aap

Association of American Publishers

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110th Congress
End of 1st Session Report

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110th Congress – End of the First Session Report 2007

The First Session of the 110th Congress was marked by partisan politics, as Democrats in control of Congress for the first time in a dozen years generated even greater disagreements with the Republican Administration. Consequently, inter-party disputes continued over the Bush Administration's Iraqi war policies, and a succession of stalemates between the House and Senate over the Congressional appropriations process. While most copyright initiatives were put on the legislative back-burner, a variety of legislative activities of interest to AAP members continued to percolate in both the House and Senate.

As the Second 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)** "e-commerce" taxes and **(4)** educational issues.

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/home/multicongress/multicongress.html. Simply look under either "Bill Summary" or "Bill Text," click on the icon labeled "110th Congress," and follow the instructions from there.

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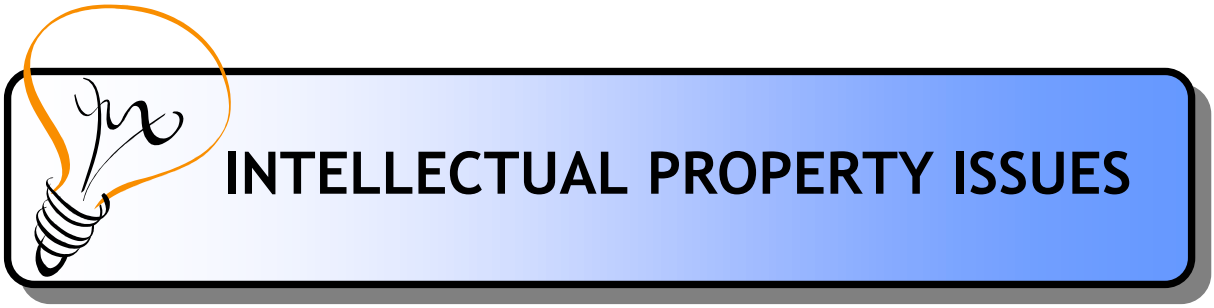


Consolidated Appropriations Act of 2008
(H.R.2764; Public Law 110-161; December 26, 2007)

America COMPETES Act
(H.R.2272; Public Law 110-69; August 9, 2007)

Although efforts to advance major patent reform legislation dominated the intellectual property agenda of Congress during the First Session of the 110th Congress, several pieces of copyright and copyright-related legislation kept AAP quite busy looking after book and journal publishers' interests.

Concerns that scientific journal publishers have voiced about the NIH Enhanced Public Access Policy since it was proposed in 2004 moved to a heightened stage early in 2007 with the appearance of a legislative proposal to make the *voluntary* manuscript submission aspect of the NIH policy *mandatory*.

Under the voluntary NIH policy, which was implemented in May 2005, NIH-funded researchers who wrote articles for publication in scientific journals were "requested" to submit an electronic version of their final, peer-reviewed manuscripts to NIH immediately upon acceptance by a journal for publication, so that the agency could make it freely available to the international online world through its PubMed Central web site no more than 12 months after the date of journal publication.

Claiming that a low compliance rate of only about 4% by NIH-funded researchers justified changing its submission policy from voluntary to mandatory, the NIH began lobbying for such a change in 2006 and finally managed to convince both the House and Senate Appropriations Committees to include obliging statutory language in their respective versions of the **Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 2008 (H.R. 3043; S. 1710)**.

Procedurally, journal publishers decried this attempt to enact the change in policy through a "rider" on appropriations legislation, without hearings or studies to assess its merits and without scrutiny from the Congressional committees that have expertise and legislative jurisdiction regarding laws governing federal scientific research programs and intellectual property rights.

On substance, they responded that changing from a voluntary to mandatory submission policy was premature, in that NIH had begun seeking the change barely a year after implementing the voluntary policy and without giving publishers an opportunity to work with the agency to raise the compliance rate. They also argued that such a change would be inconsistent with policies embodied in U.S. copyright law, insofar as it would eliminate the concept of permission for NIH's use of the copyrighted work, and effectively allow the agency to take important publisher property interests without compensation, including the value added to the article by the publishers' investments in the peer review process and other quality-assurance aspects of journal publication.

Journal publishers also argued that a mandatory policy would undermine publishers' ability to exercise their copyrights in the published articles, which is the means by which they support their investments in such value-adding operations. Journals published in the U.S. have strong markets abroad, and a government policy requiring these works to be made freely available for international distribution is inherently incompatible with the maintenance of global markets for these highly successful U.S. exports. Smaller and non-profit scientific societies and their scholarly missions would be particularly at risk as their journal subscribers around the world turn to NIH for free access to the same content for which they would otherwise pay.

