

# THE MEDIA COALITION INC

275 SEVENTH AVENUE • 15<sup>TH</sup> FLOOR • NEW YORK, NEW YORK 10001  
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ  
Executive Director

## Memorandum in Opposition to Indiana House Bill 1042 As Amended

American Booksellers  
Foundation for Free  
Expression

The members of Media Coalition believe that House Bill 1042 as amended still violates the First Amendment rights of retailers and others. The members of Media Coalition represent most of the book and magazine publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording, video, and video game retailers in Indiana and the rest of the United States.

Association of American  
Publishers, Inc.

Comic Book Legal  
Defense Fund

Entertainment Software  
Association

H.B. 1042 would require any business or individual that sells or intends to sell any “sexually explicit materials” to register with the Secretary of State. To register, one must inform the Secretary of the intent to sell such material and provide a statement detailing the types of material to be sold. The Secretary of State must then inform the “local county officials” of the registration by a retailer or individual. “Sexually explicit” is defined as any product or service that is harmful to minors as defined by IC 35-49-2-2. This section applies to speech that is constitutionally protected for adults but illegal for minors. A violation is a misdemeanor offense.

Entertainment Merchants  
Association

Freedom to Read  
Foundation

Magazine Publishers of  
America, Inc.

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

Publishers Marketing  
Association

Recording Industry  
Association of America,  
Inc.

*Chair*

Sean Devlin Bersell  
Entertainment Merchants  
Association

*Immediate Past Chair*  
Judith Krug  
*Freedom to Read*  
*Foundation*

*Treasurer*

Chris Finan  
American Booksellers  
Foundation for  
Free Expression

*General Counsel*

Michael A. Bamberger  
Sonnenschein Nath &  
Rosenthal LLP

The requirement that a retailer register with the Secretary of State based on the type of content they were going to offer is immediately constitutionally suspect. Indiana cannot ask a bookstore to register with the state based on the content of its inventory and provide the state a list of types of books before being permitted to sell sexual content any more than Indiana could require a retailer to register with the state and provide a list of the types of titles that might be sold before selling religious or political books. Retailers do not need clearance from a state before selling First Amendment protected content. The U.S. Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-7 (2000). To do so the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is narrowly tailored to achieve that interest. *See, e.g., R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Here the state does not meet any of the requirements set out by the Supreme Court in the *US v. Playboy*.

The 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 in the United States.

Further, the state cannot place special burdens on retailers of First Amendment-protected material. As the Supreme Court has said, the government can neither require a license of speakers of protected communication not generally imposed nor impose a business tax specific on the dissemination of protected speech not generally imposed. See, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press*, 297 U.S. 233 (1936). This bill is essentially a licensing scheme. Retailers would be required to submit a letter of intent and a list of material that would be sold to get permission from the Secretary of State to sell certain types of content.

Also, the legislation would have a serious chilling effect on many retailers. They would have the added burden of reviewing their inventory to determine if any material they sold or rented included “sexually explicit” material. If even a single book, movie, music recording or video game was in the store or came into the store, the retailer would then be required to register. The low threshold likely means that many if not most book, video, and music stores would be subject to registration. The proprietor would then have to decide whether they should remove the content because they would lose customers if they were registered as an “adult store” that sells or intends to sell “sexually explicit material” with the Secretary of State.

Passage of this ordinance 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 several recent successful challenges, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys’ fees in each litigation.

We ask you to please protect the First Amendment rights of all people of Indiana and defeat this legislation. If you would like to talk further about our concerns, David Horowitz, Executive Director of Media Coalition can be reached at 212-587-4025 x11 or [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).