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## Country Report for the United States Annual Report to the IFLA CLM committee Singapore 2013

This report is a short account of copyright-related developments relevant to libraries and archives in the United States for the period August 1, 2012-July 24, 2013.

### Copyright

#### *Proposed legislation*

No copyright legislation was introduced in the last year.

#### *Regulations*

**Digital Millennium Copyright Act Section 1201 Rulemaking.** On October 26, 2012, the Librarian of Congress concluded the fifth triennial rulemaking proceeding pursuant to Section 1201 of the Copyright Act. See [www.copyright.gov/1201](http://www.copyright.gov/1201). The 2012 rulemaking granted five exemptions, for:

1. Literary works distributed electronically, to permit blind and other persons with print disabilities to use screen readers and other assistive technologies;
2. Computer programs on wireless telephone handsets, to enable interoperability of software applications (referred to as “jailbreaking”);
3. Computer programs on wireless telephone handsets that were acquired within ninety days of the effective date of the exemption, for the purpose of connecting to alternative networks (referred to as “unlocking”);
4. Motion pictures on DVDs or distributed by online services, for purposes of criticism or comment in noncommercial videos, documentary films, nonfiction multimedia e-books offering film analysis, and for certain educational uses by college and university faculty and students and kindergarten through twelfth grade educators; and
5. Motion pictures and other audiovisual works on DVDs or distributed by online services, for the purpose of research to create DVD players capable of rendering captions and descriptive audio for persons who are blind, visually impaired, deaf, or hard of hearing.

#### *Pending legislative issues*

**Reform of U.S. copyright law.** On March 20, 2013 U.S. Register of Copyrights Maria Pallante spoke before the House of Representatives Committee on the Judiciary on “The Register’s Call for Updates to U.S. Copyright Law.” Pallante requested that Congress address issues essential for keeping copyright meaningful into the digital future: the scope of exclusive rights, exceptions

and limitations for libraries and archives, orphan works, provisions for persons with print disabilities, providing guidance to educational institutions, exemptions for incidental copies in appropriate circumstances, enforcement provisions, statutory damages, the efficacy of the Digital Millennium Copyright Act, small copyright claims issues, reforming the music marketplace, updating the framework for cable and satellite transmissions, encouraging new licensing regimes, and improving the systems of copyright registration and recordation. See [http://judiciary.house.gov/hearings/113th/hear\\_03202013.html](http://judiciary.house.gov/hearings/113th/hear_03202013.html).

This address followed Register Pallante's lecture on March 4, 2013 at Columbia University Law School entitled "The Next Great Copyright Act," <http://judiciary.house.gov/hearings/113th/03202013/Pallante%20Lecture.pdf>. An extended version of that lecture may be found in Maria A. Pallante, "The Next Great Copyright Act," [http://www.copyright.gov/docs/next\\_great\\_copyright\\_act.pdf](http://www.copyright.gov/docs/next_great_copyright_act.pdf).

On April 24, 2103, the House of Representatives Judiciary Committee announced that it will conduct a comprehensive review of U.S. copyright law over the coming months. The committee, working with U.S. Register Pallante, will hold a comprehensive series of hearings on U.S. copyright law in the months ahead with the goal of updating of copyright law to accommodate new technologies.

**Orphan works reform.** There has been no legislative 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.

On October 22, 2012 the U.S. Copyright Office issued a *Notice of Inquiry on Orphan Works and Mass Digitization*, seeking comments on the current state of play for orphan works. The Copyright Office is interested in identifying legislative, regulatory, or voluntary solutions. Initial comments were submitted by a deadline of February 4, 2103 and reply comments were submitted by a deadline of March 6, 2013. There were 91 submissions in the initial round of comments. All comments and background materials are available at <http://www.copyright.gov/orphan/>.

**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 since the submission of the Section 108 Study Group Report in March 2008. However, there is a renewed interest in discussion of Section 108 reform.

On February 8, 2013 Columbia University Law School's Kernochan Center for Law, Media and the Arts, in cooperation with the U.S. Copyright Office, hosted a symposium on *Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform* to renew the discussion of Section 108 in the context of mass digitization by libraries. The symposium was the first event in connection with U.S. Copyright Office's plans for moving forward on Section 108 reform within the larger framework of updating U.S. copyright law for the digital environment. See <http://web.law.columbia.edu/kernochan/symposia/section-108-reform>.

