

## **Advocacy and Policy Update—April 2015**

### **Marrakesh Treaty**

The Obama Administration is currently working on its ratification package for the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which it signed in October 2013. It is expected that the Administration will send the Marrakesh Treaty together with the Beijing Treaty on Audiovisual Performances to the Senate for ratification along with implementing legislation. The linking of the two treaties is a strategic decision intended to create a “balanced” package, with one treaty providing for rights of audiovisual performers while the other focuses on limitations and exceptions, or rights for persons with print disabilities. However, these treaties may be de-linked if there is considerable controversy over one.

While it has been the position of ARL and other organizations that no implementing legislation is necessary for ratification of the Marrakesh Treaty (due to the existence of the Chafee Amendment and availability of fair use), the Administration appears committed to including such legislation in its package. While the package is still circulating through the interagency process, it appears likely that the proposed legislation will include changes to the class of beneficiary persons, expanding the scope of works covered by the Chafee amendment, and clarifying the right to export works. Additionally, publishers would like to see broader changes such as enhanced requirements for record keeping for authorized entities that create and distribute accessible formats or the introduction of a commercial availability provision, restricting the exception to cases where a commercially available accessible format does not exist.

ARL is working with a coalition organized by the Open Society Foundation (OSF) that includes organizations representing the blind and disabled, non-profit organizations and authorized entities. ARL has had a number of meetings with Congressional staff and Administration officials to encourage a smooth ratification.

### **TEACH ACT Status**

Discussions between representatives of higher education and the National Federation of the Blind (NFB) are ongoing. TEACH is a bill that seeks to ensure that students with disabilities have equal access to instructional technologies used by postsecondary institutions. Stand-alone bills were introduced in the House and Senate and TEACH was included in the Senate HEA reauthorization bill. A small committee of higher education and NFB representatives was tasked with drafting a statement to find agreement on what current law requires of institutions of higher education and what TEACH is designed to do.

### **DOJ/EdX settlement**

On April 2, 2015, the US Department of Justice (DOJ) and edX, a nonprofit provider of massive open online courses (MOOCs), entered into a settlement agreement to “remedy alleged violations” by edX of Title III of the Americans with Disabilities Act (ADA). DOJ

believes that edX’s platform for providing online courses was not accessible to people with disabilities, including those who are deaf, individuals who are blind or have low vision, and those who have physical disabilities affecting manual dexterity. According to DOJ, “the settlement requires edX to provide accurate captioning for the deaf, oral navigation signals for the blind, and programming changes so those with dexterity disabilities can navigate content without struggling with a hand-operated mouse.”

The settlement requires edX to make changes to its website, learning management system, and mobile applications as well as utilize the Web Content Accessibility Guidelines (WCAG) 2.0 AA. For individuals and organizations authoring content to be hosted by edX, edX will provide “guidance and authoring tools” to promote fully accessible online courses. It is important to note that those authoring the content remain responsible for the accessibility of the content. Additionally, edX will hire an accessibility consultant to review annually the accessibility of its website, learning management system, and mobile applications. There is a timeline for each of the many steps that edX must take under the agreement.

The actions required of edX by this settlement may become the de facto best practices for providing accessible online content in higher education.

### **Copyright Court Cases**

On October 17, 2014, the Court of Appeals for the Eleventh Circuit released its opinion in the Georgia State University (GSU) electronic course reserves (E-reserves) case. The Eleventh Circuit reversed and remanded the decision to the district court for further evaluation of whether GSU’s uses were fair uses. In doing so, the Eleventh Circuit rejected bright line rules, finding that fair use is a flexible doctrine and that such decisions must be made on a case-by-case basis. The Eleventh Circuit also affirmed that even where a use is non-transformative, a nonprofit educational purpose can still favor fair use.

