2000-2001 CD# 22
2001 ALA Midwinter Meeting

Freedom to Read Foundation
REPORT TO COUNCIL

2001 Midwinter Meeting – Washington D.C.

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

FEDERAL LEGISLATION

CIPA/NCIPA: In June 2000, Senator McCain and Representatives Istook, Pickering, and Santorum succeeded in attaching two filtering mandates to H.R. 4577, the appropriations bill for Labor, Health and Human Services, and Education. Throughout the remainder of the legislative session, the proposed filtering requirements remained part of H.R. 4577, even though Congress' own investigative body, the COPA Commission, recommended against adopting any mandate requiring filters. The COPA Commission declined to endorse filtering not only because of the inherent First Amendment burdens imposed by filtering, but also because of the flawed nature of filtering software. As you know, however, despite the best efforts of many organizations devoted to freedom of expression and libraries, Congress passed H.R. 4577, making the Children's Internet Protection Act (CIPA) and the Neighborhood Children's Internet Protection Act (NCIPA) the law of the land.

A summary of the Acts that I prepared for the Freedom to Read Foundation Board is attached to this report. **(Attachment)** CIPA and NCIPA are scheduled to take effect on April 20, 2001. [The summary is not attached to this report; a summary of CIPA and NCIPA can be found at http://www.ala.org/cipa.]

The Freedom to Read Foundation believes it is vital that the library profession assume a lead role in a legal challenge to CIPA. We believe that ALA should be the lead plaintiff in this challenge. The FTRF Board spent a considerable amount of time discussing how the challenge should be filed and what its scope should be. We will be discussing this with the ALA Executive Board. The FTRF Board suggests that the following factors be considered as part of the decisions that must be made concerning potential litigation: 1) ensuring that ALA's approach to freedom of speech in libraries is the central focus of the challenge; 2) ensuring that ALA's best interests are served by all decisions made by the legal team, including public statements and the choice of other plaintiffs; 3) making choices that will have the best chance of being favorably viewed by ALA's constituents and local public library governing bodies; and 4) making choices that we can afford.

The FTRF Board also exhaustively discussed the scope of the challenge. We believe our overall goal should be to protect freedom of speech in all types of libraries. CIPA applies directly to public libraries and elementary and secondary schools. School libraries are affected as a result of being part of, and funded by, the school authority. At this time, we do not know if ALA's counterpart for schools, the National Education Association, is considering challenging this legislation. We will certainly be checking on this. As far as our litigative effort is concerned, we are discussing with our lawyers the best strategies, recognizing that we have joint public/school libraries, joint public/academic libraries, and a variety of other arrangements that could affect the issues we litigate and how we litigate them.

STATE AND LOCAL LEGISLATION

Legislators in eighteen states followed Congress' lead in 2000, introducing legislation mandating the use of filters or an Internet Use Policy in libraries and schools. Of those initiatives, four of the bills tied state funding to the library's implementation of the proposed filtering requirements. Most of these bills died in committee at the end of their respective legislative sessions. However, the legislatures in Colorado, Michigan, Minnesota, and Utah passed bills imposing filters or Internet Use Policies that were subsequently signed into law.

Already, 2001 has seen significant legislative activity centering on minors' access to the Internet. State representatives in Arkansas, Maine, Mississippi, Missouri, and Virginia have filed bills mandating the use of filters in public schools and libraries.

Filtering, however, was not the only subject matter addressed by legislators. Following the lead of the Indianapolis City Council, legislators in Arkansas and California introduced bills designed to make it a crime to allow minors to access scenes containing graphic violence or "explicit graphics." The Arkansas bill seeks to criminalize the distribution of violent videos; the target of the proposed legislation in California is arcade games.

NEW LITIGATION

Three important cases involve threats to the privacy of bookstore customer records.

