

February 22, 2002

TO: AAP Board of Directors, Heads of Houses and Other Interested Parties

FR: Allan Adler and Angela Peters

RE: Update - End of the First Session of the 107th Congress

The First Session of the 107th Congress had two distinct segments that were strongly influenced by events that occurred outside the House and Senate chambers. The first half of the session, which began in January 2001, was dominated by the official onset of the Bush Administration, following the U.S. Supreme Court's controversial but historic resolution of the contested presidential election. Then, in the second week of September, when Congress traditionally resumes its work after a long summer recess, the tragic terrorist attacks on the twin towers of the World Trade Center in New York City and the Pentagon just outside Washington changed the Congressional agenda as swiftly as it changed numerous aspects of life throughout our Nation.

As the Second Session of the 107th Congress gets underway, AAP members can now review some of the significant legislative activities that AAP's Washington Office either monitored or participated in on their behalf. At the same time, this report provides a timely opportunity to alert publishers to some of the public policy issues that can be expected to require AAP's attention during the remainder of the 107th Congress.

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

A summary, text and status report for each piece of referenced legislation, whether enacted or not, can be found online in the Congressional Legislative Reference Service of the Library of Congress at <http://thomas.loc.gov/>. Simply look under the "Legislation" heading at either "Bill Summary" or "Bill Text," click on the icon labeled "107th Congress" and follow the instructions from there.

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

Enacted Legislation

“No Child Left Behind Act”

[H.R. 1, enacted as Public Law 107-110, January 8, 2002]

One of the biggest accomplishments of the first session of the 107th Congress was the “No Child Left Behind Act” (H.R. 1), an education bill, which reauthorized the Elementary and Secondary Education Act. President Bush signed this historic bill into law on January 8, 2002, after months of negotiations between both Republicans and Democrats and Senators and Representatives. As a result of the Act, federal education funding reached a historic high with the fiscal year 2002 authorization level hitting approximately \$26.3 billion, \$13.5 billion, for Title I.

Overall, the Act is designed to help educationally disadvantaged children achieve the same high State academic achievement standards as all other students. H.R. 1 is the most significant attempt to date to hold States and local school districts accountable for federal education funds, particularly “Title I” funds that provide education services to disadvantaged students. H.R. 1 will have a substantial impact on American students, teachers, parents, and publishers, particularly those in the testing arena. The Act mandates annual testing in reading and mathematics at grades 3-8 as well as corrective actions for schools that fail to make “adequate yearly progress.” Under the reauthorization, states will be required to create new tests and refine existing assessment programs. AAP’s Government Affairs division and School Division were involved in advocating a number of important programs in the bill. Below is a brief summary of the portions of the bill which will have the most impact on publishers.

Assessment & School Improvement Provisions:

- **Authorization Period:** The Act sets an authorization period of six years. The first year of the authorization period will be fiscal year 2002 (October 1, 2001 - September 30, 2002) and the last year will be fiscal year 2007. Most of the Act’s assessment provisions are in Title I, Part A.
- **Overall Funding:** The Act authorizes \$26.5 billion in education spending at the K-12 for fiscal year 2002. This represents a \$8 billion increase over the previous year.
- **Annual Assessments:** H.R. 1 requires States to have annual reading and math assessments for grades 3–8. States — not Congress or the U.S. Department of Education — will select and design tests of their choice. State assessments must be aligned with State academic standards, and they must allow achievement to be comparable from year to year.
- **Implementation of Annual Tests:** States will have until the 2005–2006 school year to develop and implement math and reading assessments. States must

develop science standards by the 2005-2006 school year and then implement science assessments by the 2007–2008 school year in one grade in each grade span of 3–5, 6–9, and 10–12.

- **Use of NAEP as a Verification Assessment:** The Act requires State tests to be verified by the National Assessment of Educational Progress (NAEP). Verification of State tests will occur every other year at the fourth and eighth grade levels. A sample of students in each state will be assessed as part of the verification process.
- **Funding for Annual Testing:** The Act authorizes \$490 million for States to develop and administer annual assessments at grades 3-8. The Act includes an appropriations “trigger” to ensure federal funds are available to develop and implement the tests. A State may postpone the start of testing for one year for each year that funds do not reach the set amount. But, a State must continue to develop its assessments and it must continue to comply with current (1994) law by administering assessments in reading and math in one grade in each grade span of 3–5, 6–9, and 10–12. The trigger amounts are: \$370 million for FY 2002; \$380 million for FY 2003; \$390 million for FY 2004; and \$400 million for FY 2005–2007.
- **Adequate Yearly Progress:** H.R. 1 specifies that States must make “adequate yearly progress” in improving the performance of disadvantaged students. Each state must now have a definition of adequate yearly progress that applies to disadvantaged students as well as to the overall student population. The Act requires States to:
 - Define adequate yearly progress so that all students achieve at the State’s “proficient” level on State reading and math academic assessments within 12 years.
 - Set the achievement bar to reach 100 percent proficiency. States may choose where to set the initial bar based upon the lowest-achieving schools in the State or the lowest-achieving demographic subgroup (whichever is higher). The State must “raise the bar” gradually in equal increments to reach 100 percent proficiency.
 - Use one other academic indicator. For secondary schools the indicator will be graduation rates. Each State will choose the indicator for elementary schools.
- **School Improvement & Corrective Actions:** The Act sets the following schedule of corrective actions for schools that fail to make adequate yearly progress:

- Schools that have not made State defined adequate yearly progress for two consecutive school years will be identified by the school district as needing improvement. These schools will receive assistance to improve performance. They must also develop a two-year plan for improvement. Districts must offer public school choice (unless prohibited by State law) to students in the failing school. Districts must provide transportation for public school choice.
- Schools failing to make adequate yearly progress for three consecutive years, must offer school supplemental educational services such as tutoring. The schools must also continue to offer public school choice.
- Schools failing to make adequate yearly progress for four consecutive years must take corrective actions such as replacing staff or implementing a new curriculum. They must also continue to provide public school choice and supplemental services.
- Schools failing to make adequate yearly progress for five consecutive years, must implement alternative governance actions such as a State takeover, the hiring of a private management contractor, conversion to a charter school, or staff restructuring. Public school choice and supplemental services must continued to be required.
- Corrective actions are not required once the school makes adequate yearly progress for two consecutive years

Report Cards: The Act requires States and school districts to report disaggregated data in annual, public report cards beginning with the 2002-2003 school year.

