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### Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines

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## Chapter 7: Library Freedom

## 7.1 Introduction

This chapter will address the way in which the right to freedom of expression applies to the legal governance of libraries and public libraries in particular. The position of the library in the public networked information environment from the perspective of this study is interesting for a number of reasons. First, the library combines an active selective role with a relatively passive role. The public library may be the purely intermediary speaker, it selects those worthy of selection while not actively speaking itself. In that sense, the library seen as an intermediary in the networked information environment is different from the press and publishers on the one hand, as well as different from conduits such as Internet access providers. Second, one of the dominant conceptualizations of the Web and the Internet more generally is linked to a vision of the digital library.<sup>480</sup> Search engines help to fulfill the potential of the World Wide Web as a globally and publicly accessible library. And finally, library governance offers an example in which the state has fulfilled a prominent and generally facilitative role.

For these reasons, the way in which the right to freedom of expression has informed the legal governance of libraries, as well as the way in which public libraries, seen as intermediaries, have dealt with the communicative interests of information providers and library patrons can be expected to contribute to an answer to the main research question. James Grimmelmann, for instance, recently stated:

*“A good search engine is more exquisitely sensitive to a user’s interests than any other communications technology. [...] Except, perhaps, the library reference desk.”*<sup>481</sup>

This chapter will take a closer look at the way in which public library governance has struck a balance between the different and possibly conflicting communicative interests involved. It will focus on the legal governance of information flows facilitated by the public library from the perspective of freedom of expression and the proper role of government in this context. Section 7.2 will shortly discuss the historic background of the library as well as some of the recent developments related to libraries in the digital environment. Section 7.3 will discuss the normative principles underlying the governance of public libraries, including the right to freedom of expression. What are the general ideas and principles underlying library governance and the library’s mission and in what way are those ideas and principles informed by the right to freedom of expression? In section 7.4 a number of specific issues related to the right to freedom of expression in the context of the public library will be discussed, such as the question about the library’s independence from government, possible conflicts relating to its collection policy and library censorship, and the value of privacy in the context of access to library materials.

## 7.2 The library: history and recent developments

Libraries have existed since the Antiquity and even before that. Old empires erected the first libraries some 5000 years ago. These libraries contained the first collections of written materials.<sup>482</sup> One of the

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<sup>480</sup> See Section 2.1.1. See also Stefik 1996.

<sup>481</sup> Grimmelmann 2010. (Grimmelmann adds that librarians don’t scale.)

<sup>482</sup> On the earliest libraries, see Casson 2001. See also Staikos 2004.

oldest known libraries is the Library of Ashurbanipal, a collection of tens of thousands of clay tablets, in a library named after the king, who ordered the collection of these materials to be stored in a central location. Surely the most famous ancient library is the *Library of Alexandria*, which allegedly construed its collection by confiscating all written materials from incoming ships and travellers.<sup>483</sup> The scarcity of information sources was one of the driving forces behind the creation of libraries. The storage and classification of these materials in one place provided the best access to these valuable materials. Library collections had considerable political importance as well. This is maybe best reflected in the tragic fate of many of the most famous libraries of the ancient world. New empires and dynasties destructed them and the cultural and political heritage they represented.<sup>484</sup>

A library can be defined as an organization keeping a systematic collection of information sources in a place.<sup>485</sup> The information sources are selected classified and ordered for the purpose of facilitating access to them. The material can be classified in terms of the type of medium, such as clay, print, and digital storage, or the type of content.<sup>486</sup> A library is also an organization in which library professionals are maintaining the collection and working to fulfill its mission. Finally, the library used to be a physical place where the collection would be kept and made accessible to the community. The digitization of information sources and the introduction of electronic access and the Internet has transformed this last aspect of libraries and given rise to the phenomenon of the 'digital library', access to which, from a technological or functional perspective, is not necessarily restricted to a specific location.<sup>487</sup>

Throughout history, a large variety of libraries emerged, such as the research library, the national library, the private library and the public library. Naturally, these different types of libraries are different in terms of their collections, functions, funding and governance. A national library typically has strong national archiving and cultural heritage functions. There is a wide variety of private libraries. The academic or research library facilitates the access to research materials and is primarily focused on the scientific community. A public library's primary role is to serve the general public and its collection can be relatively limited. In the remainder of this chapter the focus is placed on public libraries, including public research libraries.

The roots of the modern library and the public library in particular lay in the period after the invention of the printing press and the Enlightenment. The widespread use of the printing press caused an enormous increase in the amount of publications the library could facilitate access to. The ideal of general literacy of the Enlightenment gave rise to reading societies and public reading rooms. In the Netherlands, these reading societies and public reading rooms became a widespread phenomenon in the nineteenth century. Out of these reading societies and reading rooms, the modern public library emerged.

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<sup>483</sup> Wright 2007.

<sup>484</sup> See Wright 2007, pp. 50-51. And still libraries are deliberately destructed because of political reasons, such as the national and university library in Sarajevo and various libraries in Iraq. See e.g. Zećo & Tomljanovich 1996.

<sup>485</sup> Miksa & Doty 1994.

<sup>486</sup> Knight 1981. On the new opportunities of ordering in the digital world, see Weinberger 2008. For a discussion of the more problematic aspects and consequences of classification, see Bowker & Leigh Star 2000. See also Hacking 1999.

<sup>487</sup> About the digital library see generally Pace 2003; Earshaw & Vince 2008. For a famous early account of the possibility of the digital library, see Licklider 1969.

Recently, the digitization of information sources and the introduction of the Internet and electronic access have had implications for the library. First, the Internet and the World Wide Web is a tremendous new resource of easily accessible material. Second, digitization has also removed the library's collection from its physical premises into an electronic realm.<sup>488</sup> There are no physical restraints on where to access the collection, if material is digitized. This has made the precise physical location of a library for its users irrelevant, at least from the perspective of access to digitized information. It is unclear to what extent the digital library should replicate some of the boundaries traditional physical libraries would have in terms of their collections. A physical public library would serve a specific community of people in its area and have a collection that reflected its financial means and societal goals. If we ignore the current legal limitations on electronic access to digital library materials stemming from copyright law, which introduces superficial scarcity in view of the rights of authors and the encouragement of creative production, one public digital library could easily satisfy the demands for access to written materials for the whole population. In fact, such a library could serve the global population as well. It is this type of library of everything, accessible from everywhere, that is one of the most compelling, be it unfulfilled promises of the digital revolution. It is also this type of library whose abundance would make the development of proper search tools particularly important.

