

# Advocacy and Public Policy Update

January 15, 2019

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 September 14, 2018, through January 15, 2019, 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

### Public Domain Day 2019

On January 1, 2019, a significant number of published works entered the public domain in the United States for the first time in 20 years. Although works published in 1923 were originally scheduled to enter the public domain in 1999, the Copyright Term Extension Act extended copyright term for 20 years, giving copyrighted works published between 1923 and 1977 an expanded term of 95 years. Celebrated as Public Domain Day, as of January 1, 2019, all works published in 1923 are now free to use without permission.

Those who hold a copy of a work that entered the public domain on January 1 can digitize the copy and post it online, free for anyone to use or reuse. HathiTrust, for example, has [made over 53,000 titles from 1923 available from its digital library](#). Google Books will provide full text for its 1923 titles rather than the snippet view provided for in-copyright works. A number of libraries will similarly be digitizing and making available 1923 works in their collections, many of which are unique items that are not readily available in other collections.

ARL will collect links to these works from member libraries and include them in a publicly available database to be released in mid-January. Additional events to celebrate Public Domain Day will occur throughout the year. ARL institutions are encouraged to [use this form](#) to input information about their resources that entered the public domain this year.

### Second Circuit Court Rules against Digital First Sale in *Capitol Records v. ReDigi*

On December 12, 2018, the US Court of Appeals for the Second Circuit issued its opinion in *Capitol Records v. ReDigi*, affirming the lower court's finding that ReDigi's service allowing the resale of iTunes files

infringed copyright. The Second Circuit ruled that the first sale right applies to the distribution of copies, but does not provide a defense to the making of copies that occurs during the transfer of digital files. Additionally, the Second Circuit rejected the argument that fair use applied to the copies ReDigi made in facilitating the resale of the digital files. In rejecting the application of fair use, the Second Circuit noted that ReDigi's use was non-transformative and merely provided a competing market for the same recorded music as the rightsholder. This case could provide precedent with respect to controlled digital lending.

For more information, see Jonathan Band's guest post on *ARL Policy Notes*, "[The Implications of the ReDigi Decision for Libraries.](#)"

### **Eleventh Circuit Court Rules Georgia's Annotated State Laws Not Copyrightable**

On October 19, 2018, the US Court of Appeals for the Eleventh Circuit found that Georgia's annotated laws are not protected by copyright, thereby reversing the district court. In *Georgia v. Public.Resource.Org*, the state of Georgia claimed copyright infringement when Public.Resource.Org posted the state's annotated laws online, free to be read by the public. The Eleventh Circuit's ruling was a narrow one: it found only that the annotations in the present case were done at the direction of state officials and therefore intertwined with the law itself, leaving open the question as to whether other annotated laws might fall under copyright protection. Even though the Eleventh Circuit did not issue a sweeping ruling with respect to copyrightability of annotated laws, this ruling could be persuasive in other cases involving Public.Resource.Org. ARL [submitted an amicus brief](#) in the case, together with the American Library Association (ALA), the Association of College & Research Libraries (ACRL), Public Knowledge, and other groups and individuals.

## **Eleventh Circuit Court Reverses, Remands Georgia State University E-Reserves Case Again**

In a long-awaited opinion released October 19, 2018, the Eleventh Circuit again reversed and remanded the Georgia State University (GSU) e-reserves case. This is the second time the Eleventh Circuit has reviewed the case and the second time it has reversed.

In the first reversal, the Eleventh Circuit overturned the lower court's decision in favor of fair use for 43 of the 48 cases of alleged infringement. The Eleventh Circuit directed the lower court to re-examine the weight it gave to the market-substitution factor in its fair use analysis, and also to re-evaluate the four use factors holistically, rather than using an arithmetic approach (in other words, if three factors favor the use, but one does not, fair use should always apply). On remand, the district court ruled that 44 of the 48 cases constituted fair use, assigning each factor a weight: 25% for factor one (purpose and character of the use), 5% for factor two (nature of the work), 30% for factor three (amount and substantiality of the portion used), and 40% for factor four (potential effect upon the market).

The Eleventh Circuit found that the district court once again erred in its evaluation of fair use and that the court should not have re-evaluated its analysis on the fourth fair use factor. Additionally, the Eleventh Circuit once again directs the district court to avoid a mathematical approach and instead use a holistic approach.

