Data Processing Contracts: A Tutorial

No one can adequately condense the immense field of contract law into a short speech or paper. Expertise in contract law should be left to lawyers. A librarian who attempted to learn contract law would be wasting his time because it is so easy to hire professional help on those rare occasions when it's needed. Contract negotiations, however, are a different matter. No lawyer is trained in law school to understand the ramifications of contract negotiation for data processing services, especially in a library. The technical aspects of the anticipated contract, as opposed to the legal aspects, are usually beyond the comprehension of attorneys. Attorneys generally rely on the businessmen involved, i.e., the vendor and the librarian, to anticipate the technical problems that may arise in contract negotiations. In order to understand fully all the implications of technology in the contractual setting, however, the librarian must know some basics of contract law and possible contract clauses.

The speech at the 1977 clinic on which this paper is based was intended to be an introduction to contract law for the purpose of conducting a practicum in contract negotiations. The aim of the practicum was to present a situation as close to an actual contractual environment as possible. A turnkey circulation system was used as the example, since that is perhaps the form of data processing most commonly entered into first. The proposal given in Appendix A is somewhat limited in technical statements to ensure that the practicum participants could discuss them all in the time allowed. The standard form contract given in Appendix B
is a composite of several contracts presently being used by vendors of library systems. The content is typical of library turnkey system contracts in both language and length. It is also typical in that there are provisions that may not be in the best interests of the library. A wise librarian would want to suggest changes, possibly in accordance with some of the suggestions made in this paper. This paper will be easier to follow if the reader refers to the appendixes for examples of problems delineated here.

**EXISTENCE OF OBLIGATION**

In reviewing contract law, it is best to begin with certain basics. The discussion will begin at the negotiating stage rather than at some later time after mistakes have been discovered. Ordinarily, one need not worry about unwittingly creating an obligation (a "contract") with a vendor. Nevertheless, it can happen; for instance, a letter to the vendor, stating: "I like your proposal. We accept it just as it is," might be construed by a court as acceptance of a contractual offer, even though there was never any formal discussion with the vendor about delivery, installation date, warranties, and so on.¹ A letter, stating: "I like your proposal except that there are a few points I want clarified and I want a more extended payment period," could be construed as a counter-offer. If the vendor replies, "All right, I agree to everything you say; let's get that machine in there," then he is accepting your counter-offer. Although this is not a formal contract, it is nevertheless a contract.²

The basic rule is not to deal too fast. Do not say that you will take it as you see it. Sit down and talk with the vendor; make no final commitments without arrangements for warranties, delivery dates, and all the things that are part of a good contract. The last thing to do is to have a vendor rely (to his detriment) on promises or expectations of business. The court may create a contractual obligation simply through failure to deny.

**ENFORCEMENT OF OBLIGATION**

The enforcement of obligation may seem remote during contract negotiation, but the real purpose of a contract is to establish the rules for the enforcement of obligation.

**The Parol Evidence Rule**

Perhaps the most heartbreaking rule for a novice data processing purchaser is the parol evidence rule. "Parol" means oral; oral evidence about a written contract does not stand up in court. The law presumes that a written agreement contains all the terms of that agreement. Thus, the parol evidence rule also includes written statements made prior to the
contract. Many standard form contracts contain a clause that all statements, oral and written, made outside the contract are not pertinent.  

Occasionally, parol evidence can be valid if it is made after the contract has been signed.  For instance, the vendor may say: “Look, I have a cancellation of another contract. I can deliver two months earlier. Why don’t you gear up ahead of time?” The librarian assents and hires expensive staff to begin on the new starting date. Under these circumstances, if the vendor fails to deliver by the new date, the librarian can probably recover. There is still the problem of proof. If a change is made subsequent to the signing of the contract, any conversation should be followed by a letter spelling out exactly the new terms agreed upon.

The basic problem with the parol evidence rule is that it eliminates the proposal as part of the evidence of the obligation.  In a typical situation there are differences between a proposal and a contract. (Note the differences between the proposal and contract included in the appendixes, taking into account the terms added under the vendor’s instructions, Appendix C, before the negotiations began.)

In the case of Lovable Co. v. Honeywell, Inc., Lovable, a brassiere manufacturer, had an attractive proposal from Honeywell for a data processing system. The U.S. Court of Appeals for the Fifth Circuit ruled that Lovable failed to include a letter from Honeywell in the contract. In their letter, Honeywell guaranteed that the system would work. Since that was not in the contract, all that Honeywell really guaranteed when they sold the system to Lovable was that the machines would arrive. Although this case occurred in 1970 (when courts still thought of computers as fancy typewriters), such a ruling could be made today. The clause in the Lovable contract disallowing parol evidence is still common in contracts.

Breach of Contract

Perhaps the best way to avoid problems of enforcement of obligation is to find a good vendor in the first place. A one-page contract is sufficient with a vendor whose performance is known. Unfortunately, such certainty is rare. The fact that a vendor has been selling good library supplies for some time does not mean that the data processing department, made up of a completely different staff handling a completely different product, will perform as capably. Similarly, if the library systems department of a big computer vendor makes no money, it will be scuttled for more profitable endeavors, leaving the library with a computer without upkeep or support.

Nevertheless, any reputable dealer who feels able to perform will have no qualms about signing a contract. The vendor can easily say what he intends to do if he really intends to do it. Vendors who squirm or try to avoid contract negotiation are cause for concern. Some vendor sales-
men claim they are not allowed to discuss contract terms; ask to speak to someone who can.

