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Are Private, Not Public Policy

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Over the years, questions have arisen concerning the application of the *Library Bill of Rights* principles to specific library practices. One of the first, a 1951 Peoria, Illinois, case involving films in the public library, required the American Library Association (ALA) to clarify the application of the *Library Bill of Rights* to nonprint materials. A recommendation by the ALA Intellectual Freedom Committee and the Audio-Visual Board resulted in the ALA Council's adding an interpretive footnote explaining that the *Library Bill of Rights* applies to all materials and media of communication used or collected by libraries. More than fifty years later, these questions have resurfaced at the Cook Memorial Public Library District. Members of the library board proposed that the library use the Motion Picture Association of America (MPAA) movie rating system to restrict minors' access to movies. The following is an excerpt from Deborah Caldwell-Stone's recent presentation to that board on this issue. Deborah is deputy director of the ALA Office for Intellectual Freedom.

Over the past several months, advocates claiming to advance “family values” and “community standards” have urged several local library boards to adopt policies restricting minor patrons’ access to DVDs and videos rated R, or Restricted, by the Motion Picture Association of America (MPAA). Adoption of the MPAA ratings system as a means of restricting minors’ access to certain films or videos raises significant legal concerns for public libraries.

A Private and Voluntary Ratings System

To understand the legal risks involved, it is important to understand the role of the MPAA and the nature of its ratings system. Despite public perception to the contrary, the MPAA is not a government entity, nor are its activities sanctioned by local, state, or federal government. It is a private trade association whose members produce and distribute motion pictures in theatres, on television, and by release on videotapes and DVDs. As one of its services on behalf of its members, the MPAA administers the Classification and Ratings Administration (CARA), the organization responsible for awarding ratings to motion pictures. The MPAA administers CARA as a means of giving parents advance information about a film, so the parents can decide whether a film is appropriate for their child.

A filmmaker who wants an MPAA rating affixed to his or her film submits the film to CARA, whose reviewers watch the film and decide which rating is appropriate—G, PG, PG-13, R, and NC-17. Ratings can be assigned based upon certain criteria—the number of expletives used in the dialogue, or the number of times a body part is exposed, or the number of murders or injuries that take place within the film. Ratings can also be assigned based on how the reviewer perceives the film as a whole. Whatever the rating, it is meant to serve only as an informative advisory for parents. An MPAA rating is not, and has never been, a legal determination that a particular motion picture is “obscene,” or “obscene as to

minors,” or “harmful to minors.”

Only a court of law can make that determination.

The MPAA itself emphasizes that its ratings system is strictly voluntary and has no force of law. No law requires a filmmaker to submit a film for a rating, and no law requires a theatre or video dealer to follow the MPAA ratings guidelines when selling movie tickets or DVDs. Those who participate in the MPAA ratings system are doing so voluntarily to provide a service to parents.

The Library as Government Agency

Public libraries, as government agencies, are bound by the requirements of the U.S. Constitution and the Bill of Rights. In *Board of Education of Island Trees v. Pico*, the Supreme Court affirmed that the First Amendment protects the library user’s right to receive information in the public library.^①

Public libraries cannot restrict a user’s access to library materials on the grounds that the content of the materials is somehow objectionable or unsuitable. Rules and policies that restrict access to library materials because of their content create a presumption that the library is engaging in an unconstitutional prior restraint of constitutionally protected speech. This presumption arises even when the library user is a minor, for minors unquestionably possess First Amendment rights. As the Supreme Court noted in *Erznoznik v. Jacksonville*, “speech that is neither obscene as to youths nor subject to other legitimate proscription cannot be suppressed solely to protect the young from ideas or images a legislative body thinks unsuitable for them.”^②

In addition, restrictions on users’ access based on the content of library materials must meet exacting requirements to pass constitutional muster. For adults, this means a court must find that a film is obscene under the test set out in *Miller v. California*.^③

In the case of minors, such restrictions can only be enforced when a court of law determines that a movie is “obscene as to minors” or “harmful to minors” under Illinois law.^④

When a library imposes restrictions on a user’s access to a film before a court of law determines its legal status, the library, as a government agency, must provide a means and an opportunity for a hearing on the validity of the restriction at the earliest possible time.

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A public library's use of MPAA ratings as a means of restricting minors' access to films fails to comply with any of these legal standards. The MPAA candidly admits that its reviewers make no use of the tests for obscenity imposed by state or federal law when they assign ratings to films.⁵

Instead, the reviewers employ imprecise, subjective, and frequently changing criteria that provide no notice to the filmmaker or the viewer regarding precisely what content is proscribed, or why. And when a public library adopts the MPAA ratings to restrict minors' access to certain films, there is no means at all for judicial review of the prohibition. The public library's restriction on films represents a presumptively unconstitutional prior restraint on speech.

Public Institutions and Private Standards Don't Mix

As a government agency, the public library is empowered to set policy and create rules for the operation of the library by the authority granted to the library's board by state and local laws. And as a government agency, its policies and implementation of rules are subject to review by the legislature and the courts.

But when a library uses MPAA ratings to restrict users' access to films, it is delegating its power to make rules for the operation of the library to a private, unregulated organization that is not subject to oversight by a court or legislature. By giving over the library's authority to make policy to a private organization—authority reserved by Illinois state law to the library district and its board—the library can violate the Due Process Clause, which assures citizens that every act taken by a government entity is subject to proper checks and balances under the law.

