

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

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**MATTER OF:** Applicability of Depository Library Act to National Technical Information Service publications

**DIGEST:** Legislative history of section of Depository Library Act which exempts "cooperative publications which must necessarily be sold in order to be self-sustaining" from free distribution to designated depository libraries, indicates that publications of National Technical Information Service (NTIS) which are based on material furnished by other agencies are deemed "cooperative." Since statute establishing NTIS provides that publications for special use and benefit of private groups and individuals must be self-sustaining while those issued primarily for general benefit of public need not be, former category is exempt while latter is not.

By letter dated December 30, 1974, the Public Printer, United States Government Printing Office (GPO), requested our decision as to the applicability of the Depository Library Act of 1962, as amended, approved August 9, 1962, Pub. L. No. 87-579, 76 Stat. 352, 44 U.S.C. §§ 1901 et seq. (1970), to publications issued by the National Technical Information Service (NTIS), Department of Commerce. The matter arose out of a request by NTIS to GPO to discontinue the free distribution of certain NTIS publications.

The Depository Library Act provides generally that all Government publications, with exceptions hereinafter noted, shall be made available to designated depository libraries throughout the United States. Publications printed by GPO are to be distributed by the Superintendent of Documents and charged against GPO appropriations. Publications printed or processed elsewhere than at GPO are to be furnished by the issuing agency to the Superintendent of Documents for appropriate distribution. The cost of printing and binding such publications is to be borne by the issuing agency.

NTIS evolved from the mandate of the Act approved September 9, 1950, ch. 936, 64 Stat. 823, 15 U.S.C. §§ 1151 et seq. (1970), which directed the Secretary of Commerce to "establish and maintain within the Department of Commerce a clearinghouse for the collection and dissemination of scientific, technical, and engineering information." The purpose of this enactment was to make the results of technological research available to industry, business, and the general public.

The original clearinghouse was the Office of Technical Services, which was superseded by the Clearinghouse for Federal Scientific and Technical Information, which was in turn superseded by the present NTIS.

In brief, NTIS receives information and reports primarily from other Federal agencies, but also from some State and private institutions. NTIS catalogs and indexes the input data, and compiles from it various serial publications (indexes and bibliographies). Documents and serial publications are then reproduced and sold in response to orders. At present, NTIS indicates that approximately 50-60,000 new titles are added to its collection each year.

GPO contends that NTIS publications "of general interest to the public" are subject to the requirements of the Depository Library Act, and that NTIS must therefore supply GPO with copies of such publications for depository library distribution, and must pay for such publications printed or processed outside the GPO. NTIS contends that the Act does not cover NTIS publications (1) of documents supplied by other agencies, and (2) of a bibliographic nature which are compiled from such documents or from other materials supplied by the agencies contributing the documents. Both parties have submitted detailed briefs in support of their respective positions.

Pertinent provisions of the Depository Library Act are 44 U.S.C. §§ 1902 and 1903, set forth below:

"§. 1902. Availability of Government publications through Superintendent of Documents; lists of publications not ordered from Government Printing Office

"Government publications, except those determined by their issuing components to be required for official use only or for strictly administrative or operational purposes which have no public interest or educational value and publications classified for reasons of national security, shall be made available to depository libraries through the facilities of the Superintendent of Documents for public information. Each component of the Government shall furnish the Superintendent of Documents a list of such publications it issued during the previous month, that were obtained from sources other than the Government Printing Office.

" 1903. Distribution of publications to depositories; notice to Government components; cost of printing and binding.

"Upon request of the Superintendent of Documents, components of the Government ordering the printing of publications shall either increase or decrease the number of copies of publications furnished for distribution to designated depository libraries and State libraries so that the number of copies delivered to the Superintendent of Documents is equal to the number of libraries on the list. The number thus delivered may not be restricted by any statutory limitation in force on August 9, 1962. Copies of publications furnished the Superintendent of Documents for distribution to designated depository libraries shall include--

"the journals of the Senate and House of Representatives;

"all publications, not confidential in character, printed upon the requisition of a congressional committee;

"Senate and House public bills and resolutions; and

"reports on private bills, concurrent or simple resolutions;

but not so-called cooperative publications which must necessarily be sold in order to be self-sustaining.

