



ASSOCIATION OF RESEARCH LIBRARIES[®]

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Advocacy and Public Policy Update

March 31, 2016; Updated April 1, 2016

Below is an update of key advocacy and policy issues of interest to the research library community in Canada and in the US from December 22, 2015, to March 31, 2016, written by Prue Adler and Krista Cox of ARL.

Prior advocacy and policy updates can be found at <http://www.arl.org/news/advocacyandpolicyupdates/term/summary>.

New resources—such as infographics, issue briefs, and videos—are linked from the end of this update.

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Copyright and Intellectual Property

Marrakesh Treaty Needs Four More Country Ratifications; Canada and US Consider Ratifying

Sixteen countries have ratified the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, with Israel being the most recent country to ratify the treaty. Twenty country ratifications are required for the treaty to go into effect. For more information, see the March 21 *ARL Policy Notes* blog post, “[Four More Marrakesh Treaty Ratifications Needed for Entry Into Force.](#)”

In the US, the Obama Administration transmitted the Marrakesh Treaty package on February 10 to the Senate for its consideration. In the transmittal letter, President Obama stated, “narrow changes will be needed for the United States to implement certain provisions of the treaty.” These changes will require the House and Senate Judiciary Committees to consider changes to the Copyright Act. The Senate Foreign Relations Committee will also consider the treaty. The Association of Research Libraries (ARL), the American Library Association (ALA), and others interested in the passage of the treaty are meeting with key Congressional personnel and asking for support of the treaty.

In Canada, Bill C-11 to amend the Copyright Act in preparation for accession to the Marrakesh Treaty was introduced in the House of Commons on March 24. In June 2015, [Bill C-65 was introduced](#) to likewise amend the Copyright Act to prepare for the Marrakesh Treaty, but that bill did not move forward before the election. Among other changes, Bill C-11 would broaden the scope of accessible formats and would allow the exportation of an accessible-format work regardless of the nationality of the author.

Fair Use/Fair Dealing Week 2016 Highlights Balance in Copyright System

This year’s Fair Use/Fair Dealing Week, an annual celebration of the doctrines of fair use and fair dealing, took place February 22–26. The event was organized by ARL and participants included universities, libraries, library associations and many other organizations, such as Creative Commons, the Electronic Frontier Foundation, Public Knowledge, the R Street Institute, Re:Create, and Wikimedia. This year 136 organizations participated—more than double the number of participants in 2015—including 50 ARL member libraries. ARL released an infographic, “Fair Use In A Day In the Life of A Student” and many other great resources were created during the week, including blog posts, comic books, and videos ([five from ARL libraries](#)). For highlights of the week, see “[Fair Use/Fair Dealing Week 2016 Highlights Balance in Copyright System.](#)”

Court Cases

Perfect 10 v. Giganews: ARL Joins Amicus Brief

ARL joined the Electronic Frontier Foundation, Public Knowledge, ALA, and the Association of College and Research Libraries (ACRL) in filing an [amicus brief \(PDF\)](#) on March 2 in *Perfect 10 v. Giganews*, a case involving the liability of online service providers. In the case, Perfect 10 asserts that any service provider whose customers engage in some infringement would be subject to liability, ignoring the actual conduct of the service provider. This position raises the risk that service providers will feel compelled to more closely scrutinize user activities, leading

to the potential for over-blocking of content in an effort to limit litigation and liability. The amicus brief notes that “changes to the legal climate for these service providers can have profound consequences for free expression online” and that Perfect 10’s position would undermine the carefully crafted balance in the copyright system. The brief advocates for the “volitional conduct” standard and urges the Ninth Circuit Court of Appeals to reject strict liability for copyright infringement for intermediaries.

Fox News Network v. TVEyes: ARL Joins Amicus Brief

ARL joined the Internet Archive, ALA, ACRL, and the Society of American Archivists in filing an [amicus brief \(PDF\)](#) on March 23 in a fair use case before the Second Circuit Court of Appeals, *Fox News Network v. TVEyes*. The case involves the archiving of television broadcasts and the creation of a searchable database of the archived content. The brief encourages the Second Circuit to uphold this transformative fair use. Amici point out the importance of preserving television broadcasts—which are ephemeral in nature—to ensure that the historical and cultural record is not lost, to allow for verification of information in past broadcasts, and to promote public discourse and political accountability. The brief also notes that television archives allow for the generation and collection of metadata that researchers can mine and analyze.

