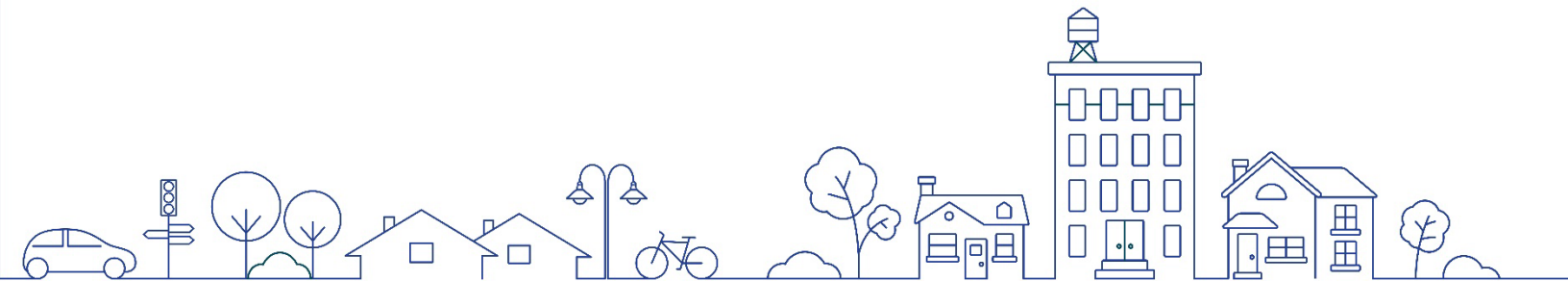


— Oregon Municipal Handbook —

CHAPTER 20: LIBRARIES



**Published by the League of Oregon Cities
April 2023**

Chapter 20: Libraries

As a free resource open to everyone, public libraries not only provide access to the traditional resources such as books and magazines, but many libraries also provide access to public meeting rooms and electronic resources such as e-books, computer stations, and free wi-fi. Some libraries even offer a coffee shop or loans of craft making equipment.

This chapter is intended to discuss the laws and legal issues facing libraries. The legal issues discussed below include: (i) the First Amendment rights of library patrons; (ii) patron behavior policies; (iii) First Amendment Audits; (iv) censorship of library materials, and (v) copyright law.

I. OREGON LAW GOVERNING LIBRARIES

A “public library” means “a public agency that provides to all residents of a local government unit free and equal access to library and information services that are suitable for persons of all ages.”¹ In Oregon, public libraries are operated by different governmental entities such as the state of Oregon, cities, counties, universities, community college library service districts established under ORS chapter 451, and special districts established under ORS 357.216.²

In Oregon, governance of libraries is largely through local control, but the state, through the State Library Board, does confer “public library status” and for those eligible libraries, providing state aid and grants.³ Local governments operating libraries organized after September 13, 1975, must follow the formation and operation statutes contained in ORS chapter 357.⁴ Public libraries operating before this date are not required to, but may choose to conform with ORS chapter 357.⁵

New libraries may be formed by resolution, ordinance or election, but the proposed library must: meet the minimum conditions established by the State Library Board; provide financial support from public funds; and hold regularly scheduled open hours.⁶ The minimum standards do not apply to libraries serving populations of 2,000 or fewer residents.⁷

¹ ORS 357.400.

² *Id.*

³ ORS 357.780; OAR 543-010-0036.

⁴ ORS 357.610.

⁵ *Id.*

⁶ ORS 357.417; *See* OAR 543-010-0036.

⁷ *Id.*

Each library established since 1975 must appoint a library board, comprised of five to 15 members.⁸ The local government's governing body shall determine the library board's responsibility for: (1) appointment of staff; (2) rules and policies; (3) annual budget; (4) approving or delegating expenditures; (5) selection of sites for library facilities; (6) entering into contracts, and (7) any other activities.⁹ To terminate public support of a library, the local governing body must hold at two public hearings on the matter at least 90 days apart and publish notice of the first public hearing for two successive weeks at least 30 days in advance of the first hearing.¹⁰

II. FIRST AMENDMENT

The First Amendment of the United States Constitution protects an individual's right to speak, publish, read, and view materials in the library.¹¹

Under the federal forum analysis, a library is a designated (or limited) public forum.¹² In designated public forums, the First Amendment does not require public libraries to grant access to all those wishing to exercise free speech rights on its property.¹³ In comparison, a traditional public forum such as sidewalks or parks, is a place where the government may only enact time, place and manner regulations that are narrowly tailored to serve a significant government interest and may not prohibit all communication.¹⁴ As a designated public forum, courts have recognized that libraries may have reasonable rules in place for patron use of the library, consistent with the library's mission to provide access to library materials and services to the entire library community.¹⁵

Courts have upheld a library's regulation of spaces inside of the library such as the

⁸ ORS 357.465.

