



SUMMARY

Public libraries are a bedrock resource in many U.S. communities. In one recent study, librarians were identified as the most trusted source for locating valid information and more than three-fourths of all U.S. adults agreed that the public library helps them find information that is trustworthy and reliable. At the same time, however, individual items in libraries, particularly those in public schools, have been under attack by people who think the books or other media are not appropriate for children. Library governing bodies and staff might find it difficult to respond to competing demands and fulfill legal obligations.

State and federal statutory and case law govern how public libraries provide space, information, and resources to the communities they serve. This article discusses the underlying Wisconsin and federal statutes and a few of the cases that have defined important legal concepts, such as intellectual freedom, public forums, privacy, and copyright law.

BY KRIS TURNER

Library Law: Intellectual Freedom, Privacy, and Governance

Do you want to read a new (or old) book, watch a movie, listen to music or an audiobook, meet with a student or friend, or learn a new skill? These products and services are all available at Wisconsin's public libraries; this article introduces their governance.

Libraries play a unique and important role in the United States in general and Wisconsin in particular. No longer bastions of stereotypically stern library staff and dusty periodicals, libraries are hubs of information, technology, and community events. In 2019, more people visited Wisconsin public libraries (25.83 million)¹ than attended all 256 National Football League games combined (17.04 million).² Libraries provide access to traditional print resources and also bridge the digital divide with free internet access. As public discourse has moved online, libraries provide important common space used by community groups ranging from legal clinics to veterans' meetings to teenagers' game nights.

In a 2017 Pew study, librarians were identified as the most trusted source for locating valid information, topping health-care providers, local or national government, family and friends, social media, and news outlets. Further, 78% of all U.S. adults agreed that the public library helps them find information that is trustworthy and reliable, a percentage that spikes to 87% for millennials. These survey results emphasize that libraries remain trustworthy pillars of their local communities.

But which laws govern how libraries work? Under the seemingly benign surface of library policies is a web of case law and statutory provisions that govern how these public institutions provide space, information, and resources to the communities they serve.

This article examines the laws that govern Wisconsin libraries and discusses case law that has defined important legal concepts, such as intellectual freedom, public forums, privacy, and copyright law.

Wisconsin Library Types

Library governance happens in different ways, depending on the type of library.

Public Libraries. Public libraries are free and open libraries that are financed by taxpayers and operated by county, city, or tribal governments, are accessible to anyone, and allow materials to circulate to cardholders. These libraries tailor themselves to the needs of the community, with programs and materials for children and teenagers and also adult services and educational events, free internet access, and community spaces.

Academic Libraries. A second type is an academic library, including academic law libraries. Academic libraries often have a strong research-oriented collection with specialized staff who can answer complicated questions.

Special Libraries. "Special libraries" is a broad designation for the third type of library. These libraries contain highly specialized collections and are purposefully designed to serve a specific type of researcher. Law firm, medical, and business libraries are special libraries. Two governmental special libraries are the Wisconsin State Law Library and the Theobald Legislative Library.³

School Libraries. School libraries are the final common library type – libraries that are part of kindergarten to grade 12 systems that tend to receive careful scrutiny from lawmakers because of their use by educators and minors.

Statutory and Local Governance

Chapter 43 of the Wisconsin Statutes provides the law on most public library governance and outlines how libraries can create consortia for sharing resources and receive state aid



and which powers devolve onto local governing boards. Other libraries have specific legislative origins. Wisconsin Statutes sections 757.40 and 757.41 govern the creation of circuit court libraries, while the Theobald Legislative Library helps fulfill the Wisconsin Legislative Reference Bureau's statutorily imposed duty outlined in Wis. Stat. section 13.92(1). An 1836 federal act created the oldest library in Wisconsin: the

for library patrons and how they access information.

One example of the impact of these public library boards revolves around overdue fines. Libraries have long employed overdue fines to ensure users return books on time by blocking accounts until the user pays a fine, with some fines outsourced to collection agencies. However, library boards across the U.S. have determined that fines are actively

Library Association in the 1950s, which states that the removal of controversial books from library shelves impedes freedom of expression and hinders the ability of democracy to operate efficiently. But this policy does not carry the force of law. Instead, most libraries have a detailed procedure that allows for formal challenges to books via a written form, which a librarian will review. The person submitting the challenge can usually appeal, to a library board or library director, a librarian's decision to remove or retain an item. Discretion for collections will usually stay with the selecting librarian or the local board that oversees the library.

In *Board of Education v. Pico*,⁷ the U.S. Supreme Court stated that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'" However, this decision was highly fractured, with only a plurality joining, resulting in weaker precedential value and various limitations. Decisions in later cases carved out more space for local school boards and public library boards to make discretionary book removals so long as they do not blatantly remove a book solely based on opinion of the content.