Following the Eleventh Circuit’s decision, the publishers filed a petition for rehearing *en banc*, which the court denied. On remand to the district court, on February 24, 2015, the publishers filed a motion to reopen the record, claiming a need for “evidence of GSU’s ongoing conduct (e.g., its use of E-Reserves during the most recent academic term.” GSU opposed the motion to reopen, noting the burdensome nature of reopened discovery and pointing out that the publishers were essentially looking for an entirely new trial. GSU’s opposition noted, “The Eleventh Circuit’s thorough disposition of the legal and factual arguments advanced over years of litigation—including almost a month of trial testimony—simply cannot be a dry run for Plaintiffs’ “second-go’ at whole new allegations of infringement.”<sup>1</sup>

While litigation continues in *GSU*, the *HathiTrust* litigation has ended with a victory for fair use. On January 6, 2015, the parties entered a settlement on the sole issue remaining before the district court. While the Second Circuit ruled in favor of

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<sup>1</sup> ARL posted an issue brief on this case, “Fair Use Decision Making Post-*Georgia-State*” that is available online: <http://www.arl.org/storage/documents/publications/gsu-code-best-practices-6nov14.pdf>

HathiTrust's digitization of works for purposes of use in a full-text search database and providing access for the print disabled, it remanded to the district court on the issue of preservation. The Authors Guild and HathiTrust ultimately entered a settlement agreement with the defendants stipulating that they have complied with Section 108(c) of the Copyright Act and have only made replacement copies where the original was damaged, deteriorating, lost or stolen, and that an unused replacement could not be obtained at a fair price. Defendants also agreed that for a period of five years, if they do not comply with the stipulation, it will notify the Authors Guild. This settlement agreement ended the *Authors Guild v. HathiTrust* saga with a strong victory for fair use as the Second Circuit opinion will now stand.

## Copyright Review

The House Judiciary Committee is continuing its hearings on copyright review with the next hearing currently scheduled for April 30 where Register of Copyrights, Maria Pallante, will be the sole witness.

Over the past two years, the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet has held numerous hearings and ARL, as part of the Library Copyright Alliance (LCA) has submitted or endorsed statements on the following issues: copyright and innovation; the "making available" right; fair use; preservation and reuse of copyrighted works; the first sale doctrine; copyright term; remedies; technological protection measures; and, most recently, in November 2014, on copyright, education and people with print disabilities. All of [these comments](#) are available for download.<sup>2</sup>

As part of efforts to raise awareness regarding fair use during this period of copyright review, ARL coordinated Fair Use Week from February 23-27, 2015, an annual celebration of the important doctrines of fair use and fair dealing. This year, 64 organizations and institutions participated including universities, libraries, library associations and a number of civil society organizations. Numerous resources were created, including more than 90 blog posts, 13 videos, 2 podcasts a comic book and an infographic. Highlights from the week, including links to resources, can be found at [www.fairuseweek.org](http://www.fairuseweek.org).<sup>3</sup>

In addition to the House Judiciary Committee's copyright review, it is expected that the Copyright Office will release its report and recommendations on orphan works and mass digitization, which will include proposed legislation. The USPTO has also had roundtables and meetings regarding issues covered in its 2013 green paper on *Copyright Policy, Creativity and Innovation in the Digital Economy*. USPTO's most recent meeting was held on April 1, 2015 on the topic of the online licensing environment for Copyrighted Works, focusing largely on music licensing.

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<sup>2</sup> <http://www.librarycopyrightalliance.org/submissions/domestic/copyright-review.shtml>

<sup>3</sup> A recap of the week's highlights is available at: <http://www.arl.org/news/arl-news/3550-fair-use-week-2015-highlights-.VsfTw5TF9EA>

## GAO Reports on the Library of Congress and Copyright Office

On March 31, 2015, the US Government Accountability Office (GAO) released a [report reviewing the Library of Congress information technology infrastructure and its management](#). The report was requested by the U.S. House of Representatives Appropriations Subcommittee on the Legislative Branch. GAO was asked to “conduct a review of IT management at the Library. GAO's objectives focused on the extent to which the Library has established and implemented key IT practices and requirements in, among other areas: (1) strategic planning, (2) governance and investment management, (3) information security and privacy, (4) service management, and (5) leadership. GAO is recommending that the Library expeditiously hire a permanent CIO. GAO is also making 30 other recommendations to the Library aimed at establishing and implementing key IT management practices. The Library generally agreed with GAO's recommendations and described planned and ongoing actions to address them. In January 2015, at the conclusion of GAO's review, officials stated that that the Library plans to draft an IT strategic plan within 90 days and hire a permanent CIO. If it follows through on these plans, the Library will be in a stronger position to address its IT management weaknesses and more effectively support its mission.”

