FREEDOM TO READ BRIEFS

Fiscal Year 2002-2003

Freedom to Read Committee
Association of American Publishers

The First Amendment is not an abstract legal concept for publishers. Threats to free speech such as government-mandated "solutions" to the problem of media violence, legal actions to hold publishers and other content providers liable for criminal acts "inspired" by their works, and high-stakes libel and defamation actions seeking to discourage criticism of public figures, have a profound impact on the way publishers do business. In attempting to bring to light information and ideas that will inform public debate on important issues, publishers often find themselves on a collision course with the inevitable desire of those in power to shield their actions from public scrutiny. Charged with promoting and protecting publishers' First Amendment interests, the AAP Freedom to Read Committee, has a full agenda.

FREE SPEECH AND THE PATRIOT ACT

This has been an especially difficult year for civil liberties in general and for the First Amendment in particular. The Freedom of Information Act, open government, and the right to dissent have all come under attack in the government's war on terrorism. In last year's edition of the *Freedom to Read Briefs,* we noted with concern powers granted to the federal government under the USA Patriot Act, including the ability to obtain library and bookstore records under a gag order and with virtually no judicial oversight. These provisions, along with the Attorney General's blatant directive to federal agencies to resist Freedom of Information Act requests, and the Executive Order undermining the public's right to access presidential papers and tapes, have combined to seriously chill the climate for First Amendment rights. To help raise awareness of these concerns, the Freedom to Read Committee prepared a white paper last spring for distribution at the annual conference of the American Library Association and at other gatherings. Entitled "The Patriot Act and the First Amendment: Why the Book Community is Concerned," the statement lays out the problem and urges members of the book community to express their concerns to Members of Congress.

Last summer the Freedom to Read Committee joined authors and booksellers in a letter to the Chairman and Ranking Democrat on the House Judiciary Committee supporting their efforts to exercise legitimate Congressional oversight over the Patriot Act, and harshly criticizing the

Justice Department for its refusal to respond to a Congressional inquiry regarding the number of times the Act had been used to force bookstores and libraries to reveal confidential records.

A ray of hope dawned on March 6, 2003, with the introduction of the Freedom to Read Protection Act (H.R. 1157) by Congressman Bernie Sanders of Vermont. The bill would exempt libraries and booksellers from Section 215 of the Patriot Act. Law enforcement authorities would still be able to obtain these records, but under a higher standard of judicial oversight**.**

THOMAS BOWDLER FINDS A HOME IN NEW YORK

The spirit of Thomas Bowdler, the 19th Century bluenose whose editions of Shakespeare were cleansed of everything "which cannot with propriety be read aloud in a family," has apparently taken up residence in the New York State Education Department. In the spring of 2002, the diligence of a dedicated parent brought to light the fact that literary passages used on statewide Regents Examinations (required for high school graduation) were being routinely altered and expurgated to conform to amorphous "sensitivity guidelines." Almost worse than the censorship itself, which was done without permission from authors or publishers, was the fact that students taking the exams were unaware that the passages had been changed and that the alterations had often stripped the literary works of their meaning. Among the authors whose writing was "improved" by the sensitivity police (who removed all references to sex, nudity, religion, race and even the mildest profanity) were Anton Chekhov, Isaac Bashevis Singer, Annie Dillard, and Elie Wiesel. In a work by Singer about growing up as a Jew in pre-war Poland, the censors removed all references to Jews and Poles! As a Columbia University professor pointed out, altering literary texts without indicating the works were abridged "represents a kind of academic dishonesty for which Columbia students are subject to dismissal."

AAP's Freedom to Read Committee joined with other free speech and civil liberties groups and concerned parents in a letter to New York's Commissioner of Education, calling for an end to the practice. In response to the letter and the resultant media attention (including a page-one story in the Sunday *New York Times*), education officials promised an immediate end to literary censorship on the Regents Exams. Sadly, public pledges and protestations notwithstanding, censored passages continue to appear on the exams. New letters of protest were sent in early 2003, and members of the New York State legislature have been asked to hold public hearings on the issue of accountability by the Board of Regents, the body charged with governance of all educational activities in the state. As author and columnist Anna Quindlen wrote: "…the saddest thing here [is] not the betrayal of writers by bureaucrats, but the betrayal of kids by educators."

DEVELOPMENTS IN THE COURTS

Much of the Committee's work involves First Amendment challenges in the courts. Among significant developments this year:

- In legal challenges coordinated by Media Coalition, federal courts in New York, New Mexico, Virginia, and Arizona have ruled that state statutes banning harmful to minors material on the Internet violate both the First Amendment and the Commerce Clause of the Constitution. This year another state statute in Vermont was struck down. AAP has been a plaintiff in all but the Virginia case, and in 2002 joined in challenging statutes in Ohio and South Carolina. The Ohio case is of particular interest because the challenge extended to Ohio's definition of harmful to minors. As our complaint pointed out, the Ohio definition, the most sweeping in the nation, could conceivably deny high school students the right to read such books as *Dead Man Walking*, and *The Hot Zone*. A federal judge agreed and in September ruled that the definition was overbroad and unconstitutional.

- Over the past several years, AAP has joined in a series of *amicus* briefs supporting Joyce Meskis, owner of Denver's Tattered Cover Bookstore, in her refusal to turn over customer purchase records to law enforcement officials in connection with a drug investigation. In a landmark decision in April 2002, the Colorado Supreme Court vindicated Ms. Meskis' two-year legal battle, ruling that search warrants targeting bookstore records represent such a serious threat to First Amendment-protected rights that they should only be issued after an adversarial hearing and judicial determination that the law enforcement needs outweigh the constitutional harm.

