

# Law vs. Ethics

## *Conflict and Contrast in Laws Affecting the Role of Libraries, Schools, and Other Information Intermediaries*

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Tomas A. Lipinski

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### Abstract

Law and ethics or a sense of professional responsibility are not always aligned. A characterization of the disconnect falls into one of two broad categories. At times, the law may not go far enough in achieving an ethical or professional response, at other times the law goes too far and forecloses a response based on ethical principles or professional responsibility. In the instance of the latter, ownership or control rights often conflict with other rights such as access to information, privacy, or a general sense of free speech. Where the law does not go far enough an opportunity arises for gentle intervention through education and awareness-raising. The law can, however, be said to align with principles or responsibility, and while not perfect leads to a more harmonious and desirable response. Along these three characterizations (not far enough, too far, and just about right) the role of the information intermediary such as a library or school is examined. In addition, the characterization is assessed in three subject areas: copyright, privacy, and free speech. The discussion results in further opportunity for reflection on the purpose and role of law and preferred or professional responses.



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This article discusses the legal landscape of copyright (and contract, i.e., licensing), privacy, and free speech laws in the United States and assesses this landscape on a continuum, contrasting what is legal with what might be thought to be right, formed from a sense of ethical or professional responsibility. Of course, what is right in the mind of one is not so in the mind of another. The purpose of this article is not to suggest what is “right” or “wrong” for all, in terms of professional responsibility or the proper ethical response, as differing positions can be articulated, if not also defended. Rather the point is to demonstrate that the present law contains numerous examples of variation. At times the law perhaps goes too far, offering the potential for infringing use of copyrighted material, imposing excessive privacy restrictions that can impact access rights to government activity or allowing speech that some might view as harmful. At other times the law may extend too far in the other direction, curtailing access and use of copyrighted content, failing to protect privacy, or to allow for robust comment. There may, however, be times when the law though far from perfect comes much closer to the mark, with the law and a sense of responsibility, professional or otherwise, more closely aligned.

Further, this discussion brings into focus the intermediary entity as arbiter of access within the information landscape. Of most interest to the readership of this publication is the focus on libraries and educational institutions such as schools, colleges, and universities. Such intermediaries are often in the best position to facilitate access, to educate, and to make fluent its constituents with respect to knowledge: knowledge that is often protected by copyright, knowledge that is the subject of debate, knowledge that necessitates the rights of free inquiry regarding it, and knowledge that may require rights of privacy extended to a record of its access or use. The intermediary may then be in a position to alert the patron, student, et al. to the points of friction between what our laws aspire to be and what a given law is at a given moment or in a given situation.

Finally, the examples provided here may also enhance discussion among teachers and students of law, ethics, and policy, presenting the position that the law is neither “all-bad” or “all-good” but offering points of conflict or contrast along such a continuum. In general, it is found that when the law does not go far enough, the opportunity for a learning encounter or so-called teaching moment is created. A response to which the intermediary may find is consistent with its goals of educating or enhancing the information experience. A characteristic of examples where the law does not go far enough is often the conflict of rights created by the law that may impact other rights such as free speech, self-responsibility, or self-restraint for the benefit of others.

The first examples below are drawn from the copyright law. Again, the point here is not to say that law should be changed but to suggest that choice exists. Is it not disingenuous to in one breath decry the rights of copyright owners and call for the end of copyright law and in the next breath to hide behind it? In some examples, the law may not go far enough; it allows but does

not require and the simple point is that in some circumstances a sense of professional responsibility might require more than the law does. In other examples the copyright law requires too much, challenging traditional norms of interaction with users, patrons, students, subscribers, et al. Finally the law might be just about right, promoting through passive means the goals of knowledge creation incentives, dissemination and access, and reasonable respect for the property of others.

## Copyright Scenario I: Allowing Infringing Patron Conduct

The law does not at times encourage or support the best overall behavior. There are times where it is argued that law and a sense of professional obligation are not in synch. The law may, in a sense, not go far enough to encourage proper behavior. This, however, is not necessarily a bad thing as this first example suggests. At other times, the law in the opinion of the author places an excessive obligation upon others to act so that while securing a lawful result for the intermediate actor, e.g., qualifying library or archive, it may have consequences upon others, consequences that can be arguably undesirable.

Consider section 108(f)(1) of the copyright law. Section 108(f)(1) states that nothing in section 108 “shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that making of a copy may be subject to the copyright law” (17 U.S.C. §108[f](1)). This is the provision responsible for the copyright warning notices that populate the photocopiers (or reproducing equipment for that matter) of many libraries. The copyright law is intended to be technology-neutral and so reproducing equipment in the current decade of the twenty-first century would logically include computers, scanners, samplers, etc., as these items would constitute “reproducing equipment.” As long as there is a notice placed on the equipment and the use is unsupervised, any infringement that might occur on the premises of the library or archive through use of that reproducing equipment by patrons, students, or other third parties will not impose any liability for a neglectful librarian. Without this protection in place liability might arise under a contributory liability standard, i.e., for unawareness of or failure once aware to stop infringement or be imputed to the institution by means of their employment (“library or archives or its employees”) under vicarious liability standards.

Section 108(f)(2) reminds us that “nothing in this section ... excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use

as provided by section 107” (17 U.S.C. § 108[f][2]). As a result, the immunity applies not to the user but to the intermediary qualifying library or archive or its employee. (The qualifying requirements are found in subsection [a].) The use must be “unsupervised.” Normally, employees are supervised, even if not subject to constant over-the-shoulder monitoring, so the provision arguably would not provide protection from an employee engaging in direct copyright infringement. Since employees are in fact the targets of some measure of supervision, section 108 (f)(1) cannot by law apply to use of reproducing equipment by employees. Here the traditional concept *respondet superior* (literally to let the superior respond or be responsible) is at play. As the *Lowry’s Reports, Inc. v. Legg Mason, Inc.* case demonstrates employees are considered supervised and under the control of the employer even if the employee engages in conduct contrary to employer policy: “There can be no doubt that Legg Mason had the right and ability to supervise its own employees, who infringed Lowry’s copyrights at Legg Mason offices, using company equipment, on company time” (*Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 2003, pp. 745–746). The section 108 immunity extends to material that the patron brought into the library, took from library shelves, or obtained from an online database to which the library subscribed or obtained from a web site to which the library allowed access. Any infringement the patron committed by reproducing any of these items by photocopying, scanning, downloading, etc. would be the subject of the section 108(f)(1) immunity.

This immunity is a great privilege granted to qualifying libraries and archives for infringements arising out of the availability of “reproducing equipment located on its premises.” The authors of the infamous “white paper” on intellectual property perhaps offered an observation on the significance of section 108(f)(1) when the report noted: “A library is exempted from liability for the unsupervised use of reproducing equipment located on its premises provided that the equipment displays a copyright law notice [citation omitted]. This exemption does not apply to the user of such equipment, and no other provider of equipment enjoys any statutory immunity” (Information Infrastructure Task Force, 1995, p. 111 at n. 357). As the peer-to-peer file-sharing litigation of the recent past has demonstrated a “contributory infringer may be liable based on the provision of services or equipment related to the direct infringement” (Information Infrastructure Task Force, 1995, p. 111).

Commercial actors are not granted this immunity and are responsible for the infringing activity that occurs on its premises with equipment it makes available. In *Blackwell Publishing, Inc. v. Excel Research Group, Inc.* (2009), a commercial copy shop served University of Michigan students, accepting course packs from professors and allowing students to access the master copy in order to make their own copy of readings using copy shop equipment, and in addition offering bindery service for students’ copies of readings. The federal district court concluded these practices were not a fair use: “Thus, the fact that students do

the copying does not ipso facto mean that a commercial use cannot be found ... the manner in which the copying takes place cannot be overlooked.... Excel's use of the material is unmistakably commercial" (*Blackwell Publishing, Inc. v. Excel Research Group, Inc.*, 2009, 793).