All states except Louisiana have adopted the Uniform Commercial Code, a set of rules that simplifies and facilitates business transactions. Something that under the old rule used to constitute a breach of contract by its mere occurrence may no longer constitute a breach. Under the old laws, for example, late delivery constituted breach, and consequently permitted the receiver to avoid discharging his own obligations (such as paying for the shipment). Under the UCC, the court may not allow that.\(^7\)

If the delivery were, for instance, a week late and nothing else were different, the court might note the fact that the vendor expended months of effort to get it there and decide that the contract is still in force. Under the UCC, the contract does not have to be performed to the letter. This is good for the business community as it discourages predatory businessmen from signing contracts with the intent of waiting for the other party to make a minor slip. Under the UCC, if the injured party can mitigate his damages, he is expected to do so\(^6\) and to sue (or settle) for an amount related to the extent of the damages.

There can be reasons why deviation from the terms of a contract (e.g., late delivery) is not acceptable; if the reasons are legitimate, the court will listen to them. Arguments made at that time will affect the ultimate settlement. The better the evidence presented in court (proof of the harm caused by late delivery), the better the settlement will be. Unfortunately, libraries, like other state institutions, have a very hard time claiming damages which cannot be put in terms of lost profits or of lost money. Furthermore, the UCC is generally considered to be concerned with products, not services. Insofar as data processing contracts are contracts for services, the UCC is not all that helpful. The emphasis of the UCC on fungibility and mitigation of damages may not help when dealing with the only vendor in town.

**Resolving the Contract Dispute**

Although this section is not exactly pertinent to contract negotiations, it may help to clarify options available after the fact and to aid in understanding certain contract clauses.

In order to act on another’s breach, the legal framework must be observed. In the event of a suspected breach, the offended party must notify the other party.\(^9\) After that there is a number of options, such as stopping the contract. One ought to plan to mitigate damages by seeking another vendor or perhaps by buying part of the materials needed from someone else. If a total system is being purchased, this can be quite a problem. If there had been bargaining for a prolonged arrangement for innovative work (e.g., developing a new system), the buyer might want to go to some other vendor for peripherals.
One can sue for specific performance, which means performance exactly as specified in the contract. Although the layman may think that specific performance is the common remedy, it is actually quite rare for the contracts being considered here. Specific performance is well known because most people become involved in contracts that demand specific performance; for instance, a breach of a contract for land is almost always remedied by specific performance. The traditional feeling of the courts has been that a specific piece of land is unique and that no amount of money will give the same satisfaction as owning that land. Therefore, the courts give the equitable remedy: specific performance. However, for the ordinary dealings between businessmen, when the same product is available from someone else, the courts will not demand specific performance. Even the nonexistence of competitors may not be enough for a court to consider specific performance. A library denied access to OCLC could obviously still build its own cataloging data base using MARC tapes. The court would not begin to think of specific performance in such an instance unless and until it might classify OCLC as a public utility.

The most realistic way to resolve a contract dispute is simply to talk it over with the vendor — to bargain. For instance, if a vendor will be delayed in providing the hardware for a turnkey circulation system, perhaps early delivery of the bar-coded labels for the books can be procured. The library can then gear up that part of the operation and avoid a loss of valuable personnel time.

Contract disputes can be settled by not acting at all, but at some risk. Even if the other party’s actions are considered to be a breach, failure to protest can be considered a waiver of rights to press a claim. For example, if the vendor delivers goods which are not quite up to the standards of the contract, the librarian might be tempted to accept them anyway, assuming the vendor will ultimately rectify this breach. Not only is this an unrealistic belief, but mere acceptance of the goods waives the right to have the problem corrected. Acceptance is not the only means of waiving one’s rights. A person who simply sits and waits, saying, “Why do they keep delaying? Why do they keep delaying?” and neither sends letters nor makes threatening phone calls, may be waiving his rights. If a person feels his vendor is about to breach, he should tell him so in a formal letter.

Another generally unsatisfactory way to settle a contract dispute is called “estoppel.” Consider the following scenario. The vendor calls the library to ask if the librarian anticipates a future need for a particular piece of equipment. Without adequate reflection, the librarian answers that no such need is foreseen. When the need does arise, the vendor says: “Acting on your answer, we disposed of our stock of that item. We now have no obligation to furnish this equipment to you.” The essential point here is that the vendor relied to his detriment on the librarian’s response. The
rule is simply to be cautious in making statements; always consider the consequences of the vendor's acting on a statement.

**Discharge of Obligation**

The discharge of obligation is obviously best handled by performance, but there are other ways. For instance, the statute of limitations on a contract dispute is, for most contracts, four years from the time of the breach. If a vendor breaches repeatedly, damages are limited only to those breaches which occurred within four years of filing the action. Given the delays that can naturally occur in trying to coax the vendor into performance, four years is not such a long time.

Discharge of obligation may also be due to a change in circumstances. For instance, a library faced with an unexpected increase in circulation may find the bargained-for system inadequate. The library will probably be forced to accept the slow system, because the court will rule that although circumstances have changed, the vendor had no warning. The contract clause stating that the system can handle the circulation rate will have no effect. However, if the librarian had had indications of the increasing rate, the vendor could have been pressed to alter the contract before installation. If necessary, in order to alter this inadvisable contract, the librarian could even have taken his case to court. The vendor need only be stopped from performing to his own detriment.

The final way to discharge obligation on the part of the vendor is to have his contract labeled "impossible" by the court. The vendor must cite why the contract is impossible, e.g., the technology does not exist, the correct raw materials are impossible to obtain, etc. A common reason given is that the key man in the organization has left the company. This happens even to large firms such as IBM because small units within the organization control particular kinds of sales — and the library market is a very small market. In court the vendor would probably lose on such a position. The situation must really be impossible, not just very expensive or unprofitable. Not-impossible situations are labeled "frustration." The court applies these labels in order to create a reasonably equitable policy in dealing with these matters. A frustrated vendor may not perform, but must pay.

