Freedom to Read Foundation
REPORT TO COUNCIL

2000 Annual Conference – Chicago

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

LITIGATION SUMMARY

As usual, most of my report consists of an update on litigation in which the Foundation is involved or is monitoring. I am happy to be able to report some key litigation victories over the past months.

American Civil Liberties Union v. Reno

On June 22, we won a significant victory in this suit against the Child Online Protection Act (COPA). The Third Circuit Court of Appeals upheld a preliminary injunction barring enforcement of the act, holding that the plaintiffs were unlikely to succeed at trial. COPA is an attempt by Congress to ban the commercial distribution over the Internet of material that is "harmful to minors" to children seventeen and under. COPA was enacted in 1998, and the suit was filed in the U.S. District Court for the Eastern District of Pennsylvania. The government has until September to file its petition for *certiorari* to the U.S. Supreme Court.

In discussing the problems of applying community standards in an Internet context, the court held that "[b]ecause material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability."

While not a litigant ourselves, the Freedom to Read Foundation followed this case closely. COPA is sometimes called CDA II because Congress passed COPA in response to the U.S. Supreme Court striking down major portions of the Communications Decency Act in the case brought by the American Library Association. We joined nineteen other members of the Citizens Internet Empowerment Coalition (CIEC) in filing an *amicus* brief in this case.

Playboy Entertainment Group, Inc. v. United States

On May 22, in a 5-4 decision, the U.S. Supreme Court upheld a U.S. District Court decision that Section 505 of the Telecommunications Act of 1996 violated the First Amendment when it sought to restrict certain cable channels with sexually explicit content to late night hours unless they fully scrambled their signal bleed. In an opinion written by Justice Kennedy, the Court ruled that the government may have a legitimate interest in protecting children from exposure to "indecent material." Section 505, however, is a content-based speech restriction and, therefore, must be the least restrictive means for meeting the governmental interest. The Court found that Section 505 is not the least restrictive means.

In this decision, the Supreme Court reaffirmed the burden on the government to justify restrictions on First Amendment rights. In a ringing statement that has the potential to be very useful in the continuing dialog about mandatory filtering of Internet content, the Court held:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.
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> It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government, not with the citizen.

Earlier, at the district court level, the Foundation joined thirteen First Amendment groups in filing an *amicus* brief supporting the plaintiffs' motion for a preliminary injunction to bar the government from enforcing the statute. The brief argued that the "indecent" provisions were unconstitutionally vague and attempted to usurp the role of parents, since lock boxes were the appropriate "least restrictive" means to assure children were not exposed to restricted programs. The three-judge panel of the district court denied the preliminary injunction. The issues were reconsidered, however, following an appeal to the U.S. Supreme Court, which remanded the case for further proceedings. The district court then ruled that the "indecent" provisions are unconstitutional.

Robert Corn-Revere, the attorney who argued the case before the Supreme Court, has just been elected to the Freedom to Read Foundation Board of Trustees.

Brooklyn Institute of Arts and Sciences v. Giuliani

The third victory occurred in March, when the Brooklyn Institute of Arts and Sciences reached a settlement in its cases with the City of New York and Mayor Rudolph Giuliani. The settlement is a clear win for the First Amendment: the mayor dropped his efforts to remove the museum board, to evict the museum, and to stop payments to the museum. For its part, the Brooklyn Museum agreed to drop its federal lawsuit and pay its own attorneys fees.

The controversy was around the controversial exhibit "Sensation: Young British Artists from the Saatchi Collection." Mayor Giuliani found the exhibit offensive, especially toward Catholics, and singled out a piece by Chris Ofili called "The Holy Virgin Mary." In November 1999, U.S. District

Judge Nina Gershon blocked any action against the museum by the city, citing the First Amendment. FTRF joined an *amicus* in this case, arguing forcefully that works of art are protected by the Constitution.

David S. v. Ouachita Parish School Board

The Freedom to Read Foundation has not had an official role in this Monroe, Louisiana, case. We understand, however, that the case has been settled, with the books being returned to the library and the selection policy changed to the satisfaction of the librarian.

The case involved the removal of four titles from the high school library shelves on order from the principal. The principal also ordered the librarian to provide other similar books (with "sexual" information, such as information on homosexuality) for review by the principal. After a local attorney filed suit in October 1996, the library board amended the book selection policy to create a review panel at each school composed of teachers or librarians, administrators, parents and business people from the community. The panels were charged with reviewing each new library resource before it could be placed in the school library. Plaintiffs amended their complaint on First Amendment grounds to include a facial challenge to the book selection policy. The librarian was disciplined, but not terminated, for not complying fully with the principal's directives.

In addition to those victories, the following cases are still pending.

Child Pornography Prevention Act of 1996 (CPPA)

As I previously reported, the Freedom to Read Foundation is involved in two challenges to the Child Pornography Prevention Act of 1996 (CPPA). These cases have produced two different decisions at the Circuit Court level. The act expands the definition of child pornography to include the visual depiction of what appears to be a minor engaged in sexually explicit conduct, or the advertising, promotion, presentation, description, or distribution of a visual depiction in a manner that "conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." Previously, the Supreme Court's decision to allow states to prohibit non-obscene child pornography was based on the idea that children were harmed in the process of producing the materials. (*New York v. Ferber*, 1982)

The First Circuit Court of Appeals ruled in January 1999 that the act was constitutional (*United States v. Hilton*), holding that it was neither vague nor overbroad. The Ninth Circuit Court of Appeals, on the other hand, found in December 1999 that the act was not constitutional, in the case *Free Speech Coalition v. Reno*. This creates a conflict in the two circuits, which increases the likelihood of a hearing before the U.S. Supreme Court – despite the high court's denial of plaintiff's writ of *certiorari* in *Hilton*. The government filed a petition for rehearing with the Ninth Circuit in February in *Free Speech*. That petition for rehearing is pending before the Ninth Circuit.

