

# Advocacy and Public Policy Update

September 22, 2017

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 May 20, 2017, through September 22, 2017, written by Prudence S. Adler and Krista L. 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 Issues

### **US Copyright Office Releases Discussion Draft on Section 108 Exceptions for Libraries**

The United States Copyright Office recently released a [discussion draft](#), including model legislation, recommending reform of Section 108 of the Copyright Act, the provision that lays out specific limitations and exceptions for libraries and archives. Although the Copyright Office acknowledges that members of the library and archives communities have expressed deep concerns regarding revisions to Section 108, the Copyright Office still recommends reform.

The Copyright Office makes a number of proposals for revision of Section 108. The most significant reforms include:

- Including museums as beneficiaries of the exceptions as well as adding new eligibility conditions for all beneficiaries of Section 108.
- Replacing the current published/unpublished distinction with a publicly disseminated/not publicly disseminated distinction, which effectively expands the scope of works that are covered by Section 108.
- Allowing preservation copies for all published works to be put into a dark archive, but not providing for access to these copies.
- Removing the three-copy limitation that currently exists and replacing it with a “reasonably necessary” standard, which permits all temporary or incidental copies that are necessary when creating a digital copy as opposed to an analog one.
- Allowing a replacement copy to be made for “fragile” copies and expanding off-premises access for replacement copies.
- Eliminating the current exclusion of certain works from the provisions permitting copies to be made at the request of users.
- Providing that there is no federal copyright infringement for preservation copies that violate non-bargained-for contractual

language, though other actions may still be brought for contractual violations.

- Allowing institutions to contract with third parties to perform the reproduction functions under Section 108.

While this discussion draft includes a number of reasonable recommendations, there are significant concerns that other stakeholders—particularly the Association of American Publishers (AAP) and Authors Guild—will lobby to have the fair use savings clause removed from Section 108, despite the Copyright Office’s recommendation of retaining the savings clause. The fair use savings clause reserves the general right of fair use for libraries, regardless of the specific rights granted in Section 108. Both AAP and Authors Guild have previously made statements arguing that libraries should not be permitted to rely on fair use because of the existence of Section 108. ARL will engage with Congress and other stakeholders as this issue moves forward.

### **Library Copyright Alliance Joins Amicus Briefs Supporting Public.Resources.Org in Two Cases**

As part of the Library Copyright Alliance (LCA), ARL joined two amicus briefs in cases filed against the nonprofit Public.Resources.Org: [\*Georgia v. Public.Resources.Org\*](#) (May 23) and [\*ASTM v. Public.Resources.Org\*](#) (September 22). Public.Resources.Org uploads to its website the building codes drafted by standards organizations and adopted by legislatures; standards organizations have filed lawsuits arguing that their codes are protected by copyright, despite being adopted by state and local governments. In both cases, the district courts rejected the arguments that codes are not subject to copyright law and, alternatively, that the uses were fair use. The amicus briefs support Public.Resources.Org in these cases. Depending on the outcomes of the cases and whether they are appealed, the US Supreme Court could decide to hear these cases.

## **LCA Supports Strong Fair Use Provisions in South Africa's Copyright Reform**

On July 6, the Library Copyright Alliance (LCA) submitted [comments](#) to the Parliament of South Africa regarding the South African Copyright Amendment Bill currently being considered. The comments support proposed exceptions for libraries, archives, museums, and galleries; persons with disabilities; and educational activities. The comments also make suggestions on improving the proposed fair use provision, to ensure that it is open ended and not restricted to the purposes listed in the statute. Finally, the comments suggest that orphan works are better addressed within the framework of fair use rather than a statutory license.