### *Developments affecting U.S. copyright law*

**Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.** The Library Copyright Alliance (LCA) worked with the U.S. government in the course of negotiations on the Marrakesh Treaty that was adopted

by member states of the World Intellectual Property Organization on June 27, 2013, by contributing comments to successive drafts of the treaty.

**Trans-Pacific Partnership Agreement.** On August 15, 2012, the Library Copyright Alliance sent a letter to Ambassador Ron Kirk, United States Trade Representative, concerning the Trans-Pacific Partnership Agreement, noting LCA's appreciation for the U.S. proposal for copyright exceptions and limitations in the agreement,

[http://www.librarycopyrightalliance.org/bm~doc/lt\\_kirktp14aug12.pdf](http://www.librarycopyrightalliance.org/bm~doc/lt_kirktp14aug12.pdf).

## Legal matters

### *Proposed legislation*

**Fair Access to Science and Technology Research Act of 2013.** On February 14, 2013, the Fair Access to Science and Technology Research Act of 2013 (FASTR) was introduced in both the House of Representatives (H.R. 708) and the Senate (S. 350). It would require each federal agency with extramural research expenditures of over \$100 million to develop a federal research public access policy, following common procedures for the collection and depositing of research papers, that is consistent with, and that advances, the purposes of the agency. It would make each federal research public access policy applicable to researchers employed by the federal agency whose works remain in the public domain, and researchers funded by the agency, and it specifies exclusions. It would require each federal agency to submit an annual report on its federal research public access policy to specified congressional committees. Agencies would have one year from enactment of the legislation to develop implementation policies.

This is the fifth attempt at legislation that would expand the open access mandate for publicly funded research. Previous efforts were the Federal Research Public Access Act of 2012 introduced on February 9, 2012 in the House of Representatives (H.R. 4004) and the Senate (S. 2096); the Federal Research Public Access Act (H.R. 5037) introduced on April 15, 2010; the Federal Research Public Access Act (S. 1373) introduced on June 25, 2009; and the Federal Research Public Access Act of 2006 (S. 2695) introduced in May 2006.

In recent years, there have been efforts to oppose public access to research through a series of bills countering the NIH Public Access Policy that became a federal mandate on December 26, 2007 and opposing bills that would expand the NIH policy. They include the Research Works Act (H.R. 3699) introduced on December 23, 2011 "to ensure the continued publication and integrity of peer-reviewed research works by the private sector;" the Fair Copyright in Research Works Act (H.R. 801), introduced on February 3, 2009 to prohibit federal open access mandates; and the Fair Copyright in Research Works Act (H.R. 6845) of September 9, 2008 that aimed to reverse the NIH Public Access Policy and to forbid other federal agencies from putting similar policies into place.

**White House Office of Science and Technology Policy memorandum.** Days after FASTR was introduced, on February 22, 2013, the Executive Office of the President, Office of Science and Technology Policy issued a policy memorandum directing each Federal agency with over \$100 million in annual conduct of research and development expenditures "to develop a plan to support increased public access to the results of research funded by the Federal Government." The directive was prompted by an online White House petition, called a *We the People* petition,

that demanded expanded public access to the results of taxpayer-funded research and obtained over 65,000 signatures. See <http://www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research>.

## Law cases

*Supap Kirtsaeng v. John Wiley & Sons*. On March 19, 2013 the U.S. Supreme Court issued its much-anticipated decision, holding that the first-sale doctrine applies to copies of copyrighted works lawfully made abroad. The 6-3 opinion upholding the first sale doctrine represents a victory for libraries and their users. On April 2, 2013, LCA released an issue brief explaining the landmark decision. Written by Jonathan Band, “The Impact of the Supreme Court’s Decision in *Kirtsaeng v. Wiley on Libraries*” is available at <http://www.librarycopyrightalliance.org/bm~doc/issue-brief-kirtsaeng-post-analysis-02apr13.pdf>.

The issue at stake was 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 had 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.

An adverse decision in this case would have affected 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. LCA asked 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>.

