Chicago Association of Law Libraries
A Chapter of the American Association of Law Libraries

CALL Public Affairs Committee
Report on Significant Developments
November 19, 2003

Walter Baumann
Joanne C. Kiley
Margaret A. Schilt
Christopher Simoni
Keith Ann Stiverson
Spencer Simons – Chair
Julia Wentz- Liaison

USA PATRIOT Act Update – November, 2003

Public and congressional concern about the operation of provisions of the USA PATRIOT Act has produced both legislative and judicial action in the past five months.

1. *ACLU et al v Department of Justice*, U.S. District Court for the District Columbia Case No. 1:02-cv-02077-ESH.

In a Memorandum Opinion issued May 19, 2003, the Court granted the Defendant's motion for summary judgment, holding that the DOJ properly invoked FOIA Exemption 1, which permits the withholding of information specifically authorized by an executive order to be kept secret in the interests of national defense or foreign policy. The Court "…concludes that defendant's explanation of why it has withheld aggregate statistical information revealing the number of times it used particular Patriot Act surveillance and search tools is sufficiently detailed and persuasive to satisfy the standards for protecting agency records pursuant to FOIA Exemption 1." (pg. 33)

2. *Muslim Community Association of Ann Arbor et al v John Ashcroft et al*, U.S. District Court for the E. D. Mich. S.D. Case No. 03-72913.

The ACLU in association with six Arab-American groups has filed the first case directly challenging the constitutionality of the USA PATRIOT Act, alleging that Section 215 of the Act (the provision giving the FBI expanded powers to obtain records and "other tangible things" from entities including libraries) compromises rights of privacy, free speech and due process. The suit was filed on July 30, 2003. Defendants have filed a Motion to Dismiss which is scheduled for hearing on December 3, 2003. Amicus briefs are being filed by the NAACP, Asian-American Legal Defense and Education Fund and the Japanese American Citizens League.

3. H.R. 2799 Amendments to FY 2004 appropriations bill for Commerce, Justice, state and the Judiciary
H.R. 2800, Amendments to FY 2004 Foreign Operations Appropriations bill

On Thursday, November 13, 2003, Mary Alice Baish, Associate Washington Affairs Representative of AALL, sent out an action alert, asking for support to urge House members to sign a letter to the conferees of the FY 2004 Commerce, Justice, State appropriations bill or an omnibus appropriations bill. The letter asks the conferees to accept amendments to both of these bills, approved in the House on July of this year. The amendment to H.R. 2799 would bar law enforcement from spending any funds for "sneak and peek" searches under Sec. 213 of the USA PATRIOT Act unless the targets are told in advance. The amendment to H.R. 2800 would prevent funds to be used for searches of libraries or bookstores under Section 215 of the USA PATRIOT Act. In the alternative, the letter asks that conferees incorporate language drawn from the proposed SAFE Act (see below) to accomplish the same goals.

4. Security and Freedom Ensured Act of 2003 ("SAFE Act") (S. 1709)

The SAFE Act was introduced in the Senate on October 2, 2003. The Act provides for privacy protections for library, bookseller and other personal records under the Foreign Intelligence Surveillance Act of 1978, as amended by the USA PATRIOT Act; provides that a library shall not be treated as a wire or electronic communication service provider for purposes of that Act; and strengthens the Congressional oversight provisions. It has been referred to the Judiciary Committee.

5. Benjamin Franklin True Patriot Act (H.R. 3171)

The Benjamin Franklin True Patriot Act was introduced in the House by Dennis Kucinich (D-OH) on September 24, 2003. The Act provides that 11 sections of the USA PATRIOT Act (including, inter alia, Section 213 relating to "sneak and peek" searches and Section 215 relating to the seizure of business records), 2 sections of Homeland Security Act of 2002, certain immigration regulation provisions, attorney-client monitoring pursuant to 66 FR 55063, secrecy orders under Attorney General Ashcroft's memorandum of October 12, 2001, and any actions of Attorney General Ashcroft amending the Thornburgh Guidelines of 1989, shall all cease to have any effect within 90 days of the date of enactment of the Act, unless removed from the list pursuant to hearings held by Congress at the request of the President. The bill was referred to House Committees on Education and the Workforce, Government Reform, the Judiciary, Transportation and Infrastructure, and the Select Committee on Intelligence.

