



ASSOCIATION OF RESEARCH LIBRARIES®

empowering the research library community

Advocacy and Public Policy Update: June 18, 2015

Below is an update on key advocacy and public policy issues from mid-April to mid-June 2015. The prior advocacy and policy update, dated April 22, can be found at: http://www.arl.org/storage/documents/mm15sp_APP_handout.pdf. New resources, including two issue briefs, are listed at the end of this update.

Summary: Issues concerning *copyright and intellectual property* include draft legislation proposing to make the US Copyright Office, now in the Library of Congress, an independent agency in the Executive Branch; a report by the Copyright Office on orphan works and mass digitization; action by the Copyright Board of Canada; and a revised policy by Elsevier concerning the sharing of research articles. The US House of Representatives acted recently on National Science Foundation (NSF) *appropriations* as well as reauthorization with a focus on reducing funding for the social and behavioral sciences. Intense activity on *privacy and surveillance* legislation in the US dominated much of the month of May with the expiration of key provisions relating to surveillance authorities of the Executive Branch. Items related to two *international treaties*—one concerning fast-track authority for the President to negotiate treaties and the second regarding exceptions for the visually impaired—remain key agenda items of the US Congress and the Administration. Finally, Dr. Billington announced that he will step down as *Librarian of Congress* on January 1, 2016.

Contents

Copyright and Intellectual Property

- Proposal to Establish the Copyright Office as an Independent Agency
- Orphan Works and Mass Digitization Report
- Copyright Board of Canada Certification of Low Tariff
- Elsevier Sharing Policy

Appropriations

- NSF Funding and Reauthorization

Privacy and Surveillance

- Surveillance Reform

International Treaties

- Trade Promotion Authority
- Marrakesh Treaty

Librarian of Congress to Retire Jan.1, 2016

Copyright and Intellectual Property

Proposal to Establish the US Copyright Office as an Independent Agency: Register of Copyrights Maria Pallante has proposed moving the Copyright Office out of the Library of Congress to become an independent agency. A discussion draft of a bill to this end is circulating, but not yet introduced in the US Congress.

The draft bill, entitled the “Copyright Office for the Digital Economy Act,” would establish the Copyright Office as an independent agency that would be charged with advising the US Congress, the Executive Branch and the Judiciary on national and international issues relating to copyright; participating in meetings of international intergovernmental organizations and with foreign government officials; conducting studies and programs regarding copyright, including providing education programs with foreign intellectual property offices and international intergovernmental organizations, among other activities. The President would

appoint the Director, with advice from a commission composed of the Speaker of the House of Representatives, President pro tempore of the Senate, majority and minority leaders of the US House of Representatives and the US Senate, and chairmen and ranking minority members of the Judiciary Committees. The bill provides that the Executive Branch does not have the authority to review testimony, recommendations or comments on legislation by the Copyright Office.

The bill would require a study on the future administration of mandatory deposits. It also provides a section on “modernizing copyright registration,” which provides that the Director must issue regulations on “examination copies” (deposits) and that “the Director shall provide the Library of Congress access to examination copies and related data solely for the Library’s determination of whether to demand a deposit . . . or to otherwise engage with copyright owners regarding works of authorship that may be of curatorial and collection interest to the national library.”

ARL is working with other members of the Library Copyright Alliance on a position statement on the draft legislation. Meetings with Congressional offices are planned prior to the July Congressional recess.

Orphan Works and Mass Digitization Report: On June 4, the US Copyright Office released its report on Orphan Works and Mass Digitization, including recommendations for legislation on orphan works and the creation of an extended collective licensing (ECL) regime for mass digitization.

The discussion draft for legislation on orphan works is largely based on the Shawn Bentley Orphan Works Act of 2008. The legislation would limit remedies to reasonable compensation, defined as the amount a willing buyer and willing seller in the position of the user and the rights holder would have agreed to immediately before the infringement began. This limitation would be applicable to eligible users who can establish that they engaged in a good-faith diligent search. The order to pay reasonable compensation does not apply to non-profit educational institutions, museums, libraries, archives or public broadcasting entities where 1) the infringement was performed without any purpose of direct or indirect commercial infringement; 2) the infringement was primarily educational, religious or charitable in nature; and 3) the infringer ceases to use the work after receiving notice of the claim of infringement and having the opportunity to conduct a good-faith investigation of the claim.

