

Re: Freedom to Read Foundation (FTRF) Board Meeting of 2021-01-21

Liaison Notes, Prepared for Social Responsibilities Roundtable meeting of 2021-02-25, 11am CST. *[Revised -03-21]*.

Drive source for FTRF Meeting documents (titled "2021 Midwinter Meeting"):
<https://drive.google.com/drive/folders/1iqqN6NuXzHnxtFaG9QfIN-eEJXSK0N74>

Barbara Stripling (President)

- Agenda: "FTRFMW2021Agenda_Attendee Version" (in Drive)

VI. Old Business

Theresa Chmara (Gen. Counsel, FTRF):

Reference documents:

- "Exhibit A BoardMemoJanuary2021" (Theresa's full report for Annual Board Meeting) (in Drive)
- The Agenda also includes shorter summaries of cases with some description not in "Exhibit A..."

[For details, such as on procedural and legal process, and who joined/wrote amicus curiae briefs that FTRF joined, please see the full report.]

Litigation

1. *Ex Parte Jones*: Revenge Porn ban with First Amendment implications. TX criminal statute purportedly intended to ban "revenge porn".

The law was challenged on First Amendment grounds by the defendant who faced charges for violating the statute by sending images), and the case is now on appeal.

Theresa noted that FTRF would support a revenge porn statute that was not overbroad. But FTRF joined an amicus curiae brief arguing the Texas statute violates the First Amendment since it fails on the strict scrutiny standard that should be used to analyze the statute. Precedents in case law on freedom of speech have used that standard, but the lower court used a more lenient standard. Strict scrutiny would require the govt. to prove that it has a compelling interest in having the restriction; that the law be narrowly-tailored in how it restricts free speech, and that there were no less-restrictive alternatives. FTRF argued that the Texas legislature could not meet that standard. This law: 1) has no *intent* or *knowledge* requirement, and 2) there is no exception for images that have newsworthy, historic, artistic, or educational merit.

The lower court and the intermediate court both allowed the more lenient standard that the Texas legislature argued for, and that is what is currently being appealed – since Nov. 2018 - at the highest court from criminal cases, the Texas Court of Criminal Appeals. [This case is important because if the ruling stands, Texas could potentially ban many images that have long-established value.]

2. *U.S. v. Moalin*.

PRIVACY case; First Am and Fourth Am. FTRF amicus brief: phone metadata should not be collected by or provided to the govt without a search warrant

In an earlier case, *Smith v. MD*, the US S. Ct. held that if a 3rd party received information, then there was no expectation of privacy. The argument for warrantless collection of phone metadata in *Moalin* was based on the fact that the metadata was also received by a 3rd party.

After some four years, the 9th Circuit Court of Appeals ruled on the case, Sept. 2, 2020. The 9th Circuit relied on and even quoted directly from the brief that FTRF joined. FTRF made a real impact by asserting that there should be no difference between content and metadata as to whether there needs to be a search warrant. Among other things, FTRF argued that you can't use phones anymore without metadata being created [by a 3rd party]. The case is currently pending a petition for rehearing at the 9th Circuit. Theresa notes it is yet to be seen whether they petition for cert at the US S. Ct.

3. *PEN American Center v. Trump*. ...a.k.a., *PEN America v. Trump* -- <https://pen.org/pen-america-v-trump/>

[Founded in 1922 as PEN American Center; now PEN America, its motto is: "Protecting free expression and celebrating literature".]

FREE SPEECH and STANDING (or the legal basis for bringing suit). PEN Am argued then-Pres. Trump violated the First Amendment by retaliating in a variety of ways against or otherwise constraining speech critical of him or his administration. Govt. moved to dismiss on ground that PEN Am did not have associational or organizational standing to bring the suit.

FTRF joined an amicus brief focusing on PEN Am's standing, arguing they had plausibly alleged a sufficient injury-in-fact for standing as an organization. The brief also addressed how it would harm future efforts by non-profit and NGOs when they might sue on behalf of members' and others' First Amendment rights.

