

BANNED BOOKS WEEK BRIEFING PACKET

September 27- October 4

Kristin Fahrenholz

ACLU Law Clerk

September 26, 2008

What is Banned Books Week?

Observed since 1982 during the last week of September each year, Banned Books Week celebrates the Freedom to Read. This year for its 26th anniversary, it will be held September 27-October 4, 2008. This American Library Association (ALA) event reminds Americans not to take this precious democratic freedom for granted.

Banned Books Week celebrates the freedom to choose and the freedom to express one's opinion even if that opinion might be considered unorthodox or unpopular. It also stresses the importance of ensuring the availability of those unorthodox or unpopular viewpoints to all who wish to read them.

Banned Books Week is sponsored by the American Booksellers Association, American Booksellers Foundation for Free Expression, American Library Association, American Society of Journalists and Authors, Association of American Publishers, National Association of College Stores, and is endorsed by the Center for the Book in the Library of Congress.

Why Banned Books Week?

Banned Books Week is an opportunity for librarians, teachers, booksellers, and civil libertarians to advocate the importance of our First Amendment rights and the power of literature, and to draw attention to the danger that exists when restraints are imposed on the availability of information in a free society.

What is the text of the First Amendment and what does it protect?

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”- U.S. Const. amend. I.

Written in absolute terms, the First Amendment prohibits laws that restrict speech or expression. However, its application is not absolute. The Supreme Court of the United States has interpreted the First Amendment to grant protection to an individual to express himself freely as long as the speech is not within the categories of speech that remain unprotected: 1) speech that elicits immediate lawless action; 2) “fighting words”; 3) obscenity; and 4) libel.

The term freedom of expression is used synonymously with freedom of speech to denote not only freedom of verbal speech but also any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

As Supreme Court Justice Brennan, in Texas v. Johnson 491 U.S. v. 397 (1989), said: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive of disagreeable.”

Also according to Supreme Court Justice Douglas: “Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”

Freedom of expression is also protected under Article 19 of the Universal Declaration of Human Rights. Article 19 states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

What is Intellectual Freedom?

Intellectual freedom is the right of every individual to both seek and receive information from all points of view without restriction. It provides for free access to all expressions of ideas through which any and all sides of a question cause or movement may be explored.

Why is Intellectual Freedom Important?

Intellectual freedom is the basis for our democratic system. We expect our people to be self-governors. But to do so responsibly, our citizenry must be well-informed. Libraries provide the ideas and information, through books, newspapers, magazines, audio and visual material, and access to the Internet, to allow people to inform themselves.

Intellectual freedom encompasses the freedom to hold, receive, and disseminate ideas. Courts often stress the importance of the “marketplace of ideas” as a place for the public to give merit to certain ideas. Just like a commercial marketplace, the public’s response determines the popularity, relevance and truth of certain ideas. But for the marketplace of work effectively, there must be a free flow of ideas and speech and it must be up to the public to judge. Any prior restraint of speech does not allow the public to evaluate the idea for itself. Supreme Court Justice Brandeis stated in Whitney v. California 274 U.S. 357 (1927), “It is the function of speech to free men from the bondage of irrational fears [T]he remedy [then] to be applied is more speech, not enforced silence.”

What is Censorship?

Censorship is the suppression of ideas and information that certain persons- individuals, groups or government officials- find objectionable or dangerous. Censors try to use the power of the state to impose their view of what is truthful and appropriate, or offensive and objectionable, on everyone else. Censors pressure public institutions, like libraries, to suppress and remove from public access information they judge inappropriate or dangerous, so that no one else has the chance to read or view the material and make up their own minds about it. The censor wants to prejudge materials for everyone.

Who Attempts Censorship?

In most instances, a censor is a sincerely concerned individual who believes that censorship can improve society, protect children, and restore what the censor sees as lost moral values. But under the First Amendment to the United States Constitution, each of us has the right to read, view, listen to, and disseminate constitutionally protected ideas, even if a censor finds those ideas offensive.

