# INTELLECTUAL FREEDOM AND LIBRARIES:

## AN OVERVIEW AND UPDATE

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At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Justice Dalzell. *ALA v. Reno*, 929 F.Supp. 824(1996).

The libraries of America are and must ever remain the home of free, inquiring minds. To them our citizens ... must be able to turn with clear confidence that there they can freely seek the whole truth, unwarped by fashion and uncompromised by expediency. Dwight D. Eisenhower, 1953[1]

Americans are in the center of a heated public debate concerning the true meaning of intellectual freedom in our democratic republic. The debate is focused on, but by no means confined to, the Internet. Because most public libraries provide Internet access to the general public, including children, we find ourselves at the center of the controversy. As a backdrop for examining what is happening today, it is useful to remind ourselves that controversy surrounding the freedom to read and open access to ideas is not new.

Censorship of ideas, including controversy concerning the exposure of children to ideas, has existed since the beginning of recorded history. Even as open a city as ancient Athens tried, convicted and executed Socrates for the corruption of youth.

The relationship between technological advances and the escalation of censorship attempts is also not new. For example, when the printing press was invented in the early 1450s, the Roman clergy embraced the new invention, using it to replace handwritten indulgences with printed ones.[2] However, by the time Martin Luther used the technology to disseminate his *Ninety-five Theses* in opposition to church teaching, it was evident that the Church's ability to control the dissemination of spiritual ideas had been inalterably eroded. The inevitable result was an escalation of attempts to impose religious censorship.

Centuries later, a desire for liberty motivated individuals to take great risks to colonize the "New World." The meanings of liberty to the colonists were myriad. They included personal intellectual freedom, the freedom to worship as one wished, and to express ideas without government sanction, as well as a government based on majority rather than authoritarian rule. The definition of liberty has never been free of controversy.

As Eric Foner has described it,

AMERICAN FREEDOM was born in revolution. During the struggle for independence inherited ideas of liberty were transformed, new ones emerged, and the definition of those entitled to enjoy what the Constitution called "the blessings of liberty" was challenged and extended. The Revolution bequeathed to future generations an enduring yet contradictory legacy.[3]

Much of the controversy concerning the meaning of liberty results from the tension between individual rights and a democratic (majoritarian) government. Both are necessary to achieve liberty, but without the protections afforded by the Bill of Rights, there would be the ever-present danger of a tyrannous majority abridging the individual rights of a minority.

The American public library is at the heart of this controversy because it is the only government agency with a core mission based on the values of both individual rights and popular government. The public library, by providing free access to information on all subjects from all points of view, to all people who live in the geographic area served by the library, is the major source for the information and knowledge necessary for a viable democracy. At the same time, individual rights are protected by the public library, since each library user exercises free choice in the selection of information for her or his own use.

Libraries were catapulted to the center of public debate about the Internet when the U.S. Congress enacted the Communications Decency Act (CDA)

(Pub.L.104-104, tit. V, §§ 501- 61, 110 Stat. 56 (1996).

Recognizing that this legislation would make it difficult, if not impossible, for public libraries to offer Internet service without violating the First Amendment rights of library users, the American Library Association and the Freedom to Read Foundation, along with a number of other organizations, filed a legal challenge to the legislation in the Federal District Court in Philadelphia. In the decision finding the CDA unconstitutional, Justice Dalzell made direct reference to the historical connection between free access to ideas and the Internet:

> It is not exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen. The plaintiffs [including the American Library Association] in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen. *ALA v. Reno,* 929 F.Supp.824(1996).

Challenges to the free access to materials offered by libraries did not, of course, originate with the Internet. *Banned in the U.S.A.*, by Herbert Foerstel,[4] provides a comprehensive history of attempts to censor library materials in this country.

In response to such challenges, the Freedom to Read Foundation (FTRF)(http://www.ftrf.org) was formed in 1969 to promote and defend the Constitutional rights of all individuals to express their ideas without governmental interference and to read and listen to the ideas of others. FTRF accomplishes its mission by defending the First Amendment in the courts, supporting librarians and libraries experiencing attempts to restrict library materials and services, and by providing legal and financial help in legal cases involving libraries, librarians, authors, publishers and booksellers.

Despite the fact that the U.S. Supreme Court unanimously upheld the Philadelphia Court's ruling that the CDA was unconstitutional[5], legislative attempts to limit access to the Internet continue to be enacted on the federal, state and local level.

## FEDERAL LEGISLATION

The Freedom to Read Foundation is involved in legal challenges to two federal laws that have the potential to limit the ability of libraries to provide unfettered access to the Internet.

***American Civil Liberties Union v. Reno,* 31 F.Supp. 2d 474 (E.D.Pa. 1999)**

This case is a challenge to the Child Online Protection Act (COPA) (Pub.L. 105-227; 112 Stat 2681), that was signed into law in October 1998. If found to be constitutional, COPA will for the first time establish a "harmful to minors" standard at the national level. The Federal District Court in Philadelphia has granted an injunction against the Act.