Authors Guild Files Petition for Writ of Certiorari to US Supreme Court

On December 31, 2015, the Authors Guild filed its petition for a writ of certiorari to the Supreme Court of the United States asking for review of the Second Circuit Court’s decision affirming fair use of the Google Books project. In October 2015, the Second Circuit held that Google’s copying of books submitted to it by libraries and the display of snippets of those copies is a transformative fair use. The Second Circuit also held that providing digital copies to the partner libraries that submitted the particular works to Google is not an infringement. The Authors Guild challenged this ruling, questioning when a use is “transformative” and arguing that the Second Circuit relies too heavily on evaluating transformativeness in determining whether a use is fair.

It is far from clear whether the Supreme Court will grant the Authors Guild’s petition because, despite the Authors Guild’s contentions, there is not a clear difference or split of opinion between circuit courts as to the meaning of “transformative” for purposes of fair use. Furthermore, the Second Circuit reviewed all four fair use factors and the decision was an expected one. The petition and Google’s reply brief have been distributed to the Supreme Court justices for discussion at their April 1, 2016, conference, though a decision on whether to grant or deny the petition may not occur immediately.

New Decision in Georgia State University E-Reserves Case

On March 31, the US District Court for the Northern District of Georgia released its [opinion \(PDF\)](#) on remand in *Cambridge University Press v. Becker*, the case in which three academic publishers argued that the use of excerpts of academic books for electronic course reserves at Georgia State University exceeded fair use and should require a license. The district court originally determined in 2012 that 94 of the 99 instances of claimed copyright infringement were fair use and only 5 were infringing. The case appeared before the district court again after the Court of Appeals for the Eleventh Circuit reversed and remanded the case in October 2014, directing the trial court to revisit its fair use analysis. The Eleventh Circuit’s opinion rejected an arithmetic approach to the four fair use factors (that is, the idea that if three of the factors favor fair use, but one disfavors fair use, then fair use will always apply). On remand, the district

court considered 48 infringement claims and revisited the fair use assertions by Georgia State University. Judge Evans found that of the 48 claims, 41 were non-infringing fair uses.

Copyright Office Studies and Roundtables

Digital Millennium Copyright Act (DMCA) 512 Safe-Harbor Provisions

The US Copyright Office has undertaken a study to evaluate the impact and effectiveness of the Digital Millennium Copyright Act (DMCA) safe-harbor provisions contained in [17 U.S.C. 512](#) that protect Internet service providers from liability for infringing activities of their users and other third parties. To help inform the study, the Copyright Office has solicited comments on Section 512, with a deadline of April 1. The Library Copyright Alliance (ALA, ACRL, ARL) will file comments responding to five of the questions in the Notice of Inquiry, explaining the importance of safe harbors to the library community. The comments will explain the careful balance set forth in Section 512 and discuss how safe harbors shelter libraries from liability for infringing material posted by third parties, such as in institutional repositories. The comments will also recommend that the penalties for making misrepresentations in takedown requests be increased to provide an adequate deterrent against fraudulent or abusive notices.

In addition, the Copyright Office just announced that it will conduct [two public meetings on Section 512](#). The first meeting will take place May 2–3 at the New York University School of Law and the second will be held May 12–13 at the Stanford Law School.

DMCA 1201 Provisions on Technological Protection Measures

The US Copyright Office will conduct a study on the DMCA's provisions on technological protection measures (TPM) codified at 17 U.S.C. 1201 to bar circumvention of access controls on copyrighted works. In preparation for the study, the Copyright Office solicited comments on Section 1201 and ARL, as part of the Library Copyright Alliance (LCA), [filed comments \(PDF\)](#) and will also file reply comments.

LCA's comments point out that the fundamental flaw of Section 1201 is that it can be interpreted to prohibit circumvention of a TPM even for purposes of engaging in a lawful use of the work. LCA recommends that:

- 1) Congress adopt an approach that attaches liability to circumvention only if the approach enables infringement or creates permanent exceptions for educational uses, the print disabled, and embedded software;
- 2) the 1201 rulemaking process be broadened to apply to anti-trafficking provisions;
- 3) final authority for granting exemptions should be shifted from the Librarian of Congress to the Assistant Secretary for Communications and Information of the Department of Commerce;
- 4) when an applicant seeks renewal of an exemption granted in the previous rulemaking cycle, the burden be shifted to those opposed to demonstrate why renewal is not appropriate; and
- 5) the exemptions be made broader and more simple.