Often challenges to books are motivated by a desire to protect children from “inappropriate” sexual content or “offensive” language. Although this is a commendable motivation, the Library Bill of Rights states that “Librarians and governing bodies should maintain that parents- and only parents- have the right and the responsibility to restrict access of their children- and only their children to library resources.” Censorship by librarians of

constitutionally protected speech, whether for protection or for any other reason, violates the First Amendment.

What are the Most Frequently Censored Materials?

Throughout history, books have been challenged for many reasons, including political content, sexual expression, or language offensive to some people's racial, cultural, or ethnic background, gender or sexuality, or political or religious beliefs. Materials considered heretical, blasphemous, seditious, obscene or inappropriate for children have also been censored.

With the recent advent of the Internet and the almost infinite amount of information it provides, there have been attempts to censor and filter some of its content.

What is the Difference Between a Challenge and a Banning?

A challenge is an attempt to remove or restrict materials, based upon the objections of a person or group. A banning is the removal of those materials.

What are the Most Frequently Challenged Books of 2007?

The ALA Office for Intellectual Freedom received a total of 420 challenges last year. A challenge is defined as a formal, written complaint, filed with a library or school requesting that materials be removed because of content or appropriateness. According to Judith F. Krug, director of the Office for Intellectual Freedom, the number of challenges reflects only incidents reported, and for each reported, four or five remain unreported.

The "10 Most Challenged Books of 2007" reflect a range of themes, and consist of the following titles:

1) "And Tango Makes Three," by Justin Richardson/Peter Parnell

Reasons: Anti-Ethnic, Sexism, Homosexuality, Anti-Family, Religious Viewpoint, Unsuitable to Age Group

2) "The Chocolate War," by Robert Cormier

Reasons: Sexually Explicit, Offensive Language, Violence

3) "Olive's Ocean," by Kevin Henkes

Reasons: Sexually Explicit and Offensive Language

4) "The Golden Compass," by Philip Pullman

Reasons: Religious Viewpoint

5) "The Adventures of Huckleberry Finn," by Mark Twain

Reasons: Racism

6) "The Color Purple," by Alice Walker

Reasons: Homosexuality, Sexually Explicit, Offensive Language,

7) "TTYL," by Lauren Myracle

Reasons: Sexually Explicit, Offensive Language, Unsuitable to Age Group

8) "I Know Why the Caged Bird Sings," by Maya Angelou

Reasons: Sexually Explicit

9) "It's Perfectly Normal," by Robie Harris

Reasons: Sex Education, Sexually Explicit

10) "The Perks of Being A Wallflower," by Stephen Chbosky

Reasons: Homosexuality, Sexually Explicit, Offensive Language, Unsuitable to Age Group

Off the list this year, are two books by author Toni Morrison. "The Bluest Eye" and "Beloved," both challenged for sexual content and offensive language.

Aren't There Some Kinds of Expression That Really Should be Censored?

The United States Supreme Court has ruled that there are certain narrow categories of speech that are not protected by the First Amendment: obscenity, child pornography, defamation,

and “fighting words,” or speech that incites immediate and imminent lawless action. The government is also allowed to enforce secrecy of some information when it is considered essential to national security, like troop movements in time war, classified information about defense etc.

What is Obscenity?

Sexual expression is a frequent target of censorship. The Supreme Court established the current standard to determine if material is obscene in Miller v. California, 413 U.S. 15 (1973). The Supreme Court held that material is not obscene unless:

- 1) a judge or a jury finds that an average person, applying contemporary community standards, would find that the material appeals to the prurient (or morbid, shameful, and unhealthy) interest in sex;
- 2) that it depicts or describes certain sexual acts defined in state law in a patently offensive way; and that
- 3) a reasonable person (community standards do not control this last element) would find that the material lacks serious literary, artistic, political, or scientific value.

All three elements must be present for material to be judged by a judge or jury as obscene and, therefore, illegal.

What About Limiting Library Patron Access to Materials, Whether or Not it is Legally Obscene, in Order to Keep Materials from Children?