Implicit is the distinct possibility that patrons of the qualifying library or archive will indeed infringe copyright law, but this need not be of legal concern for the library or archive or its employees, or should it? Here, when assessed with a professional standard or obligation, it could be argued that the law does not go far enough. Readers should not misunderstand the author. The breathing room (immunity from copyright liability) the law offers to qualifying libraries and archives is welcome from a legal standpoint and it should not be eliminated. Free from the worry of patron or student infringing activity triggering liability for the library or archive, the intermediary can direct its limited resources and efforts elsewhere. But in all circumstances is this satisfactory and is it wise? From a policy perspective this is a good result, but from the perspective of professional responsibility or institutional mission there may be times when intercession, while not an obligated legal result, might be the preferred result.

One example would be a library in a school setting where the school acting *in loco parentis* is charged, as the Supreme Court has noted, with the task of inculcating the community's value, such as respect for the property of others, including copyright. For example, in *Bethel School District No. 403 v. Fraser* (1986) the Court, quoting Beard & Beard (1968, p. 228) observed that the role of the public school is to "prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (*Bethel School District No. 403 v. Fraser*, 1986, p. 681). Earlier decisions have echoed this proposition: "[W]e [the Supreme Court] have acknowledged that for many purposes school authorities ac[t] *in loco parentis*, with the power and indeed the duty to inculcate the habits and manners of civility" (*Vernonia School District 47J v. Acton*, 1995, p. 655, internal quotation marks omitted). The decision in *Hazelwood School District v. Kuhlmeier* articulated the definitive expression of this concept: "Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the fundamental values necessary to the maintenance of a democratic political system. All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of community values" (*Hazelwood School District v. Kuhlmeier*, 1988, p. 278, internal quotation marks and references omitted).

A similar "teaching-moment" might occur in a public library setting when librarians are engaging in technology or information literacy interactions with

patrons, of any age and whether formal (scheduled session in the library's lab or meeting room) or informal (reference assistance at a search station) or active (an agenda item as part of scheduled session) or passive (a flyer or insert in a circulated item or other copyright warning notice). For example, this one is based on that found in the text of the statute: "nothing in this section ... excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107" (17 U.S.C. 108[f][2]). There might be other examples where in spite of the protection found in the immunity of section 108(f)(1) the library or archive may nonetheless act, not to intercede or prevent but at least to inform (the so-called teaching moment) and educate, even though legally it is under no obligation to do so, nor to do anything for that matter. There is also a practical effect of such informal or passive measures, such efforts may serve to convince policy makers that libraries and archives are doing their share to inform and model good copyright behavior among their users. Congress may be persuaded not to impose more elaborate intervention mechanisms on intermediaries such as those made part of the take-down provisions of the DMCA (discussed next; see also, Lipinski, 2006) or the distance education rules of the TEACH Act (for further discussion see, Lipinski, 2005).

## Copyright Scenario II: Excessive Interference with Patron or Student Use of Content

In contrast to Copyright Scenario I, there are examples where it could be argued the copyright law goes too far in what it requires from the intermediary library, college, university, etc. regarding the use by patrons or students of content protected by copyright. One example is the response required by the intermediary in addressing accusations of copyright infringement by its constituents. Such response-obligation and its rules regarding take-down of or disabling of access when proper notice is received from a copyright owner (or the legal representative of owner) are found in section 512. In fulfilling this obligation the statute offers a safe harbor of sorts to the intermediary: no monetary loss for contributory liability, for example. The user again remains liable.

When the safe harbor protection is triggered it provides a limitation on the imposition of all monetary relief available to copyright plaintiffs: "A service provider shall *not be liable for monetary relief*, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright." Section 512(k)(2) defines monetary relief to include "damages, costs, attorneys' fees, and any other form of monetary payment" (17 U.S.C. § 512 [k][2] [emphasis added]). The Conference Report offers a sentiment of broad protection: "The limitations in subsections (a) through (d) protect qualifying

service providers from liability for *all monetary relief for direct, vicarious and contributory infringement*” (Conference Report 105-796, 1998, p. 73, bold and italics added). It should be obvious that this limitation on monetary remedy would make a plaintiff think carefully before filing a lawsuit against an intermediary. In fact, that is the precise design of section 512 to force the copyright owner and the service provider, library, school, college, university, etc., to work together to stop the misuse of its facilities in perpetuating the infringement: “The DMCA, therefore, encourages ISPs to cooperate with content providers by offering insulation from potential copyright liability” (Yen, 2000, p. 1881). Section 512 is far too complex to cover in any detail here but the following possible sequence could occur under the statute and serves to demonstrate the level of entanglement and intertwining obligations on the part of the intermediary.

Section 512(c)(1)(C) provides that the service provider, “upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” The aforementioned paragraph (3), of section 512(c)(1) details the requirements of the notice the copyright owner sends to the service provider to trigger this removal or disabling. Section 512(c)(2) requires that service providers designate a registered agent to receive such section 512(c)(3) notices. Rather than proffering an opportunity for a teaching moment while at the same time offering legal protection as does section 108(f)(1), this statute requires discontinuation of access to content, either by disabling access or outright removal of such content, forcing intercession by the intermediary. This may or may not be useful in a commercial service provider setting but appears heavy-handed, retributive and contrary to the mission of many public institutions such as libraries or schools.

Suppose that the section 512(c)(3) notice does not meet the requirements of the statute. Then under this provision the intermediary need do nothing. However, such failed notice might arouse suspicion and possibly trigger another removal/disabling obligation found elsewhere in section 512. If three elements of the notice (identification of the work, identification of infringing material, and contact information) are substantially complied with, then while such notice might not trigger an expeditious removal or disable provision of section 512(c)(1)(C), it may nonetheless trigger an expeditious removal and disabling of the content nonetheless under section 512(c)(1)(A)(iii), **unless** the service provider contacts the sender of the failed notice or takes other steps to facilitate perfection of the notice. If this action is undertaken then the defendant can find shelter in the 512(c)(3)(B)(i) language: “A notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which

infringing activity is apparent.” This consideration occurs *only if* the intermediary “promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)” (17 U.S.C. § 512[c][3][B][ii]). In order to maintain the refuge of the safe harbor the intermediary is required to approach the copyright owner that sent the notice and attempt to perfect that notice, i.e., by obtaining further information.

Another provision offers immunity from disgruntled users (library patrons or students) who have their content removed or access to it disabled when a proper notice is served upon the intermediary by the copyright owner. There are several steps to the process: In short, in removal or disabling scenarios under the subsection 512(c)(1)(c) notice mechanism, the service provider, in the context of this monograph that would be the library or educational entity, must “promptly” contact the “subscriber” or patron or student whose post was removed or access disabled, offering the subscriber a chance to challenge the service provider’s act of removal or disabling. If a challenge occurs, a so-called counter notification, then the service provider must in turn “promptly” contact the copyright owner or his or her designated representative, the “person” from whom it received the initial subsection 512(c)(1)(C) notice, informing that party that the service provider will replace the material or restore access unless the copyright owner or designated representative “has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network” and notifies the subscriber that it has done so (17 U.S.C. § 512[g]). Finally section 512 contains the notable and somewhat controversial subsection, section 512(h), by which a copyright owner may request the “clerk of any United States district court to issue a subpoena to” that online library or school intermediary or any other online “service provider for identification of an alleged infringer” (17 U.S.C. § 512[h]). The section contains a harsh command to those in receipt of such subpoena: “The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider” (17 U.S.C. § 512[h]). Again section 512 positions the intermediary library or school as protector or buffer but as active participant in the copyright owners quest to seek remedy for alleged or perceived harms.

### Copyright Scenario III: Section 107 (Bad Faith) and Section 109 (“Lawfully Made”)

At times, the law comes closer to allowing use of content protected by copyright and at the same time ensuring that both owners and users of such content



do not abuse the rights granted by Congress. Consider the concept of fair use and its four factors that might be assessed before a use is determined to be fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work (17 U.S.C. § 107). The presence of good or bad faith on the part of the users is often applied as a sub-factor within the first factor, as a “double check” on the overall weighing of the first factor. Owners who exhibit bad faith when making their works available or users who exhibit the same behavior when making use of works protected by copyright are often derided by the courts. Such finding of bad faith can impact the finding of fair use against the owner or in a finding of infringement against the user.

