

Advocacy and Public Policy Update

September 14, 2018

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 20 through September 14, 2018, 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 and Intellectual Property Issues

ASTM v. Public.Resource.Org

On July 17, a three-judge panel at the DC Circuit Court unanimously vacated a lower court decision that had blocked Public.Resource.Org from posting technical standards that are part of US law. In *American Society for Testing and Materials (ASTM) v. Public.Resource.Org*, six large industry groups filed suit against Public.Resource.Org after it posted the standards, which had been incorporated into law, on its website. The industry groups claimed that in posting these standards, Public.Resource.Org violated copyright and trademark law.

The DC Circuit decision vacates the injunction against Public.Resource.Org and directs the district court to decide whether the activities were a fair use. The DC Circuit noted that the district court did not properly consider the fair use doctrine, which “in many cases” may support Public.Resource.Org’s efforts to publish technical standards “in order to inform the public about the law.” The concurring opinion pointed out that as a policy matter, it makes little sense to allow access to the law be within the exclusive control of private parties.

Music Modernization Act

In May, the US House of Representatives unanimously approved the Music Modernization Act (HR 5447), a bill that merged several elements of different bills related to copyright provisions on music. The bill addresses music licensing and royalties, including for recordings created prior to 1972. Under current copyright law, royalties for pre-1972 recordings are covered by state law rather than federal.

While the bill has broad support in the US Senate, Senator Ron Wyden (D-OR) introduced a competing bill on May 23. The Accessibility for Curators, Creators, Educators, Scholars, and Society to Recordings Act (ACCESS to Recordings Act) provides full federal copyright protection

to sound recordings fixed prior to 1972 and has been supported by library associations and public interest groups.

As the Music Modernization Act is considered in the Senate, ARL continues to engage in discussions with other stakeholders, including those from the recording industry, to improve the bill. ARL also continues to communicate with Senate offices regarding music modernization.

Library Copyright Alliance Comments on Mandatory Deposit of Electronic-Only Books

In response to a US Copyright Office Notice of Proposed Rulemaking concerning “Mandatory Deposit of Electronic-Only Books,” the [Library Copyright Alliance \(LCA\) submitted comments](#) emphasizing the importance of deposit in ensuring that the Library of Congress can build and preserve a national collection of works in all formats. LCA recommends that the Copyright Office make its interim rule regarding on-demand deposit requirements final and that the rule apply only to the specific circumstance of works available online only, rather than those that are also produced in a physical copy. The comments point out, “Without mandatory deposit, works created in the digital age could be lost forever. Approximately half of films made before 1950 and most silent films are unavailable because of the lack of national preservation of these important pieces of our cultural heritage. The Library is actively trying to ensure that such enormous losses are not replicated in the digital era due to the lack of mandatory deposit of online-only works.”

The comments also support a rule that does not require new security requirements, that does require retention of metadata, and that advocates for less-restrictive access rules as well as expansion to sound recordings.

Net Neutrality Update; Higher Education and Library Amicus Brief

On August 27, ARL joined 19 other higher education and library associations in submitting an amicus brief to the DC Circuit in *Mozilla v. Federal Communications Commission (FCC)*, supporting restoration of net neutrality rules, emphasizing the importance of an open internet for equitable access to information.

The amicus brief explains the importance of strong net neutrality protections, including no-blocking and no-paid prioritization, for access to information, research, and freedom of speech. The brief provides specific examples of innovative ways in which higher education and library amici have used the internet and how the FCC's abandonment of net neutrality rules will imperil the public interest mission of these institutions. The brief also points out the arbitrary and capricious decision-making of the FCC, as the agency ignored the lengthy record and numerous submitted comments.

Technology companies, attorneys general of 22 states and the District of Columbia, and public interest groups are among those that filed the lawsuit against the FCC, challenging the repeal of the Open Internet Order. Petitioners filed briefs on August 20, including [one joint brief of companies, consumer groups, and public interest organizations](#), and [one brief of government petitioners](#), consisting of 22 state governments, the District of Columbia, County of Santa Clara, Santa Clara County Central Fire Protection District, and the California Public Utilities Commission. The brief of government petitioners notes that Verizon throttled Santa Clara County Fire's data usage while the department was in the midst of fighting the largest wildfire in California history; the throttling occurred to such an extent that the department reported that it had "no meaningful functionality."