**WRITING THE CONTRACT**

Having concluded a cursory examination of contract law, the parts of a contract may now be discussed (see Appendix B). A standard form contract can be expected for almost anything purchased; it would be inefficient for the vendor to write a new contract for every sale. The vendor may have simply hired an attorney for a week to write a few terms on the back of a purchase order, but thought has gone into it.
Nevertheless, the business is more important to the vendor than obtaining a customer’s signature on a piece of paper. The vendor wants the sale. The customer can write his own contract or have the vendor’s standard form contract changed. If the vendor needs a lawyer to check the new clauses, he will hire one — provided the sale is big enough. Only a large vendor of small merchandise, such as Sears, would refuse to deviate from a standard form contract. Computer system sales, however, are big enough to force a vendor to bend.

**Matters of Fact**

Contracts can be divided into matters of fact and matters of law. For most data processing contracts, matters of fact, specifications, schedules and so on are usually included as an exhibit at the end of the contract. Be sure that all the necessary technical data are included.

Technical people are good people; they work hard all their lives, and are much too trusting. Usually one deals with a particular vendor because the library’s technical people insist that the vendor has a good product. It may well be that the technical person was convinced by a statement made by the salesman over a cup of coffee. The salesman may have been indulging in puffery, or even making untrue claims, but the technical man believed him. Or, the salesman might convince the technical person that a particular machine is being bought, that it will work as claimed, and that the exhibits are of no concern. The technical person does not care about suits and liabilities or contracts, but only about the product itself. It is the librarian’s responsibility to make sure that the technical person’s understanding of the product is represented in the exhibits to the contract.

As many of the vendor’s technological statements as possible should be included in the contract. Particularly important statements made after the contract was signed could be reflected in the contract by changes or appendixes. If a vendor were to guarantee a certain maximum response time in a letter, and that guarantee were critically important, it would be simple to append the letter to the contract as an exhibit and add a clause in the contract referring to the exhibit. This procedure is more readily acceptable than changing an entire section of the contract just to include the new guarantee. Attachment of exhibits in this way is an easy way to test the sincerity of a salesman’s claims.

There should be a lot of concern about how the products are classified. The classification of a piece of machinery as hardware, as opposed to software, can make a sizable difference with respect to litigation. For example, a “smart” terminal may have some programming included in its price, but be described as hardware in the contract. A specific UCC provision may then apply to the terminal as a product rather than as a ser-
vice provided. Furthermore, the distinction may apply to taxes. In many states software is still not taxable and may remain so for some time. Federal taxes, such as excise taxes, can also be affected by the contractual distinctions. Libraries are not always able to avoid such taxes, especially with rental agreements.

One turnkey circulation system vendor sells the system as one package, making no classification of the parts. Thus, a librarian would avoid the problem Lovable had with Honeywell. On the other hand, the delineation of parts can become important when there is a problem with a specific part. If that specific part needed to be replaced, an obstinate vendor might demand to take the whole package back in order to replace the one part. If the parts are separated on paper, the court will be more inclined to see them as individual items. It is desirable that the contract refer both to the system and to the parts of the system.

Matters of Law

The items needed in a specific contract vary, of course, according to the purpose of the contract. The individual matters of law could be thought to correspond roughly to the titles of the various clauses of the contract, provided the contract has clause titles. Care is needed, however, in forming negotiations based on a standard form contract because, occasionally, a very necessary matter of law may not be mentioned at all in a standard form contract. Clause titles solely cannot be relied on as reminders of all the relevant matters of law. The most common matters of law are given below, but a more exhaustive list can be found in Brandon’s Data Processing Contracts.

Transfer of title is an unnecessary clause in a rental agreement, but can be vastly important in a sales agreement. Is the title being obtained to both the hardware and software, or to just the hardware? Perhaps the software carries with it a trade secret limitation against resale. On an installment purchase, one may be forced to use the vendor’s services in order to replace each tube, let alone modify the hardware.

Delivery charges seem minor but can be substantial; most computer vendors sell FOB the home plant but charge for shipping and insurance without any mention in the contract. Damage in transit can be quite a bother.

The vendor might delegate installation to some third party unless the contract states otherwise. The customer may find installation assigned to a less-than-reputable subcontractor simply because the vendor received a sizable order from a large customer and would rather send staff engineers there.

The purchase agreement itself could be assigned to a bank. In this case, stopping payment because the computer does not work is futile; the
system will simply be repossessed by the bank rather than by the vendor. The bank will continue to press for the money because it does not want the machine either. The librarian must sue the vendor, who already has his money, in order to get satisfaction.

Duration of the agreement can be problematical. IBM is noted for writing contracts for long periods of time (e.g., delivery in two years) and including a proviso for termination with three months' notice. A vendor with such a clause can wait until just before or just after installation to give a three-month notice of increases. Care should be taken of clauses hidden elsewhere in the contract, not in the duration clause, which can affect the duration.

A peculiar and difficult problem is the confidentiality of the vendor-supplied software, i.e., the programs that operate the system. The vendor has made a large investment in software development and can protect that investment only if the programs are kept secret from actual and potential competitors. For that reason, the vendor is likely to restrict the buyer's use of the software. A computer operator who worked for Texas Instruments once copied several expensively-developed programs and tried to sell them covertly to Texaco. Unfortunately for him, Texaco was not a reliable fence and turned him over to the authorities. On appeal from his conviction, he tried to argue that all he had stolen were some card decks worth only a few dollars, which is not a felony. The Texas Court of Criminal Appeals ruled that the programs were actually worth $2.5 million and upheld the conviction.\(^17\) One should think twice before purloining a confidential program.

Included with a clause of confidentiality of the software may be restrictions of other sorts. The vendor may own the software outright or give the library a nonexclusive restrictive license to use the software but not to copy it. Thus, although the library owns the software, that ownership is virtually meaningless. The library would not be able to add refinements or special features and might not even be able to sell the software if it sold the system. Some vendors even restrict library personnel from looking at the programs in order to protect the programs' trade secret status.

