

Advocacy and Public Policy Update

July 14, 2016

ASSOCIATION
OF RESEARCH
LIBRARIES



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Below is an update of key advocacy and policy issues of interest to the research library community in Canada and in the US from April 1 through July 14, 2016, written by Prue Adler and Krista Cox of the Association of Research Libraries (ARL).

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

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Copyright and Intellectual Property

Copyright Office Asks for Input on Reform of Section 108

The US Copyright Office recently released a Notice of Inquiry relating to the reform of Section 108 of the Copyright Act—the exemptions for libraries and archives. The Copyright Office has requested meetings with stakeholders to discuss possible reforms. Members of the Library Copyright Alliance (LCA) will meet with Copyright Office staff on July 26. LCA released a statement reiterating its long-standing position opposing opening up Section 108 for several reasons:

- Contrary to the Copyright Office’s portrayal of Section 108 being “obsolete,” libraries use these exemptions every day.
- Fair use supplements Section 108 provisions ensuring that libraries benefit from using new technologies and services as they are introduced as was made clear in the *Authors Guild v. HathiTrust* decision.
- Amending Section 108 could restrict what libraries can do legally, as evidenced by a deeply complex regulatory proposal in the Section 108 Study Group report.
- There are more important areas of the Copyright Act in need of reform.
- Reform of Section 108 will be deeply contentious—with strong support for change from publishers and the Authors Guild among others—and debating it will require significant resources from libraries and all partners in higher education and beyond.

ARL staff conducted two calls with member library deans and directors to discuss Section 108 reform and gather input.

ARL is still requesting “stories” or specific examples of how research libraries use Section 108 on a daily basis. Please send these stories to Prue Adler (prue@arl.org) and Krista Cox (krista@arl.org).

Copyright Office Studies Section 1201

On May 19–20, the Copyright Office held roundtable discussions in Washington, DC, for its study of the Digital Millennium Copyright Act (DMCA) provisions on technological protection measures (TPMs), codified at 17 U.S.C. 1201, to bar circumvention of access controls on copyrighted works. ARL, as part of the Library Copyright Alliance (LCA), previously [filed comments](#) on this issue, recommending that:

- Congress adopt an approach that attaches liability to circumvention only if the approach enables infringement or creates permanent exceptions for educational uses, users with print disabilities, and embedded software;
- the 1201 rulemaking process be broadened to apply to anti-trafficking provisions;
- 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;
- 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
- the exemptions be made broader and simpler.

During the roundtables, there seemed to be some consensus around the need for a more efficient process to request exemptions. However, when the issue of permanent exemptions came up, rightsholder groups, including the Association of American Publishers (AAP), opposed the addition of a permanent exemption for users with print disabilities despite broad support from other groups. Additionally, during the course of the roundtables, the Copyright Office, AAP, and other rightsholders expressed support for reform of Section 108 of the Copyright Act. ARL participated on two panels and LCA participated on an additional two panels.

Court Cases

Capitol Records v. Vimeo

On June 16 the US Court of Appeals for the Second Circuit released its opinion in *Capitol Records v. Vimeo*, finding that the DMCA safe harbor applies to pre-1972 sound recordings and that Vimeo did not have “red flag” knowledge that infringing videos were uploaded nor was it “willfully blind” to infringement on its service. The Second Circuit stated that finding otherwise would require service providers either to incur heavy costs of monitoring all posts or to incur high damages. Additionally, the court noted that while Vimeo employees may have watched “recognizable” videos, that does not mean that the company had “red flag” knowledge of infringing content; the burden is on the plaintiffs to provide evidence of “red flag” knowledge. Finally, the Second Circuit upheld the district court’s finding that Vimeo was not willfully blind to infringement, in part, because there is no duty to investigate or monitor for infringement of user-generated content uploaded to its site.

