

Freedom to Read Foundation REPORT TO COUNCIL

2003 Midwinter Meeting – Philadelphia, PA

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

CIPA LITIGATION

American Library Association v. United States: As you know, our lawsuit challenging the Children's Internet Protection Act (CIPA) resulted in a unanimous decision by the special three-judge panel that the CIPA statute violates the First Amendment and is facially unconstitutional. As anticipated, the government asked the U.S. Supreme Court to review the decision, written by Chief Judge Becker of the Third Circuit Court of Appeals on behalf of himself and U.S. District Judges Fullam and Bartle.

On November 12, 2002, the Supreme Court granted the government's petition, and ordered the parties to file briefs. The government's brief was filed on January 10, 2003. Counsel for the American Library Association and the Foundation are preparing a reply to be filed on February 10. Oral arguments will be heard on March 5.

The permanent injunction forbidding the FCC and LSTA from withholding funds from public libraries that choose not to install filters remains in place during the appeal. Public libraries, thus, are not required to install filters on their computers to receive funds from either agency.

The Foundation is still actively participating in raising funds for the CIPA lawsuit, and to date has donated \$200,000 to the effort. We urge all ALA members to assist in raising the necessary funds for this most important litigation. To give online and for more information, visit ALA's CIPA Web site at www.ala.org/cipa.

PRIVACY

Privacy is an increasingly important issue that the Freedom to Read Foundation has been attending to in recent months. The Foundation is pursuing litigation and tracking legislation addressing privacy and freedom from unreasonable government surveillance.

ACLU v. Department of Justice, filed on October 24, 2002, is a Freedom of Information Act lawsuit. FTRF is one of four plaintiffs seeking a court order requiring the Department of Justice (DOJ) to disclose aggregate statistical data and other policy information about the Department's implementation of the USA PATRIOT Act, including those portions

which permit the FBI to obtain library and bookstore records without showing probable cause. On November 26, 2002, the court ordered the Department of Justice to disclose the relevant records it would turn over to the plaintiffs by January 15, 2003. The DOJ turned over 200 heavily redacted pages on January 16. Further steps are now under consideration.

President Bush signed H.R. 5005, **The Homeland Security Act of 2002**, on November 25, 2002. Among its many provisions is a statute allowing Internet service providers or any other provider of electronic communications to disclose the contents of an electronic communication to any federal, state, or local government entity if the provider believes “in good faith” that an emergency exists that poses a threat of death or physical injury. (This expands a provision of the PATRIOT Act that merely permitted disclosure to federal law enforcement agencies.) In addition, the new law allows the DOJ to install a “trap and trace” wiretap without a court order if there is an immediate threat to a national security interest or an ongoing attack against a protected computer or computer system.

LITIGATION

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

Interactive Digital Software Association v. St. Louis County: This lawsuit challenges a St. Louis, Missouri, ordinance forbidding the sale or rental of violent video games to minors. Last April, a federal District Court upheld the ban, ruling that video games are not protected expression under the First Amendment, directly contradicting the Seventh Circuit Court of Appeals decision in AAMA v. Kendrick, which overturned a similar ordinance passed by the city of Indianapolis. The plaintiffs appealed the District Court decision to the Eighth Circuit Court of Appeals, and the Foundation joined an *amicus* brief opposing the ban. The parties are now waiting for the Eighth Circuit to schedule oral arguments.

The Ninth Circuit Court of Appeals heard oral arguments last month in **Yahoo! v. La Ligue Contre Le Racisme et L’Antisemitisme**, after defendants La Ligue Contre Le Racisme et L’Antisemitisme and the French Union of Jewish Students appealed the District Court’s refusal to enforce a French court’s order imposing fines on Yahoo! for hosting pages advertising Nazi and racist memorabilia. The District 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. FTRF supported Yahoo! at the district court level, and joined in another *amicus* brief supporting Yahoo!’s position on appeal. A decision is expected shortly.

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

This lawsuit seeks 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 the law’s reliance on community standards to identify material that is harmful to minors in violation of 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, while permitting the injunction barring enforcement of the law to remain in place.

In August 2002, the parties again briefed the case for the Third Circuit, and the Foundation joined the Center for Democracy and Technology and filed a brief asking the court to find COPA unconstitutional for a second time. Oral arguments were heard on October 29, 2002. The parties are awaiting a decision from the court.

STATE INTERNET CONTENT LAWS

The Foundation continues to participate in lawsuits challenging state laws that criminalize the distribution of materials deemed "harmful to minors" on the Internet. The newest lawsuit, **South East Booksellers v. Condon**, challenges an amendment to the **South Carolina** "harmful to minors" law that sweeps in visual matter communicated via the Internet. The lawsuit was filed on November 6, 2002. The plaintiffs are now preparing to file a motion for summary judgment.

In other such cases:

Bookfriends, Inc. v. Taft: **Ohio** has amended its "harmful to minors" law in response to the lawsuit filed by FTRF and several other plaintiffs last May. The legislature's action follows the issuance of a preliminary injunction last August forbidding the State of Ohio from enforcing its newly passed law that defined "harmful to juveniles" as any material that included violence, foul words, cruelty, and glorification of crime. The state had appealed that order to the Sixth Circuit Court of Appeals. The parties expect the Sixth Circuit to return the case to the trial court in light of the legislature's action. FTRF and the plaintiffs will continue to challenge the law's Internet provisions in the trial court.

PSINet v. Chapman: Attorneys for FTRF and 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 argued the case before that court on October 28, 2002. We are now waiting for a decision from the court.

ACLU v. Napolitano: On February 19, 2002, the U.S. District Court in Arizona struck down **Arizona's** new Internet content law after FTRF and several other plaintiffs challenged the constitutionality of Arizona's revised Internet content law. The court has now issued a permanent injunction preventing enforcement of the law.

ABFFE v. Dean: **Vermont** legislators' attempt to obviate the lawsuit filed by FTRF and other plaintiffs by rewriting and amending their Internet "harmful to minors" statute 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. The

State of Vermont appealed the decision to the Second Circuit Court of Appeals, which will hear oral arguments on February 6, 2003.

FEDERAL LEGISLATION

Finally, a piece of legislation we were tracking has passed into law. On November 15, 2002, Congress approved H.R. 3833, “**The Dot Kids Implementation and Efficiency Act of 2002**,” a law that creates a “dot.kids” Internet subdomain under the top-level .us domain. The new subdomain will be operated by the private company Neustar and will exclude all material deemed “harmful to minors” and prohibit any links to material outside the .kids.us domain.

Respectfully submitted,
Gordon Conable
President, Freedom to Read Foundation