

# flicc newsletter

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## E-Government Act Takes Center Stage

Making government services more accessible and accountable by using information technology was the dominant theme of FLICC's 2004 Technology Update, "The E-Government Act of 2002: A Progress Report" held September 1, 2004. More than 60 federal librarians and information professionals attended the all-day program at the Library of Congress in which a series of speakers described provisions of the 2002 E-Government Act and summarized the recommendations and ongoing work of the Interagency Committee on Government Information (ICGI) established by the Act.

### ALA Speaker Sets the Stage

Setting the stage was Patrice McDermott, Deputy Director of the American Library Association Office of Government Relations. Stressing the important role libraries played in the formulation of the act, she singled out requirements in three key areas: making government information more accessible both near and long term; "leveling the playing field," including gauging the public impact of moving to e-government services; and providing a more accountable government,

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*"Stay tuned...Will the Office of Management and Budget ensure the implementation of the e-government policies? Will Congress do useful oversight? Will the public be consulted?"*

—Patrice McDermott, Deputy Director,  
American Library Association, Office of  
Government Relations

helping people obtain information held by multiple agencies in an integrated fashion. McDermott concluded by urging the audience to "stay tuned." When all the recommendations are in: "Will the Office of Management and Budget ensure the implementation of the e-government policies? Will Congress do useful oversight? Will the public be consulted?"

### Panelists Look at Categorization of Information

Following McDermott's talk, Eliot Christian, U.S. Geological Survey and Architect of the Global Information Locator Service (GILS), reviewed the mission and activities of the ICGI, which has set up three working groups to carry out its charge (Categorization of Information, Electronic Records Policy, and Web Content Management). Christian then, as chair of the Categorization of Information Working Group, introduced a series of speakers

**E-Gov, see pg. 3, col. 1**

# BOARD TALK

The May FLICC Executive Board (FEB) meeting covered a wide range of topics but seemed to keep coming back to the value of library skills and the need for fostering a better understanding of agency benefits from those skills in agency decision-makers.

Regarding the Librarian of the Year award, FEB members focused on the appropriate criteria to compare the diverse achievements of those who call themselves "librarian" or "information specialist" or whatever the nomenclature evolves to in the future. For the first seven years of the FLICC awards (including the year-in-process, Fiscal Year 2004), we have used the Special Libraries Association (SLA) "Competencies for Information Professionals of the 21<sup>st</sup> Century" (see

<http://www.sla.org/content/learn/comp2003/index.cfm>).

SLA updated their document last year to reflect developments in the profession in the seven years since its inception. Nevertheless, there are questions as to whether it suffices to compare the wide-ranging accomplishments by federal librarians. Not only must cataloging experts be compared with public services superstars, but first-line performers must also be compared with executive level achievers. That's not easy. The SLA competencies have provided a very flexible framework in which each nominee can be fairly rated within his/her own special area and level of expertise. The question is, could we do any better? And that's the question for the FLICC Awards Working Group to answer, with a report due to the FEB at the November meeting, in time to incorporate any changes into the awards process for Fiscal Year 2005.

So even your professional leaders are struggling with the optimal way to categorize the achievements of the "best and the brightest" in our community, as our profession continues to evolve to meet the information challenges of our current limbo between the hard-copy and digital worlds.

Since librarianship is a competencies-based profession, librarians always want to make sure we are as knowledgeable as possible about our environment and we have done everything in our power

to acquire the skills to meet the challenges. To enhance competencies, the Education Working

Group is sponsoring a number of educational opportunities, including the 5-day "Mini-MBA" from the American Management Association in August. FLICC also took advantage of Outsell, Inc.'s expertise by offering their free BrainGains seminar entitled "Debunking the Myth of Enterprise Content Management" in May. And on September 1, the Content Management Working Group is presenting a detailed report by leaders for the implementation of the E-Government Act of 2002. If FLICC and FEDLINK are not helping you meet your developmental needs for enhanced competencies, I invite you to send your

suggestions for additional initiatives to members of the Education Working Group, whose emails are listed at

<http://www.loc.gov/flicc/fwg-educ.html>, or to me at [suta@loc.gov](mailto:suta@loc.gov). ■



Susan M. Tarr, Executive Director, FLICC



**2005  
FLICC  
FORUM**

## Save the Date!

Join FLICC on March 24, 2005  
for the 22<sup>nd</sup> Annual FLICC Forum  
on Federal Information Policies.

