
**Summary**

The US House of Representatives began the summer recess on July 30th, and the US Senate adjourned on August 6th with both reconvening on September 8th. September and October promise to be very busy months as both chambers must act on the FY 2017 appropriations bills, highway trust fund, debt ceiling, and many other issues. It is also hoped that there will be a deal to increase the spending limits under sequestration, which higher education institutions and others have long advocated for.

Much of the activity related to copyright has centered around the Copyright Office. Congressional offices continue to explore and discuss ways to modernize the Copyright Office, including various proposals to move the Copyright Office out of the Library of Congress. Additionally, the Copyright Office has issued notices of inquiries that relate to orphan works, mass digitization, visual works, and extended collective licensing.

There have been positive developments with respect to open access, open educational resources, and open data. The Obama Administration released science and technology priorities for FY 2017, which note that “preserving and improving access to scientific collections, research data, other results of federally funded research, open datasets and open education resources should be a priority for agencies.” The FASTR Bill to enhance public access to research was approved unanimously by the US Senate Committee on Homeland Security and Governmental Affairs.

Privacy and surveillance concerns continue as Congress is considering cybersecurity legislation that raises serious issues for privacy and civil liberties. Litigation around net neutrality is in full swing, with the briefs of telecommunications companies opposing the FCC’s net neutrality rules filed in July.

Finally, ARL continues to promote a simple and quick ratification of the Marrakesh Treaty. Currently, 10 countries have ratified the Treaty, and 10 more are needed for it to enter into force.

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Proposal to “Modernize” the Copyright Office: As noted in the June 18 advocacy and public policy update, Representatives Chu (D-CA) and Marino (R-PA) circulated a draft discussion bill, which would remove the Copyright Office from the Library of Congress and establish the Copyright Office as an independent agency. The bill has not yet been introduced in Congress, but it is expected that it may be introduced in the US House of Representatives following the August recess.

Since the circulation of the discussion draft, ARL has met with numerous Congressional offices to discuss this issue, and there appear to be at least six options being discussed regarding Copyright Office modernization, including where the Copyright Office should be housed. The options that may be under consideration include:

- The Copyright Office remains in the Library of Congress, and improvements are made to the services and technological infrastructure of the Copyright Office.
- The Copyright Office is removed from the Library of Congress and becomes an independent agency within the Legislative Branch.
- The Copyright Office is removed from the Library of Congress and placed under the Patent and Trademark Office.
- The Copyright Office is removed from the Library of Congress and put into the Department of Commerce as a “sister” agency to the Patent and Trademark Office.
- The Copyright Office is removed from the Library of Congress, and the Patent and Trademark Office is removed from the Department of Commerce. The
Copyright Office and Patent and Trademark Office are then combined into a single Intellectual Property Office within the Executive Branch.

- The Copyright Office is removed from the Library of Congress and becomes an independent agency, akin to the Federal Trade Commission or International Trade Commission.

ARL has strongly advocated for the Copyright Office to remain in the Library of Congress. While the Copyright Office faces information technology inadequacies and other challenges, these issues should be fixed within its current placement within the Library of Congress. Moving the Copyright Office will not solve its current technological and services challenges. Additionally, removing the Copyright Office from the Library of Congress could seriously impact the current registration and deposit system that has been critical in building the collection of the Library of Congress.

Copyright Office Notice of Inquiry on Visual Works: On July 23, 2015, the Library Copyright Alliance, of which ARL is a member, filed a response to the Copyright Office’s Notice of Inquiry on Copyright Protection for Certain Visual Works. The response points out the difficulty in identifying or locating owners of the copyrights in visual works. It notes that these works often face ambiguity with respect to copyright ownership and the orphan works problem can have a chilling effect with respect to preservation, archival, teaching, and classroom uses.

In discussing the issue of orphan works, the response points out that fair use is less uncertain today than in 2008 when Congress considered orphan works legislation. Since that time, a number of cases have clarified the scope of fair use, and codes of best practices have guided the use of digitization and making special collections and archives available. Additionally, injunctions are less likely, and mass digitization has become more common.

The statement also points out that the orphan works problem has been exacerbated by the lengthy copyright term that goes well beyond what international minimum standards require.

Responses to this notice of inquiry are due on October 1, 2015.

LCA’s full response can be found here: [http://www.librarycopyrightalliance.org/storage/documents/visualworks.pdf](http://www.librarycopyrightalliance.org/storage/documents/visualworks.pdf)

Copyright Office Notice of Inquiry on Mass Digitization and Extended Collective Licensing: As noted in the June 2015 advocacy and public policy update, the Copyright Office issued a report on orphan works and mass digitization and issued a notice of inquiry regarding a pilot extended collective licensing program, despite the fact that during the public roundtables held in March 2014 there was virtually no interest in an extended collective licensing system. ARL has met with the Copyright Office, including Register of Copyrights Maria Pallante, as well as Congressional staff, on this issue.

