

Freedom to Read Foundation

REPORT TO COUNCIL

2021 Virtual Midwinter Meeting

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation’s activities since the 2020 Virtual Annual Conference:

NEW LITIGATION

This fall, the Freedom to Read Foundation joined an amicus curiae brief filed in an important appeal pending before the U.S. Supreme Court. The lawsuit, *Federal Communications Commission v. Prometheus Radio Project*, raises important issues concerning broadcast media ownership by women and persons of color. The brief signed by FTRF urges the U.S. Supreme Court to expand and support media ownership by members of historically disadvantaged groups, particularly people of color and women. We believe that this lawsuit, if successful, will help advance FTRF's strategy for supporting and enabling access to information and materials that reflect diverse voices.

The controversy arises from a number of regulatory decisions by the Federal Communications Commission that relaxed cross-ownership rules in a manner that created barriers to broadcast media ownership by traditionally marginalized groups. The amicus brief asks the Supreme Court to uphold a decision by the Third Circuit Court of Appeals that found that the FCC acted in an arbitrary and capricious manner in 2017 and 2018 when it revised its ownership rules without considering the likely impact of the revised rules on women or people of color. The brief was authored by the Leadership Conference on Civil and Human Rights and joined by 16 other civil liberties groups. The Supreme Court is scheduled to hear the case on January 19, 2021.

The Freedom to Read Foundation has also agreed to serve as *amicus curiae* in the case of *Christopher Porco v. Lifetime Entertainment*, a lawsuit that threatens to impair the right of authors, artists, and publishers to fashion creative works from real-life events. In this case, a man convicted of killing his father has sued Lifetime Entertainment, claiming that a dramatized version of those events violated his right of publicity under New York law.

The statute, NYS Civil Rights Law section 51, prohibits the use of a person’s name, portrait, picture, or voice if the use is nonconsensual and for “advertising purposes or for the purpose of trade.” The plaintiff claims that Lifetime Entertainment used his name without his consent and that the film is not

protected under the defense of “newsworthiness” defense because he claims the film is “substantially fictionalized.”

The trial court ruled in favor of the plaintiff, holding that a creative work violates the rights of a person depicted in the creative work if it is “materially and substantially fictitious,” even if the work is identified and presented as a fictionalization. If the court's ruling is upheld, it would significantly expand application of New York’s limited right of publicity and could chill the creation of much First Amendment protected expression, including literary nonfiction such as Truman Capote's *In Cold Blood*, graphic novels like John Lewis' *MARCH*, and photographs and visual works of art depicting real people. It would also chill the First Amendment rights of those who distribute those works to the public and those who read, listen to, and watch such creative works.

The *amicus curiae* brief signed by FTRF was authored by the Media Coalition. It explains the First Amendment and free expression harms that would result if the trial court's decision is upheld by the New York appellate court. The appellate court is currently reviewing the briefs filed in the case.

CURRENT LITIGATION

Since our last report, the courts have decided two of FTRF's pending cases.

The first case, *United States v. Moalin*, challenged the U.S. government's practice of seizing individuals' phone metadata without a warrant under the PATRIOT Act. The defendant in the case, Basaaly Moalin, was convicted of financing terrorism related organizations but learned that his prosecution was a product of the NSA’s phone metadata surveillance program under Section 215 of the PATRIOT Act, a fact that was not disclosed to Moalin or his defense attorneys.

FTRF joined an *amicus curiae* brief that argued that the U.S. government should not be permitted to conduct warrantless searches and seizures of individuals' phone metadata because that metadata reveals sensitive and private information about an individual’s expressive and associational activities that should be protected by both the First and Fourth Amendments of the Constitution. The brief also challenged the existing "third party rule" precedents holding that the voluntary sharing of personal data with phone companies forfeits any Fourth Amendment expectation of privacy in that data. It urged adoption of a rule requiring the government to obtain a warrant whenever it seeks to access metadata that reveals information about a user's associations and expressive activities.

