

Report on Washington Office Activities

July – December, 2004

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I. Budget/Appropriations

This fall, Congress passed three continuing resolutions to keep the government funded while it considered several appropriations bills. The budget process finally concluded on December 8, 2004, when President Bush signed the fiscal year 2005 omnibus appropriations bill (H.R. 4818; P.L. 108-447) into law. The bill was sent to the President after the House of Representatives voted to pass a resolution stripping from the omnibus appropriations bill a tax provision that set off a fiery jurisdictional dispute. The provision, inserted by House appropriations aides, would have given appropriators access to confidential IRS tax returns.

The \$388.4 billion spending package wraps up nine separate appropriation bills and includes a 0.80% across-the-board cut in all non-defense and non-homeland security spending to pay for some program increases.

After the across-the-board cut is taken into account, the Library Services Technology Act (LSTA) programs at the Institute of Museum and Library Services will receive \$205,951,000. This is an increase of \$7.7 million over fiscal year 2004, but is \$14.5 million below the President's budget request. As a result, the State Grants program would receive \$162,704,000 (\$5 million above last year and \$7.7 million below the President's budget); the Native American Library Services would receive \$3,472,000 (\$266,000 more than last year and \$203,000 less than the President's request); the National Leadership Grants would receive \$12,301,000 (\$1 million above last year and \$4.2 million below the President's request); and the Librarians for the 21st Century program would receive \$22,816,000 (\$2.9 million increase over FY 2004 and \$184,000 below the President's request).

The omnibus funds the Improving Literacy Through School Libraries program at \$19,683,264, a \$158,736 cut from FY 2004. This level is also over \$3 million below what the Senate had approved back in September. At this level, the Department of Education will be able to fund fewer than 100 grants for the approximately 3,000 eligible local education agencies.

For the Government Printing Office's Superintendent of Documents, the omnibus provides \$31,697,000, a cut of \$2.5 million below FY 2004 and \$1.3 million the President's budget request.

For more detailed information on other library-related program funding levels, please visit ALA's federal funding at:

<http://www.ala.org/ala/washoff/WOissues/washfunding/funding.htm>

National Museum and Library Services Board

On November 20, 2004, the U.S. Senate unanimously confirmed the following nominations for the National Museum and Library Services Board: Beverly Allen, Gail Daly, Donald Leslie, Amy Owen, Sandra Pickett, Renee Swartz, and Kim Wang.

The 20-member board advises the Institute of Museum and Library Services and makes recommendations for the National Award for Museum and Library Service.

Reauthorizations

IDEA

Congress passed and the President recently signed into law (H.R. 1350; P.L.: 108-446) legislation reauthorizing the Individuals with Disabilities Education Act (IDEA). The legislation includes libraries as eligible partners in the education of children with disabilities.

Delayed

Considerations of reauthorizing the Workforce Reinvestment and Adult Education Act (H.R. 1261 and S. 1627), the Higher Education Act and Head Start (H.R. 2210/S.1940) have been delayed until the next Congress.

II. Telecommunications and the E-rate

Not surprisingly, the E-rate telecommunications discount program for public libraries and K-12 schools came under scrutiny during this election year. There were three hearings this summer and fall before the House Telecommunications and Internet Subcommittee (part of the House Energy and Commerce Committee). All three hearings focused on waste, fraud and abuse in the E-rate program, an issue that has been previously reported on by the ALA Washington Office. The records show that there have been around forty problem E-rate applications that have drawn the allegations of fraud – and all the problem applications have come from K-12 schools.

In early August the E-rate administrators stopped all distribution of funds and commitment letters to E-rate award recipients. This action came because of a directive from the Office of Management and Budget (OMB) via the Federal Communications Commission (FCC) to require the E-rate program to comply with government accounting rules even though Universal Service is not a tax. Although the E-rate already complied with standard accounting rules, the “OMB requirement” prohibited USAC (the Universal Service Administrative Corporation that administers the E-rate) from sending out commitment letters without all funding for the E-rate program in the bank at the time the letters were sent to applicants.

In the final moments of the 108th Congress, the Senate passed H.R. 5419 by voice vote. This bill provides a one year E-rate “fix” and resolves the accounting problem that has held up the distribution of E-rate discounts to libraries and schools since the beginning of last August. We will revisit the issue again in the 109th Congress and continue to try to find a more permanent “fix” for this important program.

Recently, OITP achieved the long-standing goal of including state library E-rate coordinators in the bi-weekly E-rate Task Force (ERTF) conference calls with the FCC and SLD. Carrie Lowe and Bob Bocher (ERTF Chair) met with state coordinators when they gathered for an E-rate Train the Trainer session in Washington.

