COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

VICE PRESIDENT FOR INFORMATION SERVICES
AND UNIVERSITY LIBRARIAN

To: Members of IFLA Committee on Copyright and Other Legal Matters

From: Jim Neal

Date: July 28, 2008

Re: 2008 Conference Report from U.S.

Please find on the following pages various reports and documents dealing with legal and legislative matters of interest to CLM. They have been drawn from the work of the American Library Association, Association of Research Libraries, and EDUCAUSE. Look forward to our discussions and deliberations in Quebec City.

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Copyright - Current Legislation

June 2008

Orphan Works (H.R. 5889, S. 2913)

- The collections in our libraries and archives include a significant number of orphan works. These so-called orphans" are works whose copyright owners cannot be identified or found – and are not made publicly available by libraries for fear that rights holders will come forward, initiate legal action, and demand statutory damages of up to $150,000 a work!
- This leaves libraries on the horns of a dilemma – and they can either:
  - use and disseminate orphaned works at their peril (facing the risk of legal action that may require the use of the work be stopped immediately or face statutory damages);
  - *or* leave the works in archives, where few people can access or use them.

Brief History

- In 2005, the U.S. Copyright Office conducted a study of the orphan works problem and concluded that Congress should enact legislation to "free" these works, and a bill was introduced in the House of Representatives: the Orphan Works Act of 2006 (H.R. 5439). However, the 109th Congress ended before the full Judiciary Committee could consider the bill.
- On April 24, 2008, Rep. Howard Berman (D-CA) and Rep. Lamar Smith (R-TX) introduced the **Orphan Works Act of 2008 (H.R. 5889)**, co-sponsored by Rep. Howard Coble (R-NC) and Rep. John Conyers (D-MI). At the same time, Sen. Patrick Leahy (D-VT) and Sen. Orrin Hatch (R-UT) introduced the **Shawn Bentley Orphan Works Act of 2008 (S. 2913)** in the Senate.

Current Legislative Activity

- On May 7, 2008, the House Subcommittee on Judiciary Courts, the Internet and Intellectual Property approved orphan works legislation during a markup hearing.
- Following that meeting, Rep. Berman's office held a meeting of stakeholders to discuss specific bill language on issues such as a notice of use or "dark archive" requirement and what should constitute a qualifying search (i.e. best practices) for attempting to locate a copyright holder.
- We are currently awaiting markup in the full House Subcommittee in the coming weeks.
- The Senate Judiciary Committee held a mark up hearing on their version of the Orphan Works bill on May 15, 2008. The Senate bill now awaits floor action.

Analysis of Orphan Works Legislation

- **The library community thanks the House and Senate for introducing orphan works legislation** to increase access to and use of works of great historic and cultural significance.
- **We continue to advocate for a reasonable legislative solution that helps librarians make orphan works publicly available.**
- **We prefer the Senate version of the bill *over* the House version**; as we do not support the House version's additional "dark archive" provision – mandating that users file a notice to the U.S. Copyright Office before using an orphan work. Such a requirement would be excessively burdensome for users with little benefit to owners, will likely drive up compliance costs, and will require many institutions to consult legal counsel to review submissions prior to filing. (For example, these requirements will prove challenging, if not impossible, for librarians involved in mass digitization projects to meet).
- We do not support the House and Senate versions' inclusion of the following troublesome provision: tasking the U.S. Copyright Office with establishing *best practices* on conducting searches to locate the rights holder.
- Grassroots advocacy efforts will be needed on this important copyright legislation in the coming weeks.

June is a busy legislative month for Congress. Several bills are being negotiated at this writing.

Please be check out the ALA Washington Office blog: District Dispatch at wo.ala.org/districtdispatch for the most up-to-date information.

Copyright – Updates on Key Legislative and Statutory Activity

The PRO IP Act of 2007 (H.R. 4279)

The bipartisan leadership of the House Judiciary Committee introduced the Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2007. The bill's objective was to: (1) improve intellectual property enforcement by increasing penalties for infringement; (2) provide rights-holders and government with more enforcement tools; and (3) reorganize the federal offices dealing with IP enforcement. While the bill was unlikely to have a meaningful impact on IP infringement, one provision concerning copyright statutory damages, however, would have had an adverse impact on libraries.

This controversial provision was section 104 of the bill as introduced, which would have allowed a rights-holder to recover a separate award of statutory damages for each work contained in an infringed compilation. Under current law, the rights-holder can recover only one award per compilation, regardless of the number of works it contains. For example, if a CD contains 10 tracks, current law permits a maximum statutory damages award of $150,000. Section 104, in contrast, would have permitted an award of $1,500,000.

The Library Copyright Alliance (LCA), which includes ALA, sent a letter to IP Subcommittee Chairman Howard Berman (CA) and Ranking Minority Member Howard Coble (NC), expressing concern with section 104. Specifically, the LCA letter stated that the provision would exacerbate the orphan works problem by significantly increasing libraries' exposure to damages for using orphaned compilations.

In response to the opposition to section 104, Chairman Berman has asked the Copyright Office to convene a roundtable in January 2008 to explore this provision in greater detail. LCA participated in the roundtable. After the roundtable, Chairman Berman decided to drop section 104, and the PRO IP Act was reported out of the subcommittee without the provision.

On May 8, 2008, the House approved the PRO IP Act, which would establish a new copyright enforcement division with the Department of Justice and create a new position of a federal copyright enforcement "czar." The Senate has not yet addressed its version of the bill.

Federal Research Public Access Act of 2006 (S. 2695)

In the 109th Congress, a Senate bill, the Federal Research Public Access Act of 2006 (S. 2695), would have required Internet access to articles reporting on federally funded research. We hope to see the bill reintroduced in the Senate as well as a House version introduced in the 110th Congress. Libraries strongly support this legislation and are continuing to work on its introduction and passage through the Alliance for Taxpayer Access (ATA) coalition. ALA has stepped up its involvement with ATA to demonstrate support for this initiative.

Section 108 Study Group

The final report of the Library of Congress Working Group on Section 108 was recently released. The report, transcripts of previous roundtables, issue papers, and written comments are available on the Study Group web site at www.loc.gov/section108.

The Working Group was charged with making recommendations to the Librarian of Congress for possible alterations to the copyright law that reflect current technologies. The group is named after the section of the U.S. Copyright Act that provides certain exceptions for libraries and archives. Several representatives of the library community were members of the Study Group. The library community as a whole, and ALA in particular, is analyzing the Working Group's report.

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Telecommunications and Broadband Issues

June 2008

Libraries serve a unique and important role in providing equitable access to information. Public, academic, and school libraries need affordable connectivity to provide their users, especially those without connectivity at home, with access to the technologies and digital information to effectively participate in the information economy, meet the needs for lifelong learning, and develop skills to effectively function in the workplace.

ALA promotes affordable advanced telecommunications services to all communities as the highest priority for its telecommunications agenda, focusing especially on "equity of access." Because of the ever-growing public demand for access, this agenda includes:

- **Build-out of affordable, national broadband services;**
- **Stabilization of Universal Service and the E-rate**, discounts that have provided over $547 million to public libraries over the 10-year life of the program;
- **Opposition to blocking of social networks**; Internet safety education is the most effective tool for ensuring safe and effective Internet use;
- **Preservation of network neutrality**, to keep a vibrant diversity of viewpoints on the Internet.

Broadband Deployment
There are at least 83 bills in this Congress that propose to address broadband issues in various ways. ALA urges Congress to develop a long-range vision for broadband deployment and to recognize that libraries are critical partners during broadband planning and build-out. Libraries are especially important for long term service to households without any or with very slow connectivity, in rural, hard-to-reach, and low-income communities. As broadband deployment plans and projects move forward, Congress should also include libraries in all appropriate programs that foster partnerships and provide resources for broadband build-out, new applications, and Internet education.

Rural Broadband Deployment, Rural Libraries, and the Farm Bill
Amendments in the Farm, Nutrition, and Bioenergy Act of 2007 (H.R. 2419) add libraries serving rural communities into Sec. 6302 of the Senate's version of H.R. 2419 – "Telemedicine, Library Connectivity, and Distance Learning Services in Rural Areas." This provision makes libraries eligible to receive funding as part of a program that previously served only telemedicine and distance education entities. This is one of several steps in ALA's efforts to acknowledge and support the important role that libraries serve in rural areas to provide broadband services and the applications broadband enables. The "libraries" amendment language promotes partnerships to help fill the missing links in extension of rural broadband services. At this writing, Congress is re-voting on the Farm Bill because of an omission in the bill that was officially passed. It is assumed that Congress will again override President Bush's veto in the coming days.

Broadband Mapping and Reporting
Despite the universal acknowledgement of the importance of broadband deployment, the federal government has gathered very little information to document the availability of broadband facilities and services. Both the Federal Communications Commission (FCC) and Congress have considered improving the reporting requirements on broadband providers. For instance, the Broadband Data Improvement Act (S. 1492), which has been approved by the Senate Commerce Committee and is awaiting passage by the full Senate, would

require the FCC to revise its definition of broadband service and improve its reporting requirements. It also requires the Comptroller General to study broadband metrics and the Small Business Administration to study the impact of broadband speed and price on small businesses. The Broadband Census of America Act of 2007 (H.R. 3919), which passed the House in the fall of 2007, has similar requirements. The Senate version of the Farm bill also contains similar provisions. Last year, ALA submitted comments to the FCC urging it to adopt a more detailed reporting requirements by broadband providers and to change the definition of "broadband services" to reflect the need for greater capacity. In March of this year, the FCC adopted an order that creates five categories of broadband services and increases the broadband information-gathering requirements. While the FCC's order has not yet been released and will require some time to implement, it should greatly improve the ability of libraries to know what broadband facilities and services are available to them.

Network Neutrality

The debate on network neutrality has begun again, in part because publicity surrounding a number of practices by telephone and cable companies that appear to violate the FCC principles of net neutrality. Verizon Wireless temporarily blocked NARAL from contacting its members by using text messaging, Comcast admitted to engaging in "traffic shaping" (slowing down or blocking some Internet traffic), and an independent VoIP provider recently alleged that U.S. wireless carriers routinely block its efforts to provide international call-back services. Several public interest groups have filed two separate complaints with the FCC about these practices. The FCC recently held two hearings on the Comcast complaint, one at Harvard and the other at Stanford Universities. In testimony before the Senate Commerce Committee in April, FCC Chairman Martin said, "I believe that the Commission must remain vigilant in protecting consumers' access to content on the Internet. Thus, it is critically important that the Commission takes seriously and responds to complaints that are filed about arbitrary limits on broadband access and potential violations of our principles. Indeed, I have publicly stated that the Commission stands ready to enforce this policy statement and protect consumers' access to the Internet." It is widely expected that the FCC will issue an order finding that Comcast has violated the FCC's "four principles" for Internet openness sometime this summer.

Net Neutrality bills have also been introduced in both the Senate and the House. Senator Dorgan and Snowe introduced the Internet Freedom Preservation Act (S. 215), and Rep. Ed Markey (MA-D), Chairman of the House Telecom Subcommittee and Republican Congressman Chip Pickering introduced a House version, H.R. 5353, which codifies the FCC's four principles. The Senate Commerce Committee recently held a hearing on the Future of the Internet and reviewed the pending complaints against Comcast.

ALA supports net neutrality legislation that preserves the ability of library patrons to reach the content and services of their choice and for libraries to be able to virtually publish and make information available without threat of a "slow-down" of access to library websites because of ISPs giving preferential treatment to other companies or organizations. While the FCC claims that it has jurisdiction to enforce its four principles without additional legislation, there is substantial doubt that the courts would uphold FCC enforcement action without additional legislation. There is now no law requiring an Internet provider to carry all Internet traffic in a non-discriminatory fashion. ALA supports efforts to ensure that the principle of net neutrality is preserved and enforced.

[See separate Issue Brief on E-rate and Universal Service]

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E-rate and Universal Service Issues

June 2008

"The E-rate is working and benefiting students and library users of all ages."

Stabilizing the Federal Communications Commission's (FCC's) Universal Service Fund and preserving the E-rate are important priorities for ALA's "equity of access" agenda. The E-rate discount program for public libraries and K-12 public and private schools is a critical funding source for affordable telecommunications services for public libraries, and public and private K-12 schools. As part of the Universal Service Fund (USF) program, E-rate discounts have provided public libraries with discounts totaling $608,728,344.95 over the first 10 years of the program, from 1998 to 2007, with additional funding going to libraries through consortium applications.

