



ASSOCIATION OF RESEARCH LIBRARIES®

empowering the research library community

Advocacy and Public Policy Update

October 1, 2015

Below is an update on key advocacy and public policy issues of interest to the research library community in Canada and the US from mid-August to October 1, by Prue Adler and Krista Cox. Prior advocacy and public policy updates can be found at: <http://www.arl.org/news/advocacyandpolicyupdates/term/summary>. New resources are available at the end of this update.

Summary

With its return from an August recess, the US Congress faces several controversial must-pass bills and other divisive issues with little time to spare prior to the passage of a short-term funding measure for the US Government as the Government's fiscal year ended on September 30. A short-term funding bill that will fund the Government through mid-December was approved in lieu of another Government shutdown.

The US Senate continues to press ahead for passage of the Fair Access to Science and Technology Research Act (FASTR), a bill to codify the Office of Science and Technology Policy's 2013 memorandum regarding public access to federally funded research.

The White House is building a pool of prospective candidates for the Librarian of Congress position. With James Billington's retirement at the end of September, the White House has been reaching out to stakeholders, including ARL, for their input and recommendations. Legislation has been introduced in the Senate to limit the term of the Librarian of Congress to 10 years.

Copyright has been an active area over the past six weeks. Members of the House Judiciary Committee are poised to introduce several bills regarding the future of the US Copyright Office—determining the office's authority and whether it will remain in the Library of Congress. This may be the first issue that the House considers as it continues its review of the Copyright Act for possible reform. A court ruled that Warner/Chappell Music does not hold a valid copyright to the "Happy Birthday" song lyrics, and there were two positive fair use decisions in *Lenz v. Universal* and *Katz v. Google*. The Library Copyright Alliance filed comments on the Copyright Office Notice of Inquiry on Extended Collective Licensing, and the 1201 Digital Millennium Copyright Act rulemaking is still underway.

ARL participated in a number of amicus briefs on a variety of issues. ARL, the American Library Association, Association of College and Research Libraries, and Chief Officers of State Library Agencies filed an amicus brief in support of the Federal Communications Commission's Open Internet Order protecting network neutrality. ARL also joined in an amicus brief in the case *Wikimedia v. National Security Agency (NSA)*, challenging warrantless surveillance and invoking the First Amendment's protection of privacy.

Congress continues to consider reform of the Electronic Communications Privacy Act, or ECPA and there is widespread support in the House for such reform.

The US Supreme Court has agreed to rehear *Fisher v. University of Texas at Austin*, a case involving the University of Texas (UT) admissions process, which seeks to improve student-body diversity.

On the international front, several additional countries have ratified the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, with Canada moving closer to ratification of the treaty. Another meeting took place in late September–early October to finalize the Trans-Pacific Partnership Agreement, a large, regional, trade agreement among 12 countries including Canada and the US. Finally, the “right to be forgotten” online has been upheld in Europe, and French regulators declared that search engines must apply the right to be forgotten across all domains, not just in France or Europe.

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Appropriations: FY 2016 Funding Status

In early September, Congress returned to Washington from an August recess to a crush of must-pass bills and the need to grapple with some deeply contentious issues. With the resignation of Speaker John Boehner (R-OH), the passage of a short-term continuing resolution to keep the Government open through mid-December was assured. Nevertheless, given that the Congress had less than a day to pass the continuing resolution as the fiscal year ended on September 30, the Office of Management and Budget instructed agencies to plan for a government shutdown.

The US Senate approved a stopgap measure that includes funding for Planned Parenthood—an issue at the center of the end-of-year budget controversy. With support of Democratic members of the US House of Representatives, a continuing resolution was sent to the White House for President Obama’s signature. The continuing resolution keeps federal funding at approximately the current levels through December 11, 2015. Between October 1 and December 11, President Obama and congressional leaders will conduct talks to try to move beyond the budget impasse. The goal is to develop a framework for a two-year budget agreement to avoid yet another fiscal cliff during an election year.

In lieu of defunding Planned Parenthood, repealing the Affordable Care Act, and tackling contentious spending issues in the continuing resolution, conservative members of Congress will address these issues through a process called fast-track budget reconciliation. This process could allow both Houses of Congress to pass legislation on these issues, which would, in turn, become a veto fight with President Obama.