The four fair use factors serve as guideposts when libraries are sharing materials and also when courts are determining if a copyright violation occurred.

State Law Library. Finally, universities or schools generally govern academic and school libraries that serve their students and staff, while administrative codes provide more detailed guidance. Policy-based challenges to libraries typically can be brought in court or via procedures outlined by the specific library's governing board.

In most cases, local governmental authorities such as a library board or city council oversee public libraries. Members of these authorities have many of the same duties as other governmental officials though they may be either elected or volunteer positions. The board creates policies that the library follows for hiring, hours, budgets, and other operational needs. These decisions can have far-reaching implications

discouraging users from visiting the library and undercutting their missions of equal access and service. Library systems as large as Chicago's have waived all overdue fines,⁴ and in August 2020 the Madison Public Library eliminated fines,⁵ allowing more than 10,000 patrons to again use their formerly blocked accounts. This singular example of policy change emphasizes the discretion provided to library boards and the effects their decisions have for fundamental library access.

Intellectual Freedom and Libraries

Challenges to the countless resources that libraries provide occur in a number of ways. What one visitor might find relevant or necessary to their work or interests could cause another great offense. This puts libraries in a precarious position – provide a resource that library staff feel is important for their community and run the risk of a challenge or avoid the resource altogether and leave a gap in their collection while facing possible accusations of censorship. For example, there have been many recent challenges in Wisconsin and across the U.S. against children's books about LGBTQ+ topics.

Generally, libraries and their staff advocate for the "freedom to read,"⁶ a philosophy established by the American

User Privacy and Access to Information

Libraries hold seemingly contradictory goals of providing information while also championing privacy. The crucial distinction is that libraries locate publicly available information or provide the means for users to request it while conversely maintaining the privacy of information about individuals. However, courts have heard challenges to both library users' right to information and their right to privacy.

Wisconsin's strong public records laws require limiting access to library users' information. Under Wis. Stat.



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section 43.30, library records cannot be disclosed, with only a few exceptions. Federal law, however, muddies the picture. Section 215 of the PATRIOT Act⁸ allowed the FBI to issue National Security Letters to libraries and other businesses, demanding information about books, websites, and other resources accessed by library users. Many librarians and privacy advocates opposed this section of the PATRIOT Act, with librarians serving as John Doe plaintiffs in *Doe v. Gonzalez*,⁹ a successful ACLU case against the FBI requiring the FBI to withdraw one such request. Congress allowed section 215 to sunset in 2020, though ongoing investigations continued. However, given that Congress previously revived section 215 shortly after it sunset in 2015, it is possible the law will be brought back into force again.

Access to information can clash with efforts to protect minors from viewing harmful or obscene websites, as illustrated by *United States v. American Library Association*.¹⁰ In 2000, Congress passed the Children's Internet Protection Act,¹¹ which required libraries to install internet filters as a condition for receiving federal funding. Libraries and other parties challenged the law as facially unconstitutional and in direct conflict with the First Amendment.

In *American Library Association*, the Supreme Court held that the filters were essentially extensions of existing library collection practices and simplified the ability to remove obscene websites. Thus, Congress could constitutionally impose the filter requirement before dispersing funds.¹² However, as with the book-removal decision in *Pico*, the Court split, with five separate opinions filed.

So, although Congress could dictate funding based on the use of internet filters, lower courts often distinguish *Pico* and *American Library Association* in similar cases. The debate over federal funding and access to information, especially when viewed through the lens of the First Amendment, continues.

Wisconsin's Oldest Libraries

If you were to ask a librarian which library in Wisconsin is the oldest, you might get a lawyerly answer in return: It depends! Founded in 1836 as the Wisconsin State Library when Wisconsin was still a territory, the Wisconsin State Law Library (whose main location is in downtown Madison) easily claims the title of the state's oldest library. However, communities across Wisconsin established other types of libraries in the 1800s that are worth mentioning as well.

Predecessors to such well-known libraries as the Milwaukee Public Library and the UW-Madison Libraries appeared in the 1840s and 1850s. However, true public libraries (free and open to the public) were not yet commonplace. Instead, membership libraries, where patrons paid a fee to access and check out materials, proliferated. This started to change as public libraries as we now know them began to appear across the United States, beginning in the 1850s. In 1872, the Wisconsin Legislature passed Act 80, modeled on a similar Illinois act, authorizing free public libraries in the state. Shortly after the law passed, the first public library in Wisconsin opened in Black River Falls in 1872. By 1879, the Black River Falls Public Library had 1,000 volumes and by 1902, librarian Clarence Meek was making \$8 per month.

