

**LIBRARY STANDARDS FOR PRIVACY: A MODEL FOR THE  
DIGITAL WORLD?**

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**I. INTRODUCTION**

Laura N. Gasaway continues to contribute to the understanding and shaping of copyright law, particularly as it affects libraries and library users. Her career as law library director, law school professor, and associate dean serves as an example of how law and librarianship can inform each other. She has shared her expertise in copyright law with librarians in all types of libraries through workshops, through advisory roles to library associations, and through her writing of columns, essays, articles, and book chapters that target librarians. She has also shared her insights into library management with copyright law makers and stake holders, through consultations with the Copyright Office, including her leadership with the Section 108 Committee, through presentations to legal scholars and the intellectual property bar, and through her scholarship in law reviews. Her work is representative of the rich possibilities for creativity and productivity at the intersection of traditionally separate disciplines. I am grateful to Lolly for her example and for her encouragement to develop my own expertise in an area of overlapping interests, that of privacy law and librarianship.

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## II. LIBRARY PRIVACY STANDARDS FOR GOOGLE BOOKS AND BEYOND

In the ongoing Google Books settlement process, several advocacy organizations, including library associations, have filed amicus briefs to the supervising court demanding provisions for reader privacy.<sup>1</sup> Because the scanned content for Google Books has come from cooperating research libraries, these advocacy groups argued that it was in the public interest that library standards for privacy should follow that content into this new digital context. The recommendation is worth consideration for other extra-library reading as well, both in digital and print contexts. While librarians have been successful advocates for privacy in library-provided reading, the values for reader privacy

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<sup>1</sup>The Electronic Privacy Information Center (“EPIC”) argued that the settlement should not be approved because of its lack of privacy protections for readers. Motion to Intervene, *Authors’ Guild v. Google*, No. 05 CV 8136-DC (Sept. 4, 2009), *available at* [http://epic.org/privacy/googlebooks/EPIC\\_Brief-GBS.pdf](http://epic.org/privacy/googlebooks/EPIC_Brief-GBS.pdf). The Electronic Frontier Foundation, the American Civil Liberties Union, and several authors and publishers also argued that the settlement should not be approved based on its lack of protection for reader privacy. Privacy Authors’ and Publishers’ Objection to Proposed Settlement, *Authors’ Guild v. Google*, No. 05 CV 8136-DC (Sept. 8, 2009), *available at* [http://www.eff.org/files/filenode/authorsguild\\_v\\_google/File%20Stamped%20Brf.pdf](http://www.eff.org/files/filenode/authorsguild_v_google/File%20Stamped%20Brf.pdf). The Open Book Alliance also objected to approval of the settlement based on reader privacy and other grounds. Academic Authors Objections to proposed Google Books Settlement, *Authors’ Guild v. Google*, No. 05 CV 8136-CV at 6 (Sept. 3, 2009) (“We are especially concerned that Google may be intending to disintermediate librarians from their roles as trusted guardians of patron privacy.”), *available at* <http://www.openbookalliance.org/wp-content/uploads/2009/09/academic-author-letter-090309.pdf>. The Center for Democracy and Technology urged approval of the settlement but also urged addition of reader privacy provisions. Brief Amicus Curiae of the Center for Democracy & Technology in Support of Approval of the Settlement and Protection of Reader Privacy, *Authors’ Guild v. Google*, No. 05 CV 8136-CV (Sept. 4, 2009), *available at* [http://www.cdt.org/files/pdfs/CDT-GoogleAmicusFinal\\_5.pdf](http://www.cdt.org/files/pdfs/CDT-GoogleAmicusFinal_5.pdf). The American Library Association (“ALA”), the Association of College and Research Libraries, and the Association of Research Libraries argued for ongoing court oversight of the implementation of the settlement to address reader privacy and other concerns. Library Association Comments on the Proposed Settlement, *Authors’ Guild v. Google*, No. 05-CV 8136-DC (May 4, 2009) 11–14, *available at* <http://wo.ala.org/gbs/wp-content/uploads/2009/05/googlebrieffinal.pdf>.

are the same in individuals' subscriptions to Google Books, licensed access to e-reader books, reading on the Internet, and purchase of books through online or brick-and-mortar bookstores. This essay shares a librarian's-eye-view of library standards for privacy and suggests that the law of reader privacy must not only address readers of Google Books, but also other digital reading and even print reading contexts external to libraries in order to protect the privacy of thought for readers.

