

Freedom to Read Foundation

REPORT TO COUNCIL

2012 Annual Conference — Anaheim, California

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2012 Midwinter Meeting:

Litigation Activities: Defending the Right to Read Freely

Over four decades ago, librarians, lawyers, and other individuals committed to protecting free expression and open access to ideas in libraries and schools founded the Freedom to Read Foundation to provide legal resources to libraries, librarians, and other individuals who fight to preserve the freedom to read in their communities and to engage in litigation intended to advance First Amendment freedoms for every citizen.

This month marks the fifteenth anniversary of one of the Foundation's signal achievements: the unanimous Supreme Court decision in *Reno v. ACLU*, which declared unequivocally that the government could not, in order to deny minors access to speech that might possibly be harmful to minors, suppress speech on the Internet that adults have a constitutional right to receive and to address to one another. That decision—argued by FTRF's then general counsel, Bruce Ennis—secured full First Amendment protection for the Internet.

Despite this plain and unambiguous ruling, states and government agencies continue to adopt laws and regulations intended to restrict publication of constitutionally protected materials on the Internet. One such law is Utah's "harmful to minors" statute that would impair access to lawful

Internet content and allow the Utah attorney general to create an Adult Content Registry that could sweep in any site the attorney general deems unacceptable. In 2005, FTRF joined with booksellers, publishers, authors, and other free expression advocates to file a lawsuit seeking to overturn those parts of the law that threatened to limit free expression on the Internet.

I am pleased to report that our lawsuit, *Florence v. Shurtleff*, reached a successful conclusion after many years of litigation and negotiation with the state of Utah. On May 16, 2012, the district court entered an order and declaratory judgment in favor of FTRF and other plaintiffs, ruling that the statute violates the First Amendment. In its order, the court said that persons cannot be prosecuted for posting content constitutionally protected for adults on generally accessible websites, and further held that those publishing constitutionally protected material on the Internet are not required by law to rate or label that material.

Another, more effective means of Internet censorship is the use of Internet filters to block library users' access to constitutionally protected speech. When I last spoke to you in January, I reported on the growing number of lawsuits brought against schools and libraries whose overzealous or misguided filtering regimes were denying library users their right to access sites that expressed a disfavored viewpoint or favorably described a minority religion. While FTRF is not a participant in these lawsuits, we monitor their progress and remain vigilant for opportunities to defend the right to read.

One such lawsuit, *PFLAG, Inc. v. Camdenton R-III School District*, ended earlier this year with a victory that upholds minors' First Amendment right to access information that is constitutionally protected for youth. In that case, a student and a number of websites sued the school district when its custom-built Internet filtering software blocked access to websites supportive of lesbian, gay, bisexual and transgender people while allowing full and free access to sites that opposed LGBT rights and criticized LGBT people by employing a discriminatory "sexuality" category that classified pro-LGBT sites as smut—no matter their content. On February 15, 2012, the district court entered a preliminary injunction ordering the school district to stop using the discriminatory filter and subsequently approved a consent decree. Under the settlement, the school district has agreed to stop blocking pro-LGBT sites, to submit to

monitoring for 18 months to confirm compliance with the decree, and to pay \$125,000 in legal fees to the plaintiffs and their attorneys.

A second lawsuit, *Bradburn et al. v. North Central Regional Library District*, which we have been following since 2006, has ended less successfully. As you may recall, three library users, represented by the ACLU of Washington State, filed suit in federal district court to challenge the library system's refusal to honor requests by adult patrons to temporarily disable internet filters for sessions of uncensored reading and research. On April 10, 2012, the federal district court held that the library filtering policy did not violate the federal constitution, holding that the library may make content-based decisions on which material can be provided to patrons on Internet terminals in the same manner as it makes collection decision for hard copies of material in the library, despite the fact that the same space limitations and funding issues do not apply to Internet materials. The court upheld the policy in part because of the court's belief that such a policy was necessary because the libraries involved "are relatively small in size and only one has a partition separating the children's portion of the library from the remainder of the library."

