

September 1992

Legally Speaking -- Search Warrants and Records: What Libraries and Bookstores Need to Know

Bryan M. Carson J.D., M.I.L.S.

Western Kentucky University, bryan.m.carson@gmail.com

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

Recommended Citation

Carson, Bryan M. J.D., M.I.L.S. (1992) "Legally Speaking -- Search Warrants and Records: What Libraries and Bookstores Need to Know," *Against the Grain*: Vol. 4: Iss. 4, Article 48.

DOI: <https://doi.org/10.7771/2380-176X.3803>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.



LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Legally Speaking — Search Warrants and Records: What Libraries and Bookstores Need to Know

Column Editor: **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky Univ., Bowling Green, KY 42101; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

In these days of terrorism and criminal investigation, libraries and bookstores are starting to become concerned with the privacy of their users and the possibility that circulation or sales records will be requested by investigators. Although most states and the District of Columbia have library privacy provisions in their laws, exceptions have always existed for court orders and search warrants. More recently, the U.S. Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act,”¹ a mouthful known officially as the “USA-PATRIOT Act” and popularly as the “Antiterrorism Act.” The legal provisions of this Act require that librarians and bookstores balance the need for security with the individual’s right of privacy.

The records kept by libraries have always been given a reasonable expectation of privacy, and this expectation is recognized by law in every state.² As early as 1973, it was realized that “an individual’s personal privacy is directly affected by the kind of disclosure and use made of identifiable information about him in a record.”³ In addition, the ALA Code of Ethics states that librarians must “protect each library user’s right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.”⁴ Nonetheless, libraries have always been subject to court orders to disclose records. State privacy laws allow disclosure of private information when there is a valid subpoena or court order. Librarians and bookstore workers need to understand what a search warrant is and what it means in order to balance their security and privacy, both of which are important societal interests. This article will discuss what a valid search warrant is and what is covered by a search warrant.

Search Warrants

In order to investigate private records, police are required by the 4th Amendment of the U.S. Constitution to obtain search warrants. The 4th Amendment states that: “The

rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁵ Time and again, the U.S. Supreme Court has decided that, with only a few exceptions, searches that are not based upon search warrants are illegal.

The basis of the 4th Amendment is the idea that privacy is one of the paramount concerns in our society.

The goal is to prevent the police from going on “fishing expeditions.” According to the Supreme Court, “In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure.”⁶ [Citations omitted]

Although there have not been many cases within the context of bookstores and libraries, the principles of 4th Amendment law apply to all situations. One of the key cases to discuss the necessity of search warrants is *Johnson v. United States*.⁷ In the Johnson case, police searched a hotel room after smelling opium in the hallway. The Supreme Court suppressed the evidence on the basis of the 4th Amendment. According to the decision:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which rea-

sonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a

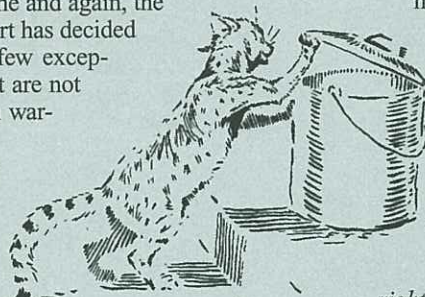
magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of

police officers. . . . *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*⁸ [Emphasis added]

One interesting point about the *Johnson* case is that the police had sufficient grounds to obtain a valid search warrant but chose not to get one. According to the Supreme Court, the odor of burning opium provided probable cause to believe that a crime was being committed in the hotel room.⁹ The problem was that the police didn’t obtain a warrant. Therefore, the evidence was obtained illegally and could not be used in court.

The *Johnson* case shows the Supreme Court’s preference for search warrants. As a result of the 4th Amendment and its reinforcement by Supreme Court decisions, police investigators must obtain a search warrant before they can legally examine circulation or business records. Libraries and bookstores are not only within their rights to deny access to investigators who do not have search warrants, but in fact may be legally required to deny access to records. The bottom line is that police officers must obtain search warrants or subpoenas first before requesting records.

continued on page 76



Probable Cause

In order to obtain a valid search warrant, the 4th Amendment requires "probable cause." Probable cause has two requirements which "must be supported by substantial evidence: [1] that the items being sought are in fact seizable by virtue of being connected with criminal activity, and [2] that the items will be found in the place to be searched."¹⁰ The officer who wants to get a search warrant needs to be able to show that he or she has a reasonable basis for believing a crime has occurred, that there is a reasonable basis for believing the person being investigated has committed the crime, and that there is a reasonable chance the evidence will be found in the area to be searched. According to the Supreme Court, if "the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."¹¹

One problem that comes up occasionally is what to do if the circulation records are needed in order to establish probable cause for the search warrant. If there is no probable cause in the first place, the records can't be searched. However, information that is available to everyone through the library catalog can be used to establish probable cause. This type of probable cause question usually occurs when a suspect is in possession of a large number of library books which appear to be stolen. Police would need to determine that the books were not checked out to the suspect before they could obtain a search warrant. Yet without circulation information, the investigators would be unable to show probable cause that a crime had been committed. After all, the suspect might have checked the books out legally.