In *Field v. Google, Inc.* (2006), Google, Inc.’s caching practices were at issue. Field failed to exercise the do not cache protocol when creating his website by including the robots.txt file which would have prevented the Google, Inc. system from caching his website along with images it contained. The court found this indicative of bad faith, i.e., Field crying wolf for the very acts that he sought to encourage or at least could have easily prevented by inclusion of the file command, whereas Google’s efforts to provide an opt-out mechanism whereby a copyright owner could easily exclude works from caching, the court viewed as good faith: “Google’s **good faith** is manifest with respect to Field’s works in particular. Field did not include any information on the pages of his site to instruct Google not to provide ‘Cached’ links to those pages.... Field’s own *conduct stands in marked contrast* to Google’s **good faith**. Field took a variety of affirmative steps to get his works included in Google’s search results ... where he knew they would be displayed.... Comparing Field’s conduct with Google’s provides further weight to the scales in favor of a finding of fair use” (*Field v. Google, Inc.*, 2006, pp. 1122–1123, italics and bold added).

In contrast in *Greaver v. National Association of Corporate Directors* (1997) it was the user who demonstrated bad faith by “[e]ven after this lawsuit was filed [] continued to use course materials that duplicated portions of the Plaintiff’s copyrighted work.... The Defendant’s failure to take any action to cease infringing the Plaintiff’s copyright and its apparent misrepresentations in claiming that it would remedy the infringement satisfy the Court that it acted willfully and in bad faith” (*Greaver v. National Association of Corporate Directors*, 1997, p. \*7). In these cases the law demonstrates an ability to not place form over substance and examines the circumstances surrounding a claimed instance of infringement or an assertion of fair use.

It could also be argued that the “lawfully made” requirement of notice of section 110(1) predicates classroom use of content that is legitimate. A condition is placed on the use of audiovisual works under section 110(1): The performance right a “motion picture or other audiovisual work, or the display of individual

images” from it granted to educators by section 110(1) does not apply if “the person responsible for the performance *knew or had reason to believe* [that the work] was not lawfully made” (17 U.S.C. § 110[1]). A similar proviso is found in the distance education rules of subsection 110(2): “performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution *knew or had reason to believe* was not lawfully made and acquired” (17 U.S.C. § 110[2]). The use rights granted by the classroom rules are conditioned on the copy or phonorecord of the work used being a lawfully made copy, not a bootleg or pirated copy. In other words the rights of teachers and students do not extend to circumstances where the legal provenance of the work is in question. The rationale behind such a condition is to eliminate any incentive for making unlawful copies, as the use of those copies cannot underlie an otherwise legitimate and statutorily condoned performance and display. Further, the standard in both provisions is know or reason to know. Again this aligns with a codified sense of responsibility to act or to refrain from acting, depending upon whether the content is lawfully made or not. As one is charged with an obligation to refrain from use only when the teacher or student (whoever is displaying or performing the content) actually knows the work is not lawfully made or has a reasonable belief that the version of the work to be used is somehow suspect. However, this does not require a user to investigate each work before a use is made.

A similar “lawfully made” proviso is contained within section 109(a): the provision allowing libraries to circulate content in its collections. It is rational for Congress to allow such distributions to the public by libraries or anyone else for that matter, to limit the copyright owner’s right of public distribution, but to condition this distribution right on the item being lawfully made, not a bootleg or pirated copy for example. The law operates to curtail the further distribution of content that is infringing, i.e., not lawfully made. Here it can be argued that the law achieves a proper balance, allowing for use but conditioning the use on a lawful reproduction of that work. However, recent court interpretation has arguably narrowed the scope of which works are available for public distribution under section 109 or section 110 (classroom use) where a similar “lawfully made under this title” proviso is also found (Chamberlain, 2011). In the Ninth and Second circuits not only must the work be lawfully made but it must be lawfully made in the United States or imported with the owner’s authority, at least that is the interpretation given to identical “lawfully under this title” phrasing in two recent court decisions (*Omega S.A. v. Costco Wholesale Corp.*, 2008, judgment affirmed by an equally divided court without opinion *Costco Wholesale Corp. v. Omega S.A.*, 2010; *John Wiley & Sons, Inc. v. Kirtsaeng*, 2011). If these decisions become the rule then it would be argued that the law has again gone too far in what it requires before a lawful use of content protected by copyright may be made.

## Privacy Scenario I: Library Content and E-book Agreements; Privacy Law Does Not Go Far Enough

As with copyright examples, privacy examples also exist where the law may be less aligned with professional standards or ethical perspectives than it could be. In some instances the law does not offer enough privacy protection for the intermediary library or its patrons, too much in others, and in some instances getting it just about right. An example of an area where the law does not go far enough in protecting the privacy rights of library patrons is taken from the impact that license content (as opposed to service) agreements may have on privacy. A number of agreements reviewed in *The librarian's legal companion for licensing information resources and services* (Lipinski, 2012) impose obligations upon the licensee to be active in what might called “compliance measures,” with the goal of promoting and ensuring licensed content is used in conformity with the terms of agreement. Issues may arise related to these obligations such as simple efficacy of fulfilling a promise made by the library vis-à-vis the agreement that all use will conform to the term of the agreement, cost, patron confidentiality, etc. Such promises may be nearly impossible to fulfill without some measure of policing or at the least more active monitoring by the library. Turning a blind eye and failing to intervene in response to knowledge of blatant, widespread, and significant misuse of the licensed content (or other material protected by copyright) is one thing, but promising that all “authorized users” will comply with the license terms is quite another. It is recommended that in situations where knowledge or awareness of misuse is not present, the most a library-licensee should be required to do is provide notice of those prohibited uses (as well as permitted uses!), especially those in deviation from the copyright law, i.e., uses permitted by the license that are beyond those that the copyright would allow if it applied and of which the user would otherwise be unaware.

While it is important to inform Authorized Users likewise of their use rights under the agreement it could be argued that any such notice except in its most rudimentary form is cumbersome at best, intrusive in the least. Perhaps issuing a general warning notice at key points of access (in the Acceptable Use Policy of the library-licensee, on the log-in page, etc.) that some content in the library is under license, that licensed content is subject to the terms of the respective agreements and that these terms may provide rights lesser or greater than those governing copyright law, and that for further information the user should..., i.e., click to relevant terms or click to see the entire license agreement. Even this approach could still be quite cumbersome. Different terms might apply to different content due to variation across vendors, and so there would need to be some way to align the different agreements and respective terms among the resources a patron might be using. This might be an acceptable compromise from the perspective of the licensor and represents a far less

ludicrous promise by the licensee of 100 percent compliance by all “authorized users.”

While the licensee might accept an obligation to intercede if it knows or is aware of misuse of the licensed content and treat such deviation consistent with a violation of its other network policies such as a prohibition against using campus email to send harassing messages, an obligation to do more should be met with caution. The licensee should not be obligated to report such infractions to the licensor nor should it accept any obligation to monitor use of the licensed content in order to ensure compliance. Consider this example from a BioOne agreement: “Use *reasonable efforts* to ensure that *Authorized Users are made aware* of and undertake to abide by the terms and conditions of this License; and immediately *on becoming aware of any unauthorized user or other breach, inform* BioOne and take reasonable steps, including appropriate disciplinary action, both to ensure that such activity cease and to prevent any recurrence.” One problem with reporting such infractions, as opposed to an obligation to nonetheless intervene by arresting the misuse and promoting corrective, compliant action by the Authorized User, is that alerting the licensor to a locus of misuse somewhere on the premises or network of the licensee — misuse which also might rise to a level of copyright infringement — is inviting further inquiry by the curious and now suspicious licensor. The next logical move is for the licensor to inquire after the name and particulars of the misuse as it contemplates legal action in response to the unauthorized use of the “authorized user,” student, patron, etc. This leads to obvious issues of patron privacy in a legal as well as perhaps an ethical sense and at the least places the licensee in an awkward limbo between the licensor and end-user who may be a patron or student of the licensee. The “perhaps” is used as there is likely little if any privacy right to engage in unlawful activity, but the problem is figuring out if this has actually happened. Remember the section 512 take-down obligation is triggered by a mere good faith assertion that the work is infringing when in reality it may not be. The same issues can arise, i.e., the licensor, the library-licensee, and the Authorized User may all have a different idea of what constitutes compliant versus deviant conduct in regards to the licensed content. A compounding problem with the legal landscape in this setting is that such persons are third parties to the contract, not bound by the terms of an agreement between the licensor and the library-institution licensee.