In addition to encouraging the judicial branch to overturn the FCC's repeal of net neutrality rules, ARL has joined in urging Congress to use

the Congressional Review Act (CRA) to reverse the FCC's decision. The US Senate used CRA, voting 52-47 in favor of protecting an open internet on May 16. The US House of Representatives has failed to act.

For more information:

International Alliance of Research Library Associations, "[Research Library Associations Commit to Principles of Net Neutrality](#)"

ARL News, "[Library and Higher Education Groups File Amicus Brief Supporting Net Neutrality](#)"

ARL Policy Notes, "[Government Petitioners' Brief Points Out Verizon Throttling of Fire Department Battling Largest Fire in California History](#)"

ARL Policy Notes, "[Mozilla, Internet Companies, Public Interest Groups and Other Petitioners File Brief in Net Neutrality Case](#)"

ARL Policy Notes, "[In Vote to Restore Net Neutrality Rules, Several Senators Note Importance of Open Internet for Research, Education and Equity](#)"

ARL News, "[ARL Applauds US Senate Vote to Restore Net Neutrality](#)"

ARL News, "[ARL Urges US House of Representatives to Restore Net Neutrality](#)"

Science and Technology Policy

Kelvin Droegemeier Nominated to Lead US Office of Science and Technology Policy

The White House has [nominated Kelvin Droegemeier](#) to be director of the Office of Science and Technology Policy (OSTP). Droegemeier is a meteorologist and recently resigned as vice president for research at the University of Oklahoma. He serves as secretary for science and technology for Oklahoma Governor Mary Fallin. He was vice chair of the National Science Board under President Bush and President Obama. Droegemeier spoke at an ARL meeting on the critical importance of public access to scientific research. ARL signaled its support for this nomination and Droegemeier enjoys strong support within the scientific and research communities. The Senate Committee on Commerce, Science, and Transportation voted unanimously to approve his nomination on September 5. Droegemeier still faces a vote by the full Senate, expected to occur later in September.

White House Releases FY 2020 Science and Technology Priorities

The US Office of Science and Technology Policy (OSTP) and the US Office of Management and Budget (OMB)—part of the Executive Office of the President—released the [FY 2020 R&D priorities memo](#). This memo advises federal agency leaders on the Administration's R&D priorities that should be reflected in proposed FY 2020 budgets and in agency programs. Several areas are mentioned, including basic medical research, quantum information sciences, artificial intelligence, manufacturing, and strategic computing.

ARL Opposes EPA's Proposed Rule on Transparency in Regulatory Science

ARL recently filed [comments](#) in opposition to the US Environmental Protection Agency's (EPA's) proposed rule, [Strengthening](#)

[Transparency in Regulatory Science](#). In the comments, ARL stated:

Sound and responsible policymaking relies on several factors, such as the use of the best available scientific data, ethical considerations and strong privacy protections for the data of human subject participants. The EPA's proposed regulation would ignore these long accepted practices and that could, unfortunately, lead to significantly inaccurate and biased policies. The importance of ensuring privacy protections cannot be overstated. These are grounded in law, ethics and confidentiality agreements with the human subject participants. If EPA discounts data that cannot be made publicly available, then it limits the universe of data and research studies available to develop well-supported and accurate rules and policymaking activities. As such, EPA would be unable to achieve its mission to preserve public health and the nation's air, waterways and land....

ARL is a strong proponent of improving the transparency of science and enhanced access to data but ARL cannot support any effort that limits the use of the best available science in rulemaking, indeed, in all of EPA's policy activities. ARL requests that EPA withdraw this proposed rule.

National Academies of Sciences Release Consensus Report on Open Science by Design

In late July, the Board on Research Data and Information of the National Academies of Sciences, Engineering, and Medicine (NAS) released a foundational report on the pressing need to move towards a fully open, global environment for the sharing of data, [Open Science by Design](#). Signaling the importance of this report to the research community, the president of the NAS, Marcia McNutt, spoke of the important role of libraries and noted that open science is the fifth milestone in the history of information sharing, following the development of spoken language, the development of written language, the creation of libraries, and the creation of the first scholarly journal

in 1665.