And of course, the Internet and the World Wide Web in particular are often characterized as a 'library' itself.<sup>489</sup> The Internet and the Web may generally lack the professional standards for selection and classification present in the context of libraries. Still, online platforms to buy books like Amazon, and online collections of digitized books such as provided by the Internet Archive or Google Books have made the Internet a major competitor for libraries, satisfying significant parts of information needs that would traditionally be served by libraries.<sup>490</sup> It is worth noting, that general search engines in particular make the Web into a library for their users.<sup>491</sup> They provide the navigation function the Web is missing, similar (but different) to the function of the library's index and collection classification system. In addition, various specific search services for library types of materials are freely offered on the Web, such as Google Scholar and Google Books.

### **7.3 Library governance, mission and normative principles**

#### **7.3.1 Regulatory models for the public library**

Public library policy and regulation can be seen from the perspective of media and communications law and policy and from the perspective of a more general social welfare policy which includes cultural and educational policy. In the following section the general regulatory framework for the governance of public libraries will be addressed, mostly from first perspective, seeing the library as a societal institution contributing to the public information environment. In the following section a distinction will be made

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<sup>488</sup> It is worth noting that this also means that the library no longer necessarily controls the materials it provides access to. Digitized materials are often licensed to libraries. Subscriptions to electronic journals are a good example of this. If the publisher discontinue access, the library loses access to 'its' copies.

<sup>489</sup> For an early account of the library metaphor for the Internet, see Stefik 1996, pp. 1-108. On the way in which Internet discourse shapes law and culture more generally, see Jørgensen 2011.

<sup>490</sup> Pessach 2007. See also Darnton 2009.

<sup>491</sup> Compare Grimmelmann 2007.

between two general models for communications and media regulation and the role of public institutions in these different models. These models are linked to differences in ideas about the meaning of freedom of expression and differences in the tasks and mission of public libraries.

As with the media in general, the public library not only has a particular role in a society, its organization and governance also reflects the type of society it exists in.<sup>492</sup> Following Hallin and Mancini, one can discern three types of media systems in Western societies, namely the North Atlantic liberal model, the North-European democratic-corporatist model and the Mediterranean politicized-pluralist model.<sup>493</sup> The organization of the public library reflects the characteristics of these different models, two of which will be shortly addressed here.

The liberal model for media and communications, the model in the United States, is characterized by a dominance of the free market mechanism. Taking a free market perspective, it can be considered the government's role to provide the goods and services (with strong public interests attached to them, or what are also called merit goods) that the market would not provide in sufficient quantities or qualities. General examples are health, security related services (police, fire-fighters) and education. In the liberal model, a typical example of government provision in the sphere of media and information goods and services is the public library. In comparison, media is left to the market and are predominantly offered by commercial enterprises. A minimal role of government, and the professional quality and independence of media from the state are seen as essential. Notably, besides the possibility of providing the service itself, the government can also regulate the market in the public interest. The regulation of communication networks and regulatory concepts tied to the public interest in this context such as universal access and common carriage are good examples of this approach, in which the provision of certain goods and services are left to the market, but the public interest is served through regulation.<sup>494</sup>

The democratic-corporatist model, the model one generally finds in the Netherlands and Germany, is a mixed model of media that are tied to specific subsets of the population and on the one hand and commercial media on the other hand. In this model, the media are seen as important social institutions, for which the State carries a certain responsibility. The role of government with regard to media, libraries and culture, is not primarily based on market considerations, although they may play a role, and increasingly so, but based on the idea that the public interest is best served by some involvement of public institutions. Generally speaking, public broadcasting, the public library, and the state monopolies in communications networks are examples of this approach. In Germany this approach is called *Grundversorgung*, i.e. a basic duty of care on government to make sure that certain service levels are guaranteed by government for the entire population. Again, it is possible that those guarantees are not met through government funding, but through market regulation.

The differences between the two models are also reflected in the way the right to freedom of expression has informed the governance of media and information services and for our purposes here, the public library. In the democratic-corporatist model, if there is reference to freedom of expression, it

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<sup>492</sup> Huysmans 2006.

<sup>493</sup> Hallin & Mancini 2004.

<sup>494</sup> See Section 6.2.

is usually a reference to a positive obligation under the right to freedom of expression and information, an obligation to safeguard the *effective and equal exercise* of fundamental rights in society.<sup>495</sup> The public library in particular is the place where those that may not have the financial means to access knowledge, culture and news in the free market, can do so. In the liberal model more emphasis is placed on freedom of expression as a negative right, guaranteeing individual liberty and a state free sphere, the functional independence of public libraries from government,<sup>496</sup> and the prohibition of censorship in the context of libraries. In fact, in the liberal model, one finds more reference to the normative role of fundamental rights in the context of libraries. Freedom of expression and the right to privacy have surfaced prominently in the debates about library governance and related case law in the United States.<sup>497</sup> In the democratic-corporatist model fundamental rights issues are less prominently addressed in the regulatory debates about public library governance. Fundamental rights and the social welfare state have blended together into a mix of publicly funded culture, media and information access support in which the public library occupies an important position. The enabling role of government with regard to providing basic access to knowledge and culture stands on the foreground.

On a different level, the distinction between the liberal and the corporatist model reflects the distinction between individual, free-market based pluralism on the one hand, and organized regulated pluralism on the other hand.<sup>498</sup> A classic example of organized pluralism is the Netherlands, in which the pillarized organization of society along the lines of different social groups was reflected by the organization of the media and public libraries. By now, the pillared structure of Dutch society may have lost much of its relevance. And more generally, as result of liberalization of information law and policy as well as European harmonization focusing on the Internal market since the 1980s, the emphasis has shifted in the direction of a free market based approach. But on the European continent, the notion of pluralism, in general and in the media in particular, is still seen primarily as relating to the interests of different societal groups, more than to the interests of individuals.<sup>499</sup> This stands in stark contrast with the notion of individual pluralism in the North-Atlantic liberal model. In this model, the individual, invested with political liberties like the freedom of speech and the freedom of association is the basic element of political organization in relation to the state and its democratically organized institutions. Pluralism is organized by the free market place of ideas, instead of monitored, facilitated or even regulated by the state.

### **7.3.2 The task and mission of the public library**

The core mission of the public library can be summarized as the mission to provide a publicly accessible place (possibly digital) where people can access knowledge, culture, information and ideas. The public library is still argued to be one of the cornerstones of a western democratic information society as can for instance be seen from the international library community's 'Public Library Manifesto':

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<sup>495</sup> See Schuijt 2006.