The case is important to us because for example, libraries and librarians often don't have the ability to bring lawsuits, so to the extent that, say, FTRF could represent them, standing would be important. The inauguration likely has rendered this case moot (as Trump can no longer revoke security clearance and press passes), but it is still pending on that issue of standing at the 2nd Circuit Court of Appeals, and although Theresa thinks it is unlikely, they could still rule on that issue even if they moot the case.

4. *Gibson Bros., Inc., et al. v. Oberlin College, et al.*

See also local news articles on the case:

<https://oberlinreview.org/18970/news/jury-rules-for-gibsons-assigns-44-million-in-damages/>

<https://oberlinreview.org/18975/opinions/media-coverage-of-gibsons-verdict-misses-the-mark/>

FIRST AMENDMENT / DEFAMATION and the standards for proving it in court.

This Ohio case stems from protests that were triggered by a Nov. 2016 confrontation between an employee of Gibson's Food Market and three African American students of Oberlin College, over the clerk's accusations that the students had fake IDs and that one of them tried to seal bottles of wine. The students did plead guilty to misdemeanor charges, but the Oberlin College student government organized a protest, and passed a resolution and posted on campus a flyer urging a boycott of the store and claiming that Gibson's had racially profiled the students and had a history of racism. The aspect of the case that seems most important to our profession is the redistribution of the student group's allegedly libelous flyer by a Dean of Students to a journalist.

Gibson's sued for defamation and at trial, the court instructed the jury that the defendants Oberlin College and the Dean of Students, could be found liable based merely on negligence, and the jury found them liable for defamation. [(detail in

news articles). In June, 2019, the jury awarded Gibson’s \$44 million, including \$33 million in punitive damages.] [Theresa notes that that was reduced by statute and after attorney fees, the College has been found liable for some \$31 million in damages to Gibson’s.]

FTRF joined many others in an *amicus curiae* brief, arguing based on precedents in Ohio law, that because the College and Dean of Students were redistributors of material written by others, the higher standard of actual malice must be applied rather than negligence. Actual malice requires either knowledge that the information is false or reckless disregard of the truth. *Amici* also argued that “requiring redistributors such as booksellers, librarians or newspapers to independently verify all of the speech generated by others that they regularly redistribute would lead to ‘apprehensive self-censorship’” – and that that would offend the First Amendment.

Oral argument was held in Nov. and the appeal at the intermediate Ohio appellate court is pending.

5. *Bethany Austin v. State of Illinois*.

Case files:

<https://www.scotusblog.com/case-files/cases/austin-v-illinois/>

This is another “revenge porn” case having some common ground with the Texas case, *Ex Parte Jones*. Bethany Austin was convicted under an Illinois statute that criminalizes the nonconsensual dissemination of private sexual images, for sending an account of her breakup with an ex to family that included nude photos of her ex. The IL Supreme Court upheld her conviction as a content-neutral time, place, and manner speech restriction that required applying merely an intermediate (rather than strict) scrutiny standard of review.

Austin filed for *certiorari* with the US Supreme Court, and FTRF joined an *amicus curiae* brief, arguing that the state court erred critically in three ways:

- 1) Holding that the standard of review for content-based restrictions on free speech should be intermediate scrutiny, rather than strict scrutiny where privacy issues are at stake;
- 2) Concluding that strict scrutiny does not apply if the restriction applies to the time, place, and manner of speech, despite the fact that the statute plainly is content-based; and
- 3) Upholding the statute despite the fact that it fails to require a finding of knowledge and malicious intent, which must be elements of the criminal offense of nonconsensual dissemination of intimate images.

The S. Ct. denied cert. in October (Theresa said, “unfortunately”), so this case is over.

VII. New Business.

A. New Litigation.

6. *Christopher Porco et al. v. Lifetime Entertainment Services*.