The authors of the report call for open to be the default for the practice of science throughout the life cycle. We sent a short piece to the ARL Directors email list on July 19 providing more details of the recommendations and next steps. This includes several areas where libraries should engage, such as the following:

- The university library community has an important role to play in the promulgation and support of open science principles and practices and training in the responsible conduct of research.
- The library community, including archivists, curators, and other information scientists, plays an important role in effecting long-term preservation and stewardship.
- Librarians should work together with other members of the research community to promote and implement open science by design.

In a [guest post on the *ARL Policy Notes* blog](#), Judy Ruttenger reviews the highly decentralized nature of the research enterprise and the implications of decentralization for access to research and information resources.

Civil Rights

ARL Joins 25 Organizations Opposing Census Citizenship Question

ARL, with 25 other organizations, sent a [letter](#) to the US Department of Commerce urging the department to remove the new citizenship question from the 2020 Census. The letter noted many serious concerns with the inclusion of this question, such as how federal funds are allocated, representation and apportionment in Congress, and more. The decision to add the citizenship question ignored the extensive research and testing that the Census Bureau undertakes in the years leading up to a decennial census. The decision was made against the advice of experts at the Census Bureau, such as chief scientist John M. Abowd. In a [memo](#) to Commerce Secretary Ross, Abowd stated that adding such a question “is very costly” and “harms the quality of the census count.” Opposition to the inclusion of the citizenship question continues to grow, including opposition by the National Academies of Sciences, Engineering, and Medicine. The National Academies noted in a [letter](#) to the Census Bureau that “the decision to add a question on citizenship status to the 2020 census is inconsistent with the ‘proper performance of the functions’ of the Census Bureau.” Finally, the Government Accountability Office recently released a [report](#) stating that the Census Bureau was facing serious challenges in attracting individuals to work on the gathering of data for the 2020 census. The inclusion of the citizen question will further hinder garnering an accurate count.

US Supreme Court Upholds Trump Administration Travel Ban

On June 26, the US Supreme Court upheld the Trump Administration’s travel ban, reversing lower court decisions. The ban under consideration was the third attempt by the Administration to enact restrictions on nationals of specific countries; this version of the ban places restrictions on seven countries—five of which have majority-

Muslim populations. In its decision, the Supreme Court affirmed the President's broad authority over national security matters.

In March of this year, ARL joined with 22 other higher education associations in filing an amicus brief opposing the travel ban, noting the detrimental effects the ban would have on cross-border exchange of ideas.

For more information, see the June 26 ARL news release, "[ARL Issues Statement on Supreme Court Decision Upholding Travel Ban.](#)"

International Issues

Marrakesh Treaty Update

On June 28, the United States Senate ratified the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled and passed the Marrakesh Treaty Implementation Act (S 2559) by unanimous consent. The Marrakesh Treaty requires countries to ensure minimum copyright limitations and exceptions for the creation and distribution of accessible formats and cross-border sharing of these materials. Cross-border exchange is a critical feature of the treaty, which could greatly alleviate the “book famine” problem, a situation in which the National Federation of the Blind has estimated that no more than five percent of published works are created in an accessible format. Now that the Senate has acted, the House of Representatives must pass the implementing legislation and the bill would then go to President Trump for signature. The United States would likely deposit its instrument of ratification with the World Intellectual Property Organization (WIPO) after these next steps are taken.

The Marrakesh Treaty currently has 39 contracting parties and entered into force on September 30, 2016, with Canada’s ratification. Countries from every region of the world, with varying levels of development, have ratified the treaty: Argentina, Australia, Botswana, Brazil, Burkina Faso, Canada, Chile, Costa Rica, Democratic People’s Republic of Korea, Dominican Republic, Ecuador, El Salvador, Ghana, Guatemala, Honduras, India, Israel, Kenya, Kyrgyzstan, Lesotho, Liberia, Malawi, Mali, Mexico, Mongolia, Nigeria, Panama, Paraguay, Peru, Republic of Korea, Republic of Moldova, Russian Federation, Saint Vincent and the Grenadines, Singapore, Sri Lanka, Tunisia, Uganda, United Arab Emirates, and Uruguay. Other countries are also moving toward ratification and the European Union is expected to complete its process for ratification later this year.