<sup>496</sup> But see Section 7.4.6.

<sup>497</sup> See e.g. Bosmajian 1983.

<sup>498</sup> See Hallin and Mancini 2004, pp. 53-55.

<sup>499</sup> See e.g. Nieuwenhuis 2007.

*“Freedom, prosperity and the development of society and of individuals are fundamental human values. They will only be attained through the ability of well-informed citizens to exercise their democratic rights and to play an active role in society. Constructive participation and the development of democracy depend on satisfactory education as well as on free and unlimited access to knowledge, thought, culture and information. The public library, the local gateway to knowledge, provides a basic condition for lifelong learning, independent decision-making and cultural development of the individual and social groups.”*<sup>500</sup>

In an age of deregulation, privatization, and commercial alternatives for library services, the demarcation of the tasks of public libraries is not an easy undertaking. The mission of the public library is the basis of its funding by the government, but the actual use of libraries may have shifted drastically. The question about the proper role of the state is particularly complex, because of the variety of public purposes the library tends to serve. Is the library simply a place to freely access information, knowledge and culture without financial or other barriers or is it also a city community centre and even a supplier of special courses and education? Is the library the place of last resort to access information and ideas for the least well off in our societies or should the library focus instead on the qualitative aspects of what is offered by a library, such as the way in which access is offered?

Because of some of the normative principles inherent in the offering of public libraries, such as independence from commercial influences, it is quite unlikely for market and commercial parties to satisfy those qualitative public interests that are at stake. It is hard to see how a private library, offering the same as public libraries in the same manner, could be sustainable without significant financial support. Arguably, by focusing on the demand side of its community, which is a natural thing to do for libraries in their mission to serve the public, public libraries can undermine their own legitimacy. If libraries do what the market can do itself, such as making extensive profiles of reading habits to personalize their services for instance, and don't do it differently from the way the market would do it, there may be less reason to fund them.

The public library does of course satisfy certain existing market demands, thereby making those markets potentially less attractive for commercial parties. Some of the things the public library has to offer might well be served without subsidies by the state, like in the case of public and commercial broadcasting. Compared to public broadcasting, however, there is still relatively little pressure on library funding from this perspective. Currently, there are simply no comparable commercial services available, although new services like Google Books might change this rapidly. Notably, the differences in the development of mass digitization projects shows again quite well the different ideas about the role of government in Europe and the United States. Whereas the general opinion in the United States seems, with some notable exceptions, to approve the free market based solution that is emerging in the sphere of digitization projects, In Europe, there is a clear tendency to see a natural role of government in the digitization of the corpus of knowledge and the cultural heritage.<sup>501</sup> Digitization and the creation of

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<sup>500</sup> IFLA/UNESCO 1994. IFLA is the International Federation of Library Associations, an international organization representing libraries and their users.

<sup>501</sup> See Jeanneney 2007.

search portals for digitized materials in Europe is taking place through public policy and funding and public institutions such as national libraries play a leading role.

From a normative perspective on the mission and legal position of the public library, the right to freedom of expression plays a role alongside other fundamental societal values. Dutch public library scholar Huysmans discerns four general values that together can be seen to provide the normative groundwork for the public library, namely freedom, equality, order/solidarity/cohesion and quality. He connects these four abstract values with nine guiding and more specific normative principles for the public library, namely accessibility and availability, diversity and multiformity, independence and objectivity, solidarity and protection of the vulnerable, social control and integration, cultural (symbolic) environment, reliability and precision, professionalism, and topicality. Clearly, these four values and nine principles do not always align and need to be balanced against each other in different contexts. For instance, information quality or social cohesion could easily be a reason to reject materials from a library, thereby restricting the availability and accessibility. Therefore these values and principles have to be considered in their totality and in the context of a specific library and its policy. With regard to specific issues relating to the governance of selection of and access to library material these normative principles do contain useful considerations.

Notably, the normative principles of Huysmans reflect that public libraries are much more than a place or portal to access information. In particular the ‘protection of the vulnerable’, ‘social control and integration’, and the ‘cultural (symbolic) environment’, go beyond the governance of selection of and access to information and ideas. The library is seen as a primary meeting place and as well as a accessible center for cultural activities. It is also a place where the groups that have the least means available to access information and knowledge can come. Public libraries tend to play an important role in literacy programs.

From a regulatory perspective, library regulation is mostly restricted to the regulation of funding through subsidies and library administration.<sup>502</sup> In Western-European social welfare states like the Netherlands, there is a trend since the 1980’s, in which the funding of public libraries has been cut down and public libraries have been deregulated like many other sectors in society. Regulation in such countries is tied to educational and cultural (subsidization) policies. The detailed sector-specific regulation one finds in media and communications law is absent. Library policy and soft law demarcates the functional boundaries of the library and sets certain key targets, mostly qualitative. In the regulatory framework for the public library in the Netherlands, mostly soft law for which regional government carries responsibility, one finds a reflection of the various normative principles named above.<sup>503</sup> The formulation of those principles by Huysmans may in fact be seen as a reflection of the role these qualitative standards are meant to play in the ‘regulation’ of the public library.

The reality of a strongly developed body of professional and ethical standards amongst librarians and a history of information and library science pre-empt legal regulation of the library practice. Library

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<sup>502</sup> In the Netherlands, the law on public library works (Wet op het openbare bibliotheekwerk, 1975) introduced a legal basis in the law for public library funding. The Welzijnswet 1985 decentralized library funding.

<sup>503</sup> See VNG, Richtlijn voor basisbibliotheken, 2005.

practice with regard to the selection of materials and the organization of access to the collection, is mostly self-governed by the library institutions and community itself. Additionally, this practice is informed by the results of the library and information science and tradition.<sup>504</sup> Notwithstanding the principle of self-governance of libraries, there are certainly examples of stricter legal conditions tied to public library subsidies, which directly relate to the selection of and access to information and ideas. In the Netherlands, there has been some case law declaring a certain licensing scheme on the municipal level in the context of libraries unconstitutional, because it infringed the right to freedom of expression.<sup>505</sup> In the United States, there is a more recent example, namely the Internet content filter installation obligation for public libraries. We will address these issues which raise questions about the implications of the right to freedom of expression for the governance of libraries in the next section.