III. Electronic Security, Privacy & You (E-SPY)

PATRIOT Section 505 Violates 4th Amendment

On September 29th, in his ruling in *Doe v. Ashcroft*, Judge Victor Marrero of U.S. District Court in New York said that Section 505 of the USA PATRIOT Act “essentially coerces the reasonable recipient into immediate compliance,” which violates the Fourth Amendment rule against unreasonable searches. The Judge also ruled that the accompanying gag order violates the First Amendment. Judge Marrero invalidated part of the Electronic Communications Privacy Act of 1986, as expanded by the PATRIOT Act of 2001, that allowed the FBI to demand a list of e-mail addresses with which a certain subscriber had corresponded and a list of Web pages visited, as well as to read stored e-mails. The judge stayed the order for 90 days to allow time for the government to appeal. The Department of Justice has indicated that it will appeal the decision.

The ALA Office of Government Relations was pleased, as well, when the National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) noted that “The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without the changes we recommend, the American public has vested enormous authority in the U.S. government. . . . Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the Patriot Act would be healthy.” (pp. 393, 394) Congress, as urged by the Commission, has been acting quickly to enact the recommendations of the Commission by passing House and Senate versions of Intelligence Reform legislation.

In its attempt to speedily pass the bill, however, the temptation has arisen to try to load S. 2845 with PATRIOT-expansion amendments. Indeed, one of these amendments would legislatively contradict Judge Marrero’s ruling: the “Tools to Fight Terrorism Act of 2004” (S. 2679, also known as the “Kyl Amendment”), which is very similar to H.R. 3179 (the Anti-Terrorism Intelligence Tools Improvement Act of 2003, discussed previously). Section 105 of this bill would make it a *crime* to disclose requests for information in national security letters (NSLs), which government officials can use to solicit customer records and other information from libraries, Internet service providers and other businesses. It would also allow the FBI to get a judge to enforce an NSL, even though no judge is involved in the issuance of the letter, and would make any knowing disclosure a misdemeanor punishable by up to a year in prison. Anyone who revealed a national security letter request with the intention of obstructing an investigation could face five years in prison. As Judge Marrero has already ruled that the use of NSLs, as expanded in the USA PATRIOT Act, violates the 4th Amendment and the imposition of gag orders – even without a criminal penalty attached – violates the First Amendment, it would seem that this section would face immediate legal challenge. Senator Collins, the

chair of the Senate Governmental Affairs Committee and the principal sponsor of S. 2845, has expressed her strong opposition to the Kyl amendment. The House bill, H.R. 10, does not contain these provisions, although it is not a bill that civil liberties supporters would welcome.

Data Mining

On October 4th, the Inspector General of the Department of Homeland Security publicly released a report criticizing the Department for not taking a more active role in the consolidation and management of terrorist watch lists. The report states that many privacy concerns related to watch list consolidation have yet to be addressed, there is no common privacy policy, and the agency consolidating watch lists did not conduct a privacy impact assessment, as required by law. Moreover, the report states that agencies are using data mining without central oversight or privacy guidelines.

Toward a National ID

The Intelligence Reorganization Act passed in the House on December 7th and the Senate on December 8th. The Act requires creation of national standards for driver's licenses and personal identification cards – standard fields and standard formats for those fields. The statute does not take the step that an earlier House version of the bill did – creating a federal database of driver license information. The fact that driver's licenses (or personal identification cards) issued by the states will have standardized fields and, moreover, that only these standardized cards will be accepted as identification by federal agencies lays the groundwork for a National ID and for expansion of collection of information nationwide.

Civil Liberties and Privacy Oversight Board

The Act also creates a Civil Liberties and Privacy Oversight Board within the Executive Office of the President that would ensure that privacy and civil liberties concerns “are appropriately considered” in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism. The Board's responsibilities encompass both advice and counsel and oversight and would include reviewing regulations and policies, including information-sharing guidelines, and providing advice to the President and departments and agencies in the Executive branch. The Board would be required to report at least annually to Congress on its major activities. In the Senate version of the bill, this Board had subpoena authority; that has been lost. The Board is authorized, however, to have access to information from departments and agencies. The Board is also authorized to make written requests to persons outside of government to produce information, documents and other evidence.

Privacy Officers

Language requiring every agency to have a chief privacy officer was slipped into the Transportation, Treasury Appropriations Act of 2005 – one of the nine appropriations bills in the omnibus bill that Congress passed late on November 20th. This person will create policy for privacy and data protection assuring that technology does not “erode privacy protections relating to the use, collection and disclosure of information.”

National Security Letters

The Department of Justice had until the end of December to appeal the September 29th ruling of Judge Victor Marrero of U.S. District Court in New York in *Doe v. Ashcroft*. In that ruling Judge Marrero said that Section 505 of the USA PATRIOT Act "essentially coerces the reasonable recipient into immediate compliance," which violates the Fourth Amendment rule against unreasonable searches. The Judge also ruled that the accompanying gag order violates the First Amendment. The judge stayed the order for 90 days to allow time for the government to appeal.

IV. Access to Government Information

Much of what the Office of Government Relations is working on currently is not in the legislative arena. Rather, it has to do with monitoring and responding to executive branch activities and policies. The mix of legislative and executive branch activity varies over time, and OITP sometimes works with OGR on the executive branch concerns.