## **ARL Releases Issue Briefs on Fair Use in Archiving Government Information, Licensing Metadata**

In [\*Using Fair Use to Preserve and Share Disappearing Government Information\*](#), William Cross, director of the Copyright and Digital Scholarship Center at NCSU Libraries, notes “Access to government information is a fundamental principle in a democratic society.... Libraries and archives have historically served as stewards of government documents, and in recent years, these institutions have paid special attention to the unique vulnerability of information during changeover in presidential administrations.” Cross discusses the complex legal issues involved in preserving and sharing government information from the internet and explains how the doctrine of fair use supports doing so. He concludes that the law is clear in granting libraries and archives “special authority” to archive and share information released by the government.

In [\*Metadata and Copyright: Should Institutions License Their Data about Scholarship?\*](#), Krista L. Cox, director of public policy initiatives at ARL, says, “The Association...is committed to promoting open scholarship, including making metadata—foundational information about scholarly

works—as widely available as possible. Allowing the broadest access to and reuse of metadata advances scholarship, research, discovery, and innovation.” Cox discusses whether metadata is or is not copyrightable in a variety of situations, as well as policies and community norms around licensing metadata. She provides recommendations on whether or not to license metadata while encouraging widespread use and sharing.

Both briefs are freely available on the [ARL website](#).

### **York University to Appeal Decision on Fair Dealing in Access Copyright Lawsuit**

On July 12, Judge Phelan of the Federal Court of Canada issued a decision in favor of Access Copyright’s lawsuit against York University. The case involves York’s “opting out” of the interim tariff established by the Copyright Board of Canada when an agreement between York and Access Copyright expired and York’s using a print shop to produce course packs. The court considered (1) whether the interim tariff was mandatory and enforceable; and (2) whether [York’s fair dealing guidelines](#) were “fair.” The court found that the interim tariff was mandatory and enforceable and that York’s uses did not fall within fair dealing guidelines. Despite the fact that education is clearly enumerated as a fair dealing purpose, the court found that York’s purpose in the case was to promote student enrollment through lower student costs. York University has announced its [intention to appeal](#) to the Federal Court of Appeal.

## US Government Information

### **Title 44 Reform with Focus on Depository Library Program and Paperwork Reduction Act**

Two US House of Representatives committees are examining possible changes to chapters in Title 44 of the US Code, “Public Printing and Documents.” Of most interest to the research library community are Chapter 19, the “Depository Library Program,” and Chapter 35, “Coordination of Federal Information Policy,” which originated as the Paperwork Reduction Act of 1980.

With the exception of Chapter 35, the Committee on House Administration is reviewing all chapters of Title 44 to reform the federal government’s printing and publishing efforts. The committee is very interested in reforming and updating aspects of Chapter 19 to better reflect the current technological environment and the shift away from print towards digital. Ninety-seven percent of government information in the Federal Depository Library Program (FDLP) is digital. ARL and others in the library community responded to the request for comment by the head of the Government Publishing Office, Davita Vance-Cooks. [ARL’s comments](#) are available online.

The House Administration Committee will conduct hearings on Title 44 beginning with a hearing on September 26 on the FDLP. Additional hearings will be conducted on October 4 and 11. It is expected that a bipartisan bill will be introduced in October.

The House Committee on Government Reform is examining Chapter 35 of Title 44, the Paperwork Reduction Act (PRA). The PRA was last amended in 1996 and provides the “rules of the road” for federal government information policy. At that time, print was still the dominant means to create and disseminate government information. That is no longer the case today as almost all government information is created, managed, and disseminated in electronic format. In July

2016, the Office of Management and Budget (OMB) updated Circular A-130 that is the guidance to federal agencies based on the PRA. This OMB update reflects the extensive use of information and networked-based technologies. Any changes to the PRA should similarly address the reliance upon these technological systems. ARL staff are working with committee staff on reauthorization of the PRA and with committee staff on updating Title 44 with a focus on Chapter 19.

### **OPEN Government Data Act Passes the Senate**

On September 18, the Senate passed the [Open, Public, Electronic, and Necessary \(OPEN\) Government Data Act \(S. 760\)](#). The act requires federal agencies to publish their information as open data utilizing standardized, nonproprietary formats. The OPEN Government Data Act builds on President Obama's May 2013 Open Data Policy and makes key aspects of the Open Data Policy permanent. The act was included in the 2018 National Defense Authorization Act. A companion bill had already been approved by the House. A conference committee comprised of House and Senate members will resolve any differences between the House and Senate bills.