Actually, there can be a tradeoff between accepting certain responsibilities for the software (and thereby creating a whole new data processing department) or leaving it all in the hands of the vendor, who then has the customer at his mercy with respect to the level of sophistication of data processing support. Creating a new department is expensive. Does the library need that much flexibility and long-range development? On the other hand, asking the vendor to add a new service after installation can be expensive and uncertain. The uncertainty results in part from the possibility that the vendor can move his senior programmers to new projects and leave the library's support in the hands of novices.
An arbitration clause is worth pursuing in contract negotiations, as it could save the library considerable expense. Arbitration also brings dispute resolution out of the atmosphere of litigation and can put reality back into the dealings between the parties. To the courts, a library is just another business. But a library has special concerns — it is service oriented, it has to provide information. Inability to get information can be damaging in ways not assessable in dollars. Arbitration enables the library to present its real needs. (Even arbitration can be avoided if good amendment procedures are included in the contract.)

The "responsibility for enforcement" clause should be clearly understood. This is the traditional clause which saddles the buyer with the vendor’s attorney fees if the vendor has to sue for nonpayment. This can create problems if one decides not to pay because the vendor has breached. Some buyers have become more timid about pursuing minor breaches because of this possibility of increased damage claims.

Many contracts also include a clause naming the state under whose law the contract will be construed. For instance, IBM usually names New York. For a party in Illinois, this clause could present difficulties, especially if the local judge suggested that suit in New York might be more sensible. Sending witnesses to New York is expensive. The alternative of going to federal court, when the jurisdictional restrictions are met, is not too pleasant. Federal courts are always overcrowded — as are the state courts in New York. That one clause can add a year’s time in court delays.

QUESTIONS OF RISK

Direct v. Indirect Risks

The notion of direct and indirect risks is one taken from Bernacchi and Larsen’s Data Processing Contracts and the Law. Direct risks are those associated with the failure of technology. Indirect risks are those associated with the consequential events due to that failure. Vendors may accept the responsibility for direct risks, but are loathe to accept indirect risks. The separation of direct and indirect risks can be difficult. For instance, if a library put its catalog into a computer system and the computer lost it, that one failure would have both direct and indirect effects. The failure would cost time and money — a direct effect. If the computer had the only copy of the catalog, then the indirect effect would be even more disastrous.

One data processing purchaser put his bills into an automated billing system. The operator did not realize that as each account was entered, the one previously entered was erased. Consequently, at the end of all that work, only the last record was entered in the system. Fortunately,
he still had the paper record, so the loss was held to the direct effects.\textsuperscript{20} Had the supposedly duplicate and soon-to-be-dated paper record been thrown away, however, the indirect effect would have been considerable.

Indirect risks can take diverse forms. The standard form contract that Mead Data Central uses to market its LEXIS legal information retrieval system contains a disclaimer for indirect risk. Law librarians were concerned at one time that Mead meant to exclude such risks as electric shocks from the terminals, but Mead’s real concern was to exclude the possibility of a suit from a lawyer who lost a case in court due to faulty information obtained from LEXIS.

**Nonperformance**

The obvious direct risk is nonperformance. The vendor may fail to perform due to management failure or financial problems within the organization. Management failure is most common with contracts for an innovative system. The contract should be written to take into account such possibilities. The pitfalls in a contract with heavy emphasis on delivery schedules should be watched for, however, because one of the most common ways data processing users lose contract battles is from their own nonperformance. If the library fails to be prepared for an on-site preinstallation inspection, the vendor may use that as an excuse for delaying delivery. The games that vendors use are well documented elsewhere and beyond the scope of this paper. The only way to prepare for them is to know the vendor through discussion with other customers and to comprehend fully the responsibilities under the contract.

**CONTRACT NEGOTIATION GAME**

The best method for attaining expertise in contract negotiations is to get some practice at it, to learn to strike a bargain. Remedies given in a contract should be designed to achieve the objectives of both parties. The practicum held at the clinic worked surprisingly well — so well, in fact, that the materials used for the practicum are appended here. The only rule is that only the person who plays the vendor’s role may read Appendix C before the negotiations begin.

**REFERENCES**

8. See Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974).
10. Equitable remedies, as opposed to monetary remedies, had their origin in the old English courts of equity, which were at one time separate and distinct from the courts of law.
15. Brandon, Dick H. Data Processing Contracts: Structure, Content and Negotiations. Cincinnati, Van Nostrand Reinhold, 1976. This is a difficult book to read, although there are many good example clauses which help make contract writing much easier.
18. The validity of these clauses is not questioned so long as there is reasonable nexus to the state chosen. See Restatement (Second) Conflict of Laws, § 187 (1971); and U.C.C. § 1-105. See also Rheinstein, Max. “Conflict of Laws in the Uniform Commercial Code,” Law and Contemporary Problems 16:114-40, Winter-Spring 1951.

ADDITIONAL REFERENCES

APPENDIX A

FANCY SYSTEMS
PROPOSAL

FOR THE INSTALLATION OF A FANCY SYSTEMS LIBRARY CIRCULATION CONTROL SYSTEM FOR THE CHAMBANA PUBLIC LIBRARY, CHAMBANA, ILLINOIS.

The Fancy Systems Company has developed a remarkable turnkey circulation system for libraries, which we call Fancicirc. It is an automated on-line inventory system which uses a stand-alone minicomputer. Transaction data are captured by a light pen reading device from bar-coded labels affixed to books and to borrower badges, or are keyed in at a keyboard/display terminal equipped with a cathode-ray tube screen. The keyboard/display terminal also allows on-line input to aid search of the inventory, patron and transaction files. All circulation terminals, computer equipment, computer programs and procedural manuals are supplied by Fancy Systems as a part of the total package.

The Fancicirc system proposed for the Chambana Public Library would be capable of handling the load carried by the library in its present stage, to wit:

- 20,000 registered borrowers using the system,
- 80,000 titles in the circulating collection data base,
- 125,000 items in the circulating collection data base, and
- 388,000 items issued annually from the library.