"The Superintendent of Documents shall currently inform the components of the Government ordering printing of publications as to the number of copies of their publications required for distribution to depository libraries. The cost of printing and binding those publications distributed to depository libraries obtained elsewhere than from the Government Printing Office, shall be borne by components of the Government responsible for their issuance; those requisitioned from the Government Printing Office shall be charged to appropriations provided the Superintendent of Documents for that purpose." (Underscoring supplied.)

At issue is whether the exemption for "so-called cooperative publications which must necessarily be sold in order to be self-sustaining" extends to all NTIS publications. GPO defines "cooperative publication" as one involving a joint effort between a governmental and nongovernmental organization, and therefore concludes that NTIS publications are not cooperative publications within the meaning of 44 U.S.C. § 1903. In any event, GPO points out that data submitted to NTIS is produced in toto by other agencies, NTIS acting solely as a clearinghouse or conduit through which the data passes to the public. As the actual preparation of NTIS publications thus does not involve a joint undertaking, such publications, in GPO's view, are not "cooperative." NTIS contends that the term "cooperative publication" includes publications jointly involving two Federal agencies. NTIS further argues that its publications are joint endeavors in that the other agencies "cooperate" with NTIS by supplying data to it, and act with NTIS to accomplish the end of disseminating the data. NTIS therefore concludes that its publications are cooperative publications for purposes of the exemption contained in § 1903.

Regarding the phrase "which must necessarily be sold in order to be self-sustaining," GPO points to section 3 of Pub. L. No. 81-776, 15 U.S.C. § 1153, which provides in pertinent part (quoting from the Code):

"It is the policy of this chapter, to the fullest extent feasible and consistent with the objectives of this chapter, that each of the services and functions provided herein shall be self-sustaining or self-liquidating and that the general public shall not bear the cost of publications and other services which are for the special use and benefit of private groups and individuals; but nothing herein shall be construed to require the levying of fees or charges for services performed or publications furnished to any agency or instrumentality of the Federal Government, or for publications which are distributed pursuant to reciprocal arrangements for the exchange of information or which are otherwise issued primarily for the general benefit of the public." (Underscoring supplied.)

GPO's position is that section 1153 indicates that NTIS was not intended to be wholly self-sustaining; that it is not in fact wholly self-sustaining since it seeks and receives annual appropriations to cover the costs of operations not otherwise recovered; and that, therefore, the exemption of 44 U.S.C. § 1903 supra, is not applicable. NTIS

counters that the language of the exemption refers only to publications and does not require that the agency itself be wholly self-supporting; that the functions of reproducing and distributing publications have in fact been self-sustaining in recent years; that, while section 1153 permits certain publications to be distributed at a less than self-sustaining price, it does not so require; and that, consistent with the clear purpose of section 1153, the section 1903 exemption applies because NTIS publications must be sold in order to provide the revenue needed to reproduce and distribute them.

In our opinion, the language of the section 1903 exemption compels neither conclusion, but appears reasonably capable of either construction. The resolution to the controversy is to be found in the legislative history of section 1903.

The depository library program has existed since the 19th century but, prior to 1962, was limited to publications printed by GPO. In the first session of the 85th Congress, Representative Wayne Hays introduced H.R. 9186, which expanded the scope of the program to include non-GPO publications but did not include the "cooperative publication" exemption. Hearings were held in October 1957, at which time two witnesses expressed the hope that publications of the (then) Office of Technical Services would be included in the program. Hearings Pursuant to H. Res. 128 Before a Subcommittee of the Committee on House Administration, 85th Cong., 1st Sess. 78, 97-98 (1958). In response to these comments, Representative Hays made the following statement:

"Mr. Hays. I might say at this time before calling the next witness, that Mr. Locke touched briefly on something that is fairly pertinent at the moment and recent developments have made it even more imprinted on our minds. That is the fact that the Federal Government does have in its various research programs a lot of technical information which many times librarians don't know exist, or do not know how to get.