Toned-Down “Student Privacy” Measure Included In Final Version of Education Legislation

The final version of the “No Child Left Behind Act” contains a toned-down version of the proposed “Student Privacy Protection Act,” legislation jointly sponsored by Senators Christopher Dodd (D-CT) and Richard Shelby (R-AL) to increase parental involvement in school activities that include collection of personal information from students for use by third-party commercial interests.

As originally introduced in the last Congress, the Dodd-Shelby legislation, like a similar House bill introduced by Rep. George Miller (D-CA), would have required parental consent before schools could allow third-party commercial interests to conduct any personal data collection activities involving students in the classroom. Prior the introduction of a revised version of the Dodd-Shelby bill in the Senate earlier this year, AAP worked with Dodd’s staff to exempt from the parental consent requirement any personal information collection from students that was conducted in connection with either (1) the “development, evaluation or provision of educational products or services” (including book clubs, and curriculum and instructional materials used by schools to

teach) or (2) the “development and administration of tests and assessments used by elementary and secondary schools.”

After its inclusion in the Senate version of the overall education reform bill earlier this year, the Dodd-Shelby provisions were revised by House and Senate conferees to eliminate the parental consent requirement, which had been vigorously opposed by a variety of commercial interests and many local school authorities as unjustified, administratively-unworkable federal interference with educators’ efforts to make up for budgetary shortfalls through cooperative programs with local businesses.

Instead of the parental consent requirement, the conference-approved version requires local educational agencies that receive program funding under the overall legislation to adopt and notify parents of specific policies regarding parental rights to inspect (1) any third-party “survey” to be administered or distributed by a school to a student; (2) any instructional material used as part of the educational curriculum; or (3) any “instrument” to be used in the collection of personal information from students for the purpose of marketing or selling such information (or otherwise providing such information to others for that purpose). Such policies must also address agency arrangements to protect student privacy in connection with certain types of surveys; the administration of physical examinations or screenings conducted on students; and the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling such information (or otherwise providing that information to others for that purpose).

H.R. 1 Promotes Reading through the Reading First and Early Reading First Programs

One of the Administration’s top priorities in the “No Child Left Behind Act” is the President’s Reading First Initiative. The goal of the initiative is to ensure that every child in America can read by the third grade.

Reading First provides grants to states and local districts to establish reading programs, based in scientific research, for all children in kindergarten through the third grade. The program builds upon conclusions issued in a report by the National Reading Panel in April 2000 that effective reading programs include teaching children about phonemic awareness, phonics, guided oral reading and practice. The final bill triples federal literacy funding from the present \$300 million in FY2001 to \$900 million in FY2002.

Under the program, states will be awarded six-year funding grants. Once a state is awarded a grant they must expend at least eighty percent of the amount of funds in competitive subgrants to eligible local educational agencies. Local educational agencies will administer screening, diagnostic and classroom-based instructional reading assessments to determine which students in grades kindergarten through 3rd grade have below average reading skills. A percentage of the grant money may also be used to provide professional development for teachers of kindergarten through third grade to prepare them in all the essential components of reading instruction.

Early Reading First is a new \$75 million initiative that allows states participating in the Reading First program funds to implement research-based pre-reading methods in pre-school programs. Particularly, the program targets children ages three through five in high poverty areas where there is a high number of children not reading at grade level. The purpose of the program is to integrate scientific reading based instructional materials and literacy activities with existing programs in pre-schools, childcare agencies or Head Start centers, which would help prepare children for formal reading instruction in kindergarten and first grade. The program is designed to provide the critical early identification and early reading interventions to assist young children in attaining the fundamental skills necessary for optimal reading development. One purpose of the new program is to ensure children develop automatic recognition of letters of the alphabet, knowledge of letter sounds, and the use of increasingly complex vocabulary.

Funding for School Libraries Measure Included In Final Version of Education Legislation

The final version of the “No Child Left Behind Act” contains a version of the proposed “Improving Literacy Through School Libraries Act of 2001” introduced by Senator Jack Reed (D-RI). The line item authorizes \$250 million for school library resources and is included as part of President Bush’s Reading First Initiative.

Federal research indicates that well-stocked and well-staffed school libraries encourage literacy and learning. Unfortunately, direct funding for school libraries was eliminated in 1981, which has resulted in all time low levels of school library funding. Currently, the average cost of a new library book is \$16, but the average amount spent by school districts per student for books is \$6.75 in elementary school, \$7.30 in middle school and \$6.25 in high school, enough to buy less than half a book. Due to this lack of funding, school libraries have an insufficient number and variety of books. Many of the books they do have are outdated and contain “facts” that were debunked decades ago, including offensive stereotypes of women and minorities.

As originally introduced, the bill would have authorized the appropriation of \$475 million for fiscal year 2002 and “such sums that may be necessary” for fiscal years 2003 through 2006. In the Senate version, the Reed Amendment provided \$500 million to local school libraries to purchase new books, to provide advanced technology training for librarians, and to allow school libraries to remain open longer. The House and Senate conferees reduced the authorization to \$250 million for fiscal year 2002 and such sums as may be necessary for each of the 5 succeeding fiscal years. The funds will be made available to school libraries for the purchase of books and up-to-date technology for media centers and the hiring of professionally certified school library media specialists. The funding would also enable students to access school libraries on weekends, during summer vacation, and before and after regular school hours. The legislation is targeted toward school libraries with the greatest need.

Department of Education Appropriations Act
[Title III of H.R. 3061, enacted as P.L. 107-116, January 10, 2002]

The Department of Education Appropriations Act, usually a contentious part of the controversial Labor, HHS appropriations bill, moved through the legislative process easily last year. Early agreements between the White House and Congressional appropriators on issues that proved contentious in previous years helped speed up the process.