In addition, the Copyright Office announced [two public meetings on this issue](#). The first meeting will take place May 19–20 at the Library of Congress in Washington, DC, and the second will be held May 25–26 at UC Hastings College of the Law in San Francisco. Five areas will be discussed at the roundtables:

- 1) Relationship of Section 1201 to Copyright Infringement, Consumer Issues, and Competition;
- 2) Rulemaking Process—Evidentiary and Procedural Issues;
- 3) Rulemaking Process—Renewal of Previously Granted Exemptions;
- 4) Anti-Trafficking Prohibitions/Third-Party Assistance; and
- 5) Permanent Exemptions.

US Patent and Trademark Office Releases White Paper on Remixes, First Sale, Statutory Damages

In January, the US Department of Commerce Internet Policy Task Force, led by the Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA), released a *White Paper on Remixes, First Sale and Statutory Damages* (following on a green paper issued in 2013). The white paper does not recommend statutory changes regarding remixes or digital first sale, but does propose multi-stakeholder negotiations on the issue. (The “first sale doctrine” is the provision in copyright law that makes it possible for libraries to lend books and other copyrighted material, for students to sell used textbooks, and for any rightful owner to sell or lend the copyrighted works they own.) The white paper points out the problems libraries have had with lending e-books due to the fact that such lending is generally governed by license agreements rather than the first sale doctrine, and suggests that if it becomes apparent that libraries cannot appropriately serve their patrons, “further action may be advisable (such as convening library and publisher stakeholders to develop best practices, or amending the Copyright Act.)” The white paper also acknowledges that publishers could interfere with library preservation. On remixes, the white paper encourages the development of negotiated best practices and a voluntary licensing system, but suggests that fair use can co-exist with this system.

With respect to statutory damages, the task force proposed several amendments including:

- 1) incorporating a list of factors for courts and juries to consider when determining the amount of statutory damages;
- 2) expanding the eligibility for lower “innocent infringement” awards when the copyright owner uses a copyright notice; and
- 3) giving courts discretion to assess statutory damages other than on a strict per-work basis in cases involving non-willful secondary infringement for online services offering a large number of works.

The white paper included numerous references to comments submitted by the Library Copyright Alliance. For more information see Jonathan Band’s guest post on the *ARL Policy Notes* blog, [“USPTO White Paper on Remixes, First Sale and Statutory Damages.”](#)

Canadian Copyright Board Decides Most Educational Copying Is Fair Dealing

On February 19, the Canadian Copyright Board set a tariff rate for “Access Copyright Elementary and Secondary School Tariff, 2010–2015,” at a substantially lower per-student rate than had been requested by Access Copyright, a licensing agency in Canada. (Canadian schools have permission to copy, remix, and share commercially published books, magazines, and newspapers as long as they adhere to the terms and conditions of the tariffs.) The rate set by the Copyright Board was between \$2.41 to \$2.46 per student, while Access Copyright had requested rates of between \$9.50 and \$15.00. Previously, the rate set by the Copyright Board was \$4.81 in 2009. The board attributed the decrease of the rate from 2009 to the Supreme Court of

Canada's decision in *Alberta v. Access Copyright*, which established that copying of short excerpts for student instruction or assignments did not require royalty payments because this use was considered fair dealing.

Open and Public Access

Fair Access to Science and Technology Research Act (FASTR) Reported out of US Senate Committee

The US Senate Committee on Homeland Security & Governmental Affairs reported out a revised Fair Access to Science and Technology Research Act (FASTR) of 2015–2016 on March 8. FASTR calls for federal agencies with extramural research budgets of over \$100 million to establish—to the extent possible—common public access policies for peer-reviewed journal articles resulting from federally funded research. The bill may now be considered by the full Senate as a stand-alone bill or attached to another bill. Two changes were made to S. 779: the embargo period was extended to up to 12 months and a new provision was added creating a petition process to change the embargo periods. ARL has strongly supported FASTR and will continue to promote the legislation going forward.