Finally, it should be noted that library law, policy and practice is heavily influenced by copyright law.<sup>506</sup> First, copyright law restrict the types of material libraries can provide access to. For example, European intellectual property law limits the possibility that libraries include certain new materials in their collections, such as proprietary software. Second, it restricts the way access can be provided, such as online access to digital material. The success of public libraries in terms of their use since the 1960s caused a conflict between publishers and authors on the one hand and public libraries on the other hand about the losses of revenue. Ultimately, in many countries a public lending right was introduced, which would guarantee some form of remuneration for right holders. Lending rights and rental rights were harmonized by the European Community in 1992.<sup>507</sup> Copyright law includes rules on how the library can make its collection available and accessible to the public, and prescribes an equitable remuneration for publishers related to lending of materials.<sup>508</sup> The European Directive on lending and rental rights introduced a harmonized lending right and rental right which served as a guarantee for such remuneration for the dissemination of copyright and related right protected works through libraries and rental establishments.<sup>509</sup> The public lending right in the Directive is subject to the possibility for broad exceptions by the Member States. As a result, there are considerable differences between European countries in practice.<sup>510</sup>

## **7.4 Specific freedom of expression issues in the context of libraries**

### **7.4.1 The library and freedom of expression**

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<sup>504</sup> See e.g. VNG 1990; VNG 2007.

<sup>505</sup> See Hoge Raad [Dutch Supreme Court] 9 nov. 1960, NJ 1961, 206 (*Vestigingsbesluit leesbibliotheekbedrijf 1958*) (System of permits for the provision of public reading rooms is found unconstitutional, i.e. in breach of the freedom of expression provision of Article 7 of the Dutch Constitution).

<sup>506</sup> For an overview, see Krikke 1999.

<sup>507</sup> Council Directive 92/100, 1992 O.J. (L 346) 27 (EEC).

<sup>508</sup> Von Lewinski 1992, pp. 3-83; Reinbothe & Von Lewinski 1993.

<sup>509</sup> See European Commission 2002 (stating that “[...] *from an economic point of view, the public lending right complements the rental right. In some cases, public lending might even replace rental. Therefore, it was felt necessary to include a [public lending right] in the draft Directive in order to ensure the proper functioning of the Internal Market in this field.*”).

<sup>510</sup> *Id.*, p.11.

Freedom as a normative value at the core of public library governance, reflects an array of liberties, including the fundamental right to freedom of expression, freedom of religion and freedom of education. In several of its declarations and its Library Manifesto in particular, the International Federation of Library Associations and Institutions (IFLA) has tied the public library's mission to the fundamental right to freedom of expression, and Article 19 of the United Nations Universal declaration of Human Rights in particular. IFLA also has a specific programme, Free Access to Information and Freedom of Expression (FAIFE), to promote freedom of expression in the context of libraries.<sup>511</sup> Freedom of expression in the context of libraries can be best related to the theory of self-fulfillment of the individual, and the democratic ideal of self-governance.

Freedom of expression in the context of libraries has implications for the relation between the publicly funded library and the state, the relation between libraries and potential information sources for their collection, and most importantly, between libraries and their users. In the following section, a number of issues with regard to library governance and freedom of expression will be discussed. First, the implications of freedom of expression for library funding will be addressed. Second, several issues in the relation between libraries and users will be discussed, namely the issue of censorship in the context of libraries, the governance of access to materials and the question about the privacy of library users. This section will conclude with a discussion of the idea of the library as a public forum.

#### **7.4.2 Public funding of libraries and freedom of expression**

In the European context, freedom of expression is seen to entail a positive obligation on public authorities to guarantee a certain basic level of access to information resources. Thus, the public library is a particular instance of the government acting under its positive obligations under Article 10 ECHR.<sup>512</sup> Arguably, by funding public libraries the state goes further than is required under Article 10 ECHR. As was noted in previous chapters, the state generally has considerable freedom to choose the way in which it fulfills its positive obligations under Article 10 ECHR. The actual level of basic access, the ways in which access is granted and organized, and most other specific public library governance issues do not follow from this general positive obligation. The positive obligation does entail the general guarantee of pluralism, also in libraries. The diversity and multiformity principle mentioned above reflect this value of pluralism in the library context.

The emphasis on the positive role of the State in the contexts of public libraries in Europe has placed freedom of expression as a negative right to the background. In the United States, by contrast, many public libraries have a (declaratory) library bill of rights as a part of their collection policy, informing the public about their rights with regard to collection governance.<sup>513</sup> From a negative rights perspective, the funding of libraries by public authorities poses the question about the appropriate degree of political involvement with library governance. The independence of public libraries from the government, not in

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<sup>511</sup> IFLA 1999.

<sup>512</sup> See Schuijt 2006, p. 28. See also Arnbak et al 1990.

<sup>513</sup> See e.g. Santa Clara County Library.

terms of their funding but in terms of their actual governance, could be based on the principle of freedom of expression.<sup>514</sup>

### 7.4.3 Collection management and access to materials

The library user and his or her interest in informing and educating itself is central to all library policy. The library provides access to knowledge and provides tools and services to the library user to search for information in its collection. The normative principles of availability and accessibility have implications for the library's collection policy and the library as a place to discover the existence of materials through metadata systems and a guide to find access to the materials in the library and elsewhere. The findability of material is a key element in library governance.

Library collection management is a complex phenomenon, in which libraries, public and private library services, various types of publishers, and review media each play their role.<sup>515</sup> First, the resources of the library in terms of its physical capacity and financial resources to manage a collection play a fundamental role. The selection and collection decisions will have to serve the respective local and possibly regional community. The quality of material is an important concern, although at the same time, a local library's collection will have to be biased towards material that is intellectually accessible for the various groups in that community. Notably, the actual selection of books and library materials by public libraries is not an autonomous practice of librarians. In practice, the publishing industry plays an important role in facilitating - and thereby influencing - selection decisions by the public library community. If we look at the Netherlands, for instance, nowadays most public libraries use the services of one privatized organisation called NBD|Bibliion B.V. for their purchasing decisions. NBD Bibliion monitors new publications and has packages tailored to the needs of different types of public libraries. The bulk of books enter the public libraries because of such arrangements.<sup>516</sup>

Because most public libraries have a rather limited collection, the principles of availability and accessibility imply that the ideal situation would be that at least one library should have a copy of a book or other potential library material and that it should be findable and accessible for library users elsewhere. If a book is available elsewhere, there are usually special inter-library traffic arrangements between libraries that are considered crucial for providing access to information. There are similar but less developed international arrangements for gaining access to materials in public libraries abroad which are promoted by IFLA. There can be some legal restriction on such access, for instance that the foreign material has to be legal in the receiving country.<sup>517</sup>

One of the most ambitious - and failed - examples of interlibrary arrangements, aiming to provide access to all published material, is the Farmington plan in the United States.<sup>518</sup> The Farmington plan was started

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<sup>514</sup> But see the decision of *U.S. v. American Library Association* discussed below, Section 7.4.6.