### *"Evolving Information Policy: Open Access And New Constraints"*

*This year's forum will focus on recent events that have both expanded and restricted information access in the federal government. Watch your mailbox for further details.*

who highlighted topics considered by that group—the definition of government information, searchable identifiers, categorization, and interoperable search—topics that are further addressed in two draft documents to be completed and submitted to the Office of Management and Budget (OMB) by December 17, 2004: *Requirements for Enabling the Identification, Categorization and Consistent Retrieval of Government Information* (<http://www.cio.gov/documents/ICGI/CGI-Requirement-040805.doc>) and *Recommendation for Search Interoperability* (<http://www.cio.gov/documents/ICGI/recommendation.html>).

T. C. Evans, Deputy Superintendent of Documents, walked attendees through the topic “Defining What Government Information is To Be Categorized.” Emphasizing that a clear definition is critical “to enable citizens to obtain a predictable body of search results of similar granularity across varying communities of practice,” Evans presented the following definition of government information:

Any information product regardless of form or format that a U.S. Federal agency discloses, publishes, disseminates, or makes available to the public, as well as information produced for administrative or operational purposes that is of public interest or educational value.

This definition includes information created or exchanged within or between agencies or information subject to Freedom of Information Act requests. Not included is information that is restricted because of security or privacy concerns; information **about** the government such as TV newscasts, or objects owned by or loaned to the government.

Moving beyond a definition of government information, James Erwin, Director of Information Science and Technology of the Defense Technical Information Center, discussed the importance of searchable identifiers in retrieving that information, addressing the questions: “What are searchable identifiers?” “What are their requirements?” and “How can they be used to improve access to government information?” Erwin described searchable identifiers as uniquely identifying an information object and supporting persis-

tent access both to the object and to information about the object. They must generate globally unique object names, be distributed, open, extensible, and scalable, must support both tangible and intangible information objects, must work with existing identifiers such as the ISSN, and must be humanly readable. Simultaneously, they must be easy to use, support multiple interfaces, be compatible with existing and emerging standards and make a transition to future technologies for long-term persistent access.

Beyond persistent identifiers, consistent categorization of government information is also key to providing access to that information, a topic Richard Huffine, Manager of the National Library Network of the U.S. Environmental Protection Agency addressed. Such categorization must allow for multiple access points, provide context for the information provided, make it possible to select from large amounts of information and to identify authoritative sources. The working group has made several specific recommendations: using Dublin Core as the starting point for developing categories and combining that effort with the establishment of authority controls for key fields to promote consistency. Huffine noted that the working group is still struggling with several issues including the granularity of information to be categorized, ways to categorize older materials and a feasible time line for implementation.

Eliot Christian rounded out the morning session by presenting “The Case for Standards-Based Interoperable Search.” Noting that interoperable search is like plumbing, “When it is done right, you do not see it,” he observed that although searchers may not be aware of interoperability, it allows them to search across different systems despite system differences. He described the current situation as one of “stove pipes” of information provided by federal, state, and local agencies, running on hardware and software from many different vendors. Usually, each of these “stove pipes” needs to be searched separately. As a result, searchers run the risk of getting only partial, questionable results; analysts miss opportunities for synthesis; and government agencies miss opportunities to leverage information sources from each other. Theoretically, searching

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across all these at once might be done by gathering all the data into a single source run by one vendor. Christian noted that while this solution is conceptually simple, it is "unworkable on a practical level" and "unacceptable on a public policy level." On the other hand, using a standards-based interoperable search system, any agency can use any search technology that supports the standard.

The morning concluded with a lively question and answer session led by James King, Chief Librarian of the Naval Research Laboratory Library. Among the issues raised, the need to include information produced **for** the government and **by** the government in the definition of government information, the potential archival role of agencies such as the Government Printing Office and the Library of Congress, and the need to "push" agencies to treat e-records as official records.

