newsletter on intellectual freedom
IFC ALA

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ISSN 0028-9485

May 2002 ☐ Volume LI ☐ No. 3

CIPA trial concludes

The U.S. Congress's third assault on Internet pornography appears likely to meet the same ignoble end as the previous two. A two-week trial over library filtering ended April 4 with a trio of judges criticizing the Children's Internet Protection Act (CIPA) as an unreasonable intrusion into the rights of Americans to view legal material online.

"We are fortunate to be in the Third Circuit Court, whose judges have confronted these issues before and are familiar with many of the interests at stake," said Judith Krug, director of the ALA's Office for Intellectual Freedom. "This morning, the judges asked probing and detailed questions in preparation for their deliberations."

CIPA, which supporters view as the government's best shot yet at reining in online pornography, requires public libraries to install filtering software on all computers or lose federal technology funding. Attorneys for a plaintiffs' coalition of libraries, library patrons and Web site operators, led by the American Library Association, who want CIPA overturned, said in closing arguments for the two-week trial that libraries cannot implement the law without denying patrons their First Amendment right to free speech under the U.S. Constitution.

"We're stuck right in the heart of the First Amendment when we're talking about libraries," observed U.S. Court of Appeals for the Third Circuit Chief Judge Edward Becker as testimony and argument concluded. Becker heads a three-judge panel that will rule by early May on the plaintiffs' request for a permanent injunction against CIPA. Whichever way the ruling goes, the case can be appealed directly to the U.S. Supreme Court.

CIPA and the Neighborhood Children's Internet Protection Act (NCIPA) were signed into law December 21, 2000. CIPA mandates the use of blocking technology for public libraries that seek Universal Service discounts (E-rate) for Internet access, Internet service or internal connections or that seek Library Services and Technology Act (LSTA) funds to purchase computers for Internet access or to pay for Internet access. The ALA and American Civil Liberties Union (ACLU) filed lawsuits challenging CIPA, but not NCIPA, which applies only to schools, in March 2001. The cases were combined and were heard by the three-judge panel made up of two district and one appellate court judge. People for

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Published by the ALA Intellectual Freedom Committee,
Margo Crist, Chairperson

in this issue

targets of the censor

books

periodicals

film

Garfinkel receives 2002 James Madison Award

Steven Garfinkel, the leading architect of the current government-wide security-classification system, is the recipient of the American Library Association's 13th annual James Madison Award, which recognizes efforts to promote government openness.

While director of the Information Security Oversight Office at the National Archives from 1980–2002, Garfinkel designed a system that has produced more than 800-million declassified pages—the largest number of pages declassified in the history of the government's program, and more than four times as many as were released in the fifteen years preceding the system's 1995 implementation.

"At a time when more and more official government activity is conducted behind closed doors and in secrecy, beyond public oversight," noted ALA President John W. Berry, "Garfinkel has been a thoughtful and informed critic of the system he supervised and consistently fought to expand public involvement in the process." ☐

(ISSN 0028-9485)

Newsletter on Intellectual Freedom is published bimonthly (Jan., March, May, July, Sept., Nov.) by the American Library Association, 50 E. Huron St., Chicago, IL 60611. Subscriptions: $40 per year (includes annual index), back issues $8 each from Subscription Department, American Library Association. Editorial mail should be addressed to the Office of Intellectual Freedom, 50 E. Huron St., Chicago, Illinois 60611. Periodical postage paid at Chicago, IL at additional mailing offices. POSTMASTER: send address changes to Newsletter on Intellectual Freedom, 50 E. Huron St., Chicago, IL 60611.

colleges fear anti-terrorism law

Opening student computer files without their permission. Reporting on the library books checked out by a graduate student. Collecting data on who on campus is sending e-mail to whom. To many college technology and library officials, these sounded like invasions of privacy that were antithetical to the traditions of academe. But these were the sorts of actions that the U.S. Patriot Act might well permit or, in some cases, require. And colleges were struggling to understand their obligations and rights under the measure, which was only now attracting their attention and leaving many campus officials confused or worried.

The anti-terrorism act gave law enforcement extra tools and authority to track suspected terrorists. Although the law, enacted in October 2001, was not specifically aimed at colleges, some administrators found enough in the measure that affected them that they were consulting lawyers and drafting policies on how to comply.

Civil libertarians charged that the law gave the federal government sweeping powers to pry into student records and e-mail accounts, and that it could hinder the climate of free inquiry. But on campuses, reaction had been more measured. Many students and faculty members seemed unaware of the law and its ramifications.

The law stretched the legal boundaries for prying into electronic communications. For example, one provision permitted agents of the Federal Bureau of Investigation, without a judge's sanction, to intercept the communication of a suspected network trespasser. The agents must first be called in by Internet service providers, which could include colleges. Another provision that worried colleges prohibits them from disclosing that federal agents have sought "business records"—which some college officials say could include library records—to investigate people tied to hostile foreign governments.

Virginia E. Rezmierski, adjunct associate professor at the Gerald R. Ford School of Public Policy and the School of Information at the University of Michigan at Ann Arbor, said the gag order prevented colleges from checking whether the government had been overzealous in investigating people. "Is this just a wide net being thrown? Is there due cause for taking these records?"

Many college administrators said they found the law extremely difficult to understand; it is a 132-page patchwork of amendments to laws, including the Family Educational Rights and Privacy Act, which governs students' privacy rights; the Foreign Intelligence Surveillance Act, which authorizes the federal government to spy on suspected foreign agents; and the Electronic Communications Privacy Act, which limits disclosure of electronic communications.

Cornell University was among the first institutions to create specific guidelines for responding to law-enforcement requests made under the law. The guidelines instructed employees of Cornell's Office of Information Technologies to contact the office's policy adviser or the office's security coordinator if they were asked to disclose information to law-enforcement agents. They would then consult with university lawyers on how to proceed.

Cornell established the guidelines because college employees were sometimes too eager to please law-enforcement agents by quickly providing them with the information they sought, or the employees were confused about which college higher-ups to contact for advice, said Tracy B. Mitrano, the policy adviser and director of the Office of Information Technologies.

Since enactment of the Patriot Act, the university had received one request for confidential information, which Mitrano declined to discuss in detail. She and Polley Ann McClure, vice president for information technologies at the university, anticipated more. "We expect that some of those may not be legally valid," said McClure, who helped write Cornell's procedures. "We don't want our staff and thus the institution to violate the privacy of our constituents in response to an invalid request."

The computer-trespasser provision allows the Federal Bureau of Investigation to help network operators, possibly including colleges, find intruders on their networks only if operators ask for FBI assistance. But some college officials fear they could be sued if they did. Law-enforcement agents can, without a warrant, intercept the communications of a hacker. But since the interception would be done without a warrant, the suspected hacker could argue that the search violated his Fourth Amendment rights against abusive searches. He also could argue that the college was complicit in violating these rights, Mitrano said.

Cooperation between the FBI and colleges also opens the door for unsophisticated law-enforcement agents to damage a college's computer system, or to start prying into other communications that are unrelated to the specific investigation, said Mitrano. "I think it sets up a very potentially complicated relationship between [computer] owners and operators, and law enforcement," she noted. "Circumstances could lend themselves to law enforcement calling owners and operators and suggesting that they have information about a computer trespasser . . . and [saying], 'Wouldn't it be helpful if we came in and took a look?'"

Apart from the possible effects of the law, Mitrano said the computer-trespass provision, among other sections of the law, had no clear connection to combating terrorism, but had long been on the Justice Department's wish list of legislative reforms. By and large, though, the law doesn't impose undue burdens on colleges' networks. For example, it doesn't require them to make design changes to their computer systems. And it provides compensation to colleges if they incur expenses to help the FBI install Internet-surveillance tools, or if they sustain damage in excess of $5,000 because of computer hackers, even if the hacking has nothing to do with terrorism.

Many other colleges were still struggling to make sense of the act, and were hesitant to make procedural changes

until they saw how the government used its new powers. "We have to wait and see how this plays out," says Steven J. McDonald, a lawyer for Ohio State University. He said Ohio State had not received subpoenas for computer files since the law took effect.

Virginia Commonwealth University was adapting Cornell's guidelines. At a campus meeting in February, faculty members and administrators tried to figure out how the law would affect their day-to-day network operations. They discussed when turning over data to the FBI would be required and when it would be voluntary. They talked about training student workers not to readily provide private records to law-enforcement officials, and about whether reporting problems to the campus police can substitute for contacting the FBI. They also talked about the types of electronic data the university stored and for how long it stored them, and about the difference between a search warrant and a subpoena.

The distinction was explained by Clyde Laushey, the university information-security officer, who said that if university officials try to contest a search warrant, "They just lock you up." Robert J. Mattauch, dean of the engineering school, requested a "first line of response" should federal agents come looking for confidential university records. He said he would help draft a simplified checklist for university staff members to follow in such a situation. Three university technology administrators were designated as interim contact people for potential FBI inquiries.

"It's going to happen," Mattauch warned his colleagues.

The University of Texas at Austin said it would probably analyze federal requests for confidential information on a "case-by-case basis." Meanwhile, the university was beginning to educate network administrators and others on campus about the requirements of the act. Despite a large number of international students on campus, Jeffery L. Graves, a lawyer for the university, said federal agents had made few requests for computer-stored data on students. He suspected that agents were getting the information they needed about students from other sources, like landlords, published articles, or phone directories.

Christopher Painter, the deputy chief of the computer-crime and intellectual-property section of the Department of Justice, has been an active defender of the Patriot Act for the government. Speaking before an audience of law-enforcement officials in January, he said the law's Internet-surveillance provisions "are not sweeping expansions of wiretap authority." They are modest changes, he said, "and they don't abrogate Fourth Amendment protections."

In response to critics who say that parts of the law have little to do with fighting terrorism, Painter said, "They're trying to make too fine a distinction between terrorist attacks and nonterrorist attacks. You don't know what kind of [computer] attack you have in the beginning."

But privacy scholars and advocates say that some of these provisions endangered the climate of free inquiry on campuses. "Universities uphold the importance of free inquiry, and we don't want to chill that inquiry by having researchers and students think that their every move is being tracked by the government," said Peter P. Swire, a law professor at Ohio State University who advised the Clinton administration on privacy issues. "On the other hand, law enforcement worries that universities might become a safe haven for terrorist organizing. The traditional university tendency to allow dissent could potentially turn into a systematic effort for terrorists to hide their activities under the name of academic freedom."

The attention already paid to the immigration violations of some foreign students showed that "we can expect a greater conflict between the tradition of academic freedom and the law-enforcement concerns about universities as safe harbors for terrorists," Swire commented..

"Universities have a homework assignment to inspect how well these provisions apply in the university setting, and if there are problems, then academics and universities should point these out," said Swire.

International students and Muslim Americans generally seemed to be more aware of the new law and its ramifications. Omar Afzal, the adviser to the Muslim student group at Cornell, had been counseling students on what to do if an agent showed up to ask them questions: Contact the international-students office or elders in the community, and be polite and straightforward. "They are terrified," he said. "They come from a culture where if a policeman shows up at the door, you are being targeted to be sent to prison for a long time."

There is less concern over breaches in privacy. Afzal told the students that law-enforcement officials can look at student information without their knowledge. "They don't understand, mostly," he said. Again, "culturally, they are coming from areas where this information is routinely [shared] with the police."

Library policies are typically designed to protect the privacy of their patrons, and librarians themselves have traditionally been staunch advocates of privacy rights. "It's not just a policy; it's an ideology, almost a religion," said Ross Atkinson, Cornell's deputy university librarian. He and other librarians worry that the government will use the law to see what patrons are reading, researching, or checking out.

Like his institution, Atkinson's library was reviewing and solidifying policies, making it clear to employees what to do if a law-enforcement agent walked through the door and demanded to see patron records.

Miriam Nisbet, legislative counsel for the American Library Association, said the Patriot Act now gave law-enforcement agencies access to business records, which could include patron records. That brought up complicated issues in an electronic age. For example, to help protect privacy, libraries tried not to keep information; most libraries destroyed the record of, say, a book loan soon after the book is returned.

But "computers being what they are, those records might still be around on backup tapes," Nisbet observed. "So even though the library has a policy to erase that information as

soon as you bring the book back, that information might still be available."

Atkinson had already thought about these issues at Cornell. His library keeps backup tapes for about 35 days, then destroys them. The existence of the tapes is troubling from a privacy standpoint, but absolutely vital from a technical one, so the time period can't be shortened, he said, adding that the tapes were a lifesaver in a recent computer crash.

But he sees more threats to privacy than the tapes. The computers in the library don't require users to identify themselves, but users at home or in a campus office have to log in if they want to get access to the various databases that the library subscribes to. Somehow, somewhere, those names are probably recorded, along with the information those people look at, Atkinson observed. He worries that the Patriot Act pushes society toward an Orwellian future. "All of this legislation wouldn't be in place if they weren't going to use it," he concluded. Reported in: *Chronicle of Higher Education* online, March 1. □

American Library Association v. *United States*

Statement by Judith F. Krug, Director, Office for Intellectual Freedom

The following statement was released at the opening of the trial of ALA *v.* United States *in Philadelphia on March 25, 2002.*

It is unfortunate, but not surprising, that I find myself back in the U.S. District Court of Eastern Pennsylvania. My last visit to the circuit court in Philadelphia was to begin the American Library Association's successful lawsuit against the Communications Decency Act in 1996.

What we face today is a new take on an old idea—once again the federal government has placed its faith in commercial filters over families and local communities. This time, Congress has attempted to force libraries to choose between technology funding and censorship. The Children's Internet Protection Act (CIPA) requires a terrible choice—and an unconstitutional one.

The American Library Association (ALA) and its plaintiffs will argue several important points starting today:

- CIPA abolishes a community's control of its library policies;
- Filters do not work;
- Poor communities and people with disabilities will be affected disproportionately;
- CIPA violates the constitutional right to freely access information.

Librarians play a unique role in our society; we bring people together with the information they need and want. We do this by making sure libraries have information and ideas across the spectrum of social and political thought, so people can choose for themselves what they want to read or view or listen to. Libraries serve everyone.

Librarians care about children. Because we care, we want them to be safe and responsible online. CIPA does not protect children. Rather, filters can give parents a false sense of security that their children are protected when they are not. We believe education is the solution. It is only through education that young people can learn self-responsibility, which ultimately is the internal filter that will stay with them throughout childhood, young adulthood and into maturity. □

Eli M. Oboler Award

Marjorie Heins, author of *Not in Front of the Children: Indecency,Censorship, and the Innocence of Youth,* is the 2002 winner of the Eli M. Oboler Memorial Award. Presented by the American Library Association (ALA) Intellectual Freedom Round Table (IFRT), the Oboler Memorial Award, named for the extensively published Idaho University librarian known as a "champion of intellectual freedom who demanded the dismantling of all barriers to freedom of expression," is presented for the best published work in the area of intellectual freedom in the preceding two years. The award consists of a citation and $500.

"The committee is very pleased to present Marjorie Heins with this award for *Not in Front of the Children* (Hill & Wang Pub., 2001), an excellent analysis of current trends to censor books and other media in the name of 'protecting minors' that we are facing in the United States today," Oboler Award Committee Chair Joan Beam said.

"Heins' book is extensively researched and a pleasure to read. Her writing style is most approachable, her examples are clearly relevant, and her argument is well presented," said Beam. "The rights of minors for free expression are constantly being thwarted by those seeking to protect them from what they perceive as harmful materials. In addition, Heins shows how access to information is thus limited to all, adults and minors alike."

Heins, a First Amendment lawyer and director of The Free Expression Policy Project, a project of the National Coalition Against Censorship, said, "I wanted to write a book that would put the whole legal history and cultural politics of youth-censorship in perspective, from attacks on detective comics in the 1950s to Internet filters and v-chips today. I can't imagine a greater honor for my book than to be recognized by America's librarians as having made a contribution to intellectual freedom."

For the first time, the Oboler Award Committee has chosen an Honor Book from among the nominees. Beam said the committee has named *The Unwanted Gaze*, by Jeffrey Rosen, as its first Honor Book, for Rosen's major contribution to the literature on the subject of all U.S.citizens' right to privacy.

The award will be presented on Saturday, June 15, during the IFRT program at the ALA Annual Conference in Atlanta. ☐

Satan banned from Florida town

The words just flowed from Carolyn Risher's pen as she sat at the kitchen table Halloween night. She wrote fast, ignoring commas and periods. When the mayor of Inglis, Florida, finished, she put the fierce rhetoric down on official town stationery complete with gold seal:

> Be it known from this day forward that Satan, ruler of darkness, giver of evil, destroyer of what is good and just, is not now, nor ever again will be, a part of this town of Inglis. Satan is hereby declared powerless, no longer ruling over, nor influencing, our citizens.

She made five copies. One was kept for her office wall, which is covered with pictures of Elvis, framed letters of thanks and a painting of the Last Supper. The rest were rolled and stuffed into hollowed-out fence posts placed at the four entrances to the town. The posts, painted with the words Repent, Request and Resist, were sealed and capped.

"You're either with God or against him," Risher, 61, and a lifelong resident, said from her office. "I'm with him."

So are a lot of other people in the town of 1,400, most of whom Risher describes as good Christians. "I have a lot of respect for her because she did that," said Martha Eiland, who was shopping for sea shells at a gift shop on U.S. 19.

But the mayor's public act of faith drew criticism from some who say it oversteps the line between church and state. "It reminds me of the Taliban. If you're not Muslim, you're worthless," said Bob Farnan, the owner of Port Inglis Restaurant. "She just reversed the situation." A waitress at the restaurant, Polly Bowser, is organizing a petition to have Risher ousted. Risher's letter, which makes several references to Jesus Christ, could be offensive to people with other faiths, Bowser said.

"I am not knocking any one faith," Risher said in the interview. "I am praying for the whole community."

