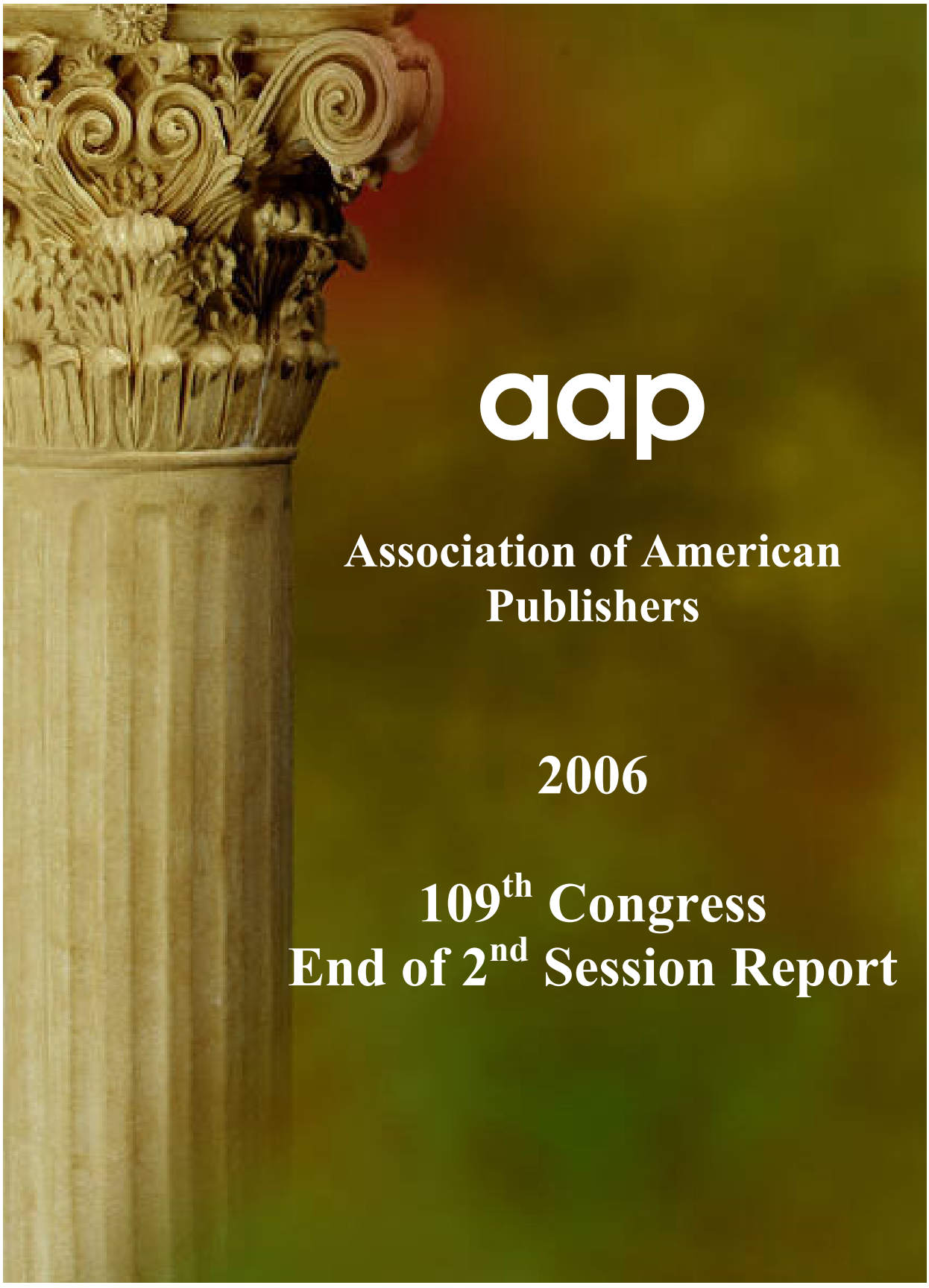


aap

Association of American Publishers

2006

109th Congress
End of 2nd Session Report

Association of American Publishers, Inc.

