

Freedom to Read Foundation REPORT TO COUNCIL

2003 Annual Meeting – Toronto, Canada

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

CIPA LITIGATION

United States v. American Library Association: On March 5, 2003, the U.S. Supreme Court heard oral arguments in *United States v. American Library Association*, our lawsuit challenging the Children's Internet Protection Act (CIPA). Paul Smith of Jenner & Block argued on behalf of the ALA, urging the nine Justices to affirm the unanimous decision written by Chief Judge Edward R. Becker of the Third Circuit Court of Appeals, in which the court struck down CIPA. Theodore Olsen, the Solicitor General, argued on behalf of the United States government.

The questions posed by the Justices to both attorneys indicated that the court, as anticipated, is sharply divided on the case. We are now awaiting the Supreme Court's decision, which is likely to be handed down either tomorrow (June 23) or, possibly, on a specially announced decision day within the next week. We are expecting a close vote.

The Foundation is still actively participating in raising funds for the CIPA lawsuit, and to date has donated \$200,000 to the effort. We urge all ALA members to assist in raising the necessary funds for this most important litigation. To give online and for more information, visit ALA's CIPA Web site at www.ala.org/cipa.

THE USA PATRIOT ACT AND LIBRARY CONFIDENTIALITY

The Foundation continues to fight to protect libraries and library users from unreasonable government surveillance through litigation and legislation:

Patriot Act Litigation:

ACLU v. Department of Justice: FTRF is one of four plaintiffs in this lawsuit filed under the Freedom of Information Act (FOIA). The suit asked the court to issue a preliminary injunction requiring the Department of Justice (DOJ) to disclose aggregate statistical data and other policy-level information that would allow a fuller understanding of the DOJ's implementation of the USA Patriot Act. In particular, the suit asked for information about the DOJ's use of the new powers granted under Section 215, which permits the FBI to obtain library and bookstore records without showing probable cause. After the DOJ

claimed that the majority of the documents sought were classified, the plaintiffs filed a motion for summary judgment. The U.S. District Court dismissed the plaintiffs' claims on May 19, accepting the DOJ's assertion that the materials were properly classified. The plaintiffs are considering their next steps.

Patriot Act Legislation:

H.R. 1157, "**The Freedom to Read Protection Act of 2003**," was introduced on March 6, 2003, by Representative Bernie Sanders (I-VT). The legislation exempts libraries and bookstores from the provisions of Section 215 of the USA Patriot Act. Currently, over 100 members of the House have signed on as co-sponsors, including twelve Republicans. Rep. Sanders was the Opening General Session speaker at this conference.

S. 1158, "**The Library and Bookseller Protection Act of 2003**," introduced by Senator Barbara Boxer (D-CA) on May 23, is similar to H.R. 1157. The bill requires law enforcement agents to show probable cause before obtaining a court order for library records. In addition, it excludes libraries from the legal definition of Internet Service Provider, making it more difficult to obtain library records through the use of a National Security Letter. The bill has been referred to committee.

In addition, FTRF is tracking H.R. 2429, "**The Surveillance Oversight and Disclosure Act**," a bill requiring the Department of Justice to report more fully on USA Patriot Act activities, including how library records are obtained and used. The bill was introduced on June 11, 2003, by Representatives Joseph M. Hoeffel (PA-D), Sam Farr (CA-D), and John Conyers (MI-D).

LITIGATION

In pursuit of its mission to preserve our right to read and receive information freely, the Foundation joins in *amicus* briefs that support parties fighting to defend those rights in court. Three of those cases have resulted in victories since the Foundation last reported to Council:

Interactive Digital Software Association v. St. Louis County: In a unanimous decision, the Eighth Circuit Court of Appeals overturned a St. Louis County, Missouri, ordinance forbidding the sale or rental of violent video games to minors, overruling federal District Court Judge Stephen Limbaugh's determination that video games were not protected expression under the First Amendment. Instead, the panel of judges adopted the views of the Seventh Circuit Court of Appeals in AAMA v. Kendrick, an opinion that overturned a similar ordinance passed by the city of Indianapolis. Concluding that video games "contain stories, imagery, age old themes of literature and messages, even an 'ideology,' just as books and movies do," the court ruled that video games are protected expression entitled to the full protection of the First Amendment. The court rejected the county's argument that it was entitled to aid parents in preserving children's well-being, finding that such desires did not give the county an unbridled license to regulate what minors read and view, particularly in light of the county's failure to provide any evidence that "violent"

video games cause psychological harm to minors. The panel of judges directed the District Court to enter an injunction barring enforcement of the ordinance.

Counts v. Cedarville: A student and her parents initiated this lawsuit after the Cedarville, Arkansas, school board voted to remove the Harry Potter books from the school library's open stacks and to require students to obtain a parent's written permission before borrowing the books. The school board acted following a parent's complaint that the series encourages children to disrespect adults and to believe in witchcraft. FTRF filed an *amicus* brief in support of the plaintiffs' motion for summary judgment. On April 23, Judge Jimm L. Hendren granted the motion, ordering the school board to return the books to the school library's open shelves. The school board voted not to appeal the decision.