⁹ ORS 357.490.

¹⁰ ORS 357.621.

¹¹ *Board of Education v. Pico*, 457 US 853, 867 (1982) (holding that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own right of speech, press and political freedom").

¹² The U.S. Supreme Court in *United States v. American Library Association* supposed that the library is a limited public forum but did not analyze whether a library is a "traditional" public forum; See John N. Gathegi, *The Public Library as a Public Forum: The (De)Evolution of a Legal Doctrine*, LIBRARY QUARTERLY (Jan 2005).

¹³ *Kreimer v Board of Police of Morriston, NJ*, 958 F2d 1242, 1256-1263 (3rd Cir 1992).

¹⁴ *Ward v Rock Against Racism*, 491 US 781, 798 (1989) (time, place or manner regulations that limit permitted First Amendment activities within a designated public forum are constitutional only if they are "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of information").

¹⁵ *Kreimer*, 958 F2d at 1256-1263.

regulation of meeting rooms.¹⁶ For example, a library may regulate the use of the meeting rooms, excluding religious worship services because it is not consistent with the library's purpose.¹⁷

In Oregon, in addition to the First Amendment, Article I, section 8 of the Oregon Constitution protects free expression. The Oregon Supreme Court has not applied the federal public forum analysis into Article I, section. Rather, in *State v. Robertson*, the Oregon Supreme Court applied a different test for free expression, without regard to the type of forum.¹⁸ The *Robertson* analysis places regulations into one of three categories of review: (1) laws focusing on the content of expression violate Article I, section 8 unless it is one of a few exceptions; (2) laws focusing on harms or effects, but directed by their terms at expression; and (3) speech-neutral laws that, although they are not directed by their terms, may be applied to expression.¹⁹

As discussed below, the policies governing library patron behavior should be limited to the third category of speech neutral laws that are limited to time, place and manner. These "speech-neutral" laws cannot be challenged facially; rather, they are reviewed to determine whether the law in a particular circumstance burdened protected expression.²⁰

A. Policies Governing Patron Behavior

Public libraries have some discretion to reasonably restrict the exercise of free speech rights in their buildings - especially to the extent that the conduct in question would be disruptive to the other patrons or inconsistent with the library's fundamental mission.²¹ Libraries may have reasonable rules in place for patron use of the library, consistent with the library's mission to provide access to library materials and services to the entire library community.²² Library patrons have the right to access information free from harassment, intimidation, or threats to their safety, well-being, and privacy rights.²³

A library may require patrons wear shoes in the library to prevent injury from documented dangers such as vomit, urine, broken glass, and a staple on the library floors.²⁴ A library may also limit activities to access to information and limit other expressive activities such as making speeches and distributing pamphlets.²⁵ The power to regulate patron behavior is not

¹⁶ See *Faith Center Church v. Glover*, 462 F 3d 1194 (9th Cir 2006) finding that the library meeting room is a limited public forum).

¹⁷ *Id.*

¹⁸ 293 Or 402, 412 (1982).

¹⁹ *Id.*

²⁰ *State v. Illig-Renn*, 341 Or 228, 234, 142 P3d 62 (2006).

²¹ *Kreimer*, 958 F2d at 1256-1263.

²² *Id.*

²³ *Id.*

²⁴ *Neinast v. Bd of Trustees Columbus Metro Library*, 346 F3d 585, 595 (6th Cir 2003).

²⁵ *Kreimer*, 958 F.2d at 1260.

limited to actual disruption but can include behavior that is not consistent with library purposes.²⁶

Although there are not many cases involving filming or photography in libraries, there are cases involving law enforcement. In *Askins v. Department of Homeland Security*, the Ninth Circuit Court of Appeals held that there is a First Amendment right to record matters of public interest in traditional public forums, which “includes the right to record law enforcement officers engaged in the exercise of their official duties in public places” such as sidewalks or streets.²⁷ The Ninth Circuit noted that such a right may not exist in areas “not freely open to the public” such as computer screens and holding cells.²⁸ Libraries should work with their legal counsel to make an individualized determination whether to regulate photography and recording in light of the potential threats posed by third-party photography or recording.

