Freedom to Read Foundation
REPORT TO COUNCIL

Monday, February 1, 1999

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

Litigation

There is great news for citizens and Internet access in libraries in two cases directly addressing the rights of library users to free and open access to the Internet.

The first case is the well-known "Loudoun County" challenge. As you probably know, the restrictive Internet use policy imposed on the Loudoun County (VA) library system was declared unconstitutional on November 23 of last year. The policy had required all library users, adults as well as children, to use the *X-Stop* filter to block access to all sites containing words or phrases -- never disclosed -- that the commercial software developer has associated with sexually explicit content. Ruling in Mainstream Loudoun v. Board of Trustees of Loudoun County Library, Judge Leonie M. Brinkema of the U.S. District Court for the Eastern District of Virginia concluded that the Loudoun County Library was a limited public forum for the purpose of the expressive activities provided by the library, including the receipt and communication of information through the Internet. The court held that the library did not support its claim that restrictions on receipt of information via the Internet based on the content of the information was necessary to minimize access to illegal pornography and avoid a sexually hostile environment. The court also held that, even if the library could demonstrate that the policy was necessary to achieve compelling needs, there are less restrictive means available. The judge listed some less restrictive means, but also cautioned that "[while] we find that all these alternatives are less restrictive than the policy, we do not find that any of them would be constitutional of implemented. That question is not before us."

The court also noted that if a library attempts to restrict access to information that may be unprotected by the First Amendment, certain standards must be met. The court found that the Loudoun County policy "lacks any provision for prior judicial determinations before material is censored. The policy includes neither sufficient standards nor adequate procedural standards[,] ... the policy speaks only in broadest terms about child pornography, obscenity, and material deemed harmful to juveniles and fails to include any guidelines whatsoever to help librarians determine what falls in these broad categories."

The second library Internet filtering case is Kathleen R. v. City of Livermore, where a 12-year-old boy allegedly had downloaded pictures of nude women at the Livermore (CA) Public Library. The boy's mother brought a lawsuit against Livermore, initially claiming that unfiltered Internet computers were an "attractive nuisance" to children -- like an open and abandoned mineshaft -- around which the library must put up some form of fence to block "dangerous" access. On October 21 of last year, Judge George Hernandez of the Alameda County Superior Court "sustained" Livermore's motion to dismiss on the ground that section 230 of the still-in-force provisions of the Communications Decency Act gave the library -- as an Internet Service Provider -- immunity from such claims.

Acting on the Judge's permission to refile her lawsuit, the mother subsequently asserted a new claim that the Livermore Public Library violated the boy's "substantive due process" rights. The mother alleged that the library intended parents to remain ignorant about significant harms from unfiltered

Internet computers. Livermore's actions assertedly "shock[ed] the conscience" and displayed "a deliberate indifference to the health and welfare of children." On January 14, Judge Hernandez again dismissed the lawsuit, this time without leave to amend. The rule in the Livermore case -- one the plaintiffs intend to appeal -- is that there is no constitutional right to filtered Internet access in libraries.

As you may know, despite the U.S. Supreme Court victory in American Library Ass'n v. United States Department of Justice, which struck down the "decency" provisions of the Communications Decency Act (CDA), Congress last year enacted the Child Online Protection Act (COPA or CDA II). This new act has prompted a new challenge by the American Civil Liberties Union. As with the CDA challenge, the round-two American Civil Liberties Union v. Reno lawsuit was commenced in the U.S. District

Court for the Eastern District of Pennsylvania in Philadelphia to vindicate the principle that speech on the Internet is entitled to the highest First Amendment protection. The Foundation joined nineteen other members of the Citizens Internet Empowerment Coalition in filing an *amicus* brief supporting the motion by the American Civil Liberties Union and other plaintiffs to preliminarily enjoin enforcement of the new act. Judge Lowell A. Reed, Jr., already found that enforcement should be temporarily restrained until the court decides the preliminary injunction motion. The hearing on the motion concluded just days ago and a decision is expected as early as February 1.

The COPA would require individuals seeking access to certain Internet sites -- ones that possibly contain materials deemed "harmful to minors" -- to type in a credit card or other adult identification number. In the *amicus* brief, the Foundation and other parties argued that this blocking of content is not the "least restrictive means" to effect the government's interest in protecting children from certain materials. Rather, adult speech is free from unconstitutional burdens only where, as now, public education and the widespread availability of filtering software for home use enables parents to determine for themselves what materials are appropriate for their own children.