### **Electronic Records Policy Group Develops Toolkit**

Michael Kurtz, Assistant Archivist of the National Archive and Records Administration, opened the afternoon session by summarizing the work of the Electronic Records Policy Working Group. Included in its charge is the identification of common characteristics of temporary and permanent e-records and barriers to managing these records and developing tools and other recommendations for short and long term e-record creation and management. Summarizing the group's progress in each of these areas, Kurtz noted that it is on a fast track, with draft recommendations due to the ICGI by September 30, 2004. The group has proposed eight metadata elements to describe e-government records, and identified several crucial barriers to their management including the failure of agencies to view e-records as critical assets related to their missions. This failure has resulted in poor implementation including little integration between records management and information technology activi-

ties. To address these issues, the group is working on an Electronic Records Management Toolkit, which, if approved, might be available by the second quarter of 2005. It includes tools in use or in development offering best practices, guidance, process models, lessons learned, training programs, tips and techniques, and policies.

### **Web Content Management Group Makes Recommendations**

Concluding the Forum was a presentation on the Web Content Management Working Group by Bev Godwin, Director, and Sheila Campbell, Senior Content Manager, of Firstgov. Godwin brought chuckles from attendees when she displayed a screen labeled "The Las Vegas Effect," filled with over twenty-five "required" links and/or logos previously mandated by various pieces of legislation or agency directives. Noting the group's goal to make U.S. government Web sites "the most citizen centric and user-friendly in the world," she introduced Sheila Campbell, who provided details on seven policy recommendations in the ICGI's *Recommended Policies and Guidelines for Federal Public Web sites* (<http://www.cio.gov/documents/ICGI/ICGI-June9report.pdf>) now under consideration by OMB and expected to form the basis for guidelines to be issued by December 2004. Included are recommendations to: ensure the authenticity, branding, and timeliness of federal government public Web sites; present information written and organized from the audience's point of view; display information in a way that is easy to access and use; simplify and unify information across the government; require agencies to establish priorities and a schedule for posting content on their public Web sites; ensure agencies continue to comply with existing federal laws and regulations; and develop an ongoing structure to guide web content policies and requirements into the future.

The day-long program ended with an open forum where all of the day's speakers and attendees asked a variety of questions in an effort to identify real-time applications of the proposed initiatives. ■



# Susan M. Tarr Wins FAFLRT Achievement Award

*"I'm delighted to receive this award on your behalf and on behalf of the FLICC/FEDLINK staff—and on behalf of the Library of Congress."*

—Susan M. Tarr, Executive Director, FLICC

Susan M. Tarr, Executive Director of the Federal Library and Information Center Committee (FLICC), is the 2003-2004 winner of the FAFLRT Achieve Award.

FAFLRT, the Federal and Armed Forces Libraries Roundtable, a unit of the American Library Association, promotes library and information service and the library and information profession in the federal and armed forces communities and appropriate utilization of federal and armed forces library and information resources and facilities. They also provide an environment for the stimulation of research and development relating to the planning, development, and operation of federal and armed forces libraries.

Their annual FAFLRT Achievement Award recognizes an individual for achievement in the promotion of library and information service and the information profession in the Federal community. Tarr was honored to received the award at the June 2004 ALA-FAFLRT meeting.

"I'm very grateful to be recognized in this way, particularly by this group. I really hadn't thought about receiving an award for what I do; the combined jobs of FLICC Executive Director and FEDLINK Director are so varied and engaging that for the past 10 years it's been a pleasure going to work—most days. What accomplishments we've made can be half-credited to the FLICC/FEDLINK staff—and for the other half, to all of you, who have volunteered your time on working groups, boards, councils, as presenters or trainers, and in so many other roles, generously sharing your precious time and expertise with your colleagues. So I'm



Susan M. Tarr, Executive Director, FLICC, winning the 2003-2004 FAFLRT Achievement Award, shown here with Shirley Loo, Library of Congress and co-chair, FAFLRT Awards Program.

delighted to receive this award on your behalf and on behalf of the FLICC/FEDLINK staff—and on behalf of the Library of Congress."

Shirley Loo, Congressional Research Service, and Maria Pisa, National Agricultural Library, co-chairs of the FAFLRT Awards Program, presented Tarr the plaque commemorating Tarr's work during the FLICC Quarterly Meeting in September at the Library of Congress.

