

Advocacy and Public Policy Update

April 30, 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 January 16, 2019, through April 30, 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 Issues

Karyn Temple Named Register of Copyrights, Releases Copyright Office Strategic Plan

Librarian of Congress Carla Hayden [appointed Karyn A. Temple as Register of Copyrights](#) on March 27. Temple had been Acting Register of Copyrights since October 2016, and previously served as Associate Register of Copyrights and Director of Policy and International Affairs since 2013. During her time as Acting Register, the US Copyright Office initiated several studies (including on [moral rights](#) and [Section 512](#)), released reports (on [Section 1201](#), [Section 108](#), and [moral rights](#)), and issued notices of rulemaking (including on [registration modernization](#) and [noncommercial use exception to unauthorized uses of pre-1972 sound recordings](#)). ARL, as part of the Library Copyright Alliance, submitted [comments](#) on each of these actions.

Soon after Temple's appointment, the Copyright Office released its [strategic plan](#) for the next five years.

Final Rule on Non-Commercial Uses of Pre-1972 Recordings to Take Effect

The US Copyright Office's [final rule on a noncommercial use exception to unauthorized uses of pre-1972 sound recordings](#) will go into effect on May 9. This rule is a result of last year's passage of the Music Modernization Act, which established an exception for certain noncommercial uses of pre-1972 recordings not currently being commercially exploited. After issuing a notice of proposed rulemaking, the Copyright Office solicited three rounds of comments before releasing the final rule.

In order to qualify for the exemption under this rule, a user must file a notice of noncommercial use after conducting a good faith, reasonable search of commercial exploitation, and the rights owner must not object within 90 days of the notice being indexed in the Copyright Office's public record. The rule establishes the specific steps to

determine a good faith, reasonable search of commercial exploitation to qualify for the safe harbor under Section 1401(c), including:

- The Copyright Office’s database of [Pre-1972 Schedules](#)
- One or more of the following major search engines: Google, Yahoo!, or Bing
- One or more of the following major streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL
- YouTube, for authorized uses
- The SoundExchange ISRC database
- Amazon.com, and, where the prospective user reasonably believes the recording implicated a listed niche genre, an additional listed online retailer of physical product
- In the case of ethnographic pre-1972 sound recordings of Alaska Native or American Indian tribes, contacting the relevant tribe, association, and/or holding institution

Notably, the Copyright Office also “confirms that the noncommercial use exception under section 1401(c) is supplementary and does not negate other exceptions and limitations that may be available to a prospective user, including fair use and the exceptions for libraries and archives. Regarding fair use specifically, the Office notes that although certain noncommercial uses may constitute fair use, not all may be fair; instead, courts will balance the purpose and character of the use against the other fair use factors. Similarly, the Office confirms that the noncommercial use exception should not affect application of the section 108(h) exception available for libraries and archives performing a reasonable investigation regarding the availability of published works in the last twenty years of the copyright term.”

ARL, as part of the Library Copyright Alliance, submitted [comments on the notice of proposed rulemaking](#).

ARL, Software Preservation Network Co-Host Webinar Series on Fair Use

ARL and the Software Preservation Network (SPN) co-hosted a seven-part webinar series from February to April discussing the [*Code of Best Practices in Fair Use for Software Preservation*](#). The seven episodes cover:

1. Overview: Why and How the *Code* Was Created
2. Beginning the Preservation Workflow (Scenarios 1–2 from the *Code*)
3. Making Software Available within Institutions and Networks (Scenarios 3–4 from the *Code*)
4. Working with Source Code and Software Licenses (Scenario 5)
5. Understanding the Anti-Circumvention Rules and the Preservation Exemptions
6. Making the *Code* Part of Software Preservation Culture
7. International Implications

Each episode was led by one of the *Code* co-PIs, with guests including practitioners and academics. The [archived videos and transcripts of the webinars](#) are on the SPN website.

Fair Use/Fair Dealing Week Highlights Balance in Copyright System

The sixth annual Fair Use/Fair Dealing Week was celebrated February 25–March 1 by 163 participating organizations as well as numerous individuals worldwide. ARL organized the event and participants included universities, libraries, library associations, and many other organizations, such as the Authors Alliance, Center for Media & Social Impact, New Media Rights, and Re:Create. Fifty-one ARL member institutions contributed a wide range of resources this year. Fair Use/Fair Dealing Week was observed around the globe by participants in such countries as Australia, Canada, Japan, the United Kingdom, and the United States. For more information and links to resources shared during the week, see the [March 4 ARL news release](#).

