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Legal and contractual aspects of networks are reviewed from a lay practitioner's viewpoint. The legal basis for establishment of networks determines the authorization to enter into contracts, receive and convey funds, cross state lines, etc. Existing state laws (or lack of appropriate state laws) hinder development of networks by the process of interlocking agreements among existing institutions. Enabling federal legislation creating networks does not clarify legal identity or authority of such networks in relation to state or host institution laws or regulations. Once networks are established, the administrators are faced with legal interpretations pertaining to operations. The composition and nature of contracts with participants are not uniform and are often vague and lack clarity. Legal interpretation pertaining to ownership and use of information banks within networks present administrative problems. The contractual interfacing of networks for extension of services or resources is difficult within the present confusion of legal jurisdiction and authority of networks. Suggestion for needed action consider a legal review of existing laws, a recodification or a national network law, and a "standardized" contract format. (Other papers from this conference are available as LI 003360 - 003380 and LI 003382 through LI 003390) (Author)

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LEGAL AND CONTRACTUAL ASPECTS OF INTERLIBRARY and INFORMATION SERVICE OPERATIONS

by

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ABSTRACT

Legal and contractual aspects of networks are reviewed from a lay practitioner's viewpoint. The legal basis for establishment of networks determines the authorization to enter into contracts, receive and convey funds, cross state lines, etc. Existing state laws (or lack of appropriate state laws) hinder development of networks by the process of interlocking agreements among existing institutions. Enabling federal legislation creating networks does not clarify legal identity or authority of such networks in relation to state or host institution laws or regulations. Once networks are established, the administrators are faced with legal interpretations pertaining to operations. The composition and nature of contracts with participants are not uniform and are often vague and lack clarity. Legal interpretation pertaining to ownership and use of information banks within networks present administrative problems. The contractual interfacing of networks for extension of services or resources is difficult within the present confusion of legal jurisdiction and authority of networks. Suggestion for needed action consider a legal review of existing laws, a recodification or a national network law, and a "standardized" contract format.

LEGAL AND CONTRACTUAL ASPECTS OF INTER-LIBRARY AND INFORMATION SERVICE OPERATION

Maryann Duggan

The first purpose of this paper is to review legal and contractual aspects of inter-library and information services operations from the viewpoint of a practitioner in the field. The second purpose is to identify specific operational areas needing further legal clarification or codification.

It should be emphasized that the author in no way claims this paper to be a "legal brief" of inter-library operations. Furthermore, the author assumes no legal responsibilities for any interpretation or actions resulting from the information presented herein. This paper is simply a presentation of "legal" problems encountered in the practice of developing and/or operating networks in the Southwest.

The complex matrix of local, state, and federal laws applicable to network activities is an unchartered labyrinth of contradictions, confusions, and legal jargon. This paper will attempt to outline the legal aspects of:

1. establishing inter-library activities or network services as a legal entity.
2. operating networks and providing services from the viewpoints of participants, information base, and network development or extension.

Copyright law, FCC regulations, or laws influencing telecommunication hardware are not considered in this paper.

The Legal Basis for Network Establishment

Using the rationale that an inter-library network is a combination of individual "nodes" or a linkage of separate organizational parts, let us start our analysis with each node. Each library participating in the net-

work has some legal basis for existing, whether public or private. Community public libraries are authorized to operate within the city charter or ordinances and are therefore subject to the restraints and operational policies so stated. State libraries are established by state law and are subject to the operational policies as interpreted by the state attorney general. It is also evident that federal libraries are legally authorized to operate on the basis of enabling federal legislation or federal code. Private libraries in industry operate within the restraints specified by corporate policy and laws of incorporation of the parent firm.