The primary responsibility for rearing children rests with parents. If parents want to keep certain ideas or forms of expression away from their children, they must assume the responsibility for shielding those children. Governmental institutions cannot be expected to usurp or interfere with parental obligations and responsibilities when it comes to deciding what a child may read or view.

Are There Any Recent and Local Examples of a Library Trying to Censor Materials?

Lakewood Public Library recently came under attack for its new proposed plan to

monitor patron Internet access remotely with spyware software. While it is appropriate for library staff to interrupt patrons who are clearly misusing the computers, this type of surveillance is an unequivocal violation of privacy and First Amendment rights.

Library Director, Kenneth Warren, states that if patrons need privacy they should get their own computer. Warren misunderstands that privacy is essential for the exercise of free speech rights. Patrons should feel secure that the information they seek is not being scrutinized or restricted based on its content. Some patrons may not visit Internet sites that have information about medical conditions, political beliefs or satire for fear the librarian may disapprove. His policy as applied would produce the effect of self imposed censorship, chilling the exercise of free expression.

Although technically dicta, footnote three of the plurality opinion of U.S. v. American Library Association 539 U.S. 194 (2003), discusses the use of techniques other than Internet filtering technologies. Justice Rehnquist, writing the plurality opinion for the U.S. Supreme Court, rejected close monitoring of computer users because it is very intrusive and would force librarians to act as police officers.

Also in the news recently, Republican Vice Presidential candidate, Sarah Palin, has been rumored to have tried to have books removed from a local library branch while she was mayor of Wasilla in 1996. Palin acknowledges that she raised the question of how to have books removed at a city council meeting. She alleges the question was rhetorical. However, Palin's church at the time, the Assembly of God, had been pushing for the removal of the book, "Pastor, I Am Gay" from local bookstores. According to news coverage, Palin asked the librarian if she would object to censorship even if people were "circling the library in protest of the book." The librarian responded that she would fight anyone who tried to dictate what belonged on library shelves. A couple of weeks later, Palin fired the librarian, claiming she was not "loyal" to the new administration. Palin said the dismissal was unrelated to the question of library censorship.

Don't Librarians Censor Everything They Choose Not to Buy for the Library?

No library can make everything available, and selection decisions must be made. Selection is an inclusive process, where the library affirmatively seeks out materials which will serve its mission of providing a broad diversity of points of view and subject matter. By contrast, censorship is an exclusive process, by which individuals or institutions seek to deny

access to or otherwise suppress ideas and information because they find those ideas offensive and do not want others to have access to them. There are many objective reasons unrelated to the ideas expressed in materials that a library might decide not to add those materials to its collection: redundancy, lack of community interest, expense, space, etc. Unless the decision is based on a disapproval of the ideas expressed and desire to keep those ideas away from public access, a decision not to select materials for a library collection is not censorship.

What if I Can't Find Something in my Library That Represents my Point of View?

Ask for the materials you want. Libraries strive to serve the interests of the entire community. If your library is unable to purchase the material you want, it may be able to obtain it for you on interlibrary loan.

What Are Some Historic Cases That Address the Foundation of Free Expression?

1) Schenck v. United States, 249 U.S. 47 (1919)

Justice Oliver Wendell Holmes stated in this case his famous aphorism about "falsely shouting fire in a theatre" and set forth a "clear and present danger test" to judge whether speech is protected by the First Amendment. "The question," he wrote, "is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree."

2) Whitney v. California, 274 U. S. 357 (1927)

Since Anita Whitney did not base her defense on the First Amendment, the Supreme Court, by a 7 to 2 decision, upheld her conviction of being found guilty under the California's 1919 Criminal Syndicalism Act for allegedly helping to establish the Communist Labor Party, a group the state argued taught the violent overthrow of government.

The Whitney case is most noted for Justice Brandeis's concurrence, which many scholars have lauded as perhaps the greatest defense of freedom of speech ever written by a member of the high court.