Without the E-rate discounts, libraries and schools could not provide library users and students, especially those without connectivity at home, with access to the technologies and digital information to participate in the information economy, meet lifelong learning needs, and develop skills to function in the workplace. Congress can support libraries, USF and E-rate in several ways:

1. Provide a permanent exemption from Anti-Deficiency Act (ADA) requirements;
2. Press the FCC to accept ALA's proposal for simplification of the E-rate application and disbursement processes;
3. Maintain the E-rate and stabilize the USF program while pushing for ubiquitous and affordable broadband capacities for all areas of the country; and
4. Provide for Internet safety education and oppose additional filtering mandates for E-rate participants.

Exemption of USF from Anti-Deficiency Act Requirements

An important legislative priority for libraries is exempting the E-rate and other USF programs from compliance with government accounting requirements under the Anti-Deficiency Act (ADA). Omnibus appropriations bills over the last four years have each included a one-year exemption. ALA now seeks a permanent exemption so that ADA rules do not shut down the flow of E-rate funds causing widespread confusion, as happened in 2004 for E-rate applicants and vendors. The current exemption expires on December 31, 2008.

ALA urges Congress to pass S. 609 and H.R. 278 to provide a permanent exemption from the ADA for all Universal Service Fund programs by amending Section 254 of the Communications Act of 1934 so that USF funds "are not subject to certain provisions of.... the Anti-Deficiency Act."

E-Rate Funding Should Not Be Extended to Additional Projects

Reps. Bobby Rush (D-IL) and Fred Upton (R-MI) recently proposed a new bill, the School Emergency Notification Deployment Act (H.R. 5806). This bill would permit K-12 public and private schools to apply USF/E-rate discounts to emergency notification systems. Rep. Ed Markey (D-MA) has also been highly supportive of this proposal.

At Annual 2008, various groups within ALA will be discussing opposition (or support) of H.R. 5806. ALA has repeatedly opposed expansion of the E-rate program for those products and services that go beyond the program's intent: to provide access to advanced telecommunications services. Every year the total amount

requested in school and library applications far exceeds the $2.25 billion E-rate cap. Adding in costly new uses of the USF program would break the back of the entire fund, even if the cap were to be increased. The E-rate was established for K-12 public and private schools and public libraries to obtain affordable advanced telecommunications services. The E-rate program already has far more demand on its cap of $2.25 billion. Allowing such services for E-rate support would be a precedent that both compromises the USF and could provoke other new demands upon the program.

There are alternatives: a more appropriate source of funding for these security systems is addressed by the Schools Empowered to Respond Act (H.R. 5766), introduced by Rep. Bob Etheridge (NC-D), with numerous cosponsors. This bill would amend the Homeland Security Act of 2002 and establish the Office of National School Preparedness and Response in the Department of Homeland Security. Grants, research and the inclusion of schools in preparedness planning are also included in H.R. 5766.

Simplification of the E-Rate Applications
With over 10 years of feedback from E-rate libraries, ALA proposed to the FCC, in filings over the last two years, recommendations to simplify the E-rate application and disbursement process. The "ALA Simplification Proposal" would promote increased library participation in the E-rate discount program and provide for improved oversight and accountability. Congress can demonstrate support for the E-rate program by asking the FCC to consider ALA's proposal to simplify the E-rate application process. (There are other "simplification" proposals from other stakeholders that do not have the features outlined by ALA.) Following National Library Legislative Day (NLLD) in May, a number of Congressional offices indicated interest in signing onto letters to the FCC about promoting moving forward and inquiring about ALA's simplification proposal

Internet Safety Education over Blocking Interactive Web Applications
There are now bills calling for Internet safety education for libraries and schools receiving E-rate discounts. Rep. Brad Ellsworth (IN-D) introduced the e-KIDS Act of 2007 (H.R. 3871) that would call for schools to certify as part of "Internet safety policy, [that...] schools are educating minors about appropriate online behavior." Sen. Ted Stevens, (AK-R) introduced Protecting Children in the 21st Century Act (S. 1965).

Both proposals require K-12 public and private schools receiving the E-rate to certify that they provide Internet safety education to their students in order to receive E-rate discounts. The Senate bill also addresses other issues such as public awareness, funding for education, strengthening investigations, etc. Public libraries are not included in these two bills. At this writing, Rep. Judith Biggert (IL-R) is expected to introduce another education bill that would require public libraries as well as K-12 schools to certify that they offer Internet safety education in order to obtain E-rate discounts.

These are welcomed alternatives to the Deleting Online Predators Act (DOPA) reintroduced by Rep. Mark Kirk (R-IL) in this Congress. The "education" bills are clearly better alternatives to DOPA, which would block access to all interactive web applications, such as MySpace, except under certain limited conditions.

ALA has long supported education as the best tool to promote safe Internet usage for young people; however, additional burdens placed on E-rate participants are not supported. Mandated blocking of all interactive web applications denies access to materials and activities appropriate for children as well as limiting their abilities to learn the skills to utilize these new technologies and applications for education and career development. Decisions about Internet safety education and/or blocking technologies are best made at the local level by library and school boards based upon community needs and standards.

Meanwhile, at this writing, the discussions at the FCC continue about the role of Internet providers in blocking access to child pornography. At least one FCC commissioner, has also informally raised the question about dealing with "harmful to minors" definitions, a much more complex legal issue than illegal child pornography.

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Privacy, National Security Letters & FISA Reform Issues

June 2008

Protecting patron privacy and the confidentiality of library records are deep and longstanding principles of librarianship and guide ALA's legislative activities on privacy, surveillance and other related issues. Based on these principles, ALA has worked on issues from reform of national security letter laws (NSLs) and the Foreign Intelligence Surveillance Act (FISA) to repeal of the REAL ID Act. At this writing, it is expected that there will new bills. proposals or other changes to report at Annual Conference in Anaheim. Watch for updates there.

National Security Letter (NSL) Reform Legislation

The Senate Judiciary Committee will soon consider issues relating to National Security Letters (NSLs). The bi-partisan NSL Reform Act (S. 2088) includes many beneficial reforms including limiting the reach of NSLs by allowing only less sensitive personal information to be made available under this authority. Other existing authorities could still be used to obtain the more sensitive information that would no longer be available with an NSL. Among other things, the bill would require the government to determine that records sought with an NSL relate to someone who is connected to terrorism or espionage.

It would also enhance oversight by requiring additional reporting to Congress and make reasonable changes to the gag rules, requiring a gag to be narrowly tailored and limiting it to 30 days, extendable by a court. The bill would also tighten standards for court-issued orders under Section 215 of the USA PATRIOT Act (the "library records" provision) by requiring the government to show that the records sought relate to a suspected terrorist or spy, or to someone directly linked to such a person.

In the House, Rep. Jerry Nadler (NY-D), with Reps. Jeff Flake (AZ-R), William Delahunt (MA-D) and Ron Paul (TX-R), introduced the National Security Letters Reform Act of 2007 (H.R. 3189). This bipartisan bill, still in committee, would provide crucial checks against the unprecedented and dangerous NSL authority expanded by the Patriot Act. This bill would give an NSL recipient the right to challenge the letter and its nondisclosure requirement, while placing a time limit on the NSL gag order and allow for court approved extensions.

BACKGROUND: The PATRIOT Act and Intelligence Authorization Act of FY 2004 drastically expanded the FBI's authority to obtain the business and personal records of Americans by issuing National Security Letters (NSLs). NSLs, which do not require prior judicial approval, can be used to obtain a wide range of documents based upon vague claims that the information is merely "relevant" to a terrorism investigation. The FBI can keep records indefinitely that it acquires records via an NSL, even when it concludes that the subject of those records is innocent of any crime and is not of intelligence interest. While the FBI needs prompt access to some of the types of information currently acquired under NSLs, the current method of self-policing simply does not work. Reports issued by the Office of the Inspector General of the Department of Justice in March 2007 and 2008 document the

drastic expansion of the use of NSLs and their subsequent abuse, making reform all the more important.

Foreign Intelligence Surveillance Act (FISA) Reform Legislation
In August 2007, Congress enacted the Protect America Act very quickly as summer recess began. The Protect Act expired on February 16 of this year. In March, the House passed a new bill incorporating parts of the Senate's FISA Amendments Act of 2007 (S. 2248), and the House's original Restore Act , H.R. 3773. In recent months, ALA has signed on to numerous letters with organizations such as the Center for National Security Studies (CNSS) and the Center for Democracy and Technology (CDT) as the various iterations of these bills have proceeded through Congress.

The "H.R. 3773 substitute bill" is substantially better than the Protect Act passed in August or the bill passed by the Senate. The substitute includes reporting requirements that will ensure that Congress obtains access to the information needed for public and Congressional consideration of what permanent amendments should ultimately be made to FISA. While the bill would authorize the surveillance of Americans' international communications without a warrant (in some circumstances where the Fourth Amendment requires a warrant), it does contain important protections against such unconstitutional surveillance. Such appropriate protections include: a) accountability for illegal surveillance by the Administration that also guarantees future oversight; b) a December '09 sunset so that these powers will be reviewed in the new Administration; c) creation of a commission to investigate & report about warrantless surveillance; d) stronger judicial oversight; and f) requiring probable cause to target Americans who are overseas.

BACKGROUND: FISA, enacted in 1978 and later amended by the USA PATRIOT Act, is at the center of the controversy concerning domestic spying. FISA passed after reports of massive domestic spying abuses by the FBI, CIA and NSA in the 1970s. It provides special procedures for conducting electronic surveillance of telephones, etc for foreign intelligence purposes including setting up the FISA Court to authorize such surveillance. FISA provides for surveillance of American citizens and others for whom the court determines that there is probable cause that they are "agents of a foreign power" as defined in the statute.

REAL ID Act
ALA opposed the REAL ID Act (P.L. 109-13) in 2005 and supports current efforts for its repeal. The Act creates a de facto national identification (ID) card by mandating standardized machine-readable driver's licenses in all states. The library community is concerned because such state driver's licenses are often used to apply for library cards. This would increase the opportunity to access and link multiple databases, including library use records, threatening privacy rights and confidentiality with respect to information sought.

Most critics agree that the REAL ID Act creates a national ID system lacking adequate privacy safeguards and puts the burden of this system on states' driver's license agencies to fund (cost estimates exceed 100 times what Congress initially projected) and manage. Enactment of REAL ID would violate many states' privacy laws; 17 states have passed (and 20 have partially-passed or introduced) legislation rejecting REAL ID. ALA passed a resolution stating its concerns about the move to standardized machine-readable driver's licenses.

Data Mining and Personal Information
There is renewed debate on several "employment" related bills that would require verification of an individual's residence status. The New Employee Verification Act (H.R. 5515) is one such bill. ALA is monitoring these proposals closely because of the implications for privacy, the problems inherent to such databases that currently exist, and the implications for libraries and their employees as well as patrons.

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School Libraries
No Child Left Behind/The SKILLs Act

Last year, Senators Jack Reed (D-RI) and Thad Cochran (R-MS) and Representatives Raul Grijalva (D-AZ) and Vernon Ehlers (R-MI) introduced a bill to address the school library crisis facing the Nation: the Strengthening Kids' Interest in Learning and Libraries (SKILLs) Act. The inclusion of the SKILLs Act in the reauthorization of the No Child Left Behind Act (NCLB) is vital to school libraries. It is the single most important piece of legislation concerning school libraries that will come before Congress this year.

The SKILLS Act requires school districts, to the extent feasible, to ensure that every school within the district employs at least one state-certified library media specialist in each school library.

Education is not exclusive to the classroom; it extends into school libraries. Long regarded as the cornerstone of the school community, school libraries are no longer just for books. Instead, they have become sophisticated 21st century learning environments offering a full range of print and electronic resources that provide equal learning opportunities to all students, regardless of the socio-economic or education levels of the community.

Across the United States, numerous studies have shown that students in schools with strong school libraries learn more, get better grades, and score higher on standardized tests than their peers in schools without libraries. A recent study reported nearly 100% of Ohio students stated that the school library helps them get better grades on projects and assignments.