### III. A LIBRARIANS' VIEW OF LIBRARY PRIVACY

My first employment in a library was as a student assistant in the large federal government documents depository at the University of Alabama Main Library in 1983. On my first day, I copied long Superintendent of Documents classification ("SUDOC") numbers onto labels and then affixed them to poultry count publications for each county in some New England state. I wondered who would use my labels to find and read these booklets. Soon I took on the role as the lone reference service provider for Sunday researchers needing help in the library. I was still just a student assistant, but the librarians took care during my weekday work hours to teach me that whoever sought the county poultry count or the Mapplethorpe photography book or *Masterplot* summaries of novels assigned in their literature course was to be treated with non-judgmental courtesy and restrained curiosity. The library patron had a right to privacy, and I was instructed to treat the details of his or her library use as a confidential exchange.

When I went to graduate school for a Master's degree in Library Service in 1985, my professors assigned articles and books written by librarians who championed core values of librarianship, including free and easy access to all information for all persons; the importance of preserving a cultural record; the value of exposure to new and disturbing ideas to democracy, innovation, and individual freedom; and the societal benefits of providing a safe haven for private learning about history, politics, religion,

health, and art.<sup>2</sup> I learned that librarians sometimes struggle with how to implement privacy protections for library users, but that librarians share a deep commitment, affirmed through our national and regional associations, to ethical principles that include privacy and confidentiality of library use.<sup>3</sup>

When I became a reference librarian in 1986 at the University of Alabama, the library converted from using signature cards to an electronic circulation system. No longer could I pull a book off the shelf and discover the names and handwriting of those who had chosen the book before me. The library was getting better at

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<sup>2</sup> Examples include Margaret F. Steig, *Fee vs Free in Historical Perspective*, 12 REFERENCE LIBRARIAN 93 (1985); Kenneth G. Peterson, *Ethics in Academic Librarianship: The Need for Values*, 9 THE J. ACAD. LIBRARIANSHIP 132 (1983). Core values currently articulated by the American Library Association are access, confidentiality/privacy, democracy, diversity, education and lifelong learning, intellectual freedom, preservation, the public good, professionalism, service, and social responsibility. American Library Association, Core Values Statement, available at <http://www.ala.org/ala/aboutala/offices/oif/statementspols/corevaluesstatement/corevalues.cfm> (last visited Jan. 24, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>3</sup> The ALA includes privacy and confidentiality in its list of core values. American Library Association, Core Values Statement, available at <http://www.ala.org/ala/aboutala/offices/oif/statementspols/corevaluestatement/corevalues.cfm> (last visited Jan. 24, 2010) (on file with the North Carolina Journal of Law & Technology). The ALA Code of Ethics includes the statement, "We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted." American Library Association, Code of Ethics, available at <http://www.ala.org/ala/aboutala/offices/oif/statementspols/codeofethics/codeethics.cfm> (last visited Apr. 15, 2010) (on file with the North Carolina Journal of Law & Technology). The American Association of Law Libraries ("AALL") *AALL Ethical Principles* provides, "We uphold a duty to our clientele to develop service policies that respect confidentiality and privacy." American Association of Law Libraries, Ethical Principles, available at [http://www.aallnet.org/about/policy\\_ethics.asp](http://www.aallnet.org/about/policy_ethics.asp) (last visited Apr. 15, 2010) (on file with the North Carolina Journal of Law & Technology). The Medical Library Association *Goals and Principles for Ethical Conduct* includes, "The health sciences librarian respects the privacy of clients and protects the confidentiality of the client relationship." Medical Library Association, Code of Ethics, available at <http://www.mlanet.org/about/ethics.html> (last visited Apr. 15, 2010) (on file with the North Carolina Journal of Law & Technology).

protecting the privacy of users, although, of course, we were entering new territory for retention and security of computer data.

