



Acquisition and Technical Processing

MILES O. PRICE

PUBLIC LIBRARIES—federal, state, county, city—are the creations and creatures of statute: directly and specifically, as the Library of Congress, state libraries, and some county and city libraries; directly by authority of general acts, as most county and city libraries; and indirectly, under the enabling acts setting up agencies within which libraries operate as necessary though unnamed functions.

Being such, they are governed by various statutes, including organic and appropriation acts and administrative regulations made under statutory authority, and they must function within their terms. This applies to the technical processes—acquisitions, binding, cataloging—which require the direct expenditure of tax-raised funds. The librarian is thus continually confronted by that bogey, *ultra vires*, which means that he may not make expenditures for a purpose or in an amount or at a time or in a manner not authorized by his specific complex of statutes and administrative regulations. It may also mean that he may not dispose of obsolete or superseded publications for credit, or sell or exchange duplicates, as is freely done in privately supported libraries. Control is maintained by a budget or auditing officer; for example, the United States General Accounting Office, which checks federal expenditures for compliance.

The first thing with which the public librarian must familiarize himself in order to stay out of trouble is the group of statutes, administrative regulations and budget or other decisions controlling his actions and expenditures. As has been stated before, these differ so much from federal department to department (and even from bureau to bureau within a department), and from state to state and city to city, that accurate generalizations are impossible. Many situations are not specifically covered by written statute or rule, but only by the tacit legislative recognition that an administrator must have reasonable inherent power to get things done. This latter is sometimes confirmed

The author is Law Librarian and Professor of Law, Columbia University.

Acquisition and Technical Processing

by statute, as in the California *Education Code* § 22228, which in defining library trustees' powers, under which the librarian operates, adds: ". . . do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter."¹ Especially in the federal government libraries, where the library is seldom named in the enabling statute or appropriation act, the legislative history—as shown in the budget hearings—may furnish some guidance.

For the sake of clarity each type of public library—federal, state, county, and city—will be considered separately, in that order. In many organic acts setting up government agencies the library has been specifically mentioned. In more recent revisions of old acts and in acts setting up new agencies, it seldom is, and then but briefly. For example the law covering the Patent Office states that it "shall maintain a library."² In practice, the library, when not specifically authorized, is set up by administrative decision if needed. The Library of Congress, *sui generis*, has its own enabling act.³

The Act of March 15, 1898, provided that law books, books of reference and periodicals for use in any executive department or other government establishment at the seat of the government should not be purchased unless authorized and payment specifically provided for in the law granting the appropriation.⁴ Therefore, government libraries had their own "budget line" in the appropriation acts of their agencies. This act, however, was repealed⁵ August 2, 1946, so that now such books and periodicals may be purchased within express limitations (as in the Independent Offices Appropriation Acts) which may be otherwise provided, and the cost thereof charged against appropriations for the necessary expenses of the particular government establishment involved.⁶ This results, in effect, in two different appropriation situations: (1) those in which the agency still has its budget line, as in the Department of Agriculture and some independent offices; and (2) the great majority of agencies, in which the amounts expendable for library additions and personnel are part of the lump sum appropriation for the agency, and are administratively determined within the agency. So far as the present writer was able to determine, the latter method works well and the allocations are strictly adhered to. This is discussed for 1943-45 by L. M. Bright⁷ in his master's paper which states that ninety per cent of the budgets studied were "consolidated," and in only ten per cent was there separate mention of the library. Fifty per cent of the budget hearings did not mention the library. One-third of the libraries were allotted

a definite sum, two-thirds not. Each act studied contained restrictions as to one or more of the following: types of publications purchasable, amounts for given types or specific titles. The method of purchase, under *Revised Statutes* § 3709, was ordinarily specified. Bright's conclusion is that Congress does little to affect directly the money spent for government libraries. This is a matter primarily handled by the budget officers of the various agencies when making lump-sum requests.

What constitutes a "government" agency within the meaning of the various acts authorizing the purchase of library material has been the subject of inquiry. It has been held that while the Federal Reserve System, Comptroller of the Currency, and Federal Deposit Insurance Corporation are such agencies, the Food and Agriculture Organization,⁸ the Rural Electrification Cooperatives, National Farm Loan Associations, and Production Credit Associations,⁹ and the Pan-American Union are not.¹⁰

The routine of government purchasing is described in detail in the U.S. Treasury Department's Bureau of Federal Supply publication, *Service of Supply, Outline of a Training Course*. A further guide to government library purchasing is contained in Huberta A. Prince's *The Washington Book Mart, a Descriptive Guide to the Libraries and Procurement Offices of the Federal Government*. The most detailed and authoritative discussion of the permissible procedures relating to book and periodical purchasing is that embodied in a Comptroller General's Decision,¹¹ relative to an inquiry of the Administrator of Veterans' Affairs on February 28, 1947. It sets forth six different procedures for as many categories of materials, relating to such things as prices, bids, dealers, and out of print or out of stock items. Although specifically addressed only to one agency, the procedures and rulings seem of general applicability and the decision might be regarded as a text on broad principles. Unfortunately, it has not been published in the printed *Decisions* and is available only in manuscript.

The 1875 law,¹² as amended, which in effect provides that, except in an emergency, advertising for competitive bids is mandatory, is the basis for the bidding requirements of the above law and for the regulations issued under it by the General Services Administration. The Act also sets forth an exception to the bidding requirement,¹³ permitting an agency to purchase supplies or services up to \$500 "over the counter," without bids. Agency practice under this exception varies. In some, by administrative rule, the amount is reduced to \$25,

Acquisition and Technical Processing

in others, where the item wanted is on the bidding schedule and costs a nominal sum, it may be requested, subject to a later confirming order; if not on the schedule and it is in a local bookstore, it may be ordered by telephone. An evasive device is the breaking down of large orders into units of \$500 or less to avoid asking for bids. Much depends upon the individual procurement officer. The librarian will carefully learn the practice of his own agency.