Courts across the country have relied upon these constitutional standards to invalidate the use of MPAA ratings as a means of restricting access to films in a variety of contexts. Among the cases are *Engdahl v. City of Kenosha*, which invalidated a Kenosha, Wis., ordinance using MPAA ratings to prohibit minors from seeing certain films⁶ and *Motion Picture Association of*

America v. Specter, which invalidated a criminal statute penalizing theatres that allowed minors to view films rated “not suitable for children” by the MPAA.⁷

More recently, federal courts in Chicago and St. Louis invalidated local ordinances that relied upon a private ratings system for video games to regulate minors' access to video arcades, reinforcing the principle it is unconstitutional for a government entity to use private ratings systems to restrict minors' access to protected expression.⁸

Thus, any library choosing to use or enforce the MPAA ratings as a means of restricting young people's access to videos or DVDs in its collection risks a significant constitutional challenge to their policy. Such challenges may consume staff and board members' time in court defending the policy. In addition, as a government agency, the library runs a financial risk in any lawsuit based upon the First Amendment and the Constitution. Should the library lose the legal challenge to its use of the MPAA ratings system, it can be required to pay the successful plaintiff an award of court costs and attorneys fees. Such awards are authorized by Section 1983, the federal law that grants citizens the right to sue the government when the government violates their civil rights.

Ethics and the Law

Restricting young people's access to films, videos, and DVDs is not only a legal issue for libraries and librarians; it is an ethical issue, as well. Article V of the ALA's *Library Bill of Rights* unambiguously calls on libraries and librarians to support and defend the young person's right to freely access ideas and information in the public library. The ALA statement “Free Access to Libraries for Minors: An Interpretation of the *Library Bill of Rights*,” outlines the ethical obligations of the library and the librarian in regard to youth, parents, and access to library materials:

“Parents—and only parents—have the right and the responsibility to restrict the access of their children—and only their children—to library resources.

Parents or legal guardians who do not want their children to have access to certain library services, materials, or facilities, should so advise their children.

Librarians and governing bodies cannot assume the role of parents or the functions of parental authority in the private relationship between parent and child. Librarians and



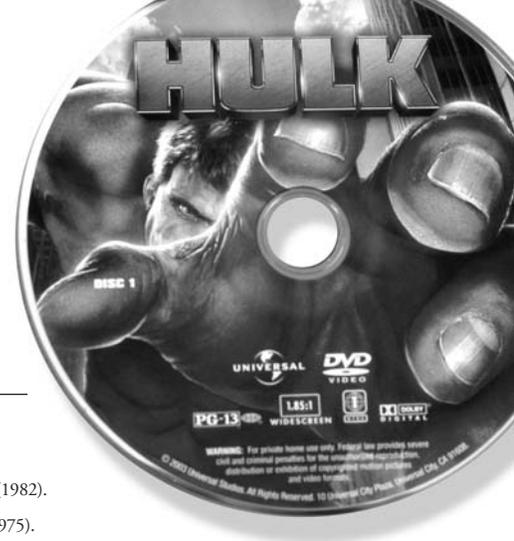
governing bodies have a public and professional obligation to provide equal access to all library resources for all library users.”⁹

Libraries are not strangers to the controversy over the use of the MPAA ratings system to restrict access to films in a library’s collection. In 1989, in response to this controversy, the ALA Council adopted the resolution, “Access for Children and Young People to Videotapes and Other Nonprint Formats: An Interpretation of the *Library Bill of Rights*,” to provide librarians with guidelines for addressing the issue:

“Policies which set minimum age limits for access to videotapes and/or other audiovisual materials and equipment, with or without parental permission, abridge library use for minors. Further, age limits based on the cost of the materials are unacceptable. Unless directly and specifically prohibited by law from circulating certain motion pictures and video productions to minors, librarians should apply the same standards to circulation of these materials as are applied to books and other materials.

“Recognizing that libraries cannot act in *loco parentis*, ALA acknowledges and supports the exercise by parents of their responsibility to guide their own children’s reading and viewing. Published reviews of films and videotapes and/or reference works which provide information about the content, subject matter, and recommended audiences can be made available in conjunction with nonprint collections to assist parents in guiding their children without implicating the library in censorship.”¹⁰

Use of the MPAA ratings system to restrict young people’s access to films and videos is a violation of the *Library Bill of Rights* and an impermissible prior restraint on free expression. Public libraries considering the use of the MPAA ratings to restrict young people’s access to videos and DVDs should instead turn to other, proven methods to guide young people’s choices in the library. The library’s professional staff can be asked to create collection development and usage policies that are consistent with both professional ethics and the law; acquire materials that provide parents with the resources and information they need to guide their child’s choices; and develop programs and workshops for young people that teach them the critical viewing and thinking skills they need to make good judgments for a lifetime of reading and viewing.



Footnotes:

- ① *Board of Education v. Pico*, 457 U.S. 853 (1982).
- ② *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).
- ③ *Miller v. California*, 413 U.S. 15 (1973).
- ④ *Ginsberg v. New York*, 390 U.S. 629 (1968).
- ⑤ Benjamin Svetkey, “Why Movie Ratings Don’t Work,” *Entertainment Weekly*, November 25, 1994.
- ⑥ *Engahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970).
- ⑦ *Motion Picture Association of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970.) Other court decisions invalidating government entities’ use of MPAA ratings include *Swope v. Lubbers*, 560 F.Supp. 1328 (W.D. Mich. 1983) and *Rosen v. Budco*, 10 Phila. 112 (1983).
- ⑧ *American Amusement Mach. Association v. Kendrick*, 244 F.3d 954 (7th Cir. 2001); see also *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).
- ⑨ “Free Access to Libraries for Minors: An Interpretation of the *Library Bill of Rights*,” American Library Association, 1991.
- ⑩ “Access for Children and Young People to Videotapes and Other Nonprint Formats: An Interpretation of the *Library Bill of Rights*,” American Library Association, 1989.

