Advocacy and Public Policy Update

May 19, 2017

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 January 27, 2017, through May 19, 2017, written by Prudence S. Adler and Krista L. Cox of the Association of Research Libraries (ARL).

Copyright Issues

US Register of Copyrights

On April 26, the US House of Representatives passed the Register of Copyrights Selection and Accountability Act of 2017 (H.R. 1695), a bill to make the position of the Register of Copyrights subject to Presidential appointment and Senate confirmation for a term lasting 10 years. This bill would remove the Librarian of Congress's authority to select a Register of Copyrights. H.R. 1695 passed with support by an overwhelming majority of the House, with a 378-48 vote in favor of the bill.

The bill now moves to the Senate, where bipartisan support is expected. However, the Senate procedures and jurisdictional issues could slow down the process. While S. 1010, the analog bill to H.R. 1695, has been filed by Senate Judiciary Committee Chairman Grassley (R-IA) and Ranking Member Feinstein (D-CA), the Senate Rules Committee also asserts jurisdiction and has requested referral of the bill.

ARL has met with Congressional staff to discuss this bill and possible paths forward. Some Congressional offices have suggested that a bill determining the selection process for the Register of Copyrights cannot be passed without also considering the question of where the Copyright Office should reside. Some offices may therefore want to introduce a larger bill addressing the location of the Copyright Office in tandem with the Register selection process. Over the past two years, there have been several suggestions regarding the location of the Copyright Office, including making it an independent agency within the legislative branch, placing it within the US Patent and Trademark Office or within the Department of Commerce together with patents and trademarks, or leaving it in the Library of Congress. ARL will continue to engage heavily with Congress and work with coalition partners on this issue.

Copyright Office Study on Moral Rights

The US Copyright Office is continuing its study of specific aspects of copyright law and issued a notice of inquiry regarding the moral rights of attribution and integrity. On March 30, ARL, as part of the Library Copyright Alliance (LCA), submitted comments to the Copyright Office noting that the right of attribution is already protected in the United States through plagiarism policies and societal norms. LCA's comments point out that adding a layer of moral rights on top of current copyright protections would impede the creation of new works and a right of integrity could chill criticism or violate the First Amendment. Additionally, the comments note that there are technical issues and concerns that codification of moral rights could violate context-specific norms for the reuse of works. LCA's comments conclude, "In sum, because of the absence of any demonstrated need for a new moral rights regime, and the many potential problems with creating one, the Copyright Office should not recommend further consideration of this issue by Congress."

Copyright Office Rulemaking on Modernizing Copyright Recordation

On May 17, the US Copyright Office issued a notice of proposed rulemaking (NPRM) on "Modernizing Copyright Recordation." The Copyright Office is proposing the amendment of regulations governing recordation of: transfers of copyright ownership, notices of termination, and other documents pertaining to copyright, in anticipation of the development of a modernized electronic recordation system. Among the issues the Copyright Office is seeking input on are (1) permitting remitters to submit transfer of copyright documents for recordation electronically; (2) retention of paper submission processes; (3) the certifications that must be submitted; (4) redactions; (5) what indexing information the Copyright Office should ask remitters to provide; (6) public availability of recorded documents; and (7) recordation of termination notices,

among other issues. Comments in response to the NPRM will be due in mid-July. ARL plans to file comments as part of LCA.

Court Cases

Georgia State E-Reserves Case

On February 13, ARL together with the American Library Association (ALA), Association of College & Research Libraries (ACRL), and the Electronic Frontier Foundation, filed an amicus brief in support of Georgia State University (GSU) in the e-reserves fair use case. After years of litigation and two opinions by the district court and one by the Eleventh Circuit, the case is once again before the Eleventh Circuit. The brief notes that continued appeals in the case are unnecessary and urges the Eleventh Circuit to affirm the lower court's decision, which ruled in favor of the vast majority of GSU's uses of excerpts as fair use. The brief points out that GSU's copyright policy is consistent with the ARL Code of Best Practices in Fair Use for Academic and Research Libraries. The brief also suggests that the district court's analysis of the second fair use factor (nature of the work) was flawed because the context of the works favors fair use. Additionally, the brief addresses the importance of the public interest in considering the fourth fair use factor (market harm).