During World War II, a most-favored-customer policy in favor of the government was adopted in library book purchases, to the effect that no price should be charged to a government library, higher than to any other buyer. A typical application in peacetime is the practice by states of charging a lower in-state price for state publications than that for out of state buyers. The recent New Hampshire *Revised Statutes* is an example. The G.S.A. New York procurement office, however, told the writer that for practical purposes this policy has been superseded by the Federal Supply Schedules, except where specifically provided for by statute. In the Treasury Department appropriation acts, 1950-56, inclusive, such a provision was included, relating to the purchase of typewriters, and it was interpreted by Comptroller's Decisions B-89875, B-90189, and B-93147. The Comptroller General states that in the New Hampshire-type situation he has no jurisdiction.¹⁴

Another problem applicable principally to the purchase of official state publications and to periodicals, is the advance payment exacted. G.S.A. told the writer that this is permitted in the government only on subscriptions, and that the requirement otherwise is, perforce, waived in favor of the government. The Comptroller General, however, held in effect by his decision¹⁵ of January 17, 1956, that, although books purchased cheaper on a subscription basis than on an individual basis are not within the term "periodicals" as used in the exception to advance payment prohibition in 31 U.S.C. § 530, they were within the term "publication" as used in that provision allowing the Veterans Administration to subscribe to publications. By the same decision, it was held that purchase through "book clubs" at a discount, is permissible. By a decision of November 28, 1956, B-129390,¹⁶ it was held that pamphlet "advance sheets," although not "periodicals" in the usual sense, were eligible for advance payment, since mailable as second class matter.

One provision relating to the most-favored-customer question¹⁷ sets maximum prices for the *United States Code Annotated* and the

Federal Digest. A May 16, 1950 decision¹⁸ of the Comptroller General also relates to the price which may be paid for certain law books for court libraries.

Generally, the bidding rule governs book buying; there is less red tape and the bidding schedule discounts are apt to be better. As a result of bids, the G.S.A. issues "Federal Supply Schedules," each naming the items awarded to successful bidders. Class 33 covers books generally; Class 35 periodicals and law books. Regulations are published in title 41 of the *Code of Federal Regulations*. The government librarian does not "order" books. He requisitions them through his agency procurement officer, who does the ordering, after checking the state of the library's allotment. This requisition-order routine is often substantially followed in state procedure, also. No contractor is under obligation to accept orders of under \$25. In practice, such orders are filled but the vouchers may be allowed to accumulate to a reasonable amount before submission by the dealer for payment. Disputes with contractors over orders may be judicially reviewed¹⁹ but no library book purchase cases have yet arisen. The General Accounting Office determines whether doubtful items are authorized for purchase under organic or appropriation acts. For example, phonograph records are not books within the acts.²⁰

Difficulties arise with periodicals, particularly law reviews published during the school year (hence with an unusual subscription period), because the contractor does not understand their idiosyncrasies, and missing number troubles are frequent. The procurement office in some agencies claims missing numbers, not the library.

There have also been problems in connection with gifts and exchanges, because there must be authorization to dispose of government material in this manner.²¹ Sales for cash are not useful to the library, as money realized must be "covered in" to the Treasury.²² A device to escape this is to have the purchaser set up in his office a credit to the government library offering materials, from which requests for books from that library will be honored. Unexpended balances revert to the Treasury at the end of the fiscal year, but this seldom happens, as money about to revert is diverted to other units of the agency. Similarly, the library may benefit by unexpended balances of other units. This is an administrative matter under lump sum appropriation procedure. In some agencies, reversion, by administrative rule, is on a quarterly basis, and funds carried from one quarter to another must be "justified." Funds for mortgaged material

Acquisition and Technical Processing

which is never received are lost to the Treasury. This creates serious difficulty where foreign "antiquariat" material is ordered, much of which is sold before the government order reaches the dealer.

The so-called Buy-American Act of March 3, 1933, as amended, applies to books and periodicals. It is now clear that the act requires the purchase of articles, materials, or supplies manufactured in the United States, regardless of the source of the constituent materials, if they are available in sufficient and reasonable commercial quantities and of satisfactory quality, unless the head of the department determines their purchase to be inconsistent with the public interest or their cost to be unreasonable. Books, periodicals, magazines, newspapers, etc., must be regarded as subject to the restrictions of the act.²³

As to purchasing, the Library of Congress is not subject to the G.S.A. schedules²⁴ so, ordinarily, new books are bought from the publishers, except that in case of urgent needs they are bought from local book stores.

Binding presents no special legal problems. By law²⁵ it must be done in the Government Printing Office, by order from the agency, on requisition from the library. Allotment of funds from the lump sum appropriation is, as with book purchases, an internal matter.

As for cataloging, with the exception of the Library of Congress which has a special budget line for "salaries and expenses" for the maintenance of its catalog, the catalog is maintained from the agency lump sum appropriation. The staff members are classed and compensated according to Civil Service job descriptions, as are other staff members.

State libraries of some kind have been created or authorized by statute in every state. These include state libraries proper, state law libraries (where distinct from the state library), medical libraries, court libraries, county public and law libraries, city public libraries, and school libraries, among others.

The writer has examined the library provisions and other pertinent sections of the compiled statutes of every state and territory, and selected session laws, and the statements below are distilled from that examination. Generalization is possible, however, only to a limited extent, as provisions vary greatly from state to state, and the librarian concerned should carefully examine the statutes and rulings of his own state. No pertinent judicial precedents were found.

In general, libraries of state agencies are subject to purchasing and

civil service rules applicable to other units of the state, with the frequent exception of institutions of higher learning. This is true, for example, in New York, which has a Division of Standards and Purchase. This corresponds somewhat to the federal G.S.A., even including the \$500 limit exemption from competitive bidding. All purchasing, and this includes books, in New York State is through this division.²⁶ However, in the case of books, the division interprets this to permit direct placement of orders by agencies.²⁷ In any case, the bidding requirements in New York do not include supplements, continuations, law reports, or odd volumes of sets. The *Official Compilation of Codes, Rules and Regulations*²⁸ covers books, periodicals, subscriptions, etc., for office libraries. Books for schools and colleges or for school and general libraries are coded (14-04) as educational supplies.