"They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and

assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”

“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

3) Near v. Minnesota, 283 U.S. 697 (1931)

In this case, the Supreme Court interpreted the First and Fourteenth Amendments to forbid "previous restraints" upon publication of a newspaper. "Previous restraints"--or in current terminology, "prior restraints--suppress the freedom of the press to publish without obstruction, and recognize that lawsuits or prosecutions for libel are "subsequent punishments." The Court invalidated as an infringement of constitutional guarantees a Minnesota statute allowing specified government officials or private citizens to maintain a lawsuit in the name of the State to suppress a public nuisance and enjoin the publication of future issues of a "malicious, scandalous and defamatory newspaper, magazine or other periodical," unless the publisher can prove "the truth was published with good motives and for justifiable ends."

4) Brandenburg v. Ohio, 395 U.S. 444 (1969)

Brandenburg, a leader of the Ku Klux Klan was convicted of advocating violence under Ohio's criminal syndicalism statute during a KKK rally. The Supreme Court established the modern version of the "clear and present danger" doctrine, holding that states only could restrict speech that "is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action." In this case, the Court held that Ohio's criminal syndicalism statute violated the First Amendment because it broadly prohibited advocacy of violence rather than unprotected incitement of imminent action.

What are Some Cases That Address the Right to Read Freely?

1) Evans v. Selma Union High School District of Fresno County, 222 P. 801 (Ca. 1924)

The California State Supreme Court held that the King James version of the Bible was not a "publication of a sectarian, partisan, or denominational character" that a State statute required a public high school library to exclude from its collections. The "fact that the King James version is commonly used by Protestant Churches and not by Catholics" does not "make its character sectarian," the court stated. "The mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself, except as a work of literature fit to be included in a reference library."

2) *Todd v. Rochester Community Schools*, 200 N.W.2d 90 (Mich. Ct. App. 1972)

In deciding that *Slaughterhouse-Five* could not be banned from the libraries and classrooms of the Michigan schools, the Court of Appeals of Michigan declared: "Vonnegut's literary dwellings on war, religion, death, Christ, God, government, politics, and any other subject should be as welcome in the public schools of this state as those of Machiavelli, Chaucer, Shakespeare, Melville, Lenin, Joseph McCarthy, or Walt Disney. The students of Michigan are free to make of *Slaughterhouse-Five* what they will."

3) *Minarcini v. Strongsville (Ohio) City School District*, 541 F.2d 577 (6th Cir. 1976)

The Strongsville City Board of Education rejected faculty recommendations to purchase Joseph Heller's *Catch-22* and Kurt Vonnegut's *God Bless You, Mr. Rosewater* and ordered the removal of *Catch-22* and Vonnegut's *Cat's Cradle* from the library. The U.S. Court of Appeals for the Sixth Circuit ruled against the School Board, upholding the students' First Amendment right to receive information and the librarian's right to disseminate it. "The removal of books from a school library is a much more serious burden upon the freedom of classroom discussion than the action found unconstitutional in *Tinker v. Des Moines School District*."

4) *Right to Read Defense Committee v. School Committee of the City of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978)

The Chelsea, Mass. School Committee decided to bar from the high school library a poetry anthology, *Male and Female under 18*, because of the inclusion of an "offensive" and "damaging" poem, "The City to a Young Girl," written by a fifteen-year-old girl. Challenged in

U.S. District Court, Joseph L. Tauro ruled: "The library is 'a mighty resource in the marketplace of ideas.' There a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger from such exposure. The danger is mind control. The committee's ban of the anthology *Male and Female* is enjoined."

5) *Case v. Unified School District No. 233, 908 F. Supp. 864 (D. Kan. 1995)*

When the Olathe, Kansas, School Board voted to remove the book *Annie on My Mind*, a novel depicting a lesbian relationship between two teenagers, from the district's junior and senior high school libraries, the federal district court in Kansas found they violated the students' rights under the First Amendment to the United States Constitution and the corresponding provisions of the Kansas State Constitution. Despite the fact that the school board testified that they had removed the book because of "educational unsuitability," which is within their rights under the Pico decision, it became obvious from their testimony that the book was removed because they disapproved of the book's ideology. In addition, it was found that the school board had violated their own materials selection and reconsideration policies, which weighed heavily in the judge's decision.