The court's decision upholding the library's filtering policy appears to be in conflict with the decision of the Supreme Court in the Children's Internet Protection Act (CIPA) case, which was upheld because the justices concluded—based on the statements of the Solicitor General at oral argument—that filtering for adults would be disabled by request and without the need for adults to justify their request for access to particular sites. Thus we firmly believe that the court wrongly decided that the library's policy is consistent with CIPA and with the Supreme Court's decision on CIPA.

The ACLU has decided not to appeal the decision, based on both factual and legal considerations. Among the considerations are the fact that the library itself has altered its filtering policies in response to the lawsuit, the age of the case, and the fact that the court thought so little of its own opinion that it refused to allow the opinion to be published. As an unreported, unpublished opinion, the case has little or no precedential value in other courts. Thus, the court's decision cannot be used to justify or defend filtering policies that do not conform to the CIPA statute and the Supreme Court's decision. Moreover, it is no assurance that a library will not be

sued if and when it adopts a filtering policy that does not allow users to disable or unblock the filter to access constitutionally protected materials.

This is amply demonstrated by *Hunter v. City of Salem and the Board of Trustees, Salem Public Library*, the ongoing lawsuit that charges the Salem Public Library and its board of trustees with unconstitutionally blocking access to websites discussing minority religions by using filtering software that improperly classifies the sites as “occult” or “criminal.” This past April, the court refused to dismiss Ms. Hunter’s lawsuit and ordered the case to trial to determine if the library director and library board violated Ms. Hunter’s First Amendment rights by refusing to unblock websites discussing astrology and the Wiccan religion that were blocked by the library’s filter. The court has set a trial date of June 24, 2013.

THE JUDITH F. KRUG FUND AND BANNED BOOKS WEEK

On June 5, the Freedom to Read Foundation, via our Judith F. Krug Memorial Fund, announced eight \$1,000 grants to libraries, schools and other organizations in support of Banned Books Week events. Banned Books Week, which will take place Sept. 30—Oct. 6, 2012, celebrates the freedom to access information, while drawing attention to the harms of censorship. 2012 marks the 30th anniversary of Banned Books Week, and the third year of FTRF’s Judith Krug Fund grants. It is also the first year that FTRF is an official sponsor of Banned Books Week

Recipients of this year’s grants are the ACLU of Pennsylvania, California Polytechnic State University, City Lit Theater Company (Chicago), Friends of the Talkeetna (Alaska) Public Library, Judith’s Reading Room, Lawrence (Kan.) Public Library, St. Catharine College (Ky.) and Simon Sanchez High School (Guam).

FTRF also is providing Banned Books Week merchandise, sold by the ALA Store, to the grant recipients. In exchange for the grant, recipients agree to provide FTRF with photos and video of their events. Video and photos of 2011 grant winners can be accessed at www.ftrf.org.

FTRF's founding executive director, Judith F. Krug, was passionate about the need to educate both librarians and the public about the First Amendment and the importance of defending the right to read and speak freely. The Judith F. Krug Fund, a memorial fund created by donations made by Judith's family, friends, and colleagues, funds projects and programs that assure that her lifework will continue far into the future.

In addition to the Banned Books Week grants, the Judith F. Krug Fund is funding the development of various initiatives to provide intellectual freedom curricula and training for LIS students. Both Barbara Jones and Jonathan Kelley continue to work with the members of ALISE to identify the best means of accomplishing this goal.

DEVELOPING ISSUES

Our Developing Issues Committee identified two emerging issues that may impact intellectual freedom in libraries and give rise to future litigation. The first is libraries' increasing adoption of new OPACs that may compromise user privacy and ALA policies that counsel against the use of prejudicial labels on books. The second issue is the expansion of CIPA's filtering requirements to students' off-campus activities in their homes by installing highly restrictive filtering software on school-issued laptop computers. This raises concerns about the ability of youth to acquire digital literacy by exploring the unfiltered Internet the tutelage of their parents; and the widening of the digital divide, favoring those whose parents can afford both an Internet connection and a private computer over those youth who can only use filtered computers.

2010 ROLL OF HONOR RECIPIENT MICHAEL BAMBERGER

It is my privilege to report that First Amendment attorney Michael Bamberger has been named the recipient of the 2012 Freedom to Read Foundation Roll of Honor Award. The Roll of Honor was established in 1987 to recognize and honor those individuals who have contributed substantially to FTRF through adherence to its principles.