AAP, working with its PSP members and the Washington DC Principles for Free Access to Science Coalition (representing over 75 of the nation's leading nonprofit medical and scientific societies and publishers), lobbied vigorously against the proposed mandatory policy throughout the year, meeting with House and Senate legislators and staff on committees with appropriations and authorizing jurisdiction over NIH, or committees with jurisdiction over copyright law and trade policies. In addition, meetings were held with key Bush Administration officials at USTR, OMB and the Department of HHS. Although these lobbying efforts produced bipartisan letters from House Judiciary Committee leaders to the House Rules Committee, demanding removal of the NIH provision from the House bill, the Appropriations Committee's prior insulating action, in adding a provison that required NIH to "implement the public access policy in a manner consistent with copyright law," blunted objections from the Judiciary Committee and allowed the House to pass the bill with the NIH provision intact. When action moved to the Senate, publishers' lobbying efforts resulted in language in the Senate Appropriations Committee report directing NIH "to seek and carefully take into account the advice of journal publishers on the implementation of this policy," as well as in a floor colloquy among several senior senators that raised several of the publishers' concerns regarding the proposed change to a mandatory policy. Unfortunately, Senate passage nevertheless ensued with the NIH provision intact.

After Congress passed the conference report that reconciled the differing House- and Senate-passed appropriations bills, President Bush quickly vetoed this legislation, based on a Statement of Administration Policy that, among other things, criticized the NIH

provision. Congress was unable to override the President's veto, but that did not mark the end of the NIH policy provision, as year-end budgetary pressures led Congress to wrap all of the pending appropriations measures – including a reduced-funding version of the Labor, HHS legislation – into the omnibus **Consolidated Appropriations Act of 2008 (H.R. 2764; P.L. 110-161)**, which was signed into law in December. The mandatory NIH policy was enacted as Section 218 of Division G, Title II of that Act.

One of the frustrating ironies of the lobbying efforts against the NIH mandatory policy was the inability to get legislators to focus on the fact that last August, even as the proposed NIH policy was under legislative consideration, Congress took a very different approach to ensuring public access to the results of government-funded scientific research when it reauthorized activities of the National Science Foundation in the "**America COMPETES Act (H.R. 2272; P.L. 110-69)**." Instead of mandating free public access to articles published by private sector journals, Congress instructed the NSF 'to provide the public *a readily accessible summary of the outcomes of NSF-sponsored projects*,' along with *'citations to journal publications'* in which funded researchers have published articles regarding such research." (emphasis added) With the House Science Committee acting through the regular legislative process, Congress thus not only avoided controversies over intellectual property interests in science publishing, but also recognized the value of publication in peer-reviewed science journals and the increasing availability of journal articles from a variety of sources.

Following the enactment of the NIH mandatory policy directive, AAP has petitioned the Department of HHS to conduct a public notice-and-comment rulemaking prior to implementing the new policy. AAP will continue to pursue publisher interests in the implementation process, and will work to ensure that similar submission mandates for other agencies do not come into effect.

During the past three years, AAP, along with other representatives of copyright-based industries, periodically engaged in ongoing discussions with the U.S. Department of Justice and key staff from the House and Senate Judiciary Committees regarding the development of a package of legislative proposals that would enhance civil and criminal enforcement capabilities for copyright owners, and provide restructuring and additional resources for interagency efforts within the federal Executive Branch to address piracy and counterfeiting of copyrighted works in the international arena. Although AAP did not pursue any specific requests in this process, it was supported by other industry reps in voicing its concerns about opening the DMCA to possible amendment, as well as the possibility that certain controversial proposed amendments (including, e.g., one that would make it a felony to "attempt to infringe") might be viewed as overreaching by copyright interests.

Not surprisingly, these discussions eventually resulted in the introduction last year of two different packages of proposed legislation concerning copyright enforcement. In the Senate, the chairman and ranking member of the Judiciary Committee introduced the **Intellectual Property Enforcement Act of 2007 (S. 2317)**, and in the House, the bipartisan leadership of the House Judiciary Committee and its Intellectual Property subcommittee introduced and quickly held a hearing on the **Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2007 (H.R. 4279)**.

Both bills contain a variety of measures to enhance civil and criminal copyright enforcement in specific ways, while also proposing to revamp the organizational structure and resources available within the federal Executive Branch for interagency coordination of intellectual property enforcement efforts in the international arena.

One notable provision that is common to both packages is a proposal to amend Section 411 of the Copyright Act, which currently says that "no action for infringement" of any U.S. work can be instituted until registration of the copyright claim has been made. The proposed amendment would revise this provision to clarify that a failure to register affects only the ability to bring civil actions for infringement, not criminal actions. Both packages also contain proposed amendments intended to harmonize current civil and criminal asset forfeiture provisions as they apply across a variety of intellectual property laws. The civil forfeiture provisions in the House bill were criticized by witnesses at the House hearing as creating penalties that would be disproportionate to the offenses involved, and would apply not only to infringing goods but to computers, cars, houses, and arguably any other real or personal property under the proposed language embracing "any property used, or intended to be used, to commit or substantially facilitate the commission of an offense."

Despite earlier discussions, the Senate bill contains proposed amendments to the DMCA that focus on "harmonizing" the definitions of "trafficking" and "private gain" in that Act with other criminal statutes that use those terms. It also contains a controversial provision, derived from earlier legislative proposals, which would allow the U.S. Attorney General to bring civil copyright enforcement actions in lieu of criminal actions in circumstances where the infringing conduct would also qualify as a criminal offense. Critics have derided this provision as an unnecessary and unjustifiable effort to effectively turn the Justice Department into a private law firm for copyright owners; however, supporters of the provision claim it would ensure that the Justice Department could act against criminal infringers even in cases where criminal actions would be difficult to bring.