Oracle v. Google

On May 26 a jury returned a verdict in favor of Google in Oracle’s lawsuit against Google for using Java application programming interfaces (APIs) in its Android mobile operating system. Google argued that its use of the code in the Android system, which relies partly on Java (an open source code that was acquired by Oracle in 2010), was fair use and the jury unanimously agreed with Google. The district court judge in the case denied Oracle’s motion for judgment as a matter of law, finding that it was reasonable for a jury to conclude that Google’s use of Java’s APIs was indeed fair use.

Open and Public Access Policies

White House Releases Impact Report

On June 21, the White House released, “[Impact Report: 100 Examples of President Obama’s Leadership in Science, Technology, and Innovation](#),” which highlights the President’s impact “in building U.S. capacity in science, technology, and innovation and bringing that capacity to bear on national goals.” Examples include supporting open government (#4 in the report), increasing R&D dollars (#7), making federal data sets publicly available (#12), opening up federally funded scientific research (#13), making STEM education a priority (#16), and funding open educational resources (OER) (#29) among many others.

Cancer Moonshot Promotes Open Access and Data Sharing

Earlier this year, the Obama Administration announced an ambitious initiative, the [National Cancer Moonshot](#), which “aims to bring about a decade’s worth of advances in five years, making more therapies available to more patients, while also improving our ability to prevent cancer and detect it at an early stage.” In recent speeches, Vice President Biden, who is leading this effort, spoke to the need for open access to publications and data stemming from federally funded grants: “the taxpayers fund \$5 billion a year in cancer research..., but once it’s published, nearly all of that taxpayer-funded research sits behind walls. Tell me how this is moving the process along more rapidly.” In addition, he called for identifying ways to incentivize researchers to share data to accelerate cancer research but to also reproduce and validate scientific studies. This stance sends a welcome and important message to the research community and should not be seen as only relative to cancer research. [ARL wrote a letter](#) in support of the Cancer Moonshot initiative and provided recommendations on additional activities that could be implemented immediately, such as requiring that research funded by the National Cancer Institute be publicly available immediately and be fully reusable.

President Obama Signs FOIA Improvement Act

Just days before the 50th anniversary of the Freedom of Information Act (FOIA) being signed into law in 1966, President Obama signed the FOIA Improvement Act. The Improvement Act is a comprehensive, bipartisan law that reforms and updates FOIA. As noted by OpenTheGovernment.org:

The reform bill codifies the presumption of openness—requiring records be released unless there is a foreseeable harm or legal requirement to withhold them. This language mirrors the [Obama Administration's](#) and the [Department of Justice's](#) 2009 guidance on FOIA, which reversed the policy of the Bush administration that had encouraged agencies to limit discretionary disclosures of information. With these legislative changes, the law makes clear that FOIA, under any administration, must be approached with a presumption of openness.

Additionally, the reform bill limits to a period of 25 years the ability of agencies to keep internal deliberations confidential; mandates that the government create a “central online request portal”; and requires proactive disclosure of material, released to any person, that has or might “become the subject of subsequent requests for substantially the same records” or if the information has been requested three or more times.

ARL staff worked with a large coalition of civil society partners on passage of the FOIA Improvement Act.

ARL Joins in Statement on Key Actions to Support Open Science

ARL joined 14 other organizations, foundations, and publishers in agreeing to commit our organizations to implement and/or support three key actions in support of open science. These actions were identified at an October 7, 2015, meeting convened by SPARC to discuss

how policies around sharing research outputs—starting with research data—could be made more aware of and interoperable with each other. The key actions are as follows:

Support for data citation: In reference sections of documents submitted to us (e.g., manuscripts, grant proposals, tenure dossiers) data and software will increasingly be required to be cited in the same way as publications are at present.

Support for monitoring data-sharing policies: The participating organizations will expand their efforts to monitor compliance with their respective data-sharing policies and with open-science principles more broadly. For example, the group will encourage the wider adoption of data availability statements in grant proposals and papers and will highlight best practices for sharing research.

Support for developing interlinking policy and infrastructure: In order to further these goals, we will stimulate the creation of policy-related infrastructure, e.g., tools that help complement text versions of sharing policies or sharing plans in a way that allows machines to assist with compliance monitoring or with facilitating the discoverability of shared resources.