As the general counsel of the Media Coalition, Mr. Bamberger has successfully challenged dozens of federal, state and local laws that attempted to censor material protected by the First Amendment, including books, magazines, recordings, movies, videos, videogames and the Internet. In his position as partner at SNR Denton law firm, Bamberger serves as Adjunct Professor of Law at Cardozo Law School and Lecturer at University of California, Berkeley, School of Law. He is author of 2000's *Reckless Legislation: How Lawmakers Ignore the Constitution*.

He is perhaps best known for the landmark case *Hudnut v. American Booksellers Association*, a challenge to an Indianapolis anti-pornography ordinance that outlawed “graphic, sexually explicit subordination of women, whether in pictures or in words,” presenting women as sex object, or as enjoying pain, humiliation, or servility. The law was inspired by Andrea Dworkin and framed as a matter of civil rights. FTRF filed amicus briefs in that case with the district court and the Seventh Circuit Court of Appeals. The Supreme Court affirmed the lower courts’ decisions to strike down the ordinance as unconstitutional.

Mr. Bamberger received the Roll of Honor Award during this conference’s Opening General Session. We are very pleased to add Michael Bamberger to the FTRF Roll of Honor.

2012 CONABLE CONFERENCE SCHOLARSHIP

I’m pleased to introduce this year’s winner of the Conable Conference Scholarship, Steven Booth. Mr. Booth is an archivist with the Presidential Materials Division at the National Archives and Records Administration. He received his Master of Library Science with an emphasis in Archives Management from Simmons College in Boston in 2009 and holds a B.A. from Morehouse College in Atlanta. As an intern at Boston University, he helped produce an electronic finding aid for the Martin Luther King, Jr. Papers, and recently wrote an essay, “A Charge to Keep I Have,” that was included in the recently published book, “The 21st Century Black Librarian in America: Issues and Challenges.” His study and work as an archivist has led him to become an advocate for open access to archived material for all.

The Conable Scholarship was created to honor the memory of former FTRF President Gordon Conable and to advance two principles that Conable held dear: intellectual freedom and mentorship. His unexpected death in 2005 inspired his wife, Irene Conable, and the FTRF Board to create the Conable Fund, which sponsors the Conable Scholarship. The funds provided by the Conable Scholarship provided the means for Mr. Booth to attend this conference, and specifically the various FTRF and intellectual freedom meetings and programs here. He has been consulting with professional mentors, and will prepare a formal report about his activities and experiences after his return to Washington, D.C.

FTRF MEMBERSHIP

The Foundation is in the second year of our multi-pronged strategic plan (available to view at www.ala.org). One of the major areas of action is building our organizational capacity in order to achieve our litigation, education, and awareness building objectives. We are working with former ALA staffer John Chrastka and his firm, AssociaDirect, to build a new website, scheduled to launch this summer, with enhanced membership interactivity. Concurrently, we are embarking on an ambitious project to increase our membership. Via social media, direct mail, and several other avenues, we want to introduce FTRF to a larger group of librarians and non-librarians who share our values of free speech, access to information, and the First Amendment.

Membership in the Freedom to Read Foundation is the critical foundation for FTRF's work defending First Amendment freedoms in the library and in the larger world. As always, I strongly encourage all ALA Councilors to join me in becoming a personal member of the Freedom to Read Foundation, and to have your libraries and other institutions become organizational members. Please send a check (\$35.00+ for personal members, \$100.00+ for organizations, \$10.00+ for students) to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

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

VALEDICTORY

As I rotate off the FTRF Board and complete my third year as Board President I would like to thank the FTRF staff for their excellent work in defense of the First Amendment. Due to an assertive strategic plan and prudent financial management FTRF is poised to take some giant leaps forward in the coming years. It is critical that all ALA members be aware of and support the important work of the Foundation. Intellectual Freedom and our First Amendment rights are at the core of what we do as librarians. How we defend these values will tell the story of how we succeed as a profession in the coming years.

Respectfully submitted,

Kent Oliver

President, Freedom to Read Foundation