A couple of years later, the topic of conversation within the library was the FBI's recruitment of librarians at research institutions to identify and monitor persons in the library who might be foreigners, especially Soviet foreigners. My colleagues were indignant of this so-called Library Awareness Program that they found discriminatory, inappropriately fearful of the dissemination of non-classified information, and offensive to librarians' ethical commitments to free and confidential access to information.<sup>4</sup>

After four years as a reference librarian at the University of Alabama Main Library, I went to law school. With both a J.D. and an M.L.S., I became a law librarian, first at Boston University ("BU"), then the University of Miami, and now at the University of North Carolina ("UNC"). In those different environments, I was always aware that we functioned under a policy, written or unwritten, of privacy protection for library users. What I have come to understand in recent years is that those policies may or may not be bolstered by any form of privacy law. I learned that forty-eight states and the District of Columbia all have library privacy statutes, and the remaining two states, Hawaii and Kentucky have Attorneys General Opinions declaring state protection for library user privacy.<sup>5</sup> But, these laws vary widely in the types of libraries covered, the categories of library information covered, and in the provisions for enforcement.

At BU, if a faculty member asked the library whether any other faculty members had checked out the BU Law Library's copy of the controversial book *The Bell Curve*,<sup>6</sup> we would decline to share that information according to our practices and policies. Massachusetts library privacy law would not have supported us, though, because it does not extend to private libraries like the BU

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<sup>4</sup> See generally HERBERT N. FOERSTEL, SURVEILLANCE IN THE STACKS (1991).

<sup>5</sup> See Appendix: State Laws on Privacy of Library Use.

<sup>6</sup> RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1996).

law library.<sup>7</sup> Similarly, if law enforcement had come to the University of Miami Law Library and asked to see the names of each person who had viewed *Defending Pornography*,<sup>8</sup> we would be bound by policy but not by law to ask for a subpoena or warrant, because the state library privacy law only covered public libraries, arguably not including those simply open to the public.<sup>9</sup> But, if a North Carolina taxpayer demanded that the UNC Law Library disclose each person who had checked out *Homosexuality and the Law*,<sup>10</sup> we would be bound not just by our policy but also by state law to deny the request.<sup>11</sup> The North Carolina law even applies to some private libraries, such as the Duke Law Library, because it covers libraries that are “open to the public.”<sup>12</sup> These laws give librarians and library support staff the authority to stand by the ethical principles of privacy for library users.

When the USA PATRIOT Act<sup>13</sup> was enacted in 2001, librarians protested provisions that relaxed barriers to law enforcement access to library patron records.<sup>14</sup> I served on a campus-wide

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<sup>7</sup> The Massachusetts library privacy statute only applies to public libraries, so the privacy of library use at Boston University, a private institution, was a function of University and Law Library policy. “That part of the records of a public library which reveals the identity and intellectual pursuits of a person using such library shall not be a public record . . . .” MASS. GEN. LAWS ANN. ch. 78, § 7 (West 2009).

<sup>8</sup> NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* (1995).

<sup>9</sup> “All registration and circulation records of every public library, except statistical reports of registration and circulation, are confidential. . . .” FLA. STAT. ANN. § 257.261 (West, Special “B” Session of the Twenty-First Leg., 2009). This provision is an exception to the Florida open records provisions that appears in both statutes and in the state Constitution.

<sup>10</sup> CHUCK STEWART, *HOMOSEXUALITY AND THE LAW: A DICTIONARY* (2001).