6) *Sund v. City of Wichita Falls, Texas, 121 F. Supp. 2d 530 (N.D. Texas, 2000)*

City residents who were members of a church sought removal of two books, *Heather Has Two Mommies* and *Daddy's Roommate*, because they disapproved of the books' depiction of homosexuality. The City of Wichita Falls City Council voted to restrict access to the books if 300 persons signed a petition asking for the restriction. A separate group of citizens filed suit after the books were removed from the children's section and placed on a locked shelf in the adult area of the library. Following a trial on the merits, the District Court permanently enjoined the city from enforcing the resolution permitting the removal of the two books. It held that the City's resolution constituted impermissible content-based and viewpoint based discrimination; was not narrowly tailored to serve a compelling state interest; provided no standards or review

process; and improperly delegated governmental authority over the selection and removal of the library's books to any 300 private citizens who wish to remove a book from the children's area of the Library.

7) *Counts v. Cedarville School District, 295 F.Supp.2d 996 (W.D. Ark. 2003)*

The school board of the Cedarville, Arkansas school district voted to restrict students' access to the Harry Potter books, on the grounds that the books promoted disobedience and disrespect for authority and dealt with witchcraft and the occult. As a result of the vote, students in the Cedarville school district were required to obtain a signed permission slip from their parents or guardians before they would be allowed to borrow any of the Harry Potter books from school libraries. The District Court overturned the Board's decision and ordered the books returned to unrestricted circulation, on the grounds that the restrictions violated students' First Amendment right to read and receive information. In so doing, the Court noted that while the Board necessarily performed highly discretionary functions related to the operation of the schools, it was still bound by the Bill of Rights and could not abridge students' First Amendment right to read a book on the basis of an undifferentiated fear of disturbance or because the Board disagreed with the ideas contained in the book.

What are Some Cases That Address Freedom of Expression in Schools?

1) *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*

In this seminal case considering the First Amendment rights of students who were expelled after they wore black armbands to school in symbolic protest of the Vietnam War, the Supreme Court held that students "do not shed their constitutional rights at the schoolhouse gate" and that the First Amendment protects public school students' rights to express political and social views.

2) *Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982)*

In 1975, three school board members sought the removal of several books determined objectionable by a politically conservative organization. The following February, the board gave an "unofficial direction" that the books be removed from the school libraries, so that board

members could read them. When the board action attracted press attention, the board described the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The nine books that were the subject of the lawsuit were *Slaughterhouse-Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories of Negro Writers* edited by Langston Hughes; *Go Ask Alice*; *Laughing Boy* by Oliver LaFarge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich* by Alice Childress; and *Soul on Ice* by Eldridge Cleaver.

The board appointed a review committee that recommended that five of the books be returned to the shelves, two be placed on restricted shelves, and two be removed from the library. The full board voted to remove all but one book.

After years of appeals, the U.S. Supreme Court upheld (5-4) the students' challenge to the board's action. The Court held that school boards do not have unrestricted authority to select library books and that the First Amendment is implicated when books are removed arbitrarily. Justice Brennan declared in the plurality opinion: "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

3) Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

After a school principal removed two pages containing articles, among others, on teenage pregnancy and the impact of divorce on students from a newspaper produced as part of a high school journalism class, the student staff filed suit claiming violation of their First Amendment rights. The principal defended his action on the grounds that he was protecting the privacy of the pregnant students described, protecting younger students from inappropriate references to sexual activity and birth control, and protecting the school from a potential libel action.

The Supreme Court held that the principal acted reasonably and did not violate the students' First Amendment rights. A school need not tolerate student speech, the Court declared, "that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." In addition, the Court found the newspaper was part of the regular journalism curriculum and subject to extensive control by a faculty member. The school, thus, did not create a public forum for the expression of ideas, but instead maintained the

newspaper "as supervised learning experience for journalism students." The Court concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." The Court strongly suggested that supervised student activities that "may fairly be characterized as part of the school curriculum," including school-sponsored publications and theatrical productions, were subject to the authority of educators. The Court cautioned, however, that this authority does not justify an educator's attempt "to silence a student's personal expression that happens to occur on the school premises.