Although the House bill does not contain proposed amendments to the DMCA, it has generated further controversy around a proposal to change the existing rule on statutory damages that treats all parts of a compilation or derivative work as one work for purposes of such awards. The provision in the House bill would give federal courts discretion to make multiple awards of statutory damages in such cases, where the constituent parts of a compilation, or a derivative work and any previous existing work on which it is based, can be considered "distinct works having independent economic value." Critics claim that

current law has functioned well, and that the proposed change in law would result in awards of statutory damages that are greatly disproportionate to the harm suffered by the copyright owner. Although AAP members routinely publish derivative works, as well as anthologies and other types of compilations, they have not called for a change in current law and have concerns regarding how such a change might impact them as users of third-party works who might be sued for infringement in such cases.

Given the tighter and shorter election-year calendar that confronts the 110th Congress as its second session gets underway, it is likely that the proponents of these measures will have to work quickly to fashion a single "package" of copyright legislation if enactment this year is a serious goal. Such a "package" might also include provisions from one or more of the standalone copyright measures that are currently pending in Congress, or are shortly expected to be introduced. In the former category would be bills like the proposed **FAIR USE Act (H.R. 1201)**, the proposed **Performance Rights Act (H.R. 4789/S. 2500)**, the proposed **PERFORM Act (S. 256)**, and various measures proposed to nullify or delay implementation of copyright royalty rates recently determined to apply to Internet "webcasting" of sound recordings. In the latter category, one might expect to see the introduction of an "orphan works" bill that would pick up the development of that legislation where it was left by the previous Congress after a bill approved by the House Intellectual Property Subcommittee in May 2006 expired upon adjournment later that year without further advancement.

AAP has been supportive of enacting "orphan works" legislation, and can be expected to be deeply involved in Second Session efforts to revive the issue. With the exception of Rep. Boucher's proposed FAIR USE Act (H.R. 1201), which AAP opposes and has previously opposed in earlier versions in previous Congresses, the other pending copyright bills are either unrelated to the interests of book and journal publishers or, as in the case of the pending House and Senate "package" bills, find AAP taking a "wait-and-see" approach to proposed amendments that publishers may consider useful or otherwise acceptable but has not actively advocated.

FREEDOM OF EXPRESSION ISSUES

Bills to Enhance National Security and to Protect Civil Liberties

Since the enactment of the USA PATRIOT Act little more than a month after the tragic events of September 11, 2001, AAP has supported legislative proposals to cut back on the broadened "national security letter" (NSL) authority that was given to the FBI under that legislation. Despite denials of abusive use by the FBI, Congressional hearings and reports from the Justice Department have revealed highly dubious uses of the FBI's sweeping administrative power to demand from any entity or organization records relating to identified individuals, without probable cause or judicial review but subject to a "gag order" prohibiting the recipient from disclosing the existence of the letter. For example, in August 2005, it was disclosed that the FBI used a NSL to demand records from the Library Connection, a consortium of 26 Connecticut libraries, including records concerning borrowed reading materials and Internet usage. Although the ensuing controversy eventually resulted in the FBI's abandonment of its demand, it took action by two federal courts to lift the "gag order" that prevented the libraries from publicly discussing receipt of the NSL.

Although federal courts have held the NSL provisions of the PATRIOT Act to violate both the First Amendment and the constitutional doctrine of separation of powers among the three branches of the Federal Government, both before and after Congress amended the provisions as part of its reauthorization of the PATRIOT Act in March 2006, opponents of this abusive authority continue to focus on legislation to curb abusive use of NSLs in light of those aspects of the 2006 amendments that added specific penalties for non-compliance or disclosure.

AAP continues to support the proposed **National Security Letters Reform Act (H.R. 3189)**, which was introduced by Rep. Jerry Nadler (D-NY) in July 2007, as well as the bill's Senate counterpart, **NSL Reform Act (S. 2088)**, which was introduced two months later. Both bills would limit the use of NSLs to criminal investigations where the records sought concern suspected spies, foreign powers or individuals suspected of related criminal activity. Unfortunately, neither measure has been the subject of legislative action since its introduction.

Bills to Provide Confidential Source Protection for Journalists

As in the previous Congress, highly-publicized investigations and court actions, in which journalists were subject to demands to reveal the identities of their confidential news sources, sparked continued debate over whether federal law should provide a "confidential source" privilege for journalists. Although unprecedented progress was made in 2007, when the House passed the **Free Flow of Information Act (H.R. 2101)** and the Senate Judiciary Committee approved a different version of identically-titled legislation **(S. 2035)**, continued opposition to federal "shield law" legislation from the Bush Administration and the inability of advocates to reach consensus on a single version may ultimately prevent enactment in this Congress.