Developments in American Civil Liberties Union v. Johnson reinforce important principles that came out of American Library Ass'n v. Pataki, a decision in 1997 that struck down New York state's version of the CDA on the basis of the Commerce Clause of the U.S. Constitution. The Commerce Clause forbids a state from enacting laws that unduly restrict the activities of citizens of another state. As you may know, the Foundation joined the American Civil Liberties Union and numerous other organizations in challenging a New Mexico statute -- nearly identical to New York's "Mini-CDA" -- enacted last year. That statute made it illegal to disseminate online "material that is harmful to a minor" depicting "nudity, sexual intercourse or other sexual conduct." On June 23, Judge C. LeRoy Hansen of the U.S. District Court for the District of New Mexico applied the Pataki decision, as well as First Amendment principles affirmed in the U.S. Supreme Court decision striking down the CDA, to preliminarily enjoin enforcement of the New Mexico statute. The court's decision is currently on appeal to the U.S. Court of Appeals for the Tenth Circuit.

In some contrast to its efforts to oppose censorship of the Internet, the Foundation's efforts to oppose censorship of conventional expressive media involve good news and bad news.

In Rice v. Paladin Enterprises, Inc., the U.S. Supreme Court refused to review a lower court decision that could potentially hold publishers liable for an act, committed by a third party, allegedly inspired by a novel, monograph, or other work that the third party may have read, viewed, or even just possessed. An action brought by relatives of three murder victims against the publisher of *Hit Man: A Technical Manual for Independent Contractors* was originally dismissed by the U.S. District Court for the District of Maryland. The publisher had successfully argued that its book, an "assassination manual" allegedly used by the murderer, was entitled to complete First Amendment protection. The U.S. Court of Appeals for the Fourth Circuit overturned the trial court decision, finding that a publisher may be liable when a work

"aids and abets" a criminal. The decision, undisturbed by the U.S. Supreme Court, ordered the lawsuit to proceed to trial on the question of the publisher's "assistance" to the murderer. Now, after obtaining disclosure of evidence, the publisher has moved for summary judgment, submitting proof that the murderer knew many of the techniques described in *Hit Man* long before he bought the book, and that the author is actually a divorced mother of two who did not even own a gun. The decision on the motion is pending.

First Amendment issues involved in holding a publisher liable for a third party's act are also being addressed in Byers v. Edmondson. On October 9, the Louisiana Supreme court summarily denied an appeal seeking to overturn a state Court of Appeal decision that allowed the family of a shop clerk shot and paralyzed during a robbery to sue director Oliver Stone and the producers of his film, *Natural Born Killers.* The 1994 film allegedly "incited" the crimes, which the Hollywood defendants allegedly "intended" viewers to commit. The Foundation, which joined an *amicus* brief supporting the state high court appeal, will consider participating in a further appeal. A motion asking the U.S. Supreme Court to review the decision of the Louisiana Supreme Court is pending.

The controversies surrounding Barnes & Noble and the sale or display of art books featuring photographs of nude children continue. The results are mixed.

In Georgia, the Cobb County prosecutor's office has refused to prosecute the bookstore for selling *Radiant Identities,* by Jock Sturges, and the *Age of Innocence,* by David Hamilton. The prosecutor stated that he did not think the works, taken as a whole, appealed to the average person's prurient interest or that they lacked serious artistic value. Both criteria would be necessary for a finding that the works violated the state's "obscenity" law.

In Alabama, Barnes & Noble is facing a trial in Birmingham on "child pornography" charges, but a date has not yet been set. An indictment in Montgomery had been dismissed, after it was narrowed to apply only to the least controversial picture in each of the Jock Sturges and Sally Mann books targeted for prosecution there.

To conclude this review of litigation on a strong upbeat, the central issues in the much-watched trio of cases involving *The Tin Drum*, an Oscar-winning film based on the novel by Gunter Grass, have been resolved. The U.S. District Court for the Western District of Oklahoma has recently ruled that the movie was not child pornography under Oklahoma law. After privately obtaining the oral opinion of a state judge that *The Tin Drum* violated laws prohibiting depiction of underage sexual conduct, police in Oklahoma City seized copies of the film from video rental stores and the public library. On December 24, 1997, U.S. District Judge Ralph Thompson, ruling in the case captioned Video Software Dealers Ass'n v. City of Oklahoma City, ordered the return of the videos on the ground that the police had exercised an unlawful "prior restraint" by failing to obtain a valid court ruling where interested parties were given an opportunity to present arguments and evidence on the "child pornography" issue. On October 21 of last year, Judge Thompson, ruling in Oklahoma *ex rel*. Macy v. Blockbuster Videos, Inc., found that short scenes -- such as one where the main character, who willed himself not to grow, has implied oral sex with a young woman -- were part of a *bona fide* artistic work.

Conclusion

On behalf of the Freedom to Read Foundation, I would like to thank all American Library Association members who are members of and support the Foundation. It is most fitting that we celebrated the thirtieth anniversary of both the Foundation and the Office for Intellectual Freedom with a gala here in Philadelphia, the cradle of liberty. We have had a very successful

thirty years. As we look forward to the next thirty, we need to continue to recruit new members and raise public awareness of the role of the library in protecting each individual's right to free speech. With this strong foundation we will rise to meet the many challenges to free speech and its exercise in America's libraries.

Respectfully submitted,

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