The Fancicirc system offers the following advantages over other systems on the market today:

1. Fancicirc is a complete system. There is no need to have any nearby large computer installation to print reports, nor is any long-distance data communications required.

2. Fancicirc is fully guaranteed to work. After all, it is not dependent on other installations; it is installed and operating in other libraries at this time (references will be supplied upon request); and the Fancy Systems Company is proud to stand behind its contractual obligations. We intend to build a reputation for serving libraries.

3. Since Fancy Systems supplies all the computer programs, a local library does not have to develop computer expertise.

4. Since the very same system is already working elsewhere, we can confidently say that we can install Fancicirc and make it fully operational within three months.

5. On-line systems are much more timely than batch systems. As such, you can catch a borrower with heavy fines pending while he is still trying to check out his next book, instead of the next day.

6. In the evening, after the library is closed, the system changes to batch format in order to generate notices, such as overdue notices and hold notices.

7. The transaction tapes generated by the system can be used to generate statistics, such as frequency of use by book, by type of borrower, etc. All you need to do is send the tapes to Fancy Systems headquarters, and we can run any report you desire, for a very nominal charge.

8. The most important feature, however, is the light pen itself. The borrower is checked out in no time. You have no badges which get jammed in the machine;
you don't have a flood of paper listing due dates; you simply stamp the book in
the good old-fashioned way because you are sure that the computer has cor-
rectly checked out the book. No chance for error.

COMPONENTS

For the Chambana Public Library, the Fancicirc system best suited to its
needs would have:

One Fancy CPU VI minicomputer, capable of handling the transactions with an
average access time of 400 nanoseconds. It has a basic 16-bit instruction word
and over 400 separate instructions. The basic system would include 131,323 bytes
of memory and a 1566 byte cache memory.

One Fancidisc LP III disc storage unit, with room for four disc drives, which
can be accessed in an average of 25 milliseconds. Peak transfer rate is in excess
of 786,000 bytes per second.

One Fanciprint IV output printer, which is a 180 cps serial printer with a 256
byte buffer and 1200 baud EIA standard interface.

Three Fancy CRT III keyboard/display cathode ray tube terminals, which
can display at a rate of 180 cps and which beeps when ready for the next entry.

Three Fancilight I light pen terminals, the latest in technology.

20,000 Fancibar Patron labels (bar-coded) and
125,000 Fancibar Book labels (bar-coded) to begin.

PROGRAM PACKAGES

The Chambana Public Library, with its present circulation policies of a 14-
day checkout with one renewal and no reserve material, would be well suited to
use the following packages in facilitating the operation of the components listed
above:

The Fancipak circulation control program, developed by Fancy Systems,
which allows input of the titles, with special designations for multiple copies, to
correspond to numbers given on the respective bar-coded labels. Each book would
have its own unique number. All users would also have unique numbers which
are distinguishable from book numbers. The program would have three files:

Inventory — All titles are listed by title, author and corresponding book
number, with annotation as to current status.

Patron — All patrons are listed with all relevant information, such as address,
type of user, with a variable field available for entry of notes on fine and hold
status, plus borrower number.

Transaction — Borrower number is linked to book number(s) with annota-
tion as to type of transaction — check-out, hold, etc. Check-in drops the transac-
tion from this file into the daily tape, which may be used for statistics or for a
history of transaction.

The Fanciwrinkle batch processing program is used to generate overdue
notices, recall notices, hold notices, bills for fines, and statistics by date. It is
normally implemented when the library is closed because it supersedes access
to the files from the Fancipak program.

TRAINING

The Fancy Systems Company believes that the Fancicirc turnkey circula-
tion system is so user-oriented that the normal training needed for this system
can be handled in an hour by the sales representative at the library itself. We do
have courses available at the Fancy headquarters which are more intensive.
These courses would make the technical services librarian a skilled master of the system and make the changeover from your present manual circulation system to Fancicirc much easier. We think that with properly trained personnel, you will find the time needed to input the holding information surprisingly small.

Manuals are available for every step of the operation. We normally include enough for your operation as a matter of course.

PRICES

The following prices represent the latest in equipment, perfected just for you (and the many other satisfied users of the Fancicirc system). If, through the goodness of our subcontractors, our own costs in procuring the components should be lowered after the contract is signed, we will pass these savings on to you. Otherwise, all prices are firm if within three months of machine shipment.

Hardware Components
Fancy CPU VI computer $57,000
Fancidisc LP III storage unit 5,000
Fanciprint IV printer 700
3 Fancy CRT III terminals, at $4000 12,000
3 Fancilight I terminals, at $500 1,500
20,000 Fancibar Patron labels
125,000 Fancibar Book labels 3,000
Wiring package 800

Program Packages
Fancipak circulation control program 17,000
Fanciwrinkle batch processing report program, for use with Fancipak 3,000

TOTAL $100,000

INSTALLATION DATE

Since so many potential customers are in the market for our system, we feel it necessary to warn you that you should sign up early for your own system. We can handle only so many installations per month, and the waiting list gets longer and longer. Presently, the Fancilight I terminals are about three months behind in delivery. Present estimates for delivery are set out below:

Contract signed: Hardware: Programs: Fancilight I's:
APPENDIX B

FANCY SYSTEMS
PURCHASE AGREEMENT

PURCHASER:

The Purchaser agrees to purchase, and Fancy, by its acceptance of this Agreement, agrees to sell, on the following terms and conditions, the machines and features listed below and more fully described in the attached Specification Sheets.

The prices shown are FOB Fancy’s plant. All transportation, rigging and draying charges will be paid by the Purchaser.