Some of the major skills that library media specialists teach are the techniques and methods for locating and answering curriculum needs through critical thinking. Using the library's many and varied resources, school librarians also teach students how to work collaboratively, which, combined with the information literacy skills, is ideal for ensuring college readiness.

The skills needed to function successfully in a 21st century global workforce have gone beyond reading. Business leaders are concerned that people are now entering the workforce without information literacy skills – those skills needed to find, retrieve, analyze, and use information – which equip people with the ability to think critically and work proficiently. Who better to teach information literacy than librarians, the information experts?

In order to be hired as a school library media specialist in all 50 States, a school library media specialist must have a state teaching certificate. The National Board for Professional Teaching Standards considers "library media specialists" a teaching position and provides certification in library media for school library media specialists who teach students ages 3-18 and demonstrate expertise in information literacy, instructional collaboration, and technology integration.

Several studies and reports have documented the significant shortages of school library media specialists. According to the Department of Education's annual "Teacher Shortage Areas Nationwide Listing" (OMB No. 1840-095, March 2008), 18 States reported teacher shortages in library media. In addition, public libraries and schools across the nation are experiencing a dire shortage of librarians, with approximately 25 percent of America's school libraries operating without a state certified school library media specialist on staff. An alarming number of librarians are reaching the age of retirement with more than three in five age 45 or older who will become eligible for retirement in the next 10 years.

Loan Forgiveness Update

The College Cost Reduction and Access Act

- On September 27, 2007, President George W. Bush signed the College Cost Reduction and Access Act (P.L. 110-84) into law.
- The bill encourages public service by providing loan forgiveness for borrowers who spend 10 years in a public service occupation.
- Specifically, the bill directs the Secretary of Education to cancel the balance of any interest and principal due on any Federal Direct Loan – including Direct Stafford, PLUS, or Consolidation Loan – which is not in default for borrowers who:

    - Have made 120 monthly payments on a Direct Loan after October 1, 2007; and
    - Are employed in a "public service job" and have been employed in a public service job during the 120 payment period.

- The bill defines a "public service job" as a:

    - Full-time job in emergency management, government, military service, public safety, law enforcement, public health, public education (including early childhood education), social work in a public child or family service agency, public interest law services, public child care, public service for individuals with disabilities, public service for the elderly, **public library sciences, school-based library sciences** and other school-based services.

Higher Education Act Reauthorization Bill

- The Higher Education Act is currently up for reauthorization. Congress has passed six extensions while the Senate and House negotiate the differences in the competing versions of the bill.
- The Senate bill (S. 1642) would extend current law for Perkins loan forgiveness (which is subject to appropriations and available for borrowers who work in specific public service jobs) to additional categories of borrowers who meet eligibility criteria and work as librarians, pre-kindergarten or child care workers, full-time faculty at tribal colleges or universities, and speech and language therapists. Specifically, the language was expanded to include service as a librarian with a master's degree working in:

    - An elementary or secondary school eligible for assistance under title I of the Elementary and Secondary Education Act; or
    - A public library serving an area containing an elementary or secondary school eligible for assistance under title I of the Elementary and Secondary Education Act.

- The House bill (H.R. 4137) authorizes discretionary loan forgiveness (excluding consolidation and PLUS loans) of $2,000 a year (up to $10,000) for service in "areas of national need." Under this program, librarians are specifically listed as an "area of national need" as long as the individual is employed full-time in a high poverty area for five consecutive years. Specifically, the individual must work in:

    - A public library that serves a geographic area within which the public schools have a combined average of 30 percent or more of their total student enrollments composed of children eligible for assistance under title I of the Elementary and Secondary Education Act; or
    - An elementary or secondary school with greater than 30 percent of its students eligible for assistance under title I of the Elementary and Secondary Education Act.

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E-Government, Government Information & Federal Libraries (I)

I. Strengthening Open Government Laws

Currently, the House and Senate have, in various stages, legislation to enhance and remove restrictions to important open government laws.

Whistleblower Protections

ALA supports "whistleblower" legislation to ensure that the American public is prohibited from only that information which is truly secret. Both the House and Senate have passed bills but a conference committee has not started to negotiate. These bills complement one another and should be melded together in order to provide the most protection to employees.

- The Whistleblower Protection Enhancement Act of 2007 (H.R. 985), introduced by Rep. Waxman (D-CA) with 29 co-sponsors, would overturn a harmful U.S. Supreme Court decision from 2006, *Garcetti v. Ceballos*, which ruled that the over 21 million public employees could not claim First Amendment rights when they voice concerns to their supervisors. Whistleblowers have been instrumental in revealing information necessary for investigating and assuring oversight and public accountability. Whistleblowers were critical to exposing the problems with the EPA library closings. Passed

- The Federal Employee Protection of Disclosures Act of 2007 (S.274), introduced by Sen. Akaka (D-AK) with 10 co-sponsors, is similar to H.R. 985 and has been referred to the Committee on Homeland Security and Governmental Affairs and to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia Committees. Passed

Presidential Records Act (PRA)

The Presidential Records Act Amendments of 2007 (H.R. 1255), introduced by Rep. Waxman (D-CA), and its Senate companion (S. 886), introduced by Sen. Bingaman (D-NM), would revoke President Bush's executive order (E.O. 13233) and other restrictions on access to Presidential records. In October 2007, a U.S. District Court judge ruled that Presidents do not have authority to control executive records after they have left office. This ruling invalidates part of E.O. 13233 that allows former Presidents and Vice Presidents to review executive records before they are released under the Freedom of Information Act. Presidential records are an important resource for historians and the larger public and it is vital that these papers are made available.

H.R. 1255 passed in March (333-93), and S. 866 stalled in the Senate. H.R. 1255 was sent to the Senate, but was prevented from moving due to a hold by Sen. Bunning (R-KY). The hold was removed December 2007; however, there is still Republican opposition to moving it forward. The bill was brought to the floor again in January 2008 and again was blocked -- this time by Sen. Jeff Sessions (R-AL).

II. Open Access to Publicly Funded Research

Scientific Research/Scholarly Publications

Every year, the federal government funds billions of dollars in scientific research. U.S. taxpayers underwrite this research and have a right to expect that its dissemination and use will be maximized and that they will have access to it. ALA is a member of the Alliance for Taxpayer Access (www.taxpayeraccess.org), a coalition of over 60 library, non-profit, and patient advocacy groups. ALA currently supports:

- **Open Access Legislation**: In the 109th Congress, the Federal Research Public Access Act of 2006 (S. 2695) would have required Internet access to articles reporting on federally-funded research.
    - ALA supports reintroduction of S. 2695 or similar legislation that would promote broad and rapid dissemination of new knowledge and unrestricted access to the results of taxpayer funded scholarship and research.

Open the Congressional Research Service (CRS)

For the past several years, librarians, academics, journalists, open government advocates, and concerned citizens have urged Congress to provide free, public access through the Internet to the unclassified, taxpayer-funded reports produced by the CRS. Taxpayers spend over $100 million a year to fund the CRS, which generates detailed reports for lawmakers. These reports play a critical role in our political process, but have never been made available in a consistent manner to the public. Although lawmakers may give copies of the reports to their constituents upon request, this is a slow, unreliable process, and there is no way for taxpayers to know what reports have been published.

- ALA supports the Congressional Research Accessibility Act (HR. 2545), sponsored by Rep. Shays (R-CT), and the Senate resolution (S. Res. 401) to provide Internet access to certain Congressional Research Service publications, sponsored by Sen. Lieberman (D-CT), that would make available on the Internet, for purposes of access and retrieval by the public, certain CRS products including reports.

Federal Depository Library Program (FDLP)

In April 2008, the Joint Committee on Printing (JCP) tasked the U.S. Government Printing Office (GPO) with conducting a study on the conditions of regional depository libraries. As part of that study, GPO requested comments from the library community. On behalf of ALA and the Committee on Legislation (COL), the ALA Washington Office submitted a letter to GPO broadly framing the complex issues and highlighting the diversity of concerns, challenges, and ideas within ALA, with respect to the current and future role of the FDLP.

On June 2, GPO released its draft report titled, "Regional Depository Libraries in the 21st Century: A Time for Change? (available at http://www.fdlp.gov/regionals/study.html). The JCP asked GPO to seek comments from the depository community in response to the report and its recommendations. To meet GPO's June 15 deadline for comments, COL reviewed the report and sought input from ALA units to draft and submit letter of response and support to GPO by their deadline. GPO's report and recommendations, as well as the future of the FDLP, will be an important agenda item at various meetings during ALA's 2008 Annual Conference.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502
May 28, 2008

MEMORANDUM FOR THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF ENERGY
THE SECRETARY OF EDUCATION
THE SECRETARY OF HEALTH AND HUMAN SERVICES
THE SECRETARY OF HOMELAND SECURITY
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF VETERANS AFFAIRS
ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
DIRECTOR, NATIONAL SCIENCE FOUNDATION
DIRECTOR, NATIONAL INSTITUTES OF HEALTH
ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
ACTING SECRETARY, SMITHSONIAN INSTITUTION
ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

SUBJECT: Principles for the Release of Scientific Research Results

FROM: JOHN H. MARBURGER, III
DIRECTOR

As called for by Section 1009 of the *America COMPETES Act* (P.L. 110-69), the attached Principles provide guidance and direction to agencies regarding the release of scientific research results. Congress directed that these principles and supporting actions be designed to "ensure the communication and open exchange of data and results of research" undertaken by scientists at civilian agencies, consistent with existing Federal laws, regulations and Presidential directives and orders. In accordance with this direction, these principles apply to the release of news and information to the media and public as well as the sharing of data and research results at the scientific and technical level.

The underlying reason for these principles is simple: science, science policy, and the greater public interest all benefit from a culture that is as open and transparent as possible. Accordingly, the Federal government should be committed to fostering such an open environment.

A solid foundation is already in place to support this objective. In April of 2006, following discussions with agency chief scientists, I provided a list of best practices regarding openness in scientific communications that was developed by NASA

Administrator Griffin. At that time I urged you to consider your own current policies in light of this model established by NASA. This was followed by additional communications to agencies, including the FY 2008 OMB/OSTP Research and Development Priorities Memorandum. In response to these communications, many agencies have already developed or revised polices related to scientific openness and provided mechanisms to ensure employees at all levels understand their rights and obligations under these existing policies.

This memorandum should serve as guidance as you work to establish, improve and implement these policies. Thank you for your continued attention to this issue as we strive to ensure agencies are aware of the polices and are coordinating and promulgating them optimally within their organizations. Please provide to me by July 31, 2008 an update on your progress in finalizing your policies in this area.

Attachment

Core Principle for Communication of the Results of Scientific Research Conducted by Scientists Employed by Federal Civilian Agencies:

Robust and open communication of scientific information is critical not only for advancing science, but also for ensuring that society is informed and provided with objective and factual information to make sound decisions. Accordingly, the Federal government is committed to a culture of scientific openness that fosters and protects the open exchange of ideas, data and information to the scientific community, policymakers, and the public.

Supporting Principles

(1) Communication with the News and Information Media

a) Agencies should provide for the widest practicable and appropriate dissemination of factual information concerning agency scientific activities and their results.

b) Agencies should develop, and update as necessary, policies governing employee interaction with the press and the public. These policies should be based on an approach ensuring that, in communicating official information on behalf of the agency:

   i) Scientific content is accurate, provided in context, and in as complete and timely a manner as practicable.
   ii) Agency employees may freely and openly discuss with the public, subject to classification restrictions and consistent with existing laws and regulations, scientific and technical ideas, approaches, findings, and conclusions based on their official work.
   iii) All federal employees are obliged to distinguish their personal views from the official positions of their agencies, and procedures should be in place to ensure that such distinctions are clearly drawn.
   iv) Agency designated policymaking officials have responsibility for determining official agency positions and for communicating official agency policies to the public.

c) These policies should include clear procedures to resolve disputes and ensure all agency employees have a route of appeal on issues regarding the communication of scientific information.

d) Agencies should endeavor to ensure internal cooperation and coordination among their organization's scientific, engineering and public affairs staff, and should promote awareness of internal agency guidelines on these issues and relevant Federal laws and policies.