Government Printing Office (GPO)

On July 23rd, it was announced that the Department of Justice had asked the Superintendent of Documents to instruct depository libraries to destroy all copies of five particular documents. The Department of Justice claimed that these were "training materials and other materials that the DOJ staff did not feel were appropriate for external use." On August 2nd, the Superintendent of Documents notified the Federal Depository Library Program (FDLP) that the Department of Justice had rescinded its request. In the interim, ALA had filed a Freedom of Information Act request for the documents. This request was withdrawn when DOJ rescinded the destruction request.

On August 24th, Senator Patrick Leahy (D-VT), Ranking Member of the Senate Judiciary Committee, and Representative John Conyers Jr. (D-MI.), Ranking Member of the House Judiciary Committee, wrote Attorney General John D. Ashcroft asking him to explain the rationale for the request that the Government Printing Office (GPO) instruct federal depository librarians to withdraw and destroy documents. The ALA Washington Office has been in communication with the congressional offices since the DOJ request.

Senator Leahy and Rep. Conyers Jr. said about the Justice Department's initial request: "Given the Administration's penchant for secrecy, we fear that this action was yet another attempt to erode the public's right to know." For a PDF copy of Leahy and Conyers' letter, visit: [http://www.house.gov/judiciary_democrats/dojlibraryltr82404.pdf]

Models for Future Development

The new Public Printer has publicly indicated his desire to explore all models for sustaining both GPO Access and the Federal Depository Library Program, and building on them to ensure an informed public. ALA, through the Committee on Legislation, the Ad Hoc Subcommittee on Government, and the Government Documents Round Table (GODORT), are engaging in discussions with GPO to ensure a model that retains and enhances no-fee and unfettered public access to government information, including (but not limited to) through Federal Depository Libraries.

Right-to-Know

The Washington Office has been actively engaged in promoting the public's "Right to Know" information created and collected by or for the federal government. This concept is an expansion and strengthening of the long-standing principle that government should make this information available. The public's right to information has come under steady pressure and challenge since September 11th, 2001.

On August 16th, ALA filed comments on a Department of Homeland Security (DHS) proposed management directive for 'compliance' with the National Environmental Policy Act (NEPA). The portion of the directive on disclosure of information is very expansive in its restrictions -- and appears to attempt to accomplish by directive what DHS has not been allowed to do by statute. We urged DHS to revise the Directive to comply with the law by limiting its nondisclosure provisions to information that unambiguously qualifies for withholding under one of the exemptions provided in the Freedom of Information Act (FOIA).

Controlled Unclassified Information (Department Of Defense)

Controlled Unclassified Information (CUI) is yet another category in the growing panoply of government restrictions on unclassified information. According to the Pentagon, CUI "includes, but is not limited to, 'For Official Use Only' information; 'Sensitive But Unclassified' (formerly 'Limited Official Use') information; 'DEA Sensitive Information'; 'DOD Unclassified Controlled Nuclear Information'; 'Sensitive Information', as defined in the Computer Security Act of 1987; and information contained in technical documents."

On September 22nd, the *Washington Times* reported that the Government Accountability Office will investigate methods used by the Department of Homeland Security to classify documents. The review was called for by Democratic Reps. David R. Obey of Wisconsin, ranking member of the Appropriations Committee and Martin Olav Sabo of Minnesota, ranking member of the Homeland Security subcommittee.

Intelligence Budget Secrecy

The 9/11 Commission unanimously recommended that intelligence budget secrecy should be reduced and that individual intelligence agency budget totals should be disclosed annually. As part of its intelligence reorganization bill (S. 2845), the Senate voted 55-37 to require annual disclosure of the total budget request, the total amount authorized and the total amount appropriated for national intelligence (not purely military

or tactical intelligence) beginning in fiscal year 2006, when intelligence funds will be directly appropriated to the new National Intelligence Director. The House version (H.R. 10) would require the budget to be kept secret. Openness is one of the many things that have been 'bargained' away during the conference sessions on the bill and the intelligence budget is classified in its entirety.

Less and Less Access to More and More Information

House Government Reform Committee Report

According to a new report issued by the House Government Reform Committee minority, the Bush Administration "has repeatedly rewritten laws and changed practices to reduce public and congressional scrutiny of its activities." Announcing the report, Rep. Henry Waxman said, "The cumulative effect is an unprecedented assault on the laws that make our government open and accountable." The report provides an exhaustive critique of executive branch secrecy, from various well-known issues such as the secrecy surrounding the Vice President's Energy Task Force to numerous less-known measures to block congressional access to agency records. The full text of the September 14th investigative report on "Secrecy in the Bush Administration" is posted here: http://democrats.reform.house.gov/features/secrecy_report/index.asp

Flight and Aeronautical Information to be Removed

The National Geospatial-Intelligence Agency (NGA) announced new withdrawals of unclassified information from the public domain. "The National Geospatial-Intelligence Agency (NGA) intends to remove its Flight Information Publications (FLIP), Digital Aeronautical Flight Information File (DAFIF), and related aeronautical safety of navigation digital and hardcopy publications from public sale and distribution." The Federal Register notices states, "This action is taken to accomplish the following objectives: safeguarding the integrity of Department of Defense (DoD) aeronautical navigation data currently available on the public Internet; preventing unfettered access to air facility data by those intending harm to the United States, its interests or allies; upholding terms of bi-lateral geospatial data-sharing agreements; avoiding competition with commercial interests; and avoiding intellectual property/copyright disputes with foreign agencies that provide host-nation aeronautical data." The Federal Register notice is at <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/04-25631.htm> The NGA asserts the right to limit disclosure of unclassified satellite imagery based on a statute enacted in 2000 (10 USC 455), which entitles the Defense Department to withhold imagery and related products under certain conditions, independent of their classification status.