The year 1891 was momentous for libraries in Wisconsin. That year, the Wisconsin Library Association formed and is now one of the largest and oldest statewide librarian associations in the United States. Also in 1891, the Beaver Dam Public Library opened. It was the first library in the United States to have "open stacks," allowing visitors to browse the shelves on their own, upending the then-omnipresent policy of patrons having to ask a librarian at a desk to get the books they wanted to look at or check out.

Wisconsin has a long, rich, and diverse library history, a legacy that will hopefully continue into the future. For more information on the oldest libraries discussed here, visit the links below:

- **Timeline of Wisconsin Libraries:** www.libraryhistorybuff.org/timeline-wi.htm
- **Wisconsin State Law Library:** <https://wilawlibrary.gov/about/history.html#wsll>
- **Origins of Wisconsin's Public Library Law:** <https://heritage.wisconsinlibraries.org/entry/origin-of-wisconsins-public-library-law/>
- **1872 Act 80 authorizing the creation of free public libraries:** <https://docs.legis.wisconsin.gov/1872/related/acts/80.pdf>
- **Black River Falls Public Library:** www.blackriverfallslibrary.org/about/
- **Wisconsin Library Association History:** <https://heritage.wisconsinlibraries.org/timeline/wla-timeline/>
- **Beaver Dam Public Library:** www.cityofbeaverdam.com/topic/blocks.php?topicid=211&structureid=260 WL

Public Forums and Library Community Space

Libraries provide more than books and internet access. Many of them also offer space that members of the public can use to hold events or meetings. Court cases, including one in Wisconsin, have

found that public library space where people can gather to express ideas is a type of a public forum.

Courts in the United States have found that library space constitutes either a designated public forum, meaning space that the government opened

for public expression, or a limited public forum, meaning space that allows public expression but only on a limited topic related to the space. Courts have treated these two terms somewhat interchangeably, and *Black's Law Dictionary* lists the terms together. Essentially, courts protect First Amendment rights in both types of space.

In *Pfeifer v. City of West Allis*,¹³ the U.S. District Court for the Eastern District of Wisconsin held that the library's refusal to allow the plaintiff to use a meeting

room to present a program on creationism violated the plaintiff's First and Fourteenth Amendment rights. The court found the meeting room at the library to be a designated public forum that the government, via library policy, had opened up as a place of expressive activity.

Libraries could revoke the public forum designation if they wish to, and there are some limits on the use of library spaces as public forums, lining up with expression not protected by the First Amendment. These exceptions are

rare, however, as is the revocation of a space as a public forum. Instead, libraries generally prioritize serving their communities and continue to provide the free meeting space.

Copyright Law and Fair Use in Libraries

Title 17 of the U.S. Code encompasses federal copyright law and provides libraries with guidance for lending, copying, and sharing materials. The first-sale doctrine, codified in 17 U.S.C. § 109(a), gives the purchaser of material the right to sell or lend the material. Clearly, the doctrine allows libraries to circulate physical items without being subject to copyright law challenges.

The issue becomes murkier with digital items. Libraries license, instead of purchase, many digital items. Meanwhile, digital items purchased by the library may require the additional purchase of costly or complicated digital platforms. Instead of simply purchasing an item and lending it under the first-sale doctrine, libraries might have to purchase additional software or negotiate licensing contracts for sharing of digital items, which in turn can restrict access to resources and information. As requests for digital resources grow, so too will the issue of how the first-sale doctrine can be adapted to better incorporate digital items.

Many libraries share material via interlibrary loan, systems by which libraries send books and digital items to other libraries, while also allowing visitors to scan and copy portions of materials. The fair use doctrine, codified in 17 U.S.C. § 107, governs these services. The fair use doctrine allows for the sharing and limited use of copyrighted material for research or educational purposes without permission from copyright owners. Whether sharing of materials is permissible under the fair use doctrine is determined by four factors: the purpose and character of the work, the nature of the work, the amount of the work shared, and the effect of the use on the work's marketplace.



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The four fair use factors serve as guideposts when libraries are sharing materials and also when courts are determining if a copyright violation occurred, with different courts giving different factors different weights depending on the specific circumstances. One long-running court case helped define digital access and fair use. In *Author's Guild v. Google Inc.*,¹⁴ the U.S. Court of Appeals for the Second Circuit ruled that the fair use doctrine protected the creation of Google Books, a freely searchable database created through scanning, digitalization, and partnerships with libraries. Since the ruling, Google Books and its academically related database, HathiTrust, have provided snippet views of materials paired with full-text searching, to assist researchers.