See also:

Reporters’ Committee for Freedom of the Press, with link to brief in support of Lifetime (from 2017):

<https://www.rcfp.org/briefs-comments/porco-v-lifetime-entertainment-services-llc-0/> (actual brief starts on p. 8)

Content Restriction. Porco was convicted of murdering his father and attempted murder of his mother, and is serving a term of 50 years to life. Lifetime created a dramatized TV version of the story, and Porco sued them under a NY statute prohibiting the use of a person's name, portrait, picture, or voice if the use is nonconsensual and for "advertising purposes or for the purpose of trade." Porco alleges that Lifetime used his name without consent and that because the film is not "substantially fictionalized", it is not protected by the "newsworthiness" defense.

Lifetime's current (pending) appeal is based on the trial court's denial of summary judgment for Lifetime, and its holding that a creative work violates the rights of people depicted if the work is "materially and substantially fictitious" – even if the work is presented as a fictionalization [as Lifetime did in this case].

FTRF has joined an *amicus* brief on behalf of Lifetime. It points out First Amendment harms that upholding the trial court ruling would cause. It would significantly expand NY's limited right of publicity and would chill the creation and publication of much First Amendment protected expression, because it's not possible to get consent in every case. So, this threatens biographies and other literary nonfiction such as Truman Capote's *In Cold Blood*, graphic novels like John Lewis' *MARCH*, and photographs and visual works depicting real people. It would also chill the First Amendment rights of those who distribute those works to the public and those who read, listen to, and watch creative works.

The appeal is pending at the intermediate NY appellate court.

7. *FCC vs. Prometheus Radio Project*.

Also see: Cornell Law School's Legal Information Institute (LII): <https://www.law.cornell.edu/supct/cert/19-1231>

Oyez.org, transcript of oral arguments last month: <https://argument2.oyez.org/2021/fcc-v-prometheus-radio-project/>

SCOTUS Blog, report on the oral arguments:

<https://www.scotusblog.com/2021/01/argument-analysis-justices-sympathetic-to-fcc-in-media-ownership-dispute/>

Diversity: broadcast media ownership by women and people of color.

This lawsuit challenges FCC rules that address the consolidation of media ownership and the agency's conclusion that the rules would not impact its longstanding goal of promoting broadcast media ownership by women and people of color. The Third Circuit found that the FCC's decision was arbitrary and capricious. The US Supreme Court granted cert. to review that decision.

FTRF joined an *amicus curiae* brief, urging the Court to uphold the Third Circuit's decision, to expand and support media ownership by members of historically-disadvantaged groups. They argued that the FCC relied on flawed data, and did not provide enough of an explanation of the data they relied on, in their claim that there would not be an impact on media ownership by women and people of color.

Now on appeal before the US Supreme Court; oral arguments were heard on Jan. 19th. Justices, including not just conservatives, but also Justice Kagan, reportedly seemed sympathetic to the FCC in being the one, rather than the courts, to decide how to balance its goals that include other things besides this diversity issue.

With the new FCC leadership, there could be changes on this.

B. Trends in State and Federal Legislation.

Reference document: “2021masterstatelegeJan” (in Drive, within “Legislative Report” folder)

Generally, here are some trends:

We are seeing legislation that is intended to end the use of or access to research databases such as EBSCO and Gale, that are available to K-12 students. Those bills are pending in UT and IN.

Bills that are aimed at stripping both public and school librarians of their legal defenses to prosecution for distributing materials that are deemed to be harmful to minors or obscene to minors. Intended to chill the library workers in their provision of materials to minors, particularly LGBTQ materials.

There is an enormous influx of laws that would harm the First Amendment Right to Protest – criminalizing protest activities. Those are listed under the Civil Liberties heading (on the “2021masterstatelegeJan” document).

We are also seeing a number of model bills. One set of bills, primarily introduced by conservative legislators, to “stop social media censorship”, intended to address their perception that conservative speech is disproportionately censored on or by social media platforms. Legislation requiring mandatory filtering of internet devices to address the scourge of pornography; under the rubric of preventing human trafficking => “Human Trafficking Prevention Act”.