Capitol Records v. ReDigi

ARL joined ALA, ACRL, and the Internet Archive in a February 14 amicus brief in a fair use case, *Capitol Records v. ReDigi*, currently before the Court of Appeals for the Second Circuit. This brief argues that existing specific limitations and exceptions to copyright law can tilt the first fair use factor (character of the use) in favor of the user and that fair use encourages innovative services. The brief argues that ReDigi's use was similar to the first sale doctrine and this similarity should have tilted the first factor in favor of fair use, noting that courts and the Copyright Office have made similar findings in various

contexts. (ReDigi enables users to buy and sell pre-owned digital music directly from and to one another.) Additionally, the brief points out, "A fair use finding in this case would provide libraries with additional legal certainty to roll out innovative services such as the Internet Archive's Open Library. Such a result would increase users' access to important content without diminishing authors' incentives to create new works."

Mavrix Photographs v. LiveJournal

ARL joined ALA, ACRL, the Electronic Frontier Foundation, Public Knowledge, and Wikimedia on May 12 in an amicus brief in support of rehearing in a case regarding the Digital Millennium Copyright Act (DMCA) safe harbors. The brief notes that Congress did not condition eligibility for DMCA safe harbors on a provider of online services monitoring or affirmatively seeking out infringing activity. As the legislative history makes clear, however, neither did Congress wish to discourage such activity; rather, it chose to leave that decision to the providers themselves. The brief points out that the Ninth Circuit's opinion in the case runs contrary to this intent by penalizing service providers who use moderators, thereby strongly discouraging platforms from reviewing third-party content for unlawful or inappropriate material. The brief argues, "Online platforms of all sizes review content posted by third parties for unlawful and inappropriate material, including material that infringes copyright. Copyright holders have benefitted greatly from these proactive measures that exceed the DMCA's requirements. The panel's decision would undo these significant public benefits. The Court should grant...LiveJournal's petition for rehearing or rehearing *en banc*."

Louisiana State University Sues Elsevier for Breach of Contract

On February 27, Louisiana State University (LSU) filed a lawsuit against international science publisher Elsevier for breach of contract resulting from the publisher's exclusion of the LSU School of Veterinary Medicine from accessing content licensed by the LSU Libraries. Elsevier has thus far not accepted service of process of the lawsuit and LSU is attempting to effect service of process at Elsevier's headquarters in Amsterdam through the Hague Service Convention. More information and background about this lawsuit is available in ARL's press release and the *ARL Policy Notes* blog post on this topic.

US Appropriations Update

With FY 2017 appropriations finally settled just prior to a federal government shutdown in late April, Congress is now focused on FY 2018 appropriations. For the remaining funding for FY 2017 (May through September 30), Congress did not follow the White House request to slash many agency programs and/or call for the elimination of several agencies, including the Institute of Museum and Library Services (IMLS), National Endowment for the Humanities (NEH), and National Endowment for the Arts (NEA). Instead, those agencies saw an increase in funding.

As a result, it is anticipated that the fight over FY 2018 will be more contentious with the President already suggesting that a government shutdown is a possibility if his forthcoming budget proposal is not accepted by Congress. The Administration is expected to release its FY 2018 budget proposal on May 23. Similarly, the House and Senate will soon release budget resolutions. Those resolutions provide a framework for the House and Senate to consider FY 2018 appropriations but are not binding.

ARL continues to press for full funding for several key federal programs and agencies.

Access to and Preservation of Government Data

Public Access to Government Data

With growing concern in the research and education communities, among others, several efforts are underway to harvest and curate government data. There have been over 40 Data Rescue events around the US and in Toronto with more anticipated in the near future. Research libraries have been active participants in these efforts and continue to work with others in the research, education, and governmental communities on this issue.

In an effort to better coordinate this work and plan for a long-term sustainable approach, two meetings were recently conducted. The first was hosted by the Social Science Research Council (SSRC) on April 21 and focused on humanities and social sciences (HSS) government data. The goals of the meeting were to build on work already underway; determine if HSS data had been harvested in other rescue events; share rescue tools; discuss and coordinate how best to deposit "rescued" data; discuss where to deposit rescued data to ensure long-term preservation and access; and, finally, how SSRC might coordinate and or facilitate future efforts in the preservation to and access of HSS government data. A report of the meeting is expected shortly.

The second meeting was co-hosted by Penn Libraries, Mozilla, and ARL on May 8–9 in Washington, DC. Sixty-five individuals from a variety of sectors, disciplines, and communities engaged in active discussions on models for long-term preservation of and access to government-produced data. Twelve lightning talks set the stage for discussions and five working groups were formed and presented recommendations for future activities and engagement. A primary goal of the meeting was to build community in order

for this ongoing work to be sustainable and to engage the right partners in this work. The participants also identified 11 principles to guide their work. A report of the meeting is forthcoming.