Note: In developing policies under this section, agencies are encouraged to draw from and build on the sound policies already in place with respect to communications with the media. (Several

agencies have developed such policies, including NASA[1], the Department of Commerce[2], the Department of Health and Human Services[3], and others.)

(2) Open Exchange of Research Data and Results by Federal Scientists

a) Research data produced by scientists working within Federal agencies should, to the maximum extent possible and consistent with existing Federal law, regulations, and Presidential directives and orders, be made publicly available consistent with established practices in the relevant fields of research.
   i) Agencies should develop, and update as necessary, clear guidelines regarding processes for sharing research data and results generated by Federal scientists. These guidelines should be consistent with the Information Quality Act guidelines[4].
   ii) In developing the guidelines, agencies should endeavor to establish clear policies regarding preservation and storage of and access to publicly available data.
   iii) Agencies should work to ensure awareness of and compliance with these guidelines, and ensure that responses to requests for publicly releasable information are made promptly, accurately, and completely.

b) Peer review is an important component of the scientific research enterprise that further validates the credibility of research data and results, which are often subsequently published in journals or other media. Agencies should take steps to ensure peer review is conducted in a manner consistent with established research practices in the relevant fields[5].

Definitions. For the purposes of this memorandum:

1. "Research Data" means "the recorded factual material commonly accepted in the scientific community as necessary to validate research findings." This does not include: "preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues." This also excludes physical objects such as laboratory samples. Research data also do not include:

(A) Trade secrets, commercial or confidential information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law or Presidential orders; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

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[1] http://www.nasa.gov/pdf/145687main_information_policy.pdf
[2] http://www.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_002841.pdf
[3] http://www1.od.nih.gov/oma/manualchapters/management/1184/
[4] http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf
[5] http://www.whitehouse.gov/omb/fedreg/2005/011405_peer.pdf

July 9, 2008

The Honorable Henry Waxman
Chair, House Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman:

We are writing to support the passage of H.R. 5811, the Electronic Message Preservation Act.

Investigations and reports by your Committee and by several nonprofits document the significant deficiencies in the preservation of email by the federal government. H.R. 5811 directs the Archivist of the United States to establish standards for the capture, management, and preservation of White House e-mails and other electronic communications and to issue regulations requiring agencies to preserve electronic communications in an electronic format. This legislation demonstrates that Congress paying attention to this serious issue, and taking steps to begin addressing the systemic problems with electronic records in general and electronic communications records that the federal agencies and the White House have failed for too long to address.

Thank you for your leadership on this critical aspect of government management and accountability. We look forward to working with you on this and other issues in the future.

Sincerely,

American Association of Law Libraries

American Library Association

Association of Research Libraries

Common Cause

Essential Information

Freedom of Information, Oklahoma

Government Accountability Project (GAP)

iSolon.org

Liberty Coalition

National Coalition Against Censorship

National Coalition for History

Mine Safety and Health News

Minnesota Coalition on Government Information

Mississippi Center for Freedom of Information

National Freedom of Information Coalition

ASSOCIATION OF RESEARCH LIBRARIES

A Victory For Media Neutrality: The Eleventh Circuit's En Banc Decision in *Greenberg v. National Geographic Society*
July 9, 2008

Ben Grillot, MLS (2002, Maryland), second year student at The George Washington University Law School, and legal intern for the Association of Research Libraries.

Sitting en banc, the U.S. Court of Appeals for the Eleventh Circuit on June 30, 2008, decided *Greenberg v. National Geographic Society*, finding that the CD-ROM set, "The Complete National Geographic" (CNG), was a privileged revision of a collective work under 17 U.S.C. § 201(c) and not a "new collective work" in violation of Mr. Greenberg's copyrights. This case is in line with the Second Circuit's decision in *Faulkner v. National Geographic Enters.*,[1] further clarified the U.S. Supreme Court's ruling in *New York Times Co. v. Tasini*,[2] and importantly, upheld the "long embraced doctrine of media neutrality" that the "transfer of a work between media does not alter the character of that work for copyright purposes."[3]

I. Facts

In 1997, The National Geographic Society, publishers of National Geographic Magazine, produced a thirty-disc CD-ROM set, "The Complete National Geographic" (CNG), containing every monthly issue of the magazine from 1888 through 1996. The CD-ROM contained scans of every page of the magazine, presenting them exactly as they appeared in print, including the original advertisements and page numbering. Additionally, the CD-ROM contained a short introductory montage and a piece of software that allowed users to search the magazine's contents, zoom in on particular pages, and print.

Freelance photographer Jerry Greenberg had his photographs published in four issues of National Geographic. Upon publication of the CNG, Greenberg sued National Geographic in Federal District Court alleging that National Geographic infringed his copyrights.

II. Procedural History

In 2000, the District Court for the Southern District of Florida granted summary judgment to National Geographic, holding that the reproduction of Greenberg's images in the CNG

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[1] 409 F.3d 26 (2nd Cir. 2005).
[2] 533 U.S. 483 (2001).
[3] *Greenberg v. National Geographic (Greenberg III)*, No. 05-16964, 2008 WL 2571333, at *8 (11th Cir. June 30, 2008), citing *Tasini*, 533 U.S. at 502.

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was privileged under §201(c) because the CNG constituted a revision of the print issues of the magazines. On appeal, a panel of the Eleventh Circuit Court of Appeals disagreed, reversed the decision, and remanded the case to the District Court for a determination of damages.[4] After a trial on the issue of damages, a jury returned a verdict against National Geographic for $400,000.

National Geographic appealed this jury verdict, arguing that the Supreme Court's post-*Greenberg I* holding in *New York Times v. Tasini* clarified §201 as it related to printed works in digital formats and required a reversal of the jury verdict. In 2007, a panel of the Eleventh Circuit agreed and held that publication of the CNG was privileged under §201.[5] This decision, however, was vacated when the Eleventh Circuit agreed to hear the case en banc.

III. Issue

Both Greenberg and National Geographic agreed that each individual issue of National Geographic, in print form, was a collective work and that National Geographic was privileged to reproduce and distribute those issues in print. At issue was whether the CNG constituted a privileged revision of the print magazines, or whether it was sufficiently different from the original issues to become a new work.

Under 17 U.S.C. § 201(c), "copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution." However, the owner of copyright in the collective work is presumed to have the privilege of "reproducing and distributing the contribution" in one of three ways: 1) as part of that particular collective work; 2) as a revision of that collective work; or 3) in any later collective work in the same series.[6]

In 2001, the Supreme Court addressed the issue of §201(c)'s privilege for publishers in *New York Times, Co. v. Tasini*.[7] In that case, a group of freelance publishers sued the New York Times and several online databases, alleging that by republishing their work in these formats, the newspaper and the database publishers infringed their copyrights. The publishers asserted that such republication was a protected revision under §201(c). The Supreme Court disagreed, holding that "[t]he Publishers are not sheltered by § 201(c) because the Databases reproduce and distribute articles standing alone and not in context."[8] Following *Tasini*, the Second Circuit in *Faulkner v. National Geographic Enters.* decided a case factually similar to *Greenberg* – a freelance photographer sued National Geographic for republishing his photographs in the CNG. In *Faulkner*, the

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[4] *Greenberg v. National Geographic Society (Greenberg I)*, 244 F.3d 1267 (11th Cir. 2001).
[5] *Greenberg v. National Geographic Society (Greenberg II)*, 488 F.3d 1331 (11th Cir. 2007).
[6] 17 U.S.C. §201(c) (2006).
[7] 533 U.S. 483.
[8] *Id.* at 484.

Second Circuit applied *Tasini* and held that because the CNG maintained the original context of the publication, National Geographic was entitled to protection under §201(c).[9]

In this case, National Geographic argued that republishing Mr. Greenberg's photographs as part of the CNG was privileged under either the first or second prongs of § 201(c) – as part of that particular collective work, or as a revision of that collective work. Mr. Greenberg, however, argued that the CNG was a "new collective work" not entitled §201(c) protection, and therefore publication of the CNG violated Mr. Greenberg's copyrights.

IV. Holding

By a 7-5 vote, the en banc Eleventh Circuit held that although the CNG is in a digital format and thus is different from the original print publications, the CNG "faithfully preserve[d] the original context of National Geographic's print issues" and therefore National Geographic "is privileged to reproduce and distribute the CNG under the 'revision' prong of §201(c)." Further, the court found the elements of the CNG not present in the print edition, including the search and zoom functionality as well as the introductory montage, were not sufficient to deprive National Geographic of its §201 protection.

V. Reasoning

In order to determine whether National Geographic's inclusion of Greenberg's photos in the CNG was protected under §201(c), the court looked to *Tasini* for guidance on what constitutes a revision. Noting that "[t]he copyright act does not define 'revision,' but *Tasini* does," the Eleventh Circuit determined that "the teachings of *Tasini* are twofold."[10] First, the court found that under *Tasini* "the concept of 'revision' necessarily includes some element of novelty," and second, that "consideration of the context in which the contributions are presented is critical in determining whether that novelty is sufficient to defeat the publisher's §201 privilege."[11]

The dissent argued that inclusion of new elements such as a computer program to perform the search and zoom functions, and the opening montage sufficiently modified the CNG to make it a new work and therefore exempt from §201(c) protection. The majority disagreed, finding that under *Tasini*, a revision may include some novelty, and that here "the new elements of the CNG ... do not bring the CNG outside the scope of the §201(c) privilege."[12] The court found the opening montage to be a "virtual cover" which "in no way alters the context in which the original photos were presented ... just as a new cover on an encyclopedia set would not change the context of the entries in the encyclopedia

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[9] 409 F.3d at 38.
[10] *Greenberg III* at *4.
[11] *Id.*
[12] *Id.* at *7.

set."[13] Further, the court found the computer program's search capability analogous to a print index and the zoom capability similar to a magnifying glass or the lens on a microfilm machine. Accordingly, the court held that "these additional features do not destroy the original context of the collective works."[14]

Drawing upon *Tasini's* suggestion that the "reproduction of print publications in microform would be privileged under §201(c)" because they represent a "mere conversion of intact periodicals (or revisions of periodicals) from one media to another,"[15] the court here found that the CNG is like microform and therefore protected. Unlike in *Tasini* where the "articles were removed from their original context," here Greenberg's photographs "are firmly positioned within their original context" just as "they originally appeared in the Magazine's print versions."[16] One of the databases in question in *Tasini*, General Periodicals OnDisk (GPO), maintained the original position of the article as it appeared on the printed page, but did not allow users to "flip" to another article. In distinguishing the CNG from GPO, the Eleventh Circuit emphasized the fact that by allowing the CNG user "to flip through the pages or issues of the Magazine after conducting a search," the CNG "preserv[ed] the original and complete context of the print issues."[17]

The court found this conclusion bolstered by the legislative history surrounding the adoption of §201(c), deciding that while the statute prevents publishers from revising the contribution itself, including it in a new anthology, or publishing it in an entirely different work, "Congress intended for publishers to retain their §201(c) privilege unless the republication constituted an 'entirely different' collective work."

Importantly, the court concluded its analysis by articulating the "long-embraced doctrine of media neutrality" stated in *Tasini:* the idea that the "transfer of a work between media does not alter the character of that work for copyright purposes."[18] In this case, the court found that "Greenberg's copyrights ... and National Geographic's privilege of reproducing and distributing the collective works – were not determined thirty years ago based on the medium in which they were produced, and they should not be determined on that basis today."[19] The court correctly recognized that "as technology progresses ... copyright law must remain grounded in the premise that difference in form is not the same as a difference in substance."[20]

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[13] *Id.* at *3.
[14] *Id.* at *7.
[15] *Id.* at *8, citing *Tasini*, 533 U.S. at 502.
[16] *Id.* at *5.
[17] *Id.*
[18] *Id.* at *8.
[19] *Id.* at *9.
[20] *Id.*

VI. Dissent

There were two dissents in this case: one by Judge Birch who was joined by Judge Wilson for the entire opinion and by Judges Edmondson and Anderson for Part A only; and a second dissent by Judge Anderson joined by Judges Birch, Edmondson, Wilson, and Tjoflat.