"One person's beliefs are fine, but not on town letterhead," countered Steve Young, who was sipping a beer at the Mouse Trap. "It doesn't seem appropriate."

Mayor Risher, whose affable demeanor and solid roots in the community have kept her in office for the past decade, is unapologetic. "If I had thought I was doing something wrong, I would have not done it," she said. "It just felt like it was something I could do for the community, mostly for our young people."

Risher said she got the idea after Pastor Richard Moore of Yankeetown Church of God announced plans to place the fence posts. Moore asked his congregation to skip one meal a day for a 40-day period. "As the elected leader of this community, she was stepping out as a Christian and trying to do something positive," Moore said. "We've gone so far in the separation of church and state it's almost like Christians don't have rights anymore."

The proclamation is not a reference to a single event, Risher explained, but an overall sense of concern. She speaks of drunken drivers, fathers who molest their daughters and people who steal from their neighbors. Town Clerk Sally McCranie, who signed the proclamation, offered another observation: Kids in town, she said, have taken to dressing in all black and painting their faces white, a style known as Goth.

"We are taking everything back that the devil ever stole from us," Risher wrote. "We will never again be deceived by satanic and demonic forces."

Despite being the talk of town, Risher said she received only one complaint about the proclamation. A business owner called her to warn against possible legal action. Town Attorney Norm Fugate declined to comment, saying questions must be asked at Town Commission meetings, so everyone can hear his response.

The following is the full text of the proclamation, published on town stationery and carrying the town seal:

> Be it known from this day forward that Satan, ruler of darkness, giver of evil, destroyer of what is good and just, is not now, nor ever again will be, a part of this town of Inglis. Satan is hereby declared powerless, no longer ruling over, nor influencing, our citizens.
>
> In the past, Satan has caused division, animosity, hate, confusion, ungodly acts on our youth, and discord among our friends and loved ones. NO LONGER!
>
> The body of Jesus Christ, those citizens cleansed by the Blood of the Lamb, hereby join together to bind the forces of evil in the Holy Name of Jesus. We have taken our town back for the Kingdom of God. We are taking everything back that the devil ever stole from us. We will never again be deceived by satanic and demonic forces.
>
> As blood-bought children of God, we exercise our authority over the devil in Jesus' name. By that authority, and through His Blessed Name, we command all satanic and demonic forces to cease their activities and depart the town of Inglis.
>
> As the Mayor of Inglis, duly elected by the citizens of this town, and appointed by God to this position of leadership, I proclaim victory over Satan, freedom for our citizens, and liberty to worship our Creator and Heavenly Father, the God of Israel. I take this action in accordance with the words of our Lord and Savior, Jesus Christ, as recorded in Matthew 28:18-20 and Mark 16:15-18.
>
> Signed and sealed this 5th Day of November, 2001 Carolyn Risher, Mayor; Sally McCranie, Town Clerk. ☐

READ

BANNED

BOOKS

censorship dateline

libraries

Washington, D.C.

College librarians who were forced by the federal government to destroy copies of a CD-ROM put out by the United States Geological Survey say destruction of the disks raises concerns about intellectual freedom. The government said the CD's, which compiled information on water supplies, posed a security risk in the aftermath of the September 11 terrorist attacks.

In October to the government ordered 335 libraries holding copies of the CD-ROM destroy them. The majority of the libraries were on college campuses, in law schools, and at community colleges. The order was sent by the U.S. Government Printing Office, which distributes publications to libraries that participate in the Federal Depository Library Program. The order asked libraries to destroy copies of a CD-ROM publication titled "Source-Area Characteristics of Large Public Surface-Water Supplies in the Conterminous United States: An Information Resource for Source-Water Assessment, 1999."

According to officials at the printing office, the geological survey deemed information in the document too sensitive for public access. Copies of the CD-ROM, like all Federal Depository documents, are the property of the U.S. government.

Patrice McDermott of the American Library Association said the request "was a major issue of concern for the ALA." "This is part of a bigger issue of restriction of access to government information on the Web and elsewhere," said McDermott. She added that a number of government agencies had been removing information from their Web sites since September 11.

Copies of the CD-ROM on water supplies were sent to libraries in the fall of 1999 and had been openly available for two years. Until the request for their destruction was sent out, they had also been available for purchase from the USGS's Information Services Office in Denver.

"Generally speaking, things don't go into the Federal Depository Library Program if they pose national-security issues," said Ruth Parlin, director of the Calvin Coolidge Library at Castleton State College in Castleton, Vermont., which was one of the libraries told to destroy its copy of the document. That federal officials would permit distribution of a document "that they would later decide is a threat . . . is problematic," she said. "It does show you how vulnerable access to information can be sometimes."

Parlin, like other campus-library directors, said the request was the first she had ever received to return or destroy a document because of its sensitive content. She said she had previously been asked to return or destroy a document because information was either inaccurate, outdated, or had been superseded by new information.

"It raises some concern," said Mary Jane Walsh, head of government documents, maps, and microforms at Colgate University in Hamilton, N.Y. But she added, "Legally, I had no choice." Walsh, who contacted the U.S. Geological Survey before carrying out the request, said she believed that this would be the last request of its kind from the federal government.

Andrew M. Sherman, of the U.S. Government Printing Office, said that the request was unusual and that the agency sympathized with the concern the request had raised among campus librarians. "We certainly understand the principle of public access to information, and we certainly understand the sensitivity to this action," he said. Although a complete list of colleges and universities that had to destroy copies of the document was not available, he said that affected institutions included the California Institute of Technology; Duke, Northwestern, Stanford, and Yale Universities; the State University of New York at Buffalo; and the University of Virginia at Charlottesville.

According to Sherman, approximately 67 percent of the 1,300 libraries that participate in the Federal Depository Library Program are academic libraries. Of the 1,300, only 335 had received the document in question. He said that this was the first such request he had heard of. Reported in: *Chronicle of Higher Education* online, February 14.

South Bend, Indiana

Perhaps some members of the South Bend police force were trying to educate themselves by checking out dozens of books from the downtown library on subjects such as racial profiling and how to get out of a ticket. More likely, they were trying to make a point.

Many officers were not happy with a presentation called "What to Do When Stopped by Police" planned for the St. Joseph County Public Library's downtown branch. A display of books at the library—including *Beat Your Ticket: Go to Court Now and Win, Racial Profiling on Highways, Shopping Malls, Taxicabs and Sidewalks,* and *Driving While Black: What to Do if You're a Victim of Racial Profiling*—advertises the event.

"There's been a police officer in here every day taking everything off the display and checking them out," said Donald Napoli, director of the St. Joseph County Public Library. The sudden interest in the books led Napoli to enact a two-book limit on books in the display. "I don't care if they're really reading them, but this borders on a form of censorship," Napoli said.

The director said the staff had to glean copies of the in-demand titles from the library's other branches. He even authorized the purchase of new copies, if need be, to keep the books on the shelf.

Cpl. Ron Glon said he checked out five books from the display. "The most interesting book is *Driving While Black.* I read three chapters yesterday," said Glon, a traffic officer who questions the premise of the book. "When I set up the radar, it doesn't go off when a driver is black, and we don't let a white driver go," Glon said.

Glon added that he doesn't know whether officers or other patrons are taking out the books. He said this was not an organized effort on the part of officers. "As long as I'm paying taxes and have a valid library card, who's to say I can't take out books," Glon said.

The president of the local police union, Fraternal Order of Police Lodge 36, said the lodge was not endorsing the officers' actions. "The FOP is not behind this — absolutely not," Cpl. Scott Wilcox said. "The only thing I know is officers are upset that the talk is supposed to be about what to do when you're stopped by police, and the police were not invited to be part of the discussion," Wilcox added.

If they had been invited to speak, what would they want to communicate? "We ask the public to be cooperative and not confrontational or argumentative when they get stopped," Capt. Terry Young said. "The last thing we want is for people to be uncooperative at the scene."

Young, a captain in the city's southeast region, said the department does not engage in racial profiling. "If a person matches the suspect description we hear on the radio, we have to check it out. If the person is totally innocent, no problem. They are sent on their way," Young said.

Napoli said the presentation was not directed toward South Bend police but seemed timely due to instances of apparent racial profiling by police across the country. "The presentation is about how the law works (and) how to work within the law and protect your rights," he said. The library director has vowed that the discussion will go on as planned, with just one speaker—a local attorney. Reported in: *South Bend Tribune,* February 15.

Russell Springs, Kentucky

A teachers' prayer group proposed that dozens of titles be considered for removal from the Russell County High School library in Russell Springs. A letter from a group member listed more than 50 books— including J. K. Rowling's Harry Potter series and *The World's Most Famous Ghosts,* by Daniel Cohen—that "may need to be removed" because they deal with ghosts, cults, and witchcraft. God "can not come into a place that is corrupted," the letter stated.

Principal Roger Cook said a small group of teachers and parents approached the school's council in February and requested a committee be formed to review library books. The group was asked to bring a proposal to the March 12 council meeting, but they did not show up, Cook said. However, more than a dozen people who did attend spoke against such a review, praising the book selections by librarian Mary Donna Foley. "I think none of the books should be taken away—leave that to parents to make that decision," said resident Donnie Wilkerson.

Cook said that although the school has a policy allowing people to initiate challenges, no one had used it in twenty years, so there was no committee in place to make judgments. No action would be taken until the school's board and attorney had reviewed the issue, Cook said. Reported in: *Lexington Herald-Leader,* March 13.

schools

Indianapolis, Indiana

North Central High School junior Ivan Dremov won the election for senior class president March 19. The next day his victory was taken away because of a line in a campaign video that administrators say violated the school's zero-tolerance policy.

The line: "Vote for Dre and Pass the Courvoisier." Courvoisier is an expensive brand of cognac.

Dremov, a school swimmer and math whiz, took a plurality of the student vote among four candidates seeking to represent seven hundred seniors next year. Students at the school voted after watching campaign videos made by each candidate. Ivan's campaign played off the similarities between his last name and rap music producer Dr. Dre. His posters used hooks and slang from Dre tunes. His video included the line "Pass the Courvoisier," the title of a rap song released late last year by Busta Rhymes.

The day after the election, Ivan was disqualified. Principal C.E. Quandt, who has been at North Central 21 years, said: "There's a very strict school rule about the promotion of alcohol, tobacco or sex. As far as what you wear, you can't come in with beer cans on your T-shirts. His reference to alcohol clearly violated the school rule. "This is the first time in 21 years that we've had someone disqualified because of the speech."

Candidates were brought into the office—as is routine after an election—and told that Will Ford was president. Ford, who is on the Junior Class Council and works two jobs, said the candidates were warned by administrators to keep the campaigning clean and responsible. "I didn't think that it was professional to say, 'Pass the Courvoisier,'" said Ford. "That's a drink, and we're not supposed to be drinking anyway. We're a high school."

The videos, produced at school, were not screened by administrators, who didn't want to appear to be censors, Quandt said. He said Dremov is an exemplary student. Last year, he won a $200 prize as one of 15 second-place finishers in a math and medicine contest. The situation was "unfortunate," said Quandt. "But we feel it is the right thing to do for school leadership." Reported in: *Indianapolis Star*, March 22.

Noblesville, Indiana

Mike DeSloover was afraid it was too late, but hoped to persuade the Noblesville School Board to change its mind. DeSloover was upset by the board's decision in January to ban a book by Hoosier author James Alexander Thom from required reading at Noblesville High School after a parent complained about its content. The move overturned an academic review committee recommendation last November to retain the book.

"You have established an extremely bad precedent," he told the board at its meeting March 19. The fuss focused on Thom's historical novel, *Follow the River*, which supplemented Noblesville's tenth grade English curriculum until the board's action January 24. *Follow the River*, written in 1981, opens with a Shawnee Indian attack on a small Virginia settlement in 1750s America. Fictional heroine Mary Ingles is abducted, but escapes by walking a thousand miles through the frontier wilderness.

A Noblesville parent objected to passages in which Ingles's husband imagines his wife being raped by her captors. The parent, whom the district declined to identify, filed a formal complaint with the board in October. That action activated Noblesville's challenge review committee.

The committee, comprising English department Chair Nicole Steele, Deputy Superintendent Lynn Lehman, media services Director Marge Cox and two parents, voted 5-0 November 13 to keep the book. "We felt this was compelling reading by an Indiana author," said Steele.

In December, the objecting parent asked the board to review the committee's decision, and board members read *Follow the River* during winter break. At its January 24 regular meeting, the board voted to remove the book from the required reading list.

"It's available in the school library, but is no longer mandatory reading for every tenth grade student," board President Kevin Brinegar said. "We agree that it's important to present historical information, but not in such a graphic, disturbing way. We felt other sources could be used to convey that period of history."

Thom, told of the Noblesville action, said he was "kind of astonished they would do that. People react to things in different ways, but this is a book that has sold over a million copies and was produced into a Hallmark Hall of Fame television program in 1995," he said. As to the specific passages that raised the Noblesville parent's ire? "These deal with basic things in the human spirit—they portrayed a man's imaginary fears for his wife," he said.

The book has been used in other school districts without objection.

Carmel teacher Donna Skeens used *Follow the River* in eighth-grade honors English classes at Carmel Junior High for three years before her retirement last spring. "The assignment was to review the book and identify qualities that make it an American classic. It was one of five books students could choose," she said. "I never received complaints about any book from students or parents."

To the Indiana Civil Liberties Union, Noblesville's action amounted to censorship, said executive director John Krull. "The parent who complained was well within her rights to say she didn't want her child to read the book. Where it crossed the line was when she said 'I don't want anyone else to read it either,' " he said. "That's what censorship is, when you start making decisions for everyone else. Obviously, the (review) committee recognized that; it's a pity the School Board didn't," Krull said.

DeSloover said he hoped the board will reconsider. But Brinegar, the board's president, considers the matter closed. "There is no sentiment on the board to revisit this issue," he said. Reported in: *Indianapolis Star*, March 20.

student press

Tampa, Florida

A column in the Plant High School newspaper promoting the availability of condoms created a stir on campus, and sent administrators scurrying to explain why they briefly considered censoring the publication. Christina Hernandez, features' editor of the *Pep O' Plant*, wrote a column supporting condom availability at the prom in the 24-page prom edition,which was set to be distributed to students a week before the March 16 dance.

"I would rather my peers be safe," said the 18-year-old senior. "I wish everyone would stay abstinent. I wish there were no diseases or unwanted pregnancies. But it's a reality, teenagers have sex."

School officials didn't share Hernandez's belief. Newspaper adviser David Webb and principal Eric Bergholm halted the distribution of 2,500 copies of the *Pep O' Plant* after seeing Hernandez's column, titled "Face It; Sex Happens" and an accompanying survey, "Do you think condoms should be

distributed at prom?" All the students in the survey said condoms should be made available.

"The problem was, it was inconsistent with the curriculum we teach," said district representative Mark Hart. "We teach abstinence." Bergholm said the survey had not been approved prior to publication.

"I'd rather see a student newspaper address issues more appropriate to the school and the curriculum instead of items that are controversial," he said. The school considered reprinting several pages of the monthly publication. But in the end, it was distributed with Hernandez's column intact.

Hart said he okayed the distribution of the newspaper after reading the two questionable articles and making sure the views expressed in them were not represented as the position of the school or the district.

But Hart said the principal had every right to halt the paper's distribution. "A principal can make an editorial decision on a student newspaper," he said. "It is not protected free speech."

The *Plant* incident marked the second year in a row that a condom controversy has arisen during prom season in Hillsborough County. Last year, Blake High School senior Lissette Stanley was barred from giving a commencement address after she put condoms in prom gift bags.

Bergholm refused to discuss whether any Plant students will be disciplined.

Some parents said the incident was much ado about nothing. "Get with the times," said Suzanne Falk, whose son is news editor of *Pep O' Plant.* "If people think kids are not having sex, their heads are in the ground. I always think talking about issues makes good sense."

Kathy Williams, who has two sons at Plant, said she opposes condom distribution, but had no problem with the most recent edition of the student newspaper. "I felt it was opinion," she said. "I don't condemn the article. But if it was something the school was promoting, I would have a problem with it."

Linda Hernandez said she supported her daughter, and wonders why the school would thwart a safe sex discussion given the problem with the spread of sexually transmitted diseases. "Basically, the school wants to be too politically correct," Hernandez said. Reported in: *St. Petersburg Times,* March 12.

Internet

Iowa City, Iowa

A fraternity suspended by University of Iowa officials in January took down its Web site February 12 after the university received a complaint that the site's content was demeaning to women. The complaint, filed by an Iowa man named Dennis Hill, also reported that the Web site named chapter members as "Slut of the year," "Pedophile of the year," and "Most likely to commit a felony." Hill filed the complaint with the university's Office of Affirmative Action.

The university won't investigate the matter further because the fraternity, Phi Delta Theta, is no longer recognized by the institution, said Thomas R. Baker, assistant dean of students. The chapter was suspended for violating university policies on hazing and alcohol, he said.

"Almost as soon as I received the complaint, the chapter —I don't know who exactly—but the chapter de-linked from the university Web site," Baker said. He added that, because of the suspension, the fraternity should not have had a Web site on the university's server at the time of the complaint. But he suspected that the Web site was still up because neither the university nor the fraternity had thought to take it down.

"When I was a student, we didn't have Web sites, so I didn't think to check that," Baker said. "What we need here is a checklist on what to do when you de-recognize a chapter."

At some point, the fraternity will ask that the university recognize it as a campus organization again, Baker said. Although he didn't know when that would be, the university will probably treat the complaint about the Web site as an issue separate from the violations of the hazing and alcohol policies, he said. "We can collect information in preparation for the chapter to submit to be recognized again by the university," Baker said. "But we probably won't take this incident into consideration." Reported in: *Chronicle of Higher Education* online, February 14.