50 F Street, NW, 4th Floor
Washington, DC 20001
Telephone: (202) 347-3375
Fax: (202) 347-3690
www.publishers.org

109th Congress – End of the Second Session Report 2006

The Second Session of the 109th Congress was shaped largely by bitterly partisan election-year politics in the run-up to the November elections, and thereafter by the change from Republican to Democratic control in both the House and the Senate. The war in Iraq remained front and center among Congressional preoccupations, and the poisonous political atmosphere resulted in an unfinished and stalemated Congressional appropriations process. Although few legislative initiatives of interest to AAP members received any attention from legislators in either body, the House and the Senate still managed to move some of them to enactment, while leaving others to await resurrection in a new, Democratic-led Congress.

As the First Session of the 110th Congress gets underway, AAP members can now review some of the significant legislative activities that were the focus of attention in the AAP's Washington office on their behalf. At the same time, this report provides a timely opportunity to alert publishers to some of the public policy issues that likely will require AAP's attention midway through the 110th Congress.

This report focuses on legislative actions that affect book and journal publishing interests primarily concerning **(1)** intellectual property protection, **(2)** freedom of expression, **(3)** new technologies and "e-commerce," and **(4)** educational issues. However, we also report on significant developments regarding **(5)** tax and **(6)** postal matters.

A summary, text, and status report for each piece of referenced legislation, whether enacted or not, can be found online in the Congressional Legislative Reference Service of the Library of Congress at http://thomas.loc.gov/. Simply look under the "Legislation" heading at either "Bill Summary" or "Bill Text," click on the icon labeled "109th Congress," and follow the instructions from there.

If you have questions or comments on any of the material in this report, you can contact Allan Adler or Emilia Varga-West by e-mail adler@publishers.org or evargawest@publishers.org, phone (202/347-3375), or fax (202/347-3690).

Allan Adler & Emilia Varga-West

INTELLECTUAL PROPERTY ISSUES

Trademark Dilution Revision Act of 2006
(H.R. 683; Public Law: 109-312; October 6, 2006)

The **"Trademark Dilution Revision Act of 2006" (H.R. 683)** was introduced in February 9, 2005 by Representative Lamar Smith (R-TX) and became public law **(P.L. 109-312)** in October 6, 2006. It entitles an owner of a famous trademark that is "widely recognized by the general consuming public" to obtain an injunction against another person who commences use of a similar mark in commerce that is likely to cause "dilution by blurring or tarnishment." Both terms capitalize on association due to similarity between the fake and original marks, but the first deals with impairing the distinctiveness of the famous mark, while the latter addresses harm to its reputation. The bill entitles the famous mark's owner to remedies under specified conditions, but most importantly, as a safeguard for freedom of expression successfully urged on House and Senate sponsors by AAP, it restores a "noncommercial use" exemption to protect authors and publishers from infringement claims in connection with incidental mentions of a famous trademark in literary works.

NON-ENACTED LEGISLATION

The **"Digital Media Consumers' Rights Act of 2005" (H.R. 1201),** largely similar to the Boucher-Doolittle bill from the previous Congress, was carefully drafted this time to fall within the primary jurisdiction of the House Energy & Commerce Committee, rather than the House Judiciary Committee. Reintroduced in March 2005, the legislation once again proposed to gut the anti-circumvention provisions of the DMCA. Among other things, it would have amended the DMCA to allow circumvention of copyright protection systems, and exemptions from liability for manufacturers and distributors of circumvention devices, if the circumvention promoted technological advancement or facilitated a non-infringing use of a work. The sponsors' justifications for the bill's provisions frequently highlighted DRM restrictions faced by consumers in their use of purchased e-books. Although AAP expected to be active in dealing with the legislation, no committee action occurred during the second half of the 109th Congress. Nevertheless, should the bill be reintroduced again, it will need to be closely watched and vigorously opposed by the copyright community.