Disclosure Prohibition for Satellite Imagery

A proposed prohibition of disclosure under the Freedom of Information Act for much of commercial satellite imagery would have severely restrict public access to a broad swath of unclassified government information. Congressional conferees narrowed the scope of the exemption for certain categories of commercial satellite imagery and related products.

As revised, the exemption would apply only to imagery whose sale to non-government customers is already prohibited "for reasons of national security."
The final language in section 914 of the 2005 Defense Authorization Act can be found at:
<http://www.fas.org/sgp/congress/2004/hr4200conf.html#914>

Other New Barriers

New barriers to public access to government information are being thrown up with increasing frequency:

§The Nuclear Regulatory Commission announced on August 4th that "certain security information formerly included in the Reactor Oversight Process will no longer be publicly available, and will no longer be updated on the agency's web site."
See: <http://www.nrc.gov/reading-rm/doc-collections/news/2004/04-091.html>

§New controls may be imposed starting October 1 on space surveillance data (orbital elements) that are currently made available on the NASA web site. See this notice <http://www.celestrak.com/NORAD/elements/notice.shtml>

§At the request of the Department of Homeland Security, the Federal Communications Commission yesterday agreed to restrict public access to reports of telecommunications disruptions. DHS argued that information about communications outages could be "a roadmap for terrorists."

§On August 4th, the *Washington Post* reported that, "Nearly 600 times in recent years, a judicial committee acting in private has stripped information from reports intended to alert the public to conflicts of interest involving federal judges," according to a Government Accountability Office report - which is now itself unavailable on GAO's website.

§GAO has a restriction category - NI or non-internet - for some of its reports. According to staff on one of the Congressional oversight committees, the criterion for its application appears to be the request of an agency. Approximately 16 reports have been thus restricted - although you can get them faxed to you or request them in print. The reports about which we know are:

GAO-04-696NI, Federal Judiciary: Assessing and Formally Documenting Financial Disclosure Procedures Could Help Ensure Balance Between Judges' Safety and Timely Public Access, published June 30, 2004.

GAO-04-456RNI, Capital Power Plant Utility Master Plan, published March 1, 2004.

GAO-04-15NI, DOD Excess Property: Risk Assessment Needed on Public Sales of Equipment That Could be Used to Make Biological Agents, published November 19, 2003.

GAO-04-80NI, Combating Terrorism: Improvements Needed in Southern Command's Antiterrorism Approach for In-Transit Forces at Seaports, published October 31, 2003.

GAO-04-851NI, Combating Terrorism: Improvements Needed in Pacific Command's Antiterrorism Approach for In-Transit Forces at Seaports, published October 31, 2003.

GAO-04-81TNI, DOD Excess Property: Risk Assessment Needed on Public Sales of Equipment That Could be Used to Make Biological Agents, published October 7, 2003.

GAO-03-731NI, Combating Terrorism: Improvements Needed in European Command's Antiterrorism approach for In-Transit Forces at Seaports, published September 26, 2003.

GAO-03-995RNI, Major Management Challenges at SSA, published July 31, 2003.

GAO-03-896TNI, Nuclear Security: DOE Faces Security Challenges in the Post September 11, 2001 Environment, published June 24, 2003.

GAO-03-132NI, Border Security: Visa Process Should Be Strengthened as an Antiterrorism Tool, published October 21, 2002.

GAO-02-955TNI, Combating Terrorism: Preliminary Observations on Weaknesses in Force Protection for DOD Deployments Through Domestic Seaports, published July 23, 2002.

GAO-02-402RNI, Space Surveillance Network: Appropriate Controls Needed Over Data Access, published April 22, 2002.

NSIAD-00-63NI, Military Capabilities: Focused Attention Needed to Prepare U.S. Forces for Combat in Urban Areas, published February 25, 2000.

There are two other reports bearing the designation NI but the General Accounting Office (GAO) will not provide the titles, saying that the release of which would adversely impact significant property interests or negatively affect public safety.

Judicial Branch – ALA Files Brief in Cheney Case

On November 29, 2004, the American Library Association, together with other library, archives, journalists and public interest organizations, filed an *amici curiae* brief with the District of Columbia Circuit Court of Appeals supporting public access to information about the makeup of the National Energy Policy Development Group (NEPDG), convened by Vice President Cheney in 2001. The case was brought by the Sierra Club and Judicial Watch and heard at the United States Supreme Court in April 2004. The Supreme Court, recognizing the importance of the issue and the conflicting principles of

separation of powers and public accountability, sent the case back to the DC Circuit Court of Appeals for adjudication.

