

Freedom to Read Foundation REPORT TO COUNCIL

2004 Midwinter Meeting – San Diego, California

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the Annual Meeting:

CIPA LITIGATION

United States v. American Library Association: As you know, on June 23, 2003, while we were meeting in Toronto, the U.S. Supreme Court handed down its opinion in *United States v. American Library Association*, our lawsuit challenging the Children's Internet Protection Act (CIPA). A divided court upheld the law, overturning the unanimous decision of the three-judge panel of the Eastern District of Pennsylvania, which ruled CIPA unconstitutional.

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, ruled that CIPA does not induce librarians to violate library users' First Amendment rights by requiring the installation of Internet filters on library computers as a condition of receiving federal assistance. The four justices held that librarians traditionally make content-based decisions in deciding what materials are provided to patrons, and therefore there are no Constitutional difficulties with CIPA's filtering requirement. They pointed to CIPA's provision permitting librarians to disable Internet filters at the user's request.

Justices Breyer and Kennedy both concurred with the judgment upholding CIPA, but disagreed with Chief Justice Rehnquist's opinion that CIPA raised no special First Amendment concerns. Instead, the two justices ruled that the law's disabling provision negated any concerns raised by blocking access to Constitutionally protected speech. In addition, Justice Kennedy warned that, if in practice, a library cannot or will not provide an adult user with unfiltered Internet access at the user's request, the user would be able to bring a second, "as-applied" challenge to CIPA, based on actual practice.

Justices Stevens, Souter, and Ginsberg all dissented from the court's judgment upholding the law. Justice Stevens found CIPA's threat to withhold funds to be a violation of the First Amendment, observing that "an abridgement of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty." Justice Souter took care to note that the library community itself has rejected Justice Rehnquist's view that public libraries and librarians are "gatekeepers," only acquiring materials of "requisite and appropriate quality."

The Foundation remains prepared to support libraries, librarians, and library users coping with the implementation and effects of CIPA's filtering mandate. FTRF donated \$200,000 to the legal effort to overturn CIPA.

THE USA PATRIOT ACT AND LIBRARY PRIVACY AND CONFIDENTIALITY

The Freedom to Read Foundation remains steadfast in its opposition to the USA PATRIOT Act's encroachment on library users' privacy and civil liberties, and remains alert for opportunities to mount a Constitutional challenge to the law. In furtherance of this effort, the Foundation joined with the American Booksellers Foundation for Free Expression and many other free expression and civil liberties organizations as *amicus curiae* in **Muslim Community Association of Ann Arbor v. Ashcroft**, a facial legal challenge to Section 215 of the USA PATRIOT Act, which amends the business records provision of the Foreign Intelligence Surveillance Act to permit FBI agents to obtain all types of records, including library records, without a showing of probable cause.

The Foundation continues to support the efforts made by several members of Congress to amend or repeal portions of the USA PATRIOT Act in order to protect libraries and library users from unreasonable government surveillance. In particular, the Foundation is encouraging its members and all members of the library community to work on behalf of the Freedom to Read Protection Act introduced by Congressman Bernie Sanders (I-VT) and the Security and Freedom Enhanced Act (SAFE) introduced by Senators Feingold (D-WI), Leahy (D-VT), Craig (R-ID), and Durbin (D-IL). A full listing of pending legislation addressing the problems in the USA PATRIOT Act can be found attached as an exhibit to this report. (Exhibit I)

LITIGATION

Since the Foundation last reported to Council, it has joined in the following lawsuits:

New Times v. Isaaks: This lawsuit is a defamation action brought against the *Dallas Observer*, an alternative newsweekly, and its parent company, New Times, Inc. Two elected officials filed suit against the publication after a fictitious article satirized the officials' actions in enforcing a school violence "zero tolerance" policy after the pair chose to jail a 13-year-old boy for writing a school-assigned essay discussing the shooting of a teacher and two students. The Texas Court of Appeals permitted the lawsuit to move forward after denying the defendants' motion for summary judgment, despite plain indicators in the publication that the article was a work of satire. FTRF has joined an *amicus* brief to defend the paper's right to engage in political satire and parody as a means of commenting on the actions of government officials.

Center for Democracy and Technology v. Fisher: The Foundation recently agreed to join the Center for Democracy and Technology's challenge to a Pennsylvania statute that allows a Pennsylvania district attorney or the state's Attorney General to require Internet service providers—including libraries—to block access to specified Web sites. To date, the Pennsylvania Attorney General has already issued hundreds of blocking requests

without adequate due process protections, barring access to both targeted sites and other, wholly innocent Web sites, raising serious First Amendment concerns. The Foundation anticipates a vigorous challenge to this law.

The Foundation is also involved in these ongoing lawsuits:

Ashcroft v. American Civil Liberties Union (formerly ACLU v. Reno): After the Third Circuit Court of Appeals once again found the Children's Online Protection Act (COPA) an unconstitutional abridgment of speech, the government sought review of the decision by the U.S. Supreme Court. On October 14, 2003, the Supreme Court granted *certiorari*, and the case is currently being briefed before the high court. The Foundation will join with other First Amendment groups to file an *amicus* brief arguing that COPA's restrictions on Internet content violate the First Amendment.