To draft policies governing patron behavior, libraries should consider the following:

- **Tailor the policies to the needs of the library.** Libraries should consider past concerns and document how the policies address the safety of staff and the patrons. Consider regular review of the policies to address concerns such disruptive behavior.
- **Draft the policies that are specific and can be applied objectively.** Courts are more likely to find that ambiguous or unnecessarily broad policies are unenforceable.
- **Draft the policies to be viewpoint neutral and limited to time, place and manner regulations.** Courts are more likely to find such policies enforceable.
- **Create an appeal process.** A process that provides notice and the right to appeal provides due process and is a best practice.

Example behavior policies are available from the American Library Association, Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage: [Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage | Advocacy, Legislation & Issues \(ala.org\)](#).

Once the behavior policies are adopted, it is important to ensure that the library staff are trained and enforce the policies consistently. Failure to follow the procedures consistently places the library at risk for claims that an individual’s constitutional rights were violated.

²⁶ *Id.* at 1270.

²⁷ 899 F3d 1035, 1044 (9th Cir 2018).

²⁸ *Id.*

B. Audits

According to the American Library Association, a growing number of public libraries across the country are finding themselves the target of "First Amendment Audits."²⁹ In First Amendment audits, individuals arm themselves with video cameras, proclaim themselves "auditors," and enter public buildings, like police precincts and libraries, to record alleged Constitutional violations.³⁰ They are also claiming that they are permitted to film and photograph library staff and patrons on the grounds that libraries are "public spaces."³¹

What if this happens at my library? The American Library Association Office for Intellectual Freedom, recommends the following:

- **Understand the library's role as a designated public forum.** In designated public forums, staffers are only obligated to allow free speech that is consistent with the nature of that forum. In other words, library behavior and privacy policies can often supersede an individual's right to film or photograph the space. As is the case in many courthouses, a library can regulate photography or filming inside the building even if the facility is open to the public.
- **Adopt or review written policies.** Written policies can help staff members regulate behavior in a manner that respects every person's right to privacy and safety. Staffers should be familiar with these policies to mitigate behavioral violations that may occur during an audit. As always, staff training and consultation with your state library or legal counsel are important parts of this process.
- **Know your rights and responsibilities.** Public library workers are public employees. Several U.S. Courts of Appeals have upheld a private citizen's right to record audio and video of public employees carrying out their duties in a public space regardless of their consent. However, this does not include the right to harass or interfere with public employees as they carry out those duties.
- **Label all private spaces.** Libraries should clearly identify all nonpublic spaces inside the building, such as bathrooms, offices, break rooms, work areas, and reservable private study spaces. Creating this identification can provide clearer guidance when a First Amendment auditor violates library policy.
- **Know when to engage.** If a First Amendment auditor is not violating any behavior policies, avoid engaging. Most auditors enter these situations with a goal of getting a rise

²⁹ See Cass Balzer, *Uptick in First Amendment Audits*, AMERICAN LIBRARIES, (2022) available at: <https://americanlibrariesmagazine.org/2022/01/03/uptick-in-first-amendment-audits-2/> (last accessed on March 26, 2023).

³⁰ *Id.*

³¹ *Id.*

out of employees. If staffers do not give them that opportunity, auditors are more likely to leave without incident.³²

C. Censorship of Library Materials

Libraries are increasingly encountering comments from the public that materials are inappropriate or offensive and asking that such resources are removed. Censorship is the suppression of ideas and information that certain persons – individuals, groups, or government officials – find objectionable or dangerous. The First Amendment right to receive information is also implicated in considering such censorship.³³

To be prepared for such complaints that materials are inappropriate or offensive and therefore should be removed, libraries should consider a collection development policy that outlines the process and criteria for selecting resources. Libraries should also incorporate a reconsideration process. Additional intellectual freedom resources and example policies are available from the Oregon Library Association at [Intellectual Freedom Resources \(olaweb.org\)](https://olaweb.org).

Libraries accepting funds from the federal government through the Children’s Internet Protection Act are required to install filtering software.³⁴ The filtering software is to keep adults from accessing visual images online that are deemed obscene or child pornography and to block minors’ access to images that are harmful to minors.³⁵ The U.S. Supreme Court upheld the constitutionality of the Children’s Internet Protection Act because the internet at the library is “neither a traditional nor a designated public forum.”³⁶

III. COPYRIGHT LAW

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression.³⁷ Copyright, a form

³² *Id.*; See also Deborah Caldwell-Stone, *Auditing the First Amendment at Your Public Library* (2019), available at: <https://www.oif.ala.org/auditing-the-first-amendment-at-your-public-library/> (last accessed on March 26, 2023); see also HIRTLE, PETER B.; HUDSON, EMILY; KENYON, ANDREW T., COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR DIGITIZATION FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS, 127-128, Cornell University Library (2009), available at: <https://hdl.handle.net/1813/14142> (last accessed on March 27, 2023).