The brief argues that the District Court should accept the Supreme Court's invitation to develop an innovative procedure for accommodating the competing interests asserted in this case: "when important constitutional principles are on a collision course, as in this case, courts should be wary of any winner-take-all resolution." The amici recommend creating a "Cheney Log" following the model of the "Vaughn Index," used for many years in Freedom of Information Act cases. The Index identifies certain basic information that may be provided by the government without undue burden or compromise of confidentiality. In the case of the "Cheney Log," such an index would provide information about whether and to what extent non-government persons participated in meetings of the NEPDG or its sub-groups. That information should provide a sufficient basis for the private parties and the courts to evaluate, thereby triggering FACA requirements that protect against the improper influence of special interests on government decision-making.

Alliance for Taxpayer Access

The American Library Association is a member of the Alliance for Taxpayer Access (AT@), an informal coalition of public interest groups, including libraries and patient and health policy advocates, that urges the National Institutes of Health as well as Congress to ensure that peer-reviewed articles based on taxpayer-funded research at NIH become fully accessible and available on line and at no extra cost to the American public. Currently, scientific journals publish the studies, which can only be accessed by subscriptions or through an academic institution that has its own subscription.

In advance of a meeting in late August where NIH received input on how to improve public access to the results of NIH-funded biomedical research, ATA submitted a letter addressed to Dr. Elias Zerhouni, director of the NIH, offering support for his efforts to provide access to taxpayer-funded research. ALA, AALL, ARL and SLA sent a similar letter to Dr. Zerhouni on August 31.

Open Public Access to Taxpayer Funded Research: National Institutes of Health (NIH) Proposal

On September 3, 2004, the National Institutes of Health (NIH) published a proposal, (NOT-OD-04-064, *Enhanced Public Access to NIH Research Information*, with a Notice also in the September 17, 2004 Federal Register) that would make NIH research available online, within six months of publication, for no extra charge to the American public. Public comments on the proposal were due by November 16th. On November 1st, ALA submitted comments on the proposal, noting that ALA "commends both the concept and the implementation plan described in the NIH notice... The plan is a measured step that effectively balances the interests of publishers and users of biomedical research." The comments further note that, "Although the plan will not solve the "journals crisis" faced by libraries (we doubt it will directly result in savings through journal cancellations by libraries), the plan does offer a way for faculty to get access to some of the research published in journals that libraries long ago cancelled. Moreover, the plan reaches out to

many users who are not otherwise served by our libraries.”

<http://www.ala.org/ala/washoff/WOissues/copyright/openaccesstoresearch/ALAltrNIH10104.pdf>

Congressional Committee Proposes Taxpayer Access

The U.S. Congressional committee with budgetary oversight of the National Institutes of Health (NIH) has urged the institutes to provide for public access to NIH-research results paid for with U.S. taxpayer funds. The proposed language is part of the Appropriations Committee report 108-636 to accompany the fiscal year 2005 Labor, Health and Human Services, Education, and Related Agencies Appropriations Bill (H.R. 5006). The language made it through deliberations by the House without amendment.

E-Government

The Washington Office is monitoring the implementation of various sections of the E-Government Act of 2002 and working to ensure opportunities for public comment and participation. Comments have been submitted by ALA supporting the recommendation of the Categorization of Information Working Group that the federal government should adopt a search service standard to enhance interoperability among networked systems.

V. Copyright

Anti-Piracy and Enforcement Legislation

In 2004, piracy deterrence and punishment were the themes of a number of copyright-related bills that were active in both houses of Congress. Libraries joined in lobbying against many of the bills: we support enforcing existing laws rather than enacting more criminal provisions and oppose the ambiguous and overly broad language characteristic of these bills. We also opposed a controversial bill in the Senate, S. 2560, the “Inducing Infringement of Copyright Act,” which was aimed at peer-to-peer file-sharing technology. Our concern was outlawing a particular technology, to the detriment of the development of innovative technology and the ability of libraries to have access to affordable digital technologies.

S. 1932, the “Artists’ Rights and Theft Prevention (“ART”) Act of 2003,” and S. 2237, the “Protecting Intellectual Rights Against Theft and Expropriation (“Pirate”) Act of 2004,” both passed the Senate in late June. We were able to get some changes in the language to make the legislation less objectionable. In the Senate, S. 2242, “Anti-counterfeiting Amendments of 2004,” did not get out of committee, but H.R. 3632, “Anti-counterfeiting Amendments of 2004,” was passed by the House as part of the “Intellectual Property Protection and Courts Amendments Act of 2004” and reported to the Senate in September.

