Chicago Association of Law Libraries
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The 108th Congress: The Good, the Bad and the Ugly
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I am always honored and thrilled to attend chapter meetings because it's a wonderful opportunity to get away from the DC policy world, meet new colleagues and network, and also learn about the issues that concern you. It's especially exciting for me today because while this is my first CALL visit, I have long admired your commitment to policy issues. You have a proven track record of activism in the government relations arena for which you should all be very proud. So I'm especially honored to be among friends this morning and thank you for the invitation.

Two years ago at about this same time of year, I predicted AALL's legislative agenda for the 108th Congress in my monthly column for *Spectrum*. It was a pretty safe bet that our key issues would be copyright and digital rights management, as well as the information industry's tenacious efforts—begun in 1996—to enact database legislation. We were also pretty sure that the debate in Congress over various provisions of the *USA Patriot Act* would continue. And government information issues would also be a high priority for us. Even before the horrific events of 9/11, there had been tension between the Administration's penchant for secrecy and the access community's concerns about reduced public access and disclosure through the *Freedom of Information Act*.

So anyone who had followed our issues could easily have made that same prediction—*Plus ca change, plus c'est la meme chose.* The key truisms of lobbying held steady during the 108th Congress—that it's much easier to kill legislation than to enact it; that we are more successful when we are part of strong and diverse coalitions; and last but not least, that all politics is local. Many of you are among our most active grassroots supporters, and for that I am most grateful. Believe me, you not only made a difference, you also contributed greatly to our success over the past two years.

When Naomi called with the invitation to be with you this morning, we both thought it would be timely to reflect on the progress made on our legislative agenda during the 108th Congress.

So I'd like to give you an overview of our core issues during the past two years—from the perspective of what was good, what was bad, and what was really ugly. I'm going to cover them under four broad categories:

- First, appropriations.
- Second, copyright and digital rights management.
- Third, the *USA Patriot Act*.
- And fourth, access to government information.

The first is the annual cycle of appropriations.
The news here is mostly good and so I'm going to be pretty brief. We have thankfully been successful over the past several years at ensuring that Congress "adequately" funds programs at the Library of Congress, the Law Library and the Government Printing Office. We also support full appropriations for the Institute of Museum and Library Services (IMLS), an agency created in 1996 to administer the Library Services and Technology Act (LSTA) and other grant programs. Under the leadership of IMLS director Dr. Robert Martin, the former Texas state archivist who has very good connections to Laura Bush, we have seen amazing increases each year for IMLS. In fact, the President's FY 2005 budget request of $262.2 M for IMLS was an increase of $32.5 M. $23 M of that will fund the third year of a grants program to recruit and educate a new generation of librarians. This important program, a pet project of the First Lady's, emphasizes bringing minorities into our profession.

Every once in awhile, a legislative crisis appears overnight, out of left field—and a year ago, it was a major threat to the National Archives' FY 2004 funding for its Electronic Records Archive, or ERA. Sen. Patty Murray, the ranking member of the Senate Appropriations Subcommittee on Transportation, Treasury, and General Government, decided to zero-fund the ERA. It was done somewhat unwittingly—the creation of the new Department of Homeland Security that year resulted in changes among the various subcommittees. NARA was moved into the Transportation Subcommittee, of all places, at a time when Murray was looking for an offset for AMTRAK. A GAO report suggesting that things could be improved at the ERA led to her short-sighted move—that and, as we later learned, the fact that the one staff person familiar with NARA and the ERA who would have said "no way" was out sick the day the decision was made. Fortunately, we were able to restore funding for the ERA, but only after a long week of Hill visits to House and Senate appropriators, and the strong grassroots support from the library and archives communities, including many of you in this room.

There has been lots of legislative activity during the 108th Congress on copyright and digital rights management (DRM) issues.

First, the good.
Several digital "fair use" bills were introduced last year and we even got as far as a hearing on one of them. That is indeed progress. H.R. 107, the *Digital Media Consumers' Rights Act of 2003 (DMCRA)* was introduced by Rep. Rick Boucher of Virginia, a strong champion of technology and libraries, in February 2003. The DMCRA would restore the historic balance in U.S. copyright law that we believe was eroded by certain provisions of the 1998 *Digital Millennium Copyright Act* (*DMCA*). Under the Boucher bill, it would not be a crime for a lawful user to circumvent a technological protection measure to access or use a digital work ***if*** the circumvention does not result in an infringement of the copyright in the work. We support H.R. 107 because it reaffirms fair use in a networked environment. For those of you familiar with the Copyright Act, it's no accident that Mr. Boucher's bill is H.R. 107, Section 107 being the fair use provision.

