



Country Report for United States

Annual report to the IFLA CLM committee
Gothenburg, Sweden 2010

Copyright

Copyright regulations

Digital Millennium Copyright Act Section 1201 Rulemaking. On July 26, 2010, the Librarian of Congress broadened the anti-circumvention exemption for creation of film clip compilations for classroom and educational use, in the triennial DMCA rulemaking. Prior to this rulemaking, only faculty who taught media or film studies were eligible for the exemption. The new ruling expands the exemption for educational use to all college and university professors, regardless of academic discipline, and to college and university film and media studies students. It also expands the exemption to include uses for documentary filmmaking and noncommercial videos. This latest round of exemptions was in accordance with requests made by Library Copyright Alliance (LCA) members in 2008 and 2009.

New copyright regulations for college campuses. Beginning July 1, 2010, new copyright regulations will go into effect for colleges that participate in federal student aid programs, in accordance with provisions of the Higher Education Opportunity Act of 2008 (HEOA) relating to copyright infringement on campus networks. There are three new requirements:

- an annual disclosure to students describing copyright law and campus policies related to violating copyright law
- a plan to “effectively combat the unauthorized distribution of copyrighted materials” by users of its network, including “the use of one or more technology-based deterrents”
- a plan to “offer alternatives to illegal downloading.”

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.

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.

Legal matters

Proposed legislation

The **Federal Research Public Access Act** (H.R.5037) was introduced in the House of Representatives on April 15, 2010. It mirrors its Senate counterpart (S. 1373) that was introduced on June 25, 2009. Both bills expand the National Institutes of Health (NIH) Public Access Policy,

that requires public access to taxpayer-funded research, to an additional 11 federal agencies with research expenditures of over \$100 million. Agencies would ensure free online access to manuscripts no later than 6 months after publication in peer-reviewed journals.

A competing bill, the **Fair Copyright in Research Works Act** (H.R. 801), introduced in the House of Representatives on February 3, 2009, would 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. Described by public interest organizations as "not new" and "not fair," H.R. 801 proposes that no Federal agency may, in connection with a funding agreement, impose or cause the imposition of any term or condition that requires the transfer or license to or for a Federal agency of any right provided under copyright law. Library and public interest groups oppose the this bill.

Preserving the American Historical Record Act. On April 19, 2010 the Preserving the American Historical Record Act (S. 3227) was introduced in the Senate. A companion bill to H.R. 2256, it authorizes the Archivist of the United States to make grants to States for the preservation and dissemination of historical records. It would ensure preservation of records and would allow for use of a range of access tools to the records. This bill would authorize a grant program to states to support "statewide projects and redistribution to local governments, historical societies, library collections, universities and other organizations to ensure essential care of documents and historical records in many forms, from paper to electronic media."

Enforcement

Anti-Counterfeiting Trade Agreement (ACTA). Negotiations continue on ACTA, a proposed plurilateral agreement aimed at creating a stronger framework for global enforcement of intellectual property rights, with a scope covering counterfeit trademarked goods and infringing copyrighted works. The sixth round of ACTA negotiations took place in Seoul from November 4-6, 2009; the seventh round in Guadalajara from January 26-29, 2010; the 8th round in Wellington, New Zealand from April 12-16, 2010; the ninth round in Lucerne, Switzerland from June 28-July 1, 2010. The 11 negotiating parties were expected to meet for the next round at the end of July in Washington, DC. On April 21, 2010, after two years of pressure from information technology companies, library associations, and consumer advocacy groups, and after the draft text was leaked in March 2010, the negotiating countries issued a "Consolidated Text for Public Release."

On March 22, 2010, LCA members joined other nonprofit organizations in two letters expressing concerns over leaked comments and proposals related to ACTA negotiations, and asked for a public discussion on the document itself. On April 19, 2010, LCA joined other organizations in voicing concerns over Article 2.2.2 of the proposed ACTA draft, which includes language mandating that ACTA parties allow for the award of statutory damages for copyright infringement as an alternative to actual damages. On April 23, 2010, LCA joined other organizations in a letter expressing concerns regarding the "Consolidated Text for Public Release" issued by the countries negotiating ACTA.