Albany, New York

The Pataki administration has ordered New York state agencies to restrict information available on the Internet and limit its release through New York's Freedom of Information Law to prevent terrorists from using the material, which includes maps of electrical grids and reservoirs, as well as building floor plans. The new policy, laid out in a confidential memorandum to agency heads from the state's director of public security, James K. Kallstrom, is one of the most far-reaching and restrictive in the nation, according to research librarians and advocates for open government.

Kallstrom, a former high-ranking official of the Federal Bureau of Investigation, said the order was aimed at preventing details about potential targets, like bridges and nuclear power plants, from falling into the hands of terrorist groups like Al Qaeda.

"The intent, clearly, is to remove from the public Web sites information that serves no other purpose than to equip potential terrorists," Kallstrom said. "This is not an attempt just to shield legitimate information from the public."

Some state agencies had removed material in the immediate aftermath of the World Trade Center attack. But in the memorandum Kallstrom issued last month, he said the Pataki administration was concerned "that there is a disconcerting amount of potentially compromising information still publicly accessible." The agency commissioners were not only instructed to review again what might be accessible, but

newsletter on intellectual freedom

index to vol. 50, 2001

indexed by Eli and Gail Liss

Intellectual Freedom Committee
American Library Association

Newsletter on Intellectual Freedom (ISSN 0028-9485) is published bimonthly (Jan., March, May, July, Sept., Nov.) by the Intellectual Freedom Committee of the American Library Association, 50 E. Huron St., Chicago, Illinois 60611.

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were also asked to classify as sensitive and make exempt information related to systems, structures, individuals and services essential to the security, government or economy of the state." He directed agency heads to remove things like data about electrical power, gas and oil storage, transportation, banking and finance, water supply, emergency services and the continuity of government operations.

The state's new policy guidelines to restrict information and tighten security are occurring in lock step with the national debate over how to balance the need for safety and the public's right to information. While acknowledging the need for protections against terrorism, Donna Lieberman, executive director of the New York Civil Liberties Union, said the Pataki administration's new policy "raises serious concerns about the future of open government" and would allow, in the worst case, the government to become "a series of secret operations."

Federal officials have removed information, like the operational status of nuclear plants and certain maps of the nation's infrastructure, that was once at the fingertips of anyone with a computer. The Environmental Protection Agency, for example, has blocked access to the toxic-release inventory, a listing of all factories and other sources that emit poisonous pollution, and has taken information about dangerous pesticides off its site, environmentalists said.

Some other states also have taken action to limit the free flow of information. Florida, for instance, has stopped posting records of drivers' licenses on the state Web sites. In New York, the Public Service Commission stopped posting the locations of power plants, including nuclear reactors. The state's Energy Department erased a detailed map of power lines and substations from its site. Directions to stockpiles of water pumps and generators used by the state's Emergency Management Office during floods or other disasters are gone from the Internet. So are the locations of wastewater treatment plants, floor maps of state buildings and some mapping databases used to analyze everything from demographics to infrastructure.

A representative of Governor Pataki said the administration was still writing more concrete guidelines on what information would be classified and no longer available. "It's a work in progress," said Mollie Fullington, the spokeswoman. "We are putting together a team to review these very issues."

Some advocates of open government contended that New York's new rules were too broad and could cover information—like the locations of chemical factories that emit toxic pollution—that fuels debates at the core of modern democracy. "No one would argue that the Pataki administration has been transparent," said Blair Horner, the chief lobbyist for the New York Public Interest Research Group. "I think there is a real danger that this directive could be used to further block from public view information the public should have access to. The decision on what should be on the Internet or not on the Internet should be a public discussion, not a private edict."

Robert J. Freeman, executive director of the State Committee on Open Government, said the Freedom of Information Law in New York State allows officials to censor some information if releasing it would endanger people's lives or compromise criminal investigations. The administration's new directive to block the release of what it deems sensitive information to people who file requests under the law could easily be justified under those rules, he said. "All they are saying is be careful, be wise," Freeman said. "All the memo says is comply with the law." Fullington said such requests would be determined in the future on a "case-by-case basis."

Kallstrom's directive also ordered agency heads to review requests made under the state's Freedom of Information Law over the last year to determine if anyone had requested information that might be useful to terrorists. The purpose, he said, was to find leads for investigators trying to thwart terrorist plots.

"We are concerned that terrorism—a very serious issue—doesn't get used to take away information from the public," said Rachel Leon, a lobbyist for Common Cause. "You have to have a balance between security and the public's right to information. We have to make sure the government doesn't overstep."

Kallstrom said his directives are not intended to keep the public in the dark on policy matters. He said the diameter and location of a suspension bridge's cables and fasteners, for instance, should not be made public. Neither should details be available about the fencing and gates around nuclear plants or the access roads leading to water reservoirs.

One example of the new policy is that fuel delivery schedules and the locations of fuel storage tanks used by state agencies are no longer posted on the Web, aides to Pataki said. Nor are many details about the state's National Guard posts and units available. The memorandum also directs agencies to set up security systems using passwords and other devices to protect the information they deem sensitive. Kallstrom has also led an effort to improve defenses against computer hackers, offering agencies help in constructing stronger fire walls against intruders.

As a practical matter, winnowing the information available on the Internet will force more people to request documents under the Freedom of Information Law, state officials said. Since the law requires a written request, a paper trail would be created for any release of information, making it easier for law enforcement officials to find out who had sought the documents.

New York's open-records law does not require public information to be posted on the Internet, though some bills have been circulating in the State Legislature that would do just that. Other laws require that campaign contributions, payments to lobbyists and information about doctors be published on the Internet.

Experts on Internet security say the state's crackdown on information may not be immediately effective. Once something has been published on the Web, it is hard to control who copies it or where those copies end up. Some search engines save information from old Web sites, for instance, so

a terrorist might still be able to find a map of New York's power grid.

"It's a bit of a horse out of the barn," Kallstrom acknowledged. "But you have to start somewhere. We don't want to unnecessarily and stupidly aid people who want to kill us." Reported in: *New York Times*, February 26.

etc.

Penryn, Pennsylvania

The Penryn police department refused to direct traffic at a YMCA triathlon because it said the club promotes witchcraft by reading Harry Potter books to children. Penryn Fire Police Capt. Robert Fichthorn said the eight-member force voted unanimously to boycott the twentieth running of the triathlon, scheduled for September 7. "I don't feel right taking our children's minds and teaching them (witchcraft)," Fichthorn said. "As long as we don't stand up, it won't stop. It's unfortunate that this is the way it has to be." The Lancaster Family YMCA began reading chapters of the Harry Potter books to children enrolled in an after-school program in November.

In a letter to the township and the YMCA, Fichthorn challenged the religious integrity of the YMCA, and questioned whether it was "serving the will of God" in using the books. The YMCA's executive director, Michael Carr, said he was disappointed by the department's decision, but didn't expect it to stop about six hundred triathletes from participating in the race. Township Supervisor Ronald Krause said the YMCA may have to hire police from another community to direct traffic for the race. Reported in: Associated Press, January 24.

foreign

Paris, France

Since September 11, nations that have strong laws and traditions against hate speech are apparently growing even more alarmed about inflammatory expression they fear could lead to racial or religious violence. That worries some civil libertarians in the United States, who point to a French court decision they believe handed governments and groups a blueprint for how to censor online hate speech that may be illegal within one country's borders but perfectly lawful elsewhere.

A little more than a year ago, the judge in the French case, *Licra* v. *Yahoo!* shook the mahogany desks of lawyers around the world when he reaffirmed an earlier ruling that Yahoo!, based in Santa Clara, California, had violated French law by allowing French citizens to view auction sites displaying Nazi memorabilia. The case has jumped the Atlantic and is making its way through the courts in the United States, where a federal judge ruled that French sanctions against Yahoo!—including $13,000 a day in fines—cannot be enforced in the United States. The two groups that sued the company in France, the International League Against Racism and Anti-Semitism (known as Licra) and the Union of French Jewish Students, are appealing the federal judge's decision in the United States Court of Appeals for the Ninth Circuit, in San Francisco.

Regardless of the appeal's outcome, nations seeking to control potentially harmful speech that arrives from offshore are seen as almost certain to use the French precedent to bolster their efforts. "They will not be tempted to do it—they will do it," said Jack Goldsmith, a professor at the University of Chicago Law School who frequently writes about Internet legal matters and is the author of a coming book, *Reining in the Net*, about how countries are putting borders in cyberspace.

That is what frightens Alan Davidson, a lawyer with the Center for Democracy and Technology, an Internet civil liberties group in Washington. The French Yahoo! ruling "really puts free expression and communication in jeopardy on the Net," Davidson said, warning that online speech could sink to a single country's lowest-common-denominator standard. Other legal thinkers, too, are beginning to consider the global implications of the Yahoo! case with respect to hate and terrorist speech on the Internet.

The case came to public attention in May 2000, when Judge Jean-Jacques Gomez of the County Court of Paris ordered in a preliminary decision that Yahoo! take action to "render impossible" the ability of French Internet users to gain access to the Nazi-related auctions found on Yahoo!'s English-language auction pages. In reaching his decision, the judge asserted that he had jurisdiction over Yahoo!, even though it is based in the United States, because the content on Yahoo!'s computers in the United States was available to French users. The court also said Yahoo!'s display of the material in France had violated a section of France's criminal code, which reflects still raw memories of World War II.

In a later ruling, in November 2000, Judge Gomez concluded that available technology would allow Yahoo! to take reasonable steps to identify and block the disputed material from French eyes—thus allowing American users, for example, to continue to view the content. Unconvinced by Yahoo!'s arguments that such technology was deeply flawed, the judge said the company would be subject to a fine of about $13,000 for each day it did not comply with his earlier order.

Yahoo! announced later that it would more aggressively enforce its ban on hateful and racist material from its auction sites, but said the move was not in response to the French legal proceedings.

American civil libertarians applauded when Judge Jeremy Fogel of the U.S. District Court in San Jose, California, ruled that the French court's order and fine would not be enforced against Yahoo! in the United States. The judge said it would be repugnant to the First Amendment for an American court to carry out the French order. The United States Constitution,

he said, protects the display of artifacts or expression of viewpoints associated with extreme political views, including Nazism and anti-Semitism.

But some legal observers question whether Judge Fogel's ruling, if upheld on appeal, is the shield that some large American Internet service providers say it is. After all, they argue, even if an American court will not enforce a foreign judgment that runs afoul of the Constitution's free-speech guarantees, the foreign court has other leverage. If a case involves a multinational company with assets abroad, the foreign court could lay claim to the company's funds, receivables or property within its jurisdiction. In addition, if the company's executives traveled to the foreign locale, the local judge could perhaps have them arrested.

On the other hand, private individuals and companies with no foreign assets would presumably have less to worry about from a foreign court's order. Indeed, Yahoo! has said it has no seizable assets in France—although some legal experts have suggested that money owed Yahoo! by its French-language affiliate, Yahoo! France, could be at risk.

Given the potential leverage of a Yahoo!-style case on multinational Internet companies, experts say that Judge Gomez has created a powerful tool for the suppression of online speech that a recipient nation finds offensive or dangerous. Some Western democracies, in fact, are showing a heightened sensitivity to hate speech lately.

In January, a tribunal in Ottawa declared that a Holocaust-denial Web site based in California and controlled by a one-time Canadian resident ran afoul of the Canadian Human Rights Act. "The tribunal acknowledged the ability to enforce its judgment was severely limited," said Michael Geist, a professor at the University of Ottawa's Faculty of Law who is an expert in Internet law. "But it wanted to make clear that this form of hate speech was illegal in Canada and not to be tolerated."

More significant, perhaps, the 43-nation Council of Europe plans later this year to propose a side agreement to a pending international cybercrime treaty. The side agreement would make computer distribution of racist and xenophobic propaganda a crime.

The United States, which has signed though not yet ratified the general cybercrime treaty, blocked attempts to include the category of Internet hate speech in the treaty itself. But the fact that nations are still discussing a ban on online hate speech suggests that other cases against inflammatory terrorist or hate speech on the Internet could land on court dockets soon, warned Barry Steinhardt, associate director of the American Civil Liberties Union. "I think it can and will happen, especially against multinational corporations," he said.

But not all legal experts in this country agree that a slew of Yahoo!-type cases would be bad thing. Some argue that countries can choose for themselves what is lawful within their own cyberborders—that just because the world is becoming networked, all nations need not adhere to American free-speech traditions. "That," said Goldsmith at the University of Chicago, "is the essence of territorial sovereignty." Reported in: *New York Times,* February 11.

New Delhi, India

The novelist Arundhati Roy was released from jail March 7 after serving what the Indian Supreme Court called a symbolic one-day sentence for contempt. She paid a $42 fine rather than spend three more months in jail, saying she did not want to make herself "a martyr for a cause that is not mine alone." Prominent editors and journalists said the court's action would chill free expression, particularly criticism of the court. Roy, a leading opponent of a huge dam project in central India, was convicted after saying the court had tried to silence criticism of its approval of the project.

Roy won the Booker Prize in 1997 for her novel *The God of Small Things.* She has written articles criticizing India's nuclear program and is a prominent campaigner against the Narmada River dam, the nation's biggest hydroelectric project, in central India. Her Booker Prize winnings—about $30,000—have gone to the campaign against the dam.

In October 2000, she joined protesters outside the Supreme Court after it approved construction of the dam. Opposing attorneys in the case accused her and a fellow protester of trying to incite other demonstrators to attack them. When the court began considering those accusations, she asserted in an affidavit that its scrutiny created "a disturbing impression that there is an inclination on the part of the court to silence criticism and muzzle dissent."

Although the lawyers' charges of incitement were dismissed, the Supreme Court ruled that the comments in her affidavit amounted to contempt. A two-judge panel found her guilty of "scandalizing" the court and "lowering its dignity through her statements," saying freedom of speech did not grant a license to do that. Roy had faced six months in prison for contempt. The court said that in sentencing her to one day, it was "showing magnanimity of law by keeping in mind that the respondent is a woman."

The police detained about 200 protesters at the Supreme Court building during Roy's hearing, saying they would be released later. Many were Narmada Valley residents whose homes will be engulfed when the dam is built. Opponents of the project say it will harm small farmers and displace tens of thousands of villagers.

Roy's lawyer, Prashant Bhushan, said she would challenge the conviction, calling it a "setback to the freedom of the common citizen to discuss matters of enormous public significance." Reported in: *New York Times,* March 7, 8.

Istanbul, Turkey

The owner of a small Turkish publishing house that brought out a book by the linguist Noam Chomsky was acquitted of charges that the book violated the country's

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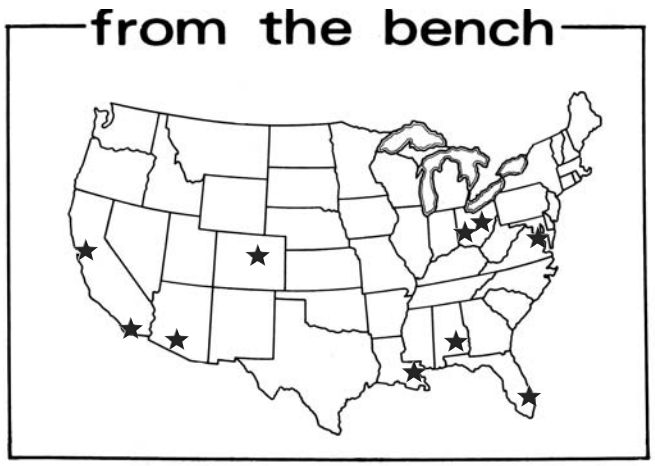


U.S. Supreme Court

The U.S. Supreme Court ruled February 19 that a federal privacy law governing educational records does not prohibit teachers from asking students to grade one another's work. The 9-0 decision ended a challenge filed by an Oklahoma mother who had argued that so-called peer grading violates the Family Educational Rights and Privacy Act because the grades are disclosed without parental consent.

The language that Congress used in establishing FERPA "implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders," Justice Anthony M. Kennedy wrote for himself and seven colleagues. Justice Antonin Scalia filed a concurring opinion, in which he agreed that FERPA did not apply to student graders but said that it might apply to marks maintained by teachers.

Justice Kennedy noted that FERPA requires schools and colleges that receive federal funds to provide parents with a hearing at which they could contest the accuracy of their child's educational records. "It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes," he wrote.

Krisja Falvo, a mother of three, had filed the lawsuit against the Owasso, Oklahoma, school district after her learning-disabled son was ridiculed as a "dummy" when his poor grades were read aloud to sixth-grade classmates. A federal district court ruled for the school district in 1998. However, the U.S. Court of Appeals for the Tenth Circuit sided with Falvo in 1999.

The American Council on Education and the National School Boards Association had filed a Supreme Court brief in support of the Owasso school district. The brief argued that if peer grading were deemed a violation of FERPA, "teachers throughout the nation would be required to abandon time-tested instructional methods," such as posting exemplary papers or assignments in the classroom, and having students exchange and assess written work that had already been graded by the instructor.

"It's a very welcome decision," said Sheldon E. Steinbach, vice president and general counsel at the American Council on Education. The Bush administration also had backed the school district; the U.S. Education Department is responsible for enforcing FERPA. Jim Bradshaw, a department spokesman, said department officials were pleased with the ruling in *Owasso Independent School District* v. *Falvo* and would "work as quickly as we can" to write clarifying regulations.

Colleges are eyeing with even greater interest another case involving FERPA that was to be heard by the Supreme Court in April. In *Gonzaga University* v. *Doe*, the court will decide whether an individual can sue a college for violating FERPA. Reported in: *Chronicle of Higher Education* online, February 20.