At the very end of the session, the Senate passed S. 3021, the “Family Entertainment and Copyright Act of 2004.” The bill was introduced by Sen. Hatch (R-UT) on November 20 and was passed on that same day by Unanimous Consent. The titles of the Act included: making it illegal to record movies in theaters; creating an exemption from copyright

infringement for devices that permit an individual to skip over content in a motion picture being viewed at home; fostering the preservation of so-called "orphaned" copyrighted works; and tougher anti-counterfeiting laws related to physical goods and fake labels. An amendment by Sen. McCain (R-AZ) was added to the bill, relating not to copyright, but to the Professional Boxing Safety Act. This amendment made the entire bill unacceptable and kept the House from acting on it before adjournment.

Ultimately, the only intellectual property bill to be enacted was H.R.3632, the anti-counterfeiting measure that was cleared to go to the President on the last day of the session. Bundled with the counterfeiting bill was another provision that had passed the House as H.R. 3754, to increase penalties for knowingly submitting false contact information to Internet domain name registrars when purchasing a Web address.

New Copyright Study by Library of Congress

The Library of Congress is convening a Working Group to re-examine Section 108 of the U.S. Copyright Act. Section 108 is a critical provision of the law as it concerns reproduction of copyrighted works by libraries and archives, including for preservation and inter-library loan. The LC's National Digital Information Infrastructure and Preservation Program (NDIIPP) and the U.S. Copyright Office are forming the Copyright Working Group in response to growing concerns that provisions of the Copyright Act may need revision to address issues arising from use of copyrighted works by libraries and archives in a digital environment. The LC has invited Miriam Nisbet, Legislative Counsel, to join the Working Group, which will have its first meeting in early January 2005.

Open access and publishing mergers

ALA is a member of the Open Access Working Group, promoting broad and rapid dissemination of new knowledge and unrestricted access to the results of scholarship and research. That effort was given a boost in August when our organizations joined with others to form the Alliance for Taxpayer Access. Our efforts have primarily been directed at supporting a proposal, announced on September 3 by the National Institutes of Health (NIH), to make research articles based on NIH funding available to the public free of charge. These articles would be publicly available in NIH's PubMed Central (PMC) within six months after their publication in a peer-reviewed journal.

<http://www.ala.org/ala/washoff/WOissues/copyrightb/openaccesstoresearch/accessresearch.htm>

Last year ALA joined with ARL, AALL, MLA, ACRL, SLA and SPARC to form a coalition called the Information Access Alliance, whose purpose is to advocate for greater scrutiny of proposed mergers of publishing firms. The coalition is sponsoring a seminar to address and publicize these issues at Georgetown Law Center in February 2005. <http://www.informationaccess.org/ats/symposium.html>

UCITA

ALA has worked successfully for five years to fight the enactment by state legislatures of the Uniform Computer Information Transactions Act (UCITA). AFFECT, the anti-UCITA coalition that ALA helped to found and continues to lead, in November published

its *12 Principles for Fair Commerce in Software and Other Digital Products*. The Principles outline 12 fair terms that should be included in shrink-wrap licenses for software and other digital products. The brochure will assist those of us working with legislators and other policymakers.

Copyright Court Cases

We continue to be actively involved as parties or *amici* (friends of the court) in a number of copyright-related cases, and anticipate that there will be others in 2005.

Faulkner v. National Geographic Society. In late June, ALA and other library and archives associations filed an *amicus curiae* brief in *Faulkner v. National Geographic Society*, a case that has major implications for projects that involve retrospective digitization of print versions of scholarly materials and the public's access to those materials. In the brief, the American Association of Law Libraries (AALL), American Library Association (ALA), Association of Research Libraries (ARL), Medical Library Association (MLA), Society of American Archivists (SAA), and Special Libraries Association (SLA) stated that "the decision will ... have profound consequences for the library and archival communities and those who use collective works."

At stake in the case is whether publishers of collective works and others who may choose to legitimately digitize them can re-publish those works in a digital format without seeking permission of authors or other contributors. Several freelance photographers, as well as some writers, sued the National Geographic Society (NGS) for copyright infringement because some of their works are included in a CD-ROM produced by the NGS. The CD-ROM contains photo-scanned images of the entire print version of the *National Geographic* magazine from 1888 to 1996 in a searchable format. A lower court found that the publication on CD-ROM is permissible under the Copyright Act. The library and archives associations are asking the U.S. Court of Appeals for the Second Circuit to affirm that decision.

The associations filed the *amicus* brief due to their concern that a reversal of the lower court decision would thwart efforts to digitize selected library collections, thus reducing access to these important resources by the public. The associations support the decision by Judge Kaplan of the U.S. District Court for the Southern District of New York that the Copyright Act permits the NGS to reproduce and distribute, through the CD-ROM compilation, the copyrighted materials that appeared in the original issues of the magazine. Judge Kaplan found that as long as digital versions place photographs and articles in the same context as the print original, there is no infringement of copyright. Thus the District Court determined that the fact that articles and photographs appear in a new medium makes no difference to the case.