Overall, the House and Senate versions contained \$123.4 billion in discretionary spending, a \$14 billion increase over fiscal year 2001. Among the line items of possible interest to publishers are the following:

- \$48.932 billion is provided in the Conference Report for education programs. This is \$4.4 billion more than the President's request and \$6.7 billion more than last year.
- \$3.4 billion increase for President Bush's education initiatives authorized in the No Child Left Behind Act 2001 (H.R. 1, enacted as P.L. 107-110) bringing the total funding for these programs to \$29.6 billion an increase of \$4.6 billion over last year's level. (See separate synopsis on H.R. 1)
- \$10.35 billion for Title 1 programs to aid states and localities in assisting disadvantaged children to achieve the same academic performance of other students, a \$1.6 billion increase over the requested amount.
- \$975 million for the Reading First program. (See separate synopsis on H.R. 1)
- \$387 million to fund the cost of developing annual state assessments of students reading and math skills. (See separate synopsis on H.R. 1)
- \$2.85 billion in state grants for improving teacher quality. It is a new program that consolidates existing professional development programs and provides states and school districts with tools to ensure classrooms have qualified teachers.
- \$24 million for Reading is Fundamental, the federal government's "inexpensive book distribution" program under ESEA, a \$1 million increase over last year's amount.
- \$250 million for Even Start child literacy programs.
- \$12.5 million for the Literacy Through School Libraries to provide students with up-to-date school library materials, and well-equipped, technologically advanced school library media centers. (See separate synopsis H.R. 1)

- \$700.5 million for education technology state grants. Under the reauthorization of the Elementary and Secondary Education Act, several technology programs including the Technology Literacy Challenge Fund, were consolidated into a State-based grant program to target specific needs of individual schools. The funds may be used to: (1) promote innovative State and local initiatives using technology to increase academic achievement; (2) increase access to technology, particularly in schools with a high-need; (3) improving and expanding teacher professional development in technology.
- \$22 million for the Ready to Learn Television program, which develops educational programming for preschool and early elementary school children, but also allows grants to be used to produce printed materials.

**“Uniting and Strengthening America by Providing Appropriate
Tools Required to Intercept or Obstruct Terrorism
(USA PATRIOT) Act of 2001”**

[H.R. 3162, enacted as P.L. 107-56, October 26, 2001]

Immediately following the horrific September 11th terrorist attacks on the World Trade Center in New York City and the Pentagon just outside Washington, D.C., Congress rushed to give the Bush Administration sweeping new authority to investigate, arrest, detain, and prosecute suspected terrorists. Unfortunately, in the process of attempting to provide greater security to the American people, Congress has, in the view of many, also undermined important protections for civil liberties in this country.

Much of the criticism leveled at the USA PATRIOT Act by civil libertarians, including a number of Members of Congress, focused on amendments to the Foreign Intelligence Surveillance Act (FISA) and other provisions that have blurred distinctions between the Federal Government’s authority to conduct criminal investigations and its authority to pursue intelligence-gathering, “national security” investigations in its efforts to combat terrorism. Judicial review requirements, along with other safeguards and accountability mechanisms designed to prevent abusive use of wiretaps, electronic surveillance, secret searches, and other investigative tools by the government have been substantially diluted, while authority to target, arrest and detain individuals suspected of being connected to terrorist activities have been substantially expanded.

Some of the most questionable provisions in the new Act broaden or establish criminal offenses and expand related government law enforcement and intelligence-gathering powers in ways that could potentially threaten even U.S. publishers, authors and bookstores based on their involvement with the works or activities of foreign authors and organizations that the U.S. Government may consider to be targets in terrorism investigations. For example:

- Expansive definitions of “domestic terrorism,” “terrorist organization,” and “terrorist activity” create the potential for conspiracy or “guilt-by-association” suspicion and targeting in connection with the solicitation of funds or membership or other material support for certified “terrorist organizations” and even for certain organizations not designated as “terrorist organizations.” Such groups, according to some critics, might even include WTO protesters, Greenpeace, or People for the Ethical Treatment of Animals (PETA) on the basis of their minor acts of violence or vandalism, and they might also include foreign political organizations, as well as their leaders and supporters, if they act and speak in ways the U.S. Government deems supportive of suspected terrorists, terrorist activity or terrorist organizations. Non-U.S. citizens who are not terrorists may nevertheless be subject to indefinite detention by the Federal Government for minor visa violations under certain circumstances.
- In connection with investigations of individuals, activities or organizations falling within the scope of these expansive definitions, the FBI now has broad authority to access sensitive business records of third-parties (including, e.g., book purchases or library loans); use intelligence investigative authority to intercept Internet-based and other electronic communications (including, e.g., identification of visited web sites); and conduct secret searches.
- Similarly, the Act permits the FBI to share wiretap and grand jury information, as well as other sensitive information ostensibly collected as part of a criminal investigation, with the CIA, NSA, INS and Secret Service for intelligence purposes without judicial review. Individual credit reports and other sensitive personal information in the possession of financial institutions are now also subject to easy access and sharing by law enforcement and intelligence agencies.

Intelligence Authorization Act for FY 2002
[H.R. 2883, enacted as P.L. 107-108, December 28, 2001]

Like the dog that did not bark in the famous Sherlock Holmes story, what did not happen with this year’s intelligence authorization legislation was of greater interest to publishers than what did. Specifically, enactment of the legislation without the inclusion of a highly-controversial criminal “leak” statute has apparently put off once again a major legislative (and potential court) battle over First Amendment protections that some Members of Congress deem to be in conflict with national security needs.

At the end of the previous Congress, then-President Bill Clinton had vetoed an initial version of the FY2001 intelligence authorization legislation because it contained a provision, sponsored by Senator Richard Shelby (R-AL), then-Chairman of the Senate Select Committee on Intelligence, which would have made virtually any unauthorized disclosure of classified national security information a federal felony punishable by up to three years in prison. In response to vigorous opposition to the provision from media organizations (including AAP), civil liberties advocates, and government “watchdog” groups, President Clinton concluded that the proposed statute, though well-intentioned,

was overbroad and could “unnecessarily chill legitimate activities that are at the heart of a democracy.”