On September 2, 2020, the Ninth Circuit Court of Appeals decided the case in a manner favorable to the position supported by FTRF, holding that the NSA's metadata program was illegal and likely unconstitutional. But sadly, the court upheld Moalin's conviction, ruling that the lack of notice concerning the phone metadata collection did not significantly prejudice his case.

In a second case, the Supreme Court, unfortunately, declined to review *Austin v. State of Illinois*, leaving in place an Illinois Supreme Court decision upholding the Illinois' statute criminalizing the

nonconsensual dissemination of private sexual images, which does not require a showing of malicious intent. That decision holds that the statute is a content-neutral time, place, and manner speech restriction that is only subject to intermediate scrutiny, rather than strict scrutiny, the higher standard of review that is traditionally used to evaluate any law criminalizing or restricting an individual's expressive activities.

Austin was charged and tried after she shared texts and photos sent to her phone by her ex-fiancé with family members in an effort to contradict her ex-fiancé's account of their breakup. The messages included nude photos. The brief signed by FTRF took no position on the facts of the case but argued that the Illinois Supreme Court erroneously held that the law is not a content-based restriction on speech subject to strict scrutiny.

While FTRF, without question, supports laws that punish individuals who deliberately harass or intimidate another person by publishing their intimate photos without consent, it opposes those laws that are written so broadly that they can be used to prosecute librarians, booksellers, publishers, and others for the distribution of images that are newsworthy or educational, such as the image of "Napalm Girl," from the Vietnam War.

FREE EXPRESSION AND CIVIL LIBERTIES ADVOCACY

The Freedom to Read Foundation regularly advocates on behalf of fundamental rights and civil liberties through correspondence and statements directed to legislatures, organizations, and government bodies. Our recent advocacy efforts include:

- Joining with the American Booksellers Association to send a letter of support of an incarcerated individual who says that Missouri prison authorities have denied him permission to publish a book unrelated to the crime he is accused of committing, on the grounds that he has forfeited his First Amendment rights.
- Joining members of the National Coalition Against Censorship to send a letter protesting a decision by the officials of the Wylie (TX) Independent School District to remove an editorial cartoon about the history of violence against Black people in the United States from the school website that was part of an assignment for the school's "Celebrate Freedom Week!" The cartoon was removed after complaints filed by the National Federation of Police.
- Signing a letter authored by the Center for Democracy and Technology (CDT) opposing S. 4632, federal legislation that would discourage social media companies from combating and removing disinformation and other content aimed at achieving voter suppression. The letter emphasized the threat the bill poses to the ongoing efforts to fight against voter suppression and urged senators to oppose the bill.
- Joining members of the National Coalition Against Censorship to send a letter opposing a

proposal to remove several classic works from the curriculum in Burbank Unified School District in Burbank, CA. The books, which include *The Adventures of Huckleberry Finn*, *To Kill A Mockingbird*, *The Cay*, and *Roll of Thunder, Hear My Cry*, were removed from the curriculum after parents complained about the books' use of racial epithets.

- Signing a letter of dissent written by the ACLU of Washington State opposing implementation of facial recognition surveillance systems at Sea-Tac and other airports operated by the Port of Seattle. The letter of dissent urges the Port of Seattle to reject collaboration with Customs and Border Patrol; withdraw funding for CBP's surveillance systems; prohibit use of facial recognition technology; and ensure that the Port of Seattle's interpretation of and compliance with its principles align with the concerns of marginalized communities.
- Joining the ACLU to submit comments opposing the Department of Homeland Security's proposed regulations that would require all non-U.S. citizens entering and exiting the United States to submit to the collection of facial recognition data and ask U.S. citizens to voluntarily submit their facial recognition data for use by DHS. The proposed regulations would permit DHS to store the information in a database for 75 years and to share it broadly with other foreign governments, agencies, and contractors, allowing for ongoing and systematic surveillance of individuals who might participate in various First Amendment protected activities such as protests, religious services, and other meetings.