Faulkner v. National Geographic Society differs considerably from *New York Times v. Tasini*, in which the Supreme Court affirmed the copyright privileges of freelance writers whose works were originally published in newspapers and periodicals and then licensed by the publishers to commercial electronic databases. The associations believe the Copyright Act permits publishers, libraries, archives, and the public to take advantage of

new technologies to preserve and distribute creative works to the public if no changes are made to the original work once republished in a different format.

ALA v. FCC. In November 2003, the Federal Communications Commission issued its rule on a “broadcast flag,” which is designed to facilitate the transition to digital television. The rule mandates that a “broadcast flag” copyright protection scheme be included in all digital television, related consumer products and personal computers to prevent the redistribution of digital content over the Internet. The broadcast flag will prevent libraries, educational institutions and consumers from exercising their fair use and other rights under copyright law and will hasten the advent of a world in which the consumer must pay to have access to all digital content. ALA and the other major national library associations (American Association of Law Libraries, Association of Research Libraries, Medical Library Association and Special Libraries Association) participated in the administrative rulemaking.

In January 2004, the libraries joined with several other organizations to challenge the rulemaking through a lawsuit in the U.S. Court of Appeals for the D.C. Circuit. The lawsuit, *ALA v. FCC*, argues that the FCC does not have jurisdiction to impose design requirements on consumer electronics devices. On May 27, we won a key procedural victory when the appeals court turned down the FCC’s request to prevent the case from moving forward pending additional agency action on other aspects of its rule. On October 4, we filed our opening brief on the merits of the case. Oral arguments will be held in February 2005.

International Copyright Issues

In addition to our work on various matters such as the draft Hague Convention on international contracts, the World Trade Organization (WTO) and the Free Trade Agreements, we have been working to strengthen our relationship with the World Intellectual Property Organization (WIPO). In September, ALA joined several hundred other non-governmental organizations and individuals in signing the Geneva Declaration on the Future of the World Intellectual Property Organization. The declaration demanded changes to the United Nations’ approach to intellectual property laws, saying that current rules are unfair to developing countries. We will follow up with WIPO in early 2005 to discuss a proposed “Access to Knowledge” treaty.

We also began working, with the Institute of Museum and Library Services, to provide our views to the U.S. Department of State on a proposed UNESCO convention on cultural diversity. Libraries as well as other parts of the U.S. cultural community should benefit from an international treaty that is intended to promote the importance of culture and art in realizing “human rights and fundamental freedoms” and to enhance public access to diverse cultural expressions. Our concern, however, is to ensure that the convention does not become yet another trade treaty promoting stricter (and unbalanced) intellectual property laws.

VI. Other OGR Activities

Committee on Legislation Retreat

Members of the ALA Committee on Legislation held an orientation retreat on December 3rd and 4th in the Washington Office. Major issues were broadly discussed and a new subcommittee on State Outreach was formalized. The orientation has generated a clearer agenda for Midwinter and beyond as ALA addresses legislative and policy issues in the new 109th Congress.

Presidential Campaigns and Election

During the Presidential campaigns this fall, the ALA Washington Office sent the same letter to both campaigns about the importance of libraries and asked each candidate to include libraries in their domestic policies. Also included in the package were fact sheets on fair use, library and school statistics, LSTA and the Improving Literacy Through School Libraries program.

At the end of October, the ALA Washington Office sent a letter to First Lady Laura Bush thanking her for being a consistent champion of libraries and librarians and asking for her continued support.

After the elections, ALA WO also sent a letter to President Bush congratulating him on his re-election and thanking him for his support over the last four years for libraries. The letter also spelled out the difficulties that lie ahead for the library community and expressing a desire to work with him to meet those demands.

Copies of the letter were sent to Margaret Spellings (Secretary of Education-Designate), Dr. Robert Martin (Director, IMLS), and Kathy Stack (Branch Chief of Education, Office of Management and Budget).

Also included in the package were fact sheets on LSTA and Improving Literacy Through School Libraries program, library and school library statistics, and the Scholastic publication summarizing the importance of school libraries.

Copies of both letters are available on ALA's "Federal Funding" web page.

VII. OITP

CALEA (Communications Assistance to Law Enforcement Act)

Previously OITP has reported on a petition from federal law enforcement to extend the coverage of the Communications Assistance to Law Enforcement Act (CALEA) to online services such as VOIP. The petition spurred a proposed rulemaking from the FCC on the matter. Although the rulemaking exempts libraries, it does so in a way that prompts more questions than answers. ALA signed on to two different sets of comments responding to the NPRM – one from the Center for Democracy and Technology, and one from a broad

coalition of higher education and library groups. Both sets are available at <http://www.ala.org/ala/washoff/WOissues/techinttele/calea/calea.htm>

RFID

OITP worked with the Book Industry Study Group to draft a set of principles for the use of RFID technology balancing privacy rights. These were distributed at Annual Conference and will be finalized in the coming months. They will also be used as a starting point to draft a library-specific set of principles.

World Summit on Information Society (WSIS)

OITP hosted a meeting of delegates to and individuals interested in the 2005 WSIS conference in Tunis. John Berry, Chair of International Relations Committee, chaired the meeting.

