

Advocacy and Public Policy Update

September 26, 2016

ASSOCIATION
OF RESEARCH
LIBRARIES



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Below is an update on key advocacy and policy issues of interest to the research library community in Canada and in the US from July 15 through September 26, 2016, written by Prue Adler and Krista Cox of the Association of Research Libraries (ARL).

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US Appropriations Update

Following a long summer recess, the US Congress returned after Labor Day to tackle FY 2017 appropriations. Congress yet again failed to complete the “regular order” of appropriations and now faces a looming end-of-the-year deadline or another government shutdown on October 1. Although it appears that a Senate-led deal is close to agreement, agencies must still have contingency plans in place. Members of the Senate Republican leadership are adamant that there will not be a shutdown, though the outcome in the House is not so certain. House conservative lawmakers in the Freedom Caucus oppose a short-term continuing resolution (CR) or stopgap measure that would last until December 9. These members advocate for a longer-term CR that would fund the government into 2017.

Sticking points include funding for Flint, Michigan, to clean up the town’s contaminated water system and emergency funding for those impacted by the flood in Louisiana. The Zika crisis–funding issues have been resolved.

If a stopgap measure is agreed to, Congress will return to Washington, DC, in December for a lame duck session to pass a likely omnibus appropriations bill comprising all appropriations bills.

New Preprint Services Emerge

Recently, new preprint services, described as the “open preprint repository network,” have emerged in support of open access and open source in a variety of disciplines. [SocArXiv](#), hosted by the Center for Open Science (COS), launched in the early summer and “is dedicated to opening up social science, to reach more people more effectively, to improve our research, and build the future.” In addition, the system that hosts SocArXiv “will allow integration of papers from many different services, such as the giant arXiv

(which is mostly math and physics), the new bioRxiv, and the new communities hosted by COS, which so far include SocArXiv, engrXiv, and PsyArXiv. At [this site](#) you can search all the preprint servers at once, or any combination of them.” Other disciplines are considering similar preprint services though not necessarily open source, such as the one to be hosted by the American Chemical Society (ACS). The ACS preprint server may be called ChemRxiv.

White House Releases Policy on Open Source Software

Each year the US government spends more than \$6 billion on software. In an effort to be more open and transparent, the Office of Management and Budget released a new policy, “[Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software](#).” This policy seeks to address the lack of sharing of code by agencies, which is inefficient and results in duplicative efforts. The policy seeks to ensure that new custom-developed federal source code be made available for reuse within the federal agencies and beyond.

In addition, the policy includes a pilot program that requires agencies to release 20% or more of new custom-developed code as open source software (OSS). The pilot will last for three years. As noted by the White House, “Making source code available as OSS can enable continual improvement of Federal custom-developed code projects as a result of a broader user community implementing the code for its own purposes and publishing improvements. This collaborative atmosphere can make it easier to conduct software peer review and security testing, to reuse existing solutions, and to share technical knowledge.”

Patricia Flatley Brennan Named Director of National Library of Medicine

On August 15, [Patricia Flatley Brennan, RN, PhD, assumed the role of director of the National Library of Medicine](#) (NLM).

Brennan, the first woman and nurse to head NLM, was previously the Lillian S. Moehlman-Bascom Professor, School of Nursing and College of Engineering at the University of Wisconsin–Madison. She also led the [Living Environments Laboratory](#) at the [Wisconsin Institute for Discovery](#), which explores new ways to effectively visualize high-dimensional data. Brennan is a past-president of the American Medical Informatics Association, a member of the National Academy of Medicine, and a fellow of the American College of Medical Informatics, the American Academy of Nursing, and the New York Academy of Medicine.

Carla Hayden Takes Office as Librarian of Congress

On September 14, [Carla Hayden was sworn in as the Librarian of Congress](#). Speaker of the US House of Representatives, Paul Ryan (R-WI); chair of the Committee on Rules and Administration, Senator Roy Blunt (R-MO); and Senator Barbara Mikulski (D-MD) spoke and Chief Justice John Roberts Jr. administered the oath of office to Hayden. The ceremony was conducted in the Great Hall of the Jefferson Building, Library of Congress. Hayden is a former president of the American Library Association (2003–2004) and was CEO of the Enoch Pratt Library in Baltimore, Maryland (1993–2016). Hayden received a BA from Roosevelt University and an MA and PhD from the Graduate Library School of the University of Chicago.

