

Excerpt from ASERL-Selectives Listserv, November 2011:

From: Romans, Larry - larry.romans@Vanderbilt.Edu
Date: November 9, 2011 3:50:42 PM EST
To: Russell, Judith - jcrussell@ufl.edu
Cc: aserl-selectives@aserl.org; aserl-selectives@aserl.org
Subject: New Feature of the ASERL Document Disposition Database: E-Mail Notification to Regionals

This seems to be a major GPO concern
Why can't we let the regionals see the lists first. It shouldn't make a big difference to the Centers of Excellence.

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From: Russell, Judith
Sent: Thursday, November 10, 2011 3:04 PM
To: Romans, Larry
Cc: ASERL Deans; ASERL DEANS FDLP Steering Committee; ASERL Selectives List; ASERL Government Documents Steering Committee; John Burger; ASERL Regional Depository Librarians
Subject: [aserl-selectives] Fwd: New Feature of the ASERL Document Disposition Database: E-Mail Notification to Regionals

Larry, I am writing this message on behalf of the ASERL FDLP Deans Steering Committee, but I am sharing it with the full ASERL membership, and I believe that most, if not all, of them will agree with it. I apologize in advance for the length of my response, but this is an important and complex set of issues and I feel it is necessary to address your question fully.

First, I understand the instinct to trust GPO as the authority on these matters and to seek conciliation. I too would prefer that we were moving ahead with this important initiative with the full support of GPO, or at least no opposition, but there is far more at stake in this debate than GPO's recent opposition to the ASERL Implementation Plan. There is a fundamental shift in policy related to the FDLP that could have serious consequences for the stability of the program.

Notwithstanding what Mary Alice said in her November 4th letter, at no time while I was Superintendent of Documents did I assert a legal obligation for Regionals to build comprehensive retrospective collections. That preference, guideline, best practice, or whatever you may wish to call it, was documented in the handbook and other policies, largely written by documents coordinators and expressing their desire for such collections, but it was never represented or asserted by me as a legal requirement.

I cannot speak for all of Ric Davis' actions and statements as Superintendent of Documents, but I have sufficient knowledge to believe that this is equally true for the years that he administered the program. He was undertaking a review of the guidelines, handbook, etc., to make sure that they made a clear distinction between legal requirements - based on the statute - and recommended practices. He reviewed the ASERL proposal as it was developed, consulted with the Office of the General Counsel, and confirmed that it was in compliance with Title 44, including the clear statement in the draft plan that there was no legal requirement for retrospective collection or replacement of lost or damaged

items. He also reviewed, again in consultation with the OGC, the 2010 ARL Statement of Principles on the Federal Depository Library Program (<http://www.arl.org/bm~doc/fdlppprinciples14oct10.pdf>), which also included the statement that there was no legal requirement for comprehensive retrospective collection, and he confirmed that the ARL statement was in compliance with Title 44.

Now the handbook and other documents have been synthesized and republished as the Legal Requirements & Program Regulations of the Federal Depository Library Program (<http://permanent.access.gpo.gov/gpo9182/legal-requirements-guidance2011.pdf>). GPO has asserted that these are regulations and therefore legal requirements, and in some cases GPO has stated requirements in correspondence with ASERL that go beyond even what is on this document. This is new and it is significant. Comprehensive retrospective collecting at each Regional Depository Library is an unfunded mandate of considerable scale, not previously understood to be a legal requirement by the directors of these libraries, and if GPO insists that this is now a legal requirement, many of the directors will be forced to either withdraw as Regionals or knowingly violate the law. And it will place increased burdens on the Selectives since we are being told that if the Regional can't take the material we should require our Selectives to retain it.

I am not an attorney, but I am well acquainted with the basics of the regulatory process. First, the agency must have the authority to issue regulations. Then the proposed rules must be published in the Federal Register for public comment. Often the public comments will result in revision and republication of the proposed rules. Uncommon terms, or common terms subject to multiple interpretations, are included in a definitions section, so people who are reviewing the proposal understand the intended interpretation. The final rule making has a notice period before it goes into affect, so those who are subject to the regulation can prepare. (The copyright office, also a legislative branch agency, has regulatory authority and follows this process.) GPO has not followed this process, and therefore GPO cannot, and more importantly it should not, claim that the statements in the document are regulations and have the force of law.