Few states go into such detail, but all have applicable rules. The writer discussed the practical aspects of book purchasing by tax-supported libraries with a large publishing house, and was told that very few states now require bidding, and that almost always the procedure of purchase is the same as for private purchasers. The prudent librarian, however, will ascertain the rules applicable to him.

Libraries of state institutions of higher education are subject to the purchase and civil service rules of their institution generally, which typically approximate those of privately supported institutions. In some states, university, court, and state libraries are specifically exempted by statute (as in New Hampshire) from book purchase restrictions applicable to other state institutions. Where there is a state civil service, state schools and colleges may be exempted from its application.

Typical statutes authorizing or establishing state libraries commonly set up standards for them, often including acquisitions, preparation and cataloging policy.²⁹ Virginia defines "books" to include all audio-visual material, a precedent to remember.³⁰ Acquisitions may include deposit by others.³¹ The Virginia State Library is directed to buy any book, pamphlet, manuscript, or other library material relating to the history of Virginia, not in the state library.³² Authority to receive gifts is frequent and important.³³ In Montana, this must "not entail any degree of federal control."³⁴ The correlative power to exchange and otherwise dispose of surplus material is usual.³⁵ The New York State Library is permitted to set up a duplicate department.³⁶ Copies

Acquisition and Technical Processing

of official state publications are often allocated to the state library (and state university library) for exchange purposes.

Provisions for physical preparation and cataloging are frequent.^{87, 88} An unusual and detailed study, with recommendations, of the technical processes division of the New York State Library was made by the Temporary State Commission on Coordination of State Activities, in its Second Interim Report.⁸⁹ It describes and criticizes some of the statutory restrictions upon library operations in a state government.

State law libraries are usually divisions of the state library and not separately mentioned in statutes, but in some states they are set up and maintained under separate statutes. Comments on state libraries proper, above, apply, except as noted below. Some law libraries as in Ohio receive fees from fines and penalties or from filing fees of legal documents as at the Los Angeles County Law Library.

State court libraries offer the widest variation and no attempt at generalization will be made. Sometimes the rules as to purchase and personnel are those applicable to other tax-supported libraries but exemptions (because of the "confidential nature" of the operation are found) usually as a subterfuge to permit the appointment of political hacks.

State medical libraries are provided for by specific statutory provisions in Iowa and New York.

Statutes particularly applicable to the technical services in school libraries are not common. Typical are the following: Minnesota⁴⁰ prescribes the purchase from booklists. Wisconsin⁴¹ does this also, and prescribes the method of purchase and binding. A Montana provision⁴² turns school library board funds over to the county library if the school library becomes a branch thereof.

With a few exceptions, county libraries are established under general enabling acts. In South Carolina there is a separate *Code* section for each county library. These acts prescribe the powers and duties of the board of trustees or other supervisory authority, the tax provisions, etc. In general, technical services are subject to the same principles as already prescribed in this paper, but there are occasional more definite references. The authority to receive gifts is common. Apportionment of expenses is sometimes provided for. In Washington⁴³ the State Board of Education supervises purchases. In New York, purchase procedure is prescribed.⁴⁴ Civil service rules are frequently applicable to county library personnel.

The public library is peculiarly the creature of the state legislature. That this is true is confirmed by statute, and the courts.⁴⁵⁻⁴⁸ Whether or not the public library is exclusively a state matter, as distinct from municipal, is unsettled.^{49, 50} This is important in connection with the powers of the trustees over library funds for purchases, technical services, and to receive and administer gifts. Both statute and decision give the power to define library trustees' duties.^{51, 52} A common statutory provision is that the library funds be kept separate from those of the municipality and separately administered.⁵³⁻⁵⁵ On the other hand, in California⁵⁶ the legal title to library property vests in the municipality, unless the deed of gift is *contra*.

The matter of gifts is important to the public library—whether it may or must accept them, their subsequent treatment, and so forth. Most state statutes empower public library trustees to receive and administer gifts, a typical provision being: "Any person desiring to make donations of money, personal property or real estate for the benefit of such library shall have the right to vest the title to the money or real estate so donated in the board of directors thereof, to be held and controlled by such board, when accepted, according to the terms of the deed, gift, devise or bequest of such property; and as to such property the board shall be held and considered to be special trustees."⁵⁷

A gift for a free public library is a gift for a general or public use.⁵⁸ The "right" in the statute above is qualified by "when accepted," and refers to the general rule that the government may receive gifts only by statutory authorization. The right of the library to refuse gifts, especially conditional, is probably undoubted,⁵⁹ but the librarian would do well in specific instances to consult counsel. On the other hand, once the gift is accepted, its terms must be carefully observed,⁶⁰ and may be enforced against the municipality by the library board in an action of mandamus.⁶¹ Deposit of newspapers, and agreements for their care, are authorized in California.⁶²

This brings up the serious question of *ultra vires* in accepting gifts—whether compliance with their terms entails unauthorized actions or expenditures for equipment or salaries, or discriminatory practices. These concern special quarters or equipment for the gift; cataloging expense; reclassification of existing collections to harmonize with the gift, or a gift of money simply for reclassification because the donor does not like the present scheme. All these questions have been posed to libraries. A Mississippi provision somewhat in point states that "the

Acquisition and Technical Processing

county shall bear no expense in connection with any donation.”⁶³ Another troublesome condition is to withhold the gift from public use for a specified period. Restrictions as to use by a class have been proposed. The power to subpoena gifts in connection with loyalty or other investigations is a serious question which has not been tested in the courts, but the power generally to subpoena public records, whether or not in a library, is frequently exercised. In an allied matter, in a bequest for the purchase of books, it was held that the money could be invested and only the interest used and that it was not required that the whole fund be expended immediately.⁶⁴

Would the condition of gift, prohibiting circulation outside the library, operate to rescind the gift? As to the discretion of the library to do or not to do a thing, it has been held that the library may decline to accept certain responsibilities, but having accepted them, it is bound to carry them out as prescribed by law or condition of gift.⁶⁵

Acquisitions by purchase are covered in the residual power of the trustees “to do and perform any and all other acts and things necessary or proper to carry out” their functions (a power usually tacitly understood, but sometimes provided by statute, as in California).⁶⁶ Usually, the general statute confers the power,⁶⁷ often subject to limitations as to indebtedness.^{68, 69} As to the latter, it was recently suggested by a trustee of one of the borough libraries of Greater New York that the circulation of books be limited both as to the number to a borrower at one time, and the period of the loan, so that fewer copies of a title would be needed.