There is recent concern in the use of e-book readers and other technologies that track a user’s reading and searching habits. Libraries may unwittingly contribute to such problems when patrons obtain content through the library’s account but the source and control of that content is governed and monitored by a third party supplier of the content. To this point consider the language from the Kindle license: “Information Received. The Software will provide Amazon with data about your Kindle and its interaction with the Service (such as available memory, up-time, log files, and signal strength). The Software will

also provide Amazon with information related to the Digital Content on your Kindle and Other Devices and your use of it (such as last page read and content archiving). Annotations, bookmarks, notes, highlights, or similar markings you make using your Kindle or Reading Application and other information you provide may be stored on servers that are located outside the country in which you live. Any information we receive is subject to the Amazon.com privacy notice located at [www.amazon.com/privacy](http://www.amazon.com/privacy).” While many interfaces purport to have privacy policies in place, such are inadequate for at least two reasons. First, such provisions do not vest the subscriber with enforcement rights against the promisor either against the provider or another subscriber. For example in *Noah v. America Online, Inc.* (2003) a subscriber made a “claim[] that the ISP wrongfully refused to prevent participants in an online chat room from posting or submitting harassing comments that blasphemed and defamed plaintiff’s Islamic religion and his co-religionists”; it was barred by section 47 U.S.C. § 230 immunity because the subscriber “seeks to treat AOL as the publisher of the allegedly harassing statements of other AOL members” (*Noah v. America Online, Inc.*, 2003, p. 534). The Terms of Agreement regarding online comportment standards (labeled “Community Guidelines”) created no contractual duty on the part of AOL; rather the “plain language of the Member Agreement makes clear that AOL is not obligated to take any action” (*Noah v. America Online, Inc.*, 2003, p. 545).

Worse, the vendor may not comply with its own guidelines. The track record of Amazon.com is but one sad example (see Friess, 2011 and *Del Vecchio v. Amazon.com*, 2011). Amazon is collecting quite a bit of information about how a licensee uses his or her Kindle such as what pages a reader flips through, what pages the reader returns to or rereads, how long a reader spends on a page and any annotations, bookmarks, notes, highlights, or similar markings a reader makes. Use of such information is subject to the Amazon privacy policy which oddly is located somewhere else on its website and is not made part of the actual Kindle license. Amazon might also change the policy at any time without notice (it has done so in the past).

If reader information can be tracked when public library patrons use Kindle products and services without being subject to the same level of protection enjoyed under state statutes—some but not all states protect the circulation history of patrons regarding library items such as books, CDs, DVDs, search history of a patron’s subject interests, and what services the patron receives—a serious threat to patron privacy arises (state library confidentiality statutes are discussed in more detail below).

The alteration of language in the Kindle license making clear that the licensor (or any similarly situated licensor) is bound contractually to the same level of privacy (or greater) regarding patron information under which the library is bound by its state law or policy to follow is a necessary first step. Language could be inserted into the license to ensure a consistent level of patron-user

privacy across all information and services accessed at or through the library. A sample provision might be something along the lines of the following: “*Licensor shall undertake reasonable measures [“reasonable efforts” would be better, “best efforts” would be best, as these two phrases have meaning in the eyes of the law] to minimize the collection and retention of information that identifies a patron or information regarding a patron [or use and define a concept of “personally identifiable information”] or associates a patron with the use of facilities services, or content, including but not limited to patterns of use, presence in the library, subject, search or other use patterns.*” In addition, one of the following provisions could also be added: “*Patron information collected or retained by the licensor is confidential and shall not be released without the prior written and explicit consent of the patron and the licensee,*” or “*Any such patron information [or “personally identifiable information”] shall be protected to the same extent equal to or greater than that imposed on the licensee-library by a state privacy statute, other laws or library policy under which the licensee-library operates.*” Second, notice should be given to the patron in circumstances where the control over the use of the information is governed by or resides with a third party. Notice could be accomplished by actual signs located near terminals or on the screen where the patron accesses a vendor database (e.g., “Warning: you are about to leave the protection offered by your state’s library confidentiality statute....” or “Warning: your use of this e-content may be subject to tracking by the third party provider of the content....”). This is especially true in situations where content is under the control of the licensor such as when a database is accessed from the website of the vendor or content is tied to a device such as an e-reader or tablet that is under the control of the vendor.

## Privacy Scenario II: USA PATRIOT

It may be an unusual approach to offer an aspect from the USA PATRIOT Act (as first enacted in 2001) to demonstrate the overprotection of privacy laws. When the law is described as going too far, offering an over-protection of privacy or in a more refined sense here, secrecy, there is legitimization of practices that are not in the best interest of a broader range of stakeholders. Often this legitimization is at the expense of other civil rights such as free speech, access to government information, etc. The odd inclusion here might also be indicative of the infrequency with which such overprotection occurs in matters of national security. Under the first iteration of the USA PATRIOT Act one concept challenged in the courts was the so-called “gag order” rule found in several sections of the law. The excessive privacy (secrecy) of all parties involved, i.e., the target of the investigation, the holder of the record regarding that target, and the government activity surrounding the order, offers an example of overprotection, of the law going too far. This protection as courts later determined was excessive

in that it butt privacy/secrecy rights against competing civil rights such as the right to speak (of the record holder) and the right to know (by other members of society, from the record holder, the circumstances of the request and of the government, of frequency and veracity of such requests). As the district court offered this sage reflection at the interest at play in the challenge: “Like most of our constitutional law’s hardest cases, this dispute is about two fundamental principles: values and limits. It centers on the interplay of these concepts, testing the limits of values and the values of limits where their ends collide” (*Doe v. Ashcroft*, 2004, p. 476). The federal district court concluded that the gag order contained in the national security letter issued under 18 U.S.C. § 2709 was unconstitutional. In addition to lacking meaningful judicial review under the Fourth Amendment, the gag order constituted a prior restraint under the First Amendment: “On separate grounds, the Court also concludes that the permanent ban on disclosure contained in § 2709(c), which the Court is unable to sever from the remainder of the statute, operates as an unconstitutional prior restraint on speech in violation of the First Amendment.” (*Doe v. Ashcroft*, 2004, p. 475). Similar language in the infamous Section 215 “allowing seizure of tangible things (including books, records, papers, documents, and other items)” and of concern to the library community contained a similar gag order: “No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.” (50 U.S.C. § 1861[d]). The district court concluded that the lack of judicial review also implicated the privacy rights of the intermediary’s subscribers or where the intermediary is a library, its patrons: “Though it is not necessary to precisely define the scope of ISP subscribers’ First Amendment rights, the Court concludes that § 2709 may, in a given case, **violate a subscriber’s First Amendment privacy rights**, as well as other legal rights, if judicial review is not readily available to an ISP that receives an NSL” (*Doe v. Ashcroft*, 2004, p. 506, emphasis added). Not only are the subscriber’s or patron’s privacy rights undermined, the institution may possess an interest worth protecting as “associations or other organizations that receive NSLs may have **their own independent First Amendment** [right to anonymous speech] **or other interests** in protecting their subscribers’ information from discovery” (*Doe v. Ashcroft*, 2004, p. 506, 2004, emphasis added). Though the law impeded the privacy rights of the subscriber (patron) with the gag order in place it could be argued that the privacy of the librarian and library remain secure. True enough, the protection borders more on secrecy than privacy. However as indicated earlier this overprotection resulted in other legal problems, vis-à-vis right of access or review of government activity.