The International Federation of Library Associations (IFLA) recently published a guide, [*Getting Started: Implementing the Marrakesh Treaty for Persons with Print Disabilities, A Practical Guide for Librarians*](#). This guide—supported by the Canadian Association of Research Libraries (CARL), the World Blind Union, EIFL, and the University of Toronto Scarborough—answers frequently asked questions about the Marrakesh Treaty, the role of libraries in providing accessible formats, accessible book services, and technical issues regarding accessible formats.

For more information:

ARL News, [“ARL Celebrates United States’ Ratification of the Marrakesh Treaty”](#) and Library Copyright Alliance, [“LCA Applauds Senate Ratification of Marrakesh Treaty and Adoption of Implementation Act, S. 2559”](#)

ARL News, [“University of Toronto Makes First International Transfer of Accessible Books to Kyrgyzstan under Marrakesh Treaty”](#)

ARL Policy Notes, [“Marrakesh Treaty Unanimously Supported by U.S. Senate Foreign Relations and Judiciary Committees”](#)

North American Free Trade Agreement Update

ARL continues to monitor the renegotiation of the North American Free Trade Agreement (NAFTA), which includes a chapter on intellectual property. On August 27, the Office of the US Trade Representative released a [fact sheet](#) indicating agreement with Mexico on a new version of NAFTA with changes to the intellectual property provisions, including changes to copyright term. Reports indicate that the United States and Mexico are also working on inclusion of Canada in the renegotiated NAFTA. Consumer groups have urged that any intellectual property chapter include copyright-balancing language similar to the provision agreed to in the previously negotiated Trans-Pacific Partnership Agreement (TPP), from which the United States

ultimately withdrew in 2017.

EU Parliament Vote on Copyright Directive

On September 12, the European Union (EU) Parliament voted in favor of the EU Copyright Directive, which includes controversial provisions on online linking and filtering. The Copyright Directive was originally introduced in 2016 and has gone through many changes before passage of this version, with 438 members of Parliament voting in favor, 226 opposing, and 39 abstaining.

The two most controversial provisions of the EU Copyright Directive are Articles 11 and 13. Article 11, known as the “link tax” provision, would require online platforms to pay media outlets to link to their content. Article 13, known as the “upload filter” provision, would force online platforms to filter content uploaded to their sites and remove infringing copyrighted material. Critics of the bill have noted that these new rules will fundamentally alter the way content is created and shared online.

While the EU Parliament voted in favor, the law is not yet final. Negotiations with the European Commission and EU member states to reconcile their different positions are needed before a final vote by the EU Parliament, which is expected to occur in January 2019.

EU Court Considering Reach of Right to Be Forgotten

The European Court of Justice (ECJ) is currently hearing a case on whether the EU’s “right to be forgotten” law applies globally. A [2014 ruling](#) on the right to be forgotten suggested that search engines could be forced to delete results that are “inaccurate, inadequate, irrelevant or excessive,” but did not specify the parameters for such deletions. The current case, in which a 15-judge panel of the ECJ heard arguments on September 11, involves a complaint by France’s data protection agency, the Commission Nationale de l’Informatique et des

Libertés (CNIL). CNIL asserts that when Google delists results upon request from private citizens, the search engine only does so on EU versions of the site. Google has argued that the right to be forgotten only applies within the EU and expanding this right globally would infringe on freedom of speech.

The EU, as well as some member states, have supported Google's argument that global application of the right to be forgotten would expand EU's privacy laws beyond their intended scope.

US Appropriations Update

The Senate cut short its August recess to focus on appropriations prior to the end of the fiscal year, September 30. With the return of the House in early September, as of September 12, there are seven legislative days to complete the full appropriations process and avoid a government shutdown. A number of policy riders have slowed the House process and all need to be resolved prior to the consideration of several bills. There is concern that Judge Kavanaugh's nomination to the US Supreme Court could affect the appropriations process, thus the press to complete appropriations as soon as possible. The House and Senate will need to reconcile differences between House and Senate passed bills.

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