<sup>515</sup> For an overview of library collection management see Gardner 1981.

<sup>516</sup> Interestingly, NBD Bibliion has made itself somewhat accountable for the reviews it publishes (20.000 a year), with 'guidelines for reviewers' in combination with an appeal procedure. See NBD Bibliion 2011. The decision on the merits of an appeal is based on NBD Bibliion's guidelines for reviewers and is only accessible to the reviewers themselves.

<sup>517</sup> See Gardner 1981.

<sup>518</sup> See Gardner 1981, pp. 248-249.

in 1942 as an attempt by a group of major university and research libraries to make sure that at least one copy of every valuable publication from each country in the world would be available in some library in the United States. The responsibility for collecting between participating libraries was divided by subject and geographic area of publication. Combined with an interlibrary loan system, the Farmington plan would have made each library into the universal library, in the sense of access and availability. However, for various reasons, including the lack of coordination and the emphasis on availability without consideration of demand, the plan was not a success and was formally dissolved in 1972.<sup>519</sup>

#### **7.4.4 The library and its relation to the library user**

The relation of the public library's collection management with regard to the user is a complex one. The public library aims to serve the needs of the public so the collection is arranged in view of the library user. This does not mean that library users decide what will be inside the library or that public libraries are completely governed by community demand.<sup>520</sup> The library user might be able to suggest acquisition of certain materials, but the library institutions makes the collection decisions itself. Possibly, the increased emphasis on satisfying popular demand and the use of popularity metrics in collection governance may have changed this slightly. Below two more specific issues related to collection management and the interests of library users will be addressed. First, the role of libraries to confront library users with materials they might not have selected themselves and second the issue of library censorship.

In terms of its offering of a collection of knowledge and culture to its users, a public library is not merely passive in its relation to its users. Historically, the public library has an emancipator and educational role with regard to the library user. As a result, in the ideal world, a public library is a place where the public, when browsing through the library stacks and catalogues, will be confronted with a carefully selected body of knowledge and information materials they wouldn't have come across otherwise, in a context in which professionals can advice them. The ideal is that this professional has to be passive in the sense that the library user makes the choices of how he navigates the collection.<sup>521</sup> He cannot be forced to read or access certain materials but has to accept the fact that he will be confronted with materials that might upset him.

The confrontational role of libraries, which sees the library's collection of materials as a shared public space that is more than the sum of the individual needs of its users, fits well with the critique of personalization of the public information environment by the American constitutional scholar Cass Sunstein. Personalization is increasingly taking place in the library's accessibility infrastructure. Technology and user data can be used to build a profile of interests on the basis of a library user's lending history and searching behavior. Personalization is attractive for libraries, because it strengthens their relationship with the library user. But it implies a shift as regards accessibility governance from supply driven to demand driven.

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<sup>519</sup> See Gardner 1981.

<sup>520</sup> See Gardner, 1981; Osburn & Atkinson 1991.

<sup>521</sup> See VNB 1990.

Sunstein argues, with reference to the ideals underlying the First Amendment, that personalization of the information environment into a 'daily me' for each citizen stands in the way of the shared experiences that are a prerequisite for a functioning democratic society.<sup>522</sup> It must be noted that Sunstein does not provide much empirical backing for his claims that existing personalization developments are actually having the effects he warns for. As a result, Sunstein's argument should be understood as a contribution to the discussion of the normative ideals that should inform selection practices by mediating institutions in the public information environment. In the library context, personalization of accessibility could weaken the ideal of the confrontational role of the library. This is particularly true if there is no possibility to browse the stacks of books and confrontation with material takes place through a search engine. Notably, in the United States in particular, this confrontational role of publicly funded information providers is sometimes contested because of the alleged paternalistic role of the state and the positive notion of political liberty it entails. In the context of library collection management it is generally accepted that the public library should be more than the sum of the wishes of its users. The extreme example of a library failing to adhere to this is the practice of library censorship, which typically entails the removal of material at the request of certain members of parts of the public. Before discussing library censorship, the question about access and collection governance will be addressed through a discussion of the public forum doctrine in United States constitutional law as applied to the public library context.<sup>523</sup>

Obviously, from the perspective of the library materials, there are some hurdles to be taken for them to enter a library.<sup>524</sup> First, recognized publishers are a very important proxy for library collection management. Unpublished material does not usually enter a library, unless it is of local or historic interest. Local libraries might be interested in archiving material relating to the history and culture of the local community. Products of vanity publishers, i.e. publishers that make profits out of charging the author for publication, are usually disregarded. Certain independent and alternative publishers could be included, but clearly have a special position.<sup>525</sup> Importantly, commercial communications are not included in a library. Furthermore, there could be a standard relating to type of material and its format and for books there could be standards like the number of pages.

The fact that the library's collection policy mostly relies on publishers implies that the issue of possible illegal material not often arises. In most cases, the library can rely on publishers to have taken responsibility for the publication of the material. It is possible that a publication turns out to be illegal afterwards. In these circumstances, the library has to make a choice what to do with the illegal material in its collection. It can destroy the material, or it can make it inaccessible or restrict access but keep it archived. If a public library has archival functions as well, the latter option is preferable. The digital library presents a set of new issues in this context, since publishers often keep control over the materials in the collection and the library does not have a physical copy of the material itself.<sup>526</sup>

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<sup>522</sup> See Sunstein 2002; Sunstein 2007.

<sup>523</sup> See e.g. Stone 1974; Bevier 2003; Nunziato, 2005.

<sup>524</sup> For a discussion see Gardner 1981.

<sup>525</sup> See Gardner 1981.

<sup>526</sup> See e.g. Besek & Loengard 2008.

