



**Country Report for the United States
Annual Report to the IFLA CLM committee
Helsinki, 2012**

Copyright

Proposed legislation

Sound Recording Simplification Act. The Sound Recording Simplification Act (H.R. 2933), introduced on September 14, 2011, would bring pre-1972 sound recordings under federal copyright protection by amending §301 of the U.S. Copyright Act. No legislative action was taken by Congress.

On December 28, 2011, the U.S. Copyright Office issued a report on Federal Copyright Protection for Pre-1972 Sound Recordings, following a notice of inquiry, request for comments, and public hearings held in May and June 2011. The report, prepared after receiving written and oral input from stakeholders, recommends that sound recordings made before February 15, 1972 be brought into the federal copyright regime. On April 13, 2011, the Association of Research Libraries (ARL) and the American Library Association (ALA) submitted reply comments to the U.S. Copyright Office stating that federalization of protection for pre-1972 sound recordings would create significant challenges for libraries, at <http://www.copyright.gov/docs/sound>.

SOPA, PIPA, and OPEN

Stop Online Piracy Act. The Stop Online Piracy Act (H.R. 3261) (SOPA) was introduced on October 26, 2011 “to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property.” Its twin bill in the Senate was the **Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (Protect IP Act)** (S. 968) (PIPA), introduced on May 12, 2011 “to prevent online threats to economic creativity and theft of intellectual property.” This legislation would curtail copyright violations on the Internet by blocking access to and cutting revenue sources for foreign websites primarily dedicated to infringing or counterfeit goods, referred to as “rogue websites.”

There was enormous opposition to these bills from technology industry, public interest groups, the library and educational community, and the public. The Obama administration expressed opposition to major elements of the bills, and an Internet blackout by more than 10,000 websites as a gesture to boycott SOPA and PIPA fueled the opposition. LCA expressed in a letter on November 8, 2011 to lawmakers: “In this environment, the criminal prosecution of a library for copyright infringement is no longer beyond the realm of possibility. For this reason, we strongly oppose the amendments described above, which would increase the exposure of libraries to prosecution. The broadening of the definition of willful infringement could result in a criminal prosecution if an Assistant U.S. Attorney believes that a library’s assertion of fair use or one of the Copyright Act’s other privileges is unreasonable. This risk is compounded with streaming, which SOPA would subject to felony penalties even if conducted without purpose of commercial advantage or private financial gain.”

The November 8, 2011 LCA letter focused on section 201, specifically the definition of willfulness in section 201(c) and the expansion of criminal penalties to public performances in section 201(a), which together could threaten important library and educational activities. On December 14, 2011, LCA sent a letter to members of the U.S. House Judiciary Committee, outlining its concerns with SOPA. The letter focused on the Manager's Amendment, specifically that it did not address the problems with treatment of streaming video that LCA identified in its November 8, 2011 letter. On December 21, 2011, LCA sent a letter to members of the U.S. House Judiciary Committee thanking them for their vigorous advocacy of First Amendment rights and the value of an open and secure Internet during the markup of SOPA. See <http://www.librarycopyrightalliance.org/submissions/domestic/othercr.shtml>.

The Senate bill, PIPA, was largely a reintroduction of the Combating Online Infringement and Counterfeits Act (COICA), which failed to pass in 2010. The library community's concern with this legislation was its potential impact on first amendment rights.

Online Protection and Enforcement of Digital Trade Act. A third bill, the Online Protection and Enforcement of Digital Trade Act (S. 2029) (OPEN), was introduced on December 17, 2011. It was intended as less severe alternative to SOPA/PROTECT-IP. The Library Copyright Alliance welcomed its measured approach to stopping copyright infringement on foreign websites. But as a result of the overwhelming opposition, all three bills failed in Congress.

Regulations

Digital Millennium Copyright Act Section 1201 Rulemaking. On September 29, 2011, the U.S. Copyright Office initiated its 2012 triennial rulemaking proceeding in accordance with provisions of the Digital Millennium Copyright Act allowing the Librarian of Congress, upon the recommendation of the Register of Copyrights, to exempt certain classes of works from the prohibition against circumvention. Comments and reply comments were solicited in a notice of inquiry, and have been posted at <http://www.copyright.gov/1201>. Public hearings were held in Washington, DC and Los Angeles in May and June 2012. The Librarian of Congress is expected to issue the exemptions later this year.

