

THE MEDIA COALITION INC

March 30, 2010

Governor Deval Patrick
Statehouse Room 280
Boston, Massachusetts 02133

Re: Request for Veto of Senate Bill 997

Dear Governor Patrick,

The members of Media Coalition ask that you veto Senate Bill 997 or send the bill back to the legislature without Sections 2 and 3. As federal courts have repeatedly held, statutes very similar to Sections 2 and 3 of this bill violate the First Amendment rights of producers, retailers, and their customers. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Massachusetts: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

We regret raising our concerns for the first time at this late point in the process. However, Sections 2 and 3 were added to S.B. 997 as an amendment on the floor of the House. It was not included in a printed version of the bill available to the public until yesterday after it had been passed by the legislature and sent to the Governor. After Sections 2 and 3 were added to the bill, it was not raised in any committee in either chamber of the legislature. See <http://www.mass.gov/legis/186history/s00997.htm>

Section 2 would expand the definition of material in Section 31 of chapter 272 that is subject to section 28, the harmful to minors law, to include any electronic communication. This means every web site, listserv, chat room, or social networking site would be subject to prosecution regardless of whether or not the speaker intended for minors to access the speech. We understand that this amendment is meant to address the recent decision by the Massachusetts Supreme Judicial Court in *Commonwealth v. Zubiell*. There, the Court ruled that the definition of “material” in Section 31 does not include electronic communication including email and text-messaging in the definition of material subject to Massachusetts’s harmful to minors law. The ruling in *Zubiell* can and should be addressed with a narrower change to existing law that will not infringe on the free speech rights of citizens and businesses.

Chair
Chris Finan
*American Booksellers
Foundation for Free
Expression*

Immediate Past Chair
Sean Devlin Bersell
*Entertainment Merchants
Association*

Treasurer
Sally Jefferson
*Entertainment Software
Association*

General Counsel
Michael A. Bamberger
*Sonnenschein Nath &
Rosenthal LLP*

Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers and consumers in the United States.

The application to material generally available on the Internet goes far beyond protecting minors from adults sending email or text to a specific minor or minors and is likely overbroad. It would threaten speech on the Internet that is neither written for minors nor intended for them to access. In *Ginsberg v. New York*, 390 U.S. 629 (1968) (as subsequently modified by *Miller v. California*, 413 U.S. 15 (1973)) the Supreme Court established a three-part test for determining whether material is “harmful to minors” and may therefore be banned for sale to minors. This framework is sensible for brick and mortar retailers who have the opportunity assess a customer’s age.

However, cyberspace is not like a book or video or video game store. There is no way to know whether the person receiving the “harmful” material is a minor or an adult. As a result, the effect of a blanket ban on the electronic dissemination of material “harmful to minors” is to force a content provider, whether a publisher or an on-line carrier, to either risk prosecution or restrict access to both minors and adults, thus infringing the First Amendment rights of adults. Online bookstores, sexual health websites, movie streaming businesses, and personal blogs would all be at risk if a minor accessed such material.

Two federal laws that restricted the availability of matter inappropriate for minors on the Internet have been declared unconstitutional violations of the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997); *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir 2008), *cert. den.* 129 Sup. Ct. 1032 (2009). In *Mukasey*, the court struck down as overbroad a law banning dissemination to minors of material harmful to minors by commercial web sites on the World Wide Web. The court found that there are less restrictive means to protect minors from harmful to minors speech without unduly restricting the rights of adults to access speech to which they are legally entitled. Similar state laws that banned the transmission of speech with sexual content to minors on the Internet have also repeatedly been ruled unconstitutional. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2nd Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F.Supp. 2d 1180 (D.S.C. 2003); *American Libraries Ass’n v. Pataki*, 969 F.Supp. 160 (S.D. N.Y. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). In addition to First Amendment deficiencies, some courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

We believe the legislature can draft a narrower law that is limited to electronic communications that an adult directs to a specific person known by the adult to be a minor that could pass constitutional muster. House Bills 4489, 5528, and 5529 are still pending in the Joint Committee on Judiciary and could be amended to address the decision in *Zubiel* without violating the First Amendment. If this bill were vetoed, we are prepared to work with the legislature and the Governor’s staff to craft a constitutionally sound law.

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees. In the

successful challenges to such state laws plaintiffs have received as much as \$450,000 in legal fees.

If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #11 or at horowitz@mediacoalition.org.

Again, we ask you to please protect the First Amendment rights of all the people of Massachusetts and veto this legislation or send it back to the legislature without Sections 2 and 3.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director

cc: Mo Cowan, Chief Legal Counsel