No statute or case directory relating to acquisitions procedure (bidding and the like) was found, except for the expenditure of state aid funds.⁷⁰ Booklists are required in book selection under certain conditions in some states,^{71, 72} and Wisconsin⁷³ expressly limits the scope of purchasing.

Almost all statutes and regulations governing bids on public contracts specify that the award shall be made to the “lowest bidder,” the “lowest responsible bidder,” the “lowest and best bidder,” or the “best or responsible bidder.” The most common phraseology is the “lowest responsible bidder.” Just what constitutes the lowest responsible bidder is a question of fact, in the reasonable discretion of the awarding board, acting in good faith. Being an exercise of discretion it is not subject to review by a court.

“Responsible” means more than financial ability, but includes judg-

ment, skill, ability, capacity, and integrity as well. A lowest, but unsuccessful, bidder cannot compel the awarding of the contract to him by *writ of mandamus*, nor enjoin performance of the contract by the successful bidder, nor recover damages for the refusal of the government to give him a contract. Further discussion of these points may be found in the *Library Journal* of April 1, 1958.⁷⁴

Many troublesome acquisitions problems have arisen, among them the authority to make advance payments covering material to be received beyond the current appropriations period. Discarding of items purchased with tax money is another, and it is frequently prohibited because not expressly provided for. Trade-ins of earlier editions for credit on current ones are often impossible, except by subterfuge. Discounts come up in unexpected ways. Does the Robinson-Patman Act prohibit quantity discounts to large public libraries? Is the discount offered by a dealer to a library a private or a public matter? Some dealers assert their right to knowledge of competitors' discounts in non-bidding situations.

The matter of disposing of library materials acquired by purchase or gift is a difficult one. While the library laws of most states provide, directly or indirectly, for the acquisition by purchase or gift of library materials, only rarely, either in the general statutes relating to property or the library statutes, is there provision for disposal of them. It is quite common in statutes relating to state libraries proper to provide for exchange of publications, and this is sometimes done for state university libraries as well, but not for public libraries. Only one case directly in point was found⁷⁵ which held that law books distributed to a library could not be sold or diverted to any other purpose.

The South Carolina *Code* of 1952 provides separately for each county and city library. For example, the Aiken County Library is empowered to "dispose of such books as may be deemed obsolete and worn out."⁷⁶ There are few such explicit statutes, however, and about the nearest thing to a general permission is in those few enactments, such as in New Jersey,⁷⁷ which empower the library trustees to "generally do all things necessary and proper for the establishment and maintenance of the free public library of the municipality." This would seem to be sufficient to grant the same freedom of action to the public library as to a privately supported one, but, first two rules of construction must be surmounted.

The first is that a statute conferring powers on the sovereign must

Acquisition and Technical Processing

be strictly construed, and that little can be assumed. Second, if the function involved in the sale or other disposition of municipal property is "governmental" rather than "proprietary or ministerial," express statutory permission is required for the disposition of property, either real or personal unless it can be shown that the material is no longer of utility to the municipality. Just what the distinction between these functions is, is a problem of considerable difficulty, and no definition will be attempted here. Matters of public health, education and welfare, however, are "governmental," which would seem to cover public libraries, though in an early case involving the Chicago Public Library, it was held that delivery of books from the central library to a branch was "ministerial."⁷⁸ Where property is held in trust, the courts usually construe it as involving a "governmental" function, and library trustees do hold property in trust.

In Utah,⁷⁹ the general rule is "A city sometimes has on hand personal and real property not devoted to the use of the public. . . . All such property . . . not devoted to the public use, may be sold under the general authority to sell or lease, as the public welfare may demand." Courts will usually not interfere, in the absence of a strong showing of fraud.⁸⁰ Bids may be required, as in Ohio and Arizona.^{81, 82} Few state statutes specifically cover the disposal of property. The *Utah Code*⁸³ states that the municipality ". . . may purchase, receive, hold, sell, lease, convey and dispose of property, real and personal, for the benefit of the city . . . and may do all other things in relation thereto as natural persons. . . ." City charters often contain similar provisions.

Some librarians consulted by the writer were forbidden to trade in superseded editions for credit toward later ones. The writer has had no difficulty in such cases in securing credit by defacing the old title page with the statement that credit has been received and that the books are not to be sold or exchanged. The question has also been raised as to the legality of selling duplicates to the public library staff. There are no cases, but if, under the applicable statutes and rulings, duplicates may be sold at all, it would seem that there must be adequate publicity, and that the staff should not be favored, but that the public served should have at least an equal chance to buy. In applying the above and similar statutes, the prudent librarian will obtain rulings covering his own situation, as there is great variation.

Cooperative purchasing of library materials, either through joint efforts by several participating libraries or through "book clubs" is

not directly covered by any statute seen by the writer. It must be decided, therefore, under the terms of more general acts or by administrative rulings.

Under a general act covering library materials, the Veterans' Administration participates in book clubs.⁸⁴ Similarly, tax-supported libraries have been permitted to take advantage of club magazine subscription rates through dealers, and to buy multiple copies of books at a discount, for exchange purposes. The matter as applied to state libraries is discussed by Arie Poldervaart in the *Law Library Journal*.⁸⁵ The same issue contains a Report of a Special Committee to Study Cooperative Purchasing of Law Books.⁸⁶ Another aspect of this problem has arisen in the operation of cooperative deposit or storage libraries. Participating tax-supported libraries may not give books to these libraries, without statutory permission, but may only deposit them on long-term loan.