In another challenge to the same provision, involving a library the court questioned the impact of excessive privacy surrounding the issuance of a national security letter: “Second, § 2709(c) creates a unique situation in which

the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public. This ban is particularly noteworthy given the fact that advocates of the legislation have consistently relied on the public's faith in the government to apply the statute narrowly in order to advocate for passage and reauthorization of various provisions of the Patriot Act" (*Doe v. Gonzales*, 2005, p. 81). Under a revised PATRIOT ACT, review of the initial order as well as annual appeal of the gag order is now possible. Furthermore, a number of oversight provisions include audit and annual reporting to Congress of a version of the PATRIOT ACT that could be argued still goes too far but at least not as far as its original incarnation in offering excessive privacy and secrecy at the expense of other civil liberties such as access to and fair comment on government investigatory practices.

### Privacy Scenario III: Some State Library Confidentiality Statutes

Not all library confidentiality statutes would fall within the subject of this section — the law getting it just about right — but a subset of those state statutes that include within its reach (protection) record of all use of the library environs including facilities (meeting room or surveillance camera recording of a patron moving about the stacks for example), services (reference assistance or online searching), and collections (both circulation and in-house use of material). (Links to all state statutes can be found on the ALA website: State Privacy Laws Regarding Library Records, available at <http://www.ala.org/offices/oif/ifgroups/stateifchairs/stateifcinaction/stateprivacy>.)

Even those statutes offering the widest protection often include logical exceptions such as consent of the record subject, court order, and normal course of library operations (interlibrary loan for example). The best of these statutes can be argued to get the law just about right. The protection level is high yet there are logical exclusions. In this way the law gets the privacy protection of a qualifying library's patrons just about right. Again, not all statutes would fall under this. Consider the Tennessee statute which protects a wide array of records: "no employee of a library shall disclose any *library record* that identifies a person as having *requested or obtained specific materials, information, or services or as having otherwise used* such library" (Tenn. Code Ann. § 10-8-102, emphasis added). This is in contrast to more limiting statutes that protect content contained in circulation and registration records alone and where it could be said the law does not go far enough. Further, the concept of circulation is often tied to a more limited vision of the circulation of actual items from the physical collections of the library, of items that can be borrowed. Florida is but one example: "All *registration and circulation records* of every public library ... are



confidential.... Except in accordance with proper judicial order, a person may *not make known in any manner any information contained in* such records, except as provided in this section ... ‘registration records’ includes any information that a library requires a patron to provide in order to become eligible to borrow books and other materials, and the term ‘circulation records’ includes all information that identifies the patrons who borrow particular books and other materials” (Fla. Stat. § 257.261, emphasis added). At least for those states that protect all records of use of space, material, services, these privacy laws are just about right.

Use of library space, including mere presence in the library (time of ingress, duration of stay, time of egress) as well as movement within that space can now be collected through RFID technology and can help the library in making collection and service decisions. As RFID chip technology is embedded in the physical library card of the patron, his or her time of entry and exist can be recorded as well as what areas of the library the patron visited, assuming the library places chip register devices in various areas. Stores and other businesses have been using this technology for a number of years (Brito 2004, Hildner, 2006; Stein, 2007). It may be only a matter time before such applications may benefit libraries. The risk of course is that another piece of information regarding a patron is created, a record that reflects patron access and use of the library. More limited “borrow” or “circulation” statutes may fall short of protecting such records but those statutes broadly written are arguably inclusive of these new sorts of records as well.

So too those statutes that allow release upon court order have it just about right. In contrast those states where release of patron record is dependant (in certain circumstances) upon the discretion of the record custodian (the library director) are more problematic, as internal decision-making, external pressures, etc. may result in less than consistent application. Consider two such “discretion” statutes. Virginia situates its library protection provision as an exception to its open records law and provides: “The following *records* are excluded from the provisions of this chapter but *may be disclosed by the custodian in discretion.... Library records* that can be used to identify both (i) any library patron who has *borrowed* material from a library and (ii) the material such patron borrowed” (Va. Code Ann. § 2.2-3705). Wisconsin also ties release to discretion but with respect to surveillance tape records alone: “*If a library requests the assistance of a law enforcement officer, and the director of the library determines that records produced by a surveillance device under the control of the library may assist the law enforcement officer to render the requested assistance, the library may disclose the records to the law enforcement officer*” (Wis. Stats. § 43.30, [5][b]). Record of patron entrance or movement via RFID chip in Wisconsin would not however fall under the Wisconsin discretion proviso as that applies to records produced by a surveillance tape alone and would remain subject to protection. State statutes protecting patron privacy vary greatly from

state to state but a number of states get the law just about right when offering patrons protection for a wide array of uses of library facilities, services and materials, subject to a limited number of exceptions.

## Free Speech Scenario I: “Politically Incorrect” and Hate Speech

One area where it could be argued the law goes too far is speech that is derogatory or hateful of a person or group of persons based upon racial, religious, ethnic or other characteristics. Previous commentators have advanced this position such as MacKinnon (1993) and more recently Waldron (2010). These commentators argued for a view of hate speech that constitutes a form of group defamation: “group defamation laws ... look instead to the basics of social standing and to the association that is made — in the hate speech, in the libel, in the defamatory pamphlet or poster — between the denigration of that basic standing and some characteristic associated more or less ascriptively with the group or class ... group defamation sets out to make it a liability by denigrating group-defining characteristics or associating them with bigoted factual claims that are fundamentally defamatory” (Waldron, 2010, p. 1609). Courts of other countries have shared this view: “Hate speech at a personal level as experienced by individuals comprising the group affected by the speech (‘the target group’) is a direct invasion of dignity and infringement on the rights of association of an individual (*Afri-Forum and Another v. Malema and Others*, 2011. p. 18). To be sure there is a fine line between legislating what one can think in terms of harm to others and speech that does indeed harm without limiting the discussion to the legalistic parameters of protected class. Moreover, the focus here is not speech that is merely “offensive or disagreeable” (see *Texas v. Johnson*, 1989, p. 414: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). Again the point of the article is not to suggest that the law should move in one particular direction or another but rather to indicate and discuss the contrast between the moral and the legal result; in this contrast there is potential for discussion and hopefully understanding. The law in the United States decidedly errs on the side of the rights of the speaker as opposed to approaches that balance listener rights or deleterious potential impact that such speech can have on the listener, bystanders, or on society as a whole. Other approaches exist in many European countries such as France. See for example *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme* (2006), discussing a French law prohibiting the display for sale of Nazi memorabilia. As explained by a recent decision from the South Africa Equality Court: “Public speech involves a participation in political discourse with other citizens, in a manner that respects their own

correlative rights. Hate speech has no respect for those rights. It lacks full value as political speech. Hate speech does not address the community in general but merely a portion of it; those who are the target group. Hate speech should not be protected merely because it contributes to the pursuit of the truth. If it denies recognition of the free and reasonable rights of others it makes no direct contribution to the process” (*Afri-Forum and Another v. Malema and Others*, 2011. p. 19). The South African court concluded, in a decision citing a U.S. Supreme Court on free speech, that singing the song “shoot the Boer” by ANC activist Julius Malema was hate speech prohibited under the South African constitution and legislation. The court’s order prohibited the further singing of the song viewing alignment between the interpreted law protecting human dignity and the appropriate societal moral response as well: “The [] respondents are interdicted and restrained from singing the song known as Dubula Ibhunu at any public or private meeting held by or conducted by them (“the song”). The words and the song constitute hate speech. The morality of society dictates that persons should refrain from: using the words, singing the song” (*Afri-Forum and Another v. Malema and Others*, 2011. p. 63).

