1999-2000 CD #22
(2000 ALA Midwinter Meeting)

Freedom to Read Foundation
REPORT TO COUNCIL

January 17, 2000
2000 Midwinter Meeting – San Antonio, TX

As President of the Freedom to Read Foundation, I am pleased to provide an updated summary of litigation involving freedom of expression in which the Foundation is involved.

FEDERAL LEGISLATION

I previously reported to you the Foundation's role in challenges to two federal laws.

American Civil Liberties Union v. Reno

This case is a challenge to the Child Online Protection Act (COPA), which Congress enacted after major portions of the Communications Decency Act (CDA) were found unconstitutional by the U.S. Supreme Court. There are several significant differences between COPA and CDA: 1) COPA applies to material that is "harmful to minors," while the CDA applied to "indecent" speech; 2) COPA applies to persons 17 and under, while the CDA applied to persons 18 and under; and 3) COPA only applies to persons engaged in the commercial distribution of material on the Internet. If found to be constitutional, COPA will establish, for the first time, a national harmful to minors standard.

In February 1999, a district court granted a preliminary injunction against COPA, using the "least restrictive means" test. The government appealed the injunction in April. Oral arguments were heard November 4 by an appeals panel of the Third Circuit; the Supreme Court is not required to hear any appeal from that ruling. The Freedom to Read Foundation joined an *amicus* brief in August, arguing that COPA is facially invalid and imposes constitutionally unacceptable burdens on speech.

Child Pornography Prevention Act of 1996

This act expands the federal definition of child pornography to include the visual depiction of what *appears* to be a minor engaged in sexually explicit conduct. It also outlaws 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." Prior to the enactment of this legislation, criminal penalties for the production, distribution, or possession of child pornography were based on the harm to the children used in producing the images. This act would extend those criminal penalties to include images that use adults who appear to be children or computer-produced images that appear to be minors involved in explicit sexual conduct. The act has been challenged in two cases, in two different circuits, and the decisions are in direct conflict with one another.

In one case, ***United States v. Hilton***, a Maine district court found the act unconstitutional, but in January 1999 the First Circuit Court of Appeals reversed that decision. The First Circuit held that it should not be overturned, but that it should be narrowly applied. Mr. Hilton's petition for writ of *certiorari* with the United States Supreme Court was denied. FTRF joined an *amicus* brief at the appeals stage of this case.

In the second case, ***Free Speech Coalition v. Reno***, a Northern California district court upheld the act, but in December 1999 the Ninth Circuit Court of Appeals overturned that decision on appeal. The Ninth Circuit held that "[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." The government must decide by mid-February whether it will seek a petition for a writ of *certiorari* in this case.

STATE LEGISLATION

The Foundation is involved with litigation in three states concerning attempts to regulate Internet content. Despite consistent court decisions finding such statutes to be unconstitutional, states have continued to pass content-restrictive laws. To date, none has passed constitutional muster.

American Civil Liberties Union v. Johnson

New Mexico's Internet content law was found unconstitutional by the Tenth Circuit Court of Appeals on November 2, 1999, after an 18-month court battle. The court relied heavily on the landmark Supreme Court decision in the Communications Decency Act; indeed this statute and others are often referred to as "mini-CDAs." The statute prohibited the dissemination through computers of material harmful to minors, defined as material that "in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct." It did not exempt schools, libraries, or museums. It was quickly found unconstitutional in district court.

In deciding the appeal, the Tenth Circuit found that although the government has a compelling interest in protecting children, the means it chooses must be "carefully tailored" to achieve that end. The state claimed that the statute should be given an extremely narrow interpretation and read to apply only to a person sending a message to a single minor with knowledge that the minor was under the age of eighteen. The court concluded that the defendants' "narrowing" would amount to a "wholesale rewriting of the statute." Additionally, the Tenth Circuit agreed with the district court that the statute violated the Commerce Clause of the U.S. Constitution. This finding follows previous state court decisions.

The government has indicated that it will not appeal. Plaintiffs are preparing a petition for attorneys' fees.

PSINet Inc. v. Gilmore

This case, filed October 8, 1999, challenges Virginia's Internet statute, which passed April 7, 1999. Several plaintiffs, including the Freedom to Read Foundation, argued that the statute restricts constitutional speech without protecting minors effectively or by the least restrictive means. It is also overly vague, and a violation of the Commerce Clause. In November, the District Court of the Eastern District of Virginia dismissed the lawsuit without prejudice, accepting the defendants' arguments that the Governor and Attorney General of Virginia are not the proper defendants. In mid-December, the plaintiffs refiled the lawsuit in the Western District of Virginia suing two Commonwealth attorneys and two chiefs of police. The two chiefs of police have filed motions to dismiss the actions with respect to them. Those motions, as well as a motion for a preliminary injunction filed by the plaintiffs, are pending.