## Internet Communications Policies

### Net Neutrality

On July 18, ARL and higher education associations submitted [joint comments](#) to the Federal Communications Commission (FCC) urging the commission to maintain strong protections for net neutrality. In late August, ARL then submitted two sets of reply comments to the FCC. ARL joined with eight other higher education associations to file [one set of reply comments](#), noting that an open internet is fundamental to the service missions of institutions of higher education and libraries, that Title II provides a strong legal basis to protect and preserve an open internet, while also pointing to protections the FCC could enact under Section 706. ARL also submitted [individual reply comments](#) highlighting the importance of net neutrality to ARL institutions, urging the FCC to maintain protections under Title II (noting that it is the clearest path to regulatory certainty), and noting the importance of an open internet to the protection of the First Amendment. The individual comments link to a [webpage](#) on the ARL website with additional examples of how ARL institutions rely on an open internet. A [press release](#) is available on the ARL website.

### Stop Enabling Sex Traffickers Act

Congress is currently considering the [Stop Enabling Sex Traffickers Act \(SESTA\) \(S. 1693\)](#), a bill that would harm the protections of Section 230 of the Communications Decency Act (CDA), which protects online free speech. (The House has a similar bill, the [Allow States and Victims to Fight Online Sex Trafficking Act \(H.R. 1865\)](#).) Section 230 of the CDA has been a cornerstone of internet communication, generally shielding internet intermediaries from liability for hosting user-generated content. Under Section 230, while the actual speaker is at risk of liability, the site hosting the content is not. SESTA would reinstate the moderation dilemma that existed before Section 230 was adopted; prior to Section 230, online services feared liability for what

they might miss in moderating socially harmful content. SESTA would rewrite Section 230 to expose providers to new enforcement actions by state law enforcement and civil plaintiffs. The Senate held a hearing on SESTA on September 19 and it appeared that a number of Senators are open to amending the bill to address these concerns.

### **Modernization of Electronic Communications Privacy Act**

On July 27, Senators Lee (R-UT) and Leahy (D-VT) introduced the [ECPA Modernization Act of 2017 \(S. 1657\)](#), a bill to reform the Electronic Communications Privacy Act (ECPA). ECPA is a law from 1986 governing privacy for online communications and, not surprisingly, has long been in need of reform. The House version of the bill, the [Email Privacy Act \(H.R. 387\)](#), was introduced by Congressmen Yoder (R-KS) and Polis (D-CO) earlier this year, a bill that unanimously passed the House of Representatives in 2016. ECPA reform would rectify the absurdity that allows the government to seize online documents and communications older than 180 days without a warrant, even though they could not do so for hard-copy documents, and would restore Fourth Amendment protections to the digital environment. ARL is supporting ECPA reform and participating in coalition work on this.

## US Government Budget

In early September, the United States House and Senate passed a continuing resolution to fund the government through December 2017. The House and Senate also provided disaster relief funding for those states and territories impacted by Hurricane Harvey. The [Continuing Appropriations Act 2018](#) funds the federal government through December 8, 2017. The House and Senate are actively pressing ahead on appropriations bills for 2018; the House is farther along in moving bills through committees and to the floor than the Senate.

## International Trade Agreements

### LCA Comments on Renegotiation of North American Free Trade Agreement

The Trump Administration has entered into renegotiations of the North American Free Trade Agreement (NAFTA), a regional trade agreement between the United States, Canada, and Mexico. LCA [submitted comments](#) recommending that any renegotiated chapter on intellectual property (IP) include provisions on limitations and exceptions, similar to what was included in the final text of the Trans-Pacific Partnership Agreement (TPP). The comments also encourage inclusion of:

- a first sale/exhaustion of rights provision stating IP should be treated like all other property—when you buy a copy, you own that copy, and you can give it away, resell it, or lend it;
- intermediary safe harbors that provide immunity for online service providers so they cannot be held liable for their users' infringement of copyright or IP law; and
- a number of instances of balancing language (with respect to objectives and principles) that were included in the TPP.