In addition to these contentious issues, Congress must pass the Highway Trust Fund bill, raise the debt ceiling, and potentially consider reauthorization of the Export-Import Bank. Some in Washington believe that Speaker Boehner will seek to “clear the decks” prior to stepping down on October 30 in order for there to be fewer divisive issues for the next speaker to tackle.

Institute of Museum and Library Services Director Confirmed by Senate

Kathryn K. Matthew was confirmed on September 23 by the US Senate as the director of the Institute of Museum and Library Services. Matthews has a 30-year career in museums that spans a variety of collections and roles. Her biography can be found at: <https://www.ims.gov/news-events/news-releases/dr-kathryn-k-matthew-confirmed-director-institute-museum-and-library>.

Fair Access to Science and Technology Research Act (FASTR)

Prior to the August recess, the Senate Homeland Security and Governmental Affairs Committee unanimously approved S. 779, the Fair Access to Science and Technology Research Act (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 literature resulting from federally funded research. S. 779 was amended at markup with two changes: the six-month embargo was replaced with a “no later than 12 months, but preferably sooner” provision, and another provision was added to give stakeholders a means to petition federal agencies to change the length of the embargo period if the 12-month period does not serve, “the public, industries, and the scientific community.” Some Senators and their staff are engaging the possible consideration of FASTR by the full Senate. ARL continues to actively support passage of FASTR in the House and Senate.

Librarian of Congress Transition

With the Librarian of Congress, James Billington, stepping down effective September 30, the White House is in the process of building a pool of prospective candidates. White House staff have reached out to many constituencies including ARL. ARL has been working for several years with the American Association of Universities and Association of Public and Land-grant Universities on both the qualifications and attributes that the associations believe will be

important in a new leader, as well identifying the names of potential candidates. Once President Obama nominates a new Librarian of Congress, that individual will be considered by the Senate Rules Committee and then, if approved by that Committee, the nomination moves to the Senate floor for a vote. It is not known when the White House will nominate an individual, but the process is well underway.

On September 29, Chairman Roy Blunt (Senate Rules Committee, R-MO) introduced legislation that would limit the term of the Librarian of Congress to 10 years with the possibility of reappointment. Currently, the position is a lifetime appointment. The legislation is supported by all Senate members of the Joint Committee on the Library that oversees the Library of Congress.

Copyright and Intellectual Property

Copyright Modernization

As noted in the June and August Advocacy and Public Policy Updates, Congress continues to consider modernization of the Copyright Office. There appear to be at least six options under consideration, many of which would remove the Copyright Office from the Library of Congress, but a bill has not yet been introduced in Congress.

ARL strongly advocates for the Copyright Office to remain in the Library of Congress while acknowledging that the serious information technology challenges should be addressed. ARL continues to engage with Congressional and Executive Branch staff on this issue. Additionally, as part of the Re:Create coalition, ARL advocates against creation of the Copyright Office as an independent agency.

It is expected that more than one bill on copyright will be introduced in the House this fall. Representatives Judy Chu (D-CA) and Tom Marino (R-PA) will likely introduce a bill based on their earlier discussion draft on the Copyright Office in the Digital Economy (CODE) Act to make the Copyright Office an independent agency. Representatives Ted Deutch (D-FL) and Jason Chaffetz (R-UT) will likely have a draft that will keep the Copyright Office within the Library of Congress while granting the Copyright Office some independent authority in areas such as technology, staffing, and procurement. A third bill moving the Copyright Office out of the Library of Congress and placing it within the Department of Commerce may also be introduced.

Copyright Reform

The House Judiciary Committee continues to engage in discussions regarding possible reform of the Copyright Act. Committee staff have been meeting with interested stakeholders and those who testified at the committee's hearings over the last two years. Recently, the committee announced that they would conduct a listening tour in venues around the country. The first roundtable was conducted on September 22 on the campus of Belmont University in Nashville, Tennessee. The roundtable discussion included members of the music community. Additional roundtables are expected on the west coast.