Previous winners of the awards include Janet D. Ormes, NASA Goddard Space Flight Center, and Dan O. Clemmer, Department of State. ■

## FLICC Newsletter

The FLICC Newsletter is published by the Federal Library and Information Center Committee. Suggestions of areas for Federal Library and Information Center Committee attention or items appropriate for inclusion in the FLICC Newsletter should be sent to:

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The Federal Library and Information Center Committee was established in 1965 (as the Federal Library Committee) by the Library of Congress and the Bureau of the Budget to foster excellence in federal library and information center services through interagency cooperation and to provide guidance and direction for the Federal Library and Information Network (FEDLINK).

# GC Forum Looks at Fair Use

One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. One of the more important limitations is the doctrine of “fair use.” Although fair use was not mentioned in the previous copyright law, the doctrine has developed through a substantial number of court decisions over the years. This doctrine has been codified in Section 107 of the Copyright Law (<http://www.copyright.gov/title17/>).

Last February, the FLICC/General Counsels Forum gathered for a thorough discussion of fair use issues and how federal libraries and information centers can work within the law to meet the needs of their patrons. David Carson, the general counsel for the U.S. Copyright Office, and Robert Kasunic, the principal legal advisor for the U.S. Copyright Office, began the sessions with a presentation on the specifics of the Copyright Law. The following is a summary of their remarks and the questions and answers featured at the forum.

## Turning Concepts into Practice

There is a great deal of precedent that is instructive to analyzing fair use properly, particularly Supreme Court precedents, although there is little precedent as to what constitutes fair use by the U.S. Government. The continental Europeans, who have the other major copyright tradition, codify the specifics of fair use (as opposed to the U.S. law, which leaves open what particular uses may be considered fair use) which promotes certainty but also decreases flexibility.

The first paragraph of Section 107 of the Copyright Act states the basic philosophy of fair use. If one’s use does not fit the illustrative uses mentioned in the preamble, it is wise to be circumspect about the applicability of fair use. Although these illustrative uses are not a limit on potential fair uses, they represent the general types of uses that have historically been considered fair uses. Uses outside these illustrations are going to present an up-hill battle for use.

The second paragraph of Section 107 states the mandatory nonexclusive factors that courts must consider when deciding a fair use question. Some factors will be more important in particular factual situations, but all must be considered.

The first factor is the purpose and character of the use including whether the use is commercial. In the early post-1976 cases, there was a virtual

presumption that commercial use was not fair use. That presumption shifted with the case of *Campbell v. Acuff Rose* (c. 1995) to a review of whether the work is transformative—i.e., does it supersede the original work, or, instead, add something new? The latter is transformative. Commercial use has thus become only one factor to consider when reviewing the purpose/character of the use.

The Copyright Office has clarified this discussion above as follows: “The first factor is a very important one and tends to set the stage for the rest of the analysis. The point of *Campbell* was to not apply simplistic “presumptions” that will taint the rest of the analysis. Each case has to be viewed on its own merits. In some cases the commercial/noncommercial nature will be *an* important consideration, but not in all. If a use is transformative and creates something new which does not supercede the market for the original, the commercial/noncommercial distinction will be less significant. The *Campbell* case was trying to move us away from rigid application and simply invoking words used in the previous Supreme Court case. Therefore, the more transformative, the more important that aspect of the use. But some courts had also previously focused on “productive” uses. Since multiple copies for classroom use is in the preamble, transformation is not a necessity in all cases. Rather, the particular “purpose” or “character” of the use and the need for that use must be examined (and analyzed with the other factors – more used than necessary? Was the use readily available on the market for a reasonable price? etc).”

The second factor is the nature of the copyrighted work. There is more protection for a creative work than for a fact-based work. The creative/fact distinction is a continuum. The more that is taken from creative expression, the more likely this factor will weigh against fair use. While this factor is sometimes downplayed by courts, it can be very important when the use of primarily factual information is at issue. The unpublished nature of the work is also an important consideration weighing against fair use.

The third factor is the amount or substantiality of use in relation to the work as a whole. One must also look at the relation to the purpose of the use: how much of the work was necessary to carry out an appropriate purpose? In some cases, the courts allow the use of the entire work, but this is the exception to the rule.

The fourth factor is, according to the Supreme Court, the single most important factor. This factor takes into consideration the effect the use has upon the potential market for or value of the copyrighted work (i.e., what is the effect of everyone making a copy, not just the effect of one person's actions, as affecting the market for the work). Both the actual and potential market for the work are relevant for this factor.