The approach in the U.S. is decidedly different. In a recent case involving protest at a funeral of an American soldier killed in Iraq the Supreme Court observed: “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case” (*Snyder v. Phelps*, 2011, p. 1220). Lower courts reiterate that the impact of the speech is not to be considered in judging its merits. In *Monteiro v. Tempe Union High School District* (1998), the Ninth Circuit Court of Appeals considered “whether the [Tempe Union High School] District’s conduct, the requirement that students read books [*Huckleberry Finn*] that were determined by the appropriate school authorities to have educational value, and the refusal to remove those books from a mandatory curriculum, can form the basis for a complaint alleging discriminatory conduct under the Equal Protection Clause and Title VI. We approach this question in light of a number of considerations.... The third is the awareness that words can hurt, particularly in the case of children, and that words of a racist nature can hurt especially severely....” (*Monteiro v. Tempe Union High School District*, 1998. pp. 1026–1027). While the court agreed that words can hurt, it feared the practical result if listeners (or in this case the student readers or their parents) could object to offensive works, requiring removal from the curriculum. The court explained its refusal to side with the plaintiff: “First, the fact that a student is required to read a book does not mean that he is being asked to agree with what is in it. It cannot be disputed that a necessary component of any education is learning to think critically about offensive

ideas—without that ability one can do little to respond to them. Second, it is important for young people to learn about the past—and to discover both the good and the bad in our history. Third, if all books with messages that might be deemed harmful were removed, the number of ‘acceptable’ works might be highly limited. Because sexism and racism, and other forms of inequality, exist in almost every culture—and because our values tend to change and are not immutable—and because the dispute over what ideas are proper or improper will always be a matter of intense controversy—it would be folly to think that there is a certain ‘safe’ set of books written by particular authors that all will find acceptable ... although we recognize that books—and words—are powerful tools that can convey extremely injurious messages, we conclude that the assignment of a literary work determined to have intrinsic educational value by the duly authorized school authorities cannot constitute the type of discriminatory conduct prohibited by the Fourteenth Amendment and Title VI, regardless of the fact that the work may be deemed to contain racist ideas or language” (*Monteiro v. Tempe Union High School District*, 998. pp. 1031–1032).

Of course the context is critical. In *Monteiro v. Tempe Union High School District*, the circumstances reflected no ill will, even though the plaintiff argued that there was an ill impact. In cases of the off-color remark, proverbial “polish joke” or insensitive remark reflecting “incorrectness” there may be less bad motive and more ignorance. Yet in circumstances where hate is the driver of the speech, courts in the United States are nonetheless careful not to tread upon the rights of the speaker. “The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomfiting” (*Virginia v. Black*, 2003, p. 358). For example, numerous cases relating to college speech codes were concluded with a similar result. The campus policy or rule was struck down in decision after decision (*Doe v. University of Michigan*, 1989; *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 1991; *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University*, 1991; *DeJohn v. Temple University*, 2008; *McCauley v. University of the Virgin Islands*, 2010). If the speech codes are based on words alone in the absence of any so-called “fighting words,” those words are protected speech, the words are not obscene. This is in contrast to words linked to conduct such as fighting words or incitement. Otherwise courts view the regulation flawed for any harm remains in the mind of the listener alone: “Given that Paragraph H may be used to punish *any* protected speech, without forewarning, based on the subjective reaction of the listener, we conclude that its overbreadth is substantial in an absolute sense and relative to its plainly legitimate sweep” (*McCauley v. University of the Virgin Islands*, 2010, p. 252, emphasis original). Courts are careful to not proscribe ill thinking.

To this point the Supreme Court has had more than one occasion to visit circumstances of quintessential hate, the burning cross. In *R.A.V. v. City of St. Paul, Minnesota* (1992), the court observed: “We have long held, for example,

that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses— so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not” (*R.A.V. v. City of St. Paul, Minnesota*, 1992, p. 385). The Court struck down a city ordinance prohibiting bias-motivated disorderly conduct that prohibits the display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” (Minn. Stat. § 609.2231[4]). By reaching “fighting words” with the stated bias or animus the city “has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul’s comments and concessions in this case elevate the possibility to a certainty” (*R.A.V. v. City of St. Paul, Minnesota*, 1992, pp. 393–394). Such “selectivity” belies that the viewpoint, the thought underlying the conduct is the target and not the act alone, rendering the ordinance unconstitutional on the basis of viewpoint discrimination.

A Virginia statute making it a felony “for any person..., with the intent of intimidating any person or group..., to burn ... a cross on the property of another, a highway or other public place was the subject of a later decision by the Court. The statute also provided that “[a]ny such burning ... shall be prima facie evidence of an intent to intimidate a person or group” (Va.Code Ann. § 18.2-423). Cross burning can be regulated when it ties the content to specific ill-intent (unlike the campus speech codes which focused on the ill-intent without requiring ill-conduct). However, to base the concept of intimidation on the act so proscribed results in a bit of circular logic. “We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form” (*Virginia v. Black*, 2003, pp. 347–348.) Intimidation as an element of the crime must be determined apart from the statute but from extrinsic evidence from the circumstances of the act, i.e., the cross burning. As “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death” (*Virginia v. Black*, 2003, p. 360), the Supreme Court concluded that “Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate” (*Virginia v. Black*, 2003, p. 362). The Court did find unsound “the prima facie provision [that all cross burning is by definition intimidating] strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise

their constitutional right not to put on a defense.... The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself” (*Virginia v. Black*, 2003, pp. 365). The Court appears to make the prohibition of hate speech dependent upon an ill expression (cross burning) and an ill intent (the intent to intimidate). Cases that have one and not both or where the bias, animus, or thought behind an act is targeted while other biases are left untouched as in *R.A.V. v. City of St. Paul, Minnesota* (1992) are problematic. Such distinctions may be lost on the subject-listener or upon those nonetheless offended or outraged. And while offensive or outrageous speech is not unconstitutional nor should it be, such examples serve to demonstrate again a divergence between what is legal and what is perhaps in some situations less than preferable or as South African Judge Lamont concluded, conflict with the dictates of moral society.

## Free Speech Scenario II: Fair Comment Restrictions in License Agreements

One area where the law does not go far enough in protecting speech rights occurs again at an intersection of competing legal concepts: the right of free speech and the right to contract. As in the previous examples of the law not going far enough, this deficiency often legitimizes conduct or situations that jeopardize other civil rights such as free speech. While limited scope restrictions can serve a useful purpose in contracts, such as to protect trade secrets, broad use of “gagwrap” provisions often prevent critical comment on contracted services or content. In the library context this would apply to license agreements with vendors.

Some license agreements require the licensee to abstain from engaging in other conduct unrelated to the use of the licensed content but related to it in other ways. This restriction may be stated in very general terms such as a prohibition on engaging in any conduct that will interfere with the ability of the licensor to achieve or maximize revenue from the licensed product or service. What if the license contains a clause prohibiting product review or a more general clause that prohibits any conduct that might interfere with the ability of the licensor to exploit the contents of the database or software commercially? For example, the Nature (corporate) licensee may not “*undertake any activity* which may have a *damaging effect* on the Licensor’s ability to *achieve revenue* through selling and marketing the Licensed Material.” Making a truthful but nonetheless damaging comment on a library listserv or blog about the glitches in a new circulation module or a software program or about the poor customer or technical support associated with a database service can certainly harm the licensor’s interest in this way. In the alternative, the agreement may in specific prohibit the licensee from conducting benchmark testing on the service and

from dissemination of those results, or from disseminating review of or similar comment on the product. While performance testing might not be an option where the subject of the license is information such as a database, tests could be made of the search features that accompany the database. A likely scenario involving benchmark testing involves software. In business-to-business software agreements the release of benchmark testing is often prohibited.