The Freedom to Read Foundation joined *amicus* briefs in support of each challenge.

Kathleen R. v. City of Livermore

This case, in which the Livermore (CA) Public Library has been sued for not filtering the Internet, is still pending before the California appellate court.

A parent sued the Livermore Public Library after her twelve-year-old son evidently downloaded pornographic images to a disk at the library, printed them out at a relative's house and then distributed them. The lawsuit was filed on May 28, 1998, alleging that the library had become a "public nuisance." The lawsuit was dismissed in October 1998, on the ground that the library and City of Livermore are immune from such a lawsuit under the CDA.

The lawsuit was refiled and lawyers for the parent claimed that the library's policy of providing unfiltered access to the Internet violated the constitutional rights of parents and children using the library. The second lawsuit was dismissed on January 14, 1999. It is our understanding that the dismissal by the Superior Court of California was not accompanied by a legal analysis. On March 11, 1999, the plaintiff filed an appeal of the dismissal of her lawsuit. In October 1999, FTRF joined an *amicus* brief in support of the City of Livermore (and the library) with the ACLU, ACLU of Northern California, and the People for the American Way. The *amicus* brief addressed several issues. First, the brief argued the CDA immunizes the library from liability for merely providing access to material that was transmitted by a third party. Second, the brief argued that the plaintiff had failed to allege the deprivation of a constitutionally protected liberty interest. Third, *amici* argued that rather than being constitutionally prohibited, the open access policy of the Livermore library was constitutionally compelled by the First Amendment.

Wichita Falls, Texas

This case, involving the books *Daddy's Roommate* and *Heather Has Two Mommies*, is still pending in trial court.

In February 1999, after much agitating and negotiating, including an organized censorship campaign, the Wichita Falls City Council passed a resolution creating a "parental access" area in the library with books that are available only to patrons eighteen-years-old or older. A book will be placed in the parental access area if it is designed for children twelve-years-old or younger, and 300 patrons of the library have signed a petition indicating their belief that that material is "of a nature that is most appropriately read with parental approval and/or supervision."

In July 1999, *Heather Has Two Mommies* and *Daddy's Roommate* were removed from the children's section after such a petition was delivered. Jenner & Block, acting on behalf of the Foundation, worked with a local attorney and the Texas ACLU in filing a lawsuit on behalf of numerous private citizens of Wichita Falls, arguing that the resolution was unconstitutional on several grounds. Prior to a hearing on the request for a temporary restraining order, city attorneys agreed to such an order and the books were returned to the children's room of the library. In August, the judge held a hearing to decide whether to issue a permanent injunction, and the parties filed proposed findings of fact and conclusions of law.

NEW LITIGATION

Tattered Cover search warrant

We have agreed to participate in litigation to challenge an order to force an independent bookstore to reveal its sales records. The Tattered Cover in Denver was presented with a search warrant to allow police officers to search the store's records to see whether a suspect in a drug case purchased books there on making methamphetamine. Joyce Meskis, owner of the Tattered Cover, challenged the efforts in court; a hearing on a temporary injunction in the case will be held July 26.

LEGISLATION

Filtering Requirements

Both the Senate and House versions of the Labor, Health and Human Services, Education appropriations bill (H.R. 4577) include filtering requirements as a condition for the receipt of E-rate funds. The Senate version includes two amendments related to filtering, each with a different approach.

The McCain amendment (No. 3610) would require libraries receiving E-rate funds to install and use technology that blocks access by minors to obscenity, child pornography, and "any other material that the library determines to be inappropriate for minors." Prior to the Senate vote on the

McCain amendment, Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT) added a provision requiring large Internet Service Providers to provide filtering software to their customers for free or at cost. Leahy believes that this provision would allow teachers, parents, and librarians to have the tools they need to make decisions in their local communities.

The Santorum amendment (No. 3635) offers libraries a choice between developing a community-based Internet Use Policy and filtering.

The House version of the bill includes a filtering requirement for schools receiving E-rate funds. The two versions of the bill are expected to go to conference committee in mid-July.

State Laws

Two state Internet content laws have recently been signed, one in Arizona and the other in Vermont. These laws are similar to ones that have been overturned in New York and New Mexico, and which are currently being challenged in Virginia (*PSINet, Inc. v. Gilmore*) and Michigan (*Cyberspace v. Engler*).

OTHER BUSINESS

Anchorage, AK, Internet filtering

In August 1999, the mayor of Anchorage, AK, unilaterally imposed filtering software on all municipal computers, including those used by library patrons and staff. The Freedom to Read Foundation Board has made a grant to the Alaska Civil Liberties Union to pursue any necessary litigation. In April 2000, a new mayor was elected, who has since terminated the head librarian. Although no litigation has been brought in this situation, FTRF continues to closely monitor the state of affairs.

Web Page

The Freedom to Read Foundation Web Page is gaining in popularity. Don Wood is now posting updates on the cases in which the Foundation is involved or interested. I urge you to use this method to keep up-to-date between conferences. The address is http://www.ftrf.org/.

Respectfully submitted,
Candace D. Morgan
President