These varying basis of legal establishment and operational policies result in a virtual hierarchy of legal constraints individually effecting each existing library or library system. The author did not find a concise review of the existing laws pertaining to each type or level of library or "node". From actual experience, however, it is believed that the restraining influence imposed on each participant or network member as a result of the varying legal base for existance are a real factor in establishing networks by the process of putting together existing components into an organizational structure. For example, a review[1] of various state laws pertinent to interstate networks or library consortia among six state libraries revealed legal barriers which would seem to inhibit this type of network development. The most prevelant state laws enabling state libraries to engage in interstate networks are interstate library compact laws, joint exercise of powers laws, and interlocal cooperation act. Analysis of these laws (and an attorney general's ruling) indicates several constraints, namely:

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[1]McMurrey, Katherine and Funk, Ralph. "Legal, Organizational and Financial Aspects of Interstate Interlibrary Cooperation in the Southwest", presented at SWLA Working Conference, Arlington, Texas, September 17, 1970.

1. Inability for a state with interstate library compact to enter into an agreement with a state not having this law.
2. Stationary limitations restricting a state to enter into agreements with only adjoining states.
3. Incompatibility of state laws negating any general agreements.

Another method for developing networks is via the creation of a new agency, i.e.; a "network corporate body" which may or may not be chartered or incorporated. This body then contracts with participants or members to provide certain services or perform certain duties. Academic library consortia are an example of this type of network organizations. Each participant agrees to certain objectives or to a role in the consortium with the funding grant being administered by a core agency acting in behalf of the other members.

Apparently the source of funds for establishing the network determines which of the two types of organizational structure develops; i.e.; interlocking of existing "nodes" or establishment of a "central agency". If we limit our consideration of networks to only these organizations using telecommunication devices, the formation and establishment of library networks has been primarily motivated by four federal laws:

1. Library Services and Construction Act, Title III.
2. Higher Education Act, Title II.
3. State Technical Services Act.
4. Medical Library Assistance Act.

Each of these laws may be interpreted as "enabling legislation" in that funds are provided to develop networks to achieve some purpose or objective as outlined in each law. Apparently the federal laws take precedent over state or local laws, in these cases. For example, although many states do

not have an interstate compact law, these same states are participating in one or more of these networks involving the crossing of state lines for library services. By accepting federal funds, the state agencies apparently give precedent to the federal laws in cases of conflict. Most of the cases reviewed involve contracts or service agreements of individual state agencies or institutions with a "central agency" created by federal grant, i.e.; the regional medical library programs. The attorney general of one state has ruled that the state library cannot participate in interstate activity, and yet another state agency in that same state is very much involved in interstate library activity under one of the above federal programs.

Apparently federal laws provide enabling legislation and funding permitting the establishment of various types of networks. The guidelines pertaining to these laws provide interpretation and procedural instructions which - in essence - become part of the law. Each participating state apparently reviews the federal program and, in some manner, adjusts state rulings to permit the implementation of the intent of the federal law. Each state usually prepares a state plan which must be reviewed (and approved) by the federal agency administering the program. Theoretically, the state plan serves as a "legal framework" for implementation of the program within the state. Unfortunately, most state plans are extremely vague and leave many policy and procedural questions unanswered.

It is impossible to discuss legal and contractual aspects of establishing networks without also discussing funding and regulations pertaining to use of funds. Apparently many conflicts exist between Bureau of Budget Circulars and state fiscal regulations. Such interpretations as encumbrance policy, fiscal year, matching funds criteria, and redistribution of budget line items present a confusing array of conflicting regulations. Interpreta-

tion of indirect cost calculations continue to be an exercise in "one-upmanship". The network administrator is treading on thin ice if legal connotations are seriously considered and fiscal integrity is attempted.

This situation is further complicated by federal programs that oscillate between "grants" in one year and "contracts" in a following year. The legal implications of these two methods of establishing networks needs clarification to most network administrators.

