



**Country Report for United States**  
Annual report to the IFLA CLM committee  
San Juan, Puerto Rico 2011

## **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. The ruling will be in effect for three years.

### ***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 the wake of the rejection of the Google Book Settlement, there has been renewed interest in legislative solutions to a variety of copyright issues affecting libraries, including orphan works legislation. On March 24, 2011 LCA issued a statement in response to the rejection of the Google Book Settlement, urging copyright reform to address orphan works: "The decision makes clear that copyright law continues to present significant barriers to libraries and other partners interested in engaging in mass digitization initiatives. Such initiatives provide broad, deep, and important public access to cultural and historical resources to users throughout the world. The library community has always supported-and worked long and hard for-constructive and practical orphan works legislation that would benefit all stakeholders." The statement is available at [http://www.arl.org/bm~doc/lca\\_gbsstmt24mar11.pdf](http://www.arl.org/bm~doc/lca_gbsstmt24mar11.pdf).

In addition, on May 16, 2011 LCA issued a statement on copyright reform, addressing the implications of copyright law on the mass digitization of books, the use of orphan works, and revision of Section 108. It is available at [http://www.librarycopyrightalliance.org/bm~doc/lca\\_copyrightreformstatement\\_16may11.pdf](http://www.librarycopyrightalliance.org/bm~doc/lca_copyrightreformstatement_16may11.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 a report issued in January 2011, the Library of Congress recommended working with the U.S. Copyright Office and Congress to pursue Section 108 Study Group Report recommendations for updating copyright law for digital preservation. The report also outlined initiatives to create stronger digital preservation projects nationwide, including the establishment of the National Digital Stewardship Alliance that consists of organizations from academia,

government and the private sector demonstrating a commitment to digital preservation. *Preserving Our Digital Heritage: The National Digital Information Infrastructure and Preservation Program 2010 Report* is available at: [http://www.digitalpreservation.gov/library/resources/pubs/docs/NDIIPP2010Report\\_Post.pdf](http://www.digitalpreservation.gov/library/resources/pubs/docs/NDIIPP2010Report_Post.pdf).

## **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 would 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. Last action on the bill was on May 26, 2010. Neither nor H.R. 5037 nor S. 1373 became law. Legislation aimed at expanding public access to federally funded research has not yet been introduced in the 112<sup>th</sup> Congress.

The **PROTECT IP Act of 2011**. The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (S. 968) was introduced on May 12, 2011 and is intended to crack down on rogue websites dedicated to the sale of infringing or counterfeit goods. The library community's concern with this legislation is its potential impact on first amendment rights. The American Library Association (ALA) joined other organizations and sent a letter to Senate leadership stating, as currently drafted, "...S. 968 makes nearly every actor on the Internet potentially subject to enforcement orders under the bill, raising new policy questions regarding government interference with online activity and speech." The letter is available at <http://www.districtdispatch.org/wp-content/uploads/2011/05/Public-interest-968-letter.pdf>.

### ***New legislation***

**COMPETES Reauthorization Act of 2010** (Public Law 111-358). On January 4, 2011 President Obama signed into law the America COMPETES Reauthorization Act of 2010 (Public Law 111-358). The law enacted two open access-related initiatives. The law establishes a working group to coordinate federal science agency research and policies related to the dissemination and long-term stewardship of the results of federally supported unclassified research. The law requires the Office of Science and Technology Policy, in consultation with relevant federal agencies, to develop formal policies for the management and use of federal scientific collections, including policies for the disposal of collections, and to create an online clearinghouse for information on the contents of and access to federal scientific collections.

**Extension of U.S. Patriot Act**. On May 27, 2011 President Obama signed into law a four-year extension of the U.S. Patriot Act, renewing the government's post-September 11 powers to search records and conduct roving wiretaps in pursuit of terrorists. The extension leaves Section 215, known as the "library records provision," unchanged. This has been a serious concern to the library community. ALA was disappointed in the outcome. Under the provision the FBI can ask a federal court for access to "any tangible thing," including library records, relevant to a terrorist threat.

### ***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. Formal negotiations were launched in October 2007 and concluded after 11 rounds in October 2010 in Tokyo, Japan. Negotiating parties included Australia, Canada, Japan, the Republic of Korea, Morocco, New Zealand, Singapore, Switzerland, Mexico, the United States, and the European Union.