A [summary of the meeting](#) is now available and the list of signatories follows. Association of Research Libraries, The Bill & Melinda Gates Foundation, Berkeley Initiative for Transparency in the Social Sciences, Center for Effective Global Action, Center for Open Science, eLife, F1000, Figshare, Laura and John Arnold Foundation, National Institutes of Health, Pensoft, Public Library of Science, RIO Journal, SPARC, Wellcome Trust.

Senate Appropriations Bill Includes Open Educational Resources Requirement

The Labor, Health and Human Services, Education, and Related

Agencies Appropriations bill includes language directing the US Department of Education to detail steps that it is taking in support of the use of open textbooks in higher education institutions.

The bill states:

Open Textbooks—The Committee directs the Department to provide a report to the Committee no later than 180 days after enactment of this act on steps it has taken or plans to take to help achieve the highest level of savings possible for students through the sustainable, expanded use of open textbooks at institutions of higher education and production of the highest quality open textbooks.

The bill awaits floor action in the Senate. The House has yet to act on a companion bill.

White House Workshops on Open Data

In late May, ARL staff participated in a White House workshop on open data research. This workshop was one of a series of White House workshops on open data. Earlier workshops on privacy and quality issues were conducted and ARL participated in the workshop on data and privacy issues.

Appropriations Update

The contentious focus on gun control following the attack in Orlando on June 12 led to the breakdown of the FY 2017 appropriations process prior to the July 4 Congressional recess. The House and Senate returned the week of July 5 and Appropriations Committees are moving bills—12 in the Senate and 10 in the House. This activity provides a base from which to work when Congress returns from its summer recess from mid-July through Labor Day. A Continuing Resolution (CR) may be necessary as October 1 is the start of the federal fiscal year. Current discussions suggest that the CR would last until December or longer, allowing additional time to pass an omnibus bill. It is unlikely that floor action on all of the appropriations bills could be completed before October 1 given the Congressional schedule in an election year.

On July 8, the House Appropriations Subcommittee on Labor, Health and Human Services, and Education approved its FY 2017 [spending bill](#).

Senate Confirms Carla Hayden as Librarian of Congress

Prior to adjourning for its summer recess, the Senate approved the nomination of Carla Hayden to be the 14th Librarian of Congress, in a vote of 74-18. She will be the first woman and the first African American to hold the position. Hayden is currently the CEO of the Enoch Pratt Free Library in Baltimore, Maryland, and a member of the US National Museum and Library Services Board.

Net Neutrality

DC Circuit Upholds FCC's Net Neutrality Rules; Some Members of Congress Threaten Net Neutrality

On June 14 the US Court of Appeals for the DC Circuit released its long-awaited opinion in *US Telecom Association v. Federal Communications Commission (FCC)*, upholding the FCC's 2015 Open Internet Order by a 2-1 vote. The Open Internet Order reclassified broadband Internet providers as common carriers under Title II of the Communications Act and set forth five rules to protect net neutrality: bans on blocking, throttling, and paid prioritization; a general conduct rule; and an enhanced transparency rule. The DC Circuit held that the FCC acted within its authority to reclassify and that its Open Internet Order appropriately relied on multiple sources of legal authority. Additionally, the DC Circuit found that the FCC's order was not impermissibly vague and did not infringe on the First Amendment rights of service providers.

ARL staff participated in a coalition of higher education and library organizations, submitting comments and meeting with the FCC prior to enactment of the order. ARL, together with four other library associations, also submitted an amicus brief to the DC Circuit supporting the FCC's net neutrality rules.