United States v. Irwin Schiff, et al.: The Foundation filed an *amicus* brief in this lawsuit after the federal government successfully sought a temporary restraining order against Irwin Schiff and his publisher, Freedom Books, forbidding them to publish Mr. Schiff's book, *The Federal Mafia: How Government Illegally Imposes and Unlawfully Collects Income Taxes*. The government argued that the book aids and abets the commission of a crime by counseling people on how to avoid paying taxes. FTRF's brief opposed the court's prior restraint of Mr. Schiff's book. On June 17, 2003, a federal judge in Las Vegas upheld the restraining order. Mr. Schiff and the ACLU of Nevada appealing the ruling to the Ninth Circuit Court of Appeals, and FTRF will continue to join with other organizations to fight the court's order forbidding publication of Mr. Schiff's book.

Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme: In April, 2000, two French organizations, La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students, attempted to enforce an order by a French court imposing fines against Yahoo! for hosting Web pages accessible to French citizens containing auctions of Nazi and racist memorabilia. Yahoo! sued in federal court in California, and a district court judge ruled that no other nation's law, no matter how valid in that nation, could serve as a basis for quashing free speech in the United States. The French organizations appealed that ruling and launched a second suit in France accusing Yahoo! of "justifying war crimes." In February 2003 a French court dismissed that suit on its merits. Yahoo! banned Nazi material on its auction sites when they imposed fees on such sites, but continues to allow other material that violates the French court's 2000 order. FTRF has supported Yahoo! throughout the litigation, filing *amicus* briefs with both the trial and appellate courts. The case remains pending before the Ninth Circuit Court of Appeals.

STATE INTERNET CONTENT LAWS

The Foundation continues to participate as a plaintiff in lawsuits challenging state laws that criminalize the distribution of materials deemed "harmful to minors" on the Internet. Most recently, FTRF became a plaintiff in **Shipley, Inc. v. Huckabee**, which mounts a First Amendment challenge to recent amendments made to the Arkansas "harmful to minors" display statute. FTRF and its fellow plaintiffs filed a motion for summary judgment on

July 25, 2003, and oral arguments were heard on December 8. We are now awaiting a decision from U.S. District Judge G. Thomas Eisele in Little Rock, Arkansas.

ABFFE v. Petro (formerly Booksellers, Inc. v. Taft), the lawsuit filed by FTRF and other plaintiffs to challenge the State of **Ohio's** amendment to its definition of "harmful to juveniles" materials, has been remanded to the District Court by the Sixth Circuit Court of Appeals after the state legislature amended the law again in an effort to moot the lawsuit. Plaintiffs filed an application for fees and an amended complaint on August 6, 2003, and a motion for summary judgment on October 13. The State of Ohio then filed a brief opposing the application for fees. Cross-motions for summary judgment were submitted to the court on December 15. A decision on both motions is expected shortly.

PSINet v. Chapman: Attorneys for FTRF and other plaintiffs argued this case before the Fourth Circuit Court of Appeals on June 2, 2003, encouraging the court to uphold the permanent injunction forbidding enforcement of **Virginia's** Internet content law. Instead of deciding the appeal, however, the Fourth Circuit certified two questions of state law to the Virginia Supreme Court. Following briefing by the parties, the Virginia Supreme Court refused the certified questions, and the case is once again pending before the Fourth Circuit Court of Appeals.

ACLU v. Goddard (formerly ACLU v. Napolitano): The **Arizona** state legislature amended its new "harmful to minors" statute after a federal district court struck down the state's new Internet content law and entered a permanent injunction barring its enforcement. As a result, the case has now been remanded back to the District Court, where the parties exchanged briefs on the effect of the new statute on the lawsuit. The state has agreed not to enforce the new law while the court's decision on the briefs is pending. At the request of the court, the parties are briefing whether a new lawsuit must be brought to challenge the amended statute.

ABFFE v. Dean: After the U.S. District Court in Brattleboro, Vermont, declared **Vermont's** "harmful to minors" Internet statute unconstitutional, the state appealed the decision to the Second Circuit Court of Appeals. On August 27, 2003, the Second Circuit handed down its opinion, which affirmed the District Court decision in part and modified the decision in part, limiting the protection of the District Court's injunction forbidding enforcement of the law to two of the plaintiffs. After the Second Circuit denied the parties' motion for rehearing, plaintiffs filed their application for fees on the appeal and renewed their application for fees for the trial. Those motions remain pending before both courts while the state considers whether to petition the U.S. Supreme Court for *certiorari*.

Southeast Booksellers v. McMasters (formerly Southeast Booksellers Association v. Condon) is a lawsuit challenging an amendment to the **South Carolina** "harmful to minors" law that sweeps in visual matter communicated via the Internet. On July 25, 2003, the District Court denied South Carolina's motion to dismiss or certify the case to the Supreme Court of South Carolina. The defendants then submitted a motion for summary judgment, and the plaintiffs filed a brief in opposition to the motion on

December 5. The parties are awaiting the court's decision. FTRF is not currently a plaintiff in this case.

FUNDRAISING

In addition to its efforts in the courts, the Foundation's Board of Trustees is presently exploring new fundraising ventures to further buttress the Freedom to Read Foundation's efforts on behalf of intellectual freedom and the First Amendment.

To become a member of the Freedom to Read Foundation, please send a check to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

You can also use a credit card to join the Foundation. Call (800) 545-2433 ext. 4226 or visit us online at www.ftrf.org to use our online donation form.

Respectfully submitted,

Gordon M. Conable

President, Freedom to Read Foundation