The U.S. Supreme Court on April 1 let stand a 2001 ruling that allowed an adjunct faculty member to sue administrators at a community college over his free-speech rights. Kenneth E. Hardy had sued Jefferson Community College, in Kentucky, when it failed to renew his contract because he had used offensive words in a classroom discussion.

The college declined to renew Hardy's contract when, in 1998, he encouraged class members to use slurs against members of minority groups—including women, blacks, and homosexuals—during a discussion about offensive communication. The college acted after a local civil-rights leader complained to the institution's officials. In 1999, Hardy sued the college and two administrators—Richard Green, then president, and Mary Pamela Besser, a dean—claiming that his dismissal violated his First Amendment right to free speech. A federal district court dismissed all of Hardy's claims against the college on the ground that, as a state institution, it is immune to such lawsuits. The court, however, also rejected Green's and Besser's argument that they had legal protection against being sued as individuals.

The case was appealed and, in 2001, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit unanimously affirmed the district court's denial of the immunity defense to Green and Besser. Jefferson Community College appealed to the Supreme Court, which declined to hear the case.

Hardy, currently a visiting instructor at the University of Louisville, responded with a "wow" when he learned of the justices' ruling. "I think they made the right decision," he said. "This issue has been decided, and it leaves academic freedom in the hands of faculty, not administrators."

By deciding not to consider Jefferson's challenge, the Supreme Court let the lawsuit move to trial without clarifying

guidelines for when the First Amendment does and does not apply to employee speech. "You can never really tell what it is that motivates" the justices, John G. Roberts Jr., the lawyer representing Green and Besser, said of the Supreme Court's action. He added, however, that "the court has always said that denial of certiorari rights doesn't mean that they think the decision [of a lower court] is correct. It just means that they don't want to get involved."

Regardless of the April action, Roberts said the Supreme Court eventually will have to deal with the "confusion" in the lower courts. "The rules about how the First Amendment applies here are different across the country," he said. Reported in: *Chronicle of Higher Education* online, April 2.

U.S. Supreme Court justices rained skepticism on an Ohio village's effort to regulate door-to-door proselytizing by the Jehovah's Witnesses February 26, suggesting through their questions during oral arguments that the local ordinance violates the religious group's rights to free speech.

The Village of Stratton, a collection of some three hundred largely elderly people living on the banks of the Ohio River, said its ordinance requiring a permit to go door-to-door was necessary to protect the safety and privacy of its residents, and applied equally to everyone. The Jehovah's Witnesses, who have a long history of fighting and winning free-speech cases at the Supreme Court, sued Stratton, claiming that the ordinance violated the First Amendment, but both a federal trial judge in Ohio and the U.S. Court of Appeals for the Sixth Circuit sided with the village.

At the Supreme Court, however, most of the pressure seemed to be on Abraham Cantor, the attorney for Stratton. Justice Sandra Day O'Connor asked whether the ordinance also might mean that trick-or-treaters would have to get a permit. Cantor said it would not. "We can all stipulate that the safest societies in the world are totalitarian societies," Justice Antonin Scalia remarked to Cantor, adding that accepting "some risk" of crime might be necessary to achieve liberty.

Only Chief Justice William H. Rehnquist evinced a measure of sympathy for the village's approach, noting that two teenagers recently arrested for a brutal double murder in rural New Hampshire allegedly posed as poll-takers to gain access to homes in the area.

The case is *Watchtower Bible and Tract Society of New York* v. *Village of Stratton.* A decision is expected by July. Reported in: *Washington Post,* February 26.

The Supreme Court's refusal to hear an Indiana case concerning government display of the Ten Commandments is another defeat for the movement to adorn courthouses and public schools with religious symbols, said Americans United for Separation of Church and State. "Public buildings should display patriotic symbols that bring us together, not religious symbols that divide us," said the Rev. Barry W. Lynn, executive director of the group. "All Americans should feel welcome when they walk into a city hall, a courthouse or a public school. The posting of religious symbols there says some religious groups are better than others."

The court declined February 25 to hear *O'Bannon* v. *Indiana Civil Liberties Union, et al.* The ICLU filed the suit in May 2000 after Gov. Frank O'Bannon agreed to erect a Ten Commandments monument on the statehouse lawn in Indianapolis. The monument, which is seven feel tall and weighs over 11,000 pounds, features the Decalogue on one side, the Bill of Rights on the other, and has the preamble to the state constitution etched on its side. Last year, the U.S. Court of Appeals for the Seventh Circuit ruled that the display violates the separation of church and state, and the high court's rejection of the case let that ruling stand.

The *O'Bannon* case had generated interest from attorneys general in nine states, each of whom urged the Supreme Court to hear the matter, including Alabama, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah and Virginia. Last year, the high court refused to hear a similar case from Elkhart, Indiana, and numerous lower courts have struck down government display of the Commandments. In fact, advocates of government-sponsored religious displays have fared poorly in courts. Over the last three years, state and federal courts have struck down Commandments displays in South Carolina, Kansas, Kentucky and Indiana in a separate case.

"Here's a new commandment we all need to follow: Thou shalt not mix religion and government," said Lynn. "Houses of worship should sponsor religious displays, not the government." Reported in: Americans United Press Release, February 25.

The U.S. Supreme Court agreed February 19 to hear a challenge to a law that extends copyright protection for all published material for an additional twenty years. Some professors say the law hampers their ability to publish electronic resources and teach courses online. Classroom-based courses often use copyrighted material under a "fair use" exemption that the law does not make available to online instructors.

The case, *Eldred* v. *Ashcroft,* concerns the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, which protects the copyright of material for seventy years after its author's death. Before the law was passed, copyright was protected for fifty years after the author's death or seventy-five years after the material was first published.

Eric Eldred, who filed the suit, publishes an online archive of classic literature. He said in an interview that old books, songs, and movies should flow continuously into the public domain. But he said Congress keeps bowing to publishing companies that want to prevent works from ever being available free.

"Every time Mickey Mouse threatens to go to the public domain, the lobbyists go to work to get an extension," he said. "If the big publishers and media giants have their way, then basically they'll turn our culture into a pay-per-view event." If Congress had not extended copyright protection, Mickey Mouse cartoons would have begun entering the public domain in 2003.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled against Eldred in February 2001.

Lawrence Lessig, a Stanford University law professor who is representing Eldred, said the U.S. Constitution allows Congress to protect copyright for a "limited" period of time. But he said that, with the Copyright Term Extension Act, Congress is aiming for unlimited protection by retroactively extending copyright for materials already published.

Congress should be able to change the copyright protections only to affect new materials, Lessig said. "The copyright power is a quid pro quo," he said. "Congress gives [authors] a monopoly in exchange for something new." He also said that the law violates the First Amendment by continuing to prevent published material from entering the public domain.

But Theodore Olsen, the U.S. solicitor general, wrote in a brief that Congress has the sole power to establish copyright protection, and that the act fits within the scope of Congress's power. The brief says that no previous Supreme Court cases have limited Congress's ability to extend copyright. "And historical practice amply supports the sensible view that Congress may extend the term of existing copyrights when it extends the term of copyrights for future works," Olsen wrote.

The case affects the use of all copyrighted works, online or off. But Lessig said that removing the new copyright restrictions is especially important for anyone who publishes material electronically. The Internet allows anyone to publish information, not just large media companies, Lessig said. Most people can't afford to hire lawyers to help secure permission from authors or determine what is or isn't in the public domain. "It's now more important than ever that the principle of public domain be preserved," he said.

Fritz Dolak, copyright and electronic-resources librarian at Ball State University, said that the Copyright Term Extension Act especially hurts online education. Published materials used in the classroom are often exempt from copyright laws, because of the fair-use doctrine. But Congress has not extended the same exemption to online education. Reported in: *Chronicle of Higher Education* online, February 20.

library

Columbus, Ohio

A software programmer, who sued the Columbus Metropolitan Library for requiring him to wear shoes, lost his case in federal court March 27. U.S. District Court Judge Algernon L. Marbley told plaintiff Robert Neinast that the library was not restricting his constitutional rights and that its shoe requirement "promotes communication of the written word in a safe and sanitary condition."

Neinast had been asked to leave the downtown library for being shoeless on several occasions between 1997 and 2001. He told reporters that the library's barefoot ban was to protect patrons from themselves, not others. "If any bureaucrat can make a rule regarding health and safety, state parks could make everyone wear sunscreen," he said.

Library Director Larry D. Black commented afterwards, "We think the rules are reasonable and for the good of all our customers. I always expected to win. I just hate to see the library spend the money to defend itself." Reported in: *Columbus Dispatch*, March 28.

Internet

Tucson, Arizona

In a lawsuit brought by a broad array of media and civil liberties plaintiffs, a United States District Court in Tucson, Arizona, held unconstitutional and permanently enjoined the enforcement of an Arizona statute criminalizing the intentional or knowing transmission over the Internet to a minor of material considered "harmful to minors" as defined by Arizona law. The Court, holding the statute unconstitutional under both the Commerce Clause of the U.S. Constitution and its First Amendment, found the statute overbroad, unconstitutionally vague and violative of the Commerce Clause because Arizona has no legitimate interest in protecting persons outside of Arizona from speech that Arizona deems to be harmful to minors.

The plaintiffs, who filed the suit in the summer of 2000, included Media Coalition members American Booksellers Foundation For Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation, Magazine Publishers of America, National Association of Recording Merchandisers, Periodical and Book Association of America, Publishers Marketing Association, Recording Industry Association of America, Inc., and Video Software Dealers Association. Also plaintiffs were the ACLU and a number of websites. While the Arizona legislature last year amended the law after the lawsuit had commenced in an apparent attempt to avoid the law being invalidated, the federal court's February 19, 2002, order held that the further amendment was unconstitutional as well.

Michael A. Bamberger, one of the counsel for plaintiffs, said, "We are gratified but not surprised by the result. Similar laws have been uniformly held unconstitutional, including those in New York, New Mexico, Virginia and Michigan." Reported in: Media Coalition Press Release, February 27.

San Diego, California

In a unanimous decision, a panel of federal judges from the U.S. Court of Appeals for the Ninth Circuit ruled January 31 that terriwelles.com, Web site of 1981 Playboy Playmate of the Year Terri Welles, could feature the term "Playmate of the Year" because it did not infringe upon the trademarks of Playboy Enterprises. Playboy had accused the aging center-

fold queen, who has appeared in thirteen issues of the magazine and eighteen newsstand specials, of allegedly infringing upon the bunny company's famous trademarks by including them in the text and meta tags of her website. The complaint threw the intellectual property book at Welles, charging trademark infringement, dilution, false designation of origin and unfair competition.

But the three-judge panel, in an opinion written by Justice Thomas Nelson, said that Welles had the right to use what amounted to her previous job title—even if her porn site competed with Playboy's rather more famous homepage by hawking a $19.95 a month membership fee.

"We conclude that Welles' uses of [Playboy's] trademarks are permissible, nominative uses. They imply no current sponsorship or endorsement. Instead, they serve to identify Welles as a past 'Playmate of the Year,'" the judges said.

The judges mostly agreed with an earlier decision by U.S. District Court Judge Judith Keep in San Diego. "The marks are clearly used to describe the title she received in 1981, a title that helps describe who she is," the panel explained. "It would be unreasonable to assume that the Chicago Bulls sponsored a website of Michael Jordan's simply because his name appeared with the appellation 'former Chicago Bull.' Similarly, in this case, it would be unreasonable to assume that [Playboy] currently sponsors or endorses someone who describes herself as a 'Playboy Playmate of the Year in 1981.'"

Playboy has trademarked the phrase "Playmate of the Year."

In 1979, Welles was a flight attendant for United Airlines who was invited to Hugh Hefner's famous mansion by a mutual friend. Hefner offered to put her on the cover of the magazine, and she accepted. Since then, Welles claims, she's frequently referred to herself as a "Playmate" or "Playmate of the Year," with zero complaints from Hef or his lawyers—until she opened her own subscription sex site in June 1997. It includes nude photos of herself, a fan club and a brief autobiography.

"Playboy has not yet determined what it will do. It is reviewing its options," said Dave Francescani, an outside attorney who represented Playboy. "The court did not award attorneys' fees to Welles," Francescani said. "The argument that was made below was that it was a frivolous action on Playboy's part. The district court and the court of appeals decided that this was not the case at all."

Kevin Smith, an attorney who represents trademark holders, says he's not overjoyed with the decision. He said the court's ruling that Welles was making legal "nominative use" of Playboy's trademarks was disturbing. "As a trademark practitioner, I don't like this decision. It bothers me inasmuch as they're furthering the creation (of nominative use) that they've already started. I think trademark owners would be better served if we don't create a new exception in trademark law," Smith said.

Smith suggested a traditional "fair use" test would be fairer to trademark holders. "I think the court wanted to come out the way they did and looked for a rationale to support it."

Playboy did win a minor victory. The appeals court said Welles' repeated use of the term PMOY in the background of her site was a trademark infringement: "We affirm the district court's grant of summary judgment as to PEI's claims for trademark infringement and trademark dilution, with the sole exception of the use of the abbreviation 'PMOY.'"

Eugene Volokh, a law professor at UCLA, applauded the Ninth Circuit's decision. "I think it's quite good. It reinforces one important point, which is that it's certainly OK to use someone else's trademark if you're accurately relating your relationship with that entity," Volokh said. "If you're a body shop that repairs Volkswagen cars, you can say so."

Volokh said: "In context, nobody is going to be confused. Nobody's going to think the Welles site is endorsed by Playboy. They're going to think it's just run by a former Playmate of the Year." Reported in: *Wired News*, February 7.

Fort Lauderdale, Florida

Internet giant America Online has won a civil lawsuit against a company it accused of sending unsolicited pornographic e-mail to AOL members. The settlement requires Fort Lauderdale-based Netvision Audiotext to pay AOL an undisclosed amount in monetary damages. The accompanying injunction requires the company to stop sending unsolicited e-mail, or "spam," to AOL members through Netvision's Webmaster affiliates, and to provide detailed information to AOL during future spam investigations.

"This puts adult Web sites on notice that to avoid liability of being sued, they have to start imposing controls on their Webmasters and making sure that people who spam are terminated from their affiliated programs," AOL representative Nicholas Graham said.

The settlement and accompanying injunction concluded a January 2001 lawsuit filed by AOL against Netvision. The lawsuit alleged that Netvision violated the Virginia Computer Crimes Act and the Federal Computer Fraud and Abuse Act, among other statutes.

Netvision, which owns Cyber Entertainment Network, the site accused of spamming, has claimed that its service has a "no-spam" policy. However, AOL's lawsuit alleged that CEN offered incentives for third-party Webmasters to transmit spam, targeting AOL members in particular.

The settlement forces Netvision sites to discontinue soliciting affiliate Webmasters to send spam on their behalf. It also forces Netvision to police itself. Netvision will need to revise its Web site policy to include provisions to crack down on third-party Webmasters who send spam.

Jason Catlett, president of anti-spam organization Junkbusters, praised the victory, but warned of the tough road still ahead. "They're blocking some major sources of spam to their members, which is laudable," he said. "Unfortunately, most spammers are not large, slow-moving

targets that can be efficiently litigated." Reported in: News.com, April 3.

Cincinnati, Ohio

A federal appeals court on March 11 allowed a protest site to return to the Web while First Amendment issues are considered, overturning a lower court decision. According to Public Citizen, a Washington, D.C.-based nonprofit public interest organization, the U.S. Court of Appeals for the Sixth Circuit suspended an order issued December 7, 2001, by a U.S. District Court in Michigan. The Michigan Court ordered Henry Mishkoff, a computer consultant who resides in Dallas, Texas, to take down "Taubman Sucks.com," a Web site critical of The Taubman Co.—a shopping mall developer based in Bloomfield Hills, Michigan.

Ironically, Mishkoff's first brush with the Taubman Co. occurred when he created a "fan site" praising a mall known as "The Shops at Willow Bend." On his Web site, Mishkoff wrote in 1999 he was "delighted to learn" of the mall's pending development in nearby Plano, Texas. The shopping center eventually opened August 3, 2001. Mishkoff noted that Taubman had registered two domain names as "official" Web sites for the mall—"The ShopsAtWillowBend.com" and "ShopWillowBend.com" —so he created "ShopsAtWillowBend.com" as a "fan" site.

According to Mishkoff, when Taubman learned of his site two years later, the company demanded he relinquish the domain name. When he refused, based on the fact that his site was non-commercial, Taubman sued Mishkoff for trademark infringement. In response to the lawsuit, Mishkoff said he created a protest site called "TaubmanSucks.com." Acting as his own attorney, Mishkoff unsuccessfully opposed an injunction ordering him to take down the "ShopsAtWillowBend.com" site. However, when Taubman sought an injunction against "TaubmanSucks.com," the case drew the attention of Public Citizen's Paul Levy.

"Public Citizen filed an amicus (friend of the court) brief on Mishkoff's behalf when the injunction expanded to include the 'sucks' site," Levy said. Levy characterized the district court's order for Mishkoff to take down his two sites as a "dangerous step toward restricting non-commercial speech on the Internet." He said the appeals court will rule on the merits of Mishkoff's case regarding both sites.

"The fan site is an interesting issue," said Levy. "It is a fan site for a commercial enterprise, so I don't know how it will turn out. As for the complaint site, I cannot imagine the plaintiff prevailing," he added. "While there is not an appeals court ruling on the matter, 'sucks' sites have been upheld by lower courts and repeatedly upheld by UDRP." Reported in: Newsbytes.com, March 11.

church and state

Montgomery, Alabama

Alabama Supreme Court Chief Justice Roy Moore issued an opinion in a child-custody case calling homosexuality "a sin" that "violates both natural and revealed law." A portion of the ruling cited the biblical books of Genesis and Leviticus.

"It appears that Justice Moore is once again making his decisions on the basis of his personal religious beliefs, not the commands of the law," said the Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State. "Justice Moore would make a great official of the Inquisition, but he doesn't belong on a state supreme court.

