

THE MEDIA COALITION INC

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DAVID HOROWITZ
Executive Director

March 13, 2008

American Booksellers
Foundation for Free
Expression

Mitch Daniels, Governor

Association of American
Publishers, Inc.

Office of the Governor

Comic Book Legal
Defense Fund

Statehouse

Indianapolis, Indiana 46204-2797

Entertainment Consumers
Association

Re: Request for Veto of House Bill 1042

The members of Media Coalition believe that House Bill 1042 violates the First Amendment rights of retailers, their customers, 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.

H. B. 1042 as passed by the legislature would require any new or relocated retailer or library that sells or intends to sell “sexually explicit materials” to register with the Secretary of State and provide a statement detailing the type of materials they sell or intend to sell. The Secretary of State must then report to local government officials and zoning boards the name of any store in their jurisdiction that has registered. “Sexually explicit materials” is defined as any product that is “harmful to minors” under existing state law. There is a \$250 registration fee. Failure to register is a misdemeanor.

This bill is very likely unconstitutional. The restriction would apply to material based on its content which makes it immediately constitutionally suspect. 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 has failed to satisfy any part of the test. No explicit compelling state interest is

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Foundation

Treasurer
Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

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

offered in the bill. Even assuming the purpose of the bill is to identify “adult bookstores,” this provision could apply to virtually any general interest book, music, video or video game store that carries art or health books, popular music, Oscar-winning movies or other mainstream content. This means H.B. 1042 is plainly ineffective in serving this purpose and wildly overbroad at the same time.

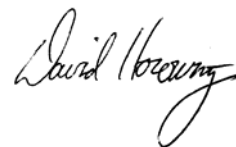
Further, the state cannot place special burdens on retailers of First Amendment-protected material. As the Supreme Court has said, the government can neither require a license of speakers of protected communication not generally imposed nor impose a business tax specifically on the dissemination of protected 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 subject to the law. They would have the added burden of reviewing their present or potential inventory to determine if a single book, CD, DVD, magazine or video game they sell or rent included “sexually explicit” material. This means a retailer would have to decide if the material meets a three prong test established by the Supreme Court. *Ginsberg v. New York*, 390 U.S. 629 (1968). The test is explicit but varies based on the age of the minor at issue. This is no easy judgment for a non lawyer. Additionally, if such material is in the store or might come into the store, the retailer would have to decide if they should register with the state, or if it would cause them to lose customers because they are officially classified as a store that sells “sexually explicit” material. The alternative is to sanitize the store to avoid registration and potential prosecution.

Passage of this law 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 veto this legislation. If you or your staff would like to further discuss this legislation, I can be reached at 212-587-4025 x11 or horowitz@mediacoalition.org.

Thank you,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive, flowing style.

David Horowitz
Executive Director