Then we are seeing some bills that quite bluntly are intended to advance transgender discrimination in a number of states.

These are not new trends. We will see where they go.

C. Media Coalition Report

David Horowitz, Exec. Dir.

Focusing on two particular bills that really target libraries, and primarily what materials minors can access.

1. FL Senate Bill 410. 2 parts:
 - i. Would change the legal definitions in FL for 1) *child pornography*; 2) *obscenity for minors* and 3) *obscenity for adults*.
 1. *child pornography*. Current Supreme Court standard limits this to images of actual minors who are nude and displayed lasciviously, engaging in sexual activity. This bill would change that to “images and text” – so, any discussion of minors engaging in sexual activity, or any discussion of the bodies of minors would then become illegal. So, sexual health books that discuss changes in minors’ bodies; much YA literature that discusses coming of age; initial sexual experiences; exploring one’s own body; (etc...) – Those materials would then become child pornography.
 2. *obscene* (or what’s called *harmful to minors*). Currently, the S. Ct. has a 3-part test: material that: 1) appeals to the prurient interest of minors; 2) is patently offensive under contemporary community standards for minors; 3) lacks serious value when taken as a whole. The change in this bill would remove the serious value prong; so again, any discussion of sexual activity – and it would not have to be with minors, so, e.g., a romance novel, could be deemed inappropriate since even though it could be deemed a decent book, that has value – that would no longer be a safe harbor.
 3. *obscene (to adults)*. Rather than judging material as to adults, it would be judged, the 3-part test would be applied to materials as to minors, which means a broader amount of material would be illegal than would be when dealing with adults.

- ii. Every school library, reading list, curriculum, would then have to purge any material that fit within these definitions, and certify each year that they had removed any such content.
 - b. These changes would be in the criminal code. So sale or possession of “child pornography” is illegal under the criminal code. Any library, bookstore, etc. could be liable criminally under this bill. Obviously, this bill is unconstitutional, but that does not always stop states from passing these things.
 - c. Media Coalition will vigorously oppose this bill, and if it were to pass, MC would almost certainly bring a challenge, and would hope that FTRF would be a plaintiff in such a challenge, along with booksellers, etc.
2. UT Senate Bill 38. Attack on databases. [Hard to understand these. (We’ve seen this in CO and OH as well. Trying to drive databases out of libraries.) Kids can go on Google and find bad stuff. They’re looking for political pressure points. 15 parents can put a lot of pressure on a local school district, and that’s what was done in CO.] This bill would allow the UT Education and Telehealth Network (UETN), which buys the rights to the database statewide and then gives access to individual school districts or individual libraries, to withhold payments for the databases or providers of internet access in libraries or schools, if they fail to block obscene material, or prevent students from accessing or sharing such material. It is very unlikely that any UT library has material that’s “obscene” for adults, even in UT. This is due to the history of court decisions about what obscenity for adults is. It’s very explicit, specifically sexual content.

In a discussion on whether the bill should go forward, at a hearing in Dec., the woman who presented her PowerPoint presentation said the material she found was so bad she could not show any of it, but that it included bestiality, incest material; and that you can go to sites where you can purchase children to have sex with them – and worse (?). One legislator said that jail was not enough – that the state should “draw and quarter” the perpetrators. So, this bill is likely to pass. It is supported by the chair of the UT Senate Judiciary Committee; the sponsor is a member of the UT House Judiciary Committee. Both of these legislators routinely sponsor what they would call “anti-porn” legislation. Maybe the only thing in our advantage is they are both lawyers, and fairly pragmatic in many ways about considering constitutional issues.

Media Coalition is trying to make changes to the bill that will insulate it from potential political pressure – so that those behind this bill can’t put so much pressure on UETN; so that they can’t politicize the process.