On March 22, 2010, LCA members joined other nonprofit organizations in two letters expressing concern 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. A revised text, dated 15 November 2010, is presumed to be the final text. It has been submitted to the participants' respective domestic authorities for ratification.

**Annual Report of U.S. IP Enforcement Coordinator.** On February 7, 2011, U.S. Intellectual Property Enforcement Coordinator Victoria Espinel issued a 92-page annual report on IP enforcement. Espinel, who received Senate confirmation in December 2009, reported significant progress on the plan to coordinate IP enforcement activities across various U.S. government agencies. This includes actions taken against alleged counterfeit and pirated goods, and an upcoming white paper to Congress concerning recommended changes to IP laws. The report is available at [http://www.whitehouse.gov/sites/default/files/omb/IPEC/ippec\\_annual\\_report\\_feb2011.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ippec_annual_report_feb2011.pdf).

**Two White House IP Advisory Committees Created.** In February 2011, President Obama signed an executive order to create two government advisory committees on intellectual property rights enforcement. The committees put IP rights at the highest interagency level possible and aim to promote innovation through the protection of IP rights.

**U.S. White Paper on IP Enforcement.** On March 15, 2011 the White House issued the Administration's *White Paper on Intellectual Property Enforcement Legislative Recommendations*, identifying specific recommended legislative changes designed to increase the effectiveness of U.S. enforcement efforts. The paper proposes sweeping revisions to U.S. copyright law, including making illegal streaming of audio or video a federal felony "in appropriate circumstances" and allowing FBI agents to wiretap suspected infringers. The report was prepared by Intellectual Property Enforcement Coordinator Victoria Espinel, and represents a tightening of IP law. It is available at [http://www.whitehouse.gov/sites/default/files/ip\\_white\\_paper.pdf](http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf).

## Law cases

**Google Book Settlement.** In a ruling on March 22, 2011, the federal judge overseeing the case rejected the settlement reached by Google, the Authors Guild, and the Association of American Publishers. Stating that it "would simply go too far," even though "the digitization of books and the creation of a universal digital library would benefit many," he urged the parties to revise the settlement. At a status hearing on July 19, 2011, Judge Chin again urged the parties to reach a revised settlement, and said he would set a schedule for the case to proceed to trial if the parties are not close to a settlement by then. The next hearing date has been set for September 15, 2011.

The rejection of the settlement agreement has strengthened support for creation of a Digital Public Library of America, and has reinforced the importance of digital preservation and access initiatives such as the HathiTrust as libraries' best chance for broad access to a wide variety of books and other digitized materials. Additional information about the case, including *A Guide for*

*the Perplexed Part IV: The Rejection of the Google Books Settlement*, is available at <http://wo.ala.org/gbs>.

**Cambridge University Press et al. v. Georgia State University.** In April 2008, 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), 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 shifted to GSU's new copyright policy and fair use checklist, which reflect guidelines and policies common to many other institutions. In February 2010, both sides filed motions for summary judgment.

The trial judge has dismissed the claims of direct and vicarious infringement in favor of the University. The claim of contributory infringement remained for the trial, which was held from May 16 to June 8, 2011. Judge Orinda Evans of the Federal District Court in Atlanta will decide the case on a single claim of "indirect liability." 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 December 13, 2010 the Supreme Court issued a 4-4 split ruling that affirmed the 2008 decision of the U.S. Court of Appeals for the Ninth Circuit, ruling that the "first-sale doctrine" applies only to copies manufactured in the U.S. The case centered on Omega's claim that Costco had infringed Omega's copyrights by importing Omega watches from other countries, instead of paying higher prices from a domestic distributor, and by reselling them in the U.S. Costco claimed that its activity was permissible under the first sale doctrine. At issue was whether the first sale doctrine applies only to copies physically made in the U.S. The Ninth Circuit ruled that the doctrine applies only to copies made legally and sold inside the U.S.

The case has implications on core library activities—lending and public display of foreign works—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.

On July 8, 2010, the Library Copyright Alliance filed an amici curiae brief urging the Court to reject the Ninth Circuit's interpretation of the first sale doctrine, and to affirm that the first-sale doctrine applies to "all copies manufactured with the lawful authorization of the holder of a work's U.S. copyright," which would include materials made in foreign countries.