"That is not the purpose of this hearing, but if this is as much a problem as has been suggested, I think it might be well on reflection and reading over the printed hearings of this committee when they are printed and sent to you, that if you have any further ideas on it we would be glad to hear from you. If we cannot get into the matter sufficiently under our jurisdiction, I would be glad to refer it to the Committee on Government Operations of which Mr. McCormack is a member, and I am sure under the

Moss subcommittee they would be happy to go into that field and see if they can help you pry out the documents that you need.

"I think we are all aware of the fact that we need all the research help and tools that we can get, particularly so at this time. If that is a problem to you, I am sure the proper committee would be interested in trying to find a solution to that." Id., at 105.

No further action was taken on H.R. 9186. In the second session of the 85th Congress, Mr. Hays introduced H.R. 11042, the identical bill with the addition of the "cooperative publication" exemption, which remained intact in all subsequent versions of the bill until final enactment.

Mr. Hays reintroduced his bill as H.R. 13140 later in the 85th Congress, second session, and again as H.R. 519 in the 86th Congress. Both bills were passed by the House but were not acted upon by the Senate. The version that finally became Pub. L. No. 87-579, the Depository Library Act of 1962, was H.R. 8141, introduced by Mr. Hays in the 87th Congress. In commenting on H.R. 8141 in a letter dated March 8, 1962, to the Chairman, Senate Committee on Rules and Administration, the Secretary of Commerce requested that the bill or legislative history clearly state that the "cooperative publication" exemption was intended to include publications of the Office of Technical Services. This suggestion was not adopted. Hearings on H.R. 8141 Before the Subcommittee on the Library, Senate Committee on Rules and Administration, 87th Cong., 2d Sess. 118 (1962).

In reporting on H.R. 8141, the Senate Committee on Rules and Administration stated the following:

"Cooperative publications

"H.R. 8141 excludes so-called cooperative publications (which must necessarily be sold in order to be self-sustaining) from the materials to be sent gratis to depository libraries. The Subcommittee on the Library feels this is a reasonable exception and that it should be applicable to publications of this type issued by any agency of the Government. For the purposes of the record an explanation of the term 'cooperative publications,' supplied by the Librarian of Congress, as follows:

"The Library of Congress is glad to have 'cooperative publications' exempted from the requirements of the act because we engage in many such undertakings with nongovernmental organizations and agencies. The Library's authority to do so is specifically recognized by the Library of Congress Trust Fund Board Act of 1925, as amended (2 U.S.C. 154-163). These cooperative publications are sold to the public; they could not otherwise be undertaken. The price usually covers the cost of preparation as well as of printing, and in those cases the publications are plainly fully 'self-sustaining.' We fear, however, that questions may be raised about cooperative publications sold to the public at a price that would recover the cost of printing but not the cost of preparation, which may be borne by many agencies or organizations, so many, in fact, that it would not be feasible to try to estimate or recover the cost of preparation. We believe that those who have drafted and considered the several bills of recent years to revise the depository library laws meant to include under 'cooperative publications' both of the above types of cooperative publications. If our understanding is correct, it would be helpful if the record could show this." S. Rep. No. 1587, 87th Cong., 2d Sess. 12-13 (1962).

The Librarian of Congress had requested the above insertion in a letter dated July 28, 1961 (Senate Hearings, supra, at 112), and during testimony on March 16, 1962 (Id., at 98-99). The House Report merely restates the statutory language. H.R. Rep. No. 724, 87th Cong., 1st Sess. 3 (1961).