Open Government Data Act

The Open, Public, Electronic, and Necessary (OPEN) Government Data Act, S. 760, was unanimously approved without any changes by the Senate Committee on Homeland Security and Governmental Affairs on May 17. This legislation seeks to ensure that government-produced data is open and available whenever possible. S. 760 would codify the February 2013 OSTP memo on public access to government data. This bill defines open data; creates standards for making government data available to the public; requires the federal government to use open data to improve decision-making; and ensures accountability by requiring oversight during key periods of implementation. There is a companion bill in the House, H.R. 1770, which the Committee on Government Reform is expected to mark up in the coming weeks. ARL joined many others in the public and private sectors in a letter supporting this legislation.

Preserving Data in Government Act

On April 27, Senator Cory Gardner (R-CO) and Senator Gary Peters (D-MI) introduced bipartisan legislation to help federal agencies maintain open access to machine-readable databases and data sets created by taxpayer-funded research. The Preserving Data in Government Act (S. 960) would require federal agencies to preserve public access to existing open data sets, and prevent the removal of existing data sets without sufficient public notice. The bill was referred to the Committee on Homeland Security and Governmental Affairs. This legislation is very pertinent to all of the recent Data Rescue events that have occurred since the November election. ARL will work with Committee staff and other partners in support of this legislation.

Net Neutrality

The battle over an open Internet continues in the Trump Administration, which has been extremely critical of net neutrality. The Federal Communications Commission (FCC) has been engaged in a long process resulting in the 2015 Open Internet Order, which reclassified broadband Internet service as a Title II common carrier and protects against blocking, degradation, and paid prioritization (after its 2010 Open Internet Order was struck down by a court). The 2015 Open Internet Order, implemented after the FCC's notice of proposed rulemaking and a lengthy period of public comment, was upheld by the Court of Appeals for the DC Circuit in June 2016.

The current threats to net neutrality involve continued litigation, a new FCC notice of proposed rulemaking (NPRM) and Congressional interest in amending net neutrality rules. In light of these concerning actions, on March 30, higher education and library organizations reaffirmed their commitment to net neutrality through letters to the FCC and Congressional leadership articulating principles that should form the basis of any review of the 2015 Open Internet Order.

With respect to litigation, on May 1, the Court of Appeals for the DC Circuit declined to rehear the case by a full court. No announcement has been made by the petitioners on whether they will seek review by the Supreme Court of the United States.

On April 27, the FCC noted that it would vote to adopt a new NPRM and seek comment regarding rolling back net neutrality protections at its May 18 meeting; new FCC Chairman Ajit Pai has repeatedly criticized net neutrality rules and vowed to take a "weed whacker" to the 2015 Open Internet Order. The FCC appears to want to reverse course on Title II reclassification—which provided the strong legal basis for the no-blocking, no-throttling, and no-paid-prioritization rules—and potentially give enforcement oversight to the Federal Trade Commission (FTC) instead. Some observers

have noted, however, that quick reversal of Title II reclassification could be on shaky legal ground and courts would closely scrutinize such a decision; the FCC must therefore demonstrate substantial changes in the environment to ensure that new rules would not be seen as arbitrary and capricious actions of a new administration. ARL plans to file comments in response to the new NPRM together with other higher education and library associations.

Meanwhile, some members of Congress continue to express an interest in rolling back the protections of the FCC's Open Internet Order. While it is possible that a compromise bill could emerge in Congress to provide at least some protections for net neutrality, ultimately such a bill would likely weaken the rules under the 2015 Open Internet Order. There is speculation that FCC Chairman Pai's aggressive stance against net neutrality may be used to propel Congressional action.

Trade Agreements

Trans-Pacific Partnership Agreement

After President Trump was elected in November, it appeared that the Trans-Pacific Partnership Agreement (TPP)—a comprehensive regional trade agreement between 12 countries including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States—would not go into effect due to a requirement that Japan and the United States ratify the agreement. When President Trump announced that the United States was withdrawing in January 2017, some of the remaining countries began discussing whether the TPP could go forward without the United States as a member.

In early May, negotiators from the remaining 11 TPP countries met in Canada to discuss a possible path forward for the TPP. Some countries expressed an interest in going forward and amending the TPP to ensure entry into force with as few as five ratifications.

Other countries suggested renegotiation of the agreement, possibly with additional countries from outside the current TPP countries. Finally, others suggested that the TPP would not be meaningful without United States involvement. Some countries that are seeking to move forward with ratification have reportedly taken the position that even if some provisions of the TPP are renegotiated, the demands of the United States should be preserved with the hopes that the US would join under a new Administration.