There shall be added to the prices shown below amounts equal to any taxes, however designated, levied or based on such prices or on this Agreement or the machines, including state and local privilege or excise taxes based on gross revenue, and any taxes or amounts in lieu thereof paid or payable by Fancy in respect of the foregoing, exclusive, however, of taxes based on net income. Any personal property taxes assessable on the machines after delivery to the carrier shall be borne by the Purchaser.

Terms
This Agreement must be received by Fancy on or before the Date of Installation of the machines. Payment in full for each machine shall be due upon the Date of Installation unless otherwise provided in an Installment Payment Agreement between Fancy and the Purchaser.

<table>
<thead>
<tr>
<th>Date of Installation</th>
<th>Item No.</th>
<th>Type (Feature)</th>
<th>Model</th>
<th>Warranty Category</th>
<th>Description</th>
<th>Quantity</th>
<th>Price</th>
<th>Amount</th>
</tr>
</thead>
</table>

TOTAL

<table>
<thead>
<tr>
<th>Software (Program)</th>
<th>Product</th>
<th>Programming Classification</th>
<th>Testing Period</th>
<th>Date of Installation</th>
<th>Price</th>
</tr>
</thead>
</table>

TOTAL

TOTAL OF MACHINE AND SOFTWARE PRODUCTS:

Site Preparation

1. The Purchaser shall prepare or cause to be prepared, at no expense to Fancy, a location or locations for the installation of the machines at its premises. Such location(s) shall be prepared in accordance with site preparation specifications provided by Fancy. The Purchaser shall advise Fancy when all required
preparations are completed, and with sufficient notice to permit a Fancy representative to inspect said installation location(s) at least one week prior to the scheduled date for the delivery of the machines. If, upon inspection, Fancy determines that the site preparation requirements have not been satisfied, Fancy may, at its option, reschedule delivery and installation to a mutually agreeable date, such date to be no later than one month after successful inspection of said installation location(s).

Delivery Schedule

2. The estimated delivery date is set forth in the description of machines and software in the Terms paragraph of this Agreement. In the event of delay or inability to deliver or install caused by any reason beyond Fancy’s control, including, but not limited to, any delay or inability caused by subcontractors or suppliers, or by acts of God, fires, floods, wars, embargoes, labor disputes, acts of sabotage, riots, accidents, delays of carriers, voluntary or mandatory compliance with any government act, regulation, or request, Fancy may without penalty or liability, extend delivery and/or installation schedules to the earliest time deemed feasible by Fancy.

Installation

3. Fancy shall be responsible for the installation of the machines and shall connect the same to the power lines and any requisite safety switches which are installed by the Purchaser pursuant to paragraph 1 above. The Purchaser shall make all necessary arrangements to allow Fancy personnel access to the installation location(s) during normal business hours and at such other times as may be mutually agreed upon. If any special installation work must be performed or is required in order to comply with requirements of any governmental authority including, but not limited to, the procurement of special certificates, the same shall be performed and/or procured by the Purchaser at its expense. If any labor union or unions prevent Fancy from performing the work specified, the Purchaser shall make all required arrangements with the union or unions involved to permit Fancy to complete such work. Any additional cost related to labor disputes shall be borne by the Purchaser, and Fancy’s obligation under such circumstances shall be limited to providing engineering supervision of installation and connection of the machines to existing wiring. Where applicable, Fancy shall connect the machines to telephone company-supplied data communication lines or equipment. Fancy shall be in no way responsible for the installation or the reliability of such telephone company-supplied lines or equipment.

Price Protection Period

4. Prices of the machines and software stated herein shall be subject to all established price increases except those increases which become effective during the three months immediately prior to the date of machine shipment. In the event that the price of any machine stated herein, or any software connected with such machine, is increased pursuant to the terms of this paragraph, the Purchaser may elect to terminate this Agreement as to that machine, or in its entirety. Purchaser may terminate that machine or the Agreement by writing to Fancy within 15 days of notification of the price increase; otherwise the higher prices shall be effective.

If Fancy’s established price for any machine upon the Date of Installation or 45 days after plant shipment, whichever occurs first, shall be lower than the price for such machine stated in this Agreement, the Purchaser shall have the benefit of such lower price.
Warranty

5. Machines purchased under this Agreement may be either newly manufactured by Fancy from new and serviceable used parts which are equivalent to new in performance in these machines, or assembled by Fancy from serviceable used parts, or machines which have been previously installed. Machines assembled from serviceable used parts and machines previously installed will at the time of shipment meet product functional specifications currently applicable to new machines.

The Purchaser will be responsible for assuring the proper use, management and supervision of the machines and programs, audit controls, operating methods and office procedures, for establishing the necessary controls over access to data, and for establishing all proper check points and procedures necessary for the intended use of the machines and the security of the data stored therein. The Purchaser agrees that Fancy will not be liable for any damages caused by the Purchaser’s failure to fulfill these responsibilities. The following Warranties shall apply to the machines described herein.

I. Service and Parts Warranty

Commencing on the Date of Installation, Fancy will maintain in good working order each Warranty Category A machine for one year and each Warranty Category B or C machine for three months, at no additional charge to the Purchaser. At the Purchaser’s request, Fancy will make all necessary adjustments, repairs and parts replacements. All replacement parts will be new or equivalent to new in performance when used in these machines. All replaced parts will become the property of Fancy on an exchange basis. Fancy may, at its option, store maintenance equipment or parts on the Purchaser’s premises that Fancy deems necessary to fulfill this Warranty.

Service pursuant to this Warranty as required at any time will normally be furnished by Fancy’s nearest branch office or resident location. Fancy shall have full and free access to the machines to perform this service. There will be no charge for travel expense associated with warranty services except that actual expense shall be charged in those unusual instances where the site at which the machine is located is not normally accessible by private automobile or scheduled public transportation. The Purchaser shall promptly inform Fancy of any change in the machine location during the warranty period. Service outside the scope of this Warranty will be furnished at Fancy’s applicable hourly rates and terms then in effect.