Tattered Cover Bookstore: As I reported in July, the Tattered Cover Bookstore in Denver, Colorado, has filed suit to quash a search warrant ordering the bookstore to turn over to the police customer records related to the investigation of a methamphetamine laboratory discovered in a group home in the state. Two books related to the production of drugs also were found in the home, and in an exterior trash can, police found an envelope from Tattered Cover with an invoice number. They did not find any information with the envelope that would identify the books purchased from Tattered Cover. The police theorize that the Tattered Cover envelope must have contained the invoice for the two books related to amphetamine and drug laboratories. Thus, the police believe that if they can identify who purchased the books, they will be able to prove who built the lab. The

search warrant was issued by a judge who was not informed of an agreement between Tattered Cover and another law enforcement district to hold off on such action until the First Amendment implications could be reviewed.

The Freedom to Read Foundation and fourteen other groups joined an *amicus* brief arguing that search warrants or subpoenas directed to bookstores or libraries that demand information about the reading habits of patrons significantly threaten the exercise of First Amendment rights. The brief argued that the government should not be permitted access to bookstore customer records unless it is able to demonstrate that it has a compelling need for the requested information, that there is a substantial nexus between the information sought and the subject of its criminal investigation, and that it has exhausted other avenues to obtain the information in ways that do not burden First Amendment rights. In the particular situation at Tattered Cover, we argued that it would set a dangerous precedent to argue that the commission of a crime (the construction of a methamphetamine lab) could be proven by showing who had purchased certain books (the books related to the amphetamine manufacture and drug laboratory construction). Moreover, we argued that there was no link between the books found inside the trailer and the invoice found in the exterior trash can. Even if the invoice was for the books in question, it was equally possible that a housemate was trying to determine what another housemate was building. Simply reading a book could not prove that the same person committed the crime.

A hearing was held in October 2000. Judith Krug testified on behalf of Tattered Cover. On October 20, 2000, the state court partially granted Tattered Cover's request for an injunction. The court agreed with Tattered Cover and *amici* that the burden was on the government to establish a compelling need and held, moreover, that the request for all purchasing records of an individual – even for a one month period – constituted a fishing expedition for which the government had failed to establish a compelling need. However, the court also held that Tattered Cover was required to produce the information related to the particular invoice found in the exterior trash can.

Tattered Cover filed an appeal with the Colorado Court of Appeals. That case is pending. The Foundation has voted to grant $2,500 to Tattered Cover to aid its litigative efforts.

Borders Books v. United States Department of Justice: A situation similar to Tattered Cover's occurred in Kansas City. In a context of a grand jury investigation of distribution of illegal drugs, Borders was served with a subpoena for information related to the book purchases of a particular individual. Borders moved to quash the subpoena.

The Freedom to Read Foundation joined a number of groups in an *amicus* brief in support of Borders. As in the Tattered Cover case, *amici* urged the court to put the onus on the government to establish a compelling need for the material, a reasonable nexus between the investigation and the information sought, and that no reasonable alternatives existed. The government absolutely refused to make that showing, arguing simply that it needed the material and that it should be produced.

At a hearing on the matter, the federal district court judge ordered the government orally to make the requisite showing given the important First Amendment rights at stake. The

district court did, however, allow the government to make its showing *in camera*, out of the courtroom and without the presence of counsel for Borders or *amici*. After reviewing the evidence submitted by the government, the district court issued a one-paragraph ruling, holding that the government had not met its burden, and quashed the subpoena.

Braintree, Massachusetts: The Foundation will be considering whether to join an *amicus* brief in another case involving a Borders Bookstore. In Braintree, Massachusetts, an unidentified person threw a book at a house. The book had a Borders sticker over the barcode. Borders was served with a supoena requesting two years' records of the purchasers of that book in an attempt to identify the person who bought the book that was thrown.

City News and Novelty v. City of Waukesha: This case involves a challenge to a Waukesha, Wisconsin, city ordinance pertaining to the licensing of adult-oriented establishments. Such establishments must annually renew their license to operate. City News filed a facial challenge to the constitutionality of the ordinance on several grounds. Principally, the complaint alleged that the ordinance is unconstitutional because it fails to guarantee prompt judicial review of a license denial and does not permit maintenance of the status quo during the judicial review process. The Court of Appeals of Wisconsin held that one portion of the ordinance was unconstitutional. The court disagreed, however, that the ordinance failed to provide for prompt judicial review and that it was facially unconstitutional for failing to mention that the status quo must be maintained during a judicial review process. City News successfully petitioned the United States Supreme Court for a writ of *certiorari*.