The proposed **"Public Domain Enhancement Act" (H.R. 2408)** was similarly reintroduced by Representative Zoe Lofgren (D-CA) in May 2005 as a proposal to reinstate copyright renewal requirements that would allow works whose copyright owners cannot be known or located to enter the public domain, so that those works could be used in otherwise infringing circumstances without risk of infringement liability for the user. In particular, it proposed to terminate copyright in a work if the copyright owner fails to renew the copyright by paying a maintenance fee ($1) to the Copyright Office, due 50 years after the date of first publication or on December 31, 2006, whichever would be later. However, after the Copyright Office's rejection of this approach to dealing with the "orphan works" issue, and with vocal opposition from producers of copyrighted works, including the book publishers, the bill died in subcommittee during the First Session of the 109th Congress.

Over a year's worth of study, public comment, hearings and negotiations paved the way for the introduction of "orphan works" legislation (H.R. 5439) in the 109th Congress. In late January 2005, the Copyright Office published a Notice of Inquiry in the Federal Register seeking public comment on ways to address the problem of how to permit use of an in-copyright work, for a purpose that ordinarily requires permission, when the copyright owner cannot be located or contacted in order to obtain permission. After public comments were submitted in response to a Federal Register notice of inquiry, the Copyright Office organized public roundtable discussions in July and August, with participation from the AAP and some of its member company representatives. In early February 2006, the Copyright Office issued a report with recommendations that closely tracked the overall "reasonably diligent search/limitation on remedies" framework urged by AAP for statutory treatment of "orphan works." A hearing on the report by the House Judiciary Intellectual Property Subcommittee in March, which featured AAP as one of four hearing witnesses, was followed by "marathon" orphan works meetings organized by the Subcommittee staff at the direction of the Subcommittee chair to negotiate a consensus regarding revisions to the draft statutory language recommended by the U.S. Copyright Office in its report. Although the negotiating group did not reach a full consensus, particularly in its efforts to deal with objections raised by photographers, graphic artists, and illustrators, Subcommittee Chair Lamar Smith (R-TX) introduced the group's most advanced draft as the **"Orphan Works Act of 2006" (H.R. 5439)** in May. Within two weeks, the bill was approved by the Subcommittee and was referred to the full House Judiciary Committee for further consideration.

Basically, H.R. 5439 proposed to limit the remedies available to a copyright owner if the user of a work proved that a "reasonably diligent good faith search" to contact the copyright owner was performed without success before the infringing use occurred, and the user provided reasonable attribution for the work according to available information. However, the owner would be entitled to reasonable compensation from the infringing user unless the work was used without any commercial advantage for charitable or educational purposes and the infringement stopped upon request. Additionally, injunctive relief would be available to prevent further use, except if the new work transformed or integrated the infringed work and contained the user's original expression.

In September, to the great disappointment of AAP, Rep. Smith combined the orphan works bill with provisions from two other bills for purposes of markup by the House Judiciary Committee. Title I of the newly introduced **"Copyright Modernization Act" (H.R. 6052)** contained a highly controversial, 85-page digital music licensing bill, while Title III included two relatively non-controversial new copyright enforcement provisions. Although combining these measures in a single Act was supposed to help buoy each component for Committee approval, the packaging had exactly the opposite effect, as it sank the still-troubled orphan works legislation when unresolved disputes over the music licensing provisions resulted in the proposal being pulled from full Committee consideration. Additionally, at the final markup session, Rep. James Sensenbrenner (R-WIS), chairman of the full House Judiciary Committee, was prepared to introduce Rep. Berman's (D-CA) amendment in the nature of a substitute that included provisions to address the concerns of photographers, graphic artists and illustrators by delaying the effective date of the bill either for 5 years or until the Copyright Office developed a database that had "text-based search capability" for images. However, fortunately, the amendment, which was opposed by publishers, was never offered. H.R. 6052 was not enacted before the Second Session adjourned. Given the high profile of the orphan works legislation, AAP expects renewed efforts to enact legislation similar to H.R. 5439 early in the 110th Congress.