*Cambridge University Press et al. v. Georgia State University*. On August 10, 2012, the U.S. District Court for the Northern District of Georgia issued its final order for relief in the case. Judge Orinda Evans rejected the plaintiff publishers’ proposal for relief and ordered the publishers to pay the defendants’ attorneys’ costs. On September 10, 2012 the three plaintiffs filed an appeal with the Eleventh Circuit Court of Appeals. Speculation that the U.S. Department of Justice (DOJ) would weigh in on the case ended in late February 2013 when the DOJ decided not to file an amicus curiae brief. On April 25, 2013, LCA filed an amicus brief in support of Georgia State University (GSU) in the appeal, arguing that GSU’s e-reserves policy is consistent with widespread and well-established best practices for fair use at academic and research libraries, and that these uses have no negative effects on scholarship, <http://www.librarycopyrightalliance.org/bm~doc/announce-gsu-amicus-26apr13.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 GSU, 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.

Judge Evans issued her ruling on May 11, 2012. It 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. The Judge deferred a decision on remedies and attorney's fees. The ruling overwhelmingly favored GSU. 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](http://www.arl.org/bm~doc/gsu_issuebrief_15may12.pdf).

*AIME v. UCLA*. On November 20, 2012 the U.S. District Court for the Central District of California, ruling on the Defendants' Motion to Dismiss the Second Amended Complaint, dismissed the case with prejudice.

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. An amended complaint was filed.

On October 3, 2011 that amended complaint was dismissed. In its order, the court found that the plaintiffs had failed to state a claim for which relief could be granted. However, the court allowed the plaintiffs to refile. The plaintiffs filed a second amended complaint on October 24, 2011. UCLA then filed another motion to dismiss, arguing that the plaintiffs had failed to address the deficiencies the court had identified in its October 2011 order. The ruling on November 20, 2012 was in response to UCLA's motion to dismiss the second amended complaint.

*Authors Guild v. HathiTrust*. On October 10, 2012 the U.S District Court for the Southern District of New York issued a 23-page decision, representing a victory for HathiTrust. The court found that the retention and use of books digitized for purposes of preservation, text search, and accessibility for the visually impaired were within the limits of fair use. The ruling is important for the continued existence of HathiTrust and will be helpful in future evaluations of fair use in the context of libraries, education, and research.

On November 8, 2012 the plaintiffs filed an appeal in the U.S. Court of Appeals for the Second Circuit. On June 3, 2013, the members of LCA filed an amicus brief in the U.S. Court of Appeals for the Second Circuit in support of HathiTrust and its partners. The brief argues three points: that activities outside the specific exceptions favoring libraries (sections 108 or 121) can still qualify for fair use, that the activity of the HathiTrust Digital Library falls within fair use, and that libraries are authorized entities that may make accessible books available to the print disabled. See <http://www.librarycopyrightalliance.org/bm~doc/lca-amicus-hathitrust-appeal-03june13.pdf>

The case dates from September 12, 2011, when 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, that was subsequently suspended.

On April 20, 2012, members of the LCA filed an amicus brief in the U.S. District Court for the Southern District of New York 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. 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). See <http://www.librarycopyrightalliance.org/submissions/domestic/amicus.shtml>.

On July 6, 2012, members of LCA, together with the Electronic Frontier Foundation (EFF), filed a second amicus brief in the U.S. District Court for the Southern District of New York, urging the federal court to find that the fair use doctrine permitted the creation of the HathiTrust Digital Library. The brief argued 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>.

**Settlement between Association of American Publishers and Google.** On October 4, 2012 the Association of American Publishers (AAP) and Google announced a settlement agreement that will provide access to publishers' in-copyright books and journals digitized by Google for its Google Library Project. The dismissal of the lawsuit ended seven years of litigation that commenced in October 2005. Under the agreement, books scanned by Google in the Library Project can now be included by publishers. Further terms of the agreement are confidential.

This settlement is the result of negotiations between Google and the AAP. It does not affect Google's current litigation with the Authors Guild or otherwise address the underlying questions in that lawsuit.

**Authors Guild v. Google.** On July 1, 2013 the Second Circuit Court of Appeals vacated the Southern District of New York's order certifying the class in *The Author's Guild, Inc. et al. vs. Google Inc.*, holding that such certification was premature, and the case is now remanded to the district court for consideration of Google's fair use defense.