On August 22, 1961, the House passed H.R. 8141. On June 15, 1962, the Senate passed H.R. 8141 with several amendments of a primarily technical nature. The House concurred with all but one of the Senate amendments on July 18, 1962, and returned the bill to the Senate with a change to the amendment in disagreement. In the course of the House debate on July 18, Mr. Ways made the following statement:

"Mr. Speaker, permit me to cite one specific item in the bill which requires clarification as to intent. It appears in lines 21, 22, and 23 of section 4. Concern has been expressed as to the

applicability of this legislation to publications intended to be self-sustaining such as those of the Office of Technical Services of the Department of Commerce. The language, ' ; but shall not include so-called cooperative publications which must necessarily be sold in order to be self-sustaining, ' was intended to make it absolutely clear that all self-sustaining or self-liquidating publications such as those of the Office of Technical Services of the Department of Commerce are among those exempted from the requirement of free distribution. This means self-sustaining or self-liquidating publications resulting from either joint private-Government efforts or wholly Government-sponsored efforts." 108 Cong. Rec. 13934 (1962).

On July 25, 1962, the Senate agreed to the House action and forwarded the bill to the President for signature. Except as noted above, the legislative history of section 1903 contains no other comment or discussion pertinent to the meaning of the "cooperative publication" exemption.

GPO interprets the inclusion of the comments of the Librarian of Congress in Senate Report No. 1587 as amounting to a congressional definition of the term "cooperative publication," limiting the concept to a joint undertaking involving a governmental and a nongovernmental organization. A conflict is thus perceived between the Senate Report and the July 18 statement of Representative Hays. GPO argues, however, that a committee report is a more authoritative source of legislative intent than a statement of an individual congressman, even if that individual was the sponsor of the bill, especially when the statement is made after the bill has cleared both Houses.

NTIS argues that Senate Report No. 1587 is not inconsistent with Mr. Hays' statement. Thus it is said that neither the purpose of the comments of the Librarian of Congress, when considered in their entirety, nor the inference to be drawn from the Senate Committee's incorporation of such comments, was to limit the scope of "cooperative publication" to joint undertakings with nongovernmental organizations. Rather, the purpose of those comments was to clarify the meaning of the term "self-sustaining." In this connection, we quote from the NTIS brief at pages 22-24:

"This quotation [from the July 28, 1961, letter] shows that the principal concern of the Librarian of



Congress was that the word 'self-sustaining' might be construed too literally. If the cost of preparing a document was borne by a cooperating agency or institution, and the proceeds from sale covered only printing costs, it could be argued that the document was not fully 'self-sustaining' and therefore would not be subject to the distribution requirements of § 1903. To forestall such an approach to construction, the Librarian of Congress requested that the record show a Congressional intent that the word 'self-sustaining' be construed more broadly. \* \* \*

"Thus, careful analysis of the quotation and the subcommittee statement preceding it shows that the Senate Report does not limit the meaning of the term 'cooperative publications' in the manner alleged by GPO, and is in no way inconsistent with the subsequent statement by Representative Hays. \* \* \* The principal thrust of the quotation, agreed to by the subcommittee's inclusion of it 'for the purposes of the record,' was that the term 'self-sustaining' should be construed in a broad and general sense, rather than a literal sense." (Footnotes omitted.)

We note in addition that the Librarian of Congress was describing his own type of "cooperative publications" which happen to involve undertakings with non-governmental organizations and agencies. There is no reason to assume that the Senate Committee's inclusion of this particular type of "cooperative publication" indicates that all other cooperative arrangements are excluded. We believe the Librarian's statement was quoted in the Report to serve as an illustration of one such enterprise, as well as to highlight the meaning of the term "self-sustaining."

Thus, the question in our view is not the weight to be given Mr. Hays' statement when balanced against the Senate report, but the weight to be given that statement standing alone.

It seems clear that a statement of an individual Member of Congress, made when the legislative process is virtually completed, even if that Member is the bill's sponsor or draftsman, would not be controlling in the face of contrary indications in more authoritative portions of legislative history such as committee reports. Here, however, we perceive no such contrary indications in the Senate report. The only possible source of contradiction lies in the failure of Congress to adopt the suggestion advanced by the Secretary of Commerce in

his above-mentioned March 8, 1962, letter. It may be, of course, that the failure reflected a congressional belief that NTIS publications should not be considered "cooperative publications"; but we find no support for this conclusion elsewhere in the legislative history. In any event, we hesitate to override a positive statement on the basis of speculative inferences to be drawn from a failure to act.