In the House, there is no love lost between the Judiciary Committee—which sides with Hollywood, the recording industry and publishers who want stronger copyright protections—and the Energy and Commerce Committee—where there is strong support for business, competition, and the technological innovation that drives our economy. The Boucher bill was carefully drafted for referral to Energy and Commerce. We were very pleased that its Subcommittee on Commerce, Trade, and Consumer Protection held a day-long hearing on May 12, 2004. It was one of the most significant and balanced copyright hearings in memory, with twelve witnesses representing both the content and public interest communities. Miriam Nisbet, legislative counsel for the ALA Washington Office, testified for libraries. She noted that the DMCA provided additional protections for copyright owners but it omitted corresponding allowances for fair use and other exceptions that are crucial for libraries to fulfill their mission in the digital age. There is a downside to everything, and unfortunately, the hearing was so successful for our position that it brought out the opposition in droves. While we were in Boston last July, Jack Valenti, who until his recent retirement represented Hollywood interests, convinced the Ranking Member of Energy and Commerce, Rep. John Dingell, to withdrawal his support of the bill. As a result, we were unfortunately unable to move H.R. 107 out of subcommittee this summer.

Another "good" copyright bill is the *Public Domain Enhancement Act* (H.R. 2601) introduced by Rep. Zoe Lofgren of California in June 2003. The goal of H.R. 2601 is to balance the harmful effects of the 1998 *Copyright Term Extension* Act. It creates a mechanism so that older materials would enter the public domain after 50 years unless the copyright owner files an electronic form with the Copyright Office and pays a $1 maintenance fee. If the payment is not received, the copyright expires and the work enters the public domain. Lofgren's bill was referred to the House Judiciary Committee where, not unexpectedly, it didn't even get a hearing. Rep. Lofgren also introduced the BALANCE Act (H.R. 1066) that protects fair use, allows first sale rights of digital content, and provides permissible circumvention.

We also saw two "good" copyright bills in the Senate. Sen. Ron Wyden of Oregon introduced the *Digital Consumer Right to Know Act* (S. 692) that requires notice to consumers about technological features on digital products that would restrict their use of the content. And Sen. Brownback of Kansas introduced the *Consumer, Schools and Libraries Digital Rights Management Awareness Act* (S. 1621) that would prevent manufacturers from using DRM technologies to restrict consumers from reselling or donating digital media products they lawfully own to schools and libraries. Sadly, there were no cosponsors for either bill.

Now for the bad.

In mid-June, Senators Hatch, Leahy, Frist, and Daschle introduced S. 2560, the *Inducing Infringement of Copyrights Act* (INDUCE Act) that is strongly supported by Hollywood and the recording industry because of their concerns about peer-to-peer (P2P) file-sharing networks. They argue that P2P technology is mainly used by consumers to illegally trade copyrighted materials, and that developers of such technology should therefore be held liable. The bill would make companies and Internet service providers (ISPs) liable if their

software or technology "induces" users to infringe copyrighted works. We believe strongly that the solution is not to ban technology simply because it can be used to "induce" consumers to make illegal copies. The bill is so broadly drafted that it has many unintended consequences far beyond targeting those who infringe copyright. One of our key concerns is that it would chill educational innovation by banning the development of new technologies.

We have participated in a broad "Friends of Fair Use" coalition for several years, and together we have worked hard to stop INDUCE. One of our tactics was to give the Senators a very narrowly drafted alternative, the *Discouraging Online Networked Trafficking Inducement Act* or, are you ready, the *DON'T INDUCE Act*. (See, it's not all work and no play—we do somehow keep a sense of humor through all this!) The *DON'T* INDUCE Act says that only someone who distributes a commercial computer program that is "specifically designed" for piracy on digital networks can be held liable for copyright violations.

Not only is INDUCE bad public policy, it's also dangerously on the fast-track. Senate Judiciary Chairman Hatch, a strong supporter of the interests of Hollywood and the recording industry, is term-limited out as chair of the Judiciary Committee and he is determined to get this bill enacted before he leaves. After weeks of negotiations among the stakeholders and half a dozen redrafts throughout September and October, there is still no consensus on this bill and it has not been marked-up. As you all know, Congress is back in town as of yesterday for their lame-duck session, and there is quite possibly going to be an effort to rush through an omnibus copyright bill. INDUCE could conceivably squeak through in the dark of night and so we are watchful and very nervous.