Consider program regulation 54: Designated regional depository libraries must:

- Ensure the comprehensiveness and integrity of a tangible FDLP collection in their state or region,
- Provide interlibrary loan,
- Manage the publication withdrawal process in their state or region they serve, and
- Provide reference services to depository libraries within the region they serve.

We read the phrase 'state or region' and on the face of it see no conflict with the ASERL Plan. We are assuring one or more comprehensive collections in the region we serve. We are managing the discard process in the state and the region. We are committed to providing reference service to the region. Unfortunately, GPO interprets the word 'region' more narrowly, saying it means the state we serve. If it means the same thing as state, why are both words used? If it means something other than the commonly understood meaning of region, why hasn't GPO clearly defined the word and provided justification for that interpretation? How was anyone reading these regulations to know that this was GPO's interpretation, prior to the correspondence with ASERL?

Secondly, and more relevant to the specific issues related to the ASERL Implementation Plan, this plan was carefully developed, with broad consultation, over an 18-month period. The decision to give priority to Centers of Excellence was not lightly made and it is not insignificant to the goal of establishing at least two distributed, and cataloged, comprehensive-as-possible print collections in the southeast, in addition

to the large, but incomplete, collections at the 12 (now, with the addition of Maryland as an ASERL member, 13) Regional Depository Libraries in the region.

No selective depository library is required to discard anything in order to provide it to a COE, and of course, Regionals cannot discard, with limited exceptions. No depository library, Regional or Selective, is precluded from acquiring any material it wants or needs for its own collection. However, as a group, we acknowledged the difficulty of building even two comprehensive print collections. While there is some material that is broadly available and frequently discarded, there are other materials that are relatively scarce and infrequently discarded, particularly materials published prior to 1950. It is critical to the goal of creating a comprehensive collection for a specific agency or topic that the relevant materials be placed at a COE, otherwise we continue to build fragmented collections and it is unlikely that we will ever have even one comprehensive collection in the region. Rather than competing for scarce documents, we have agreed to collaborate to optimize the placement of these documents in COE collections for preservation and public access, to the extent that discards anywhere in the region make the documents available.

An example that I used when we were discussing and agreeing to the policy on giving priority to COE collections is a hypothetical WPA document being discarded by a Selective in Florida, not in the regional collection at the University of Florida or in the COE collection at the University of Kentucky. In order to build a comprehensive print collection at UK for the benefit of the region, I proposed, and my colleagues agreed, that should such a document become available, UF would allow UK to select it, and UF would add it to our own needs list in case another copy was subsequently discarded by another Selective anywhere in the region. If UF felt an immediate need for the item, we would borrow it from UK and create a digital copy of sufficient quality that we could generate a print copy, if necessary, to meet the needs of our local users. The digital copy would make the document readily available to users throughout the region and beyond. The print copy at UK would ensure preservation and access to the original document.

When ASERL first decided to develop a collaborative approach to managing the FDLP print collections in the southeast, it was with the understanding that Title 44 was unlikely to be changed in the near term. Consequently, the task force was charged to develop a plan that was as innovative as possible within the constraints of the governing law. We acted in good faith and in consultation with the Superintendent of Documents in office at the time. Our decisions were strategic and carefully designed to make it possible to accomplish our goal. We might not have developed this plan if the recent interpretation of Title 44 was the broadly accepted interpretation at the time. In fact, we might have decided that we could not achieve our goal and remain in compliance with the law if that was the accepted interpretation.

What the current Superintendent of Documents is asking us to do is not a simple compromise or minor change in the ASERL documents disposition database. She is demanding a fundamental change in design of the Implementation Plan, based on a new interpretation of the statute and promulgation of purported regulations -- without any justification for asserting a legal requirement for comprehensive retrospective collection or narrowly interpreting the statute's deliberate use of the word region in lieu of the word state in describing regional responsibilities. ASERL cannot in good conscious concede to these changes without clarification from GPO about the legal justification for its assertions because such concessions would redefine the project so substantially that it might render it ineffective.

With your permission, I would like to post your question and my response on the ASERL website and share it with the ALA Committee on Legislation (COL) and its Government Information Subcommittee

(GIS), among others. I hope you will share this with GODORT and other groups that have an interest in this matter so they will understand the ASERL perspective on these issues.

Thank you for your continued interest in, and support for, the ASERL project and for posing your questions. If you have these questions, then I am sure others do as well, and it is important that ASERL address them fully and openly.

Judy

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