<sup>11</sup> N.C. GEN. STAT. ANN. § 125-19 (a) (1988).

<sup>12</sup> N.C. GEN. STAT. ANN. § 125-18.

<sup>13</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>14</sup> *Expanded FBI Powers Threaten Library Privacy*, 33 AM. LIB. 19 (2002); Eric Licktblau, *Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law*, N.Y. TIMES, Sept. 16, 2003, at A23. Numerous library associations passed resolutions in opposition to provisions in the USA PATRIOT Act. The ALA has maintained a list of “USA PATRIOT Act Resolutions” available on its website. <http://www.ala.org/> (last visited Feb. 16, 2010) (on file with the North Carolina Journal of Law & Technology).

library committee to update and publish privacy policy and procedures on how staff members should respond to various types of government requests for information. We joined librarians across the country who conducted audits of their practices to make sure no personal information was collected unnecessarily and that the information was not retained beyond the time needed for normal library management. Libraries became a touchstone for debate about whether anti-terrorism legislation was going too far by intruding upon citizens' civil liberties.<sup>15</sup> Eventually, the USA PATRIOT Act was amended, and some minor exceptions were made for the privacy of library use.<sup>16</sup>

Currently we are again updating our privacy policies to reflect the realities of the digital reading environment. We should alert library users that some database vendors, such as LexisNexis and Westlaw in the law school environment, can track individuals' research habits through personal passwords. Further, we should warn library users that we are not always able to shield them from tracking of their Internet activities if they provide personally identifying information in the process of obtaining services and resources. The digital environment also presents opportunities for libraries to change long-standing approaches to purging reader data in order to serve other, competing values of personalized services such as a saved record of all the books one has checked out, or the ability to share one's circulation records with others through the library online system. Libraries have tentatively ventured into these privacy compromising areas to create new services, knowing that once the information is collected, it can be found by others, and once information is shared, it can be used in unanticipated ways. So we proceed cautiously, with a policy of opt-in, rather than opt-out for those services that have the potential to

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<sup>15</sup> See generally Anne Klinefelter, *The Role of Librarians in Challenges to the USA PATRIOT Act*, 5 N.C. J. L. & TECH. 219 (2004).

<sup>16</sup> 50 U.S.C. § 1861 (2006) (introducing restrictions on business records access and nondisclosure requirements); 18 U.S.C. § 2709(f) (2006) (creating a library exception to the use of national security letters, although the strength of the exception is debated). See Susan Nevelow Mart, *The Chains of the Constitution and Legal Process in the Library: A Post-USA PATRIOT Reauthorization Act Assessment*, 33 OKLA. CITY U. L. REV. 435 (2008).

compromise reader privacy. And, because the information has some protection through state library privacy laws and through special provisions in the USA PATRIOT Act,<sup>17</sup> the records created and retained still have better legal protections for confidentiality than do records collected by non-library information providers.

Other librarians would have different stories. Although few write about their concerns, some would question refusals to cooperate with law enforcement without a subpoena or warrant.<sup>18</sup> Some might wonder whether privacy is important to a culture fueled by Facebook, blogs, Twitter, and celebrity.<sup>19</sup> Others highlight how the library's own need for security of property and patrons or effective book recommendation services may trump reader privacy.<sup>20</sup> Some librarians also regret the loss of both individual and collective data that could be analyzed by historians and social scientists to tell the story of the book and of the culture of the library and library users.<sup>21</sup> However, most librarians are committed advocates for the privacy of thought through reading.

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<sup>17</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>18</sup> In an interview with Delray Beach Public Library, librarians involved in the FBI's collection of computers used by suspected terrorists behind the September 11, 2001 attacks, John Callahan said, "We actually went to law enforcement officials first in what we thought was basically our civic duty to report this criminal activity . . ." *Privacy Versus Security—What's at Stake*, 32 AM. LIBR. 54, 56 (2001).