Noting that Congress had passed the proposed criminal statute without the benefit of any public hearings, President Clinton’s veto statement echoed the criticisms in many newspaper and broadcast editorials in stating that the legislation “might discourage Government officials from engaging even in appropriate public discussion, press briefings, or other legitimate official activities,” and could “unduly restrain the ability of former Government officials to teach, write, or engage in any activity aimed at building public understanding of complex issues.” In the belief that “incurring such risks is unnecessary and inappropriate in a society built on freedom of expression and the consent of the governed and is particularly inadvisable in a context in which the range of classified materials is so extensive,” President Clinton vetoed the authorization bill and encouraged Congress to “pursue a more narrowly drawn provision tested in public hearings.”

When it became clear last summer that Senator Shelby and other supporters of the “leak” statute were preparing to resurrect the discredited proposal, the same cries of opposition arose and the newly-installed Bush Administration was courted by both supporters and opponents of the measure. With the House Judiciary Committee making clear its intention to assert legislative jurisdiction over any proposed criminal “leak” statute, the Senate Intelligence Committee was informed by Attorney General John Ashcroft in early September that the Administration needed more time to study Shelby’s proposed measure and was not prepared to present testimony at a planned hearing on the issues it raised.

The Bush Administration’s signal that it was not prepared to engage in a major public brawl over the issue took the steam out of Shelby’s effort to resurrect the criminal “leak” statute in the present Congress. As a compromise, the intelligence authorization legislation advanced through Congress with a requirement for the Attorney General, in consultation with other senior Executive Branch officials, to “carry out a comprehensive review of current protections against the unauthorized disclosure of classified information” and to submit a report to Congress no later than May 1, 2002 describing the findings of the review and any recommendations for legislative or administrative action.

**Cybercrime and Intellectual Property Provisions of
Commerce, Justice, State Appropriations Act of 2001**
[H.R. 2500, enacted as Public Law 107-77, November 28, 2001]

Unlike past years, the Commerce, Justice, State Appropriations Act sailed through Congress while appropriating \$41.6 billion for fiscal year 2002, a \$1.9 billion increase over fiscal year 2001. Among other things, legislators once again recognized the importance of ensuring adequate funding to address cybercrimes, including those that target intellectual property.

In the final version of the legislation, House and Senate conferees provided a total of \$10 million to U.S. Attorney’s Office for cybercrime and intellectual property enforcement.

The conferees directed the U.S. Attorneys to report to the House Appropriations Committee on the number of copyright prosecutions undertaken in the proceeding year, including those under the No Electronic Theft (NET Act), by type and location, no later than April 30 of this year. The FBI is required to report to the Senate Appropriations on the number of copyright law investigations that led to prosecutions in the preceding year, including those under the NET Act, by type and location, no later than June 30, 2002.

In addition to providing funding for enforcement of federal copyright laws, House and Senate conferees provided additional funding to promoting the importance of protecting intellectual property. Under funding for the Patent and Trademark Office, the conference agreement allocated not less than \$1,000,000 to the International Intellectual Property Institute “to promote sustainable development in developing countries and to promote business interest by assisting in the establishment of intellectual property legal frameworks.” The Committee also provided \$750,000 to the National Academy of Sciences for a study to develop long-term strategies to address global intellectual property counterfeiting and piracy that threatens the US economic strength.

**Emergency Postal Funds in Department of Defense
Appropriations Act for FY 2002**

*[Div.B, Title IX, Chap.12 of H.R. 3338, enacted as P.L. 107-117, January
10, 2002]*

The U.S. Postal Service was already in the midst of a deepening financial crisis, as evidenced by its preparations to file yet another round of proposed rate increases barely six months after the second of two earlier rounds of increases had gone into effect, when it was further traumatized by the tragic events of September 11th and the anthrax-tainted mail crisis that followed in their aftermath.

Emergency expenses relating to the urgent need to protect USPS employees and the public from isolated but unresolved incidents of biohazardous material in the mailing system, along with those relating to the replacement or repair of USPS facilities destroyed or damaged in terrorist attacks in New York City, became a funding priority on top of growing financial crisis arising out of the USPS’s regular mail operations. But, where would the money come from?

Mailers were already being hammered by a series of rate increases sought by USPS to balance its rising costs and falling revenues. Despite AAP’s best efforts in the earlier rate case litigation, book publishers, who primarily utilize the mail subclassification known as “Bound Printed Matter” (BPM), had already taken an extraordinary hit in the form of a nearly 18% rate increase for BPM last Spring when it became clear that USPS’s rising red ink would require additional proposed rate increases in the Fall averaging about 9% for all subclasses, including BPM.

With efforts for legislative postal reform at a standstill, the acting Chairman of the Postal Rate Commission urged settlement of the looming rate case, rather than the usual

prolonged 10-months of litigation that had produced such unsatisfactory results for publishers and others in the previous rate case, so that USPS could realize the benefits of the new rate increases as soon as possible. The mailing community grumbled but, acknowledging the emergency circumstances confronting the USPS, agreed to a settlement that would impose the new rate increases at least four months sooner than would ordinarily occur if the rate case were to be fully litigated. In return, they received a tentative commitment from USPS to avoid further rate increases before October of this year. The settlement process is expected to be completed in time for the new rates to become effective at the end of June.

Meanwhile, USPS, supported by the mailing community, appealed to Congress for the funding to meet its emergency needs. Initial requests for over \$1.5 billion were ignored as both Congress and the Bush Administration grappled with the need to fund the war on terrorism, provide homeland security and redress the human and property losses of September 11th within some plan of fiscal rationality.

Finally, just before the Congress adjourned in late December, an agreement was reached to include \$500,000 for emergency expenses in the Postal Service Fund as part of the defense appropriations legislation. The statement of the House and Senate conferees on that legislation is noteworthy and instructive regarding the inexplicable nonchalance that seems to characterize the overall Congressional reaction (or lack thereof) to the USPS's burgeoning problems.

