

## 2006 Copyright Agenda

ALA supports efforts to amend the Digital Millennium Copyright Act (DMCA) and to urge the courts to restore the balance in copyright law, ensure fair use and protect and extend the public domain

### HIGHLIGHTS OF COPYRIGHT LEGISLATION AND RELATED ACTIVITY

For details, please go to [www.ala.org/copyright](http://www.ala.org/copyright)

(Note: The text of bills is available at <http://thomas.loc.gov>.)

#### **“Digital Media Consumers’ Rights Act of 2005” (DMCRA) (H.R. 1201)**

Congressmen Rick Boucher (D-VA), John Doolittle (R-CA) and Joe Barton (R-TX) in March 2005 introduced fair use bill, H.R. 1201

**Nov. 2005:** House Energy & Commerce subcommittee held hearing on fair use, copyright law, and technology; Subcommittee chairman stated intention to hold hearing in 2006 on H.R. 1201

Libraries urge Members of the House to co-sponsor HR 1201, which would:

- Amend Section 1201 of the Digital Millennium Copyright Act (DMCA) to allow bypassing a technological lock that controls access to and use of a copyrighted work - if the circumvention does not result in infringement of the work
- Codify U.S. Supreme Court's 1984 ruling that a copying technology (there, the videocassette recorder) is permissible if it can be used for non-infringing as well as infringing purposes
- Broaden allowances for anti-circumvention scientific research (e.g., to allow scientists to research the strength and reliability of technological locks, without subjecting themselves to civil and criminal penalties)
- Require proper labeling of "copy-protected" compact disks so consumers know what device their CD can be played on.

#### **“Orphan Works” legislation**

Congress asks how better to allow use of copyrighted works whose owners cannot be located with reasonable effort.

**May 2006:** Rep. Lamar Smith (R-TX) introduces H.R. 5439, “Orphan Works Act of 2006”

**Sept. 2006:** Rep. Smith combines orphan works provision into H.R. 6052, “Copyright Modernization Act of 2006”

- U.S. Copyright Office submitted its Report on Orphan Works to the Senate Judiciary Committee in January 2006, along with recommended legislative changes
- House Judiciary subcommittee marks up H.R. 5439 on May 24, 2006 and refers to full Judiciary Committee
- Combined into larger “Copyright Modernization Act” bill; pulled from markup by House Judiciary on September 27
- Senate Judiciary Comm. hearing April 6 on orphan works issue, but no companion bill in Senate
- Related: “Public Domain Enhancement Act” (H.R. 2408) - Rep. Zoe Lofgren (D-CA) introduced in May 2005 to amend Copyright Act to allow abandoned copyrighted works to enter the public domain after 50 years.

#### **“Digital Transition Content Security Act of 2005” (H.R. 4569)**

Rep. James Sensenbrenner (R-WI and House Judiciary Committee Chairman) and Rep. John Conyers (D-MI) introduced bill in Dec. 2005 to close the “analog hole”

- The “analog hole” is created by devices that convert analog content on television into digital versions, which then can be transmitted over the Internet
- Intended as counterpart to legislation mandating code (“broadcast flag”) to be included in digital television (DTV) signals to prevent redistribution of content over the Internet
- Libraries urge Members: be cautious of government technological mandates that lock up content

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<p><b><u>FCC “Broadcast Flag” Rulemaking, Litigation and Legislation</u></b></p> <p><b>2003:</b> Federal Communications Commission mandated use of copy protection mechanisms for DTVs (digital televisions) &amp; personal computers to prevent Internet distribution of broadcast content</p> <p><b>2005:</b> <u>ALA v. FCC</u> - court set aside the FCC’s rule on the "broadcast flag"</p> <p><b>2006:</b> Congress considers “flag” legislation</p>	<ul style="list-style-type: none"> <li>• Petition by libraries and other public interest organizations charged the FCC acted in excess of its authority and contrary to the factual evidence in the record.</li> <li>• U.S. Court of Appeals for D.C. Circuit ruled in favor of libraries and consumers on May 6, 2005, invalidating the “flag” – court held that the petitioners had standing to challenge the FCC, relying on statements of librarians about the potential adverse impact of the flag.</li> <li>• House Judiciary Committee held hearings in Nov. 2005 and June 2006 on whether to authorize a new “broadcast flag” rule</li> <li>• Senate Commerce Committee held hearing in Jan. 2006, on the "flag" and similar anti-piracy technology.</li> <li>• Sen. Stevens’ telecommunications bill, S. 2686, introduced in May 2006, contains “broadcast flag” provision. Unlikely that bill will move in this session.</li> </ul>
<p><b><u>DMCA Section 1201 Rulemaking</u></b></p> <p>Section 1201 of the Digital Millennium Copyright Act provides for exemptions from the prohibition on circumvention of technological locks that control access to copyrighted works</p>	<ul style="list-style-type: none"> <li>• The exemptions are available to users of "classes of works" who would be "adversely affected by virtue of such prohibition in their ability to make non-infringing uses" of those works.</li> <li>• Libraries filed comments on December 1, 2005, with the U.S. Copyright Office, requesting two new exemptions plus a renewal of the four exemptions granted in 2003 by the Librarian of Congress.</li> <li>• The exemptions from the anti-circumvention provision will be announced in late October 2006.</li> </ul>
<p><b><u>Section 108 Study Group</u></b></p> <p>The Library of Congress has convened a “Section 108 Study Group” to make recommendations for possible changes to the section of the U.S. Copyright Act that provides exceptions for libraries and archives.</p>	<ul style="list-style-type: none"> <li>• The Study Group hosted a series of roundtables in March 2006 for interested parties to offer suggestions and comments on how best to revise these exceptions for the digital era.</li> <li>• The Group expects to make recommendations to the Librarian of Congress by Spring 2007.</li> <li>• Issue papers, roundtable transcripts and written comments available at <a href="http://www.loc.gov/section108">http://www.loc.gov/section108</a></li> </ul>
<p><b><u>Court Case: Perfect 10, Inc. v. Google, Inc.</u></b></p> <p>Appeal to U.S. Court of Appeals (Ninth Circuit)</p> <p><b>July 2006:</b> libraries join <i>amici curiae</i> (friends of the court) brief on behalf of Google</p> <p>Lower court’s decision contains both positive and negative rulings for search engines</p>	<ul style="list-style-type: none"> <li>• Federal district court issued preliminary injunction to Perfect 10, which alleged that Google infringed copyright both for displaying thumbnail images of Perfect 10 photographs in response to search queries and for linking to sites where infringing images were displayed.</li> <li>• Court found that providing links to third-party web pages did not lead to Google’s direct or secondary liability for copyright infringement, but court imposed direct liability for Google’s display of the thumbnail images by rejecting Google’s fair use defense.</li> <li>• Court’s ruling concerning display of thumbnails, if it stands on appeal, could create serious problems for search engines. Libraries rely on commercial search engines, including image search functions, to help patrons navigate the sea of information that constitutes the World Wide Web.</li> </ul>