II. Parts Warranty

For one year commencing on the Date of Installation, Fancy warrants each Warranty Category B or C machine (excluding vacuum tubes and solid state and other electronic devices which are warranted for three months) to be free from defects in material and workmanship. Fancy’s obligation is limited to furnishing on an exchange basis replacements for parts which have been promptly reported by the Purchaser as having been, in his opinion, defective and are so found by Fancy upon inspection. All replacement parts will be new or equivalent to new in performance when used in these machines. All replaced parts will become the property of Fancy on an exchange basis. No service will be furnished pursuant to this parts warranty.

III. Limitations

The foregoing warranties will not apply to repair of damage or increase in service time caused by: accident, transportation, neglect, or misuse; alterations (which shall include, but not be limited to, any deviation from circuit or structural
machine design as provided by Fancy, installation or removal of Fancy features, or any other modification or maintenance related activities, whenever any of the foregoing are performed by other than Fancy representatives; any machine other than those owned by Fancy, under warranty provision of a Fancy purchase agreement or under a Fancy maintenance agreement; failure to provide a suitable installation environment with all facilities prescribed by the appropriate Fancy Installation Manual — Physical Planning (including but not limited to, failure of, or failure to provide adequate electrical power, air conditioning or humidity control); the use of supplies or materials not meeting Fancy specifications for such installation; or the use of the machine for other than data processing purposes for which designed.

Fancy shall not be responsible for failure to provide service or parts due to causes beyond its control or required to adjust or repair any machine or part if it would be impractical to do so because of alterations in the machine or its connection by mechanical or electrical means to another machine or device or if the machine is located outside the United States, Puerto Rico or the Canal Zone.

Limitation of Liability

FANCY MAKES NO REPRESENTATION OR WARRANTY OTHER THAN THAT SET FORTH IN THIS PURCHASE AGREEMENT. THE WARRANTY STATED HEREIN IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR AGAINST INFRINGEMENT.

The Purchaser further agrees that Fancy will not be liable for any lost profits, or for any claim or demand against the Purchaser by any other party.

No action, regardless of form, arising out of the transactions under this Agreement, may be brought by either party more than one year after the cause of action has accrued, except that an action for nonpayment may be brought within one year after the date of the last payment.

In no event will Fancy be liable for consequential damages even if Fancy has been advised of the possibility of such damages.

Title and Security Interest

6. Title to each machine passes to the Purchaser on the date of shipment from Fancy, or on the date of acceptance of this Agreement by Fancy, whichever is later. Fancy reserves a purchase money security interest in each of the machines listed herein in the amount of its purchase price. These interests will be satisfied by payment in full unless otherwise provided in an Installment Payment Agreement between Fancy and the Purchaser. A copy of this Agreement may be filed with appropriate state authorities at any time after signature by the Purchaser as a financing statement in order to perfect Fancy’s security interest. Such filing does not constitute acceptance of this Agreement by Fancy.

Title to the Software shall not pass from Fancy to the Purchaser, and the software shall remain the sole property of Fancy at all times.

Fancy retains for itself all proprietary rights in and to all designs, engineering details, and other data pertaining to the machines and the software, and retains for itself the sole right to manufacture, lease, and sell any and all such machines and software. The software and the configuration of the machines shall be deemed trade secrets of Fancy.
Software License

7. Fancy hereby grants to the Purchaser a nonexclusive, nontransferable license to use the software in accordance with provisions of this paragraph. The software is furnished to the Purchaser only for use by the Purchaser with the machines listed in the Terms paragraph. The Purchaser shall not modify or copy the software or any portion thereof, and shall not provide or otherwise make available the software, or any portion thereof, in any form, to any third party without the prior written approval of Fancy. All of the software, including, but not limited to, operating systems, operating system components, and application programs, is and shall remain the sole property of Fancy.

Maintenance

8. Fancy shall provide, at the option of the Purchaser, an agreement for maintenance of the machines and software, covering parts, labor, and travel expenses for all corrective and preventive maintenance for a period of five (5) years. The performance by the Purchaser of its obligations hereunder shall be separate from and independent of the performance of either party of its obligations under such maintenance agreement.

Documentation

9. Fancy shall provide with the machines and software, without charge to the Purchaser (a) two copies of any manual written with respect to a particular machine listed in the Terms paragraph or two copies of any manual for several machines sold as a system listed in the Terms paragraph and (b) that number of Operator’s Guides which is the same number of terminals listed in the Terms paragraph.

Training

10. Fancy shall provide, without charge to the Customer, group training sessions on the operation and use of the machines and software for up to three Purchaser personnel. Such sessions will be conducted for not more than ten days prior to and after the installation of the machines at times and at locations to be agreed upon by Fancy and the Purchaser. The Purchaser shall be responsible for the salaries and the travel and accommodation expenses of its personnel.

General Provisions

11. This Agreement is not assignable without written permission from Fancy; any attempt to assign any rights, duties or obligations which arise under this Agreement without such permission shall be void.

12. This Agreement will be governed by the laws of the State of Illinois. It constitutes the complete and exclusive statement of the agreement between the parties which supersedes all proposals, oral or written, and all other communications between the parties relating to the subject matter of this Agreement.

13. If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

14. This Agreement may only be changed in writing, executed on behalf of Fancy and of the Purchaser. The term “this Agreement” as used herein includes any applicable Installment Payment Agreement, Supplement, or future written amendment made in accordance herewith.
15. The Purchaser represents and warrants that he has read this Agreement, understands it, and agrees to be bound by its terms and conditions. The Purchaser further agrees that this Agreement is intended by the parties as a final, complete and exclusive statement of the terms of their agreement. No course of dealings between the parties and no usage of the trade shall be relevant to supplement any term used in this Agreement.