The chief disputes over the terms of the legislation concern the scope of the privilege, the nature of permitted exceptions, and the question of who would be entitled to claim protection under the privilege. Starting from the premise that journalists should have some protection from being compelled by a Federal entity to produce documents, provide testimony, and identify confidential sources in connection with any "matter arising under Federal law," the House-passed bill would exempt a "covered person" from having to comply with a subpoena requiring documents or testimony, unless a court, after affording such "covered person" notice and an opportunity to be heard, determines that all reasonable alternative sources for the information sought have been exhausted; there is a reasonable belief that a crime occurred and the information sought is critical to the resulting investigation, prosecution or defense; or, the information sought is critical to the successful completion of a non-criminal proceeding that is based on information provided by a third-party. Where the testimony or documents sought "could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source," the privilege would attach unless disclosure of the identity of such source is "necessary" to (1) prevent or identify the perpetrator of an act of terrorism or significant and specified harm to national security; (2) prevent imminent death or significant bodily harm; or (3) identify someone who has disclosed a trade secret, individually identifiable health information, or nonpublic personal information about any consumer, in violation of federal law; or (4) is "essential" to identify, as part of a criminal investigation or prosecution, a person with authorized access to classified national security information who disclosed such information without authorization; and the court also determines that "the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information." The bill further provides an exception for "criminal or tortuous conduct," generally excluding an otherwise "covered person" from asserting the privilege if the information sought was obtained by such person through "eyewitness observation" of alleged criminal conduct or as the result of the commission of alleged criminal or tortuous conduct by such person.

With the exclusion of certain persons designated as a foreign power or agent of a foreign power, or persons affiliated with organizations or entities designated as terrorists or terrorist organizations, the House-passed bill defines a "covered person" as one who "regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of" such person. It defines "journalism" as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

In determining who should be eligible to claim the protection of the privilege provided by the bill, legislators argued over whether the coverage of "bloggers" would unreasonably extend the privilege to any person with Internet access. The requirement that a "covered person" must engage in the described activities "for a substantial portion of the person's livelihood or for substantial financial gain" reflect the majority desire to restrict, if not entirely eliminate, the ability of "bloggers" to claim the bill's protections. Unfortunately, this qualification may also exclude freelancers and many other types of writers and authors who cannot meet its terms. The bill approved by the Senate Judiciary Committee (S. 2035), which generally tracks the House-passed bill in most respects, contains the same definition of "covered person" but without this qualifying language.

Prior to the introduction of H.R. 2102, AAP expressed concerns that explicit reference to authors and publishers of books should be included in the bill to ensure that they would be able to assert the privilege against compelled disclosure. Similar expressions of concern that use of the term "journalist" to define parties eligible to claim the privilege had resulted in the addition of specific references to "book" authors and publishers in proposed "shield law" legislation in the previous Congress; however, with respect to H.R. 2102, the news media advocates who are viewed as the primary constituency for this legislation resisted such specificity, preferring the broader, less specific reference to "journalism" as a way of blurring the controversy over "blogger" coverage. AAP was successful in insisting that the definition of "journalism" should include "news *or information* that concerns local, national, or international events or other matters of public interest for dissemination to the public," and should not be limited to "current" or "contemporary" events, so that books – which may concern matters of historical interest and take a more time to produce than "hot news" – would not be excluded from a broad reading of the definition.

AAP will continue to advocate enactment of a federal "shield law" this year, and will continue to press for assurance that authors and publishers of books are acknowledged to be "covered persons" eligible to assert the privilege against compelled disclosure.

Bills to Improve Public Access to Federal Agency Records

OPEN Government Act Of 2007

(S. 2488; Public Law No.110-175; December 31, 2007)

With the Bush Administration continuing to polish its reputation as among the most secretive in the history of this country, Congressional efforts to improve public access to federal records and promote accountability and openness in the Executive Branch, continued during the first session of the 110th Congress through the introduction of a variety of House and Senate bills. While most of this proposed legislation has received little or no further legislative attention after its introduction, two measures that sought to improve existing federal records legislation managed to advance through the legislative process.

The **OPEN Government Act (S. 2488; P.L. No. 110-175)** was enacted as a result of legislative activity from both sides of Congress. Bills such as the proposed **Freedom of Information Act Amendments (H.R. 1309)** and the proposed **OPEN Government Act (H.R. 1326)** originated in the House, but played important roles as stepping stones to enactment of the similar Senate bill. The bipartisan team of Senate Judiciary Committee chair Patrick Leahy (D-VT) and Committee member John Cornyn (R-TX) led the way toward enactment with the reintroduction of legislation that they had proposed but were unable to advance in the previous Congress. The initial version of the proposed **OPEN Government Act (S. 849)** passed through the Senate just before the August recess in 2007, but then stalled for several months in the House Oversight and Government Reform Committee. Negotiations with the House committee leadership resulted in Senator Leahy's introduction of a slightly revised measure **(S. 2427)** that was then further amended to address additional concerns of the House and the Bush Administration. The final version of this legislation **(S. 2488)** was immediately passed by both houses and signed into law by President Bush less than a week after its introduction in December.