"I don't know what to expect next from Moore," continued Lynn. "Perhaps a witch burning?"

The decision in *In Re: D.H.* v. *H.H.* concerns a lesbian living in California who sued her ex-husband in Alabama to obtain custody of the couple's three minor children. The Alabama Supreme Court unanimously rejected the mother's case, and Moore wrote a separate concurring opinion blasting homosexuality on religious as well as legal grounds. Among other things, Moore called homosexuality "an evil disfavored under the law," "an inherent evil," a "detestable and an abominable sin," and "an act so heinous that it defies one's ability to describe it."

Moore even suggested that execution is an appropriate penalty for gay people.

"The State," observed Moore, "carries the power of the sword, that is, the power to prohibit conduct with physical penalties, such as confinement and even execution. It must use that power to prevent the subversion of children toward this lifestyle, to not encourage a criminal lifestyle."

Tracing the history of laws banning homosexuality, Moore, in his February 15 ruling, cited passages from the books of Genesis and Leviticus and favorably cited anti-sodomy laws in legal codes stretching back to the sixth century. Moore wrote, "No matter how much society appears to change, the law on this subject has remained steadfast from the earliest history of the law, and that law is and must be our law today. The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent."

Lynn criticized Moore for using his office to promote a fundamentalist Christian agenda. He noted that Americans United is currently suing Moore in federal court, challenging his display of a two-ton Ten Commandments monument at the Supreme Court building in Montgomery. Reported in; Americans United Press Release, February 20.

film and video

Denver, Colorado

A federal judge on March 4 dismissed a lawsuit that claimed several video game distributors and filmmakers

shared blame for the Columbine High School massacre. U.S. District Court Judge Lewis Babcock granted motions to dismiss filed by Time Warner, Inc., and Palm Pictures, as well as eleven video game makers, including Sony Computer Entertainment America, Activision and Id Software, the maker of "Doom." The lawsuit was filed by the family of slain teacher Dave Sanders and on behalf of other Columbine victims. It alleged that the makers and distributors of the games and movies should have known their products could have led student gunmen Eric Harris and Dylan Klebold to carry out the massacre.

In the ruling, Babcock said there was no way the makers of violent games including "Doom" and "Redneck Rampage," and violent movies, such as *The Basketball Diaries*, could have reasonably foreseen that their products would cause the Columbine shooting or any other violent acts. In a journal written a year before the attack, Harris wrote of his and Klebold's plans: "It'll be like the LA riots, the Oklahoma bombing, WWII, Vietnam, Duke and Doom all mixed together . . . I want to leave a lasting impression on the world," Harris wrote. "Duke Nukem" is also a video game.

Babcock rejected the plaintiffs' claim that video games should not be protected by the First Amendment, ruling that a decision against the game makers would have a chilling effect on free speech. "Setting aside any personal distaste, as I must, it is manifest that there is social utility in expressive and imaginative forms of entertainment, even if they contain violence," Babcock wrote.

During the investigation into the April 20, 1999, shootings, police found a videotape that shows one of the killers with a sawed-off shotgun he called "Arlene" after a character in the video game "Doom." The plaintiffs also said Harris and Klebold had watched the Leonardo DiCaprio movie, *The Basketball Diaries*, in which a student kills his classmates. Babcock also rejected the argument that the video games were defective because they taught Harris and Klebold how to point and shoot guns without teaching them the responsibility or consequences of using weapons. He also ruled that the defendants' legal fees be paid.

Authorities say the gunmen killed Sanders and twelve students before killing themselves in the attack that also left about two dozen others wounded. Babcock is the judge who previously dismissed all but one of nine lawsuits filed against the school district by the families of those slain or wounded at Columbine High School. The one he didn't dismiss was filed by Sanders' family.

The other defendants included in the motion to dismiss are: Acclaim Entertainment, Capcom Entertainment, EIDOS Interactive, Infogames, Interplay Productions, Midway Home Entertainment, Nintendo of America and Square Soft. Not included were Apogee Software, Atari Corporation, Island Pictures, New Line Cinema, Meow Media, Network Authentication Systems, Polygram, Sega of America, and Virgin Entertainment. Reported in: freedomforum.org, March 5.

New Orleans, Louisiana

The Louisiana Supreme Court will not hear a lawsuit claiming that Oliver Stone's movie *Natural Born Killers* inspired a teen-ager to shoot and cripple a convenience store clerk. The court refused without comment to hear the appeal filed by the family of Patsy Byers, who was paralyzed when Sarah Edmondson shot her during a 1995 holdup in Ponchatoula. A state district judge threw out the case last March, ruling that Stone and Time Warner Entertainment Co. are protected by the First Amendment. Byers' family could not show that Stone meant the film to incite violence, Judge Bob Morrison ruled.

The case was at the end of a 3-page list of writ applications denied in February by the appeals court.

Edmondson shot Byers during a two-state crime spree with her boyfriend, Benjamin Darras, who had killed a man in Mississippi the day before. Byers died of cancer in 1997. Edmondson is serving a 35-year prison sentence in Louisiana for shooting Byers. Darras is serving a life sentence for the Mississippi killing.

Edmondson told investigators that before they left Oklahoma, she and Darras repeatedly watched the 1994 movie about a young couple who kill 52 people during three weeks. Attorneys for the Byers family said the director and Time Warner should be held responsible for the violent reaction to the film. Reported in: Associated Press, February 14.

privacy

Washington, D.C.

A federal judge in late March ordered the FBI to expand its search for records about Carnivore, also known as DCS1000, technology that is installed at Internet service providers to monitor e-mail from criminal suspects. The court denied a motion for summary judgment and ordered the FBI to produce within sixty days "a further search" of its records pertaining to Carnivore, as well as a device called EtherPeek, which manages network traffic.

The FBI has defended Carnivore by assuring the public that it only captures e-mail and other online information authorized for seizure in a court order, but the Electronic Privacy Information Center (EPIC) has voiced concerns over potential abuse. EPIC sued the FBI, the investigative arm of the Justice Department, in July 2000 under the Freedom of Information Act so it could examine Carnivore-related documents.

EPIC "has raised a 'positive indication' that the FBI may have overlooked documents in other FBI divisions, most notably the offices of the General Counsel and Congressional and Public Affairs," U.S. District Court Judge James Robertson wrote in his order. The court order marks the latest chapter in EPIC's ongoing legal battle with the Justice Department. The lawsuit could have significant implications

for the government's tactics of monitoring Internet use in federal investigations.

According to the order, the FBI had completed its processing of EPIC's FOIA request, producing a search of 1,957 pages of material but releasing only 1,665 pages to EPIC. The privacy group claimed those records were inadequate, saying they only addressed technical aspects of Carnivore, not legal and policy implications.

EPIC General Counsel David Sobel said the FBI and Justice Department have been "very grudging" about the Carnivore information they are willing to release. "A new court-supervised search is likely to result in the release of a lot of significant new information, particularly because the information that we're likely to get now is material dealing with the Justice Department and the FBI's assessment of the legal issues raised by the use of Carnivore," Sobel said. "I think now—especially after September 11 when these kinds of techniques are likely to increase in use—it's even more important that information be made public and how the techniques are being used and how the Justice Department sees the legal issues."

In September 2000, the Justice Department commissioned IIT Research Institute, an arm of the Illinois Institute of Technology, to undergo a review of Carnivore. Two months later, the institute released its findings, saying the technology "protects privacy and enables lawful surveillance better than alternatives." The report said Carnivore provides investigators with no more information than is permitted by a given court order and that it poses no risk to Internet service providers. Reported in: ZDNet News, March 27.

etc.

San Francisco, California

To the dismay of crime victim advocates, the California Supreme Court on February 21 gutted the state's version of New York's "Son of Sam" law that for nearly two decades has kept convicted felons from profiting off their crimes. By unanimous vote, the court's seven justices, in a case revolving around the 1963 kidnaping of Frank Sinatra, Jr., ruled unconstitutional a key prong of the law that prevents criminals from making money off books, movies and other "expressive materials" concerning their offenses. The court said specifically that California Civil Code § 2225(b)(1) of the state's Victims' Rights Law was overinclusive.

The justices' reasoning was based on its evaluation of the U.S. Supreme Court's ruling in *Simon & Schuster* v. *Members of the New York State Crime Board*. That 1991 decision declared unconstitutional New York's very similar "Son of Sam" law, named after serial killer David Berkowitz, who terrorized New York City in the summer of 1977.

"Section 2225(b)(1) contains the fundamental defect identified in Simon & Schuster," Justice Marvin Baxter wrote for the court. "It reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the criminal's speech or expression on any theme or subject, if the story of the crime is included."

The case began in 1998 when Sinatra sued in Los Angeles County Superior Court to prevent Columbia Pictures from paying $1.5 million for the rights to a film about the then-19-year-old's four-day kidnaping at the hands of Barry Keenan and two other men. Columbia's offer had been prompted by "Snatching Sinatra," a story about Keenan in the January 1998 issue of *New Times Los Angeles*.

Widespread interest in the case was heralded by *amicus curiae* briefs being filed by the California attorney general's office on Sinatra's behalf and by the American Civil Liberties Union Foundation of Southern California and several publishers on Keenan's side.

Sinatra had argued that the California Victims' Rights Law compelled Keenan to pay any profits from books, movies and other expressive outlets to the victim or to a state trust to go toward unpaid fines, reimbursing trial costs and compensating crime victims in general. Keenan—who now works in Austin, Texas, for a nonprofit organization involved in prison and drug policy reform—responded by simply saying that California's law was just as unconstitutional as the New York law thrown out by the U.S. Supreme Court.

The trial court and Los Angeles's Second District Court of Appeal sided with Sinatra. But the state's Supreme Court reversed and remanded, saying that the California law's financial disincentive "discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds."

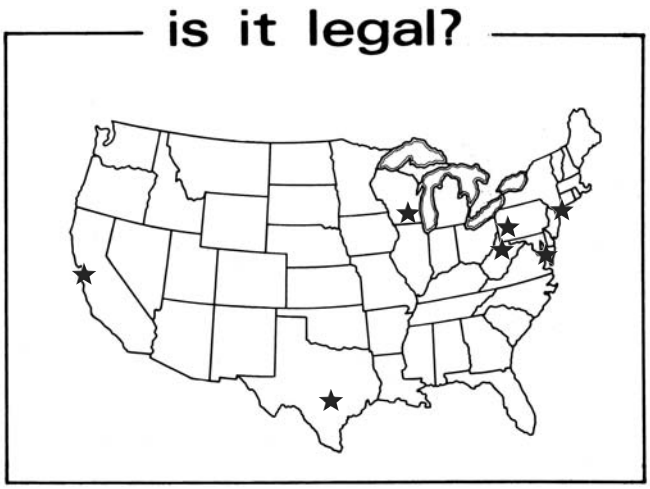
The justices also fretted that the law, as worded, would have prevented earlier works by the likes of civil rights activist Malcolm X, Watergate figures Charles Colson, G. Gordon Liddy and John Dean, and publishing heiress Patricia Hearst.

"A statute which operates in this fashion," Baxter wrote, "disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of the crime."

Sinatra also had argued that the California law differed from the New York law in that it applied only to convicted felons and allowed an exemption for materials that had only a "passing mention" of the crime. The court brushed those arguments aside.

The ruling in *Keenan* v. *Superior Court* let stand a section of the law prohibiting convicted felons from profiting from the selling of memorabilia, property and rights that were enhanced by their crime-related notoriety. It also, in a huge footnote, stressed that the ruling is narrow and doesn't

(continued on page 142)



Internet

San Francisco, California

The San Francisco-based Electronic Frontier Foundation (EFF) asked the California Supreme Court February 1 to overturn a lower court decision barring a disgruntled ex-Intel employee from sending angry e-mail messages to workers for his former company. In December, a California appeals court ruled that Intel could sue former employee Ken Hamidi for sending e-mail to Intel employees after the company warned him to stop.

In January, Hamidi's attorneys asked the California Supreme Court to review the appeals court ruling. EFF attorneys filed an *amicus curiae* letter in the case.

EFF attorneys said the appeals court's interpretation of the case could have a disastrous impact on electronic speech and commerce. By accepting Intel's claim that Hamidi "trespassed" on the company's servers, the court in essence said: "even if you cause no harm, as long as the owner of an Internet-connected device doesn't want you to make contact with that device, you are vulnerable to prosecution," EFF Senior Attorney Lee Tien said. Under that interpretation, search engines could be held liable for bouncing Web surfers to other Internet addresses without permission, Tien said.

The original case arose out of a series of e-mail messages that Hamidi sent to all Intel employees following his dismissal. Although Intel conceded in court that the e-mail had caused no physical damage to its systems, the appeals court affirmed a lower court ruling that the messages constituted an illegal trespass. Tien said the trespass rules Intel sued under require real damage to the property that was allegedly trespassed upon. Reported in: Newsbytes.com, February 1.

Washington, D.C.

In a March 19 memo, the White House ordered all federal offices to review the content of their Web sites for sensitive materials in the wake of the September 11 terrorist attacks. But the move raised questions about whether the Bush administration was simply using the attacks to justify a policy that began well before September. Federal offices have until June 19 to review the content of their Web sites for "sensitive but not classified" materials and report back to the Office of Homeland Security, according to the memo, released by White House Chief of Staff Andrew Card.

White House spokesman Jimmy Orr said the materials could include anything that would threaten national defense or aid in the construction of "weapons of mass destruction." Orr said he couldn't give any specifics, nor would he say whether the public could still access the information through other venues, such as the Freedom of Information Act.

"We don't want to classify documents and hinder the distribution," Orr said, explaining why certain items were being removed from Web sites. However, Ari Schwartz, a policy analyst at the Washington-based Center for Democracy and Technology, said the whole thing is a bad idea. By creating a new category, "sensitive but not classified," the White House has created a huge blanket that can be cast over almost any type of information the government wants to hide, Schwartz said. The current administration might have noble motivations, he said, but what would stop future officials from abusing the directive?

Instead of fixing problems and making the nation's critical infrastructure such as dams, nuclear power plants and other facilities, more secure, the administration has attacked information about these sites, he argued. "They are basically blaming the messenger for the problems that are out there," Schwartz said.

Before September 11, President George W. Bush said publicly that his administration wouldn't be as open as past presidencies, and he blocked the release of information from the Reagan administration that was supposed to be made public this year. "I think they have been using September 11 as an excuse to make that [increasing secrecy] happen," Schwartz said. "There really is a pattern here that started well before September 11."

Orr stressed that the current decision to review government Web sites builds on a policy created under former President Bill Clinton. Card's memo doesn't do anything that goes beyond reviews put in place under Clinton, Orr said. All it does is ask government agencies to review material that could be a threat to the public safety.

Schwartz said several Web sites have been tracking information that has been removed from the Web, such as one run

by the San Francisco-based Electronic Frontier Foundation (EFF). He suggested that people visit the EFF site or the other sites to see for themselves. Reported in: Computerworld.com, March 25.

Washington, D.C.

The U.S. Interior Department is slowly bringing its constellation of Web sites back online as a court appointed master certifies that the sites do not threaten the privacy of individuals who participate in a 100-year old Native American trust fund program. On December 5, U.S. District Court Judge Royce Lamberth ordered nearly all Interior Department Web sites and external e-mail access frozen, after hackers showed how easy it was to break into the agency's computers and set up arbitrary accounts.

The hack was orchestrated by plaintiff's attorneys in a five-year-old class-action case involving allegations that the Interior Department mismanaged more than 500,000 Indian trust fund accounts. Interior Department spokesman Hugh Vickery said the affected sites are being brought back online one-at-a-time as their operators are able to demonstrate their security protections to the court.

The first site to come back online was that of the United States Geological Survey. The National Park Service was next and the Bureau of Reclamation site came back online a few days later, Vickery said. The order affected nearly all of Interior's bureaus, including the Bureau of Land Management, which handles federal land leasing, grazing rights, timber and mining policy. Other agency arms cut off from the Internet included the Bureau of Indian Affairs, the Fish & Wildlife Service, and the Minerals and Mining Service, the outfit that manages offshore oil drilling contracts with the private sector. Reported in: Newsbytes.com, March 4.

Washington, D.C.

High-tech lobby groups and civil liberties associations told Secretary of State Colin Powell and Attorney General John Ashcroft February 6 that an addition to the Council of Europe's proposal to ban "xenophobic" and "racist" speech on the Internet is a violation of the U.S. free speech principles. The Computer & Communications Industry Association (CCIA) also said that the Council of Europe's anti-racist speech clause would hold Internet service providers and Web site operators responsible if their users employ hate speech on individual Web sites or Internet postings.

CCIA President and CEO Ed Black in a statement said that "More speech, not less, is the most effective response to the spread of ignorance and hate. We believe a free marketplace of ideas should regulate content, not government. "We also object to the imposition of liability on ISPs for anything that is sent over their networks. This treaty would force ISPs to monitor all users' activities," Black said. "It flies in the face of practicality, privacy and the open nature of the Internet."

The convention was adopted in early November by 43 countries, but each country must ratify it as well for it to go into effect. The U.S. Justice Department, the CCIA noted, has expressed reservations about conflicts between the hate speech clause and the U.S. Constitution. It was drafted as an attempt to set some level of legal and ethical standards for online activity. Ratifying members will be required to pass similar legislation to combat a host of Internet crimes, including copyright infringement, child pornography, and malicious hacking.

The multi-country treaty has steadily come under fire from several consumer and civil liberties groups concerned that the convention could lead to the emergence of an international electronic surveillance network, or a kind of "global Big Brother." Reported in: Newsbytes.com, February 6.