Freedom to Read Foundation joined an *amicus* brief in support of City News, arguing that it is unconstitutional to permit an existing business selling constitutionally protected material to either close or self-censor during the judicial review of a decision to revoke or deny a business license. The case is pending before the United States Supreme Court.

American Amusement Machines Association v. Kendrick: An Indianapolis city ordinance restricts minors' access to arcade games, primarily video games, that include "graphic violence" or "strong sexual content." A complaint was filed in an Indiana district court, challenging the ordinance as a violation of the First Amendment.

The district court denied the request for a preliminary injunction on October 11, 2000. As an initial matter, the district court held that for purposes of the preliminary injunction motion it could conclude that "at least some video games are expression entitled to First Amendment protection." However, the district court disagreed with plaintiffs that the ordinance violated the First Amendment. The court held that (1) the city had established that violent video games harm children; (2) there is no "principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to minors;" and (3) the ordinance is carefully tailored to apply to children without any risk of restricting adult access to speech.

Plaintiffs appealed to the Seventh Circuit. The Freedom to Read Foundation joined a brief in support of plaintiffs. *Amici* argued that there is no constitutional basis for holding that "graphic violence" is not constitutionally protected. In addition, we argued that the ordinance is unconstitutional because it makes no distinction between older and younger minors. Finally, we argued that the language of the ordinance is impermissibly vague.

The Seventh Circuit heard oral argument on the matter in December 2000. The case is pending.

Yahoo! judgement in France: The French courts have ruled that the auction of Nazi memorabilia on Yahoo!'s U.S. Web site is a violation of French law, and that Yahoo! must take action in the United States to be in compliance with French law. If Yahoo! does not comply with the ruling, it faces a fine of 100,000 francs per day. In early January, Yahoo! announced that it would prescreen hateful and racist material, such as Nazi memorabilia and Ku Klux Klan artifacts, from its auction sites. This action affects users worldwide, not just in France, and was rendered against an American company, not a French affiliate. Yahoo! has filed suit in federal court in California requesting a declaratory judgement that the French ruling should not be enforced in the United States against Yahoo!'s legal assets since the ruling violates the First Amendment. Yahoo! is now seeking *amicus* support for that filing, which Media Coalition (of which the Foundation is a member) is considering.

OLD LITIGATION

American Civil Liberties Union v. Reno (COPA): At the 2000 Annual Conference, I reported on the significant victory in this suit against the Child Online Protection Act, or COPA. The Third Circuit Court of Appeals upheld a preliminary injunction barring enforcement of the act, holding that the plaintiffs were likely to succeed at trial. Since that decision, the United States government requested and received an extension of time until February 12, 2001, to make the decision whether to file a petition for writ of *certiorari* with the United States Supreme Court. The Freedom to Read Foundation has joined two *amicus* briefs in this case, one in district court and one in the Third Circuit. More information on this and all active cases can be found on the Foundation's Web site at www.ftrf.org.

At our meeting on Friday, Jim Schmidt reported on his tenure on the **COPA Commission**, which was established as part of COPA to investigate the issues related to protection of children on the Internet. The commission recently filed its report, which also is available online, thus concluding its mandate. The commission was unanimous in its decision not to recommend new legislation that would mandate filtering, but Congress ignored that in its rush to pass CIPA.

The commission's report calls for three things: first, a massive education effort, which would need to continue over a long period of time, directed at teaching parents what they can and should do when it comes to their children and the Internet; second, an objective evaluation of filtering technology, which the commission did not get (due, in part, to the incredibly rapid change of technology in this area, and due, in part, to a lack of funding);

and third, enforcement of existing laws on child pornography, following testimony by law enforcement that there is next to no priority assigned to such enforcement.