GAO's review found that “significant weaknesses across several areas have hindered their [the Library] effectiveness.” These include:

- “Strategic planning: The Library does not have an IT strategic plan that is aligned with the overall agency strategic plan and establishes goals, measures, and strategies.”
- “Investment management: Although the Library obligated at least \$119 million on IT for fiscal year 2014, it is not effectively managing its investments.”
- “Information security and privacy: The Library assigned roles and responsibilities and developed policies and procedures for securing its information and systems. However, its implementation of key security and privacy management controls was uneven. Such deficiencies also contributed to weaknesses in technical security controls, putting the Library's systems and information at risk of compromise.”
- “Service management: While Library Information Technology Services has catalogued services, “it has not fully developed agreements with the other units specifying expected levels of performance. Further, the other units were often not satisfied with these services, which has contributed to them independently pursuing their own IT activities.”
- Leadership: “The Library does not have the leadership needed to address these IT management weaknesses.

The US Senate Appropriations Subcommittee on the Legislative Branch requested that GAO “review the Copyright Office's current IT environment and plans for the future.” [GAO Releases Report on Copyright Office IT Infrastructure](#). ”The report “(1) describes the legal, technical, and organizational aspects of the Copyright Office's current IT environment, and (2) describes and evaluates the Copyright Office's plans for modernization.”

GAO noted that “the office must be able to receive and examine copyright registration applications, collect and maintain deposited copies of copyrighted works, and maintain records of the transfer of copyright ownership. To meet these mission requirements, the office relies on several IT systems, as well as the infrastructure managed by the Library of Congress's central IT office. However, GAO and others have identified challenges with this environment. For example, comments solicited by the Copyright Office from external users have described limitations in the performance and usability of the office's electronic copyright registration system, and the Copyright Office has expressed concerns about the integrity of the files stored in the Library's servers. “The Copyright Office requested over \$7 million in fiscal years 2015 and 2016 to address four key challenges: (1) reengineer recordation—one of the office's key business processes—to include developing an online filing capability; (2) develop a secure digital repository for its electronic materials (e.g., books and music); (3) develop a software application development environment; and (4) establish a data management team, to include developing data standards.”

In its review, GAO recommends that the Copyright Office “(1) develop key information to support proposed initiatives for improving its IT environment and submit them to the Library's IT investment review board for review, and (2) develop an IT strategic plan that is aligned with the Library's strategic planning efforts. The office neither agreed nor disagreed. GAO continues to believe its recommendations are warranted.”

GAO found that:

“The office has not adequately justified these proposed investments [a request for \$7 million]. Specifically, it has not identified the business needs they are intended to meet, expected costs, or how they align with the agency's strategic plan, as called for by Library IT investment management policy.”

“The office also did not present the investments to the Library's IT investment review board. However, without identifying key costs and benefits of proposed initiatives and presenting this information to the Library-wide investment review board, decision makers at the Library and the Copyright Office do not have the assurance that the selected investments support the organization's goals and do not duplicate existing activities.”

“In addition, the office does not have an IT strategic plan, and officials described difficulties in developing such a plan given that the Library has not yet developed one. As noted in a recent GAO review of the Library's IT management, the Library has recently committed to developing an updated IT strategic plan, and it will be important for the Copyright Office's own strategic planning to be aligned with this effort.”

## **IMLS**

The US House of Representatives Budget Committee released its FY 2016 Budget Resolution, “A Balanced Budget for a Stronger America.” The resolution provides a blueprint for how appropriations committees may consider FY 2016 federal agency

budgets and programs, but it is not binding on the House and Senate appropriations committees and subcommittees as they work to develop agency budgets.

The House Budget Resolution proposes to eliminate the Institute of Museum and Library Services (IMLS). In lieu of IMLS, the committee calls for the promotion of state, local and private funding for museums and libraries. The resolution report notes that “[t]he Federal Institute of Museum and Library Services is an independent agency that makes grants to museums and libraries. This is not a core federal responsibility. This function can be funded at the state and local level and augmented significantly by charitable contributions from the private sector.”