Cooperative cataloging would seem to depend upon whether the expenditure of funds was held to be for the purchase of cards—things—or for the salaries and other expenses of producing the cards; in other words, whether a product was being bought, or services were hired. Under general principles, the former is more likely to be approved than the latter. Setting up a cooperative organization to perform a service might well be held to be *ultra vires*, particularly if it operated across state lines, or even across political subdivisions within a single state. Another recurring question is whether a public library may send its binding work outside the state to be done. In a New Jersey case⁸⁷ it was held that the lowest responsible bidder must be awarded the bid, notwithstanding it was not a resident of the state.

May a public library sue or be sued? Generally, a government entity is excluded, except under specific statutory procedure, which includes the consent of the agency in question. Some statutes specifically authorize suit, and in the tort liability of libraries it has been held that the conveyance of books from one library building to another by means of an automobile along the public highway by employees of the library renders the city liable for negligence of the driver.⁸⁸

An issue irksome to both public and privately supported libraries is that of photocopying by libraries for patrons, of materials protected by common law or statutory copyright. There is an extensive bibliography on the subject. In this writer's opinion, by far the most useful treatment, by an experienced copyright lawyer rather than by wishful-

Acquisition and Technical Processing

thinking scientists or professional association committees, is in two articles by L. C. Smith in the *Law Library Journal*.^{89, 90} The second article is principally devoted to suggestions for needed legislation. Smith has been a member of the staff of the U.S. Copyright Office since 1923, and senior attorney of the office since 1941.

Although this paper is concerned solely with the possible legal liability of the copying library, the ethical question involved also concerns libraries. It arises because, as a practical matter, publishers have not sued libraries for such copying even though there may be technical infringement giving a cause of action. Though they have warned them:

The increasing prevalence of photographic and other reproduction of copyrighted material by libraries has been rather forcibly brought to our attention in recent years. Our investigation of the matter convinced us that this practice is not only a technical violation of copyright but in some instances—and certainly in the aggregate—may constitute a substantial impairment of our interests.

Perhaps our gravest concern is that we do not, by acquiescence in infringements of this kind, jeopardize our copyright and our right to continue protection against more substantial infringement by others.

These considerations led us to adopt a policy opposed to such reproduction of any part of our publications without our consent in each instance. We have had occasion to assert our rights in this respect, though fortunately a demand has sufficed so far without any need of legal proceedings.

Our decision on this matter was reached with great reluctance. We make every effort to co-operate with the libraries. . . . But the threat to our interests is so serious that we feel that no other course is open to us.⁹¹

So far it has not been worth it, financially, to bring an action except, perhaps to enjoin persistent refusals to heed requests to desist. No reported cases have been found. To paraphrase an old legal maxim, *de minima non curant* publishers. As a consequence, the libraries may find themselves in the uncomfortable position of persistently and knowingly violating the legal rights of others, just because they can safely do it. The ethical question is one which the so-called "gentlemen's agreement" discussed below has attempted to solve in some degree.

Publishers and copyright owners generally have a two-fold interest in photocopying. First, although they are usually little concerned with financial loss due to the reproduction of single copies of their literary

properties for the use of scholars or for court use by lawyers, they are becoming fearful that, by failing to stop this practice, they may permit copiers to establish by continued permissive custom a sort of prescriptive right to such practices. They are troubled, secondly, by the multiple-copy users who incorporate them in collateral "readings" or "cases and materials" without express permission, for class use by students. With this latter aspect this paper is not concerned, as libraries do not knowingly participate.

The basic questions at issue are: whether in fact photocopying of copyrighted material constitutes infringement of the copyright, and if it does, whether libraries are relieved from legal liability by the conventional disclaimer agreements with the photocopy buyer.

The photocopying practice of libraries, and their procedure in facing the legal problems, are essentially as follows. A patron of the library, the reader, orders from it, and is supplied by it with, a photocopy of an item in its collection, which item is protected by either common law or statutory copyright. In order to protect itself, ethically and legally, the library causes the reader when ordering to sign a statement or disclaimer to the effect that the copy is desired only for the scholarly use of the patron, and that he undertakes to protect the library by assuming all liability for copyright infringement due to the original copying or the patron's subsequent use of it. Customarily, not more than two copies will be supplied of a given item to a reader. As will be explained later in discussing disclaimers, the writer believes that the above constitutes two or more separate and distinct transactions: the copying by the library and transfer to the reader; and the reader's subsequent use of the copy. It is important to keep this in mind.

Whether or not there is a technical infringement depends, first, upon whether the copied material is protected by either common law or statutory copyright. If an unpublished item is involved—a letter or manuscript thesis, for example—the common law copyright owner's right is against publication at all, at any time, or in any degree, because publication, except the "limited publication" discussed below, operates as a dedication to the public and destroys the common law protection forever. The doctrine of "fair use," applicable to statutory copyright, does not apply.⁹²⁻⁹⁵ Whether the reader has the right to copy for his own use, and whether the library in permitting him to do so incurs any liability, will be discussed later.

Libraries occasionally expand or modify existing subject classifica-

Acquisition and Technical Processing

tions for their own purposes. Where, as with the Library of Congress classification, there is no copyright, no legal question arises, though common courtesy would seem to require apprising the original compiler of the action taken and getting his blessing. Where, however, as with the Dewey Decimal classification, the original work is copyrighted, the question of infringement arises.

It would seem too obvious to require discussion that an expansion based squarely upon the Dewey class numbers, mnemonics, country divisions, etc., would technically infringe if published. The question, then is whether there is publication. If the expanded classification is printed or multiplied in another manner, and distributed widely to interested users, there is undoubtedly publication and infringement, and the prior written consent of the copyright owner is required. Here is a case where the circulation of even a single copy outside the compiling library, say to an engineering library not interested in the entire Dewey Classification, might deprive the publisher of a sale—and that is the clearest of all stigmata of infringement.

A more difficult question arises if the expansion is a private, type-written one, for use only in the library which makes it. If the classification were reproduced in a limited number and kept on the desks of the catalogers, there would probably be no publication, or at most only permissible limited publication. But as soon as the classification is applied to books, call numbers placed on the spines, and the books shelved and circulated, a serious question of publication is presented. There are no cases in point, but on general legal principles as well as courtesy, a library before applying such an expansion should receive the consent of the copyright owner. Presumably it would already own a *Dewey*; if not, and the expansion were made from a borrowed copy, there would be a clearer case of improper use.