Cyberspace v. Engler

This lawsuit challenges Michigan's Internet content law, enacted in June 1999. The ACLU sued, using arguments similar to those used in other states' cases. In July, a district court judge granted the plaintiffs' request for a preliminary injunction. The government appealed the case to the Sixth Circuit. Plaintiffs' brief in the appeal is due at the end of January 2000. To date, FTRF has had no formal role in the case, but is considering joining an *amicus* brief during the appeals process.

LIBRARY CASES

Kathleen R. v. City of Livermore

A mother is seeking to force the Livermore (CA) Public Library to limit its policy of free and open Internet access, after her 12-year-old son allegedly downloaded pictures of nude women there. The trial court dismissed the case, but on March 11, 1999, the plaintiff filed an appeal. In October, FTRF joined an *amicus* brief in support of the city and the library. One key argument is that under the CDA the library is immune from liability for merely providing access to material that was transmitted by a third party. This case is pending before the state appellate court.

Wichita Falls, Texas and Monroe, Louisiana

These two cases involve book removals in libraries. In February 1999, the Wichita Falls City Council passed a resolution creating a "parental access" area in the library for books that are made available only to patrons eighteen years or older. A book will be placed in the parental access area if it is written for children twelve years old or younger and 300 patrons of the library have signed a petition indicating their belief that the material is "of a nature that is most appropriately read with parental approval and/or supervision."

In July, *Heather Has Two Mommies* and *Daddy's Roommate* were both removed from the children's section after such a petition was delivered. Jenner & Block, acting on behalf of the Foundation, joined a local attorney and the Texas ACLU in filing a lawsuit on behalf of numerous private citizens of Wichita Falls, arguing that the resolution is unconstitutional on several grounds. In August, the judge scheduled a hearing to decide whether to issue a permanent injunction. Prior to the hearing the city agreed to a temporary restraining order and the books were returned to the children's area. The parties are in the process of filing proposed findings of facts and conclusions of law. A decision should be issued shortly after the completion of this process.

In Monroe, Louisiana, the principal ordered four titles removed from the high school library. The principal also ordered the librarian to provide other similar books (with "sexual" information, such as information on homosexuality) for review by the principal. A local attorney filed suit in October 1996, at which point the school board amended the book selection policy. The new policy creates a panel at each school comprised of schoolteachers or librarians, administrators, parents, and business people from the community. The panel must review each new library resource before it can be placed in the school library. The policy does not include guidelines for the panel to use in reaching these decisions. Plaintiffs amended their complaint to include a facial challenge to the book selection policy on First Amendment grounds. The librarian was disciplined, but not terminated, for not complying fully with the principal's directives.

The parties in this case, *David S. v. Ouachita Parish School Board*, are engaged in ongoing settlement discussions. FTRF has had no role to date, other than to provide background information regarding the removed books.

Anchorage, Alaska

In response to concerns about inappropriate Internet use on work time by municipal employees, the Anchorage mayor in August 1999 ordered that all Internet access on municipally owned terminals be filtered. The public library became aware of this action when patrons reported being blocked from Web sites. The ACLU is challenging this action, and the Foundation voted to provide financial assistance for the challenge.

OTHER CASES

Brooklyn Institute of Arts and Sciences v. Giuliani

This is the widely publicized case involving the "Sensation" exhibit at the Brooklyn Museum of Art. As many of you already know, New York's Mayor Rudolph Giuliani cut city funding to the museum because he was offended by the exhibit and believed it denigrated religion. The museum sued to prevent the mayor from taking any punitive action in response to the museum's exercise of First Amendment rights. The City then sued the museum, seeking to eject it from the land and building in which it has exhibited its collections for over one hundred years.

FTRF joined a number of arts and free expression organizations in submitting an *amicus* brief in support of the museum's request for a preliminary injunction, which was entered by the district court in November 1999. During oral argument in the case, the issue of public libraries was raised. The court queried whether the City would take the position that it could direct a publicly supported library to remove certain books or face the loss of funding. Counsel for the City took the position that "the visual art in the Exhibit has a greater impact than do books." This argument for making a distinction was roundly rejected by the court. The City appealed the injunction to the U.S. Second Circuit Court of Appeals; FTRF joined an *amicus* brief that was filed in December. The case is still pending.

OTHER BUSINESS

We are pleased to inform you that the Foundation has a new Web address, www.ftrf.org, which we hope will help draw attention to the Foundation from a larger audience. Additionally, FTRF now accepts credit cards for membership dues and donations. You can give through our Web site or over the phone. We are currently in the middle of our 2000 membership drive, and hope that as many First Amendment supporters as possible will join us in protecting all forms of free expression.

Respectfully submitted,
Candace D. Morgan
President