Austin, Texas

The Republican Party of Texas has told the owner of www.enronownsthegop.com to shut down his Web site or face a barrage of trademark infringement lawsuits. The site, modeled after www.texasgop.org, lampoons several state GOP incumbent candidates for refusing to return tens of thousands of dollars in PAC money contributed by Enron employees. The Web site reads "The Republican Party of Texas, Brought to You by Enron," and includes the Texas GOP's trademarked symbol of an elephant superimposed on a map of the Lone Star State. Sprinkled nearly everywhere on the site—including on the back of elephant—is Enron's now-infamous "crooked-E" symbol.

"Your Web site is clearly intended to imitate and mimic the RPT trademark symbol and Web site, and to create confusion and mislead the public," a letter from the Texas GOP stated. The Web site's owner, Kelly Fero, said the Republican Party of Texas apparently doesn't feel like a parody site about its ties to Enron is very funny—or protected by the First Amendment.

"I'm fully aware of parody exception in trademark law, but we don't think it applies in this case," said Texas GOP attorney Jonathan Snare. "The position of state party is that we want this site shut down, because we believe it's going to create confusion."

Fero is one of the top strategists helping to coordinate the Democratic ticket in Texas, but he insists he paid for the site with his own money. Fero said the GOP candidates skewered on his site would remain there until they return the money to Enron or to funds that have been set up to help employees whose life savings were erased with the company's collapse.

The site has been up since the beginning of the year, and represents the Democratic ticket's effort at "comprehensive communications," Fero said. "We're now moving our message through more non-traditional ways, to audiences who in recent years have not participated as broadly in the democratic process as perhaps they should, including the online community," he said.

Mike Godwin, a senior fellow at the Center for Democracy and Technology in Washington, D.C., and specialist in trademark law, said while court rulings in such matters have traditionally been split depending on the region of the country, judges have increasingly favored the defendant in cases where the domain name in question is critical of another entity. "In this case, because the name itself is a parody, it's difficult to imagine any reasonable person thinking that the Web site represents the GOP in any way, shape or form," he said. "Everyone understands that the interest you protect with trademark law is primarily a business interest, and you certainly can't use trademark law to suppress criticism." Reported in: Newsbytes.com, February 15.

schools

Altoona, Pennsylvania

The Altoona School District will no longer allow private groups to distribute written materials on campus after the American Civil Liberties Union challenged a flier for religious study groups. Under the change, approved by the school board February 11, the district will distribute only materials related to school events. The policy revision was the latest in a string of changes, dating back to 1999 when a Baptist preacher filed a request to display the Ten Commandments in a school, saying it would help build character.

The district responded with a policy that allowed religious and historical documents to be posted for twenty-five school days if they showed no disrespect to any individual, ethnic group or religion. But the committee charged with approving or rejecting submitted documents received a flurry of writings on topics including the Baha'i faith, atheism, gay history and Wicca, a New Age religion criticized by conservative Christians as a form of witchcraft. The district dropped the policy after two months.

The latest change means another group, Habitat for Humanity, will be prohibited from circulating a flier soliciting student participation in a charity basketball game. "We thought rather than get into situations, perhaps what we experienced with the Ten Commandments, that we would just enact a policy that would limit the material that we would distribute," said Assistant Superintendent Frank Meloy.

The school's last policy required organizations to submit materials to a superintendent, who would "study and make a decision as to the educational, social and moral worth of the services offered." The policy was dropped after the ACLU asked to distribute its student rights handbook.

"The only way to allow religious materials is to also allow nonreligious materials, which leads to a difficult situation because there's no way to stop the potential flood of materials coming in," said Witold Walczak, executive director of the Pittsburgh chapter of the ACLU. Reported in: *Pittsburgh Post-Gazette,* February 14.

colleges and universities

New York, New York

A regional office of the National Labor Relations Board filed a complaint February 28 charging New York University with illegally denying tenure to a professor who voiced support for a graduate-student union drive. Joel Westheimer, who was an assistant professor of education, charged that he was denied tenure last year because he had testified at NLRB hearings on behalf of NYU's graduate students, who were seeking the right to unionize. He was the only professor without tenure to do so.

Celeste Mattina, who directs the labor board's New York region, said a four-month investigation into the case had shown that there is "probable cause" to conclude that NYU violated the National Labor Relations Act. "After balancing the information, we concluded that the real reason for his denial of tenure was because of his union activities," said Mattina.

A hearing before an administrative law judge was scheduled for April 30. NYU issued a statement denying the charges. It called the labor board's decision to file a complaint "wrong—wrong on the facts, wrong on its interpretations, and wrong in its conclusions." Westheimer, the statement said, was denied tenure because he lacked sufficient scholarship and failed to contribute to his department. His union activities played no part in the decision.

Westheimer, who received unanimous support from his department in his tenure bid, began teaching at NYU in 1996. He has written numerous journal articles and a 1998 book, *Among Schoolteachers: Community, Autonomy, and Ideology in Teachers' Work* (Teachers College Press). "I'm just so thankful that the labor board has shown that NYU is not above the law," Westheimer said. "Firing a professor for their political views should have no place at an institution like NYU."

Although the administration opposed the organizing drive for years, NYU is the only private university to officially recognize a graduate-employee union. Reported in: *Chronicle of Higher Education* online, February 28.

Morgantown, West Virginia

The band of West Virginia University demonstrators moved toward Stewart Hall in virtual silence, a strange tableau during a demonstration promoting the concept that free speech reigns anywhere and not just in two university-designated "free speech zones." The peculiar tranquillity was jarred when a passing young man screwed up his face in scorn and yelled, "Get a job, you lazy bastards."

A second or two passed. And then one of the female protesters became downright exultant. "See, you're exercising your right to free speech. You rock!" Seizing the moment, the others enthusiastically cheered the man's right to verbally express his utter disdain for them. Speechless at the turnabout, the heckler hurried away.

It was that kind of protest February 12, indicating both how much campus demonstrations have changed since the 1960s and how one thing—the three-decade-old university policy that precipitated it—has remained. Unlike the Vietnam-era protests that rocked WVU and other campuses, there was no anger, raised fists, disruption or violence by the forty or so demonstrators.

The protesters wanted to show that a holdover from the '60s protest days—the university policy designating two small areas outside the student union building as free speech zones—was not only unconstitutional but absurd, that they could exercise their right to free speech anywhere on campus without being disruptive or worse. The controversy over the free speech zones began in 1996 when a group of concerned faculty formed the West Virginia Association of Scholars to deal with what they perceived as political correctness stifling intellectual diversity. The group subsequently uncovered the long-standing policy for the speech zones.

In October 2000, students protesting outside a Disney recruiting seminar were told by campus police they could not hold signs outside the free speech zone. In November 2001 a student who had passed out fliers decrying Disney's international labor record and then attended Disney's recruiting seminar was ejected by police on grounds he had violated the free speech zone policy. The students and professors had had enough. The West Virginia University Free Speech Consortium was formed. After that, the university appointed an ad hoc committee of faculty and students to study the issue.

"Our main point is to show that free speech can happen without disruption and without any kind of violence," said Nathan Moore, 21, a senior anthropology major who dressed for the protest as Abraham Lincoln, honoring both the sixteenth president's ideals and his birthday. "We want a policy that makes clear free speech is a good thing."

"We just want them to go by the Constitution," said WVU associate professor David Shapiro, who formed the scholars group and attended the protest.

Even before the demonstration, university President David Hardesty offered to meet with representatives. The protesters learned that the Foundation for Individual Rights in Education, Inc., a Philadelphia-based organization, had taken up their cause and was faxing a three-page letter to Hardesty protesting the university's position. Bathed by sun but chilled by a stiff breeze, the group moved around campus, stopping several times to promote free speech with impromptu comments from the group. For the most part, other students went on with their daily business. Some stopped to watch for a moment or two, like the sophomore who, when asked if he supported the issue, replied: "I guess if I really had something to say I would."

Student Becky Thompson, 22, of Elkins, didn't know what the protest was about but when she learned, she was shocked: "Free speech is allowed anywhere. I don't see how the university can regulate it." As it turned out, that sentiment, and those of the protesters, was shared by Hardesty. After meeting with them for a half-hour, he said he agreed "that the university can do better. If we needed to be speeded up, and [the protest] helped, I'm happy about it. It was a positive day."

Hardesty said the protesters' issues would be conveyed to the ad hoc committee studying the issue. A report expected by month's end will be given to the protesters for their input, he promised. "I feel the concept of the zone should be replaced by ideas about conduct, about interfering with other people, about disruption, about hurting property or individuals . . . I don't think we have to limit individuals' free speech to a small area of the campus. There is no issue about what can be said here. The question is a reasonable time, manner and place respecting the rights of everyone who holds a different opinion," Hardesty said.

Student Matthew Poe, one of the group's leaders, said he was optimistic following the meeting and that Hardesty and the protesters seemed to be on the same page. "I hope the intentions we discussed today to liberalize the policy significantly will come to fruition," Poe said. Reported in: *Pittsburgh Post-Gazette*, February 13.

Whitewater, Wisconsin

The University of Wisconsin at Whitewater temporarily rescinded a newly published free-speech policy that students,staff, and faculty members had complained was open to misinterpretation and could potentially impede the open exchange of ideas. The guidelines, titled "Policy for Free Speech, Distribution of Literature, Protests and Demonstrations and Political Activity," were added to the University Handbook in December, but had been a part of existing rules and guidelines at the university, in bits and pieces, since 1991, university officials said.

Among other things, the policy designated certain spaces on campus as "free-speech areas" and forbade any "person or group" from placing "political signs, posters, banners, or similar material on or in university property." It also required twenty-four hours' notice to obtain a permit for demonstrations or protests.

"The policy is very similar to what you'll find on a lot of campuses," said Barbara C. Jones, assistant chancellor for student affairs. She acknowledged, however, that "there probably are some things in there that have gone beyond what the original intent of it was," such as the prohibition against placing political signs, posters, or banners anywhere on university property.

According to Jones, the incorporation of the free-speech policy into the handbook was part of an effort started in 1999

to update and codify campuswide policies. An e-mail message informing the entire campus community of the policy's incorporation into the handbook was sent out on January 4. In early February a number of student-government representatives, staff members, and professors raised concerns over some of the language in the policy with Chancellor Jack Miller.

"The policy was never interpreted as necessarily malicious, but it may have been misinterpreted, which was the cause for concern," said Edward E. Erdmann, chair of the Faculty Senate. "Faculty members were concerned that the policy not be used to quell free speech."

Erdmann said he wrote a letter to Miller expressing his concerns about the policy shortly before the chancellor announced that the policy would be suspended and reviewed. Both Erdmann and Jones agreed that, to the best of their knowledge, the policy had never been used to deny any group the right to engage in any form of political activity on campus.

Jones said the university was bringing together a group of students, professors, and staff members to help revise the policy with an eye toward ensuring that the university's commitment to free speech is made clear. Reported in: *Chronicle of Higher Education* online, February 13.

open records

Washington, D.C.

The U.S. book publishing industry on February 28 urged a federal court to nullify President Bush's executive order limiting access to presidential papers and to order the National Archives to administer the Presidential Records Act of 1978 as Congress intended. In an *amicus* brief submitted to the U.S. District Court for the District of Columbia, the Association of American Publishers, leading a distinguished coalition of organizations representing publishers, authors, journalists, and historians, called the Bush Order a "real, substantial, and immediate threat . . . to the integrity of the historical record and to the public interest."

The brief was submitted in support of a legal challenge brought in November by the public interest group Public Citizen seeking to compel the National Archives to abide by the terms of the Presidential Records Act (PRA). Enacted in 1978 in response to public outrage over the abuses of the Nixon Administration, the PRA established permanent public ownership and governmental control of presidential records, setting forth procedures governing their preservation and making them publicly available twelve years after a president leaves office. The lawsuit was brought to overturn Executive Order 13,233 signed by President George W. Bush on November 1, 2001, which limits access to presidential records and gives incumbent and former presidents, and members of a president's family veto power over the release of records. As presidential historian Richard Reeves noted in the *New York Times*: "With a stroke of the pen on November 1, President Bush stabbed history in the back. . . . From now on, scholars, journalists, and any other citizens will have to show a demonstrated, specific 'need to know' in requesting documents from the Reagan, Clinton, and two Bush presidencies-and all others to come."

Timed to prevent the release of Reagan-era records, which as Reeves pointed out, "could be embarrassing to some men and women now back in power with the second Bush administration," the Executive Order, as the amicus brief notes is "not an implementation of the PRA, as it purports to be, but rather an unlawful attempt to render it void." Noting that "publishers serve the primary interest animating the PRA by disseminating works that draw significantly upon presidential records, thereby insuring broad public access to the information," the brief asserts that the Executive Order "sharply limits the ability of publishers to fulfill this core mission."

Urging the court to grant plaintiffs' motion for summary judgment, the brief argues: "Against the tendency of those in power to distort and conceal . . . the work of historians and journalists in 'keeping the record straight' plays a pivotal role in the successful operation of our democratic system."

Other organizations joining the Association of American Publishers on the *amicus* brief are the American Booksellers Foundation for Free Expression, the American Society of Newspaper Editors, the Association of American University Presses, the Freedom to Read Foundation, PEN American Center, the Organization of American Historians, the Society of Professional Journalists, the Authors Guild, and the Publishers Marketing Association. The brief was written by AAP's Freedom to Read counsel R. Bruce Rich, Jonathan Bloom, Benjamin Marks, and Natalia Porcelli. Reported in: AAP Press Release, February 28.

Austin, Texas

The stacks of the Texas State Library and Archives groan with boxes of carefully preserved papers dating back to James Pinckney Henderson, the first governor, who served from 1846 to 1847. But anyone trawling for insights into the most recent former governor, George W. Bush, or say, his ties to Enron in the years he ran Texas, would have to travel 118 miles east to College Station. Even then, it might be months, maybe even years, before many of the records are available.

The papers, sitting in 1,800 boxes, are at the center of a tug of war between Bush and the director of the Texas state archives. By placing them at his father's presidential library at Texas A&M University, Bush is putting them in the hands of a federal institution that is not ordinarily bound by the state's tough Public Information Act. That law, among other things, assures anyone who requests state records a reply within ten days. Officials at the Bush library say the best

they can do, given staffing and other priorities, is ninety days, and some requests have taken longer. "We'll do our best," said Warren Finch, the Bush library archivist.

But Peggy D. Rudd, the Texas state archivist, said doing their best was not quite enough. "Our opinion is that the records belong to the State of Texas, and that the State Public Information Act pertains," she said. "So, no, ninety days is not good enough."

The struggle over Bush's records is just one of many battles over access to public records as politicians test new ways to keep tight control over their archives. "Who needs a shredder when you have Daddy's presidential library?" said James Newcomb, an official with the Better Government Association in Chicago, which relies heavily on freedom-of-information requests.

In New York, former Mayor Rudolph W. Giuliani also has been criticized over an eleventh-hour deal that his administration made to send his papers to a private center that people close to him will control. Critics have expressed most concern over a line in the agreement that seems to give Giuliani the right to block the release of a document in which he has a "personal interest."

In the cases of Giuliani and Bush, people involved in the decisions have said they had the public's interests at heart. "The whole purpose here was to make them more accessible, not less," Giuliani said. In a similar vein, background materials in the Texas bill that gave Governor Bush the authority to name an alternate repository for his papers refer to the desire to modernize records and ease the state's load.

Archivists say there have always been politicians who treated their papers as chattel, dating to George Washington, who packed his papers into two trunks and returned to Mount Vernon. By 1978, tired of tussling with Richard M. Nixon over documents, Congress passed the Presidential Records Act to assure that all official papers, with some exceptions, become public twelve years after a president leaves office. But last November 1, President Bush issued an executive order that blocked the long-awaited release of documents from Ronald Reagan's presidential library. The order, which is being challenged in court by several organizations, permits a sitting president to veto the release of a former president's records.

The Bush administration also has been criticized over a memorandum that Attorney General John Ashcroft issued in October, telling federal officials they could "be assured" of Justice Department backing if they resisted freedom-of-information requests. Vice President Dick Cheney also is battling the General Accounting Office, the investigative arm of Congress, over a request to produce records about his energy task force. Cheney said that doing so would hinder his ability to get unvarnished advice from industry.

"What seems to be coming out of the administration is the idea that public information is a dangerous thing," said Tom Connors, a council member of the Society of American Archivists who also took part in a recent rally to protest Giuliani's records transfer.

The transfer of Bush's records was authorized by the State Legislature in 1997. The law says the governor, "in consultation with" the state archives, may designate an alternate repository for his records. But, as Rudd says, "The law is silent on what happens after the transfer takes place."

Rudd also complained that there was little if any consultation before Bush's papers were sent away. She remembers being startled when, on December 19, 2000, she was asked to sign a one-page statement noting the governor's wish to ship the papers to his father's library. "The afternoon of Bush's final day in office, a young man runs over with the agreement and says, 'Sign here,'" she said. She signed.

Ever since, the archives, the Bush library and representatives for the current and former governors have tried thrashing out the terms of the transfer to no avail. One of the main sticking points, said Edward Seidenberg, the assistant state librarian, was that "the Bush library said they could not agree to abide by a Texas law."

On January 16, an interim memorandum of understanding was reached that binds the parties until May 20. That is when they expect a ruling from the Texas attorney general that they hope will clarify whether Governor Bush, by transferring the records, effectively moved them from under the aegis of the state, and its public information law.

Few in Austin care to bet how John Cornyn, the attorney general, will come down. The first Republican to occupy his office since Reconstruction and a member of the Bush-Cheney transition team, he ran on a platform of open government. Cornyn declined to be interviewed, but in his inaugural speech on January 13, 1999, he not only thanked his "friend" Governor Bush but also promised his supporters to "vigorously enforce the laws requiring that government records and meetings shall be open to public view."