For additional analysis of the case, see the *ARL Policy Notes* post [“Eleventh Circuit Reverses and Remands Georgia State E-Reserves Case \(Again\).”](#)

## **Library Copyright Alliance Comments on Noncommercial Uses of Pre-1972 Sound Recordings**

In October 2018, the US Copyright Office issued a Notice of Inquiry

regarding noncommercial use of pre-1972 sound recordings, a result of the passage of the Music Modernization Act. In response, the Library Copyright Alliance (LCA) submitted comments urging the Copyright Office to make clear that section 1401(c) of the Copyright Act does not apply to libraries and archives that employ the section 108(h) exception incorporated in section 1401(f)(1)(B). The comments note, “Because of the similarity in language between sections 1401(c) and 108(h), there is a danger that librarians and archivists without expertise in rights clearance may confuse the two and believe that they must comply with the more complex procedures of section 1401(c).” See [LCA’s original comments](#) and [reply comments](#).

## Net Neutrality Update

In late 2017, the Federal Communications Commission (FCC) repealed the net neutrality rules that had been established in 2015 (and upheld by the US Court of Appeals for the DC Circuit). Although the US Senate used the Congressional Review Act (CRA) in 2018 to reverse the FCC's repeal of net neutrality protections, the House of Representatives did not vote on the resolution, meaning that efforts to overturn the repeal using CRA are now dead. While CRA would have allowed Congress to reverse the repeal and reinstate the FCC's 2015 Open Internet Order, Congress can still act to pass its own net neutrality law. Additionally, court challenges to the FCC's repeal are still underway.

The court system could end up deciding whether the federal government or individual states enforce net neutrality rules. The FCC is defending its net neutrality repeal in court against a lawsuit filed by more than three dozen entities, including state attorneys general, consumer advocacy groups, and tech companies. Oral arguments at the DC Circuit are scheduled for February 1, 2019. ARL filed an [amicus brief](#) in the case together with other higher education and library associations.

## **International Issues**

### **NAFTA Renegotiation Results in US-Mexico-Canada Agreement**

On September 30, 2018, Canada announced it would join the trade agreement with the United States and Mexico that is replacing the North American Free Trade Agreement (NAFTA). The US-Mexico-Canada Agreement, or USMCA, includes much more prescriptive provisions on intellectual property than the original NAFTA.

USMCA requires Canada to amend its copyright law to provide for longer copyright terms, extending the term from the international standard of life of the author plus 50 years to life of the author plus 70 years. Additionally, Canada must extend the copyright term for corporate works to 75 years. Another required change to Canada's copyright law results from provisions on anti-circumvention of technological protection measures, which involves highly prescriptive and detailed requirements with a closed list of limitations and exceptions; additional exceptions may be provided for through rulemaking or legislative processes. The text also makes circumvention an independent and separate cause of action, apart from any underlying copyright infringement.

Notably, USMCA failed to include language on limitations and exceptions similar to those agreed upon by the negotiating parties of the now-defunct Trans-Pacific Partnership Agreement (TPP), prior to the Trump Administration withdrawing from the TPP.

For additional analysis see the *ARL Policy Notes* post "[What's In \(and Out\) of the IP Chapter of the United States, Mexico, Canada Trade Agreement.](#)"

### **Marrakesh Treaty Updates**

In September 2018, the US House of Representatives passed the



Marrakesh Treaty Implementation Act, S. 2559, which had previously passed the Senate along with unanimous ratification of the Marrakesh Treaty. [President Trump signed the bill in October](#). The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled requires contracting parties to ensure minimum copyright limitations and exceptions for the creation and distribution of accessible formats of works and cross-border sharing of these works. The Trump Administration still needs to deposit its instrument of ratification with the World Intellectual Property Organization (WIPO).

The Marrakesh Treaty entered into force on September 30, 2016, and now has 47 contracting parties from every region of the world, with varying levels of development. Significantly, the European Union also ratified the Marrakesh Treaty on October 1, 2018, greatly expanding the potential for cross-border exchange of works in foreign languages. In November 2018, reports surfaced that the [EU Commission sued 17 member states](#) for failure to comply with the treaty's requirements.

## **US Legislation and Agencies**

### **US Appropriations Update**

A partial US government shutdown continues with no immediate end in sight. Approximately 800,000 government workers have been affected by the closure with 350,000 working without pay as they are deemed “essential” personnel. Several ARL members are affected, such as the National Archives and Records Administration and the National Agricultural Library. Also affected are the National Science Foundation, the National Oceanic and Atmospheric Administration, the US Geological Survey, the National Endowment for the Humanities, and many more. A prolonged shutdown will impact both the work of intramural and extramural scientists and researchers as well as members of the public.