New U.S. Copyright Czar. In September 2009 President Obama appointed Victoria A. Espinel as the nation's first Intellectual Property Enforcement Coordinator, or "copyright czar." Congress created the new position last year as part of intellectual property reform legislation, to implement the Pro-IP Act that became law in October 2008. She is expected to play a key role for the U.S. in ACTA negotiations, and reports directly to the president and Congress regarding domestic and international intellectual property enforcement programs. Vice President Biden is committed to anti-piracy initiatives. The newly established Intellectual Property Enforcement Committee has issued its first report indicating that changes may be required to employ IP enforcement on the Internet. The appointment was applauded by both the "copyleft" and the "copyright," in the belief that Espinel will be fair in IP enforcement issues.

Law cases

Google Book Settlement. The complex Google Book Settlement (GBS) has broad implications for the future of library and public access to millions of books digitized under the Google Print Library Project. The GBS grew out of litigation that commenced on September 20, 2005 after Google had made agreements with major university libraries to scan millions of books in their collections. Google considered the scanning to be a fair use under copyright law. Authors and publishers saw it as a violation of copyright law and commenced legal action in ***Authors Guild et al v. Google***. On October 28, 2008, the settlement was announced. On October 7, 2009, a court hearing was scheduled to take place to determine the fairness of the settlement. On October 7, 2009, Judge Chin confirmed that current settlement was no longer on the table, and set November 9 for a revised settlement. On November 13, 2009, Google, the Authors Guild, and the Association of American Publishers filed an Amended Settlement Agreement, notable for the exclusion of foreign rightholders of books published outside U.S. unless they were published in Canada, Australia, U.K. before January 5, 2009, or registered with U.S. Copyright Office before January 5, 2009. At the fairness hearing scheduled for February 18, 2010, Judge Chin made a decision to delay his ruling: "There is too much to digest." We await his ruling.

Cambridge University Press et al. v. Georgia State University. Cambridge University Press, Oxford University Press and SAGE Publications filed suit against the President, the Provost, the Provost for Information Systems and Technology, and the Dean of Libraries of Georgia State University (GSU) in April 2008, alleging 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. This is considered the first lawsuit to be filed over "electronic course packs." The complaint cited numerous copyrighted works made available to students for downloading, viewing and printing without permission from copyright holders.

In February 2009, GSU adopted new, more conservative copyright policy. It claimed state sovereign immunity for past conduct. On June 22, 2009 a motion for "protective order" was granted by Court, stating that future discovery should be limited to defendants' "ongoing and continuous conduct." The case now focuses on GSU's new copyright policy and fair use checklist, which reflect guidelines and policies common to many other institutions. In February 2010, both sides file motions for summary judgment. We await the judge's ruling on the motions for summary judgment. The court's ruling is expected to impact e-reserve policies and use of copyrighted works in course management systems in higher educational institutions nationwide.

Costco v. Omega. On July 8, 2010, the Library Copyright Alliance filed an amici curiae brief in support of the Petitioner, urging the Court to reject the Ninth Circuit's interpretation of the first sale doctrine. The case has implications on core library activities—lending and public display—conducted under the "first sale doctrine," codified in Section 109 of the Copyright Act. The first-sale doctrine allows any purchaser of a legal copy of a book or other copyrighted work to sell or lend that copy, based on the principle of exhaustion of rights; and also to publicly display the copy. The U.S. Court of Appeals for the Ninth Circuit ruled that the first-sale doctrine applies only to copies manufactured in the United States. The Supreme Court will review the Ninth Circuit's decision. At issue is whether the first sale doctrine applies only to copies physically made in the U.S. Supreme Court affirmance of the Ninth Circuit would call into question libraries' ability to lend and publicly display books and other materials printed abroad.

UMG v. Veoh. On July 26, 2010, the Library Copyright Alliance joined a coalition of public interest and consumer groups in an amicus brief written by the Electronic Frontier Foundation asking the Ninth Circuit to reject the arguments made by Universal Music Group and affirm the lower court's decision in *UMG v. Veoh*. The case involves the legal "safe harbor" for online service providers hosting content on the Web. The safe harbor protects online service providers from damages liability if a third party using the online service infringes copyright.

Viacom v. YouTube. On April 12, 2010, LCA members joined other groups in filing an amici curiae brief urging the Court to reject the Plaintiffs' interpretation of Section 512 of the Digital Millennium Copyright Act . The judge sided with the Defendant, concluding that it was against the DMCA's purpose to hold YouTube legally liable for every video uploaded on the website, amounting to some 20 hours of video every minute, even if they might have had a general idea that the site was being used to violate copyright laws.