In the meantime, news organizations and a public interest group, Public Citizen, have petitioned the Bush library for the sixty or so Enron- related documents believed to be in the governor's files, many dating from 1997 to 1999 when Texas was debating utility deregulation. If ten workdays elapse, and the petitioners sue, the matter would go before a judge.

"To say we have ten days to respond is mind-boggling," Doug Menarchek, director of the Bush library, said of the task before him. The records, housed in a temperature-controlled, specially lighted room, arrived on sixty pallets. Cataloging could take one archivist up to six years. By then, Bush might have his own presidential library. Reported in: *New York Times*, February 11. □

adult bookstores

Marlborough, Massachusetts

It takes edge, confidence, and gumption to patrol the highways of Massachusetts as a state trooper, and former US Marine Eugene O'Neill felt that he had honed the requisite skills, especially during a decade of clashes with authorities over his two adult emporiums in Somerville and Marlborough. But the State Police felt otherwise about O'Neill's business ventures, and in January, revoked his admission into the next class at the State Police Academy, citing his refusal to divest his ownership in the two erotic bookstores, which sell sexually oriented videos, magazines, and novelties.

So O'Neill filed suit in federal court, charging that the decision infringed on his First Amendment right to free speech. "This is an important case, because the law makes clear that the First Amendment protects a public employee's right to engage in constitutionally-protected speech, even if members of the public find that speech offensive," said O'Neill's lawyer, Shannon Liss-Riordan. "That right extends to police officers."

The State Police had made O'Neill a conditional job offer November 21, but rescinded it with a terse letter January 24 after performing a background check.

A State Police representative, Captain Robert Bird, would not comment on O'Neill's suit, but said the head of the State Police must approve any outside employment for a trooper. "It can't interfere with the member's duties," Bird said. According to the policy, extra jobs cannot create conflicts of interest or bring the officer or the State Police into disrepute.

In the past, Bird said, State Police officials have denied requests from troopers to work second jobs as a firefighter, an auto auction consultant, and a professional boxer.

"He made it through the screening and physical agility check and submitted a long application," Liss-Riordan said. "He passed everything else, but was denied because of his bookstores." An Arlington resident, O'Neill owns a half-share of Main Street Video in Somerville and Main Street Video in Marlborough. Ever since O'Neill opened his store near Marlborough City Hall in 1996, officials have been on the offensive. The city crafted new zoning regulations targeting adult video and bookstores, but O'Neill's shop was not subject to the revised rules.

Police discovered a basement peep show in O'Neill's store at the end of 2000 and cited him for illegally operating a movie theater. Marlborough eventually won an injunction, and O'Neill complied, removing the coin-operated video booths, but he challenged the decision in court. Reported in: *Boston Globe,* February 14.

libraries

Elgin, Illinois

Supporters of a book detailing a young woman's first experience with love and sex won a key battle December 12 in the effort to make the novel available again to middle schoolers at Elgin-based School District 46. A committee of district staff and parents, as well as librarians from outside the district, voted unanimously to return Judy Blume's *Forever* to middle school library shelves after a four-year absence. The committee's recommendation was accepted by the Elgin School Board January 22 in a 5–2 vote.

After the committee's vote was announced, Eastview Middle School librarian Joan Devine was greeted with hugs and high-fives from parents and staff. Devine led the group of middle school and high school librarians who asked that the book be put back on the shelves. "I'm very happy," Devine said. "I think it's a victory for the students."

Elgin parent Jean McNamara, who spearheaded the fight against the book, said she thought the committee was stacked with librarians and staff instead of parents. McNamara, who schools her children at home, said Christian parents should pull their kids from the "pagan school district." "This book is harmful . . . it shows teens committing sins," McNamara said.

The book originally was removed from middle school libraries in 1997 after McNamara complained about its sexual content, profanity and depictions of drug use. Devine appealed after waiting the required two years. A district committee recommended reinstatement, but the book stayed

off the shelves when the school board deadlocked 3-3. This time, all the district's middle school and high school librarians joined Devine in challenging the ban. The book is allowed in the high school libraries.

Nearly thirty of the fifty people in attendance spoke, with about two-thirds favoring the book's return. Supporters argued that the book is a cautionary tale that helps provide teens with information and shows them the consequences of their actions so they can make good decisions. Opponents said it encourages promiscuity, profanity and drug use.

Parents who want their kids reading *Forever* should go to the public library or buy it, L. Dean Hufsey of South Elgin said. *Forever* sanctions promiscuity and sin, and therefore it shouldn't be on the middle school shelves at taxpayer expense," Hufsey said.

Gina Palmisano, an eighth grader, said she knows others her age who are having sex and using drugs. Parents who think their children are not exposed to such things are fooling themselves, she said. The book can help teens talk to their parents, she said. Doug Heaton of Elgin said he did not want his daughter coming across the book, which he called smut, while browsing the library stacks. The district must find a way to prevent that, he said.

But Streamwood resident Lisel Ulaszek called that censorship. "It is not their right to act as a moral compass for the entire community. . . .What one person finds objectionable another person might find enlightening."

Forever ranks eighth among the American Library Association's most challenged books of the past decade, with 42 written complaints. For each recorded complaint, there are an estimated four or five more that go unreported. Reported in: *Chicago Tribune,* December 13; NCAC Press Release, January 23.

Waukesha, Wisconsin

The Guinness World Records books may stay in public elementary school libraries throughout the city, a School District committee unanimously decided March 21. The nine-member Consideration Committee's decision followed a sometimes impassioned public hearing, during which the Guinness books were alternately referred to as "thinly veiled pornography" and valuable reference tools. "This is not about banning the book. It is simply recognizing the book is not for children," said Banting Elementary School teacher Mel Culver, who in February asked the district to remove copies of the Guinness World Records books for 2000, 2001 and 2002 from elementary libraries.

The Consideration Committee—a group of teachers, librarians and school administrators that handles requests to remove materials and books from schools—disagreed. Its vote will keep *Guinness World Records* books in libraries at the seventeen elementary schools, unless overturned on appeal by the School Board. Culver declined to comment after the meeting on whether she would appeal the decision.

In her complaint to the district, Culver said the books should be removed because they contained photographs of scantily clad women for "sexual entertainment." She said boys in her school were making special trips to the library solely to look at the "girls in Guinness."

"No other book in our library displays sexual pictures like this," Culver said. Holding up a picture of the book's buxom "most downloaded woman," she said, "I ask, 'Is this appropriate for children?'"

Some residents and teachers supported Culver's request. About a dozen people spoke at the hearing, almost evenly divided in their opinions on the issue. Waukesha resident Janet Maier said serial killer Ted Bundy was moved to murder by viewing pornography. "It could start with one picture or one magazine," she said.

But others worried about the precedent that removing the books would set. If the district starts with Guinness, then any book that has something that offends someone could be next, said Sonia Evans, a sixth-grade teacher at Bethesda Elementary School. "Then, no book in our library is safe," she said.

Pleasant Hill Elementary School parent Quin Ayers said his 7-year-old son brought home a book on Martin Luther King, Jr., that included pictures of lynchings. He was disturbed by those photos, he said, but wouldn't want to see the book eliminated because of them.

"Do we really have to be known as the only school to ban the Guinness book or remove it?" Ayers said. "This is not a record I would like to be associated with."

In a brief discussion prior to voting, members of the Consideration Committee revealed some of the reasons they rejected Culver's request. The School District's "philosophy on educational materials" makes a distinction between books that are available in libraries for student choice and those that are required for use in classrooms, two members pointed out. "Maybe freedom of choice is part of becoming a responsible citizen," said Barbara Kasten, a guidance counselor at Butler Middle School.

Reading specialist Gloria Esser said Guinness' short passages might be something she could use to get "reluctant readers," who are discouraged by long encyclopedia entries, to start reading. "I've seen books like this really hook young readers," Esser said.

After the meeting, Central Middle School teacher Thomas Mancuso said the debate over Guinness "raises some important issues" and that the publisher has some explaining to do about the overly large photographs of sexy women in its books. But denying students access to the book might have attracted even more interest over it than currently exists among elementary boys, he said. "It certainly brings more attention to it," he said. Reported in: *Milwaukee Journal Sentinel,* March 22.

art

Honolulu, Hawaii

The City of Honolulu will display a painting of a nude woman on a crucifix that it had banned from Honolulu Hale a year ago, according to the settlement of an American Civil Liberties Union lawsuit. "This is a year overdue," said artist Daria Fand, who painted the work, titled "Last of the Believers." The ACLU sued the city after Fand was told she could not display her work in the "Art of Women" exhibit last March. Initially, city officials told Fand her piece was inappropriate for children. Later, they told her it was banned because of its size and because it was submitted late.

The ACLU sued the city in August. As part of the settlement announced March 6, the painting was displayed at a March 16-31 Honolulu Hale exhibit featuring the art of women. "This is certainly a vindication of the principle that the government cannot censor art or speech based upon its content," said ACLU legal director Brent White.

Last year, Fand was one of several artists invited by the Honolulu County Committee on the Status of Women and the Mayor's Office on Culture and the Arts to display her paintings at the exhibit. Marylucia Arace, chair of the committee, said Fand's entry was submitted more than two weeks after the deadline and measured 5 feet by 3.5 feet. Arace said the largest size accepted for the exhibit was 18 inches by 24 inches. But Fand said larger paintings and works involving nudity were displayed at the show. Furthermore, Fand said, she and other artists submitted other paintings after the deadline that were featured in the exhibit. Fand said she believed her painting was banned based on "the controversial nature of the woman being Christ-like."

"I simply used a cross as a metaphor. It wasn't a commentary on Christianity," Fand said. "Even if I had some sort of religious parallel, I still think the city needs to remain objective regardless of what their interpretation was. It's really up to the observer to make that decision."

White noted: "The artist's portrayal of a nude woman does not make the censorship any more acceptable. In fact, the 'Art of Women' exhibit itself contained other paintings of nude women."

City officials decided to allow the piece to be displayed in this year's exhibit "in the interest of moving on," said city representative Carol Costa. As part of the settlement, the city was expected to pay the ACLU $5,000 in attorneys' fees and costs. The city also will suspend a part of its exhibit application form until it creates a policy that prohibits content-based discrimination.

"The First Amendment protects even controversial or offensive speech," White said. "Rather than risk offending certain individuals, the city deprived Fand of her constitutional rights and all of us of the opportunity to view the work of a fine artist and to make up our own minds about the piece." Reported in: *Hawaii Star-Bulletin,* March 7.

college

Galveston, Texas

A Texas community college granted tenure March 25 to a self-described Marxist professor despite protests from some local residents who said the professor is a threat to the area's conservative views. David Michael Smith, a government professor at the College of the Mainland, had written several guest columns for local newspapers, some of which questioned whether U.S. foreign policy played a role in events such as the September 11 terrorist attacks. His views had drawn the ire of some local veterans and other conservatives, one of whom is a former professor at the college. The former professor, Howard Katz, led an informal group of local residents who protested Smith's tenure bid.

"He stands for everything I can think of that we don't want our kids taught," said Ray Holbrook, a local resident who spoke at a meeting of the college's Board of Trustees. Homer M. Hayes, president of the 3,000-student college, said that Smith's opponents accused him of brainwashing his students and encouraging them to protest the war in Afghanistan.

"There was a distaste for his political views, which had built up over some time," said Hayes. "But what I've always heard from students is that he encourages a free exchange of ideas and, yes, that does include challenging them to think about their positions and where they stand."

Smith, whose tenure bid was supported by his departmental colleagues and by Hayes, said he does encourage students who oppose the war to protest, but denied that he brainwashes students. "The average age of our students here is 28," he said. "These students are grown and they are very much their own people."

The college's seven-member board unanimously voted to grant Smith tenure at its regularly scheduled meeting March 25, which was attended by both protesters and students who supported Smith. Hayes called the situation "a classic demonstration of why tenure exists."

But Holbrook, a veteran and retired county judge, maintained that it's "a classic example of what's wrong with these colleges and universities." He said he would try to encourage more people who he feels reflect the community's views to run for the college's locally elected board. "Schools are full of administrators and professors . . . who are opposed to American culture and the American government. I'm just saying that there ought to be a balance," he said. Reported in: *Chronicle of Higher Education* online, March 27.

etc.

Gainesville, Florida

The state of Florida said March 14 that a Gainesville man can keep his personalized license plate that says "ATHEIST." Prompted by complaints, the Department of Highway Safety and Motor Vehicles declared in February that the tag

was "obscene or objectionable," and ordered Steven Miles to ship it back. Miles called the American Civil Liberties Union instead. After a story about the recall appeared in the St. Petersburg Times, department higher-ups reversed a supervisor's decision to cancel the tag.

The DMV will now form a committee to review all tags "that fall into a gray area" before they are yanked, said spokesman Robert Sanchez. He said the "ATHEIST" tag would have qualified for committee review.

"I'm elated," said Miles, who received a call from a DMV official informing him that he could keep his tag. "Now I don't have to fight for what should be mine in the first place." The ACLU was ready to step into the fray if Miles didn't get to keep the tag on his 1994 Toyota Camry. Howard Simon, executive director of the ACLU of Florida, said the state's decision to yank the license plate was "absurd," and revealed a lack of standards.

"Apparently the standard is whatever happens to pop into the head of DMV at any particular time," Simon said. He said the committee should write and publicize "rational guidelines" for determining what qualifies as objectionable.

The complaint that sparked the DMV's initial disapproval was a typed letter dated February 11: "We are all Florida residents and we saw the Florida tag "Atheist' on a vehicle the other day. We are writing to say we find this tag offensive and we do not think it should be on a vehicle." It was signed by twelve people.

The DMV has canceled 57 tags in the last three years. Other than "ATHEIST," only one was theological in nature. It was "SONAGOD." Many of the others involved expletives or sex acts. The state has issued many tags with religious references. Carol Sakolsky of New Port Richey used to have one on her Toyota Celica that said, "JESUS." She sold the car three years ago and the tag went with it. Sakolsky thinks Miles should be able to keep his plate even though she doesn't agree with his viewpoint.

"If people can have "JESUS,' I guess he can have that, too," she said.

As news of the DMV's initial decision to cancel the tag spread across the Internet, Miles received an electronic show of support, much of it from atheists. Miles is an electrical engineer at the University of Florida and vice president of Atheists of Florida. One supporter who called Miles was Rob Sherman, a resident of Buffalo Grove, Illinois. He also has a license plate that says, "ATHEIST." When Sherman applied for the tag in 1987, he was turned down by the Illinois DMV. Sherman said he had to appeal to the secretary of state, who backed him.

Ellen Johnson, president of American Atheists in Cranford, New Jersey, a First Amendment public policy group, called the DMV's decision "an absolute victory." "This is about freedom of speech and freedom of conscience," she said.

Said Miles, contentedly: "Actually, we didn't have to fight very hard." Reported in: *St. Petersburg Times*, March 15. ☐

(censorship dateline . . .from page 121)

anti-terrorism laws. After a short hearing at a court in Istanbul February 13 the publisher attributed his acquittal to the presence in the courtroom of Chomsky, a professor of linguistics at the Massachusetts Institute of Technology. The linguist turned the case into an embarrassment for the Turkish authorities, at a time when they are pushing hard to be accepted into the European Union, by declaring that he was ready to be named a co-defendant. Some fifty reporters covered the opening of the trial.

The book, *American Interventionism,* published in Turkish last September, is a collection of essays by Chomsky on U.S. foreign policy. The prosecutor took issue with several short passages that accuse Washington of supporting human-rights abuses, including "intensive ethnic cleansing," committed by the Turkish government against Turkey's large Kurdish minority. The comments were drawn mostly from a lecture that Chomsky gave at the University of Toledo, in Ohio, last March.

Fatih Tas, owner of the Aram Publishing House, in Istanbul, faced a year's imprisonment on the charge of "propaganda against the indivisible unity of the Turkish state," a charge that has been used on a number of occasions against people who speak out in defense of the rights of the Kurds. But when the trial opened, the prosecutor, Bekif Rayir Aldemir, told the court that he understood that "the book did not seek to divide the Turkish nation" and that he accepted defense lawyers' demand for an acquittal.

Lawyers for the defense had requested that Chomsky be included in the case as a co-defendant, but the prosecution declined to charge him. The linguist said that he was willing to be a co-defendant "if it is a way of trying to protect the human-rights activists and others here, and to bring the freedom-of-speech issue and the Kurdish issue both to public attention." He added that he hoped the court's decision would "be a step toward establishing the freedom of speech in Turkey that we all want to see."

Tas said that despite his acquittal, he expected to be convicted on some of the charges he is facing in six other cases stemming from books he has published. Reported in: *Chronicle of Higher Education* online, February 14. ☐

(CIPA trial . . . from page 109)

the American Way has served as supporting counsel for the ALA challenge.

A key plank in the case against CIPA is the limitations of filtering software products such as Cyber Patrol, Smart Filter, Web Sense and N2H2, which are designed to block access to Web sites deemed harmful to children under 17, including more than 100,000 sites with sexually explicit content. Even the government's attorneys conceded that no product on the $250 million filtering software market can screen out objectionable Web sites without also blocking constitutionally protected sites, including those of *Sports Illustrated*, Planned Parenthood, and Salon.com.

The law's "terms, if you will, are a sham. Everybody knows you can't comply with its terms," American Civil Liberties Union Attorney Chris Hansen told the court.

U.S. District Court Judge Harvey Bartle appeared to agree. "Every witness has testified that the statute can't be applied according to its own terms," he said. Judges also seemed concerned that the decision about which of the eleven million Web sites deserved to be blocked is made by anonymous corporate executives who consider their choices to be vital trade secrets.

"The nameless and faceless," intoned U.S. District Court Judge John Fullam. "What right does the government have to require this kind of filtering system?"