Copyright and Intellectual Property

US Copyright Office Activities

Section 108

The US Copyright Office is conducting closed-door meetings on Section 108 of the Copyright Act—which provides exemptions for libraries and archives—and invited stakeholders to meet and discuss possible reforms. On July 26, the Library Copyright Alliance (LCA) met with the Copyright Office to explain the concerns of the library community regarding [reform of Section 108](#), particularly that (1) Section 108 is not obsolete; (2) fair use provides a sufficient update when necessary; (3) amending Section 108 has inherent risks and could limit what libraries currently do today; and (4) amendment of the section would be a highly contentious and resource-intensive process.

During the meeting with LCA, the Copyright Office noted that it did not expect to request any written comments because it believed an ample record has been developed since the Copyright Office began looking at the issue in 2005. The Copyright Office also said that it would take a deeper look at the issues that have come up in the stakeholder meetings during the fall and prepare a report with a legislative recommendation to be released in late fall or early winter.

The Copyright Office asserted that reform of Section 108 is needed to add museums to the beneficiaries of the exception, and also that authors who benefit from library access have advocated for amendment. While LCA expressed opposition to reform of Section 108, LCA did note that if the Copyright Office is committed to advancing reform efforts, the office should make the exceptions simpler and broader. Additionally, LCA suggested that contract-preemption language, ensuring that contract language does not override specific limitations and exceptions (including fair use), would be one area of reform that could benefit libraries. Most

importantly, LCA reiterated the importance of the fair use savings clause that currently exists under Section 108, noting that any efforts to remove the savings clause would greatly damage the benefits of the exceptions. (The fair use savings clause provides that the specific exceptions granted do not preclude reliance on fair use.)

LCA's concern regarding the potential removal of the fair use savings clause is well grounded in the positions that have consistently been taken by the Association of American Publishers (AAP) and other rightholders (such as the Authors Guild) that specific limitations and exceptions override fair use. For example, in the *Authors Guild v. HathiTrust* litigation, rightholders argued that fair use did not apply even with an existing savings clause. Furthermore, a recent report in *Communications Daily* quoted Allan Adler, general counsel and vice president of government affairs at AAP, as supporting restrictions on fair use in 108 reform efforts:

AAP, which supports an overhaul [of Section 108], said in its meeting that the CO should recommend that Congress clarify “the relationship between the specifics of the Section 108 exemption and more general limitations and exemptions like fair use,” Adler said. “It makes little sense for Congress to attempt to craft specific limitations and exceptions that take into account the nature of particular users or particular kinds of works if instead people are simply going to look to fair use in order to support such activities.” Adler noted that the Authors Guild’s HathiTrust Digital Library case turned partly on Section 108’s being the only Copyright Act provision that specifically refers to fair use. The US Court of Appeals for the 2nd Circuit ruled in 2014 in favor of HathiTrust’s digital content repository (see 1406120086).

Fair use has “been interpreted as a result of the HathiTrust case in a way that encourages libraries and others to view fair use as the argument to support things that they’d like to do that are not specifically covered by Section 108,” Adler said.

For more information, see Jonathan Band’s guest post on the *ARL Policy Notes* blog, [“A New Approach to Copyright Exceptions and Limitations,”](#) and Krista L. Cox’s post on *ARL Policy Notes*, [“Why is the Copyright Office Trying to Reform Section 108?”](#)

Mandatory Deposit

ARL, as part of the Library Copyright Alliance, filed a response to the Copyright Office’s Notice of Inquiry regarding extending mandatory deposit requirements to online-only books and sound recordings. The comments support expansion of the 2010 interim rule—which applied to online-only electronic serials—to books and sound recordings. The comments support broader expansion of mandatory deposit and point to the important link between deposit and preservation. Additionally, the comments encourage reconsideration of the restrictive rule that limits simultaneous access to two on-site users at dedicated terminals for these online-only works collected under the interim rule.