In late April 2005, the House and Senate passed concurrent resolutions **(H.RES. 210 and S.CON.RES. 28)** expressing the Sense of Congress regarding the importance of protecting

intellectual property rights in the United States and worldwide on the World Intellectual Property Day. The timing was good in coinciding with an AAP press release emphasizing the problem of book piracy in China, and publicizing the U.S. Government's Special 301 decision to elevate China from the "Watch List" to the "Priority Watch List" due to its failure to stem the rising tide of piracy in IP works. A year later two similar concurrent resolutions were also passed in the Second Session, **(H.CON.RES. 380 and S.CON.RES. 87)** re-emphasizing the need for intellectual property protection globally and calling for such actions by the Russian Federation, the People's Republic of China, Mexico, Canada, India and Malaysia. Although none of the resolutions became laws, the publishing community still views Congress' recognition of the need for IP protection as an important supportive step.

In the wake of continued battling between AAP's Professional & Scholarly Publishers Division and the NIH over the latter's Enhanced Public Access Program for scientific journal articles written by NIH-funded researchers, the proposed **"Federal Research Public Access Act," (S. 2695)** was introduced in May 2006 by Senators John Cornyn (R-TX) and Joseph Lieberman (D-CT). The Cornyn/Lieberman bill, as it was generally known, would have gone much further than the NIH program in its requirement for submission of published articles to be made freely available online through government agency websites.

Not only would S. 2695 have made it mandatory, rather than voluntary, for authors of published articles based on government-funded research to submit their final, peer-reviewed manuscripts to the funding agency so that these works can be posted online for free public access within six months of publication in a journal, but it would also have expanded the reach of this requirement beyond scientific research funded by the NIH to include <u>any</u> research (including research performed by government employees) that was funded by any federal agency that spends over $100 million annually on research grants to non-employees (i.e., "extramural" research). The terms would have applied to eleven federal agencies, including the Environmental Protection Agency (EPA), National Aeronautics and Space Administration (NASA), National Science Foundation (NSF), and the cabinet-level Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, and Transportation. As Senator Lieberman was occupied with the mid-term national elections, the legislation beyond the initial referral to subcommittee did not receive any further consideration before the end of the 109th Congress. Nevertheless, as AAP continues to oppose the open access advocacy movement backing the Cornyn/Lieberman bill, it is clear that S. 2695 will be reintroduced in the new Congress in some fashion, in which case, AAP will oppose the bill again.

Meanwhile, efforts to expand the NIH policy were also the subject of legislative action last year. In June 2006, the "open access" advocates, not satisfied with the current terms and performance of the NIH policy, urged the House Appropriations Committee to report its version of the **"Labor, HHS Appropriations"** bill **(H.R. 5647)** with language that would have <u>required</u> all NIH-funded researchers to submit an electronic version of their final, peer-reviewed manuscripts upon acceptance for journal publication to PubMedCentral no later than 12 months after the official date of publication. Although the provision did not mandate that such manuscripts be made available for free online public access within 6 months after publication, AAP continued to successfully oppose <u>the change from a policy of voluntary submission to mandatory submission</u>. While the Labor, HHS appropriations bill, the main vehicle for this battle, was not enacted during the limited time left in the 109th Congress after the midterm election, AAP will have to remain vigilant when the appropriations measures are reintroduced in the new Congress.