The resolution also proposes that the Government Publishing Office (GPO) be more selective in what it prints and thus decrease costs at the agency. The report notes that “[t]he GPO prints thousands of pages of government documents each year—most of which have gained a ubiquitous online presence. This resolution supports greater selectivity in the material GPO prints, allowing users to rely more heavily on increased electronic access to materials.”

ARL opposes the proposal to eliminate IMLS and, once IMLS funding is considered by House and Senate appropriators, ARL will advocate for full funding for the agency. For more details about the proposed budget, see the [Budget Resolution and related documents](#) on the House website.<sup>4</sup>

## **1201 Rulemaking**

ARL, as part of the Library Copyright Alliance (LCA), submitted petitions for proposed exemptions, in the Digital Millennium Copyright Act (DMCA) Section 1201 Anti-Circumvention Rulemaking. The triennial rulemaking permits the Librarian of Congress, upon the recommendation of the Register of Copyrights, to grant exemptions to certain classes of works in order to circumvent technological measures in electronic device that control access to copyrighted works. LCA’s petitions request renewal of an exemption grating people who are print disabled circumvention of technological protection measures on literary works distributed electronically as well as renewal and expansion of an exemption for motion picture excerpts for educational purposes.

On February 6, 2015, LCA joined in five filings that provide evidence for the need of various exceptions that have been proposed including for: use of audiovisual works for educational use, for MOOCs, and for informal learning and K-12; e-book accessibility; and 3-D printing.<sup>5</sup> Hearings on the proposed exceptions will be held from May 19-21 in Los Angeles and from May 26-29 in Washington, DC.

ARL, as part of LCA, has supported the re-introduction of the bipartisan Unlocking Technology Act in the House of Representatives in March 2015 and introduction of the Barriers to Innovation Act in the House and Senate in April. The Unlocking Technology

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<sup>4</sup> <http://budget.house.gov/fy2016/>

<sup>5</sup> LCA’s comments and filings can be found at the LCA site at:

<http://www.librarycopyrightalliance.org/submissions/domestic/circumvention.shtml>

Act would permanently allow consumers to unlock their cell phones and allow the opening of digital locks for other legitimate uses. The bill permanently fixes a central flaw of the Digital Millennium Copyright Act (DMCA) which can be interpreted to allow liability for opening a digital lock even when there is no copyright infringement. The Barriers to Innovation Act, introduced by Senator Wyden (D-OR) and Representative Polis (D-CO) corrects some of the flaws of the three-year rulemaking process mandated by Section 1201 of the Copyright Act, such as by providing that previously granted exemptions would be automatically renewed unless changed circumstances justify retraction of the exemption.

## **Net Neutrality**

In February 2015, the FCC voted to approve a new Open Internet Order governing net neutrality. The Order reclassifies broadband Internet as a Title II “common carrier” while also relying on its Section 706 authority to ban blocking, throttling and paid prioritization. The text of the FCC’s report and order explicitly recognized the role of libraries and institutions of higher education, including several citations and references to comments ARL filed with other library and higher education associations in July and September of 2014. Additionally, while the FCC originally proposed using a “commercially reasonable” standard to assess the conduct of broadband providers, the library and higher education coalition expressed concerns that this standard might not adequately protect the open character of the Internet. The final report and order ultimately adopted a better standard, prohibiting unreasonable interference with an end user’s ability to access lawful content or an edge provider’s ability to make such content available.

On April 13, 2015, the FCC published its final Open Internet Order governing net neutrality in the Federal Register. The rules will become effective on June 12, 2015, 60 days after its publication in the Federal Register, unless overturned by Congress or by courts. Its publication in the Federal Register triggers two clocks, one which gives Congress 60 days to overturn an agency regulation by passage of a joint resolution under the Congressional Review Act, the other is a 10-day clock for legal challenges to the new rules.