The conferees made it clear that, in providing the \$500,000 for emergency expenses, Congress intended the funds to be used only to enable USPS to protect postal employees and customers from exposure to biohazardous material, to sanitize and screen the mail, and to replace or repair destroyed or damaged USPS facilities in New York City. However, regarding the task of sanitizing and screening the mail, Congress barred any expenditure of the funds for that purpose until USPS submits to designated Congressional committees "an emergency preparedness plan" to combat the threat of biological and chemical substances in the mail, along with a plan for spending the allocated funds in support of that plan.

Moreover, the conferees noted that USPS has not received a direct appropriation for operations for nearly two decades and that, in providing the emergency funds for the "extraordinary circumstances" confronting USPS, they "do not intend to set a precedent for operational subsidies of the Postal Service" because they "continue to support current law requirements that the Postal Service operate on a self-sustaining basis."

PubSCIENCE & Technical Information Management
Provisions of the Energy and Water Development
Appropriations Act, 2002
[H.R. 2311, enacted as P.L. 107-66, November 12, 2001]

As federal agencies continue to exploit their Internet web sites as an increasingly important means for communicating with, and distributing materials to, key agency

constituencies and the general public, concerns have arisen in some quarters of the private sector – including book and journal publishing – regarding the potentially unfair consequences of such activities that may constitute government competition with commercial business enterprises. In one case this year, these concerns attracted Congressional attention.

Since its inception in October 1999, PubSCIENCE has raised complaints among some publishers of scientific journals and, in particular, publishers of abstract and indices services related to such journals. The service, which was developed and administered under the auspices of the Department of Energy's Office of Scientific and Technical Information, offers free public online search and access capabilities across a large database of abstracts and citations from journal articles in the physical sciences and other disciplines of interest to DOE researchers. Although PubSCIENCE provides hyperlinks from abstracts to the publisher's server for purposes of obtaining access to the full text article, it does not provide access to the article unless the user or his/her organization has a subscription to the journal in which the article appears. If the user lacks such a subscription, access to the full text article can be obtained by pay-per-view, by special arrangement with the publisher, library access, or through commercial providers. In these and other respects, PubSCIENCE is based, at least in part, on PubMed, a medical sciences service that is funded and operated by the National Institutes of Health.

Although it reportedly obtains abstracts and citations from over 1200 journals through the cooperation of some 35 participating publishers (as well as through OSTI's DOE Energy Science and Technology database of journal citations), PubSCIENCE has been criticized by some publishers as constituting unfair government competition to private enterprises that provide essentially the same services on a commercial basis.

This sentiment surfaced in the report of the House Appropriations Committee regarding legislation to fund the FY 2002 budget for DOE's Technical Information Management program, which provides funding for OSTI and, consequently, PubSCIENCE. The Committee noted its concern that "the Department is duplicating technical information services that are already available from the private sector" and instructed the Department to "carefully review its information services such as PubSCIENCE to be sure that such efforts remain focused on appropriate scientific journals and do not compete improperly with similar services available from the private sector."

Internet Tax Nondiscrimination Act
[H.R. 1552, enacted as P.L. 107-75, November 28, 2001]

On October 21, 2001, the Internet Tax Freedom Act (ITFA) expired. The Act had prohibited state and local governments from imposing any new taxes on "Internet access services" or any "multiple or discriminatory taxes on electronic commerce" for three years. Although the House of Representatives acted before ITFA's expiration to extend the Internet tax moratorium for another two years, the bill was delayed in the Senate and it was not until a month after the ITFA expired that the Senate passed the House bill and sent it to the President to be signed into law.

Originally, H.R. 1552, as introduced by Representative Christopher Cox (R-CA), would have placed a permanent moratorium on taxing Internet access and extended for an additional five years the moratorium on multiple and discriminatory taxes on electronic commerce. Under this legislation, states would have been required to simplify their sales-tax system before seeking ratification from Congress.

One of the most controversial issues regarding the extension was the debate surrounding the States' ability to collect sales tax on Internet purchases. As the debate continued, support for a permanent or five-year extension of the moratorium waned. In the House Judiciary Committee, H.R. 1552 was amended to extend the Internet tax moratorium for only two years, until November 1, 2003. This scaled back version of the original bill passed the full House of Representatives on October 16, 2001 and was sent to the Senate in hopes they would take up the bill and pass it before the moratorium expired. The debate in the Senate took a lot longer than originally anticipated, with a number of Senators supporting the States' request to start collecting sales tax revenues on purchases made over the Internet. On the other side of the issue, the high tech industry was lobbying the Senate to adopt a straight extension of the moratorium.

On October 18, 2001, Senators Mike Enzi (R-Wyo), and Byron L. Dorgan (D-ND), introduced the Internet Tax Moratorium and Equity Act (S. 1567). If enacted S. 1567 would have permanently banned Internet access taxes and barred multiple and discriminatory Internet taxes until Dec. 31, 2005. The bill would have also encouraged States to simplify their uniform sales-tax systems by authorizing States to enter into an Interstate Sales and Use Tax Compact that streamlines sales and use tax systems. If twenty States entered into the Compact, it would be sent to Congress for approval and if approved, States could begin to tax online sales. The Senate took up S. 1567 as an amendment to the House-passed bill, but it failed on a 57-43 vote.

Although the moratorium was extended for another two years, the States are working hard to develop a uniform tax system, so we can expect to see the issue of Internet taxation arise in Congress before the extended moratorium expires.

Non-Enacted Legislation

Technology, Education And Copyright Harmonization (TEACH) Act [S. 487]

After weeks of intensive negotiations in which AAP and other copyright industry organizations, representatives of the education community, and U.S. Copyright Office officials sought a consensus compromise on a digital distance education bill, a revised version of S. 487 was reported by the Senate Judiciary Committee in May and passed by the Senate in June.