The relationship of the network agency and the "host institution" is also a source of legal confusion. Apparently most existing networks are legally and fiscally appended to some previously existing institution. The question then arises as to which fiscal and legal codes are to be adapted by the network, i.e.; the "host institution" or the "funding agency". Based on interviews with several network directors and my personal experience with two networks (one in a private university and one in a state university) establishment contracts should clarify these important policies. If the regulations and laws of the "host institution" are prohibitive, the network will continue to be hampered in operations and development. The most successful networks reviewed seem to be those that transcend inhibiting regulations of host institutions or that operate as a separate legal entity. The network administrator is caught between the federal regulations defining qualified agencies to apply for network development funds - and thus inheriting the often restraining operational regulations of the host institution - and the need to have certain freedom to develop a new type of operation transcending institutional regulations and policies. Contracts imply commitment. The importance of the establishment contract with the host institution (and the implied commitment) cannot be over emphasized. Too often the network is pushed to one side within the host institution

after the establishing contract is signed and the federal funding assured.

Thus, in summary, existing networks are an ephemeral quasi-official organization with questionable legal identity and powers resulting from a long series of contracts generally following this pattern and subject to legal interpretation of the following:

1. Enabling federal law.
2. Bureau of Budget rules.
3. Guideline to the federal law
4. State agency rules and grant agreement between federal and state agency.
5. State plans for that particular law.
6. Qualifying host institutions contract with state agency (or federal agency).
7. Host institution regulations.
8. Agreement with network administrator and host institution - and behold, a network is established!

One legal counsel suggested the following interpretation and "modus operandi" for network administrators, namely:[2]

"Don't look for laws enabling you to perform certain functions; assume you have that right until you are confronted with a law that says you cannot. Network operations require an extra-legal attitude and operating policy in the current jungle of levels of laws."

It thus appears that clarification of the local, state, and federal laws regulating the establishment of library networks is needed.

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[2] Dr. Roy M. Merskey, Director Law Library, University of Texas, Austin, in private communication.

The Legal Basis for Network Operation

Networks do get established, in spite of the contradictory legal interpretations. However, the uncertainty of their legal origin and jurisdiction does adversely effect the operational capabilities. Three operational areas of concern in this paper are:

1. Participants role.
2. Information banks.
3. Network interfacing.

With regard to participants, a variety of situations occur in the established networks. In the case of networks established by interlocking agreements, the establishment instruments usually determine and clarify the participants role and expectations. In the case of networks developed around a "central agency", participants usually contract for certain services at a pre-determined fee. Examination of some of these contracts reveal a great diversity. Apparently, a "standard contract" has not been developed. A review of contract components shows that some or all of the following have been included:

1. Definition of participating parties and individuals authorized to request services.
2. Time period covered by the contract.
3. Work to be performed or services to be provided and responsibilities of each party.
4. Fees (or costs), discount rates, and method of billing, (i.e.; reciprocity or exchange vs cash payments), and method of conveying funds.
5. Eligible users or authorized method of use, with constraints on "rebroadcasting".

6. Liability disclaimer or other limits of legal responsibilities, i.e.; patents and copyrights.
7. Contract cancellation rights and procedures.
8. Penalties for non-conformity or non-compliance.
9. Legal process for contesting disputes.

This author reviewed the "membership agreements" or "participants contracts" being used by seventeen networks operating within or in one state. No two networks had a similar instrument and the lack of standardization was obvious - even within the boundaries of one state.

One legal counsel questions the legality and binding nature of these contracts. To avoid this issue, some networks simply call these contracts a "membership agreement". There is considerable question concerning the legal right for a network to enter into contracts - depending on its founding charter, its state of incorporation, its tax status, etc. One network was advised by legal counsel that the state law required the collection of state sales tax for photocopy charges or fees charged for search reports. In networks involving industry members, the legal implications of anti-trust laws and "restraint of trade" laws are an impeding factor. The question of liability for inaccurate or incomplete services to network users are also raised in two networks serving industry. Although the "membership agreement" contained a disclaimer waiving the network from any such responsibility, legal counsel felt that such disclaimer would not hold up in a court test. It must be re-emphasized, however, that formal, written agreements of some type are believed to be essential in operating a successful network. Again, contracts imply commitment - and networks cannot operate without full commitment from participants.