The next Fair Use/Fair Dealing Week will take place February 24–28, 2020.

WIPO Copyright Committee Continues Discussions on Limitations, Exceptions

The World Intellectual Property Organization (WIPO) [Standing Committee on Copyright and Related Rights](#) (SCCR) is continuing work on its action plan, which includes discussion of limitations and exceptions to copyright for libraries, archives, and museums; persons with disabilities; and educational and research institutions. As part of this work, WIPO will be holding several regional seminars: Singapore (Asia-Pacific region) on April 29–30, Kenya (Africa region) on June 12–13, and Dominican Republic (Latin America-Caribbean region) on July 12–13. Additionally, WIPO will host an international conference in Geneva, Switzerland, October 17–18 on limitations and exceptions.

US Government Actions

Appropriations Update

President Trump released his [FY 2020 proposed budget](#) on March 11. Much of what is included in the proposed budget was included in the two previous years' budget submissions that were not accepted by Congress. This submission again calls for major cuts to scientific agencies' budgets, no funding for the National Endowment for the Humanities (NEH) and the Institute of Museum and Library Services (IMLS), and a host of other cuts throughout the federal government. Members of Congress, and appropriators in particular, have indicated a lack of support for this proposed FY 2020 budget.

The challenge for this year will be that the Budget Control Act—the two-year agreement that provided additional funds to defense and non-defense appropriation bills—has lapsed, thus caps will be placed on agency budgets. Senate Majority Leader Mitch McConnell (R-KY) announced recently that he and House Speaker Nancy Pelosi (D-CA) will negotiate to lift the budget caps for FY 2020–FY 2021.

The House and Senate Budget Committees are at different points in focusing on a resolution that provides a blueprint for the overall FY 2020 budget request. The Senate Budget Committee has passed a Budget Resolution that would decrease funding from both defense and non-defense appropriations. It is not clear if the House will pass a budget resolution due to divisions within the Democratic caucus. As with the President's request, these resolutions are not binding. The House has held several hearings to date, including on the Library of Congress and the Government Publishing Office FY 2020 requests. The Senate has conducted a hearing on the Library of Congress budget request for FY 2020.

There may be no clarity on the FY 2020 budget until the end of the federal government fiscal year is reached at the close of September 2019.

Trump Issues Executive Order on Free Speech

On March 21, President Trump issued an executive order (EO), [“Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,”](#) potentially linking access to federal research and education dollars to university and campus-based policies in support of free speech. An initial review by ARL and others in higher education suggests that colleges and universities receiving federal research and education funds will, in essence, agree via the grant process, to do what is already standard campus policy with regards to free inquiry. Still, this EO is a deeply concerning development and ARL will be watching its implementation carefully.

The EO states, “Free inquiry is an essential feature of our Nation’s democracy, and it promotes learning, scientific discovery, and economic prosperity. We must encourage institutions to appropriately account for this bedrock principle in their administration of student life and to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.”

In Section 3 of the EO entitled, “Improving Free Inquiry on Campus,” 12 federal agencies are to coordinate with the Office of Management and Budget (OMB), in accordance with federal law, “to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.”

The EO applies to the following agencies: the Departments of Defense, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, and Education; the Environmental Protection Agency; the National Science Foundation; and the National Aeronautics and Space Administration. Student aid grants are excluded from this EO. “Federal research or education grants” to institutions are covered by this policy.

ARL will work with others in higher education and libraries to engage collaboratively on a response to the work of OMB and agencies as policies and compliance issues are considered.

Bipartisan Dreamer Legislation Introduced in House, Senate

ARL and 37 other higher education associations sent a [letter](#) to congressional leadership in support of the [Dream and Promise Act of 2019](#). Representatives Lucille Roybal-Allard (D-CA), Nydia Velázquez (D-NY), and Yvette Clarke (D-NY), introduced the bill that would allow undocumented students to earn lawful permanent residence in the United States and a path to citizenship. The bill would also allow “Dreamers” to be eligible for Title IV federal student aid programs. Senator Dick Durbin (D-IL) and Senator Lindsey Graham (R-SC) reintroduced the [Dream Act](#) in the Senate. The bipartisan bill would allow undocumented immigrants who were brought to the United States as children to qualify for lawful permanent residence and become eligible for a path to citizenship. ARL has long supported Dreamer legislation.