As enacted, the OPEN Government Act was primarily intended to ease agency compliance and reduce excessive delays in agency response to requests for agency records under the Freedom of Information Act (FOIA). Specifically, it ensures that any member of the news media, including freelance journalists, bloggers, and anyone writing for free magazines, even without a prior history of publication, may be eligible for a waiver of search and copying fees. In addition, it requires an agency to refund FOIA search fees if it does not fulfill the related request within the 20-day statutory time period**.** In response to the problem of growing FOIA litigation costs, the legislation creates an Office of Government Information Services within the National Archives, which the responsibility to mediate agency-level FOIA disputes in order to resolve them without litigation. Finally, in order to help the public and the news media monitor the status of their FOIA requests, the Act creates a tracking system and establishes a hotline service for all federal agencies, where requesters may make inquiries either by telephone or via the Internet.

Meanwhile, the **Presidential Records Act Amendments of 2007 (H.R. 1255)**, which was introduced by Rep. Henry Waxman (D-CA), chair of the House Oversight and Government Reform Committee in March of last year, was a response to a restrictive Executive Order issued by President Bush in 2001 that created unjustified, new obstacles to public access to presidential records widely viewed as inconsistent with the letter and spirit of the Presidential Records Act of 1974.

The Presidential Records Act, enacted by Congress after the Watergate scandal raised questions about the wisdom of letting a former president have custodial authority over presidential records, established that such records belong to the American people, not to the president. It gave the Archivist of the United States custody of the records of a former president, with the "affirmative duty to make such records available to the public as rapidly and completely as possible…" Under its provisions, a president may restrict access to records for up to 12 years, after which records are to be released in accordance with the Freedom of Information Act, excluding application of FOIA's `deliberative process' exemption. The Presidential Records Act recognizes presidential authority to assert executive privilege, maintaining the *status quo* with respect to whatever constitutionally-based privilege may be available to an incumbent or former President.

The 1974 Act was first applied to the records of former President Reagan, pursuant to the terms of an Executive Order he had issued to establish a process for dealing with potential executive privilege claims over records covered by the Act. The Executive Order required the Archivist to give incumbent and former presidents thirty calendar days advance notice before releasing presidential records. It authorized the Archivist to release the records at the end of that period unless the incumbent or former president claimed executive privilege, or unless the incumbent president instructed the Archivist to extend the period indefinitely. If the incumbent president decided to invoke executive privilege, the Archivist would withhold the records unless directed to release them by a final court order. If the incumbent president decided not to support a former president's claim of privilege, the Archivist would decide whether or not to honor the claim.

In November 2001, President Bush issued another Executive Order that overturned the Reagan Executive Order and gives current and former presidents and vice presidents broad authority to withhold presidential records or to delay their release indefinitely. In addition, it requires the Archivist to honor executive privilege claims made by either incumbent or former presidents; even if the incumbent disagrees with the former president's claim, the Archivist must honor the claim and withhold the records.

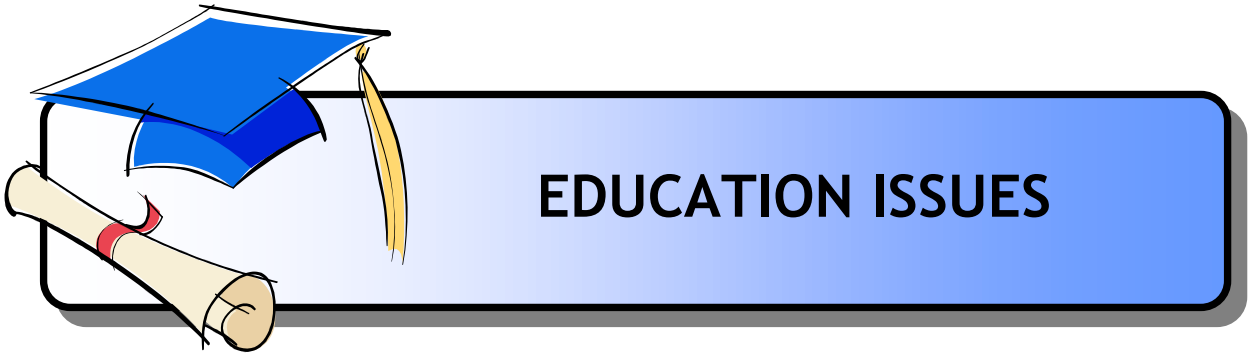
Unlike the Reagan Executive Order, which stated that records were to be released on a schedule unless some other action occurred, the Bush Executive Order states that records will be released only after actions by former and current presidents have occurred. Therefore, if either the current or former president does not respond to the Archivist, the records would not be released. Moreover, under the Bush Executive Order, designees of

the former president may assert privilege claims after the death of the president, in effect making the right to assert executive privilege an asset of the former president's estate. The Executive Order also authorizes former vice presidents to assert executive privilege claims over their records.

H.R. 1255 would create a set of guidelines regarding the process of publicly disclosing any presidential records for the first time. The bill requires that both the incumbent and the former President during whose term the documents were created should be notified of such action, and grants them the right to file privilege claims to hold the records for a specified time if necessary to review the files. However, without any time extension request, the records would become publicly available within 20 days of providing initial notice to the incumbent and former presidents.

Despite unsurprising opposition from the Bush Administration, H.R. 1255 passed the House in March of last year, and was approved by the Senate Committee on Homeland Security and Governmental Affairs without amendment just three months later. Unfortunately, since that time, the bill has been the subject of successive "holds" in the Senate, first by Senator Jim Bunning (R-KY) and then by Senator Tom Coburn (R-OK), which have kept it from being considered by the full Senate. Although there may be hope that the Senate will consider the bill before adjournment, it is likely that passage will result in a presidential veto.