A good-faith diligent search requires, at a minimum, a search of the Copyright Office records (which are not available online); searching sources of copyright authorship, ownership and licensing information; the use of technology tools, printed publications and “where reasonable, internal or external expert assistance;” and the use of databases, including the Internet. In addition, a good-faith diligent search “shall include any actions that are reasonable and appropriate under the facts relevant to the search, including actions based on facts known at the start of the search and facts uncovered during the search, and including a review, as appropriate, of Copyright Office records not available to the public through the Internet that are reasonably likely to be useful in identifying and locating the copyright owner.”

This discussion draft legislation also includes a “Notice of Use” requirement to include the following information: 1) type of work used; 2) description of the work; 3) summary of the qualifying search conducted; 4) any other identifying indicia available to the user; 5) source of the work (such as the library or website where the work was located or publication where the work originally appeared); 6) certification that the user performed a qualifying search; and 7) name of the user and description of how the work will be used.

Injunctions may be granted, subject to an exception where the use is recast, transformed, adapted or integrated into a work “with a significant amount of original expression” and the infringer pays reasonable compensation and provides attribution. This limitation on injunctions does not apply, however, if the owner is the author of the work and objects, alleging that the new use “would be prejudicial to the owner’s honor or reputation, and this harm is not otherwise compensable.”

Additionally, the discussion draft includes a fair use savings clause, explicitly stating “This section does not affect any right or any limitation or defense to copyright infringement, including fair use, under this title.”

More information and analysis on the Copyright Office’s report and recommendations on orphan works is available at: <http://policynotes.arl.org/?p=1075> In addition, LCA sent a letter to the Register of Copyrights reiterating its position on orphan works legislation as there appears to be a misunderstanding. LCA stated, “In the report, the Copyright Office misunderstands the position of the Library Copyright Alliance and the utility of fair use, and the fair use best practices, in addressing the orphan works problem. Our clarification should prove helpful if orphan works legislation does proceed. In particular:

- LCA does not oppose any orphan works legislation. Rather, LCA takes the more nuanced position that libraries’ need for orphan works legislation has diminished.
- LCA bases its fair use analysis related to the digitization of special collections not only on *Authors Guild v. Google* and *Authors Guild v. HathiTrust*, but also on many other fair use determinations.
- LCA’s assessment of the changed legal environment goes beyond the evolving fair use jurisprudence to include changes in the law relating to injunctions, the widespread industry practice of website archiving, and library experience with mass digitization.
- The best practices in fair use for libraries and archives do not create a blanket solution that removes from the copyright owner the ability to recover reasonable compensation in all cases. To the contrary, they provide specific guidance for libraries on how to apply the fair use doctrine to the digitization of special collections.”

Links to the LCA letter: <http://www.librarycopyrightalliance.org/storage/documents/Pallante-orphans-cover-letter.pdf>

And statement: <http://www.librarycopyrightalliance.org/storage/documents/Reflections-on-the-Copyright-Offices-Orphan-Works-Report.pdf>

Copyright Board of Canada Certification of Low Tariff: On May 22, 2015, the Copyright Board of Canada certified a surprisingly low tariff for copying undertaken by employees of provincial governments. The tariff certified (11.56 cents per employee per year from 2005 through 2009 and 49.71 cents per employee per year from 2010 through 2014) was a small fraction of the tariff that had been proposed by authors’ collective Access Copyright (of \$15). The Copyright Board’s ruling rejected the argument that Access Copyright had an extended collective licensing model, which is an opt-out model. The Copyright Board also rejected Access Copyright’s narrow interpretation of the scope of fair dealing. Bobby Glushko from the University of Toronto wrote a guest blog post explaining the impacts of this decision: <http://policynotes.arl.org/?p=1056>

Elsevier Sharing Policy: ARL joined a growing list of organizations worldwide, ARL member libraries and individuals that signed a COAR-SPARC policy statement denouncing a new Elsevier sharing policy and calling for it to be revised. The Elsevier policy would make

significant changes to current practice, impose longer embargo periods in some cases and require that authors use a restrictive license that does not permit full reuse. As the statement noted, “ This policy represents a significant obstacle to the dissemination and use of research knowledge, and creates unnecessary barriers for Elsevier published authors in complying with funders’ open access policies. In addition, the policy has been adopted without any evidence that immediate sharing of articles has a negative impact on publishers subscriptions.” The policy statement can be found at: <https://www.coar-repositories.org/activities/advocacy-leadership/petition-against-elseviers-sharing-policy/>