What constitutes "publication"⁹⁶ is vital in common law copyright, and is unsettled. Making copies freely available to the public is certainly publication. Deposit of a document in a public office where it is available for inspection has been so regarded,⁹⁷ but there is authority *contra*.⁹⁸ In order to mitigate the harshness of this rule, the doctrine of "limited publication" has been evolved, under which common law rights are not forfeited. Limited publication has been defined as one "which communicates the contents of a manuscript to a definitely selected group for a limited purpose, and without the right of diffusion, reproduction, distribution or sale."⁹⁹ This doctrine is severely limited, however, by the requirement that communication

must be restricted "both as to the persons and the purpose."¹⁰⁰ If *either* is not so restricted, then there is general publication, and forfeiture results.¹⁰¹ Where communication is to a selected number on condition, express or implied, that no rights are released, that has been held to constitute limited publication.¹⁰²

Do the readers who use a large public or university library constitute a restricted group within this definition? It seems doubtful and a negative inference might be gathered from *White v. Kimmel* in the lower court: "No copy was ever placed in a public library, a reading room or on the shelf of a book store or club, where it was made accessible to anyone who wished to look at it."¹⁰³ Although dictum and reversed on other grounds, nevertheless this seems some indication of what the court might do if faced with the problem. In another case involving statutory copyright, it was said that ". . . it is safe to say that the appearance of a pamphlet, after its delivery to plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly was a 'rendering it accessible to public scrutiny,' and was likewise a 'communicating it to the public by distribution of copies.'"¹⁰⁴

The question here is whether the group is a "definitely selected" one. If it is, there is only limited publication, since the use is restricted, and there is then no dedication to the public. It is the writer's opinion that a group of 5,000,000 people eligible to use a public library (as in Chicago), or of 26,000 university library readers (as in New York University) is by no reasonable definition a "selected one" in these circumstances. If it is not, then the free availability of an unpublished document for reading in such a library would constitute general publication, regardless of the purpose for which read, and common law rights would be forfeited. Even more so, photocopying by the library for such groups, for use outside the library, would seem to be general publication.

In university libraries, this is a particularly vexatious problem with manuscript master's essays. Commonly, these do not circulate, but may be freely used within the library building, in the absence of specific restrictions imposed by the author. According to C. H. Melinat,¹⁰⁵ as cited by R. R. Shaw,¹⁰⁶ only five per cent of university and research libraries studied by him consult the author before circulation. Under the tests above, this simple consultation would seem to forfeit common law rights; copying by the library goes even further, and permits inspection beyond the confines of the library building. It might be

Acquisition and Technical Processing

said that, since circulation has already destroyed these rights, there can be no legal liability on the library for copying, but that is, ethically, an uncomfortable doctrine. As to theses, it has been said that: "The literary property in theses and writings as performed by students in colleges and universities is of concern, for the institution may require the placing of a copy in the library with the result, unknown to the school or author, being a general publication. . . . The privilege of 'fair use' has no place in common law copyright for in this field the author has exclusive control. . . ." ¹⁰⁷ Beginning in 1958, the Columbia University School of Law requires authors of manuscript LL.M. theses to state in advance whether or not photocopying is permitted, this permission or lack thereof to be stamped on the library copy.

Some authors of masters' essays have indignantly denied the right of the university to divulge even the existence of such essays, the reason being that they expected to use them as the basis of further research toward a doctoral dissertation, and feared that if their topics and research were publicized, others would publish first and defeat their own efforts.

The present writer believes that circulation of unpublished material to relatively large groups of eligibles, even for limited purposes, constitutes general publication within the test set up by the courts, and that the added publicity by copying for sale to a reader is general publication. There are no cases, but since libraries are so astute to protect themselves by requiring the reader to sign a disclaimer, it would seem that they are equally bound to hand the common law copyright owner a statement setting forth the possible legal consequences of permitting the public to examine, or the library to copy, the material deposited. Few people are even aware of the existence of common law copyright; the library, which is, should be astute to protect rights under it.

The statutory copyright owner's right to prohibit copying is subject to the doctrine of "fair use," under which copying for private study or criticism or review is permissible. How much copying may be done, however, is in hopeless confusion. Justice Story's rule in *Folsom v. Marsh* is as definite as any: "The entirety of the copyright is the property of the author, and it is no defense that another person has appropriated a part, and not the whole of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other con-

siderations, the value of the materials taken, and the importance of it to the sale of the original work." 108

Application of this rule, however, has been uncertain. "The issue of fair use . . . is the most troublesome in the whole law of copyright. . . ." 109 For practical purposes, the "gentlemen's agreement," discussed on page 449, constitutes some guide, as the following excerpts show:

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest. . . . The statutes make no specific provision for the right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyrighted materials are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcriptions.

Whether or not photocopying by a library for a patron is a technical infringement is a matter of law, to be determined on the facts in each instance. Common prudence would indicate caution on the part of the library. Complete safety requires express prior and written permission for each copying of protected material. This is hardly feasible as it takes too long and often the address of the copyright owner is unobtainable.

Other countries are more definite, in their statutory doctrine of fair dealing. The British Copyright Act of 1956¹¹⁰ under the heading "Special exceptions as respects libraries and archives," sets forth definite principles which have been summarized in *1957 Statutory Instrument*.¹¹¹ The provisions are essentially restricted to articles in periodicals, or to where the librarian does not know and cannot ascertain by reasonable inquiry the name and address of the copyright owner. This is of interest now in this country, since our nation has subscribed to the Universal Copyright Declaration of September 6, 1952, under which copyright protection in the United States is conferred upon the nationals of the other signatories. Formerly, most foreign publications were in the public domain.