The question whether a library should be seen as a public forum was explicitly answered negatively by the Supreme Court in its heavily divided ruling on the Children’s Internet Protection Act (CIPA), which tied restrictions to library funding to the libraries’ freedom to provide access to the Internet:

*“A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to “encourage a diversity of views from private speakers [...]”<sup>527</sup>*

The public forum doctrine, the practical implications of which are rather limited because the Court has restricted its application to traditional public fora, i.e. public parks and streets,<sup>528</sup> was first introduced in *Hague*<sup>529</sup>, which overturned *Davis*.<sup>530</sup> *Hague* clarified that the government was not allowed full discretion with regard to the regulation of expressive activity in streets and parks, because of their historical function. Streets and parks were considered to function like the public information space per se, the metaphorical town hall. The Court complicated matters in *Adderley*, in which it introduces the concept of a semi-public forum, i.e. a designated public forum for specific purposes, thereby possibly limiting expressive liberties.<sup>531</sup> Since then, the Court has expressly dismissed a range of public forum claims, including for utility poles<sup>532</sup> and airports<sup>533</sup>. If public property is not a public forum, the government has much more leeway to impose restrictions on expressive liberties: restrictions only need to be reasonable, as long as they are not viewpoint based.<sup>534</sup>

#### 7.4.5 Censorship in the context of libraries

Censorship of materials in the context of libraries is an interesting issue which illustrates the possible conflicts between the selection governance of libraries on the one hand and the demands and

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<sup>527</sup> *United States v. American Library Association*, 539 U.S. 194, 207 (2003).

<sup>528</sup> The Supreme Court has limited the public function doctrine to functions that are traditionally an exclusive function of the State, *Hudgens v. National Labor Relations Board*, 424 U.S. 527 (1974). See also Stone 2009 p. 1550.

<sup>529</sup> *Hague v. CIO*, 307 U.S. 496 (1939) (famous dictum by Justice Roberts, limiting the possibility the government to restrict speech in streets in parks on the basis of their historical function).

<sup>530</sup> *Davis v. Massachusetts*, 167 U.S. 43 (1897) (concluding that the government may limit the use for speech purposes because it may even end the use for public purposes altogether).

<sup>531</sup> *Adderley v. Florida*, 385 U.S. 39 (1966) (“*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.*”)

<sup>532</sup> *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (arguing that “[t]he mere fact that public property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted”).

<sup>533</sup> *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (deciding in a complicated set of opinions of a heavily divided Court that publicly owned airport terminals are not public fora, because they, having made a late appearance in society “cannot be said have immemorially [...] time out of mind been held in the public trust and used for purposes of expressive activity”).

<sup>534</sup> See *Perry Educators’ Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983). With regard to a public forum content related speech restrictions must be serving a compelling state interest and must be narrowly tailored. Content neutral restrictions must be reasonable. If public property is merely designated for speech purposes (voluntarily) it is bound by the same standards. The public owner can however withdraw the designation for speech purposes. A third category is property that is neither a forum for speech by tradition (streets and parks) or by designation.

expectations of the various elements in the served community on the other hand. It has renewed relevance in the context of Internet content filters on library Internet access points.<sup>535</sup> Library censorship, a non-legal notion, should not be conflated with the notion of prior restraints with regard to publications discussed in Chapter 5 and 6. In the context of libraries, censorship is typically understood as the suppression, removal, or deletion of material from a library's collection because it is considered objectionable. The discussion about library censorship often includes the discussion of systematic biases in the decisions to *include* materials in the collection for the apparent reason that the non-selected materials are considered objectionable.

A central complexity in the context of library censorship stems from the fact that the selection of materials for the library's collection is exactly a daily task of librarians. Therefore, library censorship, i.e. the undue suppression, removal or deletion of materials from the collection, has to be differentiated in one way or another, from the normal selection decisions. This distinction is not easily made. The normal selection decisions are informed by the library profession and practice, but what this selection should be is not carved in stone.<sup>536</sup> A classic explanation of the example by Asheim is as follows: "*The all-important difference seems to me to be this: that the selector's approach is positive, while that of the censor is negative.*"<sup>537</sup> In practice, librarians have considerable leeway in selecting the material they want to include in their selection. First, they are considered to be the experts as regards the proper selection of materials. Second, they have to select quite restrictively simply because of the limited resources available. In other words, an effective safeguard against censorship – undue interference with library collections – should first and foremost be part of the professional ethics of librarians.

As mentioned above, the primary reason for the suppression of material is its controversial or objectionable nature in the eyes of the library's constituency, which could include the librarians themselves. The fact that public libraries typically have educational purposes and their collections should be suitable for children is a more specific reason for the suppression of materials. The complexity is that the constituency should also inform the selection process; the library is supposed to take the needs and wishes of its constituency into account. Of course, these needs could be seriously biased.<sup>538</sup> If the constituency and the librarians of a particular library are predominantly evangelical Christians, this will probably be reflected in that library's collection decisions. Although some bias in terms of selection is acceptable, the collection policy of public libraries in the European context should always take account of the demand of pluralism.

It is worth noting that there are different ways library censorship takes place in practice. One of them would be the intentional suppression or exclusion of material from the collection because of its origin background or expressed views. Another would be the removal of such material from the collection after protests by members of the user community. Both these forms of library censorship can be the result of actions by individual librarians or the library's management. A different but quite common

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<sup>535</sup> *United States v. American Library Association*, 539 U.S. 194 (2003), 201 F. Supp. 2d 401 (ED Pa. 2002).

<sup>536</sup> See Gardner 1981; Osburn and Atkinson 1991.

<sup>537</sup> Asheim 1953.

<sup>538</sup> See Gardner 1981. The third normative value of Huysmans also reflects this. A bias stemming from a biased constituency still still have to respect the limits placed by the principle of diversity.

form of undue interference with library collections is the removal or destruction of materials by library visitors.<sup>539</sup>

The classical examples of censorship in libraries in the Netherlands and elsewhere relate to sex, politics or religion. In the Netherlands, public libraries with a certain religious background would bring their collections in accordance with religious views. For instance, catholic libraries in the Netherlands used to censor their collections. In particular, there have been many attempts to censor information about homosexuality and homosexual lifestyle.<sup>540</sup> The selection of books by public libraries which inform young adults about homosexuality remains a very controversial issue in United States local communities. In the Netherlands, both the code of conduct for public libraries and the code of conduct for librarians mention censorship as forbidden practice. Both codes lack a definition of censorship but seem to understand it as the undue interference with the library collection by the government and third parties. There does not seem to be a formalized framework for tracking library censorship.