The same issues also presented themselves in a legislative proposal earlier in the 109th Congress when, in December 2005, Senator Joseph Lieberman and 3 other senior Senate members introduced the **"American Center for CURES Act" (S. 2104),** a bipartisan bill that would have exacerbated and expanded upon the NIH Enhanced Public Access Policy. Like the later-introduced Cornyn-Lieberman bill, which would have expanded these policies beyond NIH to nearly a dozen other federal agencies, S. 2104 would have mandated that all NIH-funded researchers (and, additionally, employees of any component of the Department of Health and Human Services) submit their final, peer-reviewed manuscripts and would have made these articles freely available online to the public no later than 6 months after publication in a journal. Under the bill, a funded researcher's failure to submit a manuscript in a timely manner could have been grounds for loss of funding. AAP was relieved to see that no further action was taken on this bill in the 109th Congress following its introduction, but will expect to see some form of this bill reintroduced in the new Congress.

FREEDOM OF EXPRESSION ISSUES

USA PATRIOT
Improvement and Reauthorization Act of 2005
(H.R. 3199; Public Law No: 109-177; March 9, 2006)

NON-ENACTED LEGISLATION

Proposals to Amend the PATRIOT Act

The Congressional debate over reauthorization of certain provisions of the US PATRIOT Act of 2001 continued through the Second Session of the 109th Congress, although in a much quieter manner in 2006 than it saw during the First Session in 2005. From the publishing industry's perspective, the focus of attention in this area was Section 215 of the PATRIOT Act, which provided few safeguards for privacy and freedom of expression in authorizing the FBI to access library, bookstore and other third-party "business records" as part of an investigation into alleged terrorist activities, as well as the sunset provision applicable to Section 215 and certain other controversial provisions in the Act.

PATRIOT Act-related bills that were carried over from 2005 but received little or no attention last year included the proposed "**Freedom to Read Protection Act" (H.R. 1157)**, which was introduced by Rep. Bernie Sanders (I-VT) in order to restore the requirement that federal law enforcement agencies must show probable cause to believe the individual whose records are being sought is involved in espionage or terrorism-related activities.

However, after an exhausting year of negotiations and a number of amendments by the House and the Senate, AAP welcomed the improved legislation that emerged from a House-Senate conference committee in November 2005 and was enacted in 2006 with more acceptable civil liberties protections for Section 215 than either of the original House and Senate versions of the **"USA PATRIOT Improvement and Reauthorization Act of 2005" (H.R. 3199** and **S. 1389)**. Initially,

the differences between the two measures were significant. Under the Senate-passed version, the FBI would have had to present facts to the Foreign Intelligence Surveillance Act (FISA) court demonstrating a reason to believe that the records sought pertain to individuals suspected of espionage or terrorism and those who are in contact with them, thus reducing the possibility of a government "fishing expedition." Regarding library and bookstore records, an FBI agent would have needed prior written approval from the Director or Deputy Director of the FBI before seeking such a FISA order. Furthermore, the Senate proposed a "sunset" of Section 215 in four years, instead of ten as proposed in the House-passed bill. The conferees agreed on several key changes sought by AAP and proposed in S. 1389, including the establishment of a standard of individualized suspicion as the basis for obtaining bookstore and library records. Although they also accepted the four-year "sunset" approved by the Senate, the provision requiring "prior written approval" from the Director or Deputy Director of the FBI before seeking FISA order was not included in the conference version.

Ultimately, Congress enacted the conference version of legislation to amend the PATRIOT Act early in 2006, and that bill (**H.R. 3199)** was signed into law **(P.L. 109-177)** by the President in March of that year.

CONFIDENTIAL SOURCE ISSUES

NON-ENACTED LEGISLATION

Bills to Provide Confidential Source Protection for Journalists

The question of whether federal law should provide a "confidential source" privilege for journalists was raised in the courts in 2005 and became the subject of revised legislative proposals in both the House and the Senate during the Second Session of the 109th Congress; however, despite this activity, opposition from the Bush Administration and the inability of legislative sponsors to reach consensus on a single version of such legislation ultimately resulted in no action being taken on any of the pending bills introduced in the 109th Congress.