The Senate-approved version of the TEACH Act, which would broaden the existing copyright exemption for instructional broadcasting to encompass distance education delivered via digital networks, addresses the concerns voiced by AAP at Senate hearings in March regarding the original version of the legislation which was introduced by Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT) based on recommendations contained in a study that was conducted and issued by the Copyright Office under a mandate in the Digital Millennium Copyright Act (DMCA).

Although the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property quickly approved the Senate-passed bill following a hearing in July, the legislation has remained stuck in the full House Judiciary Committee since that time. AAP staff have been told that the hold-up on moving the bill to the House floor has nothing to do with its substance, but is part of a dispute between the leaders of the House and Senate Judiciary Committees regarding the latter Committee's failure to take up a number of House-passed measures that originated in the former. It is expected that the bill will be reported by the House committee and passed by the House later this year.

Music Online Competition Act ("MOCA") [H.R. 2724]

On August 2, 2001, Representatives Rick Boucher (D-VA) and Chris Cannon (R-UT) introduced the Music Online Competition Act of 2001, H.R. 2724, called MOCA. The bill did not receive much attention in the House in the first session of the 107th Congress, but may see more action in the coming months with a possible hearing and subcommittee mark-up.

Although the bill directly effects the delivery of music online, proposed changes to the Copyright Act regarding ephemeral copies and incidental and archival copying raise concerns among all interested copyright industries. The bill would expand the existing ephemeral recording exemption for broadcasters to include webcasters and allow them to make multiple-in-house copies. The multiple copies would be used to accommodate different bit rates, different formats, and caching throughout the network. The bill would extend the ephemeral recording exemption to include individual song recordings, and would address incidental and archival copying in two particular situations that affect

Internet technology. The bill would also exempt buffer copies made in the course of browsing or webcasting from copyright liability, based on the claim that the buffer copies are “mere technical incidents” that have no economic value. The bill would also permit consumers to make archival copies of lawfully acquired music to protect their collections against hard drive crashes and other damage.

Other changes proposed in the bill:

- **Direct payment to artists:** Would require that royalty payments be shared equally between performing artists and recording companies, and require direct payment to the artists or to a collective organization representing the artists.
- **Nondiscriminatory Licensing to affiliated and non-affiliated music distribution:** The bill would extend the nondiscrimination provision enacted by Congress in 1995 regarding cable and satellite subscriptions services by requiring vertically integrated companies that own both content and distribution services to offer nondiscriminatory licensing to similar distribution services.
- **Study and report on programming restrictions:** The Copyright Office and Department of Commerce would be required to conduct a joint study focusing on the effect sound recording statutory license programming restrictions have on digital music services, copyright owners, and consumers. The report would include legislative recommendations.
- **Administration of statutory licensing:** Under the bill, users would be permitted to notify the Copyright Office of the use of a statutory license; royalty payments and accounting information would be deposited with the Copyright Office; and the Copyright Office would develop an electronic filing system to receive notices, replacing the paper filing system used now.
- **“In-Store Sampling” Exemption:** The bill would expand the current exemption in copyright law for “brick and mortar” music retailers that record CDs on a server for customers to sample music in stores to include online retail establishments that offer music samples.

National Digital Libraries Legislation
[H.R. 1858 and S. 803]

Two pieces of legislation pending before Congress continue a trend toward the creation of so-called “national digital libraries” to provide the public with free online access to certain specified materials. Although the establishment of such libraries may generally be viewed as beneficial to the public, publishers are concerned that the proponents of such libraries often fail to address whether such libraries will contain copyrighted materials

and, if so, how the interests of copyright owners will be protected in making such materials freely accessible online.

One pending example of such legislation is Title II of the proposed “National Mathematics and Science Partnerships Act” (H.R. 1858), which would establish a National Science, Mathematics, Engineering, and Technology Education Digital Library to provide public access to an Internet-based repository of curricular materials, practices and teaching modules, as well as other information relating to the improvement of elementary and secondary teaching in these subjects. This legislation has passed the House with an amendment intended to protect the rights of copyright owners.

Another pending example is Section 204 of the proposed “E-Government Act of 2001” (S. 803), which would establish an Online National Library providing public access to “an expanding database of educational resource materials, including historical documents, photographs, audio recordings, films, and other media, as appropriate, that are significant for education and research in United States history and culture.” This legislation has been the subject of a Senate hearing, but has seen no further legislative action thus far.

Dot Kids Domain Name Act of 2001 *[H.R. 2417]*

Last June, Representatives John Shimkus (R-IL) and Edward Markey (D-MA) introduced legislation that would direct the Internet Corporation for Assigned Names and Numbers (ICANN) to create a kids-friendly top-level Internet domain in order to provide a safe online environment for children, free of material that may be harmful to minors.

Since the bill’s introduction, and its controversial reception at a House hearing, Representatives Shimkus and Markey have proposed a substitute bill that would require the National Telecommunications and Information Administration to create a secondary domain within the national “u.s.TLD,” such as “.kids.us.” The new domain would be available for voluntary use and would contain only material that is considered suitable for minors. However, the proposed substitute bill raises some serious concerns for all providers of content.

AAP is concerned with a number of issues in the proposed substitute, particularly the section dealing with civil liability. Liability protection under the bill would be afforded to anyone acting in good faith to restrict access through the new domain to material that a person or entity considers “harmful to minors, obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” This is an entirely subjective standard that is not based on established criteria. AAP is also concerned that a person or entity whose material is constitutionally protected would not be allowed to seek an injunction or other relief against restriction because the liability standard in the bill would extend to constitutionally protected content. Another concern with the proposed substitute is its lack of specificity in establishing criteria and standards. The criterion for accepting registrants in the new ccTLD would be developed by an “independent board, with diverse

membership,” but the legislation does not specify how the board will be selected or how the criterion for selection will be developed.

The House Commerce Committee has suspended any further action on this bill and has directed NTIA and Neustar to try to resolve the issue of “.kids.us”.

Anti-Spamming Act of 2001 *[H.R. 718]*

The so-called “SPAM” bill introduced by Representative Heather Wilson (R-NM) was referred both to the House Energy and Commerce Committee and the House Judiciary Committee. Separate Committee mark-ups have created two competing versions of H.R. 718, which would both place restrictions on the transmission of unsolicited commercial e-mail. Although the bill was scheduled for floor action in the House last September, in the week leading up to the vote the House leadership requested that the Chairmen of the two committees work out a compromise bill, but a compromise has yet to be produced.