In the U.S., censorship in the context of public libraries is a more hotly debated topic and the library community has developed several instruments to deal with the issue.<sup>541</sup> First of all, the American Library Association (ALA)'s library bill of rights, which deals with public library collection governance, specifically addresses the censorship of materials. The prohibition of censorship in libraries in the library bill of rights was heavily debated around 1950 when there was strong pressure on libraries to label and censor communist materials.<sup>542</sup> In the U.S., some libraries have come up with a special procedure for removing material from a library collection and a special office for intellectual freedom of the IFLA collects and publishes data on such challenges each year, thereby providing some transparency. The library bill of rights provides that “[m]aterials should not be excluded because of the origin, background, or views of those contributing to their creation, [...] should not be proscribed or removed because of partisan or doctrinal disapproval.”<sup>543</sup> The guidelines also envisage a role of the library to “challenge censorship in the fulfilment of their responsibility to provide information and enlightenment [...] and cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.[...]”<sup>544</sup>

Although library censorship was hotly debated in the United States throughout the 20<sup>th</sup> century and around 1950 in particular, it took until 1983 for the first case relating to public library censorship to reach the United States Supreme Court.<sup>545</sup> In *Pico*, the Supreme Court addressed the right to access books in a public school's library after the local school board decided to exclude nine books from its collection and the permitted school curriculum for its teachers. Reportedly, the school board had based its decision, which it took after having been provided with a list of objectionable books by a conservative parents group in New York State, amongst other considerations on the view that the books were “anti-

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<sup>539</sup> Van Dijk 1994.

<sup>540</sup> For an overview of censorship issues in the public library in the Netherlands see Van Dijk 1994; Dingemans 1980.

<sup>541</sup> See Bosmajian 1983.

<sup>542</sup> See Robbins 1993..

<sup>543</sup> American Library Association 1996.

<sup>544</sup> American Library Association 1996.

<sup>545</sup> *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982).

American”.<sup>546</sup> According to the Supreme Court, the First Amendment did “*impose limitations upon a local school board's exercise of its discretion to remove books from high school and junior high school libraries.*”<sup>547</sup> The local school boards’ “*broad discretion in the management of school affairs [including the decision to remove books from the school library's collection, JvH] must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.*”<sup>548</sup> In other words, whether or not an action of removal of books from the school's library violated the First Amendment depends on the motivation for removal. The discretion of the school board to remove books ends where it is exercised in “*in a narrowly partisan or political manner.*”<sup>549</sup> It is important to note that the majority opinion explicitly excluded the issue related to the acquisition of books. The Court based its conclusion with regard to the discretion of the school boards on their discretion with regard to educational affairs. Public school students do have some First Amendment liberties in the context of schools but they are colored by the educational environment.

*Pico* restricts the possibility of legal action against library censorship as defined above. First, although the Court recognizes a right to receive information in the context of a public institution, a school board does not have a general positive obligation to guarantee substantive civil liberties of students through the management of its library. The right to receive information freely in this context, as acknowledged by the Court in *Pico*, may be better understood as an exception: a right not to be the subject of a strict orthodox collection policy. The school board's discretion is not absolute but can be exercised without problems as long as it is not clearly displaying a willingness to act in a narrowly partisan or political manner.<sup>550</sup>

#### **7.4.6 Libraries as access points to the Internet**

Libraries do not only offer access to materials that are available in their own collections but also information about and access to materials elsewhere. Not surprisingly, nowadays public libraries also provide Internet access. In addition to their own material, the Internet and the World Wide Web provide a wealth of information for library users. Both in the United States and Europe, the library is also a typical place for the promotion of Internet access through public Internet access terminals.

Of course, the Internet and the Web, because of the uncontrolled nature of these environments, also contain material which used to be absent in library collections, such as commercial communications, pornography and possibly even plainly illegal material. In particular the fact that Internet access terminals could also be used to gain access to indecency has led to controversial regulatory action and litigation in the United States.<sup>551</sup>

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<sup>546</sup> Notably, the excluded books included Pulitzer prize winners: *Laughing Boy*, by Oliver LaFarge and *The Fixer*, by Bernard Malamud.

<sup>547</sup> *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982).

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> For further discussion see also Bosmajian 1983

<sup>551</sup> Filtering by public libraries is also common in the Netherlands. See also Section 6.5.

After the initial attempt of the U.S. legislature to suppress access to indecency online through the Communications Decency Act (CDA) and the Child Online Protection Act (COPA), Congress passed the Children’s Internet Protection Act (CIPA).<sup>552</sup> CIPA tied an obligation for public libraries to install Internet content filters to library funding. The American Library Association contested the constitutionality of this obligation on First Amendment grounds and the case was finally dealt with by the Supreme Court. The Court concluded, unlike the Court of Appeals, that libraries are not a public forum and have always had to exclude material from their collections.<sup>553</sup> The Court started by linking the way Internet access was being provided to the traditional role of libraries:

*“A public library [...] provides Internet access, [...] for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”*<sup>554</sup>

In other words, restrictions on the availability of material in a public library simply follow from the library’s task to preselect suitable material, i.e. of *“requisite and appropriate quality”*, and make it systematically available to its users. As a result it was clear for the Court that the First Amendment could not have the implication that public libraries were obliged to provide access to all the material online. Hence they were entitled to deploy filtering on their Internet access points. The Supreme Court reasoned as follows:

*“A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries’ judgments to block online pornography any differently, when these judgments are made for just the same reason.”*<sup>555</sup>

There would be more to say for this reasoning,<sup>556</sup> if it weren’t the case that the public libraries themselves, represented by their national association, expressed their discomfort with the de facto *obligation* to install filters. The conflict was not whether or not the libraries were entitled to select access to material, or install filters on Internet access terminals, but whether the government was allowed to compel them to do so. The Court answered this question by first casting doubt whether libraries could *themselves* claim protection under the First Amendment in their relation to Congress (because they were public entities themselves). It then distinguished a First Amendment case, in which it

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<sup>552</sup> See also Chapter 6.4.4.

<sup>553</sup> *United States v. American Library Association*, 539 U.S. 194 (2003), 201 F. Supp. 2d 401 (ED Pa. 2002)

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> See Bevier 2003. BeVier praises the plurality for its opinion and laments the divergence of opinions about the implications of the First Amendment for the constitutionality of CIPA, and in particular the attempt of a number of dissenting Judges to extent the protection of the First Amendment to anything that would look like a positive obligation in the context of libraries. See also Gardbaum 2003; Gardbaum 2008; Sullivan 1989, Schauer 2004.

had concluded that government funded legal aids could assert the protection the First Amendment in the following manner:

*“Public libraries, by contrast, have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.”*<sup>557</sup>

The Court finally resolved the issue by its conclusion that the restrictions must be qualified as normal collection decisions and that CIPA did not *require libraries* to install the filters. It merely made government funding for Internet access terminals conditional on the application of filters. The Court did attach weight to the fact that the filtering would be accompanied with a procedure to request access to unduly blocked material.