On November 29, 2011, the Library Copyright Alliance (LCA) submitted comments to the Copyright Office requesting that one of the previous exemptions from the prohibition of circumvention of copyright protection systems for access control technologies be renewed. That exemption allows college professors and college film and media studies students to circumvent the encryption on DVDs to enable the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of educational uses. LCA also submitted reply comments on February 27, 2012 and testified in support of the exemption.

Reports by U.S. Copyright Office

Two recent reports from the U.S. Copyright Office are indications of the directions to be taken by the new Register of Copyrights, Maria A. Pallante, appointed to the position in June 2011.

United States Copyright Office, *Priorities and Special Projects of the United States Copyright Office, October 2011-October 2013*, prepared by Maria Pallante, Register of Copyrights (October 25, 2011). Among the priorities for 2011-2013 are copyright exceptions for libraries, Section 108, mass

digitization, the Google Book Settlement, orphan works, and pre-1972 sound recordings. The report is available at <http://www.copyright.gov/docs/priorities.pdf>.

United States Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, prepared by Office of the Register of Copyrights (October 2011). The report addresses issues and solutions for mass digitization in the U.S.: “The marketplace for copyright owners of digital versions of copyrighted books is expanding rapidly, both for reproductions of books and e-books that are ‘born digital.’ At the same time, libraries and others have made clear their intentions to mass digitize (or continue to mass digitize) their collections, sometimes for preservation, sometimes in order to provide access, and sometimes when those collections are protected by copyright law.” It proposes that direct licensing, collective licensing, and other emerging business models might balance the needs of users with the interests of copyright owners. The report is available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

Pending legislative issues

Orphan works. There has been no action since the Shawn Bentley Orphan Works Act of 2008 (S. 2913) and the Orphan Works Act of 2008 (H.R. 5889) were introduced in Congress in April 2008.

In response to the lawsuit filed by the Authors Guild against the HathiTrust, on September 13, 2012, ARL released a resource packet on orphan works, explaining the lawsuit and providing general information concerning orphan works. The *ARL Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries* is at http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf.

Revision of Section 108 of the Copyright Law. There was been no action by the U.S. Copyright Office on the findings and recommendations to update Section 108 of the copyright law, which covers exceptions and limitations for libraries and archives, since the submission of the Section 108 Study Group Report in March 2008. However, there is a renewed interest in discussion of Section 108 Study Group recommendations in the context of the emerging Digital Public Library of America (see below) and the new U.S. Copyright Office reports (see above).

Legal matters

Proposed legislation

Federal Research Public Access Act of 2012. On February 9, 2012 the Federal Research Public Access Act (FRPAA) of 2012 (H.R. 4004) was introduced in Congress, “to provide for Federal agencies to develop public access policies relating to research conducted by employees of that agency or from funds administered by that agency.” Its Senate counterpart of the same title (S. 2096) was introduced on the same day. The proposed legislation, strongly supported by library and public interest groups, would require federal agencies with an extramural research budget of \$100 million or more to make federally-funded research available for free online access by the general public, no later than six months after publication in a peer-reviewed journal.

This is the fourth attempt at legislation that would expand the open access mandate for publicly funded research. Previous efforts were the Federal Research Public Access Act (H.R. 5037) introduced in the House of Representatives on April 15, 2010; the Federal Research Public Access Act (S. 1373), introduced in the Senate on June 25, 2009, and the Federal Research Public Access

Act of 2006 (S. 2695) of May 2006, requiring Federal agencies with research expenditures of over \$100 million to develop federal research public access policies.

This proposed legislation competes with the Research Works Act (H.R. 3699) introduced on December 23, 2011 to prohibit federal public access mandates.

Research Works Act. On December 23, 2011 The Research Works Act (H.R. 3699) was introduced “to ensure the continued publication and integrity of peer-reviewed research works by the private sector.” The bill was designed to prohibit federal public access mandates. It proposed that “No Federal agency may adopt, implement, maintain, continue, or otherwise engage in any policy, program, or other activity that--(1) causes, permits, or authorizes network dissemination of any private-sector research work without the prior consent of the publisher of such work; or (2) requires that any actual or prospective author, or the employer of such an actual or prospective author, assent to network dissemination of a private-sector research work.” If enacted, it also would have severely restricted the sharing of scientific data. The library community strongly opposed the Research Works Act, and there was significant public opposition to the bill, with the effect that no legislative action was taken.