North American Free Trade Agreement (NAFTA) Renegotiation

Soon after US Trade Representative Lighthizer was confirmed on May 11, Senate Finance Chairman Hatch (R-UT) requested that the Trump Administration notify Congress regarding the intention to renegotiate NAFTA, the trade agreement between the United States, Canada, and Mexico. Renegotiation of the trade agreement was one of Trump's campaign promises and could affect a number of issues, including intellectual property provisions as well as immigration and visa rules. The Trump Administration notified Congress on May 18 that it does intend to renegotiate NAFTA, triggering a 90-day consultation period. After this 90-day period expires, starting on August 16, the United States can enter into renegotiation discussions with Canada and Mexico.

Immigration and Border Control

Executive Orders on Travel Bans

President Trump has issued two executive orders banning entry into the US by individuals from several nations. After the first such order, Executive Order 13,769, was issued on January 27, district court Judge Robart issued a temporary restraining order against enforcement of certain portions of the order in *Washington v. Trump*. The Ninth Circuit denied a stay of the restraining order. The Trump Administration then issued another executive order, EO 13,780, on March 6, designed to

replace the prior order. EO 13,780 made some changes, suspending entry by nationals of six countries rather than seven (Iran, Libya, Somalia, Sudan, Syria, and Yemen) for 90 days, and the travel ban no longer applies to lawful permanent residents of the US, holders of valid visas, dual nationals, or certain other categories of people. EO 13,780 also includes a "waiver provision" to permit entry on a case-by-case basis. Numerous lawsuits have been filed nationwide.

Thus far, multiple district court judges have blocked portions of the new Executive Order from enforcement, often relying on prior statements made by Trump and Administration officials, including statements made during the presidential campaign. These prior statements suggest that the executive orders were issued "with a purpose to disfavor a particular religion, in spite of [the orders'] stated, religiously neutral purpose." These cases have now largely moved to the Courts of Appeals across the country, with oral arguments at the Ninth Circuit and Fourth Circuit already taking place. The ultimate outcomes will likely hinge on whether Trump's and Administration officials' statements regarding the travel ban may be considered in determining the purpose of these executive orders. Additional information may be found in the *ARL Policy Notes* blog post, "Court Cases on Trump's Travel Ban." See also ARL's January 30 statement, "Research Libraries, University Presses Oppose Trump's Immigration Order."

H-1B Visa Changes

On April 18, President Trump signed another executive order related to immigration, this one entitled "Buy American and Hire American." This order is targeted at "fraud or abuse" in the overseas guest-worker programs and increases oversight of the H-1B visa program for highly skilled workers. Changes to the H-1B visa program may affect not only the employees of universities and research institutions, but also the ability to recruit international students who may want to attend higher education institutions in the United States with the intention of finding employment in the US after graduation. New regulations

will be created as a result of this executive order, though a timeline is unclear. ARL will monitor the development of new regulations.

Deferred Action for Childhood Arrivals (DACA) Program Update

ARL joined 27 other organizations in a letter to the Secretary of Homeland Security, John Kelly, requesting that the Secretary clarify to all staff of the US Department of Homeland Security that the existing protections offered under the Deferred Action for Childhood Arrivals program are still valid and that DACA beneficiaries not be targeted for deportation. The signatories noted that "while DACA recipients, or DREAMers, are not an official priority, there is still a large element of local discretion in enforcement that belies the official position. Consequently, we urge you to make clear throughout the Homeland Security enforcement arms, and to cooperating local and state law enforcement, that the United States means what it says when it offers vetted individuals with the promise of 'deferred action.'"

Passwords at the Border

Recently, news reports have indicated that individuals—including United States citizens and lawful permanent residents—have been ordered by US Customs and Border Protection (CBP) agents to unlock devices or provide passwords to cell phones, tablets, computers, or other devices. Although the ability for CBP to detain someone indefinitely or turn them away for refusal to provide passwords depends on the status of the individual (United States citizen, lawful permanent resident, visa holder, or other visitor), reports have indicated that CBP has interrogated or scrutinized many travelers about religious and political views, reading and viewing habits, news sources, and private communications. In some cases, the information stored on the devices has included confidential professional information or classified material.

In a February 2017 House Homeland Security Committee hearing,

the Department of Homeland Security stated that it was considering requiring visa applicants to provide log-in information, such as passwords, for social media accounts. Such a requirement raises serious concerns regarding privacy of information. Additionally, foreign scientists, researchers, and other experts may be discouraged from traveling to the United States because of fear of having to reveal confidential information. Freedom of expression may also be threatened because of fear of scrutiny by the government.

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