Ashcroft v. American Civil Liberties Union (formerly ACLU v. Reno) (COPA)
The Third Circuit Court of Appeals once again considered the constitutionality of the Children's Online Protection Act (COPA) after the Supreme Court returned the case to the Third Circuit after holding that the law's reliance on community standards did not by itself render COPA unconstitutional. The Foundation joined the Center for Democracy and Technology and other groups to file an *amicus* brief arguing that COPA's restrictions on Internet content violate the First Amendment. On March 6, the Third Circuit found the law unconstitutional for a second time. It is anticipated that the government will appeal the decision to the Supreme Court.

The Foundation is also involved in the following lawsuits:

United States v. Irwin Schiff, et al.: The Foundation filed an *amicus curiae* brief in this lawsuit after the 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*. FTRF's brief opposed the court's prior restraint of Mr. Schiff's book. On June 17, a federal judge in Las Vegas upheld the restraining order. Mr. Schiff and the ACLU of Nevada will appeal the ruling to the Ninth Circuit Court of Appeals.

Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme remains pending before the Ninth Circuit Court of Appeals after the French courts dismissed its order imposing fines on Yahoo! for hosting Web pages containing auctions of Nazi and racist memorabilia. The lawsuit was filed after La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students sought to enforce an earlier order by the French court imposing fines against Yahoo! for hosting the pages. 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, and the French organizations appealed that ruling. FTRF has supported Yahoo! throughout the litigation, filing *amicus* briefs with both the trial and appellate courts.

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:

FTRF will become a plaintiff in **Southwest Booksellers v. Condon**, a challenge to an amendment to the **South Carolina** “harmful to minors” law that sweeps in visual matter communicated via the Internet. The lawsuit was filed on November 6, 2002. The defendants filed a motion to dismiss the case and to refer the legal issues raised in the case to the South Carolina Supreme Court. The parties are awaiting the court’s decision.

Bookfriends, Inc. v. Taft: The State of **Ohio** responded to the lawsuit filed by FTRF and other plaintiffs by amending its definition of “harmful to juveniles” after the district court issued a preliminary injunction forbidding the state from enforcing its newly passed law. The case is before the Sixth Circuit Court of Appeals, which took it up after the state appealed the district court’s initial order finding the law unconstitutional. The plaintiffs have asked the Sixth Circuit to return the case to the district court for a determination of the constitutionality of the law’s remaining Internet provisions.

PSINet v. Chapman: Attorneys for FTRF and other plaintiffs argued this case before the Fourth Circuit Court of Appeals on June 2, encouraging the court to uphold the permanent injunction forbidding enforcement of **Virginia’s** Internet content law. We are awaiting a decision from the court.

ACLU v. Napolitano: After a federal district court struck down **Arizona’s** new Internet content law and entered a permanent injunction barring its enforcement, the state appealed the court’s decision to the Ninth Circuit Court of Appeals. Subsequently, the Arizona legislature began drafting an amended version of the statutes and briefing on the appeal was deferred. Meetings are planned with the appellate court to set a scheduling order.

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 February 6, the Second Circuit heard oral argument from the parties. We are awaiting the court’s decision.

FEDERAL LEGISLATION

On April 29, President Bush signed “**The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Act**” (PROTECT Act) into law. The PROTECT Act replaces those parts of the Child Pornography Prevention Act (CPPA) struck down by the U.S. Supreme Court last spring in *Ashcroft v. ACLU*. The new law criminalizes the creation of any “visual depiction that is a digital image, computer image, or computer-generated image of, or that is indistinguishable from an image of, a minor engaging in specified sexually explicit conduct” and requires the defendant to prove, as an affirmative defense, that the image is a computer creation or only used adults to create the image. FTRF will monitor enforcement of the law.

ROLL OF HONOR AWARD

This year's Roll of Honor Award is presented to our extraordinary attorney, Theresa Chmara, General Counsel of the Freedom to Read Foundation and partner with the law firm of Jenner & Block in Washington, D.C. Chmara joined the Foundation's legal team in the early 1990s and became FTRF General Counsel in 2000. In that time, she has represented the First Amendment interests of innumerable librarians and library users. She was a key member of the legal team that helped to win the case of *ALA v. Department of Justice*, which overturned portions of the Communications Decency Act, and led the team that has guided the Children's Internet Protection Act case to the U.S. Supreme Court. She is the lead faculty member of ALA's ongoing Lawyers for Libraries training institutes, and serves on the board of the American Booksellers Foundation for Free Expression. She has also given invaluable legal assistance to libraries and librarians facing attempts to ban books, visits from law enforcement, demands to censor the Internet, and countless other challenges. She is a true professional and a joy to work with. We are thrilled to present her with the Freedom to Read Foundation's highest honor.

Respectfully submitted,
June Pinnell-Stephens
Treasurer, Freedom to Read Foundation