Freedom to Read Foundation
REPORT TO COUNCIL

2001 Annual Conference – San Francisco, CA

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

LITIGATION SUMMARY

American Library Association v. United States The Freedom to Read Foundation has joined the American Library Association and several other litigants in one of two high-profile challenges to the Children's Internet Protection Act (CIPA). The suit was filed in the Eastern District of Pennsylvania on March 20, and has been combined with a similar suit filed later the same day by the ACLU and others.

On May 15, a scheduling conference took place, at which time oral argument on the government's motion to dismiss our case was set for July 23.

The plaintiffs decided not to file for a preliminary injunction because the government has clarified that libraries do not have to make a final decision about filtering until the year 2002. Instead, plaintiffs asked to set a trial date this year.

Although libraries that wish to continue to be eligible for e-rate discounts related to Internet access do not have to have software filters in place until July 1, 2002, libraries with Year 4 approval letters must begin taking steps to study their options **prior to July 1, 2001**. In addition, since the Neighborhood Children's Internet Protection Act (NCIPA) is not being challenged in court, libraries will have to complete the requirements of this act as a prerequisite for receiving Year 5 discounts.

Foundation attorneys, ALA's Office for Intellectual Freedom, Development Office, Washington Office, and Public Information Office, along with our co-plaintiffs, are working together to keep libraries informed concerning the steps they need to take prior to the July 1, 2001, deadline. One result of this cooperation is the CIPA Web site, www.ala.org/cipa/. Please check that site regularly for updates on the litigation, and for information about fulfilling the requirements of CIPA and NCIPA. Another result is the CIPA Legal Fund, to which the Foundation will contribute $100,000. You can contribute to the CIPA Legal Fund at this conference or online or by contacting the ALA Development Office.

On other fronts, we have met with a good deal of success in the past six months:

Cyberspace v. Engler A Michigan state statute enacted in June 1999 provided that it is a crime to disseminate sexually explicit material to minors on the Internet. The ACLU sued, alleging that the statute violates the First Amendment because it would ban an entire category of constitutionally protected speech between adults and older minors and that it violated the Commerce Clause of the Constitution. This is one of several "mini-CDAs" — so called because of their similarity to the federal Communications Decency Act, which was unanimously overturned by the U.S. Supreme Court — against which we have been involved in litigation.

In July 1999, the district court agreed with the ACLU and granted the plaintiffs' request for a preliminary injunction. The government appealed the case to the Sixth Circuit.

The Freedom to Read Foundation joined an *amicus* brief in support of the plaintiffs. *Amici* argued that the Michigan law was unconstitutional in several different respects: (1) the Michigan statute effectively bans speech that is constitutionally protected for adults because current technology does not allow Internet speakers to exclude minors from Internet communications that some communities might deem "harmful to minors," thus forcing speakers to refrain from engaging in constitutionally protected speech for adults; (2) the statute is overbroad because it criminalizes speech that is constitutionally protected for older minors; (3) the statute is not the least restrictive means to further the state's interest in protecting minors because parental monitoring is a less restrictive means to accomplish that result; and (4) the statute violates the Commerce Clause because Internet speakers outside of Michigan are effectively being regulated by the statute in that they cannot restrict access to their Web postings by Michigan residents.

On November 15, 2000, the Sixth Circuit Court of Appeals affirmed the district court's decision in an unpublished opinion. In February 2001, plaintiffs filed a motion for summary judgment, asking the court to find as a matter of law that the statute was unconstitutional. On June 1, 2001, the District Court, Eastern District of Michigan, Southern Division, issued an order granting plaintiffs' motion for summary judgment and permanently enjoining the defendants from enforcing the Michigan act.

Kathleen R. v. City of Livermore The California Court of Appeals upheld the final dismissal of this lawsuit on March 7, 2001. In the case, a mother attempted to force her local public library to restrict Internet access for minors after her twelve-year-old son voluntarily downloaded sexually explicit photos from a library computer and printed out the photos at a relative's home. This is the second dismissal of the plaintiff's lawsuit. Hopefully, it's the last!

