

# Freedom to Read Foundation REPORT TO COUNCIL

## 2002 Annual Meeting – Atlanta, GA

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

### CIPA LITIGATION

**American Library Association v. United States** Our lawsuit challenging the Children's Internet Protection Act (CIPA) has concluded with a unanimous decision by the special three-judge panel that the CIPA statute is facially unconstitutional and violates the First Amendment. The court reached its decision after finding that the mandated use of filtering on all computers will result inevitably in blocked access to substantial amounts of constitutionally protected speech. Chief Judge Becker of the Third Circuit Court of Appeals wrote the decision on behalf of himself and U.S. District Judges Fullam and Bartle.

The opinion filed by the three-judge panel entered factual findings confirming that filters both overblock by blocking access to protected speech and underblock by allowing access to illegal materials. The court also found that less restrictive alternatives exist to allow public libraries to protect children from illegal and inappropriate material. These alternatives include:

- offering filters as a choice for families to use for their own children at the public library;
- providing education and Internet training courses;
- enforcing Internet use policies; and
- using privacy screens, recessed monitors, and particular placement of computer terminals to insure that the patron's viewing remains private.

The panel has permanently enjoined the FCC and LSTA from withholding funds from public libraries that choose not to install filters. Public libraries thus are not required to install filters on their computers to receive funds from either agency.

The CIPA decision, unfortunately, does not address the constitutionality of filtering in schools and school libraries, and school libraries are still required to comply with the

provisions of CIPA. However, the court's extensive factual findings on how filters block substantial amount of constitutionally protected speech for adults and minors applies equally to the filters used by schools and school libraries. We believe these factual findings about the ineffectiveness of filters will be helpful to any school or school library resisting filters.

This victory, however, is only the first step. Under the special law governing constitutional challenges to CIPA, the government is entitled to appeal this decision directly to the United States Supreme Court. We anticipate that the government, in fact, will appeal; it has until June 20 to decide.

The Foundation is still actively participating in raising funds for the CIPA lawsuit, and has already donated \$100,000 of its own funds to the effort.

## **LITIGATION**

The Foundation continues to enjoy success in its defense of our right to freely read and receive information. In each of the cases below, we have joined *amicus* briefs supporting that right:

**Tattered Cover Bookstore, Inc. v. City and County of Denver** In a decision that strongly reaffirmed the fundamental principle that persons have a right to access and read whatever they wish without government interference, the Colorado Supreme Court ruled in favor of the Tattered Cover Bookstore, quashing a search warrant that sought to compel the disclosure of a customer's book purchasing records. FTRF's brief argued that search warrants or subpoenas that demand information about the reading habits of library or bookstore patrons significantly threaten the exercise of their First Amendment rights.

**Byers v. Edmondson** The Louisiana Court of Appeals has upheld the dismissal of this lawsuit, which sought to hold the makers of the film *Natural Born Killers* responsible for the criminal acts committed by two young assailants who shot a convenience store clerk after viewing the film several times. The Court of Appeals rejected the plaintiff's argument that the film was obscene and incited violence, ruling that a film's presentation of violent subject matter does not lose its First Amendment protection merely because it has a "tendency to lead to violence."

**Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme** On November 7, 2001, the U.S. District Court in San Jose, refused to enforce a French court's order to fine Yahoo! for hosting pages advertising Nazi and racist memorabilia. The court 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. Defendants La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students have appealed the District Court's decision to the Ninth Circuit Court of Appeals. FTRF supported Yahoo! at the district court level, and is participating in another *amicus* brief supporting Yahoo!'s position on appeal.

In addition to these cases, the Foundation has recently joined in an action to ensure open access to public records and archival materials. **American Historical Association v. National Archives and Record Administration** is a legal action challenging President Bush's Executive Order 13233, which permits both former and sitting presidents, and their relatives, to restrict access to presidential records eligible for release under the Presidential Records Act of 1978. The lawsuit was filed on November 28, 2001; FTRF filed an *amicus* brief in support of the action on February 28.

## U.S. SUPREME COURT CASES

Since we last met in New Orleans, the United States Supreme Court decided three cases in which the Freedom to Read Foundation had joined *amicus* briefs .

### **Ashcroft v. American Civil Liberties Union (formerly ACLU v. Reno) (COPA)**

This lawsuit sought to overturn the Children's Online Protection Act (COPA)—also known as CDA II—which restricts online materials deemed “harmful to minors.” In June 2000, the Third Circuit Court of Appeals barred enforcement of COPA, finding that the law's reliance on community standards to identify material that is harmful to minors violates the First Amendment. On May 13, 2002, the United States Supreme Court reversed that decision, upholding the law on the narrow grounds that the law's reliance on community standards did not, by itself, render COPA unconstitutional. Because the Court believed the Third Circuit did not sufficiently address all the First Amendment issues raised by COPA's restrictions on Internet speech, the Supreme Court returned the lawsuit to the Third Circuit for a fuller consideration of those issues. The nine justices agreed that the injunction preventing any enforcement of COPA must remain in place while the lower courts examine COPA's constitutionality.

