

Charging Fees to Access the Internet at Public Libraries

The decision to charge a fee to patrons outside of a library's jurisdictional area to use the library's Internet access is, as with so many library policies, generally considered one of local control and regulation.ⁱ Still, the questions surrounding open Internet access continue to raise debate because there is no bright line in Michigan law to provide guidance, as there is, for example, with the ability to charge a nonresident a fee to borrow library materials.ⁱⁱ We know of no legal authority against charging or limiting access time for those outside of the library's jurisdictional area, but, conversely, none that would (permanently) require access to be unlimited, either.

In researching these issues, we located information that may help to inform a library board of some of the arguments for and against charging guests (or anyone, really) for Internet use. Things to consider when developing a library policy on Internet access fall into three large areas of concern: 1) restrictions or requirements put in place by equipment or service supplier funding; 2) Michigan law as set forth in court decisions and statute; and 3) questions of civil rights and equal protection under state and federal constitutions. As with all articles appearing on the Trustee Corner pages, the materials here are presented as information and commentary only and should not be considered legal advice with respect to a particular library's circumstances. Any policies developed by the library should be reviewed by the library's board with assistance from the institution's legal counsel.

Equipment or service supplier funding: First and foremost, the library should review the funding criteria associated with the purchase or acquisition of any technical equipment or service facilitating electronic materials or Internet access. What were the funders' goals for materials made available through the equipment and services? For example, is the object more robust or updated access to federal information, continuing education and other forms of online learning or job training? Were the computers purchased or services provided through a grant or similar funding that was designed to facilitate open and unrestricted use of some of these Internet-based types of resources?

Charging for the use of grant-funded equipment is generally disallowed, except after a period of time. For example, when computers were made available to many Michigan libraries through grants from the Bill and Melinda Gates Foundation, the application that the Library of Michigan filed on behalf of the libraries stated that the "grants will be made only to public libraries that provide direct access to

computers for public use, and will operate and administer the computers and Internet access without charges or fees to library patrons.”ⁱⁱⁱ Charging for access in the above circumstances would violate express contract provisions, a circumstance that could jeopardize any future grant opportunities.

The agreements associated with the Gates Grant were only in effect, however, from August 1, 2005 to December 31, 2008. Grant requirements often remain in force only during the period of the grant itself.^{iv} Under such terms, then, computers funded with Gates money would no longer have free and open access requirements. On the other hand, it could be argued that the essence of the grants, expressed repeatedly in language found throughout the application material, was to make resources obtained through this funding openly available at no cost to any and all visitors to the library: viewed from this perspective then, the policy set by the original terms of the grant should arguably be continued.

In some situations, conditions of use and access are never actually put place by the funding entity or organization, but the principal driving the award arguably remains the same. The Broadband Technology Opportunities Program, or BTOP, for example, has provided the majority of public libraries in the state with new public access computers within the past three years. When Michigan State University received BTOP funding in 2010 for public access computers, the Library of Michigan became involved to encourage libraries seek to out these grants with the goal of seeing public access to the Internet expanded for all library users , not just those who could pay or who did pay through local taxes. Indeed, the underlying purpose of BTOP Public Computer Center Projects was to expand existing library computer centers by selecting sites with “vulnerable population areas” and by targeting “libraries with greatest need for additional computing capacity” for awards. ^v A number of federally-determined factors were considered to evaluate eligible sites for these awards, including whether “any membership or usage fees” were charged.^{vi} This would imply that the ultimate, long-range goal of BTOP funding is open and unrestricted access to the resources these funds have helped to make available.

Michigan law: Michigan courts have interpreted the Michigan Constitution of 1963 to support the concept that libraries have the ability to regulate use and access to their collections, see, e.g. *Goldstone v Bloomfield Township Public Library*.^{vii} While the Michigan Constitution requires the Legislature to make public libraries “available” through the legal mechanism of establishment by local communities, the Court explained, it does not require each library to offer unlimited access to everyone who comes

through its doors.^{viii} The Court stated that the Bloomfield Township Public Library's policy of not offering nonresident book-borrowing privileges was constitutionally acceptable because no public library is required to offer someone outside of the library's jurisdictional area services identical to those available to members of the jurisdictional area. To do so, the Court commented, "would disincentivize communities from maintaining libraries by making improvements and new accessions identically available to persons who had and who had not paid for them."^{ix} To accept plaintiff Goldstone's argument, the Court stated, would be to have these identical services "subsidized by the taxpayers of another community," an "anomalous result not compelled" by the Michigan Constitution.^x

The holding of *Goldstone* appears to have gained traction when it was cited a few years later in *Herrick District Library v Library of Michigan* for the proposition that "local control of libraries, and the different privileges it may entail, is not only constitutionally permissible, but clearly reflects the intent of the delegates who drafted the current [1963] Constitution."^{xi} It could be argued, however, that *Goldstone* does not truly reach the question of access to materials within the library itself, including the Internet and online databases. While the defendant library in *Goldstone* did not permit non-residents to "fully access online databases and other programs, services, and activities that were regularly available to township residents," the Court limited its discussion of access to borrowing privileges and did not directly address the library's ability to limit computer use within the building.^{xii}