<sup>19</sup> Privacy and confidentiality enhancing processes are considered in an article reviewing the introduction of user-generated bookmarking, tagging, and folksonomies and other social networking tools in academic libraries. Chen Zu, et. al., *The Academic Library Meets Web 2.0: Applications and Implications*, 35 J. ACAD. LIBRARIANSHIP 324 (2009).

<sup>20</sup> See Howard Carter, *Misuse of Library Public Access Computers: Balancing Privacy, Accountability, and Security*, 36 J. LIBR. ADMIN. 29 (2002). The book recommendation service developed through the California Digital Library relied on opt-in data from library catalog users as well as "anonymized" individual user circulation histories, achieving a personalized service while balancing privacy protections. Colleen Whitney et. al., *The Melvyn Recommender Project: Developing Library Recommendation Services*, 12 D-LIB MAGAZINE, Dec. 2006, available at <http://www.dlib.org/dlib/december06/whitney/12whitney.html>.

<sup>21</sup> "[H]istorians of the book have the ambitious goal of pinpointing how ideas in books affect actions." Alfred L. Brophy, *The Law Book in Colonial America*:

As my own experience as a librarian shows, library standards for privacy are as much about librarians' ethical commitment and policies as they are about statutory protections. By contrast, the commercial collection and use of reader data is largely unregulated and has only market forces as a substitute for librarian ethical principles for privacy.<sup>22</sup> Since no Constitutional protections are currently recognized to protect information voluntarily shared with a third party, reader data collected by a commercial entity is available to be shared with or purchased by the government without the requirement of legal process, such as subpoena or warrant, as required for access to library patron records.<sup>23</sup> When libraries serve as intermediaries, readers gain protections through the anonymizing effects of library IP addresses, through the libraries' commitment to procedures that preserve anonymizing structures, and through statutory protections for confidentiality of library use that libraries follow. To achieve a similar level of protection in an extra-library digital environment of Google Books, e-readers, and Internet reading requires new legal protection that achieves the same combined effect.

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*A History of the Book in America: The Colonial Book in the Atlantic World*, 51 *BUFF. L. REV.* 1119, 1121 (2003).

<sup>22</sup> See James Grimmelman, *The Structure of Search Engine Law*, 93 *IOWA L. REV.* 1 (2007) (outlining the lack of law to protect the privacy of online searching). At the time of this writing, the Federal Trade Commission was conducting roundtable discussions about privacy and indicated that it might adopt a more aggressive enforcement approach under Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices in the marketplace. 15 U.S.C. § 45 (2006); See also Stephanie Clifford, *F.T.C.: Media Decoder Blog: Has Internet Gone Beyond Internet Policies?* *N.Y. TIMES*, Jan. 11, 2010, available at <http://mediadecoder.blogs.nytimes.com/2010/01/11/ftc-has-internet-gone-beyond-privacy-policies/>.

<sup>23</sup> The third party doctrine in Fourth Amendment jurisprudence stems from *U.S. v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979). The intersection of First Amendment and Fourth Amendment protection for reading has little protection beyond the requirement of "scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). This limited federal protection led the Colorado Supreme Court to base its protection of bookstore sale information on state constitution privacy protections. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1055 (Colo. 2002).