Copyright Cases

Dancing Baby Case

On September 14, the US Court of Appeals for the Ninth Circuit ruled in *Lenz v. Universal Music*, also known as the "Dancing Baby" case, that copyright holders must consider fair use

before sending a takedown notification. The decision is a strong affirmation of fair use; the Ninth Circuit rejects Universal's argument that fair use is merely an affirmative defense and notes that "Fair use is not just excused by the law, it is wholly authorized by the law...The statute explains that the fair use of a copyrighted work is permissible because it is a non-infringing use." The Ninth Circuit confirms that fair use is a *right* and "Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notice—whether allegedly infringing material constitutes fair use, a use which the DMCA [Digital Millennium Copyright Act] plainly contemplates as authorized by the law. That this step imposes responsibility on copyright holders is not a reason for us to reject it."

For more information about *Lenz v. Universal*, see the ARL Policy Notes blog post, "9th Circuit Holds Fair Use Must Be Considered Before DMCA Takedown Notices are Sent," <http://policynotes.arl.org/?p=1162>.

Happy Birthday Song

On September 22, the District Court for the Central District of California ruled in *Marya v. Warner/Chappell Music* that Warner does not hold a valid copyright over the lyrics to the song "Happy Birthday." It was undisputed that the melody to the song was in the public domain. While the plaintiffs in the case sought declaratory judgment, arguing that Warner lacked a valid copyright on several grounds, the court found that the alleged owners of the intellectual property rights had the burden of proof. The court ultimately found that a 1942 lawsuit revealed that the authors of the lyrics only transferred its melodies to Summy Co. (which Warner subsequently attained the rights to) and did not transfer the lyrics. Thus, the court ruled that Warner, as Summy Co.'s purported successors-in-interest, did not hold a valid copyright in the "Happy Birthday" lyrics. Ultimately, the court held only that Warner lacked the rights and not necessarily that the work is in the public domain, essentially making the song an orphan work (a copyrighted work whose owner is impossible to identify or contact). A full trial or appeal, however, could possibly result in a finding that the work is in the public domain.

For more information, see the ARL Policy Notes blog post, "Court Finds Warner Does Not Hold Rights to 'Happy Birthday' Song," <http://policynotes.arl.org/?p=1177>.

Katz v. Google

On September 17, the US Court of Appeals for the Eleventh Circuit upheld a lower court decision finding that a blogger's use of an unflattering photograph of the plaintiff, Raanan Katz, on her blog was fair use. The blogger, Irina Chevaldina, ran a blog that was critical of Katz and posted the photograph repeatedly, both with commentary and without.

The Eleventh Circuit went through the four fair use factors finding that 1) the nature of the use was non-commercial and transformative (because it was used to ridicule and satirize Katz's character); 2) the elements of the photograph were primarily factual; 3) the amount taken was appropriate for the use; and 4) the blogger's use of the photo did not impair the incentive to publish the work due to the fact that Katz obtained the copyright to the photo for the purpose of initiating the lawsuit. Indeed, with respect to the effect on the marketplace, the Eleventh Circuit pointed out that Katz "attempt[ed] to utilize copyright as an instrument of censorship against unwanted criticism" and thus "there is no potential market for his work." The Eleventh Circuit thus held that the factors heavily weighed in favor of fair use and dismissed Katz's lawsuit and awarded attorneys fees to the defendants.

Copyright Office Notice of Inquiry on Extended Collective Licensing

The Library Copyright Alliance (LCA) will submit comments responding to the US Copyright Office's Notice of Inquiry on a mass digitization pilot program and extended collective licensing (ECL). The response will note how the pilot program is impractical and advocates against an ECL framework. While the pilot program appears to be based on the Google Books settlement (in which it was determined that the digitization of millions of books from research library collections was a fair use), the Copyright Office's approach fails to acknowledge the differences between its proposed pilot and the Google Books settlement, including the fact that Google was willing to bear significant costs for the program, subsidizing subscriptions for public libraries and higher education and paying registry start-up costs. The response will also point out the complexities in distributing royalties under the pilot program. Furthermore, the response will note that the Copyright Office has proposed inappropriate choices as possible pilot projects, such as Depression-era photographs—a library's digitization of a special collection of Depression-era photographs would likely be a fair use. Additionally, the response will point out the weakness of limiting the pilot program for literary works to commercially unavailable works. The response will be available on the ARL and LCA websites once it has been submitted.