FTRF TASK FORCE ON INTELLECTUAL FREEDOM AND SOCIAL JUSTICE

I am pleased to report that the FTRF Board of Trustees has approved the formation of a task force to explore the complexities involved in the intersection between intellectual freedom and social justice. Chaired by trustees Loida Garcia-Febo and Jim Neal, the task force is charged with developing an action plan to advance intellectual freedom and social justice initiatives. Some of the programs under consideration are those that would promote books and materials that reflect diverse voices and social justice; support libraries, publishers and bookstores that are threatened by community attacks and legal actions on matters of diversity, equity, and inclusion; and support libraries providing social justice programming and training.

DEVELOPING ISSUES

At each meeting of the FTRF Board of Trustees, members of the Developing Issues Committee choose topics of current and developing interest to inform members of the Board about potential future challenges and legal issues. Among the topics for discussion and consideration during the 2020-2021 term:

- Social Justice Requires Broadband Access
- Librarianship at the Intersection of Intellectual Freedom and Social Justice
- Facial Recognition in the Covid-19 Era
- Academic Censorship from the Left

- Is Replacing the Classics in K-12 a Form of Censorship?

THE JUDITH F. KRUG MEMORIAL FUND

Established by the family, friends, and colleagues of Judith F. Krug, the Judith F. Krug Memorial Fund supports projects and programs that carry on Judith's mission to educate both librarians and the public about the First Amendment and the importance of defending and advocating for the right to read and speak freely.

Banned Books Week Grants

A major initiative of the Krug Fund is its support for local Banned Books Week celebrations in schools and libraries across the country. Each year the Krug Fund supports a wide range of read-outs, displays, discussions, performances, and other educational initiatives that will engage communities in dialogues about censorship and the freedom to read.

This past summer, the following institutions were awarded grants of \$1,000 to support their 2020 Banned Books Week events:

- **Cambria County Library (Johnstown, Pennsylvania)** for events that will center on the history of the Beat Generation and banned books and commemorate the 65th anniversary of the Six Gallery reading in San Francisco, where one of the most infamous banned books — *Howl* by Allen Ginsberg — was read for the first time.
- **The Center for Transformative Action/Ithaca City of Asylum (Ithaca, New York)** to support a live-streamed presentation and conversation by two internationally acclaimed cartoonists whose works were censored. The featured cartoonists are Pedro X. Molina, who fled Nicaragua in 2018 and is now ICOA's writer-in-residence, and Rob Rogers, who was fired that same year by the Pittsburgh Post-Gazette for his cartoons critical of the president. Both will work virtually with children in library summer programs, judge a cartooning contest, and curate an online exhibit in addition to presenting their work and taking questions in a free online event.
- **Central Washington University Libraries (Ellensburg, Washington)** for Banned Books Week events to raise up LGBTQIA+ voices and stories in literature. The libraries will be working with campus and community partners to create and offer programming around LGBTQIA+ literature, including a moderated panel discussion featuring librarians, students, and community members; an author talk; a book club discussion; and book giveaways.
- **The Kurt Vonnegut Museum and Library (Indianapolis, Indiana)** in support of Banned Books Week events focused on civic engagement and youth writing, including writing workshops, a reading of the original play "Kurt Vonnegut: WordPlay," a reception for the

installation of an exhibit celebrating the 100th anniversary of women's suffrage and discussions about censorship and freedom of expression.