Judge Birch's 47 page dissent began with the premise that this case is "not about education, access by the masses, or efficient storage and preservation – it is about who gets the money."[21] In Part A, Judge Birch argued that the CNG is an entirely different work and thus not eligible for §201(c) protection. In Parts B and C of his dissent, Judge Birch explored issues not briefed by either party – the question of whether National Geographic could transfer its §201(c) privilege to third parties and whether by distributing a product that could project copyrighted images on a computer screen, the CNG publicly displayed the works, an act not privileged by §201(c).

Judge Anderson's dissent echoed part A of Birch's dissent and found that satisfaction of *Tasini's* contextual analysis alone does not always mean that the new publication enjoys §201(c) protection. Instead, Judge Anderson argued that *Tasini's* discussion of microform is dicta and not binding on the court. However, Judge Anderson continued, even if microforms are protected under §201(c), the CNG is not protected because the advanced search function, the compression/decompression program, and the digital format makes the CNG "an entirely new product – a sophisticated research tool."[22]

VII. Conclusion

The majority correctly interpreted §201(c), in light of *Tasini*, recognizing that digitizing a copyrighted object does not result in the loss of a publisher's ability to re-use that contribution so long as the original context is preserved and the work itself is not significantly changed. Further, by avoiding a split with the Second Circuit's decision in *Faulkner*, the Eleventh Circuit provided welcome clarification to application of §201 post-*Tasini*. In *Greenberg III*, the court struck the proper balance between the rights of copyright owners and the rights of publishers who seek to move large amounts of analog content they paid for into the digital environment.

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[21] *Id.* at *10. (J. Birch, dissenting).
[22] *Id.* at *29. (J. Anderson, dissenting).

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ASSOCIATION OF RESEARCH LIBRARIES

NIH Public Access Policy Does Not Affect U.S. Copyright Law

Analysis

The U.S. National Institutes of Health (NIH) is one of the largest funders of biomedical research in the world. In FY2008, NIH's operating budget is $29 billion and the agency distributes most of its research dollars through grant agreements to outside researchers. In FY 2007, NIH awarded approximately 47,000 research grants, with annual funding averaging $432,714.[1] NIH estimates that the research it supports generates approximately **80,000 scientific and medical journal articles per year.** To ensure that the scientific and social impact of this research is maximized, NIH maintains an online digital archive called PubMed Central (PMC) to provide researchers and the public with long term access to peer reviewed biomedical journal articles and manuscripts arising from NIH funds. Importantly, this archive also permits NIH to better manage their research portfolio and provides accountability through this taxpayer funded research investment.

Following several years of congressional consideration, NIH *requested* that investigators submit their peer reviewed manuscripts to PMC and grant NIH a license to make these publicly accessible within 12 months after the date of publication. Despite the policy being in place for almost three years, data showed that compliance with this request never exceeded 10%. As a result, Congress gave NIH explicit instructions:

> *SEC. 218. The Director of the National Institutes of* ***Health shall require*** *that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.*
>
> - Division G, Title II, Section 218 of PL 110-161 (Consolidated Appropriations Act, 2008)

Although NIH was not required by law to proceed with a notice-and-comment rulemaking to implement this directive, NIH nevertheless invited public comment on **three** separate occasions to receive the benefits of the public's views. Over six thousand comments were filed with the agency – the vast majority in strong support of this policy.[2]

A minority of the comments filed came from a subset of the publishing community who oppose the NIH Public Access Policy. In the most recent comment period, the Association of American Publishers (AAP) submitted an Opinion Letter that makes misleading and incorrect assertions

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[1] See http://report.nih.gov/award/Research/Research_Average_Award_Dollars.xls

[2] See http://publicaccess.nih.gov/comments.htm and http://publicaccess.nih.gov/comments/Overview_Context.pdf.

about the relationship between the NIH Public Access Policy and U.S. Copyright law.[3] These assertions are not supported by the law or the facts.

I. The NIH Final Policy is fully consistent with the United States Copyright Act.

Assertion: The AAP Opinion Letter suggests that NIH may be violating the provision of U.S. law against "involuntary transfers" (17 U.S.C. § 201(e)) by "forcibly extract[ing] rights from the author prior to their later transfer to a publisher." [AAP Opinion Letter page 7.]

FACT: Section 201(e) does not apply to voluntary government grants, cooperative agreements or contracts. *Copyright is an author's right.* Researchers who conduct research and report on that research in scientific and medical journals voluntarily agree that, in return for taxpayer funding, the researchers will grant NIH a copyright license to make the author's final version of these articles publicly accessible within 12 months of publication. Section 201(e) applies to statutes and regulations that by their own force transfer rights under copyright against the author's will, not to voluntary contracts and grant agreements.

The attempt to characterize these contracts as "involuntary" makes no sense; authors routinely enter into agreements with other entities that fund the creation of a copyrighted work in exchange for some or all of the rights under copyright. For example, under the logic of the AAP argument, the contract between a first-time novelist and Random House providing an advance and a promise of royalties in exchange for a transfer of copyright would be an "involuntary transfer" of copyright.

Like other entities that fund the creation of copyrighted works, NIH requires something in return. While most other entities, such as the members of the AAP, require a transfer of exclusive rights by the author when they provide financial support to the creation of a copyrighted work, the NIH policy requires **only** the grant of a non-exclusive license. This policy leaves the author free to transfer some or all of the exclusive rights under copyright to a journal publisher or to assign these anywhere they so choose.

There is no derogation of the importance of copyright or any rights thereunder for the U.S. government to abide by the longstanding and well-established principle that a party who funds an author's creation of a copyrighted work is entitled to require some agreement with the author about the management of copyrights that arise from such funding. For this reason there is no involuntary transfer of a copyright created with government funding nor does the NIH policy in any way affect U.S. Copyright law.

II. The Berne Convention and the TRIPS Agreement have no relation to the NIH Public Access Policy

Assertion: The AAP Opinion Letter suggests that the NIH Public Access Policy may violate U.S. obligations under the Berne Convention and the TRIPS Agreement because the policy concerning contractual terms governing copyrighted works created with federal support "is

[3] Online at http://publicaccess.nih.gov/comments2/files/AAP_NIH_Submission_05_30_08.pdf.

indistinguishable from a legislative *exception* to copyright term and rights." [AAP Opinion Letter page 10.]

Fact: The Berne Convention and the TRIPS Agreement do not apply to the NIH Policy. These international treaties require that Member States adhere to certain minimum standards in their copyright laws. The NIH Final Policy concerns **contract terms** between authors and a funding agency, not exceptions to copyright law. As such, the NIH Final Policy in no way implicates Article 13 of TRIPS or Article 9 of the Berne Convention, which address permissible copyright limitations and exceptions. *These treaty provisions do not apply to the terms of contracts that authors enter into in exchange for valuable consideration.*

The implications of the AAP Opinion Letter's analysis are staggering. If that analysis were correct, it would require a finding that portions of **all U.S. government procurement law and not simply the NIH policy** are in conflict with treaty obligations. It has been longstanding policy of the United States that whenever a federal agency enters into a contract, cooperative agreement, or grant that contemplates the creation of copyrighted works and other intellectual property, the agency *must* reserve a license to use such intellectual property. From the perspective of the U.S. Copyright Act, there is no difference between the copyright licenses granted in these government contracts and the license that authors are required to grant to the NIH under its policy.

Surely the United States did not understand itself to be required to amend all of federal procurement law when it enacted Section 201(e) of the Copyright Act or when it became a member of the Berne Convention, the TRIPS Agreement, or any other international instrument concerning copyright.

III. The NIH Public Access Policy is consistent with the trend among the United States' trading partners to make publicly funded research articles freely available on the Internet

Assertion: The AAP Opinion Letter suggests that the NIH Final Policy gives the appearance that the United States is weak on intellectual property protection and may set a precedent that other countries will abuse. [AAP Opinion Letter page 13.]

Fact: The NIH Public Access Policy does not amend or in any way affect the rights granted to authors under the United States Copyright Act so cannot set any precedent with respect to international standards on copyright law. Quite to the contrary, the NIH Final Policy fully supports copyright law by recognizing and respecting the rights of authors, including the longstanding and well-established right of authors to grant licenses in exchange for financial support in the creation of copyrighted works.

The weak-on-IP assertion is an attempt to direct attention away from the relevant international precedent regarding online, public access to peer reviewed journal articles reporting the results of publicly funded scientific and medical research. Prominent public and private biomedical research funders in Europe, Canada, and Australia have amended their funding contracts and grant agreements to require, as a condition of support, that authors deposit their final manuscripts

into publicly accessible, online digital repositories. For example, In October of 2006, the UK Medical Research Council (MRC), amended their contracts to require online public access as a condition of funding. MRC's policy requires researchers to make papers freely accessible in an online database within 6 months of publication in a journal. Similar policies have been enacted

by the European Research Council, The Canadian Institutes of Health Research, and the Agence nationale de la recherche in France, among others.

All of these policies covering government contracts for scientific and medical research have been implemented consistent with copyright law. All of these funding bodies have taken into consideration the role that scholarly journal publishers play in communicating scientific and medical research. The policies of these countries uniformly require an embargo period of 6 months before the results are publicly accessible. When initially proposed, the NIH Public Access Policy also had an embargo period of 6 months. In response to thousands of public comments, including those from a small group of publishers who argued that 6 months was too short, the NIH adopted an embargo period of up to 12 months instead. Far from setting the bar in this arena, the U.S. policy deviates from the international standard by being far more conservative.

IV. The NIH's procedure for adopting and implementing its Final Public Access Policy is fully consistent with the Administrative Procedures Act (APA)

Assertion: The AAP Opinion Letter asserts that the NIH Public Access Policy is a "legislative rule" requiring notice and comment rulemaking under the APA because the policy amends HHS procurement regulations. [AAP Opinion Letter page 5.]

Fact: The NIH Policy implements a specific statutory provision and is therefore an "interpretive rule" that does not require notice-and-comment rulemaking under the APA.

The very case on which The AAP Opinion Letter relies makes this distinction clearly, by differentiating between "cases where a rule is 'based on specific statutory provisions' (interpretive), and where one is instead 'based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate' (legislative)." *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993).

* * * * *

MEMORANDUM

July 7, 2008

TO: Prudence Adler
Association of Research Libraries
Washington, DC

FR: Anthony J. Zagami, Esquire
General Counsel Emeritus, Retired
United States Government Printing Office
Washington, DC

On the Matter Of: Provisions within Title 44, United States Code, requiring modification in order to facilitate the sharing of resources and responsibilities, primarily the sharing of publication collections, among federal regional depository libraries.

Introduction

The Association of Research Libraries (ARL) has asked for my opinion concerning the sections of Title 44 of the United States Code that would require legislative modifications in order to allow for the sharing of resources and responsibilities among the nation's federal regional depository libraries. Specifically, the ARL wishes to know what provisions in Chapter 19 of Title 44 would need to be amended to alleviate the need for federal regional depository libraries to retain, on a permanent basis, all publications provided them pursuant to law by the Superintendent of Documents, United States Government Printing Office (GPO) thus permitting the sharing of collections. This Memorandum will address the specific concerns of the ARL in responding to the inquiries highlighted above.

Discussion

As you well know, the federal depository library program is governed by Chapter 19 of Title 44, United States Code. The federal regional depository system as we know it today was established in the 1962 Depository Act.[1] I will not go into a lengthy discussion of the legislative history surrounding the federal regional depository library system, suffice it to say that when Congress created the program, it intended for institutions designated as federal regional depositories to act as permanent repositories for all publications of the United States Government placed in their custody. Unlike other depository libraries that are permitted to dispose of certain publications on a periodic basis, federal regional depositories are required by law to retain their collections in virtual perpetuity.[2]

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[1] Pub. L. No. 87-579 § 9, 76 Stat. 355 (1962)

[2] 44 U.S.C. § 1912 (2006) (States that "regional depository libraries must retain at least one copy of all Government publications.")

It is understood by those closely related to the Program, that notwithstanding the more recent addition and availability of federal documents in electronic formats, "[d]epository libraries, particularly regionals, face challenges providing access to and delivering Government information to library users while continuing to maintain and preserve legacy collections of tangible depository resources for permanent availability."[3] Given the retention difficulty and related problems, the Superintendent of Documents and other concerned parties have sought alternative models and methods for the sharing of resources and responsibilities among regional depository facilities. Many such plans have been instituted successfully in the past within the statutory framework of Title 44.