This was the third attempt at proposed legislation to prohibit federal public access mandates, by countering the NIH Public Access Policy that became a federal mandate on December 26, 2007, and also by competing with bills that would expand the NIH policy. The “Fair Copyright in Research Works Act” (H.R. 801), was introduced in the House of Representatives on February 3, 2009, to prohibit federal open access mandates. It re-introduced the “Fair Copyright in Research Works Act” (H.R. 6845) of September 9, 2008, to reverse the NIH Public Access Policy and to forbid other federal agencies from putting similar policies into place.

Law cases

Golan et al. v. Holder. On January 18, 2012, the Supreme Court affirmed the Tenth Circuit decision in *Golan v. Holder*, holding that Section 514 of the Uruguay Round Agreements Act does not exceed Congress’s authority under the Copyright Clause, and thus that copyright restoration to foreign works in the U.S. under the Uruguay Rounds Agreement Act (URAA) is not a violation of the First Amendment. The case challenged the constitutionality of copyright restoration in foreign works that were previously in the public domain in the U.S. Plaintiffs argued that the URAA violates the First Amendment insofar as it interferes with the right to keep using works that were exploited when they were in the public domain. The case raised interesting questions pitting U.S. obligations under the Berne Convention against U.S. constitutional law.

On June 21, 2011, ALA, ARL, and the Association of College and Research Libraries (ACRL) joined the Internet Archive, the Wikimedia Foundation, and University of Michigan Library in an amicus brief written by Electronic Frontier Foundation in support of reversal. This brief received significant attention in both the majority and dissenting opinions. On February 6, 2012, Jonathan Band, on behalf of LCA, wrote a decision summary about the case, <http://www.librarycopyrightalliance.org/submissions/domestic/othercr.shtml>.

Supap Kirtsaeng v. John Wiley & Sons. The U.S. Supreme Court is considering whether the first sale doctrine applies only to copies manufactured in the United States. On August 15, 2011 the U.S. Circuit Court of Appeals for the Second Circuit affirmed a lower court ruling that held the first sale doctrine (Section 109 of the U.S. Copyright Act) does not apply to copies manufactured outside of the United States. The appeals court ruled that Kirtsaeng had infringed copyrights by

reselling in the U.S. cheaper foreign editions of Wiley textbooks, printed by Wiley Asia, that his family had lawfully purchased in Asia. The U.S. Supreme Court agreed to review the Second Circuit's decision, and the oral argument has been scheduled for October 29, 2012.

An adverse decision in this case could affect libraries' right to lend books and other materials manufactured abroad. On July 3, 2012 LCA filed an amicus curiae brief with the Supreme Court in support of Kirtsaeng, in which LCA asks the Supreme Court to reverse the Second Circuit decision and apply the first-sale doctrine to all copies manufactured with the lawful authorization of the holder of a work's U.S. copyright. It is available at <http://www.librarycopyrightalliance.org/bm~doc/lca-kirtsaeng-brief-3july2012.pdf>. The Supreme Court decision is expected in fall 2012.

Cambridge University Press et al. v. Georgia State University. On May 11, 2012 Judge Evans issued the ruling in the Georgia State University case. The ruling involved a case by case decision on 74 claims of alleged infringement, involving use of book chapters for course readings provided to students through e-reserves. The judge provided a general summary on the 74 claims, and then an individual assessment of each, finding 5 infringements out of 74 claims. (At trial the plaintiffs introduced evidence concerning 99 excerpts, but abandoned 25 claims at the end of trial.) The Judge deferred a decision on remedies and attorney's fees. The ruling overwhelmingly favors Georgia State University.

Because the decision in this case is limited to a specific type of work- book chapters- it does not provide as much clarity on the application of fair use to course material in the academic environment as was hoped, but the ruling was nonetheless favorable in reinforcing the role of fair use in education and teaching. ARL's Brandon Butler prepared a summary of the ruling in an issue brief released on May 15, 2012, "GSU Fair Use Decision Recap and Implications," http://www.arl.org/bm~doc/gsu_issuebrief_15may12.pdf.

The original case, filed in April 2008 by Cambridge University Press, Oxford University Press and SAGE Publications against the President, the Provost, the Provost for Information Systems and Technology, and the Dean of Libraries of Georgia State University, alleged violation of their copyrights involving course-related material posted in its online electronic reserve service, through GSU's Blackboard/WebCT Vista course management system, and through departmental web pages and hyperlinked online syllabi on websites. The original complaint cited over 6,700 works made available to students for downloading, viewing and printing for some 600 courses.