Appropriations

NSF Funding and Reauthorization: On May 20, the US House of Representatives passed the America COMPETES Reauthorization Act of 2015, H.R. 1806, legislation that is the authorizing legislation for the National Science Foundation (NSF), the National Institute of Standards and Technology and several Department of Energy research programs. The main goal of COMPETES is to invest in scientific research and innovation. The bill passed by the US House of Representatives includes steep reductions to NSF’s Social, Behavioral, and Economic Sciences (SBE) directorate and includes other provisions of deep concern. There was significant opposition to the bill by the scientific community. As a member of the Coalition for National Science Funding (CNSF) and the Consortium of Social Science Associations (COSSA), ARL commented on the legislation. It is anticipated that the US Senate will not focus on the legislation until late summer or early fall.

The US House of Representatives Appropriations Committee passed the Commerce, Justice, Science (CJS) and Related Agencies Appropriations Act, 2016, H.R. 2578 on May 20th. Although the bill includes a \$50 million increase for NSF, it also includes troubling report language. As reported by CNSF, “The report language accompanying the bill requires NSF to dedicate 70 percent of its funding to four research directorates, and keep other offices (the Office of International Science and Engineering; Integrative Activities; and the U.S. Arctic Commission) at their current FY2015 funding levels. Unfortunately, this will force NSF to cut over \$250 million, 16 percent of the combined budget, from the remaining two research directorates: Geosciences and the Social, Behavioral, and Economic Sciences. Such cuts would have a devastating impact on the disciplinary and interdisciplinary research supported by these directorates, impacting research as diverse as disaster prediction and recovery, prediction of extreme weather events, weak links in cybersecurity, children’s learning, and big data.” The bill passed the US House of Representatives on June 4. In response to this language the White House issued a Statement of Administration Policy with a recommendation that the President veto H.R. 2578.

On June 11, the US Senate Appropriations Committee approved their version of the CJS bill and did not include the troubling report language. As Senate Democrats have vowed to block any FY 2016 appropriations bills until there is an agreement on how to address discretionary spending caps included in the Budget Control Act of 2011, it is not clear when or if this CJS bill will move to the US Senate floor. Finally, President Obama has said he will veto any appropriations bill that stays within discretionary budget caps.

Privacy and Surveillance

Surveillance Reform: On June 2, 2015, President Obama signed the USA FREEDOM Act into law. The USA FREEDOM Act, while seen as a compromise bill, contained significant protections for privacy and civil liberties including prohibiting bulk collection practices under Section 215 (also known as the “library records” or “business records” provision) and other

provisions, permitting transparency reports, and creating an amicus position for the Foreign Intelligence Surveillance Act or FISA court. ARL staff met with congressional staff on the legislation and joined in numerous letters to the US Congress in support of USA FREEDOM Act and opposed other surveillance proposals.

The House of Representatives passed the USA FREEDOM Act by an overwhelming majority of 338 to 88 in May. Due to a filibuster by Senator Rand Paul (R-KY), the vote on the bill was delayed in the Senate until after three key provisions of the PATRIOT Act expired, including Section 215. On June 2, the Senate voted 67-32 to pass the USA FREEDOM Act that the House passed, rejecting Majority Leader McConnell's (R-KY) efforts to weaken the bill.

Bulk collection on phone records ended on Sunday, June 1, at 8pm ET, in advance of the expiring PATRIOT Act provisions. However, because the USA FREEDOM Act—written and introduced well before any expectation that the provisions would sunset, even for a brief period—contains a six-month transition period to allow federal agencies to wind down the bulk collection program, the Administration is now seeking permission from the FISA court to reinstate bulk collection for this six month period. Critics have pointed out that reinstatement of bulk collection is not only unnecessary, but potentially unlawful given the Second Circuit's ruling in May that bulk collection exceeded the authority granted by Section 215 of the PATRIOT Act. Below are links to several letters of which ARL was a signatory.

- Coalition Letter to House Appropriations Committee Opposing Interference with Net Neutrality Rules (no link yet)
- Coalition thank-you letter to Chairman Goodlatte, Ranking Member Conyers and Representative Sensenbrenner for work on surveillance reform during the USA FREEDOM Act debate (no link yet)
- May 28 coalition letter [opposing the FISA Improvements Act of 2015](#)
- May 19 coalition letter [opposing reauthorization of expiring provisions](#) of the USA PATRIOT Act
- May 6 [coalition letter to Congressional leadership supporting the USA FREEDOM Act](#) and opposing clean reauthorization of Section 215 of the PATRIOT Act.