This development stems from the decision on May 31, 2012 by Judge Chin, the district court judge overseeing the case, to certify the plaintiffs/authors as a class in this litigation that commenced in September 2005. Google opposed the motion for class certification, and sought review of the issue with the Second Circuit. As a result of the Second Circuit's decision, the court will now proceed to hear arguments on fair use. The fair use arguments are at the heart of this case, and the outcome will have far-reaching implications.

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, [http://www.librarycopyrightalliance.org/bm~doc/lca-eff\\_googleamicus01aug12.pdf](http://www.librarycopyrightalliance.org/bm~doc/lca-eff_googleamicus01aug12.pdf). 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. On November 16, 2012 the members of LCA filed an amicus brief opposing the class certification, <http://www.librarycopyrightalliance.org/bm~doc/lcaamicus-ag-v-google16nov12.pdf>.

## Advocacy

The Library Copyright Alliance, a coalition of three major library associations – the American Library Association (ALA), the Association of Research Libraries (ARL), and the Association of College and Research Libraries (ACRL) – 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.

## Other

**Digital Public Library of America.** The Digital Public Library of America was officially launched on April 18, 2013. Based at Harvard University’s Berkman Center for Internet & Society, the project brings together leaders from libraries, archives, museums, education, industry, and government to realize a digital library in the service of the public. The project is being undertaken in collaboration with Europeana, a similar effort by the European Commission. The website is at <http://dp.la/>.

**E-books.** On August 8, 2012, ALA released “Ebook Business Models for Public Libraries,” a report that describes general features and attributes of the current ebook environment and outlines constraints and restrictions of current business models. See <http://www.ala.org/transforminglibraries/ebook-business-models-public-libraries>.

On December 27, 2012 the Pew Internet & American Life Project released its report “E-book Reading Jumps; Print Book Reading Declines,” <http://libraries.pewinternet.org/2012/12/27/e-book-reading-jumps-print-book-reading-declines/>.

On May 22, 2013 ALA released the *American Libraries* digital supplement *Digital Content: What’s Next?* that examines the future of e-book lending, <http://www.ala.org/news/press-releases/2013/05/new-american-libraries-supplement-examines-future-ebook-lending>.

## Selected releases and publications:

In August 2012 ALA released Carrie Russell’s *Complete Copyright for K–12 Librarians and Educators*, a copyright law guidebook specifically written for teachers and librarians, <http://www.districtdispatch.org/2012/08/today-copyright-law-book-available-for-school-librarians-and-educators/>.

In August 2012 ARL released the final version of *Research Library Issues* (RLI) no. 279, which is devoted to legal concerns and evolving professional practices around digitizing special collections and archival materials, <http://publications.arl.org/rli279/>.

In September 2012 Jonathan Band released a paper entitled "Cautionary Tales about Collective Rights Organizations," revealing that the organizations that manage collective licenses often fail to live up to their potential, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2149036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036).

On November 5, 2012, ARL released the report of its Joint Task Force on Services to Patrons with Print Disabilities, <http://old.arl.org/news/pr/print-disabilities-report-05nov12.shtml>, also published as *Research Library Issues*, no. 281 (Dec. 2012): *Special Issue on Services to Patrons with Print Disabilities*. ARL formed the task force in May 2012 to expand upon the ongoing work of the Library Copyright Alliance in support of an international instrument for the print disabled being negotiated by the World Intellectual Property Organization.

December 2012 saw the release of *Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries*, guidelines developed as part of the Andrew W. Mellon-funded project "Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries," undertaken by New York University; The University of California, Berkeley; and Loyola University, New Orleans. See <http://www.nyu.edu/tisch/preservation/research/video-risk/>.

On February 15, 2013, LCA issued a white paper prepared for LCA by the Samuelson Law, Technology and Public Policy Clinic on "How Flexibility Supports the Goals of Copyright Law; Fair Use and the U.S. Library Experience," <http://www.librarycopyrightalliance.org/bm~doc/lca-flex-library-experience-15feb13.pdf>.

On March 27, 2013 Jonathan Band and Jonahan Gerafi released *The Fair Use/Fair Dealing Handbook*, a compilation of all fair use and fair dealing statutes identified by the authors in national copyright laws, <http://infojustice.org/archives/29136>.

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