The Line Between Legal Advice and Legal Research

One unique way that librarians interact with the law involves visits from unrepresented litigants or questions about how the law works. As any lawyer can attest, many people want assistance guiding them through the often-stressful legal process. Librarians offering assistance to visitors must understand the difference between legal reference and legal advice and avoid accusations of the unauthorized practice of law as

outlined in chapter 23 of the Wisconsin Supreme Court Rules.¹⁵

Librarians should emphasize that their help does not constitute legal advice or representation and encourage patrons with legal questions to seek the assistance of an attorney. Library staff trained in legal reference typically phrase their answers to not mislead visitors into believing the reference assistance is advice. For example, they avoid saying “in my opinion,” “should,” and “that means” and instead use more neutral language such as “the law states” or “this may answer your question.”

It is often impossible for a librarian to become fully versed in an individual patron's case, so librarians focus on locating resources that answer questions as opposed to providing an answer or opinion on the situation themselves. Additionally, legal-assistance guides are available at many law libraries, including the Wisconsin State Law Library, the University of Wisconsin Law Library, and the Ray & Kay Eckstein Law Library at Marquette University Law School.¹⁶

Conclusion

The laws, cases, and guiding principles discussed in this article provide the groundwork for how libraries work. But library policies and practices, like the laws that govern them, will continue to

evolve based on community needs. One constant will remain: library services and resources will be in demand.

Despite dire predictions that they were no longer relevant in the digital age, libraries have instead thrived. Libraries offer millions of Wisconsin residents every year diverse services ranging from books to high-speed internet to meeting spaces, while also adding dynamic new services and spaces such as makerspaces, art installations, and public health-related services such as outside or curbside pickup and delivery of books and other items. The law has shaped, and at times limited, how librarians provide these services, but librarians have also shaped the law through their fundamental commitment to bedrock principles such as intellectual freedom, access to information, fair use, and the right to privacy. The law of Wisconsin libraries reflects the enduring and ongoing importance of these principles. **WL**

ENDNOTES

¹2019 Statistics at the Public Library Level PRELIMINARY, Wis. Dep't. of Pub. Instruction, *Wisconsin Public Library Service Data* (click on 2019 Statistics at the Public Library Level PRELIMINARY), <https://dpi.wi.gov/pld/data-reports/service-data> (last visited Feb. 4, 2022).

²Pro Football Reference, *2019 NFL Attendance Data*, www.pro-football-reference.com/years/2019/attendance.htm (last visited Feb. 4, 2022).

³<https://wilawlibrary.gov/>; <https://legis.wisconsin.gov/LRB/library/>.

⁴Press Release, Mayor Lightfoot and Chicago Public Library Announce Elimination of Late Fees, Outstanding Debt to Increase Access to Libraries Citywide, Chi. Pub. Library (Oct. 1, 2019), <https://www.chipublib.org/news/mayor-lightfoot-and-chicago-public-library-announce-elimination-of-late-fees-outstanding-debt-to-increase-access-to-libraries-citywide/>.

⁵Madison Pub. Library, *Madison Public Library Goes Fine Free* (April 7, 2021), <https://www.madisonpubliclibrary.org/library-cards/fine-free>.

⁶Am. Library Ass'n, *The Freedom to Read Statement*, <https://www.ala.org/advocacy/intfreedom/freedomreadstatement> (last visited Feb. 4, 2022).

⁷*Board of Educ. v. Pico*, 457 U.S. 853, 873 (1982).

⁸Pub. L. No. 107-56, 115 Stat. 252, § 215 (2001) (codified at 50 U.S.C. §§ 1861-1862).

⁹*Doe v. Gonzalez*, 386 F. Supp. 2d 66 (D. Conn. 2005).

¹⁰*United States v. American Library Ass'n*, 539 U.S. 194 (2003).

¹¹Consolidated Appropriations—FY 2001, Pub. L. No. 106-554, 114 Stat. 2763, §§ 1701-1733 (creating or amending 20 U.S.C. § 6301 note, 20 U.S.C. § 7001, 20 U.S.C. § 9134, 47 U.S.C. § 254, 47 U.S.C. § 609 note, 47 U.S.C. § 902 note).

¹²*American Library Ass'n*, 539 U.S. 194.

¹³*Pfeifer v. City of W. Allis*, 91 F. Supp. 2d 1253 (E.D. Wis. 2000).

¹⁴*Author's Guild v. Google Inc.*, 804 F.3d 202 (2nd Cir. 2015).

¹⁵SCR ch. 23, www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=85224.

¹⁶Wis. State Law Library, *Legal Assistance*, <https://wilawlibrary.gov/topics/assist.php>; Univ. of Wis. Law Library, *Low-Cost Legal Assistance and Self Help Tools in Dane County: Civil Matters/Tax Issues/Information & Referral*, <https://researchguides.library.wisc.edu/lowcost>; Marquette Univ. Law School, *Getting Started with Legal Research: Community Legal Resources*, <https://libraryguides.law.marquette.edu/c.php?g=318607&p=2127391>. **WL**