Vernor v. Autodesk, Inc. On February 11, 2010, LCA members joined the Consumer Federation of America, the Electronic Frontier Foundation, Public Knowledge, and U.S. Public Interest Research Group in filing an amici curiae brief asking the Court to affirm the lower court ruling, recognizing that a proper application of the first sale doctrine here requires a ruling in favor of Mr. Vernor's right to resell the four AutoCAD CD-ROMs at issue.

UCLA and AIME. In a legal challenge, the University of California, Los Angeles (UCLA) is asserting fair use and other exceptions for streaming video. In fall 2009, the Association for Information and Media Equipment (AIME) contacted UCLA, alleging violation of copyright law is use of streaming videos accessed from password-protected course web sites. UCLA temporarily suspended the posting of streamed content, assessed the legal challenge, and on March 3, 2010 announced that it was restoring its streaming video service. On February 16, 2010 it announced new "UCLA Faculty Principles on the Use of Streaming Videos and Other Educational Content." The principles are grounded in fair use and also in Section 110(1), the face-to-face teaching exemption, and Section 110(2), the TEACH Act. They are also consistent with landmark court rulings that allow video recording of television programs for viewing at a later date ("time-shifting") and the transfer of musical content from one device to another ("space-shifting"). Even as AIME has indicated its right to "move against UCLA and others that [they] are investigating," UCLA asserts fair use and other copyright exceptions for streaming.

Lobby activities

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 and the American Library Association Office for Information Technology Policy (ALA OITP) also continue 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

Best Practices for Fair Use. The Association of Research Libraries received a three-year grant from the Mellon Foundation to develop best practices in fair use for library activities, including preservation. ALA OITP and American University are partners in this initiative. ALA OITP is coordinating a project on fair use practices for media librarians. A draft of best practices for use of video should be available by the ALA Midwinter Conference in 2011.

Best Practices for Orphan Works. In October 2009 the Society of American Archivists issued "Orphan Works: Statement of Best Practices," a 16-page report that provides what professional archivists consider the best methods to use when attempting to identify and locate copyright holders. The statement, which primarily focuses on unpublished materials because they are of central concern to archivists, is available on the association's website.

ALA Privacy Initiative. A new initiative sponsored by the ALA Office for Intellectual Freedom invites library users into a national conversation about privacy rights in a digital age. The first Choose Privacy Week was launched on May 2-8, 2010. The campaign gives libraries the tools they need to educate and engage users, and gives citizens the resources to think critically and make more informed choices about their privacy.

Other

Net Neutrality. On October 22, 2009 the Federal Communications Commission (FCC) issued a notice of proposed rulemaking seeking public input on draft rules to preserve an “open Internet” in the internet neutrality debate. The FCC received nearly 15,000 comments calling for a strong net neutrality rule that would not allow service providers to discriminate against those trying to access content.

National Broadband Plan. In March 2010 the FCC issued a comprehensive National Broadband Plan to ensure every American has access to broadband capability. Approximately 100 million Americans do not have broadband at home. Congress required that this plan include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.” The FCC estimates it will cost approximately \$320 billion to bring broadband internet service to all Americans.

Broadband Support for Libraries. In December 2009, it was announced that the Bill & Melinda Gates Foundation plans to provide \$3.4 million in grants to help libraries across the U.S. upgrade their internet access to include broadband and wireless support. ALA statistics show that 60% of U.S. libraries report having insufficient broadband speeds. Almost 40% of Americans today do not have cable or DSL support at home. In 70% of these communities, a local public library is the only facility that offers free broadband Internet access.

Performance Rights Act. On October 15, 2010, the Senate Judiciary Committee passed S. 379, which would force AM and FM radio stations to compensate artist for use of their sound recordings, and it was placed on the Senate calendar. There is a companion bill of the same name pending in the House, H.R. 848, introduced on May 13, 2009.

The **Design Piracy Prohibition Act** (H.R. 2196) was introduced on June 12, 2009. It would extend copyright protection to fashion designs and includes as protected items clothing, duffel bags, tote bags and eyeglass frames. Excluded are designs embodied in a “useful article” made public by the designer more than six months before the registration of copyright application.