Last but not least, when I think about what's really ugly among our IP issues, it's database legislation because we've been fighting this for oh, so many years and it just won't go away.

We have successfully stopped database legislation since 1996, but it's been a challenge. What's it all about? Publishers say they need additional legal protections for databases because of the Supreme Court's unanimous 1991 ruling in the *Feist* case against the "sweat of the brow" doctrine. The Court said that only those elements of a database that have the requisite degree of originality, such as arrangement and selection, are entitled to copyright protection.

As I mentioned earlier, it's much easier to kill a bill than to pass one, although database is definitely testing our resolve. Our successful strategy to stop it has been to get competing legislation introduced. We did this in the 106th Congress by countering the House Judiciary Committee's "bad" database bill with a "better" bill in the Energy and Commerce Committee. As a result of these dueling database bills, the 107th Congress was spent in negotiations, trying unsuccessfully to reach a compromise between the two committees. A "bad" bill, the *Database and Collections of Information Misappropriation Act* (H.R. 3261), was introduced in October 2003 and referred to the Judiciary

Committee. It was subsequently referred to Energy & Commerce, where a manager's amendment—the "better" bill—was substituted, so we're thankfully again at an impasse.

One of the reasons for our success in opposing database bill is that once again we are part of a very strong and diverse coalition that has grown in strength and numbers over the years. Today it includes—in addition to libraries and higher education—the financial sector, the technology community and even many publishers. The diversity of our group is also a political force since both Consumers Union and the U.S. Chamber of Commerce are active and valuable members. Database is dead this year but we will continue to oppose it because we believe that the open sharing of information is fundamental to our nation's advancement in knowledge, technology and culture. The bill will lead to the growing monopolization of the marketplace for information, where the ability to use facts is increasingly controlled by a small number of international publishing houses.

Let's move on now to our third issue, the USA Patriot Act. A dozen or so bills were introduced early in the 108th Congress to repeal certain provisions of the act, so that's the good news.

One of the best known is the *Freedom to Read Protection Act* (H.R.1157) introduced by Rep. Bernie Sanders of Vermont in March 2003. It would exempt libraries from the Sec. 215 provision of the *USA Patriot Act.* Sec. 215 expanded the scope of materials that the FBI and other law enforcement agencies can access with a warrant from the FISA court, without having to show probable cause, to include library materials. Sec. 215 also prevents a librarian, under penalty of law, from informing patrons that the library is under investigation or that a patron's records have been searched.

One of my personal favorites, just for the name alone, is the *Benjamin Franklin True Patriot Act* (H.R. 3171) introduced by Rep. Kucinich of Ohio to repeal the more contentious provisions of the Act. There were several good bills introduced on the Senate side as well. The *Library, Bookseller, and Personal Records Privacy Act (S. 1507);* the *PATRIOT Oversight Restoration Act* (S. 1695); the *Reasonable Notice and Search Act* (S. 1701); and the *Security and Freedom Ensured Act, or SAFE Act* (S. 1709). You'll be happy to hear that Sen. Durbin was an original cosponsor of both S. 1695 and the SAFE Act.

There's also a USA Patriot Act—the bad—story to tell, although quick and strong opposition stopped both legislative efforts in their tracks.

In 2003, Rep. James Sensenbrenner, chair of the House Judiciary Committee, introduced the *Anti-Terrorism Intelligence Tools Improvement Act* (H.R. 3179), which contains expansions of the PATRIOT Act and FISA authorities. And last May, out of the blue, Sen. Kyl of Arizona introduced S. 2476 that would amend the PATRIOT Act by repealing the sunsets on various provisions that are set to expire on December 31, 2005. In the hectic days last month before the election recess, Kyl tried to get his bill added as an amendment to the Senate's *National Intelligence Reform Act* that implements the 9/11

Commission recommendations. Fortunately his amendment failed because it was ruled non-germane to the Commission's recommendations.

The "ugly" story about the PATRIOT Act will likely begin to unfold early next year when Congress has to decide whether to reauthorize the expiring provisions or make other changes to the statute. There will certainly be a strong push from many members for increased surveillance powers. And, as we learned last week, there will be another opportunity for debate during the nomination hearing for White House counsel Alberto Gonzales—a fervent champion of the PATRIOT Act—to replace John Ashcroft as Attorney General. I suspect he will be asked some serious questions about the DOJ's lack of accountability to Congress and to the public on how these new surveillance powers have been used.