With regard to the information bank provided by the network, several

factors seem evident. The question of ownership of the information bank has been raised in several networks. For example, a computer-based catalog of serial holdings prepared by a network and housed in a participants facility is subject to questions of ownership. Who has the legal right to access this information bank and for whom and for what purpose? If the information bank is compiled for the network on contract by an outside agency, differences of opinion can occur on the ownership of this product if these factors are not clarified at the time the contract is first let.

Another very real question pertains to the procurement of an information bank by a network from a commercial or semi-commercial agency. For example, suppose a library network desired to procure and make available to its members a commercially available information bank of current journal citations (by subject, author, etc.). Does the network contract with the supplier - and if so, on what basis - as a "franchise agent", as a "retail outlet", or as a "distributor"? The terms of access/use of this information bank become entangled in the pricing structure, the "guaranteed return", and the fair and equitable distribution of costs among network members.

In the case of "information banks" provided by federal programs (i.e.; GPO depositories), the legality of fees for services rendered to network members from these depositories has been questioned. When the library agrees to become a federal depository, is it legally committed to provide gratis service on this "information bank"?

Another type of "law" influencing network development and the information bank is the accreditation standards for college and universities. These standards reflect the library collection requirements of a totally self-sufficient institution. The conflict between this "law" and the

changing patterns of access to collections via network will need to be resolved. This recodification is particularly important in the case of newly-founded academic institutions seeking accreditation and desirous of enriching collections through network access rather than building large collections of research materials.

With regard to network interfacing, the legal aspects become even more complex. Incompatibility of operational policies, fee structures, user's access, funding base, etc., become evident when two or more networks attempt to interface. At the national level, considerable negotiating is usually required to develop an interface between a network operating under one federal program with a network operating under a different federal program. The legality of federal money provided to one network being conveyed to another federally funded network creates considerable concern to program administrators.

If a "national network" is to be developed it seems necessary that a re-codifying of the pertinent laws will be essential. Both the National Advisory Commission on Libraries,[3] and the SATCOM Committee[4] studies identify need for a national library policy, and planning, coordination and leadership at the national level. Certainly, those responsible for national planning and policy formulation should be cognizant of the legal and contractual implications on network activity at the practicing level.

Thinking of the future and visualizing an idealistic concept, perhaps a public network of all libraries might be a solution. This might take the

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[3]Knight, Douglass M. and Nourse, E. Shepley. Libraries at Large, New York: Bowker, 1969.

[4]National Academy of Sciences - National Academy of Engineering. Committee on Scientific and Technical Communication. Scientific and Technical Communication. Washington, D. C.: The Academy, 1969.

form of a "library utility" owning all library resources and providing services on contract - similar to an electric or gas utility. To some, this system might be Eutopia; to others a nightmare of loss of autonomy and private control. Certainly, a nationally operated "library utility" would simplify the legal and contractual aspects of networks.

Recommendations

Based on this author's experience and findings, the legal and contractual aspects of network establishment and operation are somewhat unclear. Networks are a relatively new type of "social organization" that do not fit into our existing laws - yet, networks are very much in evidence and very much operational. If laws are a codification of social behavior, it seems that the following action is needed:

1. A legal review by competent legal staff of existing local, state and federal laws pertaining to network establishment and operation.
2. A legal opinion on the legal nature of networks and their right to enter into contracts, receive funds, convey funds, collect taxes, etc.
3. A standardization of contract forms and elements.
4. A national networking law applicable to all federally funded networks to codify current and future practices and legal basis for establishment and operation.

REFERENCES

A preliminary literature review did not find any published material on this specific topic, per se. The paper presented by Mrs. McMurrey and Mr. Funk to the SWLA Working Conference on Inter-state, Inter-library Cooperation is the only semi-published material located by the author on the assigned topic. A variety of publications mention various implications of laws on network activity but none really confront the problems identified herein.

The various topics covered in this paper were reviewed with knowledgeable people in the field and with a corporation attorney, an attorney for a private university, and with an attorney of considerable note in the field of law bibliography. Thus, the author feels reasonably certain that these problems are real and that the recommendations are valid.