FTRF joined an *amicus* brief in August, arguing that COPA is facially invalid and imposes constitutionally unacceptable burdens on speech. The case was still pending at the time this article was written.

**Child Pornography Prevention Act of 1996 (Pub.L 104-208, sec. 121)**

This legislation expands the federal definition of child pornography to include the visual depiction of what appears to be a minor engaged in sexually explicit conduct. It also outlaws the advertising, promotion, presentation, description or distribution of a visual depiction in a manner that "conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." Prior to the enactment of this legislation, criminal penalties for the production, distribution or possession of child pornography were based on the potential harm done to the children used in producing the images. This Act would extend those criminal penalties to include images that use adults who appear to be children or computer-produced images that appear to be minors involved in explicit sexual conduct. The Act has been challenged in two cases, in two different circuits, and the decisions are in direct conflict with one another.

In one case, *United States v. Hilton*, 1st.Circ.98-1513, the First Circuit Court of Appeals reversed a decision of a Maine District Court, holding that the law should not be found unconstitutional, but that it should be narrowly applied. Mr. Hilton's petition for writ of *certiorari* with the United States Supreme Court was denied. FTRF joined an *amicus* brief at the appeals stage of this case.

In the second case, *Free Speech Coalition v. Reno*, 9th Circ.97-16536, the Ninth Circuit Court of Appeals overturned a Northern California District Court decision and found the act to be unconstitutional. The Circuit Court held that "[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end

of freedom of speech." The government must decide in early 2000 whether it will seek a petition for a writ of *certiorari* in this case.

## INTERNET FILTERING BILLS

At least four bills that would require the use of filtering and blocking software by public and school libraries as a condition for the receipt of the E-rate were introduced in the first session of the 106th Congress (S.97, H.R. 369, H.R. 543, and H.R. 896). Senator Rick Santorum (R-PA) introduced an alternative measure, the Neighborhood Children's Protection Act (S. 1545), that would give E-rate recipients a choice of installing and using filtering and blocking software or adopting Internet use policies. There is very likely to be increased activity on this subject in the second session of the 106th.

## STATE LEGISLATION

FTRF is involved with litigation in several states concerning attempts to regulate Internet content. Despite consistent court decisions finding such statutes to be unconstitutional, states have continued to pass content-restrictive laws. Litigation concerning "mini-CDAs" in two states, New York (*American Library Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997) and New Mexico (*ACLU v. Johnson*, 194 F.3d 1149, 1999) is completed; the laws have been struck down as unconstitutional.

FTRF and several other plaintiffs are challenging Virginia's Internet statute, enacted in 1999. On February 15, 2000, Judge Michael, Western District Court of Virginia, heard the plaintiff's motion for preliminary injunction in *PSINet Inc. v. Gilmore*.

Michigan enacted an Internet content law in June 1999. The ACLU sued in the Southern Division of the Eastern Michigan District Court (*Cyberspace v. Engler*, 99-cv-73 150). The judge granted the plaintiff's request for a preliminary injunction in July 1999. The government appealed the case to the Sixth Circuit. FTRF joined an *amicus* brief in February 2000.

Bills that would require Internet filtering for minors in public libraries and schools have been introduced in the Indiana, South Carolina and West Virginia legislatures. Both houses of the Utah legislature have approved a bill that would block state funding for any public library that does not restrict minors from accessing obscene material.

## LOCAL LIBRARY CASES

*Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, Memorandum Opinion in the U.S. District Court for the Eastern District Court of Virginia, Case No. 97-2049A, November 23, 1988; 2 F.Supp. 2d 783 (E.D.Va. 1998)

On April 19,1999, the Loudoun County (VA) Library System Board voted 7-2 not to appeal the November 23, 1998, decision of the U.S. District Court for the Eastern District of Virginia, which enjoined the library from enforcing its policy requiring the use of Internet blocking software on all terminals and for all users, regardless of age. The Court found that it violated the First Amendment rights of adult library users, was not the least restrictive means to further the board's declared purposes of minimizing access to illegal pornography and preventing a sexually hostile environment, and was a "prior restraint" of speech. At the time this article was written, the library board has put in place a new policy that allows adults to choose whether or not they want to use filtering when using library Internet access computers. Minors must have signed parental permission specifying whether filtered or unfiltered access is allowed.

***Kathleen R. v. City of Livermore*, Court of Appeals, State of California (App. No. A-086349)**

A mother was seeking to force the Livermore (CA) Public Library to limit its policy of free and open Internet access after her 12-year-old son allegedly downloaded pictures of nude women at the library. The trial court dismissed the case, but on March 11, 1999, the plaintiff filed an appeal. In October, FTRF joined an *amicus* brief in support of the city and the library. An important argument is that under the CDA, the library is immunized from liability for merely providing access to material that was transmitted by a third party.

