



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

April 14, 2016

The Honorable Jimmy Gomez
Member, California State Assembly
State Capitol, Room 2114
Sacramento, CA 95814

RE: A.B. 1671 (Gomez) – Oppose/as Amended on 4/12/16

Dear Assemblymember Gomez,

We believe that Assembly Bill 1671 threatens the First Amendment protections for free speech, and we are opposed to this legislation that broadens California's eavesdropping law to apply to reporting on the content of such conversations. We appreciate the legislature's efforts to prevent invasions of privacy and we do not oppose the existing wiretap law, but this legislation goes beyond those concerns to threaten publishers, authors, filmmakers and others with criminal prosecution. The trade associations that comprise Media Coalition have many members throughout the country, including California: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

A.B. 1671 makes it a crime to disclose or distribute the contents of a "confidential conversation" if it was originally heard or recorded using an electronic amplifying or recording device. It also makes it illegal to aid, abet or employ anyone who discloses or distributes the content of such a conversation. "Confidential conversation" is defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties." The definition excludes a communication made in any circumstance in which the parties to the conversation may reasonably expect that the communication may be overheard or recorded, or made at a public gathering or government proceeding. Since the confidential conversation does not have to be recorded, distributing its contents must include writing a story describing the content of the conversation. Each violation is subject to up to a year in prison, a \$2,500 fine, or both.

Neither the original bill nor the proposed amendments provide basic protection for the media. Instead, it leaves them vulnerable to prosecution for reporting on the contents of such conversations even if the reporter, author or documentary filmmaker played no part in the eavesdropping or was even aware that the conversation had been illegally overheard or recorded. This places an unreasonable burden on the media to investigate the legality of every source that describes a conversation or offers a recording of one.

Executive Director: David Horowitz **Chair:** Chris Finan, American Booksellers Association
Immediate Past Chair: Tom Foulkes, Entertainment Software Association **Treasurer:** Sean Bersell, Entertainment Merchants Association
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

The lack of an exception for the news media directly conflicts with a recent Supreme Court decision that denied civil damages for the publication of a recording of a phone conversation using a wiretap. In *Bartnicki v. Vopper*, the Court considered whether a radio station was liable for damages under state and federal wiretap laws for playing an audio tape of a phone conversation that was illegally recorded. 532 U.S. 514 (2001). The Court accepted that: the radio station played no part in the illegal capturing of the conversation; they obtained the recording lawfully even though it was originally recorded illegally; and, the conversation on the recording was a matter of public concern. *Id.*, at 525. The Court held that in balancing protection for privacy in eavesdropping laws and constitutionally protected speech, “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.*, at 535.

Similarly, in *Smith v. Daily Mail*, the Supreme Court struck down a law barring newspapers from printing the name of a minor charged with certain crimes to protect the privacy of the minor. The Court emphasized that: “A free press cannot be made to rely solely upon the sufferance of government to supply it with information. If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.” 443 U.S. at 104 (1979) (internal citations omitted).

The definition of “confidential conversation” is also overbroad. It is not limited to a conversation that would not be audible to a person who is not part of the conversation without using electronic equipment or taking extraordinary measures. It is well established that electronic eavesdropping or wiretapping may be appropriately criminalized, but it is less clear that the government can criminalize recording of a conversation that is audible without the aid of electronic device and absent extraordinary measures invade the speaker’s privacy. The Court has cautioned that even in circumstances when the state may criminalize speech, it must be mindful of “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This creates the inconsistent result that a reporter can write a story based on the account of a whistleblower who overhears a “confidential conversation” about committing a crime. However, the reporter can be prosecuted for the same story if the whistleblower has made a recording of the conversation as proof of the account.

The legislation is also likely unconstitutional for lack of a knowledge standard in 632.01(b) for anyone who aids a person in publishing the contents of a conversation that has been illegally recorded. A.B. 1671 does not require that a reporter or editor have any knowledge that a story or producing a news segment is aiding the distribution of the contents of a “confidential conversation.” In *Hamling v. United States*, Justice Rehnquist wrote for the Court, “We think the ‘knowingly’ language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.” 418 U.S. 87 at 123. The Supreme Court has held that even a negligence standard is inadequate in a law that abridges free speech. *See, Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A negligence test would place on the press the intolerable burden of guessing how a jury might

assess the reasonableness of steps taken by it...”); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”).

Finally, while the legislature may intend that this bill apply only to malicious invasions of privacy, there is nothing in the bill that limits it to those targets. An unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. As the Supreme Court held in *U.S. v. Stevens*, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” 559 U.S. 460, 480 (2010).

We respectfully ask you to protect the First Amendment rights of all the people of California and amend A.B. 1671. We would welcome the opportunity to work with the legislature to address the issues raised in our memo. If you would like to discuss our concerns, please contact David Horowitz, executive director, at 212-587-4025 #3 or horowitz@mediacoalition.org.

cc: Assemblyman Reginald Jones-Sawyer, Chair, Committee on Public Safety
Members, Assembly Committee on Public Safety
Sandy Uribe, Committee Consultant
Gary Olson, Republican Consultant
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