**Appendix: State Laws on Privacy for Library Use**

- **Alabama:** ALA. CODE § 41-8-10 (2010).
- **Alaska:** ALASKA STAT. § 40.25.140 (2010).
- **Arizona:** ARIZ. REV. STAT. ANN. § 41-1354 (2010).
- **Arkansas:** ARK. CODE ANN. § 13-2-701 (2009).
- **California:** CAL. GOV'T CODE § 6267 (2010).
- **Colorado:** COLO. REV. STAT. § 24-90-119 (2009).
- **Connecticut:** CONN. GEN. STAT. § 11-25 (2010).
- **Delaware:** DEL. CODE ANN. tit. 29, § 10002 (2010).
- **Florida:** FLA. STAT. § 257.261 (2010).
- **Georgia:** GA. CODE ANN. § 24-9-46 (2010).
- **Hawaii:** Haw. Op. Att'y Gen. 90-30 (Oct. 23, 1990), 1990 WL 482378.
- **Idaho:** IDAHO CODE ANN. § 9-340E (2010).
- **Illinois:** 75 ILL. COMP. STAT. ANN. § 70/1 (2010).
- **Indiana:** IND. CODE ANN. § 5-14-3-4 (2010).
- **Iowa:** IOWA CODE ANN. § 22.7 (2008).
- **Kansas:** KAN. STAT. ANN. § 45-221 (2009).
- **Kentucky:** Ky. Op. Att'y Gen. 81-159 (Apr. 21, 1981), 1981 WL 142193.
- **Louisiana:** LA. REV. STAT. ANN. § 44:13 (2010).
- **Maine:** ME. REV. STAT. ANN. tit. 27, § 121 (2009).
- **Maryland:** MD. CODE ANN. STATE GOV'T. § 10-616 (2010).
- **Massachusetts:** MASS. GEN. LAWS ANN. ch. 78, § 7 (2010).
- **Michigan:** MICH. COMP. LAWS ANN. §§ 397.601–03 (2010).
- **Minnesota:** MINN. STAT. § 13.40 (2009).
- **Mississippi:** MISS. CODE ANN. §§ 39-3-365–69 (2010).
- **Missouri:** MO. REV. STAT. § 182.817 (2009).
- **Montana:** MONT. CODE ANN. §§ 22-1-1101–03 (2009).
- **Nebraska:** NEB. REV. STAT. § 84-712.05 (2010).

- **Nevada:** NEV. REV. STAT. ANN. § 239.013 (2009).
- **New Hampshire:** N.H. REV. STAT. ANN. § 201-D:11 (2010).
- **New Jersey:** N.J. STAT. ANN. §§ 18A:73-43.1-2 (2010).
- **New Mexico:** N.M. STAT. ANN. §§ 18-9-1-6 (2009).
- **New York:** N.Y. C.P.L.R. § 4509 (2010).
- **North Carolina:** N.C. GEN. STAT. §§ 125-18-19 (2010).
- **North Dakota:** N.D. CENT. CODE § 40-38-12 (2010).
- **Ohio:** OHIO REV. CODE ANN. § 149.432 (2010).
- **Oklahoma:** OKL. STAT. ANN. tit. 65, § 1-105 (2009).
- **Oregon:** OR. REV. STAT. § 192.502 (2009).
- **Pennsylvania:** 24 PA. STAT. ANN. § 4428 (2009).
- **Rhode Island:** R.I. GEN. LAWS §§ 11-18-32, 38-2-2 (2010).
- **South Carolina:** S.C. CODE ANN. §§ 60-4-10-30 (2009).
- **South Dakota:** S.D. CODIFIED LAWS §§ 1-27-3, 14-2-51 (2009).
- **Tennessee:** TENN. CODE ANN. § 10-8-101 (2010).
- **Texas:** TEX. GOV'T CODE ANN. § 552.124 (2009).
- **Utah:** UTAH CODE ANN. §§ 63G-2-206, 63G-2-302 (2009).
- **Vermont:** VT. STAT. ANN. tit. 1 § 317, tit. 22 § 171-173 (2010).
- **Virginia:** VA. CODE ANN. § 2.2-3705.7 (2010).
- **Washington:** WASH. REV. CODE § 42.56.310 (2010).
- **Washington, DC:** D.C. CODE. § 39-108 (2010).
- **West Virginia:** W. VA. CODE § 10-1-22 (2009).
- **Wisconsin:** WIS. STAT. § 43.30 (2009).
- **Wyoming:** WYO. STAT. ANN. § 16-4-203 (2010).