What are Some Cases That Address Minors' First Amendment Rights?

1) *American Amusement Machine Association, et al., v. Teri Kendrick, et al.*, 244 F.3d 954 (7th Cir. 2001); *cert.denied*, 534 U.S. 994; (2001)

Enacted in July 2001, an Indianapolis, Ind., city ordinance required video game arcade owners to limit access to games that depicted certain activities, including amputation, decapitation, dismemberment, bloodshed, or sexual intercourse. Only with the permission of an accompanying parent or guardian could children seventeen years old and younger play these types of video games. On March 23, 2001, a three-judge panel of the Seventh Circuit Court of Appeals reversed and remanded the trial court's decision stating that "children have First Amendment rights." On Monday, October 29, 2001, the U.S. Supreme Court denied certiorari.

2) *Interactive Digital Software Association, et al. v. St. Louis County, Missouri, et al.*, 329 F.3d 954(8th Cir. 2003)

St. Louis County passed an ordinance that banned selling or renting violent video games to minors, or permitting them to play such games, without parental consent, and video game dealers sued to overturn the law. The Court of Appeals found the ordinance unconstitutional, holding that depictions of violence alone cannot fall within the legal definition of obscenity for either minors or adults, and that a government cannot silence protected speech for children by wrapping itself in the cloak of parental authority. The Court ordered the lower court to enter an injunction barring enforcement of the law, citing the Supreme Court's recognition in [Erznoznik v. Jacksonville](#), 422 U.S. 205, 213-14, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975) that "speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be

suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors."

Has Congress Enacted Any Laws That Aim to Restrict Internet Speech?

1996-Communications Decency Act (CDA)

Arguably the first attempt by the United States Congress to regulate pornographic material on the Internet. The CDA imposed criminal sanctions anyone who knowingly sends or displays "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." It further criminalized the transmission of materials that were "obscene or indecent" to persons known to be under 18.

Free speech advocates worked to successfully overturn the portion of the act relating to indecent but not obscene speech. While courts have legal standards to determine what is obscene (Miller), there is no such test for indecency and the definition is potentially very broad. They argued that speech that is protected under the First Amendment when printed would become unlawful if transmitted over the Internet. Critics also urged that it would have a chilling effect on the availability of medical information.

In 1997, U.S. Supreme Court held in Reno v. ACLU that the indecency provisions were an unconstitutional abridgement of the First Amendment right to free speech because they did not permit parents to decide for themselves what material was acceptable for their children, extended to non-commercial speech, and did not define "patently offensive," a term with no prior legal meaning. Also for the first time, the court recognized that online speech deserves full First Amendment Protection.

1998- Child Online Protection Act (COPA)

In 1998 Congress passed a law to restrict access by minors to any material defined as harmful to minors on the Internet. COPA is a direct response to the decision that struck down parts of the CDA as unconstitutional. COPA narrows the range of material covered, limiting only commercial speech and providers within the United States. Material harmful to minors was defined as material that by "contemporary community standards" was judged to appeal to the

“prurient interest” and that showed sexual acts or nudity. This standard is a much broader standard than obscenity. COPA was obsolete from its inception because Congress, in its haste to regulate the emerging medium, failed to predict that new technologies would render the law meaningless. The ACLU sued the day that COPA came into force and the district court quickly halted enforcement of the censorship law. It held that the ACLU was likely to succeed in proving the law unconstitutional.

In 2004, the Supreme Court upheld the district court's decision to stop the enforcement of COPA. Because the Internet had changed dramatically in the five years since the district court gathered factual evidence, the Justices returned the case to the district court for a full trial on whether there are effective ways to keep children safe online that burden speech less than COPA's criminal penalties.

In 2007, U.S. District Judge Reed once again struck down COPA, finding the law facially violates the First and Fifth Amendments of the United States Constitution. Reed issued an order permanently enjoining the government from enforcing COPA, commenting that "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection. The government appealed again and the case was heard before the Third Circuit Court of Appeals. In July 2008, the Third Circuit upheld the 2007 decision, again striking down the law.