Digital Millennium Copyright Act (DMCA) 1201 Rulemaking Process

The current Digital Millennium Copyright Act (DMCA) 1201 rulemaking cycle, where proponents propose exemptions to allow the circumvention of technological protection measures (TPMs) or "digital locks," is still ongoing. The most recent controversy related to TPMs arose out of a September 18 Notice of Violation sent from the Environmental Protection Agency (EPA) to Volkswagen (VW), which resulted in the recall of 500,000 VWs and Audis that contained software allowing the cars to cheat on emissions tests. The EPA, along with automobile makers, has opposed proposed DMCA exemptions that would allow researchers to test and evaluate engines. Without these DMCA exemptions, it is unclear whether researchers can conduct these evaluations without violating copyright law, highlighting once again the problems with the three-year rulemaking process.

Telecommunications: Amicus Brief Supporting Net Neutrality

On September 21, ARL together with the American Library Association, Association of College and Research Libraries, and Chief Officers of State Library Agencies, filed an amicus brief in the Court of Appeals for the DC Circuit supporting the Federal Communications Commission's (FCC) Open Internet Order establishing rules protecting net neutrality. The brief focuses on the importance of net neutrality for libraries and their patrons and includes several concrete examples where libraries serve as creators and providers of content and information, demonstrating that they could be disadvantaged without a prohibition of paid prioritization and without other rules protecting the open Internet. The brief also supports the FCC's "General Conduct Rule" (a rule that sets forth factors the FCC will consider in determining whether an ISP's behavior is lawful) as a necessary tool to ensure that the FCC has the flexibility to protect against future harms, including those made possible by new technological innovations and advances.

Oral arguments in the case are scheduled for December 4, 2015. For more details on the brief in *United States Telecom Association v. FCC*, see the ARL Policy Notes blog post, "Libraries File Amicus Brief Supporting Net Neutrality," <http://policynotes.arl.org/?p=1175>.

Privacy and Surveillance

Electronic Communications Privacy Act (ECPA) Reform

Congress continues consideration of reform of the Electronic Communications Privacy Act (ECPA), an outdated law passed in 1986 that has not kept pace with evolving technologies. ECPA denies important privacy protections for electronic communications, allowing agencies to access documents or communications stored online that are older than 180 days without a warrant. The outdated law has led to an absurdity that affords greater protection to hard-copy documents than digital communication.

The ECPA reform bill in the House of Representatives, known as the Email Privacy Act, has the support of an overwhelming majority of the House: 292 co-sponsors. The Senate version, known as the Electronic Communications Privacy Act Amendments Act also has bipartisan support and currently has 23 co-sponsors. ECPA reform would impose a warrant-for-content standard and ensure that Fourth Amendment rights are preserved in the digital world. On September 16, the Senate Judiciary Committee conducted a hearing on ECPA reform. During the hearing government witnesses raised concerns regarding the warrant-for-content standard, while witnesses from Google, the Center for Democracy and Technology, and BSA | The Software Alliance largely supported the ECPA reform bills. The Senate Judiciary Committee is expected to mark up the ECPA reform bill this fall.

Surveillance Amicus Brief

On September 3, ARL joined an amicus brief with library associations and bookseller associations in the case *Wikimedia v. National Security Agency (NSA)*, which challenges warrantless surveillance. The brief explains that the First Amendment is a broad guarantee that includes the ability to distribute and receive information, and to freely and privately associate. The amici note the importance of patron confidentiality, especially in the digital age. As digital communications and interactions increase, it is critical to ensure that First Amendment rights apply in the digital environment.

For more information on the amicus brief, see the ARL Policy Notes blog post, “ARL joins Amicus Brief in Surveillance Case, *Wikimedia v. NSA*,” <http://policynotes.arl.org/?p=1160>.

Diversity: *Fisher v. University of Texas II*

In the upcoming term, the Supreme Court of the United States has agreed to rehear *Fisher v. University of Texas at Austin*, a case involving the University of Texas (UT) admissions process, which seeks to improve student-body diversity. UT accepts the top 10% of graduates from Texas high schools and allows for a holistic review for the remaining open spots. This review included many factors, and an applicant’s race was only one of the factors considered. The admissions process did not have quotas or specific goals in terms of the numbers of students meeting specific characteristics.