Open Access 2020 (OA2020) Initiative Launched

On December 8 and 9, 2015, representatives from countries in Asia, Europe, and North America, mainly from national licensing consortia, met in Berlin, Germany, to discuss a proposal to flip subscription-based journals to open access models. The Open Access 2020 (OA2020) initiative is being led by the Max Planck Society, the host of the invitation-only Berlin 12 Open Access Conference. The initiative is based on an analysis outlined in a white paper published by Max Planck Digital Library (MPDL), which found that a flip to open access would be possible at no financial risk to the system. The objective of the conference was to build a consensus for an internationally coordinated effort to shift libraries' journal budgets away from subscriptions and towards an article-processing-costs model for open access journals. Participants were 96 individuals from 19 countries, including several US and Canadian representatives. The focus of the discussion was an "Expression of Interest" that will act as the basis for gaining consensus and moving forward with the proposal. More information is available at <http://oa2020.org/>.

Kathleen Shearer, partnership consultant to ARL, drafted a "[Briefing Document: Max Planck Proposal to Flip Subscriptions to OA](#)" that provides background on the Berlin 12 Open Access Conference and raises some areas of concern.

Freedom of Information Act (FOIA) Reform Bill Passes US House and Senate

The US Senate unanimously passed a Freedom of Information Act (FOIA) reform bill, the FOIA Improvement Act of 2016, on March 15. FOIA gives US citizens the right to access information from the federal government. Passage of the reform bill was delayed due to opposition from the US Department of Justice that lobbied Congress against the bill. The US House of Representatives passed a similar proposal to strengthen FOIA on January 11 and a conference committee is now required to resolve differences in the two bills. If signed by the President, the bill calls for building a single, online federal portal, which means that a requester will not need to go to more than one access point when requesting information from the government. In addition, if government information is requested several times, federal agencies should post the requested information online.

White House Announces Roundtables on Open Data

The White House recently announced that it will host four roundtables focused on open data: protecting privacy (March 24), improving data quality (April 27), applying research data (May 25), and leveraging the private sector (June 15). The White House Office of Science and Technology Policy and the Center for Open Data Enterprise are co-hosting the roundtables, which seek to address the following goals:

- Identify open data case studies, learned lessons, and best practices across the federal government
- Strengthen a community of technical, legal, and policy experts in support of open data
- Support continuity and accelerate the progress of open data work

ARL participated in the roundtable on protecting privacy. More information about the roundtables is available at <https://www.data.gov/meta/open-data-roundtables/>.

President Obama Nominates Carla Hayden as Librarian of Congress

On February 24, President Obama nominated Carla Hayden as the next Librarian of Congress. Hayden is currently the CEO of the Enoch Pratt Free Library in Baltimore, Maryland. In addition, she is a member of the National Museum and Library Services Board. In the latter capacity, she was confirmed by the US Senate in June 2010. The President sent her nomination for Librarian of Congress to the Senate Rules Committee for consideration. It is possible that the Senate Rules Committee will conduct a hearing on her nomination in mid-April. [ARL supports the nomination of Hayden.](#)

US Federal Appropriations: President Releases FY 2017 Budget; House Passes Nonbinding Budget Resolution

President Obama released the Administration's proposed \$4.15 trillion FY 2017 budget on February 17. The reaction from the Republican majority in Congress was not supportive and, with little time left on the legislative calendar, it is not clear when the House and Senate Appropriation Committees will be able to consider and move the bills. The House Budget Committee has proposed significant cuts in FY 2018 while staying with the FY 2016 budget agreement in fiscal year 2017. Importantly, last year's budget agreement—good for two years—provided some increases to discretionary funding.

On March 23, the House Budget Committee in its Budget Resolution called for the elimination of federal funding for cultural agencies such as the Institute for Museum and Library Services and the National Endowment for the Humanities. It is important to note that budget resolutions are non-binding and previous resolutions calling for the elimination of these agencies were not successful.

Privacy and Surveillance: US House Committee to Mark Up Electronic Communications Privacy Act (ECPA) Reform Bill

The US Congress continues considering reform of the Electronic Communications Privacy Act (ECPA), a law that denies important privacy protections for electronic communications. The ECPA reform bill has been co-sponsored by an overwhelming majority of the House of Representatives and has bipartisan support in the Senate. The House Judiciary Committee will mark up the bill on April 13. Chairman Goodlatte (R-VA) plans to introduce a Manager's

Substitute that includes a number of potential changes. ARL will continue to monitor this issue and work with a coalition of privacy advocates, nonprofit organizations, and companies supporting ECPA reform.

Resources

Infographic: [“Fair Use in a Day in the Life of a College Student”](#)

“[Nothing New Under the Sun](#),” a paper about copyright and creativity, by Jonathan Band and Caile Morris

[Five videos](#) from ARL libraries celebrating fair use and fair dealing