Since there is no search warrant, the police are not allowed to look at the patron's circulation record. However, many library catalogs show whether books have been checked out, although they do not specify who has the book. If this information is available to the public via the library catalog, investigators can look at the catalog to determine whether or not the books are listed as being checked out. If the books in the suspect's possession are listed as being checked in, the police have established probable cause to believe that a crime has been committed and that the suspect has committed the crime.

Particularity

One of the most important parts of the 4th Amendment is the concept of particular-

ity. The 4th Amendment provides for two different types of particularity, stating that warrants shall particularly describe "the place to be searched, and the persons or things to be seized."¹² The point is to leave as little to the discretion of the officer as possible. Instead, the decisions are to be made by an impartial judge or magistrate.

Particularity of location means that the search warrant must identify the place where the search will take place. The search must take place at the location that was given in the warrant, and investigators are not allowed to search other places without obtaining a new warrant. Usually the requirement of particularity means that the warrant will include the address of the location being searched.

If investigators want to look at library circulation records or bookstore business records, the search warrant must specify the location of the records. For example, a search warrant to look at computer sign-in logs at one library branch does not allow the police to look at the logs at another branch. Investigators must obtain a search warrant for each location, or at least identify in the search warrant each location to be searched. However, if circulation or sales records are available at any location, the warrant doesn't need to specify all branches, but need only name the location where the search will physically take place.

Particularity of items is potentially a more important area for libraries and bookstores than particularity of location. Thus, "the requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."¹³ In effect, the officers are bound by the terms of the search warrant.

The particularity requirement means that libraries and bookstores are only allowed by law to show officers the items named in the search warrant or subpoena. If the warrant asks for the circulation records of John Doe, it must state what kinds of records are included. For example, a search warrant authorizing a search of circulation records for John Doe means that only the circulation records can be given to the investigator. The warrant does not mean, for example, that computer sign-in logs are also available to the investigators. Those records would have to be named separately in the search warrant.

The search warrant must also be specific about what dates are covered. If the warrant authorizes a search of the circulation records from June 1 to July 1, the police are not allowed to look at records from May. These days the date is not actually a major issue with library circulation records, since most automated circulation systems delete the record as soon as the book is returned.

Endnotes

1. "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." Public Law Number 107-56 (October 26, 2001). Available online at <http://www.ins.gov/graphics/lawsregs/patriot.pdf>.
2. Although most states have fairly straightforward library privacy statutes, a few states put the laws in unusual places. For example, the Georgia library privacy law is part of the Code of Evidence, and the library privacy law in Kentucky is a binding Attorney General opinion. For more information, see my article "Surveying Privacy: Library Privacy Laws in the Southeastern United States," *Southeastern Librarian*, Jan. 2002.
3. Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Department of Health, Education, and Welfare. *Records, Computers, and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data Systems*, pp. 40-41. Washington: Government Publications Office, 1973.
4. American Library Association. *Code of Ethics of the American Library Association*. Chicago: American Library Association, 1995. Available online at <http://www.ala.org/alaorg/oif/ethics.html>.
5. U.S. Constitution, 4th Amendment.
6. *United States v. Jeffers*, 432 U.S. 48, 51; 72 S.Ct. 93; 96 L.Ed. 59 (1951).
7. *Johnson v. United States*, 333 U.S. 10; 68 S.Ct. 367; 92 L.Ed. 436 (1948).
8. *Johnson* at 13-14.
9. *Johnson* at 13-14.
10. Wayne R. LaFave and Jerold H. Israel. *Criminal Procedure*. p. 110. Hornbook Series. St. Paul: West Publishing Company, 1985.
11. *Dumbra v. United States*, 268 U.S. 435, 441 (1925).
12. U.S. Constitution, 4th Amendment.
13. *Marron v. United States*, 275 U.S. 192, 196; 48 S.Ct. 74; 72 L.Ed. 231 (1927).

Finally, the warrant must specifically name the person who is being investigated. If the judge issues a warrant to look at the circulation records of John Doe, the officer is not allowed to look at the library's circulation records in general and find information about Jane Doe. The police would need a separate search warrant in order to obtain information about Jane Doe. In order to avoid disclosing confidential patron information to the police in the midst of a search, the librarian or bookstore worker should obtain the specific information that was requested and give it to the police. If an automated circulation system is being used, the librarian should make a printout of the patron record for the police officer.

Conclusion

The search warrant requirements contained in the 4th Amendment of the Constitution are intended to ensure that our legal system is just and fair. Records can only be viewed if a neutral court or magistrate has issued a subpoena or search warrant based on probable cause. There must be probable

continued on page 77

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Director of the Law Library & Professor of Law, University of North Carolina, CB #3385, Chapel Hill, NC 27599; Phone: 919-962-1321; Fax: 919-962-1193)
<laura_gasaway@unc.edu> www.unc.edu/~unclng/gasaway.htm

QUESTION: Many librarians write reviews of books and music. This question relates to reuse of these published reviews without permission of the reviewer.