Sund v. City of Wichita Falls, Texas: We enjoyed a gratifying victory in this case, thanks to the fantastic work of local community members, attorneys and the library. The case was filed after the City Council passed a resolution intended to put the books *Heather Has Two Mommies* and *Daddy's Roommate* in a special "parental access" section of the library. On September 19, 2000, the district court entered a permanent injunction enjoining the city from enforcing the resolution because it is unconstitutional. Plaintiffs prevailed on all five counts raised in the complaint; the judge in the case said:

> If a parent wishes to prevent her child from reading a particular book, that parent can and should accompany the child to the library, and should not prevent all children in the community from gaining access to constitutionally protected materials. Where First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully protected information.

The city has decided not to appeal. Foundation attorneys played an active role as advisors in this case.

STATE INTERNET CONTENT LAWS

There are four states in which the Foundation is currently in the process of challenging statutes that ban the dissemination to minors of certain materials over the Internet. Each of these cases is similar to lawsuits in New York and New Mexico in which the state laws were struck down in significant victories for the Foundation. Despite such laws being found in violation of the First Amendment and the Commerce Clause in those cases, state legislatures continue to introduce and pass this legislation.

PSINet, Inc. v. Chapman (formerly PSINet, Inc. v. Gilmore): The Foundation is a plaintiff in this Virginia case. On August 8, 2000, the district court granted plaintiffs' motion for a preliminary injunction. The court concluded that the Act is not the most effective or least restrictive means for achieving the objective of protecting minors. The court relied heavily on the existence of user-based tools that can be used by adults to block minors' access to material without denying adults the right to access constitutionally protected speech. The district court concluded, "the 1999 Act provides no way for Internet speakers to prevent their communications from reaching minors without also denying adults access to the material."

The district court also agreed that the plaintiffs had demonstrated a likelihood of success on their Commerce Clause arguments in that the Act constitutes an undue burden on

interstate commerce and, given the nature of the Internet, subjects citizens to inconsistent state regulations.

The state did not appeal the district court's decision granting the preliminary injunction. The case must be set for trial on the issue of whether a permanent injunction should be granted.

Cyberspace v. Engler: The ACLU is the plaintiff in this Michigan case. The Foundation has joined an *amicus* brief. In July 1999, the district court preliminarily enjoined the enforcement of the statute, holding that it violated the First Amendment and had a chilling effect on interstate commerce. The district court also raised the argument on its own that parents have a "liberty interest in how their own children are raised." The district court held:

> Although it is difficult in today's society to constantly monitor the activities of children, it is still the right, and duty, of every parent to teach and mold children's concepts of good and bad, right and wrong. This right is no greater than in the confines of one's own home. A family with values will supervise their children. This includes setting limits, and either being there to enforce those limits, or utilizing the available technology to do so. With such less restrictive means to monitor the online activities of children, the government need not restrict the right of free speech guaranteed to adults.

The government appealed the case to the Sixth Circuit. On November 15, 2000, the Sixth Circuit Court of Appeals affirmed the district court's decision in an "unpublished" opinion. The case will now proceed to trial.

ACLU v. Hull: On August 31, 2000, a complaint was filed in the district court challenging the Arizona "harmful to minors" Internet statute. The Freedom to Read Foundation has joined as a plaintiff, and filed a motion for a preliminary injunction. The parties agreed to one hearing to determine whether a permanent injunction should be entered. A hearing was to be held in February 2001. However, the Arizona legislature recently introduced a revised bill, and we have agreed to delay our legal challenge as this bill progresses, as long as the state does not implement any part of the current law.

Vermont: Finally, we are preparing to file a legal challenge as a plaintiff in Vermont against a similar statute.

OTHER BUSINESS

FTRF Web site: I will conclude this report with a reminder that you can keep up-to-date on the Foundation's activities by visiting http://www.ftrf.org. And while you are there, please consider making a contribution to support the work of the Foundation. Thank you.

Respectfully submitted,

Candace Morgan
President, Freedom to Read Foundation