³³ *See Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982) (a plurality of the Supreme Court prohibited a school board from banning books from a public school library, finding the ban violative of the students' constitutional right to receive information).

³⁴ 15 USC §§ 6501-6506.

³⁵ *Id.*

³⁶ *United States v. American Library Association*, 539 US 194, 204-05 (2003) (plurality opinion).

³⁷ U.S. Const., Art. I, § 8, cl. 8 (Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.³⁸ Congress passed the most recent Copyright Act in 1976.³⁹

Copyright protects original works of authorship, while a patent protects inventions or discoveries.⁴⁰ Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be.⁴¹ A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.⁴²

Copyright exists from the moment the work is created.⁴³ Copyright covers both published and unpublished works.⁴⁴ In general, registration is voluntary and not required.⁴⁵ You will have to register, however, if you wish to bring a lawsuit for infringement of a U.S. work.⁴⁶

The concept of copyright in libraries is implicated in the practice of digitizing and sharing library content.⁴⁷ Digitizing content in libraries would constitute infringement if the works were protected by copyright and permission was not obtained.⁴⁸ As discussed below, there are three notable exceptions to copyright laws: (1) materials in the public domain; (2) materials that are fairly used; and (3) materials used in the library.

A. Public Domain Exception

Materials in the public domain, or materials that are not protected by intellectual property laws, may be digitized without permission or restrictions.⁴⁹ Determining what is in the public domain is exceptionally complicated. There are a few public domain categories to consider.

Discoveries); See U.S. COPYRIGHT OFFICE, CIRCULAR 1 COPYRIGHT BASICS (2021) available at: <https://www.copyright.gov/circs/circ01.pdf> (last accessed on March 26, 2023).

³⁸ 17 USC § 102.

³⁹ 17 USC §§ 101 *et seq*; See U.S. COPYRIGHT OFFICE, CIRCULAR 1 COPYRIGHT BASICS (2021) available at: <https://www.copyright.gov/circs/circ01.pdf> (last accessed on March 26, 2023).

⁴⁰ See 35 USC § 100 *et seq*.

⁴¹ *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 US 340 (1991) (holding that the white pages are not “original works of authorship” and that there is no copyright in recitation of facts).

⁴² See 15 USC §§ 1051 *et seq*.

⁴³ 17 USC § 101 (defining “created”).

⁴⁴ See *Harper & Row v. Nation Enterprises*, 471 US 539 (1985) (holding that former President Gerald Ford held a copyright on his unpublished memoir).

⁴⁵ 17 USC § 408(a) (“registration is not a condition of copyright protection”).

⁴⁶ 17 USC § 412 (registration is a requirement of an infringement action).

⁴⁷ See *Authors Guild v. Google, Inc.*, 804 F3d 202 (2nd Cir 2015); See generally, RUTH DUELOW AND MICHAEL ROBAK, LEGAL ISSUES IN LIBRARIES AND ARCHIVES, available at: <https://mlpp.pressbooks.pub/librarylaw/> (last accessed on March 26, 2023).

⁴⁸ *Id.*

⁴⁹ 17 USC § 303.

- **U.S. federal government works.** The federal government dedicates its content to the public domain. This includes works by agencies or government employees in the course of their duties.⁵⁰
- **Everything created before 1923.** If the work was published before 1923, it is likely in the public domain. This includes books, famous works of art, photographs, and early motion pictures.⁵¹
- **Works published in the U.S. between January 1, 1923, and December 31, 1977.** The copyright for work published or registered is the publication or registration date plus 95 years.⁵² Works that were published before 1964 that were not renewed are in the public domain, and works published before 1978 that have no copyright notice are in the public domain.⁵³ Works created more than 120 years ago are in the public domain.⁵⁴
- **Works created on or after January 1, 1978.** Work created for the term lasting for the author’s life plus an additional 70 years.⁵⁵

To research whether the copyright on a specific work or whether the copyright was renewed, the U.S. Copyright Office only provides online searching for records from 1978 to present available at: <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>.

Records before 1978 are available in the (print) *Catalog of Copyright Entries*.

B. Fair Use Exception

When determining whether materials should be digitized for research, it is not always possible to determine a work is in the public domain. When considering whether the materials are copyrighted, libraries can digitize work that is considered “fair use.”⁵⁶ Fair use is such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.⁵⁷

⁵⁰ 17 USC § 105.