As far as Supreme Court rulings, *Williams v. Wilkins* is instructive for government reliance on fair use. The courts permitted the National Institutes of Health to photocopy many journal articles for researchers and other libraries and research institutions. The decision was affirmed by an equally divided Supreme Court. Since that decision was reached, there have been no additional cases on government reliance on fair use, or library reliance on fair use.

There was also no specific library exemption in the Copyright Law at that time [now Section 108]. The courts were concerned with impeding science research. After the case was decided, the Copyright Clearance Center was created by a group of publishers to license photocopies. The existence of the CCC argues against fair use because there is now a mechanism in place to get permissions. At the time of *Williams*, it was impractical to obtain those rights.

With this decision in mind, a government agency's use of a work is not, per se, a fair use. A Department of Justice memorandum found at <http://www.cybercrime.gov/fairuse.htm> discusses this question in detail.

The Copyright Office has also clarified the discussion of fair use:

"As to the fourth factor, it could be said that this is generally going to be the most important consideration for government use. In many cases, the use by the government will be noncommercial and although perhaps not necessarily transformative, it will also be productive use. The uses will also tend to be more on the factual side of the continuum. In many cases, an entire article, comment, or other type of work will be at issue. Therefore, the effect on the market looms large in the analysis.

The *Texaco* case was a class action suit brought by scientific journal publishers over the photocopying practices of researchers at Texaco. The court held that

the photocopying at issue was infringing because, *inter alia*, such photocopying adversely impacted the licensing revenue of the journals and that such licenses were readily available through CCC. *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994). The *Texaco* case and its reliance on the easy availability of a CCC license is an important consideration in the fourth factor. But *Texaco* must be put into perspective. A blanket license makes sense where systematic photocopying occurs, like in the copyshop cases or the *Texaco* case. The existence of a CCC license is less compelling where sporadic, individual or isolated uses of copyrighted works are the issue. Full and fair consideration of the effect or the potential effect on the market should the particular use become widespread is a critical component of a fair use by the government. In many cases, this factor will be determinative.

For the reasons stated above, the existence of CCC creates an important consideration for the fourth factor that did not exist at the time of the *Williams v. Wilkins* decision. Whether or not it weighs against fair use in the fourth factor of the analysis is a question of the purpose and "character" of the use. Is fair use being relied on simply to avoid paying a license, or on balance, is the reason that a license was not used? The license would seem to have to be reasonable in relation to the use in order for it to be a viable alternative."

### **Copyright Law on Libraries**

Before invoking Section 107, one should also review the specific exemptions to Section 106, "Exclusive rights in copyrighted works," contained in Section 108 of the Copyright Law. Section 108, "Limitations on exclusive rights: Reproduction by libraries and archives," is a special section of the Copyright Act permitting certain copying by libraries. Section 108 permits three on-premises digital copies to be made in certain circumstances. Section 108 permits libraries to meet specific needs in individual cases but is not meant to permit systematic copying. Note that Section 108 explicitly does not affect Section 107 or any contractual obligations a library may have agreed to with the rights owner.

**Fair Use, see pg. 8, col. 1**

## Fair Use, from pg. 7, col. 2

With Section 108 in mind, the first sale doctrine, too, has limitations. It permits distribution by sale, lease or lending of a lawfully acquired copy but it does not apply to the Internet, as transfer on the Internet implicates not just distribution, but also reproduction. The Copyright Office prefers to obtain an express license to relying on an implied license and sees the checkbox as a means of obtaining such agreement. Online, the Copyright Office uses a checkbox for people to signify assent to use of their comments; or, they provide notice that comments will be used online. The Copyright Office suggests redacting or summarizing material that can be identified as third party material or making such material available for in-person viewing. If the material is available elsewhere on the Internet, the Copyright Officer prefers to link to it. Further, the Copyright Office has a loaner copy of third party materials so that people are free to make their own fair use assessments and use the office's photocopiers if they want a copy for their own purposes.

## Handling Fair Use Locally

It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright. These rights, however, are not unlimited in scope as the previous discussion indicates. In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions. For further information about the limitations of any of these rights, consult the copyright law or call the Copyright Public Information Office at (202) 707-3000

The next issue of the *FLICC Newsletter* will feature the results of the July General Counsels Forum Fair Use Roundtable Discussion. ■

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### FEDERAL LIBRARY AND INFORMATION CENTER COMMITTEE

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