6. Protecting the Rights of Individuals Act (S. 1552)

This Act was introduced by Lisa Murkowski (R-AK) on July 31, 2003. It would amend the USA PATRIOT Act to strengthen protections of civil liberties in the exercise of foreign intelligence surveillance. In particular, it would amend Section 215 of the PATRIOT Act to require that an application for a foreign intelligence surveillance order for seizure of records state the facts and circumstances relied upon to justify the belief that the person to whom the requested records pertain is a foreign power or an agent of a foreign power and, in the case of library and medical records, to state that there is probable cause to believe that the person is a foreign power or agent. The bill was referred to the Judiciary Committee.

Further information on these issues and current opinion about the USA PATRIOT Act can be found in an extensive report from the Lawyers Committee for Human Rights. See "Assessing the New Normal: Liberty and Security for the Post-September 11 United

States," available on the web at http://www.lchr.org/us_law/loss/assessing/assessingnewnormal.htm

Contact: Margaret Schilt schilt@uchicago.edu

Updates on Previously Reported Pending Legislation

The Digital Media Consumers' Rights Act of 2003 (the DMCRA or "Boucher Bill")
H.R. 107 (described more fully in the May report) would empower the Federal Trade Commission to ensure adequate labeling on non-standard or copy protected compact disks, which are a burden to consumers; it also would help ensure that fair use protections remain in place in the digital environment.
Current status: There are now 14 co-sponsors, and one Member of the House has withdrawn his co-sponsorship. The bill is not expected to go anywhere this time around.
(Contact: Keith Ann Stiverson)

FEDERAL LAW

H.R. 3261, the Database and Collections of Information Misappropriation Act, was introduced October 8, 2003, and referred to the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property. The Subcommittee held a mark-up session on October 16, amended the bill, and forwarded the legislation to the full committee. The amended text is not yet available.
Congress has attempted to pass database protection legislation since 1996, and the library associations and others have opposed such legislation as unnecessary and contrary to the principle that mere facts cannot be protected, only works with some originality.
(Contact: Keith Ann Stiverson)

STATE LAW

UCITA

Last August at its annual meeting, the National Conference of Commissioners on Uniform State Laws (NCCUSL) discharged the standby committee of the Uniform Computer Information Transactions Act (UCITA), noting the strong opposition from consumer groups, insurance companies, libraries, and their allies. What this means is that we have scored a major victory in the effort to keep UCITA from becoming law in more states. Nevertheless, UCITA is the law in both Maryland and Virginia, and it is still possible that this proposed uniform law could be considered in other states. There has been no recent movement to introduce the measure in Illinois that we could discover, but if you hear something to the contrary, please contact Keith Ann Stiverson (kstivers@kentlaw.edu) of the Public Affairs Committee.

GPO & OMB Reach Compromise This Summer

In early 2002 OMB Director Mitch Daniels created a confrontation with GPO by trying to use regulations to challenge its legal role as the government's printing facility. This past June he and the newly appointed Public Printer , Bruce James, agreed on a new arrangement for doing the government's printing within the existing provisions of Title 44.

The compact maintains GPO's central role but also provides the flexibility and direct input that Daniels and some agencies had been seeking.

By not trying to circumvent GPO, the arrangement continues the expertise and efficiencies of the GPO's procurement process. GPO will still qualify and register the private sector printers. But the agencies will be able to choose from these and be able to negotiate directly with them over issues of specifications and performance. The agencies will also get a reduction in GPO's mandatory fee from 7% to 3%. That will be for minimal services only. Other services will be for an additional charge. Payments to printers will go through GPO, but agencies will be able to approve the payments before they are made. OMB will curtail the use of in-house printing facilities by agencies to insure that the new system is used.

One of the most significant provisions for GPO is the requirement that each vendor provide GPO with an electronic version and two print copies of each publication procured. Since this is a condition of payment, GPO effectively gets to enforce these submissions. This should help greatly with the many documents that have not been included in the federal depository program. However, the costs of additional copies for distribution will be borne by GPO. Since these submissions are for physically printed documents, it still leaves open the question of what happens to agency publications that are only created in electronic format. What guidelines will apply to these?