Byers v. Edmondson In 1998, the family of a Louisiana convenience store clerk who was shot during a robbery sued Oliver Stone and Time Warner Entertainment, alleging that the film *Natural Born Killers* incited the robbers' actions. The suit was dismissed by the trial court, and FTRF joined in an *amicus* brief defending the trial court's dismissal, arguing that such lawsuits had a chilling effect on expression protected by the First Amendment.

The appeals court and the Louisiana Supreme Court overturned the dismissal, however, and the U.S. Supreme Court declined to take the case. Now, for the second time, the trial court has dismissed the lawsuit on the grounds that there was no evidence proving that Time Warner Entertainment or Stone intended to incite violence with the film.

AAMA v. Kendrick As I first reported in January, representatives of the video game industry filed suit to enjoin the enforcement of an Indianapolis ordinance that would have banned minors from playing violent and sexually explicit arcade video games without parental permission. The trial court judge denied the preliminary injunction, and the Foundation joined an *amicus* brief at the appellate level. On March 23, the Seventh Circuit Court of Appeals handed us a strongly worded victory and reversed and remanded the lower court decision. The most important aspect of the circuit court's ruling — and the part with the greatest significance to libraries — was Judge Posner's defense of minors' First Amendment rights:

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent minded adults and responsible citizens if they are raised in an intellectual bubble.

Posner further observed that

> [shielding] children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it. Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.

American Civil Liberties Union v. Reno (COPA) To no one's surprise, the U.S. Supreme Court will review the Third Circuit's decision barring enforcement of the Children's Online Protection Act. The Supreme Court will consider whether the Third Circuit properly barred enforcement of COPA on First Amendment grounds because COPA relies on community standards to identify the material that is harmful to minors.

FTRF joined in *amicus* briefs before the District Court and the Third Circuit Court of Appeals, and will continue to participate in the appeal of the Third Circuit's decision before the Supreme Court.

ACLU v. Hull This lawsuit challenging the Arizona "harmful to minors" Internet law (another "mini-CDA") was stayed by agreement of the parties while the Arizona legislature considered a new Internet law. On April 11, 2001, Governor Hull signed H.B.

2289 into law, which will go into effect on July 1, 2001. After reviewing the new law, we believe that it, as well, is unconstitutional. The Foundation will join with its co-plaintiffs to amend the original complaint in this case and continue the lawsuit to overturn the law.

STATE AND LOCAL LEGISLATION

There were at least 23 library and school filtering bills introduced in the states this year. Arkansas, California, Colorado, Florida, Hawaii, Maine, Mississippi, Missouri, Montana, New Jersey, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia all faced the possibility of mandatory filtering; however, at this time we are not aware of any of these filtering bills passing during the 2000–2001 session.

There have also been a number of attempts to amend state statutes concerning the confidentiality of library records. Bills introduced in Montana, Oregon, and Wisconsin would have granted parents and guardians the right to review their children's library records. In Louisiana, the proposed legislation would give law enforcement access to library patrons' records.

NEW LITIGATION

Sun Trust Bank v. Houghton Mifflin Company On March 23, 2001, the trustees of the Margaret Mitchell estate filed suit to prevent the publication of Alice Randall's *The Wind Done Gone*, a parody of Margaret Mitchell's *Gone with the Wind* that retells some of the events of that novel from a slave's perspective. The Mitchell estate argued that *The Wind Done Gone* infringed on its copyright for *Gone With the Wind*, and that publication of *The Wind Done Gone* would cause irreparable harm to the estate and its copyright. The Mitchell estate asked the court for a preliminary injunction preventing publisher Houghton Mifflin from selling or distributing the book.

The Freedom to Read Foundation immediately joined an *amicus* brief in support of Alice Randall and Houghton Mifflin before the federal District Court in Atlanta. *Amici* argued that without regard to the copyright issues, an injunction preventing publication of *The Wind Done Gone* would be an unlawful prior restraint of speech under the First Amendment.