Higher Education Act Reauthorization Hearings Underway

Senator Lamar Alexander (R-TN), chair of the Health, Education, Labor, and Pensions (HELP) Committee recently announced that he would like to see the Higher Education Act (HEA) reauthorized before he retires this year. That presents many challenges as reauthorization of HEA usually takes years due to its complexity and the many difficult issues involved. To date, the HELP Committee has conducted several hearings, the most recent on April 2 on HEA and sexual harassment and sexual assault.

Anne Meehan of the American Council on Education (ACE) testified on behalf of ACE and other associations including ARL. Meehan cautioned lawmakers that it may be difficult to legislate in this arena as there is a wide range of approaches within the academic community.

The [White House also released its proposed revisions to HEA](#), which are general in nature and address accreditation, innovation, and accountability, among other issues.

House Passes Save the Internet Act to Restore Net Neutrality Protections

On April 9, the House of Representatives passed the [Save the Internet Act](#), a bill designed to restore the net neutrality protections put into place by the 2015 Federal Communications Commission's (FCC) Open Internet Order. The 2015 order reclassified broadband internet under Title II and implemented strong rules to prohibit blocking, throttling, and paid prioritization as well as a General Conduct Rule designed to protect against future harms. The 2015 order was upheld in the Court of Appeals for the DC Circuit in 2016, but after a change of FCC leadership following the election of President Trump, these rules were reversed.

Current FCC rules rely on transparency mechanisms, rather than prohibiting blocking, throttling, and paid prioritization. Litigation is currently underway, with many hopeful for a DC Circuit opinion this summer.

While litigation is pending, Congressional Democrats have acted to reverse the FCC's latest actions and largely restore the 2015 Open Internet Order. The 232-190 vote in the House sends the [Save the Internet Act](#) to the Senate, where Majority Leader Mitch McConnell (R-KY) has already declared the legislation "dead on arrival." Prior to Majority Leader McConnell's pronouncement, President Trump promised to veto the act if it did clear the Senate.

US Government Considers Approaches to Privacy Legislation

Comprehensive federal privacy legislation is a priority for the US Congress in 2019. Congress has held multiple hearings on the topic of consumer privacy, and policy makers have released numerous discussion drafts and bills on this issue. These bills have taken different approaches in scope and application. On the Senate side, Senators Blumenthal (D-CT), Fischer (R-NE), Kennedy (R-LA), Klobuchar (D-MN), Markey (D-MA), Rubio (R-FL), Schatz (D-HI), Warner (D-VA), and Wyden (D-OR) have all introduced (either individually or with co-sponsors) bills that have garnered attention. In addition to bills by

members of Congress, a number of companies, associations, consumer advocacy groups, academics, and other stakeholders have discussed various principles and elements that should be included in federal privacy legislation. The US Chamber of Commerce, Intel, and the Center for Democracy & Technology have all released discussion drafts of privacy legislation.

In addition to Congressional interest in the issue, the Executive Branch has explored approaches to privacy. The National Telecommunications and Information Administration (NTIA) issued a call for comments last fall (see [ARL's comments](#)) and the Federal Trade Commission (FTC) has held numerous hearings, the most recent of which took place on April 9–10.

Affordable College Textbook Act Introduced in Congress

On April 4, Senators Durbin (D-IL), King (I-ME), Smith (D-MN), and Sinema (D-AZ) and Representative Neguse (D-CO) re-introduced the Affordable College Textbook Act in the [Senate](#) and the [House](#). This bill would create a grant program to support projects on open textbooks. The current bill is largely similar to the version introduced in the last Congress with a few key changes. These changes include an updated definition of open educational resources (OER), new language to improve accessibility of materials created under the bill for students with disabilities, and amending the Higher Education Act (HEA) to require publishers to disclose whether material is OER.

ARL, along with the Association of College & Research Libraries (ACRL), Creative Commons, SPARC, US Public Interest Research Group (PIRG), and 10 other organizations support the bill.

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