Thus, Mr. Hays' statement remains as the only clear statement of any authority regarding the applicability of the "cooperative publication" exemption to NTIS. Also, it bears noting that Mr. Hays was the sponsor of every House version of the Depository Library Act since the first version, H.R. 9100 was introduced in 1957. In this context, we do not believe that his July 18 statement may properly be disregarded. Cf. Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 280 (8th Cir.), cert. denied, 371 U.S. 912 (1962), where the Court accepted as authoritative, a statement made on the House floor (albeit at an earlier stage of the legislative process than here) by a congressman "who virtually lived with the problem during the course of several congressional sessions," and where there were "no countervailing considerations which tend to dispute the merit of the statements."

Viewing the section 1903 exemption in light of the foregoing legislative history, we agree with NTIS that its publications which involve other agencies or organizations--governmental or nongovernmental--are "cooperative publications." This is consistent with the statutory language which, since it refers to "so-called" cooperative publications, does not depend on any specific definition of the term "cooperative." On the other hand, we do not believe that this conclusion establishes an exemption for all NTIS publications.

As noted previously 44 U.S.C. § 1903 by its terms does not exempt all cooperative publications; but only those "which must necessarily be sold in order to be self-sustaining." Applying this language to 15 U.S.C. § 1153, supra, we must distinguish between the two categories of NTIS "cooperative" publications cited therein--publications "which are for the special use and benefit of private groups and individuals," and those "issued primarily for the general benefit of the public." Regarding the former category, section 1153 expressly provides that the general public (i.e., through the use of appropriated funds) "shall not bear the cost" of such publications. Thus, we agree that this category is exempt under section 1903. However, as noted previously, section 1153 further provides that "nothing herein shall be construed to require the levying of fees or charges" for publications in the latter category, i.e., "publications \* \* \*

issued primarily for the general benefit of the public." In our view, this language, both literally and by design, has the effect of removing such publications from the exemption under 44 U.S.C. § 1903.

Finally, it is true that Mr. Hays' statement of July 18, 1962, refers to (now) NTIS publications in general as an example of the exemption under 44 U.S.C. § 1903. However, the basic context of his remarks also reflects the distinction between specialized publications and those of more general interest. Thus, Mr. Hays observed, just prior to the paragraph of his remarks quoted supra:

"\* \* \* no provision was made for exempting publications produced in small numbers for specialized use, thus requiring overproduction of such publications by several hundred percent in some instances. Also, many publications such as technical and training manuals, and various types of handbooks, while perhaps of some so-called public interest, could not justify the wide dissemination and high cost of maintenance that in books of broader interest would be practical. Clearer power of determination in such cases, and greater selectivity in those publications chosen for distribution to depository librarians, would unquestionably result in a great saving in Government funds and much more efficient administration of the depository library program." 108 Cong. Rec. 13984.

Presumably the majority of NTIS publications are of a highly specialized and limited interest nature, and would be exempt under section 1903. However, there is no basis to conclude that Mr. Hays' reference to NTIS publications in general was necessarily intended to encompass or to characterize every publication by that agency. Those few publications which are issued, in the words of section 1153, "primarily for the general benefit of the public" would still be subject to the requirements for distribution to depository libraries.

To summarize, we agree with NTIS that its publications may generally be regarded as "cooperative publications." We also agree that those NTIS publications of a specialized and limited interest nature are to be self-sustaining under 15 U.S.C. § 1153, and are therefore exempt from the Depository Library Act under 44 U.S.C. § 1903. At the same time, we conclude that both statutes, as well as the legislative history discussed herein, indicate a different treatment for NTIS publications

that are "issued primarily for the general benefit of the public." Thus we agree with GPO that the latter are subject to the Library Act. It is recognized that it may be difficult to apply precisely the foregoing distinction; and this task must be left to resolution between NTIS and GPO. However, we are inclined to favor the general framework indicated in GPO's letter to us, which suggests coverage for " \* \* \* certain serial publications [by NTIS]; e.g., Government Reports Announcements and Index and the GRA Annual Index, which are of widespread public interest, most especially to the library community."

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