The fourth and final area is access to government information—the track record of secrecy by this Administration speaks for itself.

I gave a presentation to the South Carolina Library Association in late October entitled "Access to Information in Today's Political Climate." Putting that talk together reminded me that the first Bush Administration sought almost immediately to unravel the substantive efforts of President Clinton to make the federal government more open and accountable to its citizenry. For example,

- there was the October 2001 Memorandum on the Freedom of Information Act issued by Attorney General John Ashcroft that presumes secrecy over disclosure;
- E.O. 13233 that strengthens the ability of former presidents (and their families) to exert executive privilege to withhold their records;
- the 2003 Memorandum from Chief of Staff Andrew Card to withhold "Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security";
- Vice-President Cheney's refusal to disclose records of his secret Energy Task Force;
- the hundreds, perhaps thousands, of documents taken off agency web sites after 9/11 and never put back up;
- the untold number of documents that have been withheld from the public because they are deemed "sensitive but unclassified";
- and, last but not least, more documents have been classified during the past four years and more tax dollars have been spent on maintaining the government's secrets than ever before.

Certainly there has to be a careful balance between public access and withholding certain information that could assist terrorists in planning another attack. However, as you see from this track record, that balance seems to be sorely lacking. We have waited now three years for the Department of Homeland Security to issue guidance to agencies on how to define "sensitive but unclassified" information—so each agency continues to do its own thing, with no oversight, opportunity for review, or accountability. If you're interested in these issues, please take a look at the PowerPoint slides from that presentation that are on the Washington Office web site at: http://www.ll.georgetown.edu/aallwash/.

Congress, for the most part, has remained remarkably silent on the administration's penchant for secrecy. Bowing to pressure from the House in the conference committee negotiations over the legislation to implement the 9/11 Commission's recommendations (S. 2845), the Senate recently agreed that the government's intelligence budget would continue to remain classified. This decision weakens the Commission's finding that Congressional oversight of intelligence must be improved, and supports a tradition of secrecy and extensive classification that may further frustrate public oversight on matters of national interest.

Despite that bleak picture, there is some good news from the Hill and I'd like to conclude this morning on an optimistic note.

Like clockwork at the beginning of each new Congress, Senators Patrick Leahy of Vermont and John McCain of Arizona introduce a Senate Resolution to provide Internet access to more congressional committee documents and to CRS reports. We have long advocated the need for public access to CRS reports, and each year we get a little closer to making it happen. CRS' annual appropriations is about $100 M, and they produce over 1000 new reports, and over 4,000 updated or revised reports, each year. Few are made available to the public, although CRS does maintain an intranet for members of Congress and staff. The main barrier has come in the past from CRS itself, and also from the House Administration and Senate Rules Committees. While I can't make any promises, we may well see a breakthrough and have some good news for you on this front next year.

Another good effort had its start in 2003 when Rep. Martin Sabo of Minnesota introduced the *Public Access to Science Act* (H.R. 2613). His wife, a victim of breast cancer, had been frustrated to find so little publicly-funded research information about her disease available on the Internet. The Sabo bill would exclude from copyright protection any works that result from substantially federally funded scientific research. While it really went too far, it did begin a process that has led the National Institutes of Health, with support from Congress, to ensure that peer-reviewed articles on taxpayer-funded research at NIH become fully accessible and available online at no cost to the American public through PubMedCentral. AALL supports this effort, and is a founding member of the new Alliance for Taxpayer Access, an informal coalition of libraries, patient and health policy advocates, and other stakeholders who support reforms that will make publicly funded biomedical research freely accessible to the public.

And lastly, Rep. Henry Waxman of California, a strong advocate of open government, has been the most outspoken member of Congress in his criticism of the Administration's penchant for secrecy and lack of accountability to Congress and the public. In late September, he introduced the *Restore Open Government Act* (H.R. 5073) to reverses the Bush executive order on presidential records; revoke the Card and Ashcroft memos; make it clear that there is a presumption of disclosure over secrecy in all FOIA requests; and ensure openness when the president obtains advice through committees, such as Vice-President Cheney's energy policy task force. He intends to reintroduce his bill early next year, and it's one that AALL will certainly strongly support.

That concludes my remarks this morning, and if we have time remaining, I'll be very happy to answer any questions you might have. Thank you very much.