The Court’s view, cited above, is not only remarkable in its disregard of the actual sentiments of the American public library community. It is also remarkable in view of our discussion in section 7.3.2, where we concluded that freedom of expression implied independence of the publicly funded library from its funders in terms of its collection and accessibility governance. More generally, it is inconsistent with the right to freedom of expression as a constitutional check against undue interference by the legislative and executive branch, one of the primary reasons for constitutional safeguards to exist in the first place. The wide margin of discretion that is offered to the legislature to influence the library’s collection policy, does not fit very well to an information law and policy perspective, in which freedom of expression implies a minimal amount of government involvement in terms of restricting content flows. It fits much better to the sphere of cultural educational and welfare policies of the state, in which the state is granted a much wider margin of discretion.<sup>558</sup>

#### **7.4.7 Unmonitored Access**

Public libraries provide access to its collection in a public space and the way in which access is provided will affect actual library usage. Depending on the architecture of the library and its collection accessibility governance, the library users may be able to as well as actually feel free to use the library to for their personal inquiries. The architecture and spatial management of the library will affect its use and tends to reflect ideas about accessibility governance. The library catalogues, its usability and the availability of assistance will affect whether users will actually find resources. Similarly, the extent to which the library users’ movements in, browsing through, searching in and lending from the library without being specifically registered, will undoubtedly affect the behavior of its users. The digital library in particular and the subsequent introduction of electronic information retrieval and library management systems presents libraries with the question how to protect the privacy of their users.

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<sup>557</sup> *United States v. American Library Association*, 539 U.S. 194, 213 (2003). The Court distinguishes *Legal Services Corporation v. Velazquez*, 531 U. S. 533 (2001). This conclusion is remarkable in light of the history of well-documented attempts by public officials to remove material from libraries for politically motivated reasons.

<sup>558</sup> The Supreme Court’s case law on the limited First Amendments implications for government spending discretion is controversial. For a discussion, see Sunstein 1993, pp. 36-41.

The privacy of library users is considered an essential part of the freedom of expression and information in the context of public libraries.<sup>559</sup> The right of freedom expression and information may be of lesser value if there can be no legitimate expectation of privacy when searching for and accessing information and ideas.<sup>560</sup> Since the library is typically seen as a place for intellectual activity worthy of protection, the public library sector has repeatedly stood up against government interference into their user's privacy and anonymity.<sup>561</sup> Of specific concern for libraries has been the possibility for other government agencies to access personally identifiable data on the use and lending data of library materials by individual library users.<sup>562</sup> The United States Patriot Act, introduced shortly after the attacks on the World Trade Center in 2001, contained several provisions that allowed law enforcement and national security agencies to gain access to library user data. In 2006, the Dutch legislature passed a law to override personal data protection and facilitate access to personal data held by entities in the public and private sector. The law contains no exceptions for data on intellectual activity such as data held by public libraries.

It has to be noted that libraries are not completely consistent in their appeal for user privacy. From the library's perspective, the collection of data on lending behavior and the use of databases and catalogues is relevant because libraries would like to recommend users certain books based on their lending histories, thereby better satisfying the needs of their users. Precisely because of the possibilities to improve their service to library users, libraries are inclined to store more and more personal data on the use of their resources. Hence it is clear that the electronic environment increases the challenge to protect the privacy of library users. These issues in the context of search engine user privacy in more detail in Chapter 8 and Chapter 10.

## 7.5 Conclusion

Libraries may be the oldest societal institution dealing with the selection and accessibility governance of sources of information and ideas. This chapter has provided a short overview of their background and looked more closely into the implications of the right to freedom of expression for the governance of the selection of and access to collections in the context of public library. Public libraries, like the press and many other traditional knowledge institutions, are going through a transition phase related to digitization and the Internet, a transition which could have a considerable impact on the public libraries' role and future in the information society.

There is a considerable difference with regard to the understanding of freedom of expression in the context of libraries between European countries and the United States. In the American context, much more emphasis is placed on the freedom of speech and individual rights in the library context. This is probably best illustrated with the fact that most public libraries have a bill of rights. This could be explained by the continuing pressure on public libraries in the United States to suppress controversial

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<sup>559</sup> On Privacy in the context of libraries, see e.g. Sommer 1966. See also Nissenbaum 2010, pp. 195-196.

<sup>560</sup> For a discussion see Richards 2008.

<sup>561</sup> See Schepman et al 2008.

<sup>562</sup> In the U.S. there are several library-specific laws (state level) that protect the privacy of library users. See Richards 2008, note 190 and accompanying text.

material. One of such library censorship cases at the level of the United States Supreme Court, *Pico*, was addressed in more detail. The Court concluded that the First Amendment does not restrict public libraries from removing controversial content from the library collection as long as they do not act “*in a narrowly partisan or political manner*”.<sup>563</sup>

European scholars argue that by funding public libraries, the state is acting under its positive obligation to promote basic levels of access to information, ideas, culture and knowledge. The collection, classification and accessibility governance in the public library is a matter left to the library profession and independence from undue interference by public authorities and other external influences is considered a fundamental value.

In the United States, the Supreme Court is unwilling to accept any such positive obligations for the state to promote the substantive liberties of its citizens or interpret state funding to promote access to information in this light. In fact, in its last ruling on public libraries, which involved the constitutionality of CIPA, the Supreme Court ruled that public libraries have “*no [...] role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.*”<sup>564</sup> It is striking that precisely in the United States, where individual political liberties have had such an impact on library governance, the value of political independence of libraries from the state in the context of collection and accessibility governance is disregarded by the Supreme Court.

It was shown that many of the normative principles developed in the context of the public library can be linked to the underlying ideals of the right to freedom of expression. Public libraries are supposed to provide their constituencies with a collection that respects the principles of pluralism and diversity. As such, they will sometimes confront library users with material they might not have selected themselves. It was noted that due to their role of making selection decisions with regard to the collection, library censorship, understood as the undue suppression or removal of material in public libraries can be hard to distinguish from normal selection decisions. Once libraries have selected material for inclusion in their collection, the governance of accessibility is focused on facilitating access for its users. It was noted how access to material and references to material elsewhere, the Internet in particular, will affect library usage considerably. In addition, it puts pressure on the traditional role of libraries only to provide access to material of a basic quality. Finally, from the perspective of free access to information, the unmonitored access to library materials is of particular concern in the context of libraries.

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<sup>563</sup> *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982).

<sup>564</sup> *United States v. American Library Association*, 539 U.S. 194, 213 (2003).