⁵¹ Prior to 1998, copyright in published works could last at most 75 years. In 1988, the Sonny Bono Copyright Term Extension Act extended the term of all existing copyrights by 20 years and works already in the public domain (i.e. those published in 1922 and earlier) were unaffected. It is assumed that most, but not all, works published in 1922 and earlier are public domain.

⁵² See U.S. COPYRIGHT OFFICE, CIRCULAR 15A DURATION OF A COPYRIGHT (2023) available at: [Circular 15A Duration of Copyright](#) (last accessed on March 26, 2023); See also Mannapperuma, Mehesha; Schofield, Brianna; Yankovsky, Andrea; Baily, Lila; Urban, Jennifer, IS IT IN THE PUBLIC DOMAIN? (2014) available at: [FINAL_PublicDomain_Handbook_FINAL\(1\).pdf \(berkeley.edu\)](#) (last accessed on March 26, 2023).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ The Copyright Act of 1976.

⁵⁶ 17 USC §107.

⁵⁷ *Id.*

To conduct a fair-use analysis, libraries should consider the four factors listed in the Copyright Act for determining whether a particular use is fair.⁵⁸ The factors to determine fair use are the following:

- (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.⁵⁹

In considering the first factor, if the purpose is for educational purposes or research purposes, that would weigh in favor of fair use.⁶⁰ If the purpose, on the other hand, is to make a profit or for commercial gain, that would weigh against fair use.⁶¹

The courts also consider whether the use is a *transformative* one.⁶² Did the use “transform” the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original, in effect substituting for it?⁶³ A transformative use is one that alters the original work “with new expression, meaning or message...”⁶⁴

Mass digitization of copyright books have largely been considered fair use.⁶⁵ In the *Authors Guild v. Google* case, the court noted that Google, which digitized copyrighted works, did not make the entire copyrighted works freely available to read online.⁶⁶ Their uses (creating a searchable database; providing access to the print-disabled), were held to be *transformative* by the courts.⁶⁷

The U.S. Copyright Office publishes a list of the fair use cases at:
<https://www.copyright.gov/fair-use/fair-index.html>.

Before a library digitizes its holdings, it is a good practice to document the reasons that the library believes it is fair use. Libraries have a reduced exposure to statutory damages if they can prove that they had reasonable grounds for believing that the use of the copyrighted work

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *De Fontbrune v. Wofsy*, 39 F4th 1214 (9th Cir 2022) (finding reproduction of photographs of Pablo Picasso’s work in reference book sold commercially was not fair use).

⁶¹ *Id.*

⁶² *Campbell v. Acuff-Rose Music*, 510 US 569, 579 (1994).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *Authors Guild, Inv. v. HathiTrust*, 755 F3d 87 (2nd Cir 2014); *Authors Guild v. Google, Inc.*, 721 F3d 132 (2nd Cir 2015).

⁶⁶ *Id.*

⁶⁷ *Id.*

was a fair use.⁶⁸

C. Library Exception

In addition to the public domain and fair use exceptions, libraries have a specific exception to the copyright laws.⁶⁹ This library exemption, as discussed below, specifies when copyrighted material may be used for library purposes without permission from the copyright holder. This exception permits libraries and archives to:

- Make one copy of an item held by a library for interlibrary loan;
- Make up to three copies of a damaged, deteriorated, lost, or stolen work for the purpose of replacement. This only applies if a replacement copy is not available at a fair price;
- Make up to three copies of an unpublished work held by the library for the purpose of preservation. If the copy is digital, it cannot be circulated outside the library;
- Reproduce, distribute, display, or perform a published work that is in its last 20 years of copyright for the purposes of preservation, research, or scholarship if the work is not available at a fair price or subject to commercial exploitation; and
- Make one copy of an entire work for a user or library who requests it if the work isn't available at a fair price.⁷⁰

Under this exemption to the copyright laws, copies cannot be made for commercial purposes, be systematic to replace subscriptions and all copies made must include a notice stating that the materials may be protected under copyright.⁷¹ Also note that fair use is broader than the specific exemption for libraries and that the exemptions specific to libraries do not replace fair use.

⁶⁸ 17 USC § 504(c)(2).

⁶⁹ 17 USC § 108; For an additional resource on the library exception, please see Table 6.8 in HIRTLE, PETER B.; HUDSON, EMILY; KENYON, ANDREW T., COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR DIGITIZATION FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS, 127-128, Cornell University Library (2009), available at: <https://hdl.handle.net/1813/14142> (last accessed on March 27, 2023).

⁷⁰ *Id.*

⁷¹ *Id.*