Identical bipartisan proposals entitled the **"Free Flow of Information Act of 2005"** were introduced by Reps. Mike Pence (R-IN) and Rick Boucher (D-VA) in the House **(H.R. 581)** and by Senator Richard Lugar (R-IN) in the Senate **(S. 340),** in February 2005, and then reemerged in revised versions in May and July of 2006. The initial bills would have established that Federal entities can compel a "covered person" (media outlets or their employees) to testify or to provide requested documents only if the testimony could not be obtained from other sources, and was vital to an investigation, prosecution or defense in a criminal case. At the same time, they also specified that no media person could be required to reveal the identity of confidential source unless the person received an opportunity from the court to resist such disclosure. After Senator Lugar introduced a revised version of his bill with Senators Chris Dodd (D-CT), Arlen Specter (R-PA), Lindsey Graham (R-SC), and Charles Schumer (D-NY) as cosponsors (S. 2831), he coordinated the introduction of further revised House and Senate versions of the "**Free Flow of Information Act of 2005" (H.R.**

3323 and S. 1419) with Reps. Pence and Boucher in July of 2006, with an added provision permitting compelled disclosure in cases where "imminent and actual harm to national security" would outweigh the public interest in protecting the free flow of information.

However, apart from a Senate Judiciary Committee hearing on S. 1419 in October 2005, Congress took no actions related to any of these versions of "shield legislation." And, although AAP was successful in working with Senate sponsors to ensure that authors and publishers of books would be covered as beneficiaries of the protections proposed in these bills, the issue of precisely who is protected and how would they be protected under such legislation will have to be tackled anew in the 110th Congress.

EDUCATION ISSUES

Higher Education Extension Act of 2005
(H.R. 3784; P.L. 109-081; September 30, 2005)

Second Higher Education Extension Act of 2005
(H.R. 4525; P.L. 109-150; December 30, 2005)

Third Higher Education Extension Act of 2006
(H.R. 6138; P.L. 109-292; September 30, 2006)

Contrary to some expectations, after an active First Session that saw the introduction of numerous proposals to reauthorize and extend the Higher Education Act of 1965, the 109th Congress made little progress on the issue in its Second Session with the exception of two bills, which advanced through committee but were not enacted when Congress adjourned. Although Congress twice in 2005 acted to extend the authorization of appropriations for HEA programs with passage of the **"Higher Education Extension Act of 2005" (H.R. 3784; P.L. 109-081)** and the "**Second Higher Education Extension Act of 2005" (H.R. 4525; P.L. 109-150)**, its efforts to give itself adequate time to enact full reauthorization legislation in 2006 before its extensions expired proved unsuccessful. After twice-more enacting extensions to give itself additional time to act on full reauthorization before the end of the 109th Congress, the best it could do in September 2006 was to further extend the authorization of appropriations for HEA programs until June 30, 2007 in the **"Third Higher Education Extension Act of 2006" (H.R. 6138; P.L. 109-292)**, so that the new Congress might have time to enact full reauthorization legislation before yet another expiration deadline is reached.

NON-ENACTED LEGISLATION

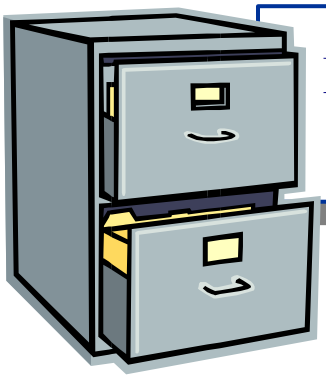
Bills to Improve Education

The two significant higher education bills that advanced during the Second Session, but were not ultimately enacted, were the proposed "**Higher Education Amendments of 2005" (S. 1614)**, which was introduced by Senate HELP Committee Chair Michael Enzi (R-WY) to revise and reauthorize certain provisions of the Higher Education Act of 1965, and the proposed **"College Access and Opportunity Act of 2005" (H.R. 609),** which was introduced by House Education and Labor Committee Chair John Boehner (R-OH) to similarly overhaul and reauthorize appropriations for a significant number of HEA programs. Among other things, both bills would have increased the allowance for books and supplies from $450 to $600 in the Work Study, Federal Perkins Loan, and the Supplemental Educational Opportunity Grants. H.R. 609 also included a non-binding "Sense of the Committee" provision listing brief "Findings" and suggested actions that "should occur to make college textbooks more affordable for students." Although S. 1614 was approved by the Senate HELP Committee and H.R. 609 was passed by the House, the bills were not reconciled through the conference process, and thus left any revision, as well as reauthorization, of HEA programs for the 110th Congress.