Outside of my job as a music librarian, I have written reviews for *FANFARE*, a national CD magazine. The Web was in its infancy, so the understanding was that all work was for one-time publication in the print edition. There was no online version at the time. Whenever anyone asked permission to use portions of reviews (or even whole ones) in advance, I granted it. But recently, it came to my attention that a batch of my reviews are posted at a commercial Website not owned or operated by *FANFARE*. To my dismay I have found many more reprints on the Web done without my knowledge or consent. Several of those who have appropriated this material claim copyright to it themselves, according to the marks on the files.


I challenged the publisher, who said that he believed that his copyright entitled him to sell portions of the magazine (or whole books) as he saw fit even though my reviews are not works for hire. Is there anything I can do?

ANSWER: One important matter is whether the reviewer ever assigned the copyright in his work to the publisher of the journal. Transfers of copyright must be in writing. If so, the publisher owns the copyright. Putting the journal online, however, raises all of the issues from the *New York Times v. Tasini* case which held that freelance authors own the electronic rights to their works unless the copyright transfer to the publisher specifically stated that the electronic rights were being transferred. It might help to remind the publisher of this. Unfortunately, however, the only real threat is filing suit.

Legally Speaking from page 76

cause to believe that a crime has been committed, that the suspect has committed the crime, and that the search will turn up evidence proving that the suspect committed the crime.

The concept of particularity keeps officers from using a search warrant as a license for a general search. The warrant must specify the location to be searched, the type of records that are included, and the specific person whose records are being investigated. The police are not allowed to look at records with information about people who are not named in the search warrant.

The requirements of probable cause and particularity help to keep library and bookstore records private, while still providing a way for investigators to do their jobs. The purpose of the 4th Amendment is to establish rules by which everyone must live. These rules help our society achieve the delicate balance between the need for security and the right of privacy. 

QUESTION: The library has some 16mm films from the Federal Aviation Authority (FAA) that are used by the Aviation Department. If federal government materials are in public domain, is it possible to convert the format of the films to video? If the library does change the format, does the film still remain in public domain?

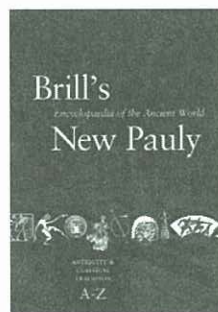
ANSWER: If the films were actually produced by the FAA, a government agency, then they are public domain. This means that

continued on page 78

Brill's New Pauly

Encyclopaedia of the Ancient World

in 20 volumes with index



Edited by Hubert Cancik, Helmut Schneider, and Manfred Landfester
Managing Editor English Edition: Christine F. Salazar

BRILL'S NEW PAULY is the English edition of the authoritative DER NEUE PAULY, published by Verlag J. B. Metzler since 1996. The encyclopedic coverage and high academic standard of the work, the interdisciplinary and contemporary approach, and the clear and accessible presentation have made the NEW PAULY the unrivaled modern reference work for the ancient world.

Fifteen volumes (*Antiquity*, 1–15) of BRILL'S NEW PAULY are devoted to Greco-Roman antiquity and cover more than two thousand years of history. Special emphasis is given to the interaction between Greco-Roman culture on the one hand, and Semitic, Celtic, Germanic, and Slavonic culture, and ancient Judaism, Christianity, and Islam on the other hand. Five volumes (*Classical Tradition*, I–V) are uniquely concerned with the long and influential aftermath of antiquity and the process of continuous reinterpretation of the ancient heritage, including the history of classical scholarship.

BRILL'S NEW PAULY presents the current state of traditional and new areas of research and brings together knowledge from leading international specialists. Many entries are elucidated with maps and illustrations. The English edition includes updated bibliographic references and an index volume.

Hubert Cancik is professor of Latin at the University of Tübingen.

Helmut Schneider is professor of ancient history at the University of Kassel.

Manfred Landfester is professor of Greek at the University of Gießen.

Christine F. Salazar is affiliated research scholar at the University of Cambridge.

Vol. 1 (A–Ari)	November 2002	ISBN 90 04 12258 3	\$186
Vol. 2 (Ark–Ci)	December 2002	ISBN 90 04 12265 6	\$186
Vol. 3 (Cl–Epi)	April 2003	ISBN 90 04 12266 4	\$186

Standing order for entire set ISBN 90 04 12259 1

Prices have not yet been set for future volumes, which will be invoiced upon publication for standing orders. Three new volumes are scheduled to be published each year.

For North American orders, call 1-800-337-9255,

fax 703-661-1501, or e-mail cs@brillusa.com.

For rest of world orders, call +31 (0)71 53 53 566,

fax +31 (0)71 53 532, or e-mail cs@brill.nl.

For more information or to request a free preview,
e-mail brillnewpauly@brill.nl.

www.brill.nl