Library and other professional and scientific organizations have long sought ways out of the copying dilemma, but so far their irresistible forces have run head on into the immovable object of copy-

Acquisition and Technical Processing

right law. At present, a joint committee of several library associations (with, so far, the conspicuous absence of the American Association of Law Libraries, which might be expected to contribute some legal knowledge) is considering a statement of policy,¹¹² with the ultimate hope of having much of it incorporated by amendment, in the copyright title of the *United States Code*, which has superseded the old Copyright Act, and so give legal status to what is at present only an act of grace.

The "gentlemen's agreement" mentioned earlier is the agreement of May, 1935, between the Joint Committee on Materials for Research of the American Council of Learned Societies, the Social Science Research Council, and the National Association of Book Publishers. The agreement is so important in its permissions given and withheld that it should be read in detail. It appeared in full in the *Journal of Documentary Reproduction*¹¹³ and is summarized in the *Law Library Journal*.¹¹⁴ In effect, it gives some status to fair use, though on an informal basis, and prescribes certain minimum conditions to be observed by libraries.

While libraries are glad to have as much as the agreement gave them, they are dissatisfied with it, would like to broaden it, and put it on a legal basis, either by contract, or, preferably, by statute. The agreement is not a contract. Furthermore, its present status is highly tentative and problematical. The agreement, which was negotiated originally by the National Association of Book Publishers and certain professional association committees, and reaffirmed in 1939 by the successor, Book Publishers' Bureau, Inc., has, as far as records show, not been ratified by the present American Book Publishers' Council, which was formed in 1946. In order for the Council to take any position on the agreement, action by its board of directors would be essential.¹¹⁵ Also, it should be pointed out, the importance of the agreement has been reduced by the fact that many publishers are not members of the publishers' organization, and librarians do not know which ones are.

For whatever they are worth, disclaimers are incorporated by many libraries into their photocopy order forms. In the opinion of the writer, they are ineffective as between the copyright owner and the library, though they may give the library a cause of action against the patron-signer, for any damages recovered by the owner against the library.

The policies of libraries vary greatly. One government library in

Washington which has long operated an exceedingly busy photostat department, disregards copyright in executing orders. At the other extreme is the Library of Congress whose policy has been stated in a letter: "The Library has its own Photoduplication Service. This division has on file releases obtained from certain publishers allowing the Service to make single copies for scholarly use only of articles by them which are out of print. Otherwise, the Service refuses to copy a copyrighted item." The New York State Education Department Photostat Service, as shown by its order blank, is even stricter to the point of virtually excluding copying of copyrighted material: "Material copyrighted during the past 56 years cannot be duplicated for republication without written authority of the copyright owner or conclusive evidence that the copyright has expired. Full responsibility for any infringement of copyright is assumed by the applicant."

Another strict policy has been recently adopted by the National Library of Medicine which will not honor requests from individuals as such. They must be channeled through other libraries. Photocopies sent to such libraries may be retained by the borrowing library. Whether this will appease the copyright owner remains to be seen.

Most libraries, however, are more liberal. Below is a typical disclaimer, drawn by legal counsel: "I represent that this order for a photocopy of each of the materials listed above is in lieu of a loan or manual transcription and that I require the copy solely for my private use for research purposes, *I understand that I cannot legally sell or further reproduce the copy supplied without the express permission of the copyright proprietor if publication is covered by copyright.* I assume the responsibility for copyright infringement arising out of this order or the use of materials requested and I will hold the [copying institution] harmless from any misuse of such material."

Note that the disclaimer does, or attempts, four things: (1) states that it is in lieu of a loan or manual transcription by the patron, to which some add that they are not selling the copy but charging for a service; (2) the reader certifies that it is solely for his private use for scholarly research; (3) that he will make no unauthorized use of it; and (4) that he assumes responsibility for copyright infringement and will hold the library harmless in any infringement action.

The first three provisions have one eye on the "gentlemen's agreement," and should be read in connection therewith but bearing in mind that the agreement is not a contract, that what constitutes compliance by the library with it is subject to judicial interpretation, that

Acquisition and Technical Processing

many publishers are not parties to it, and that it may not now be in force.

It has been assumed, without legal authority, that a reader is free to make copies for his own use, but that is by no means certain. The fact that the "gentlemen's agreement" seems to acquiesce is not decisive; it dates back twenty-two years to a time when the numerous portable photocopiers which the present day reader takes into the stacks and with which he makes wholesale copies, were not available.

As a matter of interest, a case, which is not very good authority in this connection, held that copying in shorthand violates copy-right.¹¹⁶ If the reader, in such circumstances, infringes, what of the library which permits it? There are no cases, but on general legal principles it would seem that if there were infringement, the library which knowingly permitted it would be *in pari delictu* with the reader. Even if the individual reader has the right to make copies for himself, it by no means follows that a library is free to do so for him, for hire.

Even though, as is usually the case, the library loses money on its photoduplication service, it is still conducting a commercial operation, and the legal situation is different than with the patron. Profit is not a factor, and substantial damages may be awarded in an infringement action without a showing of actual monetary damages.¹¹⁷ The library takes a risk when it unilaterally decides that the conditions are such as to permit it to copy for another and for a price.

Neither is the good faith of the library a factor, except, perhaps, in mitigation of damages. "It is not essential to the existence of infringement that there be intention to infringe or that the exhibition be for profit."¹¹⁸ ". . . For infringement lies in the act of infringing and not in the intention with which such act is done . . . at most, [intent may] bear upon the question of the issuance and scope of injunctive relief."¹¹⁹ This would seem to render ineffective the pious statements, frequently found in disclaimers, that the library is not selling the copy but merely performing a service.

Nearly all librarians consulted by the writer believed that the patron's signed undertaking to hold the library harmless in infringement proceedings was effective, that there was some magic in it. Why? Since when under the law may A, by agreement with B, to which C is not a party and of the very existence of which he is almost always ignorant, deprive C of a valuable personal property right when no public interest is involved? Such agreements are believed by the

writer to be effective, if at all, only as between A and B, to the extent that if C recovers from A for infringement, A may then have his action for the amount thereof against B.

Perhaps the chronology of the transaction—A's copying and sale to B, B's use or misuse of the copy thereafter—may make this clearer.