Here are some key changes that have been drafted by David (with Deborah):

- 1) The database companies or the internet provider is given notice of the nature of the violation, and provided all the evidence. This avoids the tactic of claiming that really bad stuff was found – “but we can’t show it to you.” Or, “We found it, but we can’t replicate how we got it, but here it is.” So there’s no way to show it was in a database, or accessible through a database.
- 2) To have an opportunity to present evidence to show that the material is not obscene. Again, so it is held to a legal standard, and not the “old-fashioned ‘I-know-it-when-I-see-it’ standard”.
- 3) An opportunity to cure if there is a violation, or to mitigate the damages by curing any problem; and
- 4) An opportunity to appeal to a court of law; so you are before a judge in a legal proceeding, rather than a political proceeding that this could wind up being.

We have given these changes to some local library groups and they are going to talk to some legislators; There is a feeling they are open to some changes – some room for compromise.

If we can present this as due process on a contract issue rather than a high-minded free speech argument, we might get further.

This UT bill is especially of concern as there is a nearly-identical bill that has been introduced in IN. So this is likely being shared, and may become a model.

Regarding Stop Social Media Censorship bills that bar websites or platforms from removing material under their terms of use, postings by users that are labeled “hate speech” – that violate their terms of service:

There was a hearing on one of these bills in ND yesterday [would be Jan. 20th], Media Coalition did submit a memo in opposition explaining why it is unconstitutional; why the editorial control goes to the website or to the platform to decide “we want to publish this speech” or “we don’t...”; the state can’t bar you from removing it, any more than they can bar a newspaper from printing a correction or taking down a story that they think they got wrong. Those are editorial decisions. It’s the same if you have a library website that allows comments, or allows people to ask questions or lets people recommend books, and somebody puts something up that’s obviously racist and you want to take it down, this would impact libraries. So we submitted a memo in opposition explaining those legal arguments, on letterhead and it does mention the members. So FTRF (along with MC) is on the record in ND as explaining why this bill is unconstitutional and why the legislature should not pass it.

- There are already about 10 of these bills and we are still (as of Jan.) early in session; so we are likely to see up to 25 of these bills, some will be multiples in single states.
- There is a lot of anger on the right about the previous president losing control of his Twitter feed and his Facebook page; so this a very real cause célèbre for Republican legislators.

D. Developing Issues Committee

(Ray James) Reference document:

“Developing Issues Report January 2021” (in Drive, within “Committee Reports” folder)

There are seven provocative issues outlined, and much overlap with SRRT goals.

E. Task Force on Intersection Between Intellectual Freedom and Social Justice

(Loida Garcia-Febo and Jim Neal) -- Reference document:

“IF and Social Justice Task Force report January 2021” (in Drive, within “Committee Reports” folder)

Barbara: I believe Liaisons are our strength in pulling in diverse voices. I would love it if those of you who represent all different areas of the Association will send comments and questions and feedback and ideas to Jim and Loida, or you can route them through me if you prefer and I will certainly forward them. Find out what members of your particular area are thinking about in terms of the intersection of intellectual freedom and social justice. Let’s get all the voices on the table so that the Task Force has a really robust picture of all of the membership, and not just the few that we may know ourselves. So, please, start the conversation with your liaison groups, and then bring that back to us; it’s a two-way conversation – not just us to you but also you to us.

Martin Garner: The Intellectual Freedom Committee is also pulling together a working group. We had our first meeting last week, and currently we have representation from the IFC, from Committee on Professional Ethics, from the National Associations of Librarians of Color. There may be some business that happens [happened] at Midwinter that ends up in some work for that group, and so once we know if our charge is expanded, I will update the Foundation so that we can make sure that these groups are working in parallel, since we have some of the same people working on the same groups. . . It is heartening to see these conversations and it’s so long overdue. I hope that we can catch up in an appropriate way without leaving any values behind.

New Membership category:

Barbara reported that the Membership Committee wanted to add a new membership category for Retired and Furloughed employees, with zero membership dues. Adding a new category required a change in the FTRF bylaws, so there was a special Board meeting on Nov. 30th to vote in the new category.

Membership Renewal for FY 2021 year:

Reminder to members to update membership for the next year, by March 31st.

Renewal notices have gone out, and reminder emails have also gone out.