC and/or Derwent for foreign family members

Mr. Curci is a Member (Partner) of Jennings, Strouss & Salmon in the Intellectual Property, Technology and Biotechnology Practice Groups. Frank represents clients in domestic and international intellectual property and technology matters. He advises entities in many technology sectors, including biotechnology, life sciences, medical device, semiconductor, software, and other technology companies, and universities/research institutions. Frank counsels clients on a variety of matters, including the development of intellectual property strategies, the establishment of strategic alliances, the resolution of technology collaborations, identification and evaluation of technology licensing opportunities, research collaboration, strategic research investments, and the commercialization of technology. He also represents technology companies in their participation in technology standards-setting organizations and other multi-party technology collaborations and consortia.

This information is intended for general information purposes only and not as specific legal advice. You are urged to consult an attorney concerning your situation and any specific legal questions you may have.
Lucy Curci-Gonzalez has over 25 years of library management and intellectual property research experience. Prior to joining Kenyon & Kenyon LLP as Director of Library Services, she was the head librarian at Morgan & Finnegan LLP. Mrs. Curci-Gonzalez earned her MS in Library and Information Science from The School of Library Service at Columbia University. She has worked as a catalog, interlibrary loan and reference librarian at state court, law school, corporate legal department and federal government agency law libraries in New York City.

Lucy is active in the Law Libraries Association of Greater New York and in the IP Group of the American Association of Law Libraries Private Law Libraries Special Interest Section. Lucy is a past AALL Executive Board Chair and was recently elected to the AALL Executive Board. She has also published articles and made numerous presentations on IP law research and law library management for LLAGNY, AALL, the Practicing Law Institute and legal information week. She has taught law librarianship courses at New York Law School and at St. John’s University law school.

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