Among the other education bills of interest to AAP that did not survive the 109th Congress was the proposed **"Make College Affordable Act of 2005" (S. 759)**, a 2005 bipartisan proposal introduced by Senator Charles Schumer (D-NY) to amend the Internal Revenue Code to increase the tax deduction for tuition and allow a higher tax credit for the interest on student loans.

Additionally, Senator Schumer's proposed **"Affordable Books for College Act" (S. 1384)** and its identical House companion introduced by Representative Tim Ryan (D-OH) **(H.R. 3259)** saw no further action after introduction. As a response to the General Accounting Office's (GAO) college textbook pricing report, which discussed the publishing industry's efforts to use new technologies to enhance the learning experience, the two bills proposed establishment of a demonstration program in college bookstores that would allow students to rent textbooks and other course materials.

The proposed **"Building Opportunities for Our Kids Act" (H.R. 6370),** a measure introduced by Rep. Jerrold Nadler (D-NY) in December 2006, was another addition to the list of AAP-watched bills that died without making further progress after introduction in the Second Session of the 109th Congress. It aimed to amend the Elementary and Secondary Education Act of 1965 to provide additional funds for the purchase of textbooks for eligible schools and to establish a Textbook Recycling Program to facilitate the donation of textbooks for K-12 level classrooms. It remains to be seen whether this legislation, as well as the two Schumer bills, will be reintroduced in the 110th Congress.



FREEDOM OF INFORMATION ISSUES

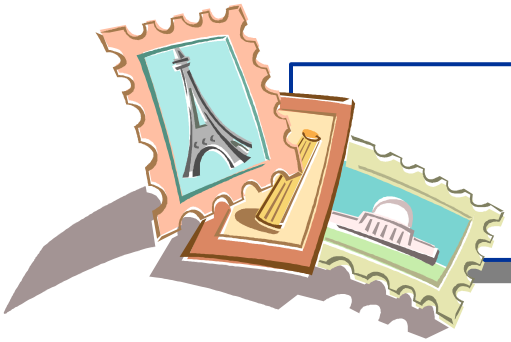
NON-ENACTED LEGISLATION

Bills to Improve Public Access to Federal Agency Records Under the FOIA

Last year proved to be very quiet regarding proposed legislation to amend the federal Freedom of Information Act (FOIA), especially in comparison with an active First Session of the 109th Congress that saw the introduction of a variety of such measures. With two exceptions, all of those initiatives died without further action beyond introduction before last year's adjournment; however, AAP expects to see several of these proposals reintroduced in the new Congress.

The proposed **"OPEN Government Act" (S. 394)**, which was introduced by Senator John Cornyn (R-TX) with bipartisan support, was approved by the Senate Judiciary Committee, but advanced no further. The bill would have provided protection against the denial of fee waivers for journalists (and authors) who lack institutional affiliation, by requiring Federal agencies to take the requester's publication history (books, articles, television and radio broadcasts) into consideration when determining eligibility for a waiver of search and copy fees. The bill also would have required the agency to assign a tracking number to such requests to indicate its status online or via phone inquiries, and would have required agencies to make a decision whether to comply with the request within 20 days of its receipt.

Another Cornyn measure **(S. 1181),** which would have required that any future legislation to establish a new exemption from disclosure under the FOIA had to be explicitly identified as such within the text of the bill, actually achieved Senate passage in June of 2005, but was never acted upon in the House.