For example, as a new cataloging upgrade or circulation module is introduced, the licensee might desire to put the system through its paces so-to-speak and then of course as a service to the profession disseminate the results by posting a summary on a library blog, wiki, old-fashioned electronic bulletin board, e-newsletter, etc. The licensor might have an interest in preventing such release or at least might desire “rebuttal” space. While such provision does not in a constitutional sense violate the free speech rights of the licensee, as it is not the government that is attempting to restrict free speech, it nonetheless offends general concepts of free speech and expression. If the licensor is concerned about negative press, then such dissemination could be conditioned upon notice to the licensor. If the licensor desires to rebut such expression it can then consider responding in the identified avenues and attempt that rebuttal. In other situations the licensor might desire to keep some information such as pricing confidential. Comment related to performance or value of an information product or service would be of benefit to the public. As a result the possibility that a license might contain a provision or provisions that a court would conclude are unenforceable as being against public policy is growing in importance. This is so for two reasons. Some licensors are pushing the envelope of licensee obligations by including ever more restrictive terms that can affect public policy (see discussion below regarding so-called DeWitt clauses, for example). Second, there is increased interest by commentators and in one instance a court in use of the doctrine to evaluate the legal-policy palpability of such restrictive terms. An example related to both reasons relates to the concept of so-called gag-wrap provisions, i.e., a license with a term that limits or in some cases prohibit altogether public comment about the license subject (a service or a good) or terms that limit some other right such as a the right of privacy. Commentators such as Belmas and Larson (2007) as well as the more conservative (i.e., those tending to weigh-in on the side of licensors) champions of the right to contract, advocates such as Nimmer and Dodd (2011), all suggest that such terms might be assessed under a public policy analysis.

Belmas and Larson observe: “The public policy framework proposed here uses settled contract law and long-standing First Amendment jurisprudence to evaluate gagwrap promises.... Under the public policy framework, many gag-wrap clauses will be held unenforceable, but other promises of silence that have important commercial or social benefits, such as source confidentiality, non-disclosure, and settlement agreements, will remain intact.” (Belmas and Larson, 2007, p. 88). Nimmer and Dodd (2011) offer the example of a gag-wrap clause

more or less but without naming it as such: “Almost invariably, licensing terms survive fundamental public policy challenges, though, in some limited cases (e.g., *proposed restraint on free speech in a public forum*) incursion on other fundamental interests may rise to such a level that the contract terms must give way” (Nimmer and Dodd, 2011, § 12:29, emphasis added).

Courts are also concluding such practices questionable under fair trade law. In *People v. Network Associates, Inc.* (2003), a state court concluded that use of a restrictive clause prohibiting purchasers from disclosing results of benchmark tests or publishing reviews of its products constituted a deceptive trade practice under New York law.

The problem is that civil or human rights such as privacy or free speech, at least under U.S. law, are not superior to relational rights, such as can be made by contract law. One may contract away such rights. The extent to which future courts might be receptive to contract reformation of the offending terms or a total renegeing of the contract containing restraints relating to speech rights (posting of product reviews on a library blog for example) remains to be seen. Nonetheless the concept has the potential to be an important weapon in the arsenal against offensive, over-reaching contract terms.

In circumstances where terms are negotiated, such excesses should not become part of the bargain in the first instance. Likewise courts are far less likely to be receptive of challenges where there is a climate of give-and-take negotiation. Here again the impact of negotiated versus non-negotiated contracts is apparent. “Contract terms that preclude comment about products and their performance are similar to terms that preclude disclosure of secrets, but are more likely to be challenged in the absence of any commercial purpose for the contract term other than to protect the reputation of the product. That being said, the better view is that, without more, a properly worded clause should be enforceable in the mass market if obtained pursuant to a reasonable commercial objective of the licensor, subject to ordinary contract law restrictions on unconscionability and the like” (Nimmer, 2011, § 7:133). Contract law uses the concept of unconscionability to describe circumstances where the contract or a provision within it is so onerous that it should not be enforced. Unconscionable contracts are voidable or their provisions severed as void. “The term ‘unconscionable’ encompasses the absence of meaningful choice by one party, as well as contract terms that are unreasonably favorable to the other party” (*Zerjal v. Daech & Bauer Const., Inc.*, 2010, p. 1073). In *Smith v. Mitsubishi Motors Credit of America, Inc.* (1998), the court provided the following explanation: “The classic definition of an unconscionable contract is one which no man in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept, on the other” (*Smith v. Mitsubishi Motors Credit of America, Inc.*, 1998, p. 349). One compromise regarding fair comment and product review is to strike such clauses that prohibit any comment whatsoever but to agree that if comment is made public the licensor must be given



notice by the licensee of the comment and the forum where made, thus providing the licensor an opportunity to respond.

## Free Speech Scenario III: Video Game Regulation and Public Library Implications

There are examples where the law does get the balance correct concerning free speech. Consider the recent Supreme Court decision striking down attempts by state legislatures to regulate the access of minors to video games with violent content. Congress has demonstrated an affinity for legislating at the national level, establishing for all children what content it is acceptable to access. In the area of video game legislation however it is state law makers who have been most active. By attempting to control access to sexual as well as violent content legislatures determine for every parent what sexual or violent content his or her child may access through rental or purchase. In *Brown v. Entertainment Merchants Association* (2011), the U.S. Supreme Court concluded that video games like other information products that entertain are worthy of First Amendment protection: “Like the protected books, plays, and movies that preceded them, video games communicate ideas— and even social messages— through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection” (*Brown v. Entertainment Merchants Association*, 2011, p. 2733). Of course this does not mean the government may never regulate such speech, but that any regulation must pass constitutional standards. In finding that violent speech could not be added to the list of speech deemed obscene, thus rendering it unprotected by the First Amendment, the Court observed that the previous “cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct’” (*Brown v. Entertainment Merchants Association*, 2011, p. 2734). The Court struck down a California attempt to restrict such content as unconstitutional because as written, the law was both underinclusive and over-inclusive, failing to restrict some content claimed harmful while at the same time restricting access to content falling outside the definition provided in the statute. In a comment that perhaps serves as a constitutional acknowledgment that the law can at times indeed not go far enough and at other times go too far the Court observed: “As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless

pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny” (*Brown v. Entertainment Merchants Association*, 2011, p. 2742).

A parent is not forced to have his or her child exposed to such content and remains free to use filters, other technological measures or good old fashioned verbal directives to control what his or her child reads, views, etc. The Court acknowledged previously that such choices are best left to each individual parent and should not be mandated by the legislature: “COPA [Children’s Online Protection Act] presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties” (*Ashcroft v. American Civil Liberties Union*, 2004, p. 2793).

This is quite different from an intermediary such as a public library creating a mechanism whereby parental preferences regarding what content their child could access would be honored. In this scheme the decision rests with the parent not the government, nor does the intermediary, such as a public library, decide what is best for a particular reader, short of deciding what material should be available in the first instance, i.e., in building its collection. Case law supports that libraries have such control. “Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them” (*United States v. American Library Association*, 2003, p. 205). Similar sentiment is expressed in *Via v. City of Richmond* (1982), where a public library possessed the discretion to determine whether or not to accept a free magazine subscription and *Bradburn v. North Central Regional Library District* (2010) where a public library could refuse to unblock filtered internet content because it was not the sort of content the library collected for its physical collection. Default matters! A law cannot prohibit such content from the eyes and ears of all children, but the Supreme Court suggests that the “state” (or any entity acting as the state, such as a public library) could implement parental preferences if it chose to do so: “parents have traditionally had the power to control what their children hear and say. This is true enough. And it perhaps follows from this that the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend” (*Brown v. Entertainment Merchants Association*, 2011, p. 2742, n. 8). On the other hand the state or a public library could not impose content restrictions upon all children except those whose parents have assented to such access: “But it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents’ prior consent*. The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents’ prior written consent—even a political

rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors” (*Brown v. Entertainment Merchants Association*, 2011, p. 2742, n. 8, emphasis added). Likewise, in *Counts v. Cedarville School District* (2003), a school library instituted a mechanism whereby a student’s ability to access books from the Harry Potter series was dependent upon first securing parental permission; a federal district court concluded “that the *stigmatizing effect of having to have parental permission to check out a book* constitutes a restriction on access. Further, the fact that Dakota cannot simply go in the library, take the books off the shelf and thumb through them — perhaps to refresh her mind about a favorite passage — without going through the permission and check-out process is a restriction on her access” (*Counts v. Cedarville School District*, 2003, p. 1002).

