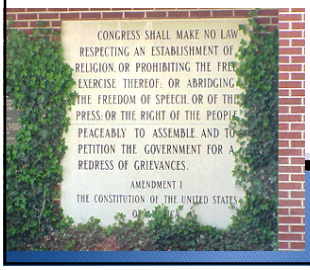
International Municipal Lawyers Association
2009 Annual Conference
Work Session XII

Public Libraries, the First Amendment & the Digital Age



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The Library's Roles: Reading Room, Lending Library, Forum, Social Center, Baby Sitter, . . .



- From a one-room reading and lending center with books and shelves to . . .

Today's Libraries: All that and access to the world!



ipl The Internet Public Library

And even virtual libraries:

www.acpl.lib.in.us/afw/center.html

www.lapl.org/central/computer_center.html

http://www.berwynlibrary.org/reference-non-fiction/seniro-center.html

The changing library

- Libraries are shifting from a world defined by scarcity of knowledge to one of perceived information ubiquity.
- The library no longer serves as a "mere" repository of books, chairs, and space.
- People can use it for much more, and library services can now "leave" the building through third-party platforms like FaceBook, YouTube and iTunes.
- But, libraries remain as social and intellectual "commons" in today's communities.

Library 2.0

As described by one presenter at a Yale Law School Symposium on Library 2.0:

- Exploding Universe of Works
- Supernova of Activity
- Ecology of Diversity
- Gatekeeper for Distribution
- Appeaser of User Needs
- Apologist for Chaos

Overview – Some Basic Questions

With new content, including user-generated info, and new means of access other than by walking in the door, questions arise:

- Who owns content?
- How is user-generated info (Noise?) balanced with library (librarian, trustees) "expertise"?
- Electronic information and access seems to require tracking, collecting and aggregating data on patron activities (more than tracking for late-return fines).

Can the Library Bill of Rights of 1939 still be relevant?

Does this suggest the need to develop/adopt fair information practices that include:
- Notice, informed consent, & recurring opt-in.
- Creation of separate accounts so that "cyberstuff" is separate from check-out information.

- Should libraries avoid using cookies?
- Should they make activity logs anonymous?
- Should there be a policy on releasing activity logs & responding to subpoenas?

Overview – First Amendment

- Difficult First Amendment issues for public libraries are now complicated by the growth of Internet access.
- This segment will briefly discuss the First Amendment in the context of libraries, with an eye toward digital information.

Traditional First Amendment Concerns

- **Does the First Amendment Allow Libraries to Limit the Public Use of Their Property?**
- **Does the First Amendment Allow Libraries to Limit Access of Patrons to Materials?**
  - **What about Children?**
- **How does a library choose "materials" to which it will provide access?**
- **Do any of the foregoing analyses change in an era of digital information?**

Traditional First Amendment Issues

- The answer to each question posited on the prior slide is, of course, "yes"
  - Coupled with lawyer's standard phrasing – "Maybe!" and "It depends!"
- Time does not allow detailed analysis of each question here, so please consult the handout which (I hope) provides a reasonable guide map to some relevant issues and law.
- Instead, we will do a "sports center" look at some highlights with a focus on cyber-information.

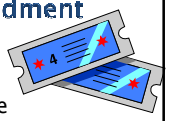
Sports Center Highlights Libraries and the First Amendment

- #1 Access to the Ballpark
  - Forum Analysis
    - Public, Limited, Designated, Non-Public
    - Which part of the library is involved
      - Materials, meeting rooms, posters, grounds, cyberspace
  - Policy Development & Considerations
    - Needs of the community
    - Ideas of policy makers
    - Compliance with First Amendment & laws (including FOIA or Right-to-Know) and ADA



Sports Center Highlights Libraries and the First Amendment

#2 Access to the Game



- Ground rules & the small print on the back of an admission ticket
- Without some ability to exercise controls, unfettered exercise of 1st Amendment rights could rise to chaos, with the result that library would be little more than a constant rumble of indistinguishable and unintelligible noise.

Sports Center Highlights
Libraries and the First Amendment

#3 Use of Facilities



- What uses are OK for everyone?
- What uses are allowed only because we have to allow it?
  - "You know we really hate to let them in."
  - "How can we make using this stuff as hard as possible?"
- "Now this stuff we really can prohibit – can't we?"

Sports Center Highlights
Libraries and the First Amendment

#3 Use of Facilities (continued)



- Know thy forum (again).
- Know what speech (expressive conduct) or assembly is protected.
- Understand Content-based & Viewpoint-based Problems.
- Permissible Use of Time, Place and Manner Controls

Sports Center Highlights
Libraries and the First Amendment

#4 Don't Take Me Out to the Ballpark (Watching the Game from Outside the Ballpark)



- What are library information portals?
- How are they used for access and input?
- Using Commentaries in various forums (again).

Content Control



- Internet filters as the 21st Century version of Book Burning
- The Special Issue of Children
- Other Problems (e.g., viruses, copyright, piracy, harassment)





Minimizing Challenges and Replays

- Set reasonably certain standards to advise users
- Minimize discretion of administrators (e.g., librarians) to censor speech/expression/access unilaterally
- Regulate instead of prohibit (when appropriate to do so)
- Provide prompt review of decisions
- Be prepared to amend
- Keep advised of developing trends & technology

To preview the copyright & patron policy segments of this work session, consider

- What is the 21st Century Version of the Library?
- It can be characterized by:
  - A pooling arrangement to deal with the problem of scarcity or access to information chaos.
  - The first sale doctrine (more than fair use) is what allows the library to exist.
  - Library lending has been called organized piracy — takes money out of the pockets of authors and publishers.
  - How do these issues and analyses apply to owners/creators/custodians of cyber-information.

Questions or Comments?

Thank you.

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