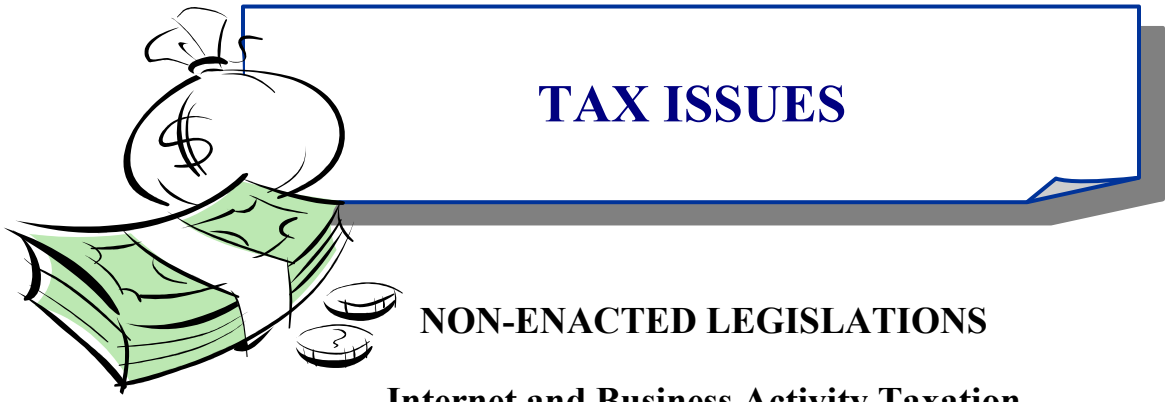
POSTAL ISSUES

Postal Accountability and Enhancement Act
(H.R. 6407; Public Law: 109-435; December 20, 2006)

The exciting news of the year was the eleventh hour passage of the first comprehensive overhaul of U.S. postal law since 1970. As supported by AAP, this legislation eliminated the health benefits payment escrow account and military pension payment requirements that placed upward pressure on

postal rates, and substantially revised the process by which postal rates are established and revised. It also restructured the authorities of the Postal Rate Commission and Postal Board of Governors.

Among other things, the legislation features reforms that would (1) shift rate regulation from its current litigation model to one tied to the Consumer Price Index for market – dominant products while permitting flexible market pricing for competitive products; (2) define "postal services" and limit USPS offering of non-postal products; and (3) give the renamed Postal Regulatory Commission subpoena power and broaden its regulatory and oversight functions. Some of these provisions, particularly those establishing new rules for the postage rate-setting process, continue to be the subject of negotiations.



TAX ISSUES

NON-ENACTED LEGISLATIONS

Internet and Business Activity Taxation

Although AAP has never adopted a formal position on any of the Internet-related tax legislation that has periodically been proposed or enacted in Congress, respecting the differing views of such initiatives that may exist between online and "brick-and-mortar" booksellers, we have monitored such legislation on behalf of our members whose own online activities continue to evolve and may become subject to such concerns.

In the spring of 2005, the proposed **"Internet Tax Nondiscrimination Act" (H.R. 1684, S. 849)**, as well as the **"Internet Consumer Protection Act" (H.R. 1685)**, were introduced in order to address the desire of some legislators and businesses to permanently prohibit State taxation of Internet access and to ban the imposition of discriminatory or multiple taxes on electronic commerce. Apart from these objectives, H.R. 1685 also proposed to revoke any State laws already in force that imposed such burdens. These initiatives sought to build upon the ground plowed by enactment of the **"Internet Tax Nondiscrimination Act of 2004" (S. 150; P.L. 108-435)**, which amended the earlier-enacted Internet Tax Freedom Act of 1998 to (among other things) extend that legislation's ban on State taxation of Internet access and on discriminatory or multiple taxes on electronic commerce until November 1, 2007; however, none of the bills advanced to enactment before the 109th Congress adjourned in December of last year.