The rest of the "freedom of information" bills introduced during the first session of the 110th Congress have not yet received any consideration by the committees of jurisdiction. The **Faster FOIA Act (H.R. 541)**, proposed by Rep. Brad Sherman (D-CA), would establish a Commission on Freedom of Information Act Processing Delays to conduct a study concerning methods to reduce delays in processing FOIA requests submitted to federal agencies. Subsequent to the introduction of that bill, Rep. Dennis Cardoza (D-CA) proposed further amendments to improve transparency of government operations in the **Freedom of Information Improvement Act (H.R. 1775).** That bill would bar treating federal contracts as privileged confidential business information or trade secrets under the FOIA, and would require federal agencies to provide access to federal contract records pursuant to FOIA requests except for specific information demonstrated to be proprietary to private persons.



College Cost Reduction and Access Act of 2007
(H.R. 2669; Public Law No.110-84; September 27, 2007)

Improving Head Start for School Readiness Act of 2007

(H.R. 1429; Public Law No.110-134; December 12, 2007)

During the past five years, at the beginning of each academic semester, there has been a steady drumbeat in the news media complaining about the prices students must pay for college textbooks and the perceived reasons for the claim that prices are unjustifiably high. These complaints have continued despite a 2005 study by the U.S. Government Accountability Office, which concluded that textbook prices have been largely driven by publishers' investments in additional instructional materials and new technologies in response to faculty needs and to enhance student success. Similarly, efforts to enact federal legislation addressing the cost of college textbooks have continued, despite a subsequent study published in May of last year by the Advisory Committee on Student Financial Assistance, a Congressionally-chartered federal advisory committee, which recommended against enactment of federal legislation that would compel stakeholders to take specific actions, impose price controls, or condition federal funding eligibility on particular actions by colleges with respect to textbook pricing.

An opportunity for proposed federal legislation on college textbooks loomed with the need for Congress to reauthorize the Higher Education Act of 1965 ("HEA"), which was last formally reauthorized in 1998 and, since 2004, has been maintained in effect only by a long series of temporary extensions that did not make substantive changes to the Act. Having already separately addressed reauthorization of those parts of the HEA that concern student loans and grants by enacting the **College Cost Reduction and Access Act (H.R. 2669; P.L. No. 110-84)** last September, key House and Senate committees were now preparing separate legislation to reauthorize the substantive programs and policies of the HEA.

Taking up that challenge, Senator Richard Durbin (D-IL) and Rep. Julia Carson (D-IN) introduced identical measures that would establish federal policy with respect to the issue of college textbook affordability. Among other requirements, Senator Durbin's proposed **College Textbook Affordability Act (S. 945)** and Rep. Carson's proposed **College Textbook Affordability and Transparency Act (H.R. 3512)** would have required publishers informing teachers about available textbooks or supplements to include written

information concerning: (1) the price the publisher would charge the bookstore associated with such institution for such items; (2) the full history of revisions for such items; and (3) whether such items are available in other formats, including paperback and unbound, and the price the publisher would charge the bookstore for items in those formats. The bills also would have required any publisher that sells a textbook and any accompanying supplement as a single bundled item to also sell them as separately priced and unbundled items.

However, working with the sponsors of the legislation, as well as with the leadership and staff of the House Education and Labor Committee, AAP was able to negotiate a number of changes in these proposed requirements before they were included in the **College Opportunity and Affordability Act (H.R. 4137),** the primary House vehicle for reauthorizing the substantive programs and policies of the HEA. The revised language would allow publishers to provide faculty with a list of substantial content revisions, rather than a full list of all changes, as originally proposed; provide an exemption from the requirement to "unbundle" packages which include third-party materials that cannot be sold separately; and, add flexibility for publishers providing information on custom textbooks.

When the House Education and Labor Committee took up H.R. 4137 in November, AAP had to fight for improvements in the two proposed provisions affecting college textbook publishers, which sought to (1) expand transparency in textbook marketing and (2) make alternative formats of print course materials more readily available to students with print disabilities.

On textbook transparency, AAP would obtain new language to enable the use of alternative means of communication between publishers and faculty, such as through email or websites, to avoid unnecessary additional burdens and cost increases as a result of forcing publishers to provide price and product information "in writing" on paper.

On the accessibility issues, however, AAP first had to convince Rep. Raul Grijalva not to offer an amendment proposed by the National Federation of the Blind (NFB) that would have basically extended the requirements of the IDEA Amendments of 2004 to higher education. AAP spent a great deal of time explaining to Rep. Grijalva and his staff, along with Committee staff, why the 2004 legislation, which AAP had worked to craft and enact, was designed for elementary and secondary education students and would not work on the higher education level. The alternative provisions that resulted from these negotiations were added to H.R. 4137 and consequently approved by the House Committee in mid-November, providing for establishment of a two-year federal Commission to study the accessibility issue and a three-year grant program for model demonstration projects. Hopefully, this compromise will give AAP some breathing room to continue developing an industry-based proposal for addressing the needs of college students with print disabilities, while also giving AAP the ability to argue that enactment of legislation in this

area by individual States is neither necessary nor appropriate in light of the federal legislation.