## **Trans-Pacific Partnership Agreement Update**

Soon after President Trump's inauguration, the administration fulfilled a campaign pledge and withdrew from the [Trans-Pacific Partnership Agreement](#), a trade agreement among 12 countries in Asia, Australasia, North America, and South America. Since then, the remaining 11 countries have met to discuss a possible path forward, including changing the requirements for the TPP to enter into force or renegotiation of portions of the agreement. According to some reports, some of the remaining countries have advocated for removal of particular clauses in the final text that were introduced at the demand of the United States, while others have suggested that the current text of the TPP should remain in place in the hopes that the United States would want to rejoin under a new administration. Some countries are reportedly pushing to conclude a new agreement by the end of the year. One provision that reportedly will be discussed is the controversial copyright term extension, covering copyright for the life of the author plus an additional 70 years.

## Diversity and Inclusion

### ARL Joins Amicus Brief in Travel Ban Case

ARL joined with 29 other higher education associations in an [amicus brief](#) in the Supreme Court combined cases of *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii*. The Courts of Appeals for the Fourth and Ninth Circuits [previously overturned](#) the Administration's Executive Orders (EO) banning entry into the United States of nationals of certain countries based on a finding that one of the EOs was discriminatory.

The amicus brief points out that the Executive Order harms US colleges and universities because the community relies on diversity of people and ideas and that international students and scholars strengthen the economy and democracy. The brief also points to specific harms with respect to international students, scholars, and conferences.

As the brief notes,

The inquiry, innovation, and invention that take place every day within amici's classrooms, libraries, and laboratories depend on the ability of scholars and students to travel to and from the United States. The EO, however, severely undermines the ability of American colleges and universities to fulfill their commitment to serving their students, their communities, the United States, and the world through innovative teaching and research. That commitment relies on maintaining a consistent pipeline of the most talented international students and scholars, who bring with them unique skills and perspectives that inure to the benefit of their classmates, colleagues, and the communities, small and large, served by amici's member institutions. And for those students and scholars who do not remain, after receiving first-class education, training and experience in the United States, they take back to their countries

the lessons and values they learned here, to the benefit of the entire international community.

The Supreme Court was originally scheduled to hear the case during its October sitting, but has canceled oral arguments pending briefs from both sides on whether the case is moot.

### **ARL Supports Deferred Action for Childhood Arrivals and DREAM Act**

Prior to and following the Trump Administration's decision to end the Deferred Action for Childhood Arrivals (DACA) program, ARL joined letters in support of the DACA program and "Dreamers," a term from the Development, Relief, and Education for Alien Minors (DREAM) Act. Two recent letters called on Congress to pass legislation that addresses this critically important issue for approximately 800,000 individuals who were brought to the US as children. As noted in a recent [American Council on Education \(ACE\) letter with 78 other organizations including ARL](#):

In the 16 years since the DREAM Act was first introduced, a number of bills have been introduced in Congress to address the uncertain status of these individuals, including various versions of the DREAM Act, which the higher education community has long supported. We urge Congress to pass bipartisan legislation as soon as possible that will include all the protections currently provided under DACA and allow these young people to continue contributing to our society and economy by working, serving in the military or attending college.

In addition to the ACE-led letter, ARL joined letters from the [American Association of Geographers](#) and the [Hispanic Association of Colleges and Universities](#). ARL supports the DREAM Act of 2017, S. 1615. The bipartisan bill provides a direct road to US citizenship for people who are either undocumented or have DACA or temporary protected status,

and who graduate from US high schools and attend college, enter the workforce, or enlist in a military program.

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