However, GPO's most recent attempt to alleviate problems associated with the storage of federal collections in federal regional depository libraries proved unsuccessful when GPO's Congressional oversight panel, the Joint Committee on Printing (JCP), denied a request from the Acting Public Printer that would have permitted the federal regional depository libraries located at the Universities of Kansas and Nebraska to consolidate their collections to serve constituencies across state lines. [4] In his letter denying the GPO's request, the Chairman of the JCP cited an opinion by the Congressional Research Service stating that the JCP lacks the authority to approve such consolidation plans.[5] The Chairman's letter went on to direct the GPO to study the issue "in consultation with all concerned elements of the library community," and to report its findings to the Joint Committee "together with any legislative recommendations for improvements to the program that you may choose to offer."[6]

Conclusion

There are two provisions in Chapter 19 of Title 44 that speak directly to the federal regional depository library system. Section 1911 allows depository libraries served by a regional depository to dispose of their federal Government publications after five years. The provision goes on to state that "depository libraries not served by a regional depository library, or that are regional depositories themselves, shall retain [federal] government publications permanently..." Section 1912, which establishes the method for designating federal regional depository libraries, further mandates that libraries so designated "will, in addition to fulfilling the requirements for depository libraries, retain at least one copy of all [federal] Government publications..."

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[3] U.S. Government Printing Office, *Regional Depository Libraries in the 21st Century: A Time for Change*, p. 17. (draft report).

[4] Letter from William H. Turri, Acting Public Printer, to Hon. Robert A. Brady, Chairman, Joint Committee on Printing, September 13, 2007.

[5] Opinion of Congressional Research Service, November 6, 2007. *GPO Authority Over Regional Depository Libraries.* By T.J. Halstead, Legislative Attorney.

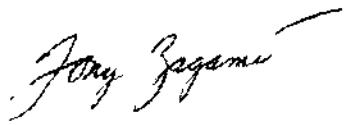
[6] Letter to Hon. Robert Tapella, Public Printer, from Hon. Robert A. Brady, Chairman, Joint Committee on Printing, February 27, 2008.

Any legislative modification proposing to change publication retention requirements for federal regional depository libraries, or to create flexibilities to include the sharing of regional responsibilities and publication collections across state lines, should focus on both sections 1911 and 1912 of Title 44. To amend only one section or the other could lead to confusion and the possibility of conflicting language within the controlling provisions of law.

I would like to close this memo with the following comment and observation. During my years as General Counsel to the Joint Committee on Printing, and later as the General Counsel for GPO, I had ample opportunity to review the legislative history surrounding Title 44. Those reviews led me to conclude that Congress reserved broad authority to the JCP to allow it to address contemporary issues and concerns that might arise in connection with Title 44 matters. As the Joint Committee on Printing considers modernizing sections of the statue that have become outdated or do not meet today's needs, I would encourage it to do so along with a thorough examination of its broad plenary authority under Section 103 of Title 44.[7]

I hope that this memo addresses the ARL's concerns and responds to your inquiries concerning the federal regional depository library program. Should you have further questions or require additional information on the subject matter of Title 44, please do not hesitate to contact me.

Sincerely,



Anthony J. Zagami, Esquire[8]

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[7] 44 U.S.C. §103. (2006). States that "The Joint Committee on Printing may use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications."

[8] The views and opinions expressed in this memorandum are strictly those of the author, and do not represent the official views or opinions of the U.S. Government Printing Office.

JUNE 2008

ORPHAN WORKS LEGISLATION

Background and general description

Both the House and Senate Judiciary Committees have introduced "orphan works" legislation. The bills, H.R. 5889 and S. 2913, are intended to enable the use of copyrighted works without permission when the copyright owner cannot be found. Under current copyright law, using a copyrighted work without permission in one of the ways reserved to the copyright owner can subject a user to substantial civil liability in the form of monetary damages and an injunction against continued use. The normal procedure for using copyrighted works in one of the otherwise proscribed ways is to get permission from the copyright owner and, when required, make payment for the use. But if the copyright owner cannot be found, the work typically lies unused out of concern for the penalties and disruption that could be imposed if the copyright owner surfaced after use has begun. As a consequence, large amounts of copyrighted works – written texts, photographs, sound recordings, video tracts, and much more – are held in university libraries, museums, archives and elsewhere, unused and largely inaccessible to the public.

The orphan works legislation is intended to enable someone, after conducting a "qualifying search" for the owner, to use an orphan work — a copyrighted work whose owner cannot be located. If an owner appears after the search, the legislation bars the imposition of monetary damages in the form of actual damages, statutory damages, costs, and attorney's fees, and instead requires only the payment of "reasonable compensation" for the use of the infringed work. Reasonable compensation is defined as the payment that a willing buyer and willing seller would have agreed to immediately before the infringing use began (*i.e.*, fair market value). If the user and owner cannot agree on reasonable compensation, a court determines what constitutes reasonable compensation and orders payment to be made.

The bills also contain a limitation on injunctive relief in circumstances where an orphan work is included in a new work that adds significant original expression (*e.g.*, a derivative work). Specifically, any injunctive relief sought by an owner who appears after a qualifying search may not restrain the user's continued preparation or use of the new work, contingent upon payment of reasonable compensation and reasonable attribution if requested by the owner. This limitation is particularly important since under current law someone could invest substantial sums of money in the development of a derivative work that includes a copyrighted work whose owner could not be found (or without knowing that the work was copyrighted), only to have the owner surface and seek an injunction against the continued development or use of the derivative work, potentially nullifying the investment.

The bills eliminate the requirement for the payment of reasonable compensation if the user is a nonprofit educational institution, museum, library, archives, or public broadcasting entity that used the copyrighted work primarily for educational, religious, or charitable purposes without any purpose of commercial advantage, and the use was

terminated after receiving a notice of a claim of infringement. The House bill, however, contains an exception to this provision, requiring the user to pay over to the owner any proceeds "directly attributable to the infringement".

Current Status

The House bill has been marked up in the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property and is expected to be marked up soon in full committee. The Senate bill was marked up on May 15th by the Judiciary Committee and now awaits floor action.

An effective orphan works program would enable higher education institutions, libraries, archives, museums, public television stations, and other public service entities with significant holdings of copyrighted works to benefit the public by providing expanded access to those copyrighted works. Copyright owners are concerned that a program with insufficiently rigorous procedures for treating a copyrighted work as an orphan work could result in uncompensated use of works whose owners are easily identifiable. But universities, libraries and other groups seeking to use orphan works are concerned that procedures that are too rigid and burdensome will make participation in an orphan works program infeasible.

The current Senate and House orphan works bills contain a number of provisions necessary for an effective orphan works program. However, several issues remain to be addressed to create a workable program. The proposed amendments attached describe the changes needed to produce legislation that universities and allied organizations could strongly support.

It is important to note that for state-funded institutions – including most public universities – the issue of state sovereign immunity presents a fundamental hurdle that must be addressed to enable those institutions to participate in the orphan works legislation currently being considered. The issue of state sovereign immunity is addressed briefly in the attachment outlining proposed amendments and in more detail in a separate attachment to this document.

PROPOSED AMENDMENTS TO ORPHAN WORKS LEGISLATION

The nation's libraries, archives, museums, institutions of higher education, and public television stations hope this Congress will pass legislation that will provide meaningful relief to the orphan works problem. S. 2913 as reported out of the Senate Judiciary Committee, and H.R. 5889 as reported out of the House Subcommittee on Courts, the Internet, and Intellectual Property, move significantly towards this objective. While there are several areas of concern with the pending legislation, included below are suggested revisions that would resolve these remaining issues.

Qualifying Search

The entire legislation turns on the standards for a qualifying search for the absent copyright owner. The language relating to qualifying searches needs to be sufficiently clear concerning its flexibility so that the search provisions cannot be interpreted as requiring cultural institutions to perform burdensome searches more appropriate to commercial uses. If the bill appears to impose threshold requirements that are too difficult for cultural institutions to meet, they simply will not take advantage of the legislation and orphan works will remain relatively inaccessible to the public. With some minor changes, language drafted by the Copyright Office (May 20) provides flexibility on the minimum standards, and does not place the best practices made available by the Copyright Office on a higher level than other statements of best practices.

Good Faith Negotiation

In both S. 2913 and H.R. 5889, a user's failure to negotiate in good faith with the copyright owner will lead to the user losing eligibility for the limitation on remedies. In an earlier version of the bill in the 109th Congress, H.R. 5439, the user faced only the penalty of paying the owner's attorneys fees. The new formulation in S. 2913/H.R. 5889 threatens to change dramatically the nature of the negotiations over compensation in a negative manner. It provides the owner with enormous leverage over the user; he can demand excessive compensation because the user will fear that failure to pay could result in a court finding that he did not negotiate in good faith, which in turn could lead to exposure to statutory damages. This will result in useless controversies about the legitimacy of negotiating tactics -- and, ultimately, in the provisions of the bill being unused by many whom it was designed to assist. The penalty for bad faith negotiation should be limited to the owner's attorneys' fees.

Sovereign Immunity

S. 2913 and H.R. 5889 limit injunctive relief in certain situations if the user pays the owner reasonable compensation. Copyright owners argue that because the sovereign immunity doctrine prevents the imposition of monetary damages on state governmental entities, the legislation might allow such state entities to avoid injunctive relief without paying reasonable compensation. Language on state sovereign immunity acceptable to public universities and copyright owners was included in H.R. 5439 – the orphan works legislation considered during the 109th Congress. However, the wording of various

provisions in S. 2913/H.R. 5889 has unintentionally re-opened the sovereign immunity issue. The current orphan works legislation needs to be modified to permit state entities, including public universities, to participate in the orphan works program on comparable terms with other participants, having access to injunctive relief and paying reasonable compensation as appropriate without raising sovereign immunity issues. Language to accomplish these objectives has been developed by public universities through negotiations and consultations with copyright owners and the Copyright Office and is attached below.

Safe Harbor

The safe harbor for non-commercial uses that appeared in H.R. 5439 (109th Congress) has been significantly narrowed to apply only to certain kinds of non-commercial entities. Given the narrowing of the safe harbor to these entities, the additional limiting language in subsections (c)(1)(B)(i) and (ii) – uses of a primarily educational, religious, or charitable nature without any purpose of direct or indirect commercial advantage -- is confusing and unnecessary. It could deter uses that involve sales of catalogues and DVDs on a cost recovery basis. These subsections should be stricken.

Moreover, in H.R. 5889, a user in the safe harbor will have to disgorge proceeds directly attributable to the infringement, even if the user promptly ceases the infringement upon receiving notice of a claim of infringement. This will discourage a wide range of socially beneficial uses by museums, libraries, educational institutions, archives, and public broadcasters. They will be reluctant to make any use that might necessitate cost recovery because they might have to disgorge that revenue. The effect will be to chill the willingness of the bill's intended beneficiaries to make use of it. In the context of the narrowly tailored overall bill, this erosion of user interests is inappropriate.

Notice of Use

Cultural institutions oppose the provisions relating to a Notice of Use filing (the "dark archive") that appear in H.R. 5889. The dark archive requirements would be excessively burdensome for users, with little benefit to owners. Mandating that users file a notice of use with a government agency would drive up compliance costs significantly. For example, filings detailing qualifying searches would need to be carefully drafted and decisions about what facts the user knew "with a reasonable degree of certainty" would need to be made in light of a vague and undefined standard. Many institutions would require legal counsel to review the submissions prior to filing.

QUALIFYING SEARCH PROPOSAL

DELETE SECTION (A)(1) DEFINITION OF MATERIALS

(2) REQUIREMENTS FOR SEARCHES.—

(A) REQUIREMENTS FOR QUALIFYING SEARCHES.—

(i) IN GENERAL.—A search qualifies under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement, undertakes a diligent effort to locate the owner of the infringed copyright and the authorized licensor prior to, and at a time reasonably proximate to, the infringement, including by following the Minimum Requirements in clause (ii);

(ii) MINIMUM REQUIREMENTS.—For purposes of clause (i), a diligent effort will ordinarily include:

(I) a search of the records of the Copyright Office, to the extent that they are available to identify and locate copyright owners, where possible;
(II) a search of reasonably available sources of copyright ownership, and where appropriate licensor information; and
(III) actions that are reasonable and appropriate in light of the facts relevant to the infringed work, the use, and the search, including actions based on facts known at the start of the search and facts uncovered during the search.