International Treaties

Trade Promotion Authority: On May 21, the Senate passed Trade Promotion Authority legislation by a vote of 62-37. Trade Promotion Authority, also known as “fast-track” authority allows the Administration to negotiate trade agreements and submit them to Congress for a straight up-or-down majority vote, meaning that Congress cannot make changes to the agreement. No agreement that has been submitted to Congress under fast-track authority has ever been rejected.

On June 12, the US House of Representatives voted on the package sent over by the US Senate. The package sent by the US Senate included not only Trade Promotion Authority (TPA), but also Trade Adjustment Assistance, legislation that helps fund programs for workers who may lose their jobs due to trade agreements. While the US House of Representatives voted to pass Trade Promotion Authority by a vote of 219-211, it failed to pass Trade Adjustment Authority by an overwhelming margin, failing by a vote of 302-126. On June 18, the US House of Representatives passed the TPA as a stand alone bill and sent it to the US Senate for its consideration of the legislation.

Fast-track authority is seen as critical in concluding negotiations of the Trans-Pacific Partnership Agreement (TPP), a large regional trade agreement that currently has twelve negotiating parties including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States. ARL staff met with and gave presentations on the intellectual property provisions in the leaked text to the US and international delegations negotiating the TPP. The TPP, as well as negotiations for other trade agreements, have been criticized for their lack of transparency. While hundreds of cleared advisors, generally representing corporate interests, have access to negotiating texts and can comment on drafts, the general public is denied access. Members of the US Congress are permitted to see the texts in secured rooms, but cannot take notes or bring in members of their staff to advise them. The lack of transparency has been criticized as severely limiting public debate.

The link to the LCA letter expressing concerns over fast-track legislation is available here: <http://policynotes.arl.org/?p=892>

Marrakesh Treaty: ARL continues to work with a coalition that includes organizations representing individuals who are blind or print disabled, non-profit organizations and authorized entities to promote a smooth ratification process for the Marrakesh Treaty. ARL has met with Administration officials, staff of the Copyright Office and Congressional staff to discuss the treaty and express support for a ratification package with minimal or no changes required to copyright law and quick passage. ARL had promising meetings with minority and majority staff from the US Senate Foreign Relations Committee, who stated that letters supporting the Marrakesh Treaty will be important in ratification efforts. ARL members should expect an alert once the ratification package has been sent to the US Senate, so that letters can be sent quickly to support swift and smooth ratification.

In Canada, Bill C-65 was introduced on June 8 to amend the Copyright Act in order to prepare for implementation and access to the Marrakesh Treaty. This bill would keep many features of Canada's existing exception in place, but broaden the exception to remove the prohibition against creation of large-print books, allow export of accessible format copies to other countries regardless of the nationality of the authors of the works, and remove the condition that circumvention of a technological protection measure must not unduly impair the protection measure.

Librarian of Congress James Billington to Retire in January 2016:

On June 10, after 27 years as Librarian of Congress, James H. Billington announced that he will retire effective January 1, 2016. A Russia scholar, Billington was appointed by President Ronald Reagan and began his service at the Library of Congress in September 1987. Billington is credited with making available online, beginning in the 1990s, materials from the library's extensive collection, including such projects as American Memory. In 1995, at the urging of then Speaker of the House Newt Gingrich, the Library of Congress initiated THOMAS.gov, an online database of congressional legislation. Billington also established with Laura Bush in 2000 the National Book Festival, which has drawn more than one million people to the annual event in Washington, DC.

The Librarian of Congress is appointed by the President and confirmed by the Senate. The White House has not announced a nomination for the next Librarian of Congress.

For more information about Billington's career, see the June 10, 2015, Library of Congress news release, "[James H. Billington to Retire as Librarian Effective Jan. 1, 2016.](#)"

Resources:

ARL has released a new issue brief on Fair Use and Text and Data Mining, available at: <http://www.arl.org/storage/documents/TDM-5JUNE2015.pdf>

ARL also released an issue brief on the Copyright Office's report and recommendations on orphan works, available at: <http://www.arl.org/storage/documents/IssueBrief-OrphanWorks-5JUNE2015.pdf>

Jonathan Band prepared a guest post on the *ARL Policy Notes* blog, "What's Missing from the Register's Proposals," available at: <http://policynotes.arl.org/?p=1024>

There are a number of additional blog posts at: <http://policynotes.arl.org/>

PSA and KLC 6/18/15