With the change in control of the House following the November 2018 elections, several bills were passed to address the stalemate but were not considered by the Senate. It is unclear how this stalemate will be resolved.

### **Museum and Library Services Act of 2018 Becomes Law**

Just prior to the close of the 115th Congress, the Museum and Library Services Act of 2018 was signed into law following passage by the Senate. The law is the primary source of funding for libraries and museums throughout the US. This law amends and reauthorizes the earlier Museum and Library Services Act and provides funding for library services and technology through FY 2023. The bill expands the definition of “library” and “museum” to include tribal libraries and museums and expands the services museums are authorized to provide.

## **Geospatial Data Act Signed into Law**

The [Geospatial Data Act was signed into law on October 5, 2018](#), as part of the FAA Reauthorization Act of 2018. The Geospatial Data Act is a good government bill that seeks to inject more efficiency into the procurement, creation of, and access to geospatial data. The goal of the act is to provide much greater coordination among agencies, reduce redundant procurement and thus costs to the government and taxpayers, and greatly expand discovery and use of geospatial data by all sectors. ARL worked closely with Senate staff on the legislation and will work with federal agencies on its implementation.

## **Government Publishing Office Update**

National Public Radio (NPR) [recently exposed a culture of “cronyism, wasteful spending and other misconduct” at the US Government Publishing Office \(GPO\)](#). An internal, interim report by the acting inspector general of GPO details how two senior officials—both formerly acting head of GPO—repeatedly violated federal statutes, regulations, and GPO directives. The interim report was shared with the Joint Committee on Printing, which is composed of members from the House Committee on Administration and the Senate Rules and Administration Committee. The House Committee on Administration has promised “vigorous oversight.”

The full US House of Representatives did not consider the FDLP Modernization Act of 2018, a much needed bipartisan bill to reform the Federal Depository Library Program (FDLP), which is overseen by GPO, so the bill will need to be reintroduced in the new Congress. ARL, the American Library Association (ALA), the American Association of Law Libraries (AALL) and the Chief Officers of State Library Agencies (COSLA) worked with House staff on the bill and [all four organizations wrote in support of the legislation](#). The former chair and ranking members of the Committee on House Administration retired January 3, 2019. It is not clear who the new champions of the legislation will be in

the 116th Congress.

Finally, the Senate Committee on Rules and Administration failed to act on the nomination of Robert Tapella to be director of GPO. It is unclear if the White House will resubmit his nomination with the start of the new Congress. [ARL, ALA, AALL and COSLA wrote in support of Tapella's nomination.](#)

### **Open Government Data Act Signed into Law**

On January 14, 2019, President Trump signed the [Foundations for Evidence-Based Policymaking Act of 2017](#). This act included the [Open, Public, Electronic, and Necessary Government Data Act](#), known as the OPEN Government Data Act, which codifies much of the Obama administration's Open Data Policy and importantly calls for all non-sensitive government data to be open by default. As the [White House announcement](#) noted, the Foundations for Evidence-Based Policymaking Act "improves evidence-based policy through strengthening Federal agency evaluation capacity; furthering interagency data sharing and open data efforts; and improving access to data for statistical purposes while protecting confidential information."

This is a significant achievement in support of open data and should greatly improve data sharing practices within and among agencies and the research community. The law calls for government data to be machine readable, in an open format, and under open licenses. In addition, each agency shall: (1) develop and maintain a comprehensive data inventory for all data assets created by or collected by the agency, and (2) designate a chief data officer who shall be responsible for life-cycle data management and other specified functions. The bill creates in the Office of Management and Budget (OMB) a Chief Data Officer Council for establishing government-wide best practices for the use, protection, dissemination, and generation of data and for promoting data sharing agreements among agencies.

## **ARL Comments on Consumer Privacy in Response to National Telecommunications and Information Administration**

On November 9, 2018, [ARL filed comments](#) responding to the National Telecommunications and Information Administration's (NTIA) request for comment on "Developing the Administration's Approach to Consumer Privacy."

In the submitted comments, ARL recognizes that strong privacy protections for users are necessary, but also that overly prescriptive requirements can cause difficulties in compliance. The comments point to several elements that are critical for meaningful privacy protection, including ensuring transparency and consent, while other areas may be nuanced and policymakers must consider unintended consequences of particular regulations. For example, the right to deletion raises complex issues and requires a nuanced approach to avoid unnecessary alterations to the cultural and historical record. The comments also note that effective remedies and enforcement mechanisms are needed to make regulations meaningful.

[All filed comments are available](#) on the NTIA website.

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