OITP Advisory Committee

OITP staff met with members of its advisory committee as well as other invited guests and experts to discuss issues and future trends surrounding the topic of digital libraries. They also listened to Vince Cerf discuss future technologies and how they might impact libraries. The results of this meeting will be gathered into a booklet that will be available in early 2005.

E-Rate

OITP conducts bi-weekly conference calls with members of the E-rate task force and representatives from the FCC and SLD to discuss the program and issues from the field. Over the last few months, OITP has implemented a conference call solution that allows us to open the calls to representatives from each of the states. We hope that this will enable us to bring more issues to the attention of those running the program and increase library participation.

Grant Activities

Copyright education activities

On September 24th, the Network of Illinois Learning Resources in Community Colleges (NILRC) and OITP sponsored "Making Copyright Work for Your Library," a free teleconference funded in part by the MacArthur Foundation. The College of Dupage Teleconference Services (who produced the program) reported that the program drew the largest audience in their history. An estimated 15,000 people tuned in for the telecast. The broadcast is available for the next 60 days via streaming video at www.cod.edu/teleconf. Copies of the 2-hour program in video (\$30) and DVD (\$40) can also be purchased.

OITP and ACRL launched a copyright web course on November 15th. Carrie Russell is the instructor.

METRO, a multi-type organization serving public, academic, special, and school libraries in the New York area (www.metro.org) is working with OITP to produce several mini-copyright workshops using a new software delivery system called Horizon. The four workshops are: *Copyright and Digital Library Services* (October 20), *How to Talk to Faculty and Teachers about Fair Use* (November 10), *Copyright in a For-Profit Environment* (December 7) and *Copyright and Teaching* (February 9, 2005). Carrie Russell is the instructor.

OITP continues its preliminary planning with the firm Russonello & Stewart to conduct research among teens, librarians and teachers to explore their attitudes about copyright laws, peer-to-peer networks and libraries. MacArthur will also fund this project. New learning gleaned from the focus groups will help OITP design its next educational effort on copyright.

Complete Copyright: An Everyday Guide for Librarians remains #1 in sales from the ALA Online Store. Over 1,000 copies have been sold since the book became available in July 2004.

Law Enforcement Survey on Access to Library Records and Technology

We have received a grant from the Knight Foundation to support this project, and are still seeking additional funds. The survey will go online on January 4. There will be publicity surrounding this project at ALA Midwinter.

VIII. Communications Activities

Library Business Alliance

On September 22, more than twenty members of the Library Business Alliance gathered in Washington, DC. After a morning briefing on key library legislative issues, the group of booksellers, publishers, and other businesses that depend on libraries went to Congress and met with their representatives and senators to lobby for increased funding for America's libraries. Attendees included representatives from: Public Information Kiosk, Inc.; Salem Press, Inc.; International Book Marketing Ltd., OCLC CAPCON Service Center; DYNIX; Thompson/Gale; Tutor.com, Inc.; 3M; Reed Elsevier Inc.; McGraw-Hill Professional; DEMCO, Inc.; Scholastic Library Publishing; PENGUIN GROUP (USA) INC.; infoUSA, Inc.; Worldbook, Inc.; and Foley Hoag/Scholastic. Members of the Library Business Alliance will be wearing special ribbons at Midwinter that identify them as part of this important group of library supporters.

Reader Privacy Coalition Press Conference

On September 29, ALA joined the American Booksellers Association, Association of American Publishers, and PEN American Center to deliver more than 170,000 signatures gathered in the Campaign for Reader Privacy to the US Congress.

Carla Hayden joined Salman Rushdie (President of PEN American Center), former U.S. Congresswoman Pat Schroeder (President of the Association of American Publishers),

and Mitchell Kaplan (President of the American Booksellers Association) in presenting the petitions on behalf of readers, writers, librarians, booksellers, and publishers at the U.S. Capitol. Hayden and the other speakers discussed their concerns over Section 215 of the USA PATRIOT Act.

The event was broadcast on October 2 on C-SPAN's Book TV and aired again on Sunday, October 3, 2004.

CapWiz Legislative Action Center

In the past six months, nearly 5,000 messages have been sent from the legislative action center (<http://capwiz.com/ala/home/>) to Members of the House of Representatives and Senate. The value of putting a link to the Legislative Action Center from the ALA Home page can be clearly seen: in the previous six-months' report, only about one-fifth (1,100) the number of messages were sent to Congress through CapWiz.

The top five subject lines of messages sent by users to Congress for the past six months (July through December, 2004) were:

- "Support Federal Funding for Libraries" (2,000)
- "Restore E-Rate Funds" (962)
- "Drop Proposed Broad FOIA Exemption" (450)
- "Oppose McCain Amendment to Intelligence Reform Bill" (162)
- "Protect the Freedom to Read" (140)

National Library Legislative Day

This year marks the 60th Anniversary of the Washington Office's tradition of advocacy for federal issues. This tradition will continue May 3-4, 2005 when ALA members convene in Washington to participate in National Library Legislative Day (NLLD).