- **Manor High School Library (Manor, Texas)** for a Banned Books Week exhibit showing how social taboos change over time and how book banning events reflect the tensions that existed in society at a given moment in time. The exhibit will utilize a self-guided living timeline featuring one banned book in each decade from 1930 to 2020, for a total of 10 stops in all. In addition to the main exhibit, there will be games, contests, and a book walk similar to a cake walk.
- **The Maricopa Public Library (Maricopa, Arizona)** for a community celebration of Banned Books Week utilizing the 2020 theme, "Censorship is a Dead End." The event will include a "Mystery Hint Search" in collaboration with local businesses and a "Murder Mystery of Banned Book Characters Party" for those who complete the puzzles. In addition to the event, the Maricopa Public Library will create educational and informative multimedia displays that will initially focus on Banned Books Week and will grow to become a Maricopa Public Library staple.

To learn about the 2020 grantees, please visit the FTRF website at www.ftrf.org/Krug_BBW.

LIS and Professional Education

The Krug Fund continues to successfully partner with the University of Illinois' School of Information Science and the San Jose State University School of Information to support dedicated coursework on intellectual freedom in libraries. Professor Emily Knox teaches "Intellectual Freedom and Censorship" at the University of Illinois while Professors Beth Wrenn-Estes and Carrie Gardner teach courses on Intellectual Freedom for San Jose State. We thank the University of Illinois and San Jose State University for partnering with the Freedom to Read Foundation to assure that high-quality intellectual freedom curricula and training remain available to LIS students preparing for their professional careers. We also thank FTRF educational consultant Joyce Hagen-McIntosh for her dedicated support for the course instructors and the students enrolled in these classes.

This fall, the Krug Fund awarded six scholarships to students wishing to attend the courses provided by the University of Illinois and San Jose State. Those recipients included Whitney Bevill (Anderson, SC), Daniel Davis (Camas, WA), Samantha (Sam) Kennefick (Lakewood, CO) and Allison Michel (Salt Lake City, UT) who are attending the Fall, 2020 intellectual freedom course offered by Professor Carrie Gardner through the SJSU iSchool. Katie Krumeich (Washington, D.C.) and Kristina Acosta (Tulsa, OK) will receive scholarships in the Spring of 2021 to attend the seminar led by instructor Beth Wrenn-Estes through SJSU that will focus on intellectual freedom issues for youth, including material on how to defend materials for youth from censorship.

The Krug Fund Education Committee also organized and presented two intellectual freedom webinars for library workers:

- **Collecting and Protecting LGBTQ+ Materials and Programs (August 5, 2020)** featuring speakers Rae-Anne Montague, Sukrit Goswami, and Tom Taylor discussing collection development tools for LGBTQ+ materials and digital resources and how each navigated challenges to LGBTQIA+ themed library programs and materials. Co-sponsors included the American Library Association's Office for Intellectual Freedom (OIF), the Rainbow Round Table (RTT) and the Intellectual Freedom Round Table (IFRT).
- **Legal and Legislative Update Webinar (September 15, 2020)** FTRF General Counsel Theresa Chmara and FTRF Director Deborah Caldwell-Stone shared insights about current legal cases and legislation from throughout the country.

FTRF MEMBERSHIP

The foundation's mission to advocate on behalf of free expression, privacy, and civil liberties is essential in this time of civil unrest and social change. Membership in the Freedom to Read Foundation not only supports the important work of defending our First Amendment freedoms, but it also builds our organizational capacity so that we can advocate on behalf of diverse voices and ensure the rights of marginalized persons.

I encourage all ALA Councilors and all ALA members to join me in becoming a personal member of the Freedom to Read Foundation. I also ask that you invite your institution or organization to join FTRF as an organizational member. You are invited to include a donation in addition to your membership dues. Please send a check (\$50+ for personal members, \$100+ for organizations, \$35+ for new professionals, \$10+ for students, \$0 for furloughed/unemployed, and \$10 for retirees) to:

Freedom to Read Foundation
225 N. Michigan Ave., Suite 1300
Chicago, Illinois 60601

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at www.ftrf.org.

I hope you will strengthen the voice and impact of the Freedom to Read Foundation by becoming a member.

Respectfully submitted,

Barbara Stripling, President
The Freedom to Read Foundation