Under *Goldstone* and *Herrick*, restrictions or fees for those outside the library's jurisdictional area are legitimate and viewed as a means to "incentivize" local communities to provide good and innovative service to residents in part by preserving the library's resources for those that have paid for them through local taxes. Both cases, however, leave ample room for the argument that the public library is the only practical place in many cases for individuals entitled - and perhaps in the greatest need - to receive information provided through the Internet to do so. In providing open access to computers and electronic materials in the library itself - even if just on a few completely open terminals - a library is effectively providing for the greater civic good and carrying out the intent of grantors that provided funds for "those most vulnerable."^{xiii}

Equal Protection, civil rights issues and "reasonableness": The *Goldstone* court found the library's policies on book borrowing did not violate the plaintiff's rights to equal protection and access to the library under the US and Michigan constitutions, holding that such policies were a "reasonable way" to

achieve the purpose of making the library available to members of its legal service area. However, library policy should avoid being so restrictive that it might be challenged under a civil rights rubric. While it is possible under Michigan law for a library to limit access based upon residency or contractual status, a policy that required a non-resident to pay a fee in excess of what it would reasonably cost the library to supply the service to one of its own jurisdictional patrons might be subject to constitutional scrutiny. Policies should also be crafted so that they do not create, even unintentionally, the appearance of discriminating against or otherwise disenfranchising a particular group. Finally, the policy should demonstrate that it is related to the desired end: does the policy, for example, limit access because demand exceeds capacity or because the individual who wants to use the equipment has book fines that have not been paid? Allocation of limited resources is likely to be considered reasonable, while a correlation between fines and use restrictions would most likely be seen as punitive and possibly discriminatory.^{xiv}

Conclusion

While it is understandable that a local library wants to maximize its resources for those in its jurisdictional area, the public library is often the only means of Internet access for many individuals from unserved areas or without close proximity to some other type of public access. For this reason, the Library of Michigan supports open and free in-house access to the Internet for all library users regardless of whether they are in the library's jurisdictional area, the library's contractual area, or perhaps just visiting the area and needing to use a resource available at the library. Offering these resources, including providing open and free Internet access and related computing capabilities to all users of the library can only (and does) heighten the profile of the library in its own and surrounding communities.

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ⁱ Members of a library's "jurisdictional area" are those whose local tax dollars help to finance the library's operations - usually through a millage - or who live in a municipality that funds operation of the library through its tax dollars. According to *Herrick District Library v Library of Michigan*, 293 Mich App

571, 575-76, a “jurisdictional service area encompasses the territory within a library’s legal boundaries where the electors are authorized to vote on library millage and may be eligible to be library board members.”

ⁱⁱ State Aid to Public Libraries Act, Section 11a, MCL 397.561a. May be found online on the Michigan Legislature website at <http://legislature.mi.gov>.

ⁱⁱⁱ Public Access Computer Hardware Upgrade Program, Grant Application, 2006. On file at the Library of Michigan. Documents explaining the technical requirements for libraries for the “PACHUG” program note moreover that the Gates Foundation defined a “Public Access Computer” as one “available for access by the public at no cost and without intervention by staff.”

^{iv} For example, general administration guidelines for LSTA grants include a provision that “Libraries may not charge patrons for the use of materials or equipment acquired with LSTA funds during the grant period. After the close of the grant, fees are a matter of local policy.” Library of Michigan, Modeling the Future Grant Administration Handbook, p. 7 (2008)

^v See “MSU Grant Will Help Expand Broadband Access in Michigan,” viewed on December 17, 2013 at <http://msutoday.msu.edu/news/2010/msu-grant-will-help-expand-broadband-access-in-michigan>.

^{vi} 75 FR 3792, 3808

^{vii} 479 Mich 554 (2007)

^{viii} *Goldstone* at 559-60.

^{ix} *Goldstone* at 564.

^x *Goldstone* at 564, n. 9.

^{xi} 239 Mich App 571, 591-92 (2011).

^{xii} *Goldstone* at 557. The library apparently had limited access to electronic materials and online resources, so the specific question was not at issue.

^{xiii} Examples of electronic resources that would speak in favor of open Internet access would be any federal documents including those on websites like healthcare.gov or those containing tax forms or legal information, job training resources, and the federally/state funded MeL databases. Not all of these, incidentally, work effectively on mobile devices, a circumstance which should help put to rest at least one common argument that people do not need the public library for Internet access because “they can use their phones.”

^{xiv} See “A Primer on Library Policies” at http://michigan.gov/libraryofmichigan/0,2351,7-160-18668_18689-54481--,00.html; ALA, “Guidelines for the Development of Policies and Procedures Regarding User Behavior and Library Usage” at <http://www.ala.org/Template.cfm?Section=otherpolicies&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13147> [last viewed on 12/30/13].