The new arrangement will be carried out as a demonstration project during FY2004 to identify any bugs and to refine the process. Full government-wide deployment is scheduled for FY 2005. In the meantime, the OMB and GPO will work with the FAR Council to develop the regulations needed to carry out this new agreement.

Given the confrontational mood that had prevailed earlier, this compromise that seems to have satisfied OMB, GPO, the library community and the printing industry, is a surprising but heartening outcome.

References:
GPO and OMB Reach Innovative New Solution for Federal Printing
http://www.lib.umich.edu/govdocs/adnotes/2003/240703/an2407b.htm

GPO and OMB Compromise on Agency Printing More Information at a Lower Cost?
By Miriam A. Drake
http://www.infotoday.com/newsbreaks/nb030616-3.shtml

The OMB-GPO Compact: A new era in government print procurement
Fred Antoun, PIA Counsel for Government Printing and Information Issues
http://www.printlaw.com/OMB%20Memo-Compact/Agency%20Memo%20re%20OMB-GPO%20Compact.pdf

Contact: Walter Baumann wbaumann@depaul.edu

Illinois Administrative Code – New Codification Effort Canceled

Last Spring we reported on the standoff over the codification of the administrative regulations of the State of Illinois. This standoff has now been resolved: the plans of the Secretary of State's Index Department for a totally new codification of the state

administrative regulations in a new organizational scheme (ILAC) have been canceled and the production of the Illinois Administrative Code (Ill.Ad.Code) by the Illinois General Assembly's Joint Committee on Administrative Rules (JCAR) will continue. The Secretary of State has also returned the maintenance of the database for the Illinois Register to JCAR (the Secretary of State's Index Office had assumed responsibility for the Illinois Register from JCAR about a year ago).

Background: 5 Ill.Comp.Stat.Ann. 100/5-80(h) (West Supp. 2003) states that the official compilation of the regulations of Illinois are those prepared by the Secretary of State. In 1998 the Secretary of State published in the Illinois Register a notice of its intent to recodify the administrative regulations into a new scheme, to be called ILAC, 22 Ill.Reg. 11532 (1998), pursuant to its authority to prescribe a uniform system for codification, 5 Ill.Comp.Stat.Ann 100/5-80(a). A schedule for this recodification was published in the Illinois Register, 27 Ill.Reg.233 (2003). The Index Office was staffed and preparing to begin the recodification early this year. An impasse arose between JCAR and the Index Office over the implementation of the project. By statute, JCAR must approve any codification, but approval "shall be conditioned only upon establishing that the proposed codification system and schedule are compatible with existing electronic data processing equipment and programs maintained by and for the General Assembly", 5 Ill.Comp Stat. Ann. 100/5-80(a). JCAR claimed that the system was not compatible with its existing LIS system and that it did not have the authorized funding to make it compatible. The Index Office's Administrator of the Administrative Code did not agree with this assessment. When we spoke to representatives of both the Index Office and JCAR in late spring the Index Office had not been able to begin its project, while JCAR was continuing to both maintain the Ill.Ad.Code and to put it on its website.

In a recent call to the Administrator of the Administrative Code we were informed that the Secretary of State's office has relinquished all plans to proceed with ILAC and has turned over responsibility for publication of any code of Illinois regulations to JCAR.
JCAR does not plan to proceed with the ILAC recodification. The maintenance of the database of the Illinois Register has also been returned to JCAR.

In summary, the production of an official compilation by the Secretary of State, although authorized by statute, will not occur, while the General Assembly's JCAR will continue to maintain the Illinois Register and the unofficial, though long-standing and generally cited, Illinois Administrative Code.

Note: there is now a parallel authorities table,
(Comparison Index, Illinois Administrative Code to Statutory Authority
http://www.sos.state.il.us/departments/index/comparison_index.pdf),
showing the statutory authority for each regulation, something the administrative code has notably lacked in the past. A purpose of ILAC was to make the statutory authority for administrative regulations clear through a parallel organization scheme. It appears the parallel authorities table was developed in response to this conflict over recodification.

Contact: Spencer Simons ssimons@kentlaw.edu