The District Court ruled in favor of the Mitchell estate, granting the injunction and ruling that the copyright issue took precedence over any First Amendment concerns. Defendant Houghton Mifflin immediately sought an expedited review of the District Court's decision before the Eleventh Circuit Court of Appeals. Once again, the Freedom to Read Foundation joined an *amicus* brief supporting Alice Randall's right to publish her novel. On May 25t, the Eleventh Circuit, in a rare oral decision from the bench, unanimously ruled that the entry of the preliminary injunction was an abuse of discretion and an unlawful prior restraint in violation of the First Amendment. It ordered the injunction be vacated and publication of *The Wind Done Gone* be allowed to proceed. The Mitchell Estate is now seeking review of the decision by the full Court of Appeals.

ABFFE v. Dean FTRF is a plaintiff in this lawsuit challenging Vermont's "mini-CDA." Attorneys for FTRF and the other plaintiffs filed a motion for a preliminary injunction to prevent enforcement of the act on April 17, 2001. On June 2, the Vermont legislature amended the new Internet statute as a response to the lawsuit. On June 5, the trial court denied our motion for injunctive relief on the grounds that the amended Internet statute is substantially different than the original Internet statute, and that any ruling would serve no purpose. Attorneys for the Foundation and the other plaintiffs plan to file an amended complaint challenging the amended Internet statute as soon as possible.

Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme Yahoo! has appealed the decision handed down by a French court last fall ordering Yahoo! to remove Web sites advertising Nazi paraphernalia for auction, even though the company and the servers for these sites are located in the United States. The French court ordered Yahoo! to prevent French citizens from accessing the auction sites displaying such items, which are illegal in France, or pay fines in excess of $13,000 per day. Yahoo! is asking the District Court in California to grant it a declaratory judgment stating that the French judgment is unenforceable in the United States. On April 6, the Freedom to Read Foundation joined in an *amicus* brief supporting Yahoo!'s position, arguing that enforcement of the French judgment is an unconstitutional infringement on the right to free expression. The parties are now waiting for a trial date.

Anchorage, Alaska A coalition of gay/lesbian organizations applied to use the exhibit space in the Anchorage Municipal Libraries' Loussac Library during the month of June 2001. On June 4, the sponsors put up the exhibit, "Anchorage Pride: Celebrating Diversity Under the Midnight Sun," which had been approved in advance by the library authorities. On June 5, Anchorage Mayor George Wuerch ordered the removal of the exhibit from the public library display area. The Alaska Civil Liberties Union (AkCLU) filed a lawsuit alleging that the removal of the PrideFest exhibit from the Loussac Library display area violates the free speech provisions of both the Alaska Constitution and the First Amendment to the U.S. Constitution. The Foundation voted at our meeting to make a grant in support of the suit.

ROLL OF HONOR AWARD WINNERS

This year's Roll of Honor inductees are John K. Horany and Carolyn Forsman. Mr. Horany is a Dallas-based attorney who returned to his hometown of Wichita Falls, Texas, to represent local citizens in their fight to overturn a city ordinance that targeted minors' access to information in libraries. Working with Foundation attorneys, Mr. Horany was successful in overturning a law that would have allowed 300 petitioners to remove books from the children's section of the library. The law was created in the wake of a furor over *Daddy's Roommate* and *Heather Has Two Mommies*, both of which were on Wichita Falls Public Library children's shelves and both of which, thanks to Mr. Horany's work, continue to be on the children's shelves.

Carolyn Forsman is a jewelry designer who has sold her jewelry at ALA conferences for over 15 years with the express purpose of donating the proceeds to the Foundation. A former professional librarian and member of ALA Council, Carolyn has been a longtime supporter of the First Amendment work of the Foundation. This year, Carolyn is at it again, at Booth #228 in the Exhibition Hall. Please stop by to congratulate her and browse her fantastic, inexpensive, and very unique jewelry.

Respectfully submitted,
Candace Morgan
President, Freedom to Read Foundation