Received by Fancy at ____________________________

by ____________________________

signature

name printed, title

on ____________________________

date

Accepted by Fancy by ____________________________

signature, name printed, title

on ____________________________

date
APPENDIX C

VENDOR INSTRUCTIONS

In playing your role as vendors, you will need to come prepared to defend your company’s financial position. The standard form contract you are using to begin discussion has been formatted by attorneys working for your firm in order to protect the firm at its weakest points. Although you do not want to lose the sale (you will make a $4000 bonus for it), you must try to get the purchaser to sign the contract with as little change as possible. If you change the contract too much, your manager may not accept it. (You can use that as an argument to the purchaser if you remember to connect that point with the “fact” that delay in signing means a longer wait for installation.) In order to give yourself an edge during the negotiations, present the contract already filled in, basing it on the proposal, but in the following manner:

<table>
<thead>
<tr>
<th>Date of Installation</th>
<th>Type Model (Feature)</th>
<th>Warranty Category</th>
<th>Description</th>
<th>Quantity</th>
<th>Unit Price</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/20/78</td>
<td>Fancy CPU VI</td>
<td>A</td>
<td>mini-computer</td>
<td>1</td>
<td>$57,000</td>
<td>$57,000</td>
</tr>
<tr>
<td>1/20/78</td>
<td>Fancidisc LP III</td>
<td>A</td>
<td>storage unit</td>
<td>1</td>
<td>5,000</td>
<td>5,000</td>
</tr>
<tr>
<td>1/20/78</td>
<td>Fanciprint IV</td>
<td>C</td>
<td>printer</td>
<td>1</td>
<td>700</td>
<td>700</td>
</tr>
<tr>
<td>1/20/78</td>
<td>Fancy CRT III</td>
<td>B</td>
<td>CRT terminal</td>
<td>3</td>
<td>4,000</td>
<td>12,000</td>
</tr>
<tr>
<td>4/10/78</td>
<td>Fancilight I</td>
<td>B</td>
<td>light pen terminal</td>
<td>1</td>
<td>500</td>
<td>1,500</td>
</tr>
<tr>
<td></td>
<td>Fancibar Patron labels</td>
<td>N/A</td>
<td>20,000</td>
<td>20,000</td>
<td>package price</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fancibar Book labels</td>
<td>N/A</td>
<td>125,000</td>
<td>125,000</td>
<td>3,000</td>
<td></td>
</tr>
<tr>
<td>1/20/78</td>
<td>DX 243</td>
<td>C</td>
<td>wiring package</td>
<td>1</td>
<td>800</td>
<td>800</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>80,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Software (Program) Product</th>
<th>Programming Classification</th>
<th>Testing Period</th>
<th>Date of Installation</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fancipak circulation control</td>
<td>FX-5</td>
<td>N/A</td>
<td>1/20/78</td>
<td>$17,000</td>
</tr>
<tr>
<td>Fanciwrinkle report</td>
<td>BXE-5</td>
<td>N/A</td>
<td>1/20/78</td>
<td>$3,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>20,000</strong></td>
</tr>
</tbody>
</table>

1. Plant tested.

Below I am listing some parameters to the bargaining situation that are only known by the vendors. These have to do with the company’s internal structure. Whether you do well or not in your role-playing will depend on how well you protect the company’s weak points. Remember, you don’t want to go back to selling pocket calculators.

1. Notice the delivery dates. The actual truth is that there is only a 4-month delay presently, but your boss has directed you to give a late delivery schedule because he has hopes of selling a large university library and it would want preference. You can get leeway here, but if you give anything here, be sure to get other concessions in return.
2. Notice that there is no delivery date for the labels. Because of production control problems with the subcontractor, you are presently woefully behind in providing these. What you hope to do is to wait until just before installation to inform the purchaser. Then you will begin delivering them piecemeal.

3. Notice the warranty classifications. The truth is that there have been many serious problems in breakdowns with respect to the CRT and the printer. The printer is the worst offender. The truth, moreover, is that the sales department keeps that particular printer in this package simply to try to engender a taste in the purchaser for a maintenance contract after the warranty period expires. If the purchaser wants a better warranty for the printer, then try to get him to shift to a better printer. Offer him a Fanciprint VII at $1,500, with an A warranty category. If the purchaser wants to change the warranty category on the CRT, try to avoid it. You have no other CRT that is any better. You can make a false statement that the real problems for the CRT are in the wiring package. Since any real problems in the wiring package show up in the first couple of weeks, you can graciously offer to make it an A warranty category item.

4. Try to avoid putting the specifications listed in the proposal into the contract. You are hoping that the limitation of liability will keep those specifications out of the bargained agreement. The CPU actually has an average access time of 900 nanoseconds, but only in rare instances in the past has that been crucial. Since this is a small installation, you should have no problem, unless the purchaser has an exceptionally fast typist.

5. Examine the contract carefully and note the following tricks:
   a. New or "comparable" used equipment.
   b. Site preparation inspection. If your engineers come upon an unexpected delay later on, they can always have the inspector flunk the library’s preparations in order to shift the blame for the delay. So keep that clause in there and the boys in the back will love you for it. (It has saved them their jobs in the past.)
   c. Try to avoid at all costs any inclusion of a clause giving penalty charges for delay in delivery, or make it inconsequential, i.e., for a very low dollar figure.
   d. Since Fancy owns the software, the tapes of the daily transactions are worthless on their own unless provision is made by the purchaser for a translating program which could make the tapes usable elsewhere. Be careful. You want to keep the purchaser technically naive so he will be stuck with you for life. ("Life" is another way of saying job tenure.)
   e. There are subtle differences between what the proposal says with respect to documentation and training and what the contract offers.

6. Avoid testing on site. Also try to keep your own personnel in charge of testing. Again, stress your technical superiority, and neglect the fact that any moderately intelligent librarian should be able to decide whether a system works or not.

7. Remember that the company’s basic strength is in making timely deliveries and its basic weakness is breakdown in the peripherals. At least, this week, that is.