**Ashcroft v. Free Speech Coalition (formerly Free Speech Coalition v. Reno)** On April 16, 2002, the U.S. Supreme Court overturned the Child Pornography Prevention Act (CPPA), known as the “virtual child pornography act.” CPPA expanded the existing federal law criminalizing child pornography to include computer-generated images designed to simulate child pornography and sexually explicit images of adults who “appear to be” minors. The Supreme Court struck down the law on two grounds. First, the Court ruled that the law was overbroad, prohibiting otherwise legal, non-obscene images depicting teenagers engaging in sexual activity, such as filmed depictions of *Romeo and Juliet* or *Lolita*. Second, because the prohibition on child pornography is based on the link between the creation of the image and the sexual abuse of the children shown in the image, there is no legal basis to prohibit any image that does not use actual children in its creation, such as images created by using computer technology or by photographing adults pretending to be children.

**Los Angeles v. Alameda Books, Inc.** The plaintiffs in this case sought to overturn a Los Angeles zoning ordinance targeting adult-oriented businesses on the grounds that there was not sufficient evidence that housing more than two adult businesses in one building produces harmful secondary effects. The Supreme Court upheld the law on May 13, 2002, finding that the city had presented sufficient grounds for the ordinance. FTRF joined in an

*amicus* brief that showed how broadening zoning ordinances to control adult businesses can adversely affect mainstream businesses by including them in the definition of an adult business.

## STATE INTERNET CONTENT LAWS

State legislatures continue to enact “mini-CDA” legislation, even though the courts overwhelmingly find them unconstitutional and strike them down. The most recent state is Ohio, which passed a new obscenity and “harmful to juveniles” law that includes Internet content and broadens the definition of “harmful to minors” to include materials that contain violence, cruelty, foul words, or glorification of crime. On May 6, 2002, FTRF joined with several other plaintiffs in challenging the law, in a suit entitled **Bookfriends, Inc. v. Taft**. The case is before the U.S. District Court in Dayton, Ohio, and is in its initial stages. Lawyers for the plaintiffs are preparing a motion for a preliminary injunction to prevent enforcement of the law while the lawsuit is pending. The motion will be filed within the week.

In other such cases:

**PSINet v. Chapman** Attorneys for FTRF and the other plaintiffs have filed a brief with the Fourth Circuit Court of Appeals, urging the court to uphold the U.S. District Court for the Western District of Virginia’s permanent injunction forbidding enforcement of Virginia’s Internet content law. The parties are now awaiting a date for argument from the Court of Appeals.

**ACLU v. Napolitano** On February 19, 2002, the U.S. District Court in Arizona struck down Arizona’s revised Internet content law after FTRF and several other plaintiffs challenged the constitutionality of Arizona’s revised Internet content law. A final judgment is pending in this case while the parties prepare proposed findings of fact and conclusions of law for the District Court. A temporary restraining order prevents enforcement of the law.

**ABFFE v. Dean** The efforts of Vermont legislators to rewrite and amend their Internet “harmful to minors” statute to forestall the lawsuit filed by FTRF and other plaintiffs has failed. On April 19, 2002, the U.S. District Court in Brattleboro, Vermont, declared the law unconstitutional and entered a permanent injunction barring its enforcement. Attorneys for the State of Vermont have filed a motion asking the Court to reconsider its decision.

## FEDERAL LEGISLATION

Members of Congress immediately responded to the Supreme Court’s decision to overturn the “virtual child porn” ban in Ashcroft v. Free Speech Coalition by proposing **H.R. 4623, “The Child Obscenity and Pornography Prevention Act of 2002,”** a bill to prohibit and regulate images of children engaged in sexual conduct. This bill was fast-tracked by the

House Subcommittee on Crime and has been marked up and referred to the full House Committee on the Judiciary.

Another measure, the **“Dot Kids Implementation Efficiency Act of 2002,” H.R. 3833**, mandates the creation of a .kids Internet subdomain under the .us Internet domain. The proposed subdomain will be administered by a private company and will exclude all materials deemed “harmful to minors” while prohibiting any links to materials located outside the domain. This bill has passed the House and has been referred to the Senate's Committee on Commerce, Science, and Transportation.

## **ROLL OF HONOR AWARD**

This year’s Roll of Honor Awards are presented to two remarkable women. Candace Morgan has been a tireless advocate of First Amendment as a librarian at Ft. Vancouver Regional Library in Washington. She has been chair of the Intellectual Freedom Committee and president of the Freedom to Read Foundation, has testified against the Children’s Internet Protection Act before Congress and in federal court, and frequently speaks and conducts workshops on intellectual freedom topics.

Joyce Meskis, owner of the Tattered Cover Book Store in Denver, recently stood up for her customers’ privacy (as you read above). Even before that, however, she was well-known in book circles for her stands against censorship. Meskis is a former board member of the American Booksellers Foundation for Free Expression and a founder of Colorado Citizens Against Censorship. She has made the Tattered Cover a beloved institution, a place where ideas across the ideological spectrum can be accessed by the entire community. I am also thrilled to announce that Joyce was elected this May to the board of the Freedom to Read Foundation.

Respectfully submitted,  
Gordon Conable  
President, Freedom to Read Foundation