Both versions of the bill would make it illegal to send unsolicited commercial e-mails from a false return email address. The Judiciary bill, however, is much narrower and less restrictive than the Commerce bill. The Commerce version would create a private right of action, giving consumers the right to sue for damages if they receive spam after they have requested it not be sent to their address. The Judiciary version makes it illegal to send fraudulent emails.

Representative Goodlatte (R-VA) from the House Judiciary Committee and Representative Wilson have been meeting to negotiate the differences between the two versions of H.R. 718. They hope to reach agreement so the bill can be moved to the House floor. On the Senate side, no action has been taken thus far on the issue of unsolicited commercial e-mail.

The Access to Books For Children (“ABC” Act) *[H.R. 1849]*

With the support of AAP, Congresswoman Carolyn Maloney (D-NY) has re-introduced legislation that would amend the 1966 Child Nutrition Act to provide vouchers for the purchase of educational books for infants and children participating in the WIC program (the special supplemental nutrition program for women, infants and children). The ABC Act would authorize the expenditure of \$10 million over three fiscal years to enable participating local agencies to distribute book vouchers worth up to \$5 to women participating in the program. The bill has been referred to the House Education and the Workforce, Subcommittee on Education Reform.

The Book Stamp Act *[H.R. 116]*

On January 3, 2001, with the support of AAP, Congressman Rush Holt (D-NJ) re-introduced legislation to establish a grant program through the Secretary of Health and Human Services to promote child literacy and improve children's access to books at home and in early learning and childcare programs. The grant program would provide children participating in specified programs with books, and also establish special postage stamps for child literacy to generate additional funding for literacy programs. The stamps would be of an image relating to a character in a children's book or cartoon and the rate of the stamps would be the price of a first-class stamp plus a differential amount. The U.S. Postal Service would pay Health and Human Services the money raised by the stamps for child literacy promotion activities. Although the bill has 35 cosponsors and has been referred to the House Education and the Workforce Committee and the House Government Reform Committee, no further action has been taken to advance the bill through the House, and no Senate counterpart to the bill has been introduced.

Contributions of Book Inventory *[S. 1415]*

One of the biggest partisan battles in the first session of the 107th Congress was the President's tax cut bill, the RELIEF Act of 2001. This landmark legislation provides the largest tax cut in 20 years and is designed to provide tax relief over the next decade to most Americans regardless of income. It also include a tax break for publishers, which was dropped from the final legislation but may resurface later this year.

On the final day the bill was debated in the Senate a group of non-controversial amendments were included in a manager's amendment that passed the full Senate by voice vote. Included in the manager's amendment was the Contributions of Book Inventory Amendment, sponsored by Senator Hatch. The Amendment was designed to enhance the incentives for book publishers to contribute excess book inventory to educational organizations. It provided companies with an enhanced tax deduction for the contributions of book inventory to particular educational organizations.

Under the amendment, eligible educational organizations for donations are defined as: (1) educational organizations that normally maintain a regular faculty and curriculum and normally have a regularly enrolled body of pupils or students in attendance at the place where its education activities are regularly carried on (schools); (2) charities organized primarily for purposes of supporting elementary and secondary education; and (3) charities organized primarily to make books available to the general public at no cost or to operate a literacy program. Unfortunately, the Senate amendment was not included in the final bill sent to the President.

Although the amendment was not included in the tax bill there was an enormous amount of interest raised in the Senate on legislation aimed at increasing book inventory donations by publishers. The amendment was limited in scope and did not address the disincentives that are often created because the current tax law does not allow deductions to be taken for the full market value. Senator Hatch has reintroduced his proposal as a stand-alone bill, S. 1415. It is estimated by Congress's Joint Committee on Taxation that the additional tax deduction if the bill was enacted would be about \$246 million for deductions of books over the next ten years. AAP is working with the Senator's staff to expand his proposal to allow book publishers to deduct the full market value.

**Deductions for Elementary and Secondary School
Teachers for Professional Development Expenses and Classroom
Materials**
[S. 495]

Two other amendments of possible interest to AAP members were adopted by the Senate in the manager's amendment to the RELIEF Act: (1) Deduction for Qualified Professional Development Expenses of Elementary and Secondary School Teachers; and (2) Credits for Classroom Materials. Although neither amendment was ultimately included in the final Act sent to the President, both amendments passed the full Senate, and a number of Senators showed interest in pursuing these goals in other legislation. AAP will support both provisions if another opportunity for passage arises.

The Deduction of Qualified Professional Development Expenses of Elementary and Secondary School Teachers amendment would have permitted teachers an above-the-line deduction for up to \$500 for qualified professional development expenses. The deduction would have been available to kindergarten through 12th grade teachers, instructors and other staff who work 900 hours during a school year in an elementary or secondary school. The deductible expenses include tuition, fees, books, supplies and equipment.

The Credit for Classroom Materials amendment would have provided a nonrefundable personal credit not to exceed \$250 in any year. The deduction would have been available to kindergarten through 12th grade teachers, instructors and other staff who work at 900 hours during a school year in an elementary or secondary school. The deductible expenses are for books, supplies, computer equipment (software), and supplementary materials.

Although the amendments did not make it in the final Act sent to the President, Senator Hatch has introduced similar legislation in the Senate. The Tax Equity for School Teachers Act (S. 495) allows eligible kindergarten, elementary, and secondary school teachers and instructors the opportunity to deduct for certain professional development expenses and an unlimited deduction for out-of-pocket expenses for classroom supplies.

Online Privacy (S. 1055)

At the beginning of the 107th Congress, online privacy appeared to be one of the hot button issues. But as the session progressed, action on privacy bills has been slow, with just a few hearings being held. Many still ask whether the industry's continued self-regulation is enough or whether it needs to be supplemented with federal legislation designed to protect the privacy interests of individual users. Although the online privacy issue is complex and multi-faceted, constant public discussion has reduced the major issues to five basic principles of "notice," "disclosure," "access," "choice," (i.e., "opt-in" v. "opt-out"), and "security." Each of these issues raises a variety of sub-issues, which makes reaching consensus on an overall statutory approach to online privacy a difficult task.