Fourteen Republicans in the House of Representatives have signed on to a joint resolution disapproving the FCC’s Open Internet Order. The Congressional Review Act allows for Congress to overturn an agency decision on a straight up-or-down vote, without the possibility of filibuster in the Senate. If Congress does overturn the FCC’s decision through this process, it would still need to survive the threat of a Presidential veto, requiring a two-thirds vote of both chambers. In addition to the Congressional Review Act, some members of Congress have put forward bills that would essentially overturn the FCC’s decision through legislation.

Almost immediately after publication of the rules in the Federal Register, Internet provider trade associations and companies, including AT&T, filed lawsuits. These lawsuits allege, among other charges, that the FCC has exceeded its statutory authority and the rules violate the Communications Act.

ARL is meeting with Congressional staff on this issue and closely monitoring the lawsuits in the case.

## **Surveillance**

In November, the Senate fell two votes shy of a cloture motion to proceed with the USA FREEDOM Act, a bill that would have provided meaningful reform to current National Security Agency (NSA) surveillance practices and protect civil liberties. Senator Leahy's USA FREEDOM Act would have ended bulk collection of phone records and prevented bulk collection of other records under Section 215 of the USA PATRIOT Act, also known as the "library records" or "business records" provision. Additionally, the bill would have provided several reforms to the Foreign Intelligence Surveillance Act (FISA) Court, such as requiring unclassified summaries of FISC opinions with information necessary to understand the impact on civil liberties and creating a Special Advocate position charged with protection privacy and civil liberties.

A different version of the USA FREEDOM Act did pass the House of Representatives in May 2014, but the House version included significant amendments and the final bill did not adequately protect privacy. Many of the bill's original co-sponsors ultimately voted against the House's final version due to these changes.

Section 215 will expire on June 1, 2015 unless Congress votes to reauthorize the provision. Although some have expressed support for straight reauthorization, numerous members of Congress from both parties have opposed renewal of the USA PATRIOT Act provisions scheduled to sunset in June as they currently stand and it is expected that a new version of the USA FREEDOM Act will be introduced.

On April 21, 2015, Senators McConnell and Burr introduced a bill to reauthorize Section 215 through 2020. This bill would provide pure reauthorization without amending this provision of the USA PATRIOT Act and therefore fails to address serious concerns regarding bulk collection and the lack of transparency and oversight.

ARL works with a coalition on surveillance legislation and once the new version of USA FREEDOM Act is introduced, will build support for its passage if it adequately protects privacy.

## **Privacy**

Bills to reform the outdated Electronic Communications Privacy Act (ECPA) were reintroduced on February 4, 2015, in both the US House of Representatives and the US Senate with bipartisan support. The bills would update ECPA and provide important privacy protections for electronic communications. ECPA, a law passed in 1986, has not kept pace with evolving technologies and permits agencies to access documents or communications stored online that are older than 180 days without a warrant. ECPA has led to an absurdity that affords greater protection to hard-copy documents than electronic communications.

The House version of the ECPA reform bill, known as the Email Privacy Act, was introduced by Representatives Yoder (R-KS) and Polis (D-CO) currently has 261 co-sponsors. In the last Congress, the House version attracted 270 co-sponsors. The Senate version, known as the Electronic Communications Privacy Act Amendments Act was introduced by Senators Lee (R-UT) and Leahy (D-VT). ARL

## **Other International**

The World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) is expected to meet twice in 2015, once in June/July and once in December. The agenda for the June meeting appears to be largely focused on efforts to push forward a Broadcast Treaty, though the agenda also lists limitations and exceptions for libraries and archives as well as educational and research institutions.

At the December 2014 meeting of the SCCR, Kenny Crews presented an updated study to the committee of his 2008 study on copyright limitations and exceptions for libraries and archives. Crews' presentation resulted in substantive discussion, with questions spanning a full day. Also at the December session, the United States further presented its proposal for "Objectives and Principles for Exceptions and Limitations for Libraries and Archives."

Due to the failure of the WIPO General Assembly to come to a decision point on the work of the Intergovernmental Committee (IGC), because this committee is not a standing committee, it does not have a mandate to work and will not meet in 2015. Discussions around a treaty for traditional knowledge, traditional cultural expressions and genetic resources were conducted at IGC, but will not take place this year.