CIPA, the third attempt by Congress to control online pornography, was theoretically designed to weather free-speech challenges by seeking only to cut off federal library funds rather than impose direct censorship restrictions. At stake for the nation's 16,000 public libraries are hundreds of millions of dollars in subsidies, such as grants provided under the Library Service and Technology Act,which are used to automate services and pay for Internet access. But the case also goes to the heart of the role libraries play as an open source of information in their communities.

The judges expressed empathy for communities that want to protect children from an aggressive commercial pornography industry intent on luring young customers. However, they also recognized the constitutional dangers of leaving censorship decisions to the local majority opinion.

Among the legal issues before the panel is whether judges can overturn CIPA without also branding unconstitutional the filtering systems already in place at libraries in Greenville, South Carolina, and Tacoma, Washington, which both provided evidence and testimony for the government's defense.

"There is no constitutional right to immediate, anonymous access to speech, for free, in a public library," Justice Department Attorney Rupa Bhattacharyya said in a spirited defense of CIPA that equated filtering software usage to the choices libraries make selecting books for their collections. "Even if you assume that libraries have a right to provide unfettered access to the Internet, they don't have a right to do so with a federal subsidy," she added. "The crux of this matter is whether or not Congress has the power to decide how to use its money."

The first attempt by Congress to control online pornography, the 1996 Communications Decency Act, was thrown out by the Supreme Court as an infringement of free speech. The second, the 1998 Child Online Protection Act, remains sidelined by an injunction with the U.S. high court due to issue a final opinion by midyear. Both would impose criminal penalties on violators.

The plaintiffs in *ALA* v. *United States* argued:

- CIPA abolishes a community's control of its library policies.
- Filters simply do not work, and CIPA does not protect children
- CIPA violates the Constitution because it makes access to funding and discounts for Internet use in public libraries contingent on accepting content and viewpoint restrictions on constitutionally protected speech.
- Poor communities and people with disabilities will be affected disproportionately if libraries are forced to choose between federal technology funding and censorship.

The law constitutes "classic prior restraint on speech," concluded Ann Beeson, staff lawyer for the American Civil Liberties Union.

Those in favor of the filtering law say its opponents mischaracterize the law and the software. Senator John McCain (R-AZ), who co-sponsored the bill, has said it "allows local communities to decide what technology they want to use, and what to filter out, so that our children's minds aren't polluted."

Over the past four years, more than $255.5 million has been disbursed to more than 5,000 public libraries through the federal E-rate program, which provides discounts on telecommunications and Internet-related technologies. The Library Services and Technology Act has distributed more than $883 million to libraries nationwide since 1998.

The trial began March 25 in the U.S. District Court of Eastern Pennsylvania in Philadelphia, with Candace Morgan, former president of the Freedom to Read Foundation, the legal defense arm of the ALA, as first witness. Morgan testified to her library's Internet-use policies and the mission of the public library to provide patrons with access to the information they want and need.

"Candy clearly brought home the point that libraries have not been waiting for the federal government to come up with a solution to concerns about inappropriate content on the Internet," said Judith Krug. "Since the library introduced computers and public Internet access in 1995, policies and procedures have been created, then re-evaluated as Internet use changed and grew."

Morgan testified that her library, the Ft. Vancouver, Washington, Regional Library, currently offers users three options: unfiltered access, filtered access and no access. Parents may make these access decisions for their minor children. Approximately 80 percent of library users select

unfiltered access, according to Morgan, compared to 19.9 percent for filtered and 0.1 percent for no Internet access. Complaints about Internet content made up less than one percent of all comments/complaints to the library.

"Libraries are local institutions—our policies are created locally, and more than 80 percent of funding is local," Krug added. "It doesn't make sense for libraries or their users to be forced to pay for commercial blocking technology—particularly when we know that it restricts legal and useful information and allows objectionable material to get through in significant amounts."

Other librarians testifying on the first day were Ginnie Cooper, library director of the Multnomah County, Oregon, Public Library; Sally Reed, former ALA Executive Board member and director of the Norfolk, Virginia, Public Library, now head of the Friends of the Library USA (FOLUSA); and Peter Hamon, director of the South Central Library System in Madison, Wisconsin.

"I feel we had a very strong beginning to this nine-day trial," said ALA President John W. Berry. "All of the librarians spoke loudly and clearly about the incredible use of library resources for education, recreation and entertainment—online and in print. We heard that even a well-wired community like Portland (OR) has only about half of households with home computers. Libraries help bridge this digital divide—particularly in poor and rural communities."

On the trial's second day, Dr. Geoffrey Nunberg, a linguist and expert on the Internet and automated classification systems, discussed his research at Stanford University and Xerox PARC that outlines the limitations of blocking software, concluding that precision is "well beyond the capability of the technology."

Judge Bartle said: "You not only have new pages added to the Web every day, you have (legal interpretations) changing. It's a moving target." Judge Fullam added that "by and large, under-blocking is not a constitutional issue. Over-blocking is."

Chief Judge Becker asked the Stanford linguist how difficult it would be to write a program that "blocks only websites that would have been judicially determined to be obscene." Nunberg replied, "That would be easy." But Judge Bartle added: "All someone would have to do is change it slightly and it would be no longer be what the court adjudicated as obscene."

Nunberg read through a catalog of sites that he verified had been wrongly blocked by filtering software. On his list: A "kitty porn" site featuring nude felines, Planned Parenthood's Teen Wire, the Sony Pictures site devoted to the comedy *The Opposite of Sex,* The Institute for Sex Research, and a page titled "Pen Is Mightier" because it compresses to include the word "penis" in the title. One erroneous block was a rant directed at Sen. Orrin Hatch (R-UT) criticizing federal legislation supporting library filtering.

"With more than 27 million Web sites, and the average Web page turning over every 44 days, the Internet is a very dynamic tool," said ALA President Berry. "Filters are technologically incapable of making the fine distinction between information that is 'good' and that which is 'bad.' They do not work today, and they will not work in the future."

Nunberg also testified to his research and writing in the magazine *The American Prospect.* In his article "The Internet Filter Farce," Nunberg explains how and why filters fail. (To see the article, go to www.prospect.org/print/V12/1/nunberg-g.html.)

The judges were visibly entertained by a list of terms that CyberPatrol appears to use to cull pages from the Internet to be included in its database—which includes categories not just for pornography, but for other areas like gambling and hate speech. The list was submitted to the court by Susan Larson, director of content for SurfControl, which sells CyberPatrol.

"It's a list of astonishing breadth, including words that seem to have no sexual suggestion," Chief Judge Becker said. "It's very neutral. It's got Democrats and Republicans. The number of categories here are astounding: Protestant, Catholic, Jews, Muslims," Becker said.

Also on the stand for the ALA was Christopher Hunter, a doctoral candidate at the Annenberg School for Communication of the University of Pennsylvania. Hunter has tested the effectiveness of four popular blocking software programs and analyzed more than forty other studies of blocking software. He testified to the overblocking and underblocking common in commercial software. (His master's thesis can be found at: http://www.ala.org/alaorg/oif/hunterthesis.html.)

"While many libraries offer a filtering option to their users, it clearly doesn't make sense to mandate their use in public libraries," Berry said. "Instead of relying on blocking technology, we must teach our children, not only the difference between right and wrong, but also how to use information wisely. There are no quick fixes. Parents and librarians need to continue working together."

Also taking the stand March 26 were: Dr. Joseph Janes, assistant professor at The Information School of the University of Washington in Seattle; Emmalyn Rood, a 16-year-old library user; Mark Brown, a Philadelphia Free Library user; Dr. Michael Ryan, director of the Annenberg Rare Book and Manuscript Library at the University of Pennsylvania in Philadelphia; and Dr. Jonathan Bertman, president and medical director of plaintiff Afraid to Ask.com, Inc. of Saunderstown, Rhode Island.

Rood testified that her attempts to research her sexuality in the public library before coming out as a lesbian would have been prohibited by smut-filtering technologies. The sixteen-year-old daughter of a public librarian, Rood, who lives in Portland, Oregon, is a plaintiff in the case.

"It would pretty much have an entirely detrimental effect," Rood said of CIPA. She explained that lesbian, gay and bisexual youth rely on the relative anonymity of the Internet more than their peers: "One of the main problems for sexual minority youth is the sense of isolation that we feel."

She said that three years ago, while exploring her sexual leanings, she found that the anti-porn software in her school mistakenly labeled sites like Lesbian.org as pornographic.

"It was incredibly helpful," Rood testified, describing the Internet sites and chat rooms she visited. "At that time of your life, you really feel isolated and alone, and it was something I didn't feel comfortable talking about."

Brown, a University of Pennsylvania graduate student, testified that he has social anxiety disorder and would not have been comfortable asking for information on cancer surgery and breast implants—information he wanted for his ill mother. He said he was able to get the information because he researched the Internet on a computer at the Free Library of Philadelphia's Central Library.

Among those who say their Internet sites would be hurt by the law is Bertman, a Rhode Island family physician and Brown University medical professor, who about five years ago started afraidtoask.com. A medical information Web site, afraidtoask.com also offers photographs, Bertman said, selected to the human body's "wide range of normal," including such things as size and shape of genitalia, hair and skin characteristics, and stature.

Bertman told the judges that his site has had 1.5 million pages viewed from 300,000 visitors and that user surveys have showed that most visitors are anonymous, 25 percent minors, and 25 percent young adults. "If a 14-year-old is concerned that a rash is possibly herpes," Bertman said, "I think it's unlikely that they'll go to the librarian and ask them to unblock a site for herpes."

The government began presenting its case on the trial's third day. Three witnesses took the stand: David Biek, of the Tacoma Public Library, who testified about his library's use of blocking software; Chris Lemmons, of eTesting Labs, who testified to his firm's testing of four popular filtering systems; and David Sudduth, of Greenville, South Carolina, Public Library, who testified about his library's use of blocking software

"Of particular note yesterday was the concession from the government's own expert witness that all filters necessarily overblock and underblock online materials," said ALA attorney Theresa Chmara of Jenner and Block. "This confirms the testimony of ALA experts, and confirms that legal and useful information is being restricted by blocking software."

Biek said librarians in Tacoma had established policies and procedures to remedy cases in which the software blocked something it shouldn't. He said filters had "made it possible for us to continue to deliver services effectively, including the Internet" and keep pornography away from patrons.

Biek contested arguments from librarians who testified that filters were inexact. He told the judges that a review of his patrons' Web habits found that 95 percent of the denied sites were blocked correctly. The library also can easily override the software's decision when a visitor or staff has discovered a site was wrongly blocked, he said. The Tacoma library also gives any patron whose site has been blocked the option of looking at a text-only version—even if it's a pornography site. That would be allowed under CIPA, he said.

Lemmons, of eTesting Labs, said tests of four filtering systems found the systems correctly blocked from nearly 83 percent to 98 percent of pornographic sites and incorrectly blocked from none to 7 percent of unobjectionable sites. He acknowledged to the judges, however, that when trying to "fool" the filters to tag inoffensive Web sites as pornography, testers "stayed away from the gray areas" and used straightforward sites that contained not a hint of racy content.

"Well, then, how good is the test?" asked Judge Bartle. "It may be a real easy test, depending on what you pick."

The government's next three witnesses, who appeared the following day, were: Beverly James and Norman Belk, of Greenville Public Library, who testified about their library's use of blocking software, and Blaise Cronin, dean of the School of Library and Information Science at Indiana University, who told the judges that even traditional indexing was imperfect.

"But in the rhetoric and controversy of this case," Cronin said, "filtering software is being held to a considerably higher standard than the labeling and cataloging tools that are already in effect."

"Once again, government witnesses conceded key points in the ALA's case," said ALA attorney Chmara. "Like Ft. Vancouver librarian Candace Morgan, Mr. Cronin testified that legal information should be freely available on the Internet in libraries for users."

After a weekend recess, the trial's second week began April 1 with three more government witnesses: Don Barlow, of Westerville, Ohio, Public Library, who testified about his library's use of Internet filters; Don Davis, of the University of Texas at Austin, who testified to the roles libraries play; and Cory Finnell, an independent consultant formerly employed by blocking technology firm N2H2, who testified to his testing of blocking systems used at Westerville; Greenville, and Tacoma public libraries.

"As have all of the technical witnesses before him, Mr. Finnell testified to the imperfection of blocking technology in differentiating legal and useful information from illegal speech," commented Chmara. "Mr. Finnell tested the systems used at all three of the libraries testifying for the government, and found significant overblocking."

The morning of April 2 began with the much-anticipated expert testimony of Benjamin Edelman, a computer expert and consultant who currently works for the Berkeman Center for Internet and Society at Harvard Law School in Cambridge, Mass., and concluded with librarian Mary K. Chelton.

Edelman provided expert testimony about his research and documentation regarding blocking programs. His

research documents 6,777 sites blocked by at least one of the four most popular blocking programs. He testified to the fact that these blocking programs persistently block a significant portion of content on the Internet that does not meet the programs' self-defined category definitions.

Chelton, an associate professor of the Graduate School of Library and Information Studies at Queens College/CUNY, testified to the purpose and function of libraries. Author of Excellence in Library Services to Young Adults 3: The Nation's Top Programs, published by ALA Editions, Chelton shared her experiences from more than twenty years of service in public libraries. "Young adults are interested in many topics that make adults nervous—things like anorexia, sex and divorce, to name a few—but this is normal curiosity and the very reason librarians must provide excellent service for young adults."

"The goal of collection development is to provide as much information as possible to meet the diverse interests of a community," OIF Director Krug commented. "Mary K. clearly showed the difference between the inclusive process of library selection of materials and the exclusive process of blocking technology. As a committed young adult librarian and advocate for youth services, Mary K.'s voice is an important one in this debate—which will ultimately affect public access for youth and adults."

Anne Lipow, a librarian and library consultant for more than forty years, also took the stand. She had reviewed certain Web sites Edelman found to be blocked and determined that they contain content of use or interest in a public library. She further testified about how the Internet has changed reference services and about the problems posed by CIPA's requirement that library users request permission to access blocked sites for "bona fide research."

On April 3, the government brought to the stand David Ewick, of Fulton County, Virginia, Public Library, who testified to his library's use of Internet blocking technology. In addition, Cory Finnell, who previously testified, was called as a rebuttal witness by the government. The ALA and ACLU did not call any rebuttal witnesses.

Final arguments were heard on Thursday, April 4. Attorney Paul Smith of Jenner and Block represented the ALA in closing; arguments from both sides lasted about three hours.

The ALA legal case centered on four main points:

- Filters don't work. Blocking technology restricts legal and useful information, while letting through illegal materials.
- Because blocking technology pervasively and necessarily restricts legal information, CIPA is unconstitutional.
- Libraries should not be forced to choose between funding and censorship. Library users, particularly those in poor and isolated communities, will be the losers in this equation.
- CIPA abolishes local decision making. The bulk of library funding is local, and libraries are governed by local agencies that set policies and procedures at the community level. CIPA demands these institutions accept a federal mandate in return for vital technology funding.

"There is much at stake in this case. Librarians play a unique role in our society: we bring people together with the information they need and want," said ALA President Berry. "Librarians do this by making sure libraries have information and ideas across the spectrum of social and political thought, so people can choose what they want to read or listen to or view. The CIPA mandates are counter to the mission of our public libraries."

Proposed findings of fact and legal briefs were due to the court by April 11, and each of the parties have one opportunity to respond to these findings and briefs by April 18. The judges will likely rule by early May so libraries will have time to prepare before E-rate and LSTA deadlines fall. The ALA will continue to post updates as they become available at www.ala.org/cipa. Reported in: www.ala.org/cipa; *New York Times*, March 25, 31; *Philadelphia Inquirer*, March 27, 29; *Wired News*, March 27. □

(from the bench . . . from page 128)

preclude legislators from drafting a statute that could avoid the constitutional problems of the current law.

Justice Janice Rogers Brown concurred separately to make clear that the court's ruling isn't meant to indicate that "crime does pay." Victims can still file civil suits to recoup damages, she said, courts can compel restitution from sources including but not limited to a criminal's storytelling, and statutes can be drawn to compensate victims without violating free speech.

"The First Amendment protects schlock journalism as well as great literature. Thus, Mr. Keenan has every right to tell his story," Brown wrote. "That does not mean the First Amendment guarantees he can keep the money. And therein lies the tale."

Keenan's lawyer, Stephen Rohde, expressed delight that the ruling found the law violated both the state and federal constitutions. "We believe it, therefore, is insulated from any future appellate review because of the independent state grounds of the California Constitution," he said. "However, I believe the U.S. Supreme Court would readily agree with this decision."

Rohde also said he believes that on remand the lower court will dismiss Sinatra's complaint and lift the injunction placed on Keenan's plans. "Columbia Studios," he said, "will be free to pay Barry for the movie deal."

Richard Specter, warned the justices at oral argument that if they found the law unconstitutional, it would be "a death knell for victims' rights statutes." Reported in: *The Recorder*, February 22. □

Support ALA's CIPA Legal Fund!

"Filters are contrary to the mission of the public library, which is to provide access to the broadest range of information for a community of diverse individuals."

- John W. Berry, ALA President

In line with our President's sentiments, the ALA filed suit in United States District Court for the Eastern District of Pennsylvania in Philadelphia on March 20, 2001.

ALA is partnering with state library associations, local libraries and library users to combat the Children's Internet Protection Act (CIPA) and protect intellectual freedom and equity of access. The funding necessary for this challenge is substantial. **Please help us make this landmark case for libraries and library users a success by contributing to the CIPA Legal Fund today.**

Please mail checks, payable to the American Library Association, to ALA Development Office, 50 E. Huron St., Chicago, IL 60611, and earmark your important contribution for the "CIPA Legal Fund." Your generosity and involvement will make a significant impact.

☐ $50 ☐ $75 ☐ $100 ☐ Other Amount_____

Name: _____

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For additional and current information, please visit ALA's CIPA Web site at www.ala.org/cipa/.

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