- In February 2003, the Freedom to Read Committee took the lead in pulling together publishers, booksellers, journalists, and authors to provide *amicus* support in the U.S. Supreme Court for the American Library Association's legal challenge to the Children's Internet Protection Act (CIPA). Our brief asks the Supreme Court to affirm the ruling by a panel of three federal judges that CIPA, which mandates the use of blocking software on all public library computers as a condition for receiving federal funding including e-rate discounts, is unconstitutional.

- In March 2003, AAP was one of a dozen national groups who joined in asking a federal judge in Arkansas to overturn the action of a local school board which had, on the complaint of one parent and without following review procedures, removed the Harry Potter books from school libraries. Although there have been numerous challenges and attempts to ban the Potter books around the country (they continue to top the ALA's list of banned and challenged books), this is the first time that a Harry Potter book ban has reached the courts.

- AAP joined with media organizations and journalists' groups in asking the U.S. Supreme Court to overturn a ruling by the California Supreme Court in *Nike v. Kasky*, which held a corporate public relations campaign, including statements and letters to the press, to be commercial speech which does not merit the highest level of First Amendment protection.

- On April 17, 2002 by a vote of 6 to3, the U.S. Supreme Court found the CPPA, which broadened the definition of child pornography to criminalize images of adults who "appear to be" minors or images created totally by computer, to be unconstitutionally overbroad and so far-reaching that it could chill mainstream works of artistic merit. AAP had joined with ABFFE, the Freedom to Read Foundation, and others in an *amicus* brief which, while stressing our concern about the underlying serious issue of sexual abuse of children, discussed the constitutional dangers which the Supreme Court ultimately recognized.

A LITTLE HELP FROM OUR FRIENDS

The Freedom to Read Committee works closely with allied organizations, notably the ALA Office for Intellectual Freedom, the American Booksellers Foundation for Free Expression, PEN American Center's Freedom to Write Program, and the Association of American University Presses. AAP is a founding member of Media Coalition, a group of trade associations working together on censorship issues. Working with these First Amendment allies, the Committee fulfilled its educational mandate with a series of outstanding programs in 2002:

- In April, at the CUNY Graduate Center in Manhattan, the Committee joined with PEN American Center and the Authors Guild Foundation to co-sponsor a program on the Bush executive order restricting access to presidential papers and tapes. Featured panelists were Richard Reeves, Robert Caro, and Arthur Schlesinger, Jr.

- In May, at BookExpo in New York, the committee joined with ABFFE and the Freedom to Read Foundation to co-sponsor a program on the impact of the 9/11 terrorist attacks on freedom of speech with columnist Nat Hentoff, *Harper's Magazine* publisher John R. (Rick) MacArthur, and authors Barbara Kingsolver and Michael Moore on the panel.

- In June, the Committee joined with ALA's Intellectual Freedom Committee and ABFFE to sponsor a program at the ALA Annual Conference in Atlanta. Drawing inspiration from the heated battle over whether *The Wind Done Gone* was protected parody or copyright piracy, the program was entitled "Barry Trotter Done Gone: The Perils of Publishing Parody." Panelists were Michael Gerber, author of *Barry Trotter and the Unauthorized Parody*, Wendy Strothman (Houghton Mifflin), publisher of *The Wind Done Gone*, and Freedom to Read Committee counsel R. Bruce Rich, (Weil Gotshal & Manges).

LOOKING AHEAD

Working to insure that American publishers can operate in a truly free marketplace of ideas, the Freedom to Read Committee has gained a reputation as one of the leading First Amendment advocacy groups in the nation. The Committee will continue its efforts in the coming year to serve as the publishing industry's watchdog on real and potential First Amendment problems, as

an advocate for publishers' interests in the area of intellectual freedom, and as an educational on resource free speech issues.

*FREEDOM TO READ COMMITTEE MEMBERS, COUNSEL AND STAFF

The following served as regular members of the Committee during
Fiscal Year 2002/2003

Jane Isay (Harcourt, Inc.)-*CHAIR*; **Susan Amster** (Harcourt General); **Brenda Bowen** (Simon & Schuster Children's Books); **Jean Casella** (The Feminist Press at CUNY); **Lisa Drew** (Scribner); **Phyllis Fogelman** (Penguin Putnam Books for Young Readers); **Roy Kaufman** (John Wiley & Sons)**; Heather Kilpatrick** (AOL Time Warner Book Group); **Nancy Miller** (The Ballantine Publishing Group); **Jennifer Pasanen** (Scholastic, Inc.); Emily **Remes** (Simon & Schuster); **Andre Schiffrin** (The New Press); **Beth Silfin** (HarperCollins Publishers); **Mark Sirota** (Reader-s Digest); **Linda Steinman** (Random House); **Suzanne Telsey** (The McGraw-Hill Companies); **Jane von Mehren** (Penguin Books); **Marlie Wasserman** (Rutgers University Press); **Susan Weinberg** (HarperCollins Publishers); **Tina Weiner** (Yale University Press)

Counsel: **R. Bruce Rich**, **Jonathan Bloom** (Weil Gotshal & Manges LLP)

Staff: **Judith Platt**, Director, Communications/Public Affairs, Freedom to Read