(iii) ADDITIONAL CONSIDERATIONS.—For purposes of clause (i), the court shall also consider whether the infringer:

I) followed an applicable statement of search guidelines made available by the Copyright Office,
II) followed search guidelines that are reasonably available and relevant to the use, including the guidelines of associations of copyright owners, authors and users of works of authorship; and
III) used reasonably available technology tools, expert assistance, and resources, including resources for which a charge or subscription fee may be imposed, to the extent such resources are reasonable for and relevant to the scope of the intended use.

(iv) LACK OF IDENTIFYING INFORMATION.—The fact that a particular copy or phonorecord lacks identifying information pertaining to

the owner of the infringed copyright is not sufficient to meet the conditions under paragraph (I)(A)(i)(I).

(B) INFORMATION TO GUIDE SEARCHES; SEARCH GUILDINES.—

The Register of Copyrights shall make available to the public, including through the Internet, 1 or more statements of search guidelines for each category, or, in the Register's discretion, subcategory of work under section 102(a) of this title, for conducting and documenting a search under this subsection, and shall updates such statements, from time to time, at the Register's discretion. In preparing and updating such statements the Register may consider all information relevant to the requirements of a qualifying search, including the availability of electronic databases for pictorial, graphical, and sculptural works, where appropriate and reasonably available for a given use.

FURTHER DISCUSSION OF PUBLIC UNIVERSITIES, ORPHAN WORKS, AND STATE SOVEREIGN IMMUNITY

The orphan works legislation is intended to enable someone, after a "qualifying search" for the owner, to use an orphan work — a copyrighted work whose owner cannot be located. If an owner appears after the search, the legislation bars the imposition of monetary damages in the form of actual damages, statutory damages, cost, and attorney's fees, and instead requires only the payment of "reasonable compensation" for the use of the infringed work. Reasonable compensation is defined as the payment that a willing buyer and willing seller would have agreed to just prior to when the infringing use began (*i.e.*, fair market value). If the infringer and owner cannot agree on reasonable compensation, a court determines what constitutes reasonable compensation and orders its payment. The legislation also contains limitations on injunctive relief in circumstances where an orphan work is included in a new work that adds significant original expression (*e.g.*, a derivative work), contingent upon payment of reasonable compensation and reasonable attribution if requested by the owner.

The goal of such legislation — to make orphan copyrighted works publicly available — is strongly supported by universities. However, some provisions of the current orphan works legislation create significant problems for public universities. As state entities, public universities are protected from liability by the doctrine of state sovereign immunity, which, among other things, holds that they are immune from liability that could otherwise be imposed by certain federal statutes. In the case of federal copyright law, sovereign immunity likely precludes the imposition of monetary damages and injunctive relief against state entities for infringement, and monetary damages against state officers acting in their official capacity, but likely permits injunctions against state officers to stop ongoing infringement.[1]

Copyright owners expressed concern that the combination of the orphan works legislation and sovereign immunity could eliminate any remedies against a state entity when that entity includes an orphan work in a new work containing significant new expression if the entity engaged in a qualifying search and the owner later appeared. Specifically, the owners expressed concern that sovereign immunity would prevent a court from ordering payment of reasonable compensation (since such compensation is a form of monetary damages), and the orphan works legislation itself would limit the imposition of injunctive relief.

Public universities, in turn, expressed concern that participation in the orphan works system would require them to waive sovereign immunity. In virtually all cases, the decision to waive sovereign immunity is made not by the public university but by its state government, and state governments have indicated that they will not permit their public universities to waive sovereign immunity as a condition of federal legislation.[2]

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[1] Recent cases are also seeking to hold state officials liable for monetary damages in their "individual" capacity, even when acting within the scope of their official duties.

[2] During consideration of a 2002 bill that would have required state entities to waive sovereign immunity as a condition for being able to benefit from federal intellectual property protection, state governments made it

After extensive discussions during debate on the earlier orphan works bill introduced two years ago, affected copyright owners and public universities worked out language under which public universities could participate in the orphan works system but do so in a manner that did not constitute a waiver of sovereign immunity. This language was incorporated into the bill, but the legislation was not passed.

Much of the sovereign immunity language from that earlier legislation was incorporated into the current bills, S. 2913 and H.R. 5889, but two new provisions require modification in order to achieve the goal of allowing state entities to participate in the orphan works program without forcing their states to waive sovereign immunity.

The first provision requiring modification is a condition of eligibility that requires consent to the jurisdiction of U.S. District Court; for public universities to do so would constitute a waiver of state sovereign immunity, which is not feasible for those institutions for the reasons discussed above.

The second provision requiring modification is the requirement that a public university (or other state entity), in order to qualify for a limitation on injunctive relief for a derivative work, makes "an enforceable promise" to pay reasonable compensation. Th problem with this language is that "enforceable" implies "in court," again implicating sovereign immunity. Moreover, it is unclear what court must be able to enforce the promise; given the exclusivity of federal jurisdiction over copyright cases, there is a substantial risk that the federal court in which an infringement action is brought would construe the provision to require enforcement by a federal court, requiring a specific waiver of sovereign immunity.

Language that would modify these two provisions has been developed in consultation with affected copyright owners and the Copyright Office. It is critical that this language be included in the orphan works legislation.

A third modification, proposed by the Copyright Office, clarifies that the special provisions of (c)(2)(C) governing entities not subject to the jurisdiction of federal courts, applies only to entities eligible to assert state sovereign immunity and not to other entities, such as foreign persons, that might argue they do not fall under the jurisdiction of U.S. federal courts.

The three proposed changes are attached.

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clear that they would not allow their public universities to waive sovereign immunity under such circumstances. Had that legislation became law, public universities would have lost federal intellectual property protection for any patents, copyrights, or trademarks they owned. The legislation did not proceed out of committee.

STATE SOVEREIGN IMMUNITY AMENDMENTS — S. 2913

Changes to S. 2913 as reported by the Judiciary Committee

1. On page 23, line 16, insert "unless entitled to assert state sovereign immunity," before "consents to";

[Clause (v) of subsection (b)(1)(A) would thus read:

"(v) unless entitled to assert state sovereign immunity, consents to the jurisdiction of United States district court, or, in the absence of such consent, if such court holds that the infringer is within the jurisdiction of the court; and"]

2. On page 30, line 4, insert ", based on the doctrine of state sovereign immunity," between "that" and "neither";

[*Note:* This change, proposed by the Copyright Office, clarifies that the special provisions of (c)(2)(C) governing entities not subject to the jurisdiction of federal courts, applies only to entities eligible to assert state sovereign immunity and not to other entities, such as foreign persons, that might argue they do not fall under the jurisdiction of U.S. federal courts.]

[Subparagraph (C) of subsection (c)(2) would thus read:

(C) The limitations on injunctive relief under subparagraphs (A) and (B) shall not be available to an infringer if the infringer asserts in the action that, based on the doctrine of state sovereign immunity, neither the infringer nor any representative of the infringer acting in an official capacity is subject to suit in the courts of the United States for an award of damages for the infringement, unless the court finds that the infringer—"]

3. On page 30, lines 12-15, strike clause (ii) and insert, in lieu thereof: "pays reasonable compensation to the owner of the exclusive right under the infringed copyright in a reasonably timely manner after the amount of reasonable compensation has been agreed upon with the owner or determined by the court."

STATE SOVEREIGN IMMUNITY AMENDMENTS — H.R. 5889

Changes to H.R. 5889 as reported by the Subcommittee on Courts, the Internet, and Intellectual Property

1. On page 5, line 19, insert "unless entitled to assert state sovereign immunity," before "consents to";

[Clause (vi) of subsection (b)(1)(A) would thus read:

"(v) unless entitled to assert state sovereign immunity, consents to the jurisdiction of United States district court, or such court holds that the infringer is within the jurisdiction of the court; and"]

2. On page 13, line 14, insert ", based on the doctrine of state sovereign immunity," between "that" and "neither";

[*Note:* This change, proposed by the Copyright Office, clarifies that the special provisions of (c)(2)(C) governing entities not subject to the jurisdiction of federal courts, applies only to entities eligible to assert state sovereign immunity and not to other entities, such as foreign persons, that might argue they do not fall under the jurisdiction of U.S. federal courts.]

[Subparagraph (C) of subsection (c)(2) would thus read:

(C) The limitations on injunctive relief under subparagraphs (A) and (B) shall not be available to an infringer if the infringer asserts in the civil action that, based on the doctrine of state sovereign immunity, neither the infringer nor any representative of the infringer acting in an official capacity is subject to suit in the courts of the United States for an award of damages to the legal or beneficial owner of the exclusive right under the infringed copyright under section 106, unless the court finds that the infringer—"]

3. On page 13, line 24, to page 14, line 2, strike clause (ii) and insert, in lieu thereof: "pays reasonable compensation to the [legal or beneficial] owner of the exclusive right under the infringed copyright in a reasonably timely manner after the amount of reasonable compensation has been agreed upon with the owner or determined by the court."

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Federal Policy Issues

Issue	Impact on Higher Education	EDUCAUSE Policy Position	EDUCAUSE Action
Telecommunications - Issue Brief			
Access to Advanced Networks: Broadband Policy Contact Garret Sern gsern@educause edu Issue Brief	Ability to provide faculty and students affordable access to information, communication and research services on and off campus Access to a high-speed Internet connection at 100mbps and higher is essential for higher education institutions to provide distributed/distance education services	EDUCAUSE calls upon the federal government to develop and implement a national broadband policy that will result in the ubiquitous deployment of broadband networks with a goal ensuring every American has access to symmetrical gigabit Internet speeds	EDUCAUSE members via the leadership Net@EDU, is articulating higher education principles and goals for affordable, ubiquitous deployment of a national broadband network Working with association, industry and public interest group partners to help educate federal policymakers on importance of high-speed connectivity for education and research
CALEA: Communications Assistance for Law Enforcement Act Contact Wendy Wigen wwigen@educause edu	If campus systems and networks are required to be CALEA compliant it will increase costs and impact innovation	EDUCAUSE supports the Court decision (June 9, 2006) that retained the exemption for private networks It is believed that most campus networks will be fully exempt due to their "private network" status and the fact that they do not support the connection to the ISP	EDUCAUSE is currently working to help campuses interpret the CALEA Second Report and Order in lieu of the Court decision Once a campus establishes it's status under CALEA, EDUCAUSE will help provide information on compliance as it becomes available We will also monitor draft legislation being introduced that would amend the existing CALEA statute