In the past, the Federal Trade Commission has sought increased authority to address and regulate online privacy. In May of 2000 for example, the FTC released a report concluding that legislation to ensure a minimum level of privacy protection by incorporating the basic principles mentioned above, coupled with continued industry self-regulation, would increase consumer confidence in e-commerce. Recent changes in the FTC leadership and staff, however, have shifted the focus away from support of online privacy legislation.

On November 7, 2001, Timothy J. Muris, the new FTC Chairman testified before the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection that the majority of the FTC does not support enactment of online privacy legislation. Instead, Mr. Muris stated that the FTC is now focusing on the enforcement of existing consumer privacy laws, additional rulemaking, and continued education for both the consumer and business.

Last June, Senator Dianne Feinstein (D-CA) introduced the Privacy Act of 2001, S. 1055, comprehensive legislation to address the increased theft of personal information and other privacy abuses on the Internet and through other mediums. The bill would set up a two-tiered system where customers would be allowed to opt-out of sharing non-sensitive information and opt-in to the sell of sensitive personal information. Under the legislation, companies that wanted to collect and then sell a customer's non-sensitive information (i.e., address or phone number) would be required to offer the customer the opportunity to opt-out of the sale. If the company would like to sell, license, or rent sensitive personal information (i.e., Social Security Numbers, driver's licenses, and financial and health data), the bill would require the individual whose personal information is for sale to opt-in to the sale. Although the Senate Judiciary Subcommittee on Technology, Terrorism, and Government Information held a hearing, no further action has been taken to advance the bill through the Senate, and no House counterpart has been introduced.

Intellectual Property Protection Restoration Act Of 2001 **[S. 1611]**

On March 19, 2002, Senator Patrick Leahy (D-VT) reintroduced his sovereign immunity bill, S. 2031 (originally introduced as S.1611), this time with a Republican cosponsor Senator Brownback (R-KA). In the House of Representatives Congressmen Howard Coble (R-NC) and Howard Berman (D-CA) introduced companion legislation, H.R. 3204. The legislation was drafted in response to a series of United States Supreme Court rulings, *Florida Prepaid v. College Savings Bank* and its companion case, *College Savings Bank v. Florida Prepaid* which, the Supreme Court ruled that state entities could not be held liable for monetary damages for patent infringement and other violations of federal intellectual property laws. State entities are protected by the Eleventh Amendment's sovereign immunity doctrine against federal statutes establishing such liability. State entities, however, continue to enjoy the full protection of those laws for their own intellectual property.

The bill stipulates that, for states and state agencies to collect damages themselves when their own intellectual property rights are violated, states must waive their immunity from damage liability for violating the intellectual property rights of others. States have two years after the enactment of this legislation to choose to waive their immunity. States that do not waive their immunity will not be allowed to recover monetary damages in their own suits against private parties for infringement.

AAP and other organizations representing the copyright industries have been actively supporting S. 2031, as a reasonable vehicle for restoring fairness to the nation's intellectual property laws. Prior to the bill's reintroduction, a full committee hearing on the issue was held by the Senate Judiciary Committee, and a hearing on the House side in the Judiciary Subcommittee on Courts, the Internet and Intellectual Property may occur later this year.

Legislation Not Yet Introduced

The Instructional Materials Accessibility Act of 2002

[Not yet introduced]

In the coming months, AAP, along with organizations representing blind students and their families, special education professionals in the field of blindness, and producers of materials in Braille will support the introduction of legislation to ensure that students who are blind or visually impaired have timely access to textbooks and other printed instructional materials in the classroom. The proposed legislation will improve the efficiency of the conversion process from print to Braille.

The draft proposed legislation would:

- Require States to develop and implement state-wide plans designed to ensure that students who are blind or visually impaired, or who have other print disabilities, have access to instructional materials in formats they can use at the same time such materials are provided to students without such disabilities.
- Provide for the establishment of a well-structured, standardized national electronic file format to be used for the conversion of textbooks and other instructional material into accessible formats.
- Require publishers to provide core instructional materials in the national electronic file format to a central repository for their timely and convenient distribution for conversion;
- Establish and authorize funding for the national repository responsible for the receipt, cataloging, storage and distribution of the standardized electronic files provided by publishers.
- Ensure sufficient time from the publication of the file format standards until their effective date to allow for a smooth national transition to these upgraded standards.
- Supplant existing state law file format requirements only after the transition period is completed (i.e., two years from the date of publication of the new national file format standards).
- Make U.S. Department of Education grants available to state/local education agencies or nonprofit organizations to assist them with training personnel to effectively utilize the new national file format and production technologies, and authorize funding for this purpose for five years.

- Link enforcement of these requirements to provisions of existing law, i.e. the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act.

Database Protection Legislation *[Not yet introduced]*

Despite lengthy roundtable discussions and continuing negotiations directed by the new chairmen of the House Commerce and Judiciary Committees, the impasse over database protection legislation that resulted from the committees' inability to reconcile their different approaches to the issue in the previous Congress seems to have continued through the first session of the current Congress.

Although Reps. Tom Bliley (R-VA) and Henry Hyde (R-IL) have been succeeded by Reps. Billy Tauzin (R-LA) and James Sensenbrenner (R-WI) as chairmen of the House Commerce and Judiciary Committees, respectively, there has been little change in the committees' turf battle over database protection legislation. A joint announcement of cooperation between the new chairmen has produced lengthy discussions between committee staff and interested parties, but has yet to result in the introduction of a bill or even the public circulation of a draft.

Reported leadership discussions attempting to tie movement on database protection to movement on another piece of legislation that has been the subject of jurisdictional squabbling by these committees ("broadband" legislation) has raised hope anew that a breakthrough on database protection will soon emerge. But thus far, talks continue with little visible signs of progress.