While there may be organizations willing to act as collecting societies for rights holders, it is unclear who the users would be in taking the license. Many institutions currently digitize collections, particularly special collections, and make the materials publicly available through a reliance on fair use. These examples of collections that have been
digitized and made available through a reliance on fair use will be an important part of the response ARL files on this issue.

Responses to the Notice of Inquiry will be due on October 2, 2015.

House Judiciary Committee’s Copyright Review: The House Judiciary Committee’s copyright review, which began in 2013, continues. The Committee has completed its hearings on the various areas of copyright law and has now sent out invitations to all witnesses—such as James Neal, university librarian emeritus at Columbia University—who testified at the hearings that have taken place over the past two years. Witnesses will have the opportunity to speak with majority and minority staff of the House Judiciary Committee about the topics on which they testified, as well as other topics that came up during the course of the copyright review process. Once meetings with witnesses are completed, members of the House Judiciary Committee will determine what issues they will tackle and how they will move forward with possible copyright reform.

Open Access, Open Educational Resources, and Open Data
Obama Administration Releases Science and Technological Priorities for FY 2017: On July 9, the Obama Administration released a memorandum outlining its science and technology budget priorities for FY 2017. The priorities include investments in R&D, STEM education and workforce development, technology transfer, R&D infrastructure, and scientific-collection management. The memorandum notes that “preserving and improving access to scientific collections, research data, other results of federally funded research, open datasets, and open educational resources should be a priority for agencies.”

Coalition Calls on White House to Open Up Access to Federally Funded Educational Resources: On August 4, ARL—along with a broad coalition of more than 90 education, library, technology, public interest, and legal organizations—called on the White House to take administrative action to ensure that federally funded educational materials are made available as open education resources (OERs) that are free to use, share, and improve. The call comes in response to the White House Office of Science and Technology Policy’s (OSTP) request for ideas to strengthen the US Open Government National Action Plan. The coalition notes the Obama Administration’s strong leadership in advancing public access to publicly funded resources and asks the Administration to build on this foundation by implementing an Executive Branch-wide policy for the open licensing of educational, training, and instructional materials created with federal funds.

Members of the public can join the call for opening up taxpayer-funded educational materials by tweeting with hashtag #OERUSA and by signing the letter at http://www.oerusa.org/. A PDF of the letter sent to the White House is available on the ARL website.

FASTR Bill to Enhance Public Access to Research Approved by US Senate Committee: On July 29, 2015, the US Senate Homeland Security and Governmental Affairs Committee unanimously approved S. 779, the Fair Access to Science and Technology Research Act, or FASTR. The bill seeks to codify the February 2013 Office of Science and Technology Policy (OSTP) memorandum on access to federally funded research. FASTR calls for federal agencies with extramural research budgets of over $100 million to
establish—to the extent possible—common public access policies for peer-reviewed journal articles resulting from federally funded research. Provisions in the legislation call for public access to these articles no later than 12 months after publication with a preference for embargo periods shorter than 12 months. ARL has long advocated for passage of FASTR.

National Technical Information Service (NTIS) Update: NTIS has released a paper describing its new strategic focus, titled A New Strategic Direction for NTIS. The new role envisioned for the agency is to support the Department of Commerce’s federal data priorities, including open access and open data, through partnerships with the private sector. The goal is to enable the development of new innovative products and services. This new role will work within current legal authorities.

In the US Senate, two bills have been introduced to eliminate the agency. S. 1636, the “Just Google It Act” and S. 787, the “NTIS Elimination Act,” have been referred to the Senate Committee on Commerce, Science, and Transportation. It is not clear when the Committee may act on the legislation. ARL staff met with congressional and NTIS staff to discuss the legislation and the proposed change in the agency’s role.

Appropriations
Appropriations Update: Although the US House of Representatives and US Senate Appropriations Committees completed work on FY 2017 appropriations bills, the momentum seen earlier this summer is now stalled. It is considered likely that Congress will pass one or more continuing resolutions to fund the US Government after October 1, the beginning of the federal fiscal year. The key sticking point is that Republican members of Congress want to see adherence to the current budget caps that were imposed during the sequestration process several years ago, and Democratic members of Congress are insisting on an increase in discretionary spending, thus lifting the budget caps.

Draft Bill Would Eliminate NHPRC
The US House of Representatives Committee on House Oversight and Government Reform pulled a discussion draft bill from consideration on July 21. The bill would have eliminated the National Historical Publications and Records Commission or NHPRC. Housed within the National Archives and Records Administration, NHPRC manages a small grants program that supports the preservation of and access to historical records, and it publishes the papers of significant leaders and individuals in US history. The draft bill sought to shift funds from NHPRC to the Office of Personnel Management (OPM) to address the massive data breach of federal employee personnel records. It is anticipated that the bill may be considered following the August recess when Congress returns to Washington, DC.

Privacy and Surveillance
Cybersecurity Legislation: Congress is currently considering the Cybersecurity Information Sharing Act of 2015 (CISA), a bill that raises serious concerns for privacy and civil liberties. While the bill purportedly is designed to strengthen cybersecurity, it contains significant flaws including: 1) failure to protect personal information; 2) allowing the use of information in investigations unrelated to cybersecurity; 3) failure to maintain civilian control of domestic cybersecurity; 4) permitting countermeasures that
could damage networks; and 5) creation of a new FOIA exemption resulting in transparency concerns.