Municipal Networks Contact Garret Sern gsern@educause edu	Working with local government, many campuses extend their networks into the surrounding community This often provides broadband access to otherwise underserved areas Laws that restrict this type of project exist, or are being considered, in many states	EDUCAUSE opposes any state or national law that would impose a blanket ban or a significant impediment to the establishment of municipal networks We feel they are an option that should be available when commercial providers are unable to provide cost-effective services	EDUCAUSE strongly supports the rights of municipalities to build and deploy their own networks We have participated in a broad coalition which has advocated before Congress the FCC and state legislatures (that were considering anti-muni legislation) of the economic and social benefits of allowing municipalities to choose the proper means of providing Internet access for their citizens without competing with the private sector
Network Neutrality Contact Wendy Wigen wwigen@educause edu	If network neutrality is not reinstated into law, it will impact innovation and raise the cost and feasibility of distance education, telehealth, and online campus business	EDUCAUSE supports the concept that the Internet should remain open to all persons, applications, and lawful content on a non-discriminatory basis	EDUCAUSE, working with several partners, is actively advocating network neutrality through Congressional visits, educational materials and interviews with the press In addition, EDUCAUSE has and will continue to, suggest possible legislative language that will insure network neutrality
Spectrum Management Issue Brief Contact Wendy Wigen wwigen@educause edu	Spectrum availability, increasing use of wireless devices on campus and involvement in municipal/community wireless projects will be impacted by the spectrum regulation/deregulation process at FCC	EDUCAUSE supports spectrum management that makes more spectrum available both on and off campus	Monitor actions at the FCC and sign-on to formal comments by other groups when appropriate, make information available to members as spectrum rules change Summary of OTARD ruling
Universal Service Contact Garret Sern gsern@educause edu	Unfair financial burden to higher education communication networks if USF collection mechanism is changed to a numbers or connections-based approach	EDUCAUSE supports maintaining the social obligations covered by the USF and encourages the federal-state joint board to develop a more cost-efficient collection	Supporting ACUTA's study demonstrating the negative impact changes in the USF collection mechanism will have on the higher education community, signing on to ex-parte letters before the FCC

		mechanism We encourage allocating USF monies away from legacy telephone services for broadband and other communication technologies that will enable all Americans access to essential information resources	Supporting ACUTA's dialogue with FCC and telecom industry to reach compromise regulations that will ensure USF solvency without resulting in an undue financial burden on colleges and universities
Cybersecurity and Privacy - Cybersecurity Issue Brief and Privacy Issue Brief			
Critical Infrastructure Protection Contact Rodney Petersen rpetersen@educause edu	Federal government efforts to improve critical infrastructure protection and implement the Federal Information Systems Management Act (FISMA) may impact higher education's resources and ability to conduct federally funded research	With their unique social position between the commercial and government sectors, institutions of higher learning have the opportunity to show how critical infrastructure protection and security can be accomplished in a diverse complex, and dynamic environment while still maintaining essential freedoms Their leadership can provide a basis for improving the national infrastructure and preclude the need for "top-down," cumbersome Federal regulation	The EDUCAUSE/I2 Computer and Network Security Task Force is working to educate the broader community on need for more robust IT security The EDUCAUSE Policy Office is collaborating with the National Cyber Security Division of the Department of Homeland Security, other federal agencies, and public-private partnerships such as the Partnership for Critical Infrastructure Security and National Cyber Security Partnership on implementation of the National Strategy to Secure Cyberspace Monitor hearings, legislation and court cases
Monitoring and Surveillance Contact Rodney Petersen rpetersen@educause edu	Logging and monitoring of information systems and networks has become a common practice in the interest of security and for the purposes of pursuing cyber crime The use of authentication also makes it possible to identify individual users The combination of electronic records available about	EDUCAUSE supports the general intent to improve the security of our networks and systems but in a way that has the least effect on our quality of life Generally this means insuring the data protections currently allowed by law Systems	The EDUCAUSE Policy Office will work closely with Net@EDU working groups and others who are developing PKI infrastructures and authentication tools to ensure that they optimize the privacy of individuals EDUCAUSE will also develop relationships with key government

	individuals create a vast amount of data that must be handled carefully to safeguard privacy and limit requests by third parties beyond the purposes for which the information was originally requested	should be monitored only as necessary for their proper maintenance and only for activity levels, never for content In this way, information can be made available to law enforcement through the proper legal channels	agencies such as the FBI, Department of Justice, National Cyber Security Division of DHS, and others EDUCAUSE will also develop relationships with non-government entities such as the Electronic Privacy Information Center, Center for Democracy and Technology, Electronic Frontier Foundation, and others to balance privacy concerns with the legitimate needs of law enforcement EDUCAUSE will also monitor hearings, legislation and court cases
Identity Theft Contact Rodney Petersen rpetersen@educause edu	Security breaches at several colleges and universities, including the theft of laptops containing personally identifiable information, necessitates that colleges and universities be concerned about the possibility for identity theft resulting from these incidents Many institutions are now turning to identify theft insurance, provide free credit reporting services, and other means to address constituency concerns	EDUCAUSE will advocate for solutions that protect the rights of individuals in a manner that imposes minimal regulatory burdens upon institutions of higher educetion EDUCAUSE will promote effective security practices that minimize the opportunity for identity theft and will supply educationel information that can be provided to individuals to both prevent identity theft and provide resources in the event that a security breach does occur	Explore voluntary efforts to curb the effect of identity theft, including credit monitoring services and insurance Monitor hearings, legislation, court cases, and educate members
Privacy Policies and Fair Information Practices Contact Rodney Petersen rpetersen@educause edu	The extensive practice of collecting personal information, ranging from prospective students' applications for admission to registrations for special events, necessitates attention to "Fair Information Practices" Some states may already require edherence to	EDUCAUSE encourages institutions to voluntarily develop policies that follow Fair Information Practices and inform users of information systems of their practices for the collection and use	Monitor legislation and court cases, assemble effective practices, educate members

	Fair Information Practices, whereas, proposals at the Federal level will seek for a national standard for the public and private sectors	of personal information EDUCAUSE does not support government mandates	
Data Security and Privacy Contact Rodney Petersen rpetersen@educause edu	Security breaches at several colleges and universities, including the theft of laptops containing personally identifiable information, will require institutions to refocus their attention on steps to safeguard information and respond to incidents appropriately Several states have passed security breach notification laws and multiple proposals are under consideration at the Federal level There are also proposals that would extend the Gramm-Leach-Bliley security safeguards to all types of consumer information	EDUCAUSE encourages institutions to eliminate the use of Social Security numbers as their primary identifier EDUCAUSE will promote effective security practices that ensure the integrity of information and prevent the unauthorized disclosure of confidential or private information EDUCAUSE does not support legislation and regulation that create unfunded mandates or the imposition of new forms of liability	Monitor hearings, legislation and court cases Educating membership on responsibilities and possible changes in the law
Spyware Contact Rodney Petersen rpetersen@educause edu	Network management challenges bandwidth, storage security vulnerabilities, compromises to personal information of system users	EDUCAUSE supports a multi-faceted approach to reducing spyware/adware that includes legislative action by the Federal government, international cooperation and innovative technological solutions	Monitor legislation, hearings and technological developments

Copyright, Patents, and Intellectual Property - Issue Brief

Copyright and Intellectual Property Contact Steve Worona sworona@educaue edu	Higher education's mission depends on faculty, researchers and student's ability to access copyrighted material as permitted under the Constitution and subsequent federal copyright laws which have been updated to reflect the growing use of digital material As content creators we also recognize the need for	EDUCAUSE promotes the fair use of online copyrighted materials, while encouraging our community to comply with existing copyright law We are opposed to any new federal mandates that require specific technologies that	EDUCAUSE works closely with our higher education and library association partners to promote legislation that facilitates the legitimate access and use of digital copyrighted materials for educational and research purposes

	safeguarding the rights of copyright holders to be fairly compensated for their labor	restrict the downloading and redistribution of copyrighted material. Instead, we work to provide our community with an understanding of methods to restrict access of copyrighted works to authorized faculty and students as required under the TEACH Act	
Reform of Patent Law Contact: Steve Worona sworona@educaue.edu	Patent law is important to higher education in its role as a consumer of patented products and as owners of patents. Most important to the IT community is the extension of patent intellectual property protection to computer software	EDUCAUSE supports the development of a patent system which provides substantive review of software patent applications consistent with current knowledge of technological developments and the cautious application of intellectual property law to software products so as not to deter innovation in software production. EDUCAUSE, similar to copyright, supports the rights of authors and inventors to protect their intellectual property and to be fairly compensated for their labor	EDUCAUSE continues to monitor patent reform legislation and educate its members on how new patent legislation could potentially impact patent protection for software products
Copyright Infringement and the Value of P2P File Sharing Contacts: Steve Worona sworona@educause.edu	Some peer-2-peer technologies will play a valuable and important role in education and research. The widespread use of other P2P systems to share content in volation of copyright law threatens network resources and poses significant issues of ethics and law	EDUCAUSE supports the development of innovative peer-2-peer systems in support of research and education. EDUCAUSE also recognizes the responsibility of colleges and universities to support the requirements of	Encouraging members to share effective practices on bandwidth management techniques and legitimate uses of P2P technology. Working with joint entertainment-higher education committee seeking balanced approaches to curtailing P2P piracy over university

		the law and to protect its network resources through measures including policy, education, and network management	networks

Federal Investment in Advanced Networking and IT - Issue Brief

Funding for Advanced Networking Research Contact Sue Fratkin sfratkin@educause edu	EDUCAUSE supports increased federal funding designated for networking and information technology-related programs We seek to educate federal policymakers on the benefits advanced networking and information technology can have for society, justifying increased federal investment in networking and IT research	Monitoring congressional appropriations, organizing meetings between community leaders and National Science Foundation CISE	
Minority Serving Institutions Contact Sue Fratkin sfratkin@educause edu	NSF Division of Education and Human Resources (EHR) is funding Centers of Research Excellence in Science and Technology (CREST) and up to $16 2M in Federal Cyber-Service scholarships CISE plans to expand Education, Outreach and Training (EOT) efforts in the area of Cybennfrastructure	EDUCAUSE supports federal government programs that fund improvements to information technology at Minority Serving Institutions and other initiatives that promote equity in educational opportunity	Monitor congressional appropriations, monitor heanngs and legislation, and collaborate with members of the Alliance for Equity in Higher Education

Content Regulation

Sexually-Explicit Materials Contact Rodney Petersen rpetersen@educause edu	Pornography, obscenity, and adult materials on campus systems or networks and the protection of minors from indecent materials	Institutions of higher education are committed to maintaining learning and working environments that are free from illegal forms of harassment The First Amendment as well as important values such as academic freedom require the free exchange of ideas The use of computers and networks to display and distribute sexually explicit content	Monitor legislation and court cases, including use of P2P for dissemination of pornography, identify appropriate campus policies and procedures, educate members about ethical approaches to uphold community standards without use of censorship or other means that impinge upon academic freedom or the First Amendment

		should be handled according to existing legal precedent New laws or regulations should not be introduced that amount to censorship of content or impede scholarship, system or network performance, or access to legitimate networked information	
Internet Governance			
Dot-EDU Domain Name Contact Mark Luker mluker@educause edu	Each accredited educational institution is entitled to a name in the EDU domain Effective and efficient electronic communication with and by educational institutions depends on competent administration of the EDU name-space		EDUCAUSE manages the EDU domain under an agreement with the U.S Department of Commerce Activities range from day-to-day technical administration of changes in the data defining the EDU domain to adjudicating policy disputes and overseeing changes in policies governing the EDU domain
Internet Governance Contact Garret Sern gsern@educause edu	Higher education depends on efficient and robust operation of the global Internet, which, in turn, depends on decisions made by ICANN	Ensure administration and technical oversight of the Internet remains in the commercial sector, avoiding any unnecessary government oversight Join industry partners in advocating running of domain name root servers remains under the purview of the United States	Attend regular ICANN meetings, commenting on ICANN's decisions and policies when appropriate Part of a broad coalition that supports continued privatization of the Domain Name System before the Department of Commerce
Internet Access to Public Information Contact Steve Worona sworona@educause edu	Higher education thrives on the free flow of information, and the Internet is an important means to that end Instruction and research are enhanced by easy access to public information	EDUCAUSE supports making public information available over the Internet in easily accessible non-proprietary formats This applies especially to information produced by publicly funded activities and	Monitor hearings and legislation

		organizations	
Competition and Innovation			
Support for Research and Development Contact Sue Fratkin sfratkin@educause edu	Higher educations would benefit from expanded federal R&D funding, targeted research grants, and an increase in H-1B Visas among others	EDUCAUSE supports the goals and objectives of the National Innovation Act, the PACE (Promoting America's Competitive Edge through Education and Research) Act, and the ACI (America's Competitiveness Initiative)	Monitoring legislation and signing on to letters of support for agency budget increases
IT Workforce Development Contact Sue Fratkin sfratkin@educause edu	Higher education is both a source of the future IT workforce and a consumer of skilled IT professionals As the first generation of IT leadership at colleges and universities begin to retire over the next few years, there will be a need for new CIO's, directors, managers, and staff to provide vision and future directions	EDUCAUSE will advocate for continued and increased funding of programs that support the education of the future IT workforce	Monitor hearings and legislation Support budget requests that advance IT education, training, and certification programs Collaborate with community colleges
Outsourcing and Offshore Services	The increased demand for skilled IT workers combined with the potential for cheaper labor rates overseas will present opportunities for outsourcing of some IT jobs both domestically and internationally	EDUCAUSE will support policy proposals that permit colleges and universities to efficiently deliver high quality IT products and services	Study the impact of the changing demands and availability of the IT workforce Monitor hearings and legislation