Although AAP took no position on them, it is worth noting a set of provisions in H.R. 4137, as reported by Committee, that were advocated by the motion picture and music industries in an effort to address the problem of illegal peer-to-peer "file-sharing" by college students of unauthorized copies of motion pictures and recorded music through campus Internet networks. Typically, efforts to address these problems have focused on proposed amendments to the federal Copyright Act, which means legislation within the jurisdiction of the Judiciary committees. However, in an effort that bears watching by AAP regarding its own members issues with so-called "electronic reserves" and other unauthorized uses of copyrighted works in the form of electronic course content, these copyright-based industries have taken their efforts to the committees with jurisdiction over key legislation affecting the institutions of higher education that they need to enlist in their efforts to combat these kinds of activities on campus.

Under the heading of "Campus-Based Digital Theft Prevention," provisions in H.R. 4137 would direct institutions that receive funds under Title IV of the HEA to annually inform students about copyright law and campus policies on peer-to-peer copyright infringement; report on institutional policies and actions to prevent, detect, and punish peer-to-peer infringements by students; and, "to the extent practicable," develop plans to offer alternatives and explore technology-based deterrents to illegal downloading and peer-to-peer distribution of intellectual property.

Not surprisingly, the higher education community is vigorously opposing these provisions as draconian threats against continued funding eligibility, although it is unclear how significant they would be in practice if enacted. The report of the House Education and Labor Committee, in approving these provisions, attempted to clear up some "misperceptions" about them by noting that "no financial aid shall be taken away from colleges and students who engage in illegal file sharing" and that "the bill does not mandate the use of any particular alternative plan by colleges…"

AAP will continue to work with key House members and staff to secure additional improvements in the textbook-related provisions of H.R. 4137 when the bill is scheduled for consideration by the full House. Given Senate passage last July of its own version of this legislation, the proposed Higher Education Amendments (S. 1642), without any provisions concerning college textbooks or accessibility, an expected House-Senate conference to agree on a final version of HEA reauthorizing legislation may give AAP an additional opportunity to deal with any problems that might remain in the House-passed version of H.R. 4137.

Another major educational reauthorization effort successfully achieved during the first session of the 110th Congress was the reauthorization of the Head Start program, which has been a cornerstone federal education "safety-net" program that ensures poor children are provided with education, nutrition and health services before kindergarten.

Two bipartisan measures to improve and reauthorize Head Start were introduced early last year. The **Improving Head Start Act of 2007 (H.R. 1429),** which was passed by the House in May, had a number of features that were recognized by AAP as important to educational and test publishers and literacy improvement. These included funding to give as many as 10,000 more children access to the program in 2008; provisions for research-based practices to support the growth of children's pre-literacy and vocabulary skills; a prohibition on further use of the National Reporting System, a testing system that had been criticized by child development experts, including AAP members; and, new requirements for teacher qualifications. In June, action moved to the Senate, where the **Head Start for School Readiness Act of 2007 (S. 556)** was passed, with additional provisions for establishing an Early Care and Education Council in each state to develop a coordinated and comprehensive system of early childhood education and development; aligning standards and services with state early learning standards; and, supporting National Academy of Sciences review of child outcomes and assessments.

After differences between the two versions of the legislation were resolved in conference, the **Improving Head Start for School Readiness Act of 2007 (H.R. 1429; P.L. No. 110-134)** was passed by Congress and signed into law in December**.**

In addition to HEA and Head Start reauthorization, the other major daunting task remaining on the education agenda of the 110th Congress is reauthorization of the No Child Left Behind (NCLB) Act, which was enacted in 2002 as a successor to the Elementary and Secondary Education Act and has been considered the major domestic legislative achievement of the Bush Administration.

Although enacted with strong bipartisan support, this federal law has increasingly become the subject of controversy regarding its effectiveness and the repeated refusal of the Bush Administration to fully fund requirements that the NCLB Act imposes on State and local educational agencies. As the NCLB Act approached its 5-year reauthorization deadline in March of last year, the debate over the Act's merits breached partisan lines, prompting introduction of the **Academic Partnerships Lead Us to Success (A PLUS) Act (H.R. 1539**) by 64 Republican members of Congress who assert that the NCLB Act has improperly interfered in State and local decision-making on education and has produced a number of other negative impacts.

AAP's School Division developed a position paper on the extension of NCLB, which was distributed to Members of Congress last March. The instructional programs, services, and assessments developed by AAP members play a critical role in NCLB programs; therefore,

AAP expressed its strong support for the reauthorization of the Act. Specifically, in order to help all students attain academic proficiency and to close achievement gaps, publishers recommended: 1) access to up-to-date instructional materials in the classroom and at home; 2) authorization and expansion of reading programs for adolescents, such as the Striving Readers Program; 3) access to a selection of instructional materials, and assurance that programs implemented under the Reading First program should continue to meet rigorous and scientifically-based criteria; 4) continuation of funding to expand math and science programs; 5) strengthened and expanded annual assessment systems for improved teaching and learning; 6) leveraging technology; and 7) improving teacher quality through training to effectively use and integrate instructional materials, assessments and data.