1. The library has copied a document protected by copyright, and sold the copy to a reader, on order. The library's act is complete at this point. There has been a copying on a commercial basis, including a transfer of possession to the reader. The reader did not make the copy; the library did, for compensation, though perhaps at a loss.

2. The right of action, if any, of the copyright owner at this stage, for the copying and sale, is against the library, not the buyer, who at law, is so far a "stranger" to the owner. The owner may have an infringement action against the library, regardless of what the purchaser later does with the copy.

3. The buyer makes some use of the copy. His agreement with the library may cover this, but can have no effect upon the right, or lack of it, of the library to make the copy in the first place. On the other hand, if the reader subsequently misuses the copy so as to constitute a new and separate act of infringement, the owner has his action against him, too, but quite independently of the original copying.

4. The copyright owner recovers in an infringement action against the library for the original copying and sale. He does not have to sue the buyer. At this point, if anywhere, the disclaimer takes effect, but not as concerns the copyright owner—who sues the guilty and solvent library, not the impecunious and judgment-proof patron. What, if anything, the library may do under this disclaimer is, in the opinion of the writer, to try to recover his losses from the patron, who by virtue of the agreement may be something of a surety for the library.

Here are some suggested safeguards for copying libraries. Since publishers ordinarily do not sue libraries for copyright infringement, the library as a practical matter is usually reasonably secure against law suits. It, nevertheless, should act in good faith and not knowingly photocopy in a manner to injure the owner. The "gentlemen's agreement" lays down workable terms.

The policy of the Library of Congress, in building up a file of advance permissions from publishers, would seem to have much to commend it, particularly with respect to publishers not members of

Acquisition and Technical Processing

the American Book Publishers Council, and so not parties to the "gentlemen's agreement." It is to be hoped that the joint committee studying the question will secure the cooperation of publishers, to the end that the copyright title of the *United States Code* may be amended by provisions somewhat paralleling the British fair dealing statute. In the meantime, a profitable activity might be the cooperative collection of mass permissions and establishment of a central repository and information agency for them.

The library can explore the possibility of taking out liability insurance. Although one insurance broker consulted doubted the feasibility or ethics of this, comparing it to insurance covering the contemplated commission of a crime, an official of a large insurance company told the writer it could be done and that there was no more ethical problem involved than that faced by professional men—physicians, lawyers, or engineers—in insuring against the consequences of torts committed by them in the course of their practice. Copyright infringement is not a crime.

A persuasive, expert opinion by G. H. Ort,¹²⁰ executive vice president of the Insurance Brokers' Association of New York, Incorporated, says in part:

First, I take it, the frequency of your occasion to reproduce copyrighted material is such that you desire not to obtain permission of the copyright owner, and second, that each instance is a commercial transaction.

I believe that it would be possible to have these special characteristics appraised by an underwriter for purposes of acceptance of the risk and quotation. It would also be my opinion that a reasonable market might be found, unless the circumstances are quite different from what I envisioned them to be. Would it be correct, for example, that your purposes are not commercial, and that your charges for the service of reproducing the material which may be copyright material, are primarily for the purpose of covering the actual expense in time and mailing costs, and photostatic material used? If so, it would seem that the owner of the copyright material might be much more interested in what use was going to be put to it by the one who obtained the material from you, and whether that person obtained copyright permission. . . .

These comments, you will recognize, which apply mostly to the library photostater are quite different. . . .

It can be stated that at the present moment at least one large university library has been offered and is considering a policy covering

damage suits for copyright infringement by photocopying protected materials.

There is now a statute of limitations on infringement actions through an act of September 7, 1957 which provides a three year period.¹²¹ Previously, there was no federal statute covering such actions, and such suits depended upon the provisions of state statutes.

The duplication of musical phonograph records has little pertinence to this paper but in this closing section is noted briefly for the record. They are not copyrightable, though the musical compositions reproduced on them may be.¹²² This subject is treated at some length in the *Columbia Law Review*.^{123, 124} There is a serious question as to whether the recording of a musical composition and the subsequent sale of records constitutes such a publication as to forfeit common law rights in the music. Logically, it should, and three lower federal court cases and one state case have so stated.¹²⁵⁻¹²⁸ One case in the Federal Court of Appeals for the Second Circuit¹²⁹ has held *contra*, due apparently to a misconstruction of the New York law.^{130, 131}

Phonograph records are not covered by federal statute but by common law; thus the law of the state in which the action arises governs. Where a record has been extensively exploited, however, some courts have applied the rules of unfair competition to protect the record companies.^{132, 133} Until there is an authoritative holding on the question by the Supreme Court of the United States, phonograph companies as a deliberate policy have often failed to copyright recorded musical compositions before selling records, so as to avoid possible surrender of common law rights, or compulsory licensing under section 1(e) of the Copyright Law.

Many libraries maintain and circulate collections of phonograph records, including those the music of which has been copyrighted. Does the library risk copyright infringement thereby? No more so than by the circulation of a copyrighted printed book, or of an uncopyrighted document. If the borrower makes unauthorized use (as for broadcasting or for public entertainment), he may incur liability.¹³⁴

By federal statute or administrative rulings thereunder, or both, it is expressly provided that certain documents should not be photocopied. Among these are naturalization and citizenship certificates, copying any part of which is penalized by fine and imprisonment;¹³⁵ and passports, the reproduction of which is illegal.¹³⁶ The Passport Division of the Department of State will, under proper conditions, furnish certified copies of passports but refuses to recognize copies

Acquisition and Technical Processing

made by others. Although army discharges may be copied, adjusted compensation certificates are obligations of the United States, copying of which is a violation of the law.¹³⁷ It is forbidden under most circumstances to copy obligations or other securities of the United States. The Treasury Department issues a circular setting forth pertinent provisions of the law. Photocopying of United States stamps is unlawful except for avowedly philatelic purposes.^{138, 139} It is also unlawful to copy amateur radio operators' licenses although the station license (on the reverse side) may be copied.

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MILES O. PRICE

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Acquisition and Technical Processing

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