The petitioners in the case will likely seek review by the Supreme Court of the United States. For more analysis of the DC Circuit's decision, see the *ARL Policy Notes* post "[DC Circuit Court Upholds FCC's Open Internet Order Governing Net Neutrality.](#)"

Additionally, some Republican members of Congress are threatening to undermine the FCC's net neutrality rules. The House approved FY17 appropriations bill passed on July 7 includes riders that, among concerns, would stop enforcement of the FCC's net neutrality rules; the Senate version did not include these riders. ARL continues to monitor

these developments and will work with a coalition to ensure that these provisions are not included in any final bill or continuing resolution.

Privacy

House Passes Electronic Communications Privacy Act Reform

On April 27 the US House of Representatives passed the Email Privacy Act (H.R. 699) by a 419-0 vote. The Email Privacy Act would update the Electronic Communications Privacy Act (ECPA), a law passed in 1986 that has led to an absurdity that affords greater protection to hard-copy documents than digital communications. While the House-passed bill did not achieve all necessary reforms, if passed by the Senate, the bill would represent a serious step forward in updating this 30-year-old law.

The Senate version of the bill, the Electronic Communications Privacy Act Amendments Act of 2015 (S. 356) has enjoyed broad, bipartisan support but has not yet made it to the floor for a vote. Civil agencies, primarily the Securities and Exchange Commission (SEC), have repeatedly sought an exemption from the ECPA reforms; these exemptions would seriously weaken reform efforts and threaten a reasonable expectation of privacy. Additionally, law enforcement officials seek a broader emergency exception provision, which has resulted in delaying movement on ECPA reform in the Senate.

For more information, see the *ARL Policy Notes* post [“Civil Agencies, Law Enforcement Officials Threaten Meaningful ECPA Reform.”](#) ARL is a member of the Digital Due Process coalition that has been working for passage of ECPA reform.

Diversity and Inclusion

Supreme Court Rules in *Fisher v. University of Texas (Fisher II)*

On June 23 the Supreme Court of the United States ruled in a 4-3 decision that the University of Texas at Austin's (UT) policy that considered race as part of its holistic review in the undergraduate admissions process did not violate the Equal Protection Clause.

This was the second time the Supreme Court heard Fisher's case. In Fisher I, the Court directed the Fifth Circuit to reconsider the case under the higher threshold of strict scrutiny. On remand, the Fifth Circuit once again upheld UT's admissions policy, under which UT accepts the top 10% of graduates from Texas high schools and uses a holistic review for the remaining open spots, including consideration of race as one factor in the review.

In Fisher II, the Supreme Court found that UT met its heightened burden in outlining its reasons and goals for improving diversity and there was sufficient evidence to support UT's claim that race-neutral admissions policies were insufficient in improving diversity. ARL joined 37 higher education organizations on an [amicus brief](#) supporting UT. For more analysis of the opinion, see the *ARL Policy Notes* post "[Supreme Court of the United States Upholds University of Texas's Affirmative Action Policy](#)."

International Issues

Marrakesh Treaty to Enter into Force September 30

On June 30 Canada became the 20th country to ratify or accede to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. As a result, the Marrakesh Treaty, which requires minimum standards for limitations and exceptions for the creation and distribution of accessible formats and allows cross-border sharing of these formats, will enter into force on September 30, 2016. Countries that have currently ratified/acceded to the treaty include (in order of ratification): India, El Salvador, United Arab Emirates, Mali, Uruguay, Paraguay, Singapore, Argentina, Mexico, Mongolia, Republic of Korea, Australia, Brazil, Peru, Democratic People's Republic of Korea, Israel, Chile, Ecuador, Guatemala, and Canada.

The Obama Administration sent the Marrakesh Treaty implementation package to the US Senate in January 2016, but the Senate has not yet taken action on ratification. The Association of American Publishers (AAP) has been holding up Senate action on the Marrakesh Treaty, pressing for unnecessary changes to US law beyond what the Administration recommended in its implementation package. ARL staff continue to work with Senate staff on ratification. It is unlikely that the treaty will be considered this year given Congress's schedule in an election year.

For more information, see the *ARL Policy Notes* post "[Marrakesh Treaty for the Blind, Visually Impaired and Print Disabled to Enter Into Force.](#)"

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