While the ruling raised questions concerning libraries' ability to lend and display books and other works manufactured outside the U.S., LCA issued a paper affirming that libraries are still on sound footing in lending foreign works in their collections. It gives a range of alternative justifications for lending that should cover the vast majority of situations that institutions face on a regular basis, to "allow libraries throughout the country to continue their existing purchasing and circulation practices with a fair degree of confidence that they will not infringe copyright by doing so." It is available at <http://www.arl.org/news/pr/costcouupdate31jan11~print.shtml>.

**AIME v. UCLA.** On December 7, 2010, the Association for Information and Media Equipment (AIME), an educational trade group of video publishers, and one of its members, Ambrose Video Publishing, filed suit against the Regents of the University of California and the Chancellor of UCLA, alleging that UCLA's practice of streaming digitized video through its course management system constituted copyright infringement.

The lawsuit had followed a legal challenge that began in fall 2009, when AIME contacted UCLA, alleging violation of copyright law in 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"). AIME/AVP also claim that UCLA is violating the provisions of AVP's DVD license and is violating the anti-circumvention provision of the Digital Millennium Copyright Act. The case is being closed watch by the library community.

**Golan, et al., v. Holder.** This case challenges the constitutionality of copyright restoration in foreign works that were previously public domain in the U.S. It was previously known as Golan v. Gonzales, and earlier as Golan v. Ashcroft. On April 3, 2009, the Court upheld the plaintiff's challenge to the constitutionality of the copyright restoration in public domain works under the Uruguay Rounds Agreement Act (URAA). The Court granted a motion of summary judgment, holding 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 raises interesting questions pitting U.S. obligations under the Berne Convention against U.S. constitutional law. The Supreme Court will hear the case, and is expected to make a decision during the new term that starts in October 2011.

## **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**

**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. The American Library Association Office for Information Technology Policy (ALA OITP) and American University are partners in this initiative.

ALA OITP is also coordinating a project on fair use practices for media librarians, and has conducted focus groups to understand what media librarians understand to be fair use of copyright protected works in educational settings. The Best Practices for Fair Use and Video

Working Group is creating a statement by and for librarians reaffirming the application of the fair use doctrine to the educational use of video collections.

## Other

**Library of Congress releases NDIIPP 2010 report.** In March 2011 the Library of Congress released *Preserving Our Digital Heritage: The National Digital Information Infrastructure and Preservation Program 2010 Report*, documenting the achievements of the Library of Congress and its NDIIPP partners in creating sustainable long-term access to digital materials. It also outlined efforts to foster digital preservation projects nationwide, including the establishment of the National Digital Stewardship Alliance in 2010.

**ARL Affirms International Interlibrary Loan and Document Delivery Practices.** ARL has issued a report affirming that it is the right of North American research libraries to participate in international interlibrary loan (ILL) and document delivery activities. Over the past year, questions have been raised concerning the current ILL practices of some U.S. research libraries. The focus has been on the delivery of resources from U.S. libraries to non-U.S. libraries. The concerns seem to be that international, non-U.S. libraries do not have to adhere to US copyright law.

ARL convened a task force, which produced the *ARL Task Force Report on International Interlibrary Loan and Document Delivery Practices*, announced in a press release on May 27, 2011, and published in the June issue of *Research Library Issues*: <http://www.arl.org/news/pr/ill-27may2011.shtml>. The report concludes that “[c]hallenges to current international ILL practices could significantly undermine this carefully crafted and balanced set of resource-sharing activities.”

**Two new ALA committees address equitable e-access issues.** Recent action from e-book publishers has led to the formation of two new ALA member task forces. The presidential task force on Equitable Access to Electronic Content (EQUACC) and the E-book Task Force were created to address these evolving issues. Of particular concern was the February 2011 decision by Harper Collins to restrict use of licensed e-books by setting a limit of 26 to the number of times its e-books may be checked out before a license expires. This practice would assimilate e-book licenses to annual journal subscriptions, based on a 2-week circulation period. EQUACC is studying solutions for improved electronic content access, distribution and preservation systems. The ALA OITP E-book Task Force is studying the public policy implications of the growing e-book marketplace and will provide informational and educational materials to the membership.

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