The Supreme Court previously heard the case and in 2013 decided in a 7-1 opinion (with Justice Kagan recusing) to remand the case to the Fifth Circuit. The Court held that the Fifth Circuit should reconsider the case under the higher threshold of strict scrutiny in determining whether UT’s admission policy comports with the Equal Protection Clause of the Fourteenth Amendment. On remand, the Fifth Circuit again upheld UT’s admission policy leading to the

Supreme Court's rehearing this term. The Petitioner in the case argues that the Fifth Circuit ignored the Supreme Court's instruction in *Fisher I*.

The fact that the Supreme Court has agreed to rehear the case raises significant concerns that some on the Court may be seeking to overturn the lower court's decision. Additionally, a report has come out that in *Fisher I*, the Court was initially prepared to overturn UT's admissions policy until a draft dissent by Justice Sotomayor placed pressure on the majority to return the issue to the Fifth Circuit.

International

Marrakesh Treaty

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled officially has 10 ratifications: Argentina, El Salvador, India, Mali, Mexico, Mongolia, Paraguay, Singapore, United Arab Emirates, and Uruguay. The Honduran parliament recently ratified the treaty and is expected to deposit its instrument of ratification with the World Intellectual Property Organization (WIPO) soon. After Honduras's ratification, nine more ratifications will be needed for the treaty to enter into force.

On June 8, Canada took steps toward ratification with Bill C-65, the Support for Canadians with Print Disabilities Act was introduced in the House of Commons (see <http://policynotes.arl.org/?p=1088>). In the United States, the Obama Administration has not yet sent its ratification package to the Senate.

Trans-Pacific Partnership Agreement

Negotiators and trade ministers for the Trans-Pacific Partnership (TPP) Agreement are meeting in Atlanta, Georgia, from September 26 to October 4 in hopes of finalizing the large, regional, trade agreement among 12 negotiating parties: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States. While the last ministerial meeting held in July 2015 was touted as the final round, trade ministers failed to reach a deal. Outstanding issues remain in several chapters, including the intellectual property chapter. Copyright issues that have not yet been resolved include (among others) copyright term, ISP liability, and some general provisions, such as the United States' and Japan's opposition to language acknowledging the importance of the public domain. (See the ARL Policy Notes blog post, "Analysis of August 2015 Leaked TPP Text," for more information: <http://policynotes.arl.org/?p=1146>).

The current timing of this ministerial meeting raises challenges for Canada and the United States. Canada is currently in its "caretaker" government due to the upcoming elections on October 19, and other governments negotiating the TPP have typically adopted observer status during "caretaker" mode. Additionally, even if a deal is reached at this ministerial, time will be needed to finalize the language of the TPP before it can be signed. Due to "fast-track" rules granted under Trade Promotion Authority in the United States, President Obama must give Congress 90 days notice of intention to sign the deal. There are additional waiting periods to make the text public and for the Administration to submit implementing legislation to Congress. These waiting periods make it likely that a vote on the TPP in the Congress would take place during the heart of the United States' election season.

Right to Be Forgotten

The “right to be forgotten” has been upheld in Europe and empowers individuals in Europe who believe that online information about them is inaccurate or irrelevant to request search engines to remove links from search engine queries. The content would remain at the original site, but would no longer appear in searches. In June 2015, French regulators declared that search engines must apply the right to be forgotten across all domains, not just domains in France or Europe where the right to be forgotten applies, thus impacting search results in the United States and other countries. The ruling has resulted in Google de-linking articles written in the United States covering the European case over the right to be forgotten. While some privacy advocates have celebrated the right-to-be-forgotten rulings, others have expressed grave concerns that this movement alters the historical record, hinders access to information, and impacts freedom of speech. An ARL issue brief on this issue is forthcoming.

Resources

- Additional blog posts are available at the ARL Policy Notes blog: <http://policynotes.arl.org/>.
- The net neutrality amicus brief in *US Telecom Association v. FCC* can be read in full here: <http://www.arl.org/component/content/article/6/3732>.
- The amicus brief in *Wikimedia v. NSA* can be read in full here: <https://www.eff.org/document/wikimedia-library-and-bookseller-amicus>.

PSA and KLC: 10/1/15