It is interesting to observe that the opinion from Justice Scalia quoted above would suggest that a public library could not adopt a policy that says children cannot access XYZ content, e.g., “may not circulate R-rated VHS, DVD, Blue Ray, etc. items unless there is parental permission on file” but a public library could enforce parental restriction preferences if it so chooses, e.g., “please check here if you do not want your child to have the ability to circulate R-rated motion pictures.” It is argued that in this way the law gets it about right. States cannot decide what content is permissible for all children, nor condition what constitutional content a child may access upon parental consent, but the law does allow the wishes of the parent to be enforced if the intermediary public school library or public library chooses to undertake and execute those wishes.

Another way in which the law gets it about right regarding intermediaries is somewhat of a companion to the above discussion. Suppose a public library decides to collect material that might be considered obscene or harmful to minors, then institute a parent preference, as opposed to a parental permission mechanism. Should the library be concerned that such content is on its selves? No, as the law in many states allows for such content in the collections of libraries and schools. Many state obscenity and harmful to minors statutes provide either outright immunity for institutions like libraries and educational entities or an affirmative defense to criminal prosecution for distributing such material. For example Wisconsin provides: “The legislature finds that the libraries and educational institutions ... carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions” Wis. Stats. § 944.21[8][a]). The provision continues with a statement of immunity from

criminal prosecution and includes both public and private schools, technical colleges, institutions of higher education and any library that “receives funding from any unit of government” (Wis. Stats. § 944.21[8][b]). A similar immunity provision is found in the state’s harmful to minors statute as well (Wis. Stats. § 948.1). Illinois likewise protects intermediary institutions but in the form of an affirmative defense to a charge of harmful material: “In any prosecution arising under this Section, it is an affirmative defense ... that the defendant was a bona fide school, museum, or public library, or was a person acting in the course of his or her employment as an employee or official of such organization or retail outlet affiliated with and serving the educational purpose of such organization; that the act charged was committed in aid of legitimate scientific or educational purposes...” (20 IL CS 5/11-21 [c][3]).

As a result it could be argued that the law gets it about right in some state obscenity and indecency statutes. Such statutes prohibit obscene performances or displays and prohibit exposing a child to material that is harmful to minors and rightly so. Yet states also recognize the value the libraries and educational entities have in at least preserving such content and so statutory allowance is provided in the form of either immunity or at least an affirmative defense to criminal prosecution. Such statutes recognize the potential for harm that such content may pose while preserving some space for such material to exist.

## Conclusion

Public intermediaries such as libraries and schools play an important role in facilitating access to information. That role is often arbitrated by the contours of what is legal. Those legal contours may allow or restrict the conduct of the intermediary. There are instances where the law could be said to be at variance with broader professional or ethical/moral approaches and responses. In some cases there is better alignment. The law may not go far enough and in others instances too far. These variations have been examined in three general areas copyright and ownership, privacy, and free speech. It is hoped that in consideration of these variations, students of the law and ethics might have fodder for future discussion, response, and action.

When it could be said that the laws does not go far enough, the intermediary and its employees will be faced with a decision point and a possible opportunity for education or awareness-raising, though not necessarily intervention. This is exemplified in the situation of library immunity for use of reproducing technologies on its premises, the ability of third parties through valid license agreements to collect patron use data or to require the library to notify the vendor of patron misuse of the vended content, and the deference the law provides for the right of the speaker to speak while failing to consider the harm the speech might proffer on the listener. The greater the variation the greater

the vacuum for conduct alternatives as the law in a sense leaves much room for response. In such situation the intermediary is protected, is not required by the law to undertake action, but this may leave the user, patron, student open to legal recourse, i.e., liability. On the other hand when it could be argued that the law has gone too far, typically in vesting some party with extensive legal rights of ownership or other control, the result is that other rights or civil liberties are impinged. Examples here include the take-down mechanisms under the copyright law that leave the user, subscriber, patron vulnerable and subject to the harsh mechanisms of network termination; release of subscriber identity, etc. under the statute; the gag order involved in the initial USA PATRIOT Act; and the restrictions in license agreements prohibiting fair comment. All of which can chill the speech of those seeking information.

Finally, the law can get it about right, where the law either encourages good conduct through incorporating a good faith and bad faith component into the fair use analysis or discourages interference with decisional rights of others, by not requiring monitoring copyright compliance by students in section 110 or by prohibiting the imposition of access restrictions on the children of all parents (even where parents could lift the access restriction through election) but would allow for the opposite default, i.e., a parent could express a desire not to have a child given access to specific material.

## Summary Table

	<i>Example: Legal Source</i>	<i>Explanation</i>	<i>Result and Comment</i>
Copyright	17 U.S.C. §108(f)(1)	Immunity for secondary liability by library or archive or its employees for use of reproducing technology by third parties, e.g., patrons.	Law allows the library or archive to turn a blind eye to infringement by patrons but patrons can still be liable. While the immunity is welcome, libraries or archives may want to engage in educating users regarding their own potential for liability.
(not far enough?)	17 U.S.C. § 512.	Law creates incentives for library or other intermediary to intervene between user and copyright owner, e.g., expeditiously remove or disable	Law faces intermediary with choice of minimizing its legal risk, of which most risk averse institutions will take advantage, or face a claim of secondary copyright infringement

<i>Example: Legal Source</i>	<i>Explanation</i>	<i>Result and Comment</i>
(too far?)	access to content claimed to be infringing, expeditiously release name of subscriber, terminate repeat “infringers.”	(contributory or vicarious). Risk averse institutions will choose the former, thus interfere with user access of content, by removing or disabling content or excluding subscriber from network or otherwise expose user to the potential for legal recourse. The law goes too far in protecting the copyright owner and intermediary at the expense of users.
17 U.S.C. § 107.	First prong of fair use includes assessment of bad faith.	Fair use is an equitable concept and considering an element of “bad faith” in determining the character of the use increases the likelihood that bad actors will be foreclosed from a determination that the use is fair while those who act with clean hands are able to claim the defense of fair use.
(just about right?)	Provisions in e-book licenses, state library confidentiality statutes, content licenses provisions that require reporting of misuse.	Law does not go far enough to protect privacy or allows ineffective protection. The content provider may be able to collect and use information that in some states and if done on the public library premises would be protected. In other situations the licensee may be required to report known misuse. Not only does this jeopardize patron privacy, further the impression of a surveillance society, but requires the library to
Privacy	E-book supplier can track patron reading, some state statutes protect narrow category of records, e.g., use of Internet, some licenses require licensee to report deviation of user from terms.	

	<i>Example: Legal Source</i>	<i>Explanation</i>	<i>Result and Comment</i>
(not far enough?)	USA PATRIOT Act	Gag order under the USA PATRIOT Act as first enacted is complete and perpetual.	surrender its roles as protector and moves it from mere bystander to active collaborator in eroding patron privacy
(too far?)	17 U.S.C. § 110(2).	Law requires the educational entity to use notices and adopt copyright policies; there is no requirement to monitor.	While monitoring is not prohibited it is not required. Closer but still not perfect.
(just about right?)	Free Speech <i>R.A.V. v. City of St. Paul.</i>	Politically incorrect speech and non-inciting forms of hate speech are constitutionally protected.	Law does not balance the broader harm speech may cause to some with the right of the speaker to speak it. (not far enough?)
(not far enough?)	Fair comment restrictions in license agreements, e.g., DeWitt Clauses, or non-disclosure provision applicable to all terms are enforceable under contract law.	No comment whatsoever may be made on the product or service. No mention whatsoever may be made regarding the contents of the agreement. Unconscionability.	The law protects provisions that go too far in restricting speech. Provisions such as these would prohibit a librarian from posting a product or service review on a list-serve or blog.
(too far?)	<i>Brown v. Entertainment Merchants Association.</i>	Regulation of violent video games unconstitutional. Immunity in some states for schools and libraries to make available	The Constitution prohibits imposing on all children limits in accessing protected content but suggests that enforcing a

**Example: Legal Source**      **Explanation**      **Result and Comment**

for obscene and “indecent” materials.      parental preference may be acceptable. In addition schools and libraries continue their mission of preserving and making available a wide array of content. It is typical however not to extend the same immunity or affirmative defense to bookstores or museums.

(just about right?)

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