The United States continues to hold negotiations on the Trans-Pacific Partnership Agreement (TPP), a regional trade agreement being negotiated between 11 other parties in the Asia-Pacific region, and Trans-Atlantic Trade and Investment Partnership (TTIP), a trade agreement with the EU. Negotiators for both agreements most recently met in the United States during the week of April 19, 2015. On April 16, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as Trade Promotion Authority or "Fast Track" authority, was introduced into the Senate and House of Representatives. This legislation lays out negotiating objectives for trade agreements and ARL joined a group of organizations and technology companies expressing concerns that the legislation failed to include references to exceptions and limitations, such as fair use, and safe harbors for online platforms.<sup>6</sup>

## **Public Access Legislation**

On March 18, 2015, members of the House of Representatives and Senate introduced the bipartisan Fair Access to Science & Technology Research (FASTR) Act of 2015. This

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<sup>6</sup> Prior to the introduction of this bill, in February 2015, ARL as part of LCA submitted a letter to Senators Hatch and Wyden expressing concerns regarding trade promotion authority: <http://www.librarycopyrightalliance.org/bm~doc/wyden-hatch-fast-track-trade-promotion.pdf>

legislation would codify the provisions to enhance public access to federally funded journal literature included in the February 2013 Office of Science and Technology Policy (OSTP) memorandum on public access to federally funded research. The legislation would require that federal agencies with research budgets of \$100 million or more make peer-reviewed final, accepted manuscripts publicly available six months following publication. In addition, the FASTR bill calls for long-term preservation and access to these manuscripts. The legislation seeks to accelerate scientific discovery and fuel innovation by making articles reporting on publicly funded scientific research freely accessible online. This bill is the same as the FASTR legislation considered in the previous session of Congress. ARL has strongly supported FASTR in the past and will continue to promote the legislation going forward.

Also on March 18, 2015, members of the House of Representatives reintroduced the Public Access to Public Science (PAPS) Act. This legislation would ensure public access to published materials regarding scientific research and activities funded by federal science agencies, including the National Aeronautics and Space Administration (NASA), the National Science Foundation (NSF), the National Institute of Standards and Technology (NIST) and the National Weather Service (NWS). This legislation would require these agencies to create federal research public access policies that provide free public access to the results of research. The legislation would provide an embargo period of up to twelve months after initial publication in a peer-reviewed publication and requires submission of the final published articles, rather than the final accepted manuscripts.

ARL is a member of the Open Access Working Group (OAWG). ARL meets with congressional staff on public access legislation and communicates with members of Congress on public access legislation.

### **FOIA Reform Legislation Introduced**

Two bills were introduced in February in the US House of Representatives ([H.R. 653](#)) and the US Senate ([S. 337](#)) to update and reform the Freedom of Information Act (FOIA), a law that gives US citizens the right to access information from the federal government. The bipartisan bills follow up on the near passage of FOIA legislation in 2014 that was stalled by last-minute federal agency objections. In seeking to move the bills quickly, the Senate Committee on the Judiciary approved S. 337 three days after the legislation was introduced.

ARL joined 46 organizations in supporting the two bills and, in a [February 5 letter to the bills' sponsors \(PDF\)](#), noted:

Public oversight is critical to ensuring accountability, and the reforms embodied in both the FOIA Oversight and Implementation Act (H.R. 653), introduced by Representatives Issa and Cummings, and the FOIA Improvement Act of 2015 (S. 337), introduced by Senators Cornyn and Leahy, are necessary to enable that oversight.

Both FOIA reform bills would:

- Codify the presumption of openness, thereby requiring records be released unless there is a foreseeable harm or legal requirement to withhold them.
- Improve public access to released records.
- Rein in the FOIA b(5) exemption, known as the “withhold it because you want to” exemption, including placing a 25-year sunset on its use.
- Clarify and reform the use of fees assessed by federal agencies for fulfilling FOIA requests.
- Strengthen the National Archives and Records Administration’s Office of Government Information Services, which reviews FOIA policies, procedures, and agency compliance; recommends changes to FOIA; resolves FOIA disputes between agencies and requesters; and provides information to the public about FOIA.

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