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<p><b>Court Case: <u>Greenberg v. National Geographic Society</u></b></p> <p>Appeal to U.S. Court of Appeals (Eleventh Circuit)</p> <p><b>June 2006:</b> libraries file <i>amici curiae</i> (friends of the court) brief on behalf of NGS Related to <u>Psihoyos/Faulkner</u> case in Second Circuit</p>	<ul style="list-style-type: none"> <li>• Eleventh Circuit appeals court will consider whether its 2001 decision against the NGS – issued prior to the U.S. Supreme Court’s decision in <u>New York Times v. Tasini</u> (June 2001) – should stand.</li> <li>• Libraries believe that the NGS publication of its past issues on CD/DVD is permitted under the copyright law, as interpreted by the <u>Tasini</u> decision. Eleventh Circuit ruling against the NGS in 2001, if not reversed, would frustrate broader public availability of more obscure, less widely accessible magazines, newspapers, scholarly journals and other periodicals.</li> </ul>
<p><b>Court Case: <u>eBay v. MercExchange</u></b></p> <p><b>January 2006:</b> ALA joined in filing an <i>amici curiae</i> (friends of the court) brief in the U.S. Supreme Court in a significant patent case that was appealed from the Federal Circuit Court of Appeals.</p> <p><b>May 15, 2006:</b> Supreme Court ruled for eBay, reversing a lower court rule that almost automatically allowed owners to get injunctions against alleged infringers</p>	<ul style="list-style-type: none"> <li>• Case has important implications for copyright law insofar as it raises questions about the nature of intellectual property: is IP just like any other form of property, or does it possess unique characteristics that distinguish it from tangible property?</li> <li>• Amici, filing on behalf of eBay, were the Electronic Frontier Foundation (which wrote the brief), the Public Patent Foundation, the American Association of Law Libraries, the Special Libraries Association and ALA.</li> <li>• Supreme Court unanimously held that issuing automatic injunctions in patent cases improperly removed discretion from trial judges to weigh competing factors, including the effect that enforcing the patent would have on the public interest.</li> <li>• Ruling underscores that patents (and copyrights) are a unique form of property, designed to achieve a specific public purpose: the promotion of scientific and industrial progress.</li> </ul>
<p><b><u>Open Access to Research</u></b></p> <p>S. 2695, Federal Research Public Access Act of 2006 (FRPAA)</p> <p>S. 2104, "American Center for Cures Act of 2005"</p>	<ul style="list-style-type: none"> <li>• S. 2695, introduced May 2006 by Sens. John Cornyn (R-TX) and Joseph Lieberman (D-CT), would require federal agencies with extramural research portfolios over \$100 million to make electronic versions of peer-reviewed articles publicly available via the Internet within 6 months of publication.</li> <li>• S. 2104, introduced Dec. 2005 by Sens. Joseph Lieberman (D-CT) and Thad Cochran (R-MS), would expedite development of new therapies and cures for life-threatening diseases and would require free public access to articles stemming from federally funded research.</li> </ul>
<p><b><u>International Copyright Issues</u></b></p> <p>International agreements and trade treaties impact libraries and U.S. copyright law</p>	<ul style="list-style-type: none"> <li>• World Intellectual Property Organization (WIPO): addressing the “development agenda,” library and archives exceptions and database protection; “broadcast” treaty</li> <li>• Hague Convention on Choice of Court Agreements</li> <li>• Free Trade Area of the Americas Agreement (FTAA) and bi-lateral free trade agreements (FTAs)</li> <li>• Continuing implementation of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS)</li> <li>• UNESCO Convention on Cultural Diversity</li> <li>• European Commission’s Database Directive – libraries urge repeal</li> </ul>