The bill passed the House of Representatives on April 22, 2015, but has not yet come to the floor of the Senate for a vote. It passed the Senate Intelligence Committee by a vote of 14-1, with Senator Wyden (D-OR) representing the sole dissenting voice on the Committee. It appears likely that the Senate may vote to approve CISA in the fall. On July 27, 2015, ARL joined a coalition of organizations and security experts in sending a letter to President Obama asking for a pledge to veto CISA.

Electronic Communications Privacy Act (ECPA) Reform: There have been strong efforts to reform the Electronic Communications Privacy Act, an outdated law enacted in 1986 that 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. In February 2015, bills to reform ECPA were re-introduced in both the U.S. House and Senate with bipartisan support.

The House version of the bill currently has 292 co-sponsors. The Senate version currently has 24 co-sponsors and its primary co-sponsors are Senators Lee (R-UT) and Leahy (D-VT).

**Telecommunications**

Net Neutrality Litigation: On July 30, 2015, telecommunications companies filed their opening briefs with the Court of Appeals for the DC Circuit challenging the Federal Communication Commission’s (FCC) Open Internet Order in the case United States Telecom Association v. FCC. In February 2015, the FCC voted to approve its new Open Internet Order governing net neutrality. The Order reclassified broadband Internet as a Title II “common carrier” while also relying on its Section 706 authority to create “bright line” rules to ban blocking, throttling, and paid prioritization. The Order also adopted a 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.

The briefs by the telecommunications companies allege that reclassification violates the Communications Act and is arbitrary and capricious. Additionally, the briefs argue that the FCC’s Internet conduct standard banning “unreasonable interference” is unlawful and that the FCC failed to provide adequate notice of the rules it ultimately adopted. One brief also asserts that the Open Internet Order violates the First Amendment and that the ban on paid prioritization is not permitted. Briefs by *amici* parties supporting the telecommunications companies and associations were filed on August 6, 2015.

The FCC’s reply brief will be due on September 16, and *amicus* supporting the FCC will file their briefs by September 21. A number of parties that participated in the FCC’s notice of proposed rulemaking have filed as intervening parties. Oral arguments in the case will be heard on December 4, 2015. ARL has been working with intervenors and *amicus* supporting the FCC. ARL plans to file an *amicus* brief in the case together with other library associations.

Additional background on the FCC’s Open Internet Order is available in the [April 2015 advocacy and public policy update](#): and in this [blog post analyzing the Order](#).
International Treaties

Trans-Pacific Partnership Agreement (TPP): The US Government is currently negotiating a large, regional free trade agreement with 11 other parties in the Asia and Pacific region: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The agreement will include a comprehensive chapter on intellectual property. On August 5, 2015, the intellectual property chapter of the TPP (dated May 11, 2015) was leaked and revealed some substantial changes from the 2014 leak (dated May 14, 2014). The newest leak showed some improvements, but several problems remain.

In July 2015, trade ministers from the twelve TPP negotiating parties met in what was widely reported as the last ministerial meeting. However, agreements could not be reached, particularly in areas relating to pharmaceuticals as well as market access for dairy and automobiles, and conclusion of the TPP has therefore been delayed. The date for the next ministerial meeting has not yet been set. Some have speculated that the upcoming elections in Canada will delay any TPP meeting until after October, though Prime Minister Stephen Harper has announced that the elections will not impact meetings of the trade ministers. If agreement cannot be reached by October, though, the ability for the US Congress to accept the agreement before the 2016 elections would be greatly impacted due to rules under the “fast track” authority that require advance notice to Congress and time for the International Trade Commission to complete an analysis of the agreement prior to any vote. The time required for these activities would place any vote on the TPP within the United States' election season.

An in-depth analysis of the TPP leak is available at: http://policynotes.arl.org/?p=1146

Marrakesh Treaty: ARL continues to work with a coalition that includes organizations representing individuals who are blind or print disabled, nonprofit organizations, and authorized entities to promote a smooth ratification process. ARL has met with Administration officials and Congressional staff to discuss the Marrakesh 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 Senate Foreign Relations Committee, who stated that letters supporting the Marrakesh Treaty will be important in ratification efforts. ARL members should expect an alert and template letter once the ratification package has been sent to the Senate, so that letters can be sent quickly to support swift and smooth ratification.

Ten countries have now ratified the Marrakesh Treaty: Argentina, El Salvador, India, Mali, Mexico, Mongolia, Paraguay, Singapore, the United Arab Emirates, and Uruguay. Ten more are needed for the Marrakesh Treaty to enter into force. Bill C-65 in Canada was introduced in June in preparation for accession to the Marrakesh Treaty.

Resources:

ARL Joins Amicus Brief in Mavrix Photographs v. LiveJournal: http://policynotes.arl.org/?p=1115

There are a number of recent blog posts at: http://policynotes.arl.org/