2000 Children's Internet Protection Act (CIPA) - Introduced in Congress in 1999, the Children's Internet Protection Act (CIPA) was signed into law in 2000. CIPA requires schools and libraries using “E-rate” discounts to operate "a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors..." Such a technology protection measure must be employed "during any use of such computers by minors." For adult Internet users, the law demands the same standards with the exception of the "harmful to minors" provision. If an adult patron comes across a site that is blocked, he needs to ask library staff to unblock it or disable the filter.

The ACLU and the American Library Association filed a lawsuit, *ALA v. U.S.*, 539 U.S. 194 (2003), seeking to get the law enjoined because it violates the Constitution to require libraries to use filters on public computers. In the Court of Appeals for the Eastern District of Pennsylvania, the ALA successfully challenged CIPA. In a 200-page decision, the judges wrote that "in view of the severe limitations of filtering technology and the existence of these less restrictive alternatives [including making filtering software optional or supervising users directly], we conclude that it is not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment." 201 F.Supp.2d 401, 490 (2002). However, the Supreme Court upheld the law in 2003, but modified it so that if a patron asks, the library must remove the filter.

What are Some Cases That Address the First Amendment and New Technologies?

1) Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)

In a 9-0 decision, the U.S. Supreme Court on June 26, 1997, declared unconstitutional a federal law making it a crime to send or display indecent material on line in a way available to minors. The decision in the consolidated cases completed a successful challenge to the so-called Communications Decency Act by the Citizens Internet Empowerment Coalition, in which the American Library Association and the Freedom to Read Foundation played leading roles. The Court held that speech on the Internet is entitled to the highest level of First Amendment protection, similar to the protection the Court gives to books and newspapers.

2) Mainstream Loudoun, et al. v. Board of Trustees of the Loudoun County Library, 24 F.Supp.2d 552 (E.D. of Va. 1998)

Adopted in 1997, the Loudoun County, Va., Library Board's "Policy on Internet Sexual Harassment" was designed to prevent adult and minor Internet users from accessing illegal pornography and to avoid the creation of a sexually hostile environment. To accomplish these goals, the board contracted with Log-On Data Corporation, a filtering software manufacturer that offers a product called "X-Stop." Though Log-On Data Corp. refused to divulge the method by which X-Stop filters sites, it soon became apparent that the software blocks some sites that are not prohibited by the policy. Shortly after the adoption of the policy, People for the American Way Foundation commenced litigation on behalf of several Loudoun County residents and

members of a nonprofit organization, claiming the policy violates the right to free speech under the First Amendment. The suit was predicated on the theory that the policy is unnecessarily restrictive, because it treats adults and children similarly, and precludes access to legitimate as well as pornographic material. On November 23, 1998, Judge Leonie Brinkema declared that the highly restrictive Loudoun County Internet policy was invalid under the free speech provisions of the First Amendment.

3) United States, et al. v. American Library Association, Inc. et al., 539 U.S. 194 (2003)

The Supreme Court upheld the Children's Internet Protection Act, which requires libraries receiving federal funds for Internet access to install filters so that both adult and child patrons cannot access materials considered obscene, child pornography, or "harmful to minors." Chief Justice Rehnquist announced the judgment of the court that the law, on its face, is Constitutional. Speaking for a plurality of four justices, Rehnquist held that CIPA was a valid exercise of Congress' spending power and did not impose an unconstitutional condition on public libraries that received federal assistance for Internet access because Congress could reasonably impose limitations on its Internet assistance, and because any concerns over filtering software's alleged tendency to erroneously "over block" access to constitutionally protected speech were dispelled by the ease with which library patrons could have the filtering software disabled. Justices Kennedy and Breyer concurred with the judgment, holding that CIPA, while raising First Amendment concerns, did not violate the First Amendment as long as adult library users could request that the Internet filter be disabled without delay.

Information and materials compiled from:

<http://www.ala.org/ala/oif/bannedbooksweek/bannedbooksweek.cfm>

<http://www.aclu.org/freespeech/index.html>