AIME v. UCLA. On October 3, 2011 the AIME v. UCLA case was dismissed. However, the court allowed the plaintiffs to file an amended complaint on October 24, 2011. The case initially was filed on December 7, 2010 by the Association for Information and Media Equipment (AIME), an educational trade group of video publishers, and one of its members, Ambrose Video Publishing (AVP), against the Regents of the University of California and the Chancellor of UCLA. The plaintiffs alleged that UCLA's practice of streaming digitized video through its course management system constituted copyright infringement. Plaintiffs allege that, using Video Furnace system, Defendants copied programs owned and licensed to AVP and streamed them on university intranet. The case is fundamentally about interpretation of contractual terms with respect to streaming as a public performance, but is relevant to the interpretation of fair use and of exclusive rights as they are implicated in streaming.

In its October 2011 order, the court found that the plaintiffs had failed to state a claim for which relief could be granted. After plaintiffs submitted an amended complaint, UCLA filed another

motion to dismiss, arguing that the plaintiffs had failed to address the deficiencies the court had identified in its October 2011 order. This motion is now pending before the court.

Authors Guild v. HathiTrust. On September 12, 2011, the Authors Guild, joined by two other authors societies, the Australian Society of Authors and the Union of Writers and Québécois Writers, and eight individual authors, filed suit against the HathiTrust and five universities: University of Michigan, University of California, University of Wisconsin, Indiana University, and Cornell University. This is a case about the digitization of copyrighted works that stems from the original Google Print Library Project that commenced in 2004 (which is the subject of a separate lawsuit). The case also concerns the HathiTrust Orphan Works Project.

The plaintiffs assert associational standing on behalf of their members. They ask not for monetary damages but for injunctive relief, requesting that the copying, distribution and display of copies cease; that defendants cease to supply Google with copyrighted works to digitize; and that the alleged unauthorized digital copies held by HathiTrust and the five universities be impounded (approximately 7 million copies of the HathiTrust's scans). Attention shifted shortly after the lawsuit was filed to claims of weakness in due diligence procedures in the HathiTrust Orphan Works Project, which had scheduled the first set of orphans to be made accessible on October 13, 2011. On October 6, 2011 an amended complaint in this case was filed, adding eight plaintiffs, including four writers' organizations and four individuals.

On April 20, 2012, members of the LCA filed an amicus brief in support of the HathiTrust, responding to plaintiffs' assertion that the library specific exceptions in Section 108 limited the availability to libraries of fair use under Section 107. In its amicus brief, LCA argued that the plaintiffs' reading of Section 108 would prohibit libraries from fulfilling their mission and conflicts with the structure and language of the Copyright Act, and that the Orphan Works Project is permitted by Section 108(e).

On July 6, 2012, members of LCA, together with the Electronic Frontier Foundation (EFF), filed a second amicus brief, urging the federal court to find that the fair use doctrine permitted the creation of the HathiTrust Digital Library. The brief argues four main points: that the HathiTrust Digital Library is serving the public interest, that its tremendous public benefit tilts the analysis firmly in favor of fair use, that a legislative "fix" is both unnecessary and unworkable, and that the plaintiffs helped foster public reliance on the HathiTrust project, of which the public should not now be deprived. See <http://www.librarycopyrightalliance.org/submissions/domestic/amicus.shtml>.

Authors Guild v. Google. With Judge Chin's rejection of the proposed Google Books Settlement in March 2011, litigation on the permissibility of the scan and snippet display of Google Book Search (GBS) resumed. On May 31, 2012, Judge Chin denied Google's motions to dismiss the claims of the Authors Guild and American Society of Media Photographers as associational plaintiffs, and he granted the motion for class certification. Google had argued that the plaintiffs did not have standing to sue, and that each affected association member should have to litigate his claim individually. The judge ruled otherwise, and the case will move forward with the Authors Guild and American Society of Media Photographers as associational plaintiffs in two separate actions.

On August 1, 2012, the members of the LCA filed an amicus brief with EFF in support of Google's motion for summary judgment on the grounds that Google Books is a fair use. The LCA/EFF brief argued the following main points: that Google Book Search is tremendously beneficial to the

public, that this public benefit tilts the analysis firmly in favor of fair use, that a legislative “fix” is both unnecessary and unworkable, and that the Authors Guild should not be permitted to shut down Google Book Search after encouraging public reliance on the tool for years.

Advocacy

The Library Copyright Alliance, a coalition of three major library associations – the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries – advocates on behalf of U.S. libraries on major national copyright issues affecting libraries and educational institutions.