Although the Internet continues to get the most media coverage, attempts to remove or restrict access to books in libraries continue. Two recent cases have received public attention.

**Wichita Falls, Texas**

In February 1999, the Wichita Falls City Council passed a resolution creating a "parental access" area in the library for books that will be available only to patrons eighteen years or older. A book will be placed in the parental access area if it is written for children twelve years old or younger and 300 patrons of the library have signed a petition indicating their belief that the material is "of a nature that is most appropriately read with parental approval and/or supervision."

In July, *Heather Has Two Mommies* and *Daddy's Roommate* were both removed from the children's section after such a petition was delivered. Jenner & Block, acting on behalf of FTRF, joined a local attorney and the Texas ACLU in filing a lawsuit on behalf of numerous private citizens of Wichita Falls, arguing that the resolution was unconstitutional on several

grounds. In August, the judge scheduled a hearing to decide whether to issue a permanent injunction. Prior to the hearing, the city agreed to a temporary restraining order and the books were returned to the children's area. The parties are in the process of filing proposed findings of fact and conclusions of law. A decision should be issued shortly after the completion of this process.

**Monroe, Louisiana**

A high school principal ordered four titles removed from the school library. The principal also ordered the librarian to provide other similar books (with "sexual" information, such as information on homosexuality) for review by the principal. A local attorney filed suit in October 1996, at which point the school board amended the book selection policy. The new policy creates a panel at each school comprised of schoolteachers or librarians, administrators, parents and businesspersons from the community. The panel must review each new library resource before it can be placed in the school library. The policy does not include guidelines for the panel to use in reaching these decisions. Plaintiffs amended their complaint to include a facial challenge to the book selection policy on First Amendment grounds. The librarian was disciplined, but not terminated, for not complying fully with the principal's directives.

The parties in this case (*David S. v. Ouachita Parish School Board*) are engaged in ongoing settlement discussions.

**American Family Association**

The American Family Association (AFA) has mounted a campaign aimed at the American Library Association (ALA), the underlying theme of which is that ALA supports providing access to pornography to children and that it forces local libraries to follow ALA policies against the will of local communities. In support of this campaign, AFA has produced a brochure "How Safe Is Your Public Library?" (http://www.afa.net/ALA1/howsafe.pdf) and sells a video entitled "Excess Access," available for purchase from http://www.afa.net. Issues related to public libraries are regularly covered by AFA's online journal (http://www.afajournal.org).

In the latter part of 1999, the Michigan state affiliate of the AFA launched a campaign to force several public libraries in western Michigan to install filtering software on public Internet computers.[6,7,8] In Holland, the campaign took the form of an initiative on the February 22, 2000, ballot that would have required the City of Holland to deny the Herrick District Library its annual payment of $1.2 million if the library failed to "restrict Internet access to obscene, sexually explicit or other material harmful to minors." Despite the fact that the groups supporting the initiative outspent those opposing it by 14 to 1, the vote was 55% no to 45% yes.[9]

**Other Examples**

There are many other examples throughout the country of the use of political pressure in an attempt to force libraries to censor Internet access. For example, in Nampa, Idaho, the City Council is withholding part of the library's book budget until the library board adopts a stronger Internet policy, including a requirement that adults must ask a library staff member for unfiltered access[10].

In Vancouver, Washington, where I am employed by the Fort Vancouver Regional Library District, a woman who does not live in the District, but who wants to force the library to require the use of filtering software, has used numerous public record requests and unfounded complaints to public officials concerning the library's fiscal accountability to attempt to discredit the library board. During one five-month period, she filed public record requests at the rate of one every 1.13 days.

## CONCLUSION

Keeping up-to-date about what is happening throughout the country is critical for preparing ourselves for attacks on the freedom to read and to access information. The outcome in Holland, Michigan, representing popular support for the underlying principles of freedom, is not unusual. Throughout the country, libraries are managing controversy using positive community processes to develop Internet and other library policies that are both constitutional and that respond to community concerns. We must develop ways to highlight the positive approach if American public libraries are to continue to be the "home of free, inquiring minds," where "each person can decide for him or herself the ideas deserving of expression, consideration and adherence."

ALA and FTRF maintain web sites that you can use to update the information in this article and to find out how other libraries are dealing with the Internet and other intellectual freedom issues. For intellectual freedom news, check http://www.ala.org/alaorg/oif/news_inf.html and "American Libraries Online" (http:www.ala.org/alonline). For links to sites with updates on pending Internet legislation, go to http://www.ala.org/alaorg/oif/internetlegislation.html. For information on subscribing to various lists that will keep you up-to-date on issues relating to intellectual freedom issues, go to http://www.ala.org/alaorg/oif/news_inf.html#list. The FTRF web site provides links to a series of legal memoranda concerning libraries and the Internet at http://www.ftrf.org.

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