Fifteen entities submitted a response to the Copyright Office, including libraries from the University of California, Los Angeles; University of Michigan; and University of Virginia.

For more information, see *ARL Policy Notes* [“ICYMI: Library Copyright Alliance Files Comments Regarding Mandatory Deposit.”](#)

Georgia State University E-Reserves Case

The Georgia State University case concerning the use of excerpts of academic books for electronic course reserves (currently captioned as *Cambridge University Press v. Albert*; previously captioned as *Cambridge University Press v. Becker* and *Cambridge University Press v. Patton*) is back on appeal before the US Court of Appeals for the Eleventh Circuit. The plaintiff publishers in the case have filed a motion for extension of time to file their brief to November 18, 2016, and have also requested permission to exceed the word and page limits; amicus

briefs in support of Georgia State University will likely be due in early 2017 (assuming additional extensions are granted).

The Georgia State case was originally decided in 2012 when a district court found that out of 99 instances of claimed infringement, 94 were non-infringing. In October 2014, the Court of Appeals for the Eleventh Circuit reversed and remanded, directing the lower court to revise the methodology used in determining whether fair use applied. The [Eleventh Circuit opinion](#) affirmed that fair use is applied on a case-by-case basis; rejected bright-line rules (such as the ten-percent-or-one-chapter rule that the district court adopted); and affirmed that non-transformative, nonprofit educational purposes can still favor fair use, among other takeaways.

[On remand](#), the district court considered each fair use factor individually and weighed them together and weighted each factor differently. Judge Evans approximated that 25% of weight should be given to factor one (purpose and character), 5% to factor two (nature of the copyrighted work), 30% to factor three (amount and substantiality of the portion used), and 40% to factor four (effect on the potential market). In evaluating each claim again, the district court found that only four of the claims were infringing. The court awarded attorneys fees to Georgia State University.

International Issues

Marrakesh Treaty to Facilitate Access to Published Works for People with Print Disabilities

Countries across the world continue to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which is scheduled to enter into force on September 30. There are currently 22 countries that have ratified or acceded to the treaty: Argentina, Australia, Brazil, Canada, Chile, Democratic People's Republic of

Korea, Ecuador, El Salvador, Guatemala, India, Israel, Mali, Mexico, Mongolia, Paraguay, Peru, Republic of Korea, Saint Vincent and the Grenadines, Singapore, Tunisia, United Arab Emirates, and Uruguay.

The United States signed the Marrakesh Treaty in October 2013 and the Obama Administration sent its ratification package to the Senate in February 2016, which included implementing legislation. However, the Senate has not yet made progress on ratifying the Marrakesh Treaty. The Association of American Publishers (AAP) held up Senate action on the treaty by pressing for unnecessary changes to US law beyond what the Administration recommended in its implementation package. Bipartisan staff from the Senate Judiciary and Senate Foreign Relations Committees directed stakeholders, including publishers, groups that advocate for the blind, and libraries and authorized entities, to work together to try to come to a compromise. ARL continues to be involved in these negotiations. Even if the negotiations are successful, it is unlikely that the treaty will be considered this year due to Congress's schedule in an election year and some questions regarding whether members of Congress would agree to ratify a treaty during the lame duck session.

India Course Pack Case

Oxford University Press, Cambridge University Press, and Taylor & Francis sued in 2012 Rameshwari Photocopy Service and the University of Delhi for the photocopying, reproduction, and sale of copies of works compiled into course packs.

In its [decision](#), released September 16, 2016, the Delhi court referenced a number of cases, including several United States and Canadian court cases such as *Basic Books v. Kinko's Graphics*, *Princeton University Press v. Michigan Document Services*, *Cambridge University Press v. Becker*, *CCH Canadian Ltd v. Law Society of Upper Canada*, among others and ultimately dismissed the case, finding that the photocopying was a valid

exercise of the educational exception under Section 52 of the Copyright Act. In the opinion, the court noted: “Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public.”

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