LCA also continues to advocate for U.S. and North American libraries at the international level. Three international copyright advocates appointed by LCA participate in meetings of the World Intellectual Property Organization’s Standing Committee on Copyright and Related Rights (SCCR), the Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC), Traditional Knowledge and Folklore, and the Committee on Development and Intellectual Property (CDIP), representing the interests of the U.S. library community and the public.

Educational activities and best practices

Best practices for fair use. On January 26, 2012, ARL, the Center for Social Media at American University, and the Program on Information Justice and Intellectual Property at Washington College of Law, American University, released the *Code of Best Practices in Fair Use for Academic and Research Libraries*. Based on the notion that court decisions on fair use are influenced by standards of accepted practice in a particular field, it defines best practices that may change the concept of “fairness” in courts, and adds to a growing set of best practice codes in various fields, developed by the Center for Social Media. It is structured on eight principles, covering use of library materials for digital teaching and learning, use of library materials for publicity and for creating physical and virtual exhibitions, digitizing at-risk works, digital collections of archival works and special collections, reproducing material for disabled users, institutional repositories, non-consumptive research, and web capture and archiving. It is available at <http://www.centerforsocialmedia.org/libraries>.

Web archiving analysis. On February 24, 2012, ARL released “A New Day for Website Archiving 2.0,” an updated analysis by Jonathan Band of the legal arguments available to support website archiving by research libraries. The report updates the original 2006 analysis, and is at http://www.arl.org/news/pr/bandwebarchive_24feb12.shtml.

Other

Digital Public Library of America. The Digital Public Library of America (DPLA), based at Harvard University’s Berkman Center for Internet & Society, brings together leaders from libraries, archives, museums, education, industry, and government to realize a digital library in the service of the public. The project will be undertaken in collaboration with Europeana, a similar effort by the European Commission. On October 21, 2011 the Sloan Foundation and Arcadia Fund announced a major contribution of \$5 million for the DPLA. The website is at <http://dp.la/>.

Ebooks. The ALA Digital Content and Libraries Working Group (DCWG) was created to study challenges and recommend potential solutions in libraries for improved electronic content access,

distribution, and preservation systems. The recent focus for the DCWG has been on public libraries, ebooks, and the “Big 6” trade publishers. Although digital content encompasses numerous important issues for the library community, it was clear from the concerns of the ALA membership that the ebook issue merited urgent attention and focus, and the group has worked in close collaboration with the overall leadership of ALA including the then President and President-elect as well as the Executive Director.

Currently two of the “Big 6” (MacMillan and Simon & Schuster) do not sell ebooks to libraries. Penguin and Hachette offer a limited selection of ebooks to libraries. Random House and HarperCollins sell to libraries at high costs and/or use restrictions that are not promising to libraries.

Work in this area has included several meetings of ALA delegations with publishers to learn more about their issues and concerns, while also sharing those of ALA. The meetings were successful in that new relationships have been forged and there is now a positive atmosphere that encourages continued dialog. The ALA delegation also met with intermediary ebook suppliers as well as author associations.

The Business Model subgroup of DCWG developed six business model options favorable to public libraries as points of negotiation with publishers. Information about the models can be found at ALA Connect, <http://connect.ala.org/node/159669> or the e-content blog <http://americanlibrariesmagazine.org/e-content>.

On May 23, 2012, ALA released a new report examining critical issues underlying equitable access to digital content through the nation’s libraries. In the report, entitled *E-content: The Digital Dialogue*, authors explore an unprecedented and splintered landscape in which several major publishers refuse to sell e-books to libraries; proprietary platforms fragment our cultural record; and reader privacy is endangered.

Recent data gathering concerning ebooks and public libraries indicates that libraries enhance the sale of ebooks and promote the discovery of authors. On June 22, 2012, the Pew Research Center’s Internet & American Life Project released a new report on public libraries and e-book borrowing. The report, *Libraries, Patrons, and E-books*, is a companion to *The Rise of E-Reading*, a report released in April 2012. Findings from the latest report show that while a modest number of library users have started to borrow e-books, many Americans are still not aware that their local library offers this service. Nonetheless, the study also indicates that many e-book borrowers also purchase e-books: 41% of library ebook borrowers bought their last ebook. A summary of the findings and the report itself are available at: <http://libraries.pewinternet.org/2012/06/22/libraries-patrons-and-e-books>.

The earlier report is at <http://libraries.pewinternet.org/files/legacy-pdf/The%20rise%20of%20e-reading%204.5.12.pdf>.

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