Despite much activity surrounding NCLB reauthorization last year, the process ground to a halt in November, and Congressional leaders announced that they expected no further action before the end of First Session. While both the House and Senate education committees have distributed discussion drafts of the reauthorization bill, neither committee has been able to formally introduce legislation. In the House, reauthorization efforts have halted due to a protracted fight over performance pay measures for teachers. Meanwhile, the two top lawmakers on the Senate Education Committee – Sen. Edward Kennedy (Chairman) and Sen. Mike Enzi (ranking minority member) did not believe that the Committee would consider NCLB until early 2008.

Since NCLB reauthorization did not occur during the First Session, the current law has been temporarily extended to remain in effect as Congress considers making a final thrust at reauthorization in 2008, or until a new president and a new Congress can address it in 2009.

INTERNET TAX ISSUES

Internet Tax Freedom Act Amendments Act of 2007
(H.R. 3678; Public Law No.110-108; October 31, 2007)

Another area where Congress moved quickly last year to renew an expiring federal law concerned Internet taxation.

The Internet Tax Freedom Act of 1998 (ITFA) created a moratorium on multiple and discriminatory taxes and Internet access taxes for three years. ITFA expired in 2001, but was extended by Congress until November 1, 2003. Advocates of a permanent moratorium sought to permanently prohibit taxes on Internet access and multiple and discriminatory taxes on electronic commerce, while phasing out the "grandfather clause" that permitted some state and local governments to continue to collect certain Internet access taxes. It also proposed to change the definition of "Internet access" to cover high-speed DSL, cable modem, wireless, satellite and dial-up services to ensure that they are covered by the prohibition and exempt from state and local taxation.

But opponents of that approach argued that such legislation would constitute an unfunded federal mandate to state and local governments, costing these deficit-ridden governments billions of dollars in desperately needed potential tax revenues. They also claimed that the bill, by altering the definition of "Internet access" to include services that are already being taxed, could further result in a substantial loss of revenue to already struggling states. State and local governments also raised a concern that Internet access providers could begin to "bundle" products and refer to the packages as providing "Internet access" in order to avoid being taxed.

The enacted compromise "Internet Tax Nondiscrimination Act of 2004" (S. 150; P.L.108-435) changed the definition of access service to exclude telecommunications services, except to the extent these are used by an Internet access provider to provide Internet access. It also changed the definition of "tax on Internet access" to include any tax on Internet access regardless of whether it is imposed on a provider or purchaser of such service and regardless of the terminology used to describe the tax. The legislation extended the ban on State taxation of Internet access and on multiple or discriminatory taxes on electronic commerce until November 1, 2007, while "grandfathering" until that date the Internet access taxing authority of States that had such a tax prior to the enactment of IFTA in 1998.

During the 109th Congress, a number of Internet tax measures were introduced to build upon the ground plowed by the 2004 Act, but none were enacted.

Early in the first session of the 110th Congress, the **Permanent Internet Tax Freedom Act of 2007 (S. 156; H.R. 743)** was introduced in the House and Senate in anticipation of the expiration of the 2004 Act in November 2007. This legislation would have permanently prohibited state and local taxation of Internet access and discriminatory or multiple taxes on electronic commerce, but it made no progress in either body despite bipartisan sponsorship.

Several other bills were subsequently introduced, with a less ambitious goal merely extending the moratorium for another four years, e.g., the proposed **ITFA Extension Act of 2007 (S. 1453),** but these also received little attention.

In September, as the clock ticked toward expiration of the ITFA, the chair of the House Judiciary Committee, Rep. John Conyers (D-MI), introduced the **ITFA Amendments Act of 2007 (H.R. 3678).** A week later, Senator John Sununu (R-NH) reintroduced the language of S. 156 in the **Permanent Internet Tax Freedom Act of 2007 (S. 2128).** During the following three weeks, H.R. 3678 moved quickly through House and was received in the Senate, where Senator Sununu amended the bill during Senate floor passage. Shortly thereafter, the Senate-amended version was approved in the House and signed into law by President Bush just one day before the ITFA was slated to expire.

As enacted, the **ITF Act Amendments of 2007** extended the existing moratorium on state and local taxation of Internet access and electronic commerce, as well as the "grandfathered" exemptions from that moratorium for States with previously enacted Internet tax laws, until November 1, 2014. In a complicated set of provisions, it expanded the definition of "Internet access" to include related communication services, such as emails and instant messaging, and redefined "telecommunications" to include unregulated non-utility services, such as cable service. The new law also repealed an earlier exception from the moratorium for taxing "Voice over Internet Protocol" (i.e., Internet VoIP telephony).

As with previous enactments on these matters, AAP took no position on this legislation, recognizing that online businesses and brick-and-mortar enterprises hold different views on the various issues involved. However, with the expectation that advocates of a permanent moratorium will continue to seek one, and that their efforts could implicate broader issues regarding the collection of sales tax for out-of-state purchases, AAP will continue to monitor Internet tax issues as they arise in the legislative context and inform its members if their interests are likely to be affected.