

# THE MEDIA COALITION INC

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DAVID HOROWITZ  
Executive Director

March 27, 2008

Senator Michael L. Fair  
211 Gressette Building  
Columbia, SC 29201

Re: Proviso: Printed Graphic Material Surcharge

Dear Senator Fair,

The members of Media Coalition believe that the Proviso imposing a 20% surcharge on printed matter threatens the distribution of First Amendment-protected material in South Carolina. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers in South Carolina and the rest of the United States. They neither produce nor sell works that are legally obscene. However they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

This proviso would impose a 20% surcharge on printed matter that contains any "frontal nudity." "Frontal nudity" is defined as any material that includes any exposed genitalia or the female breast if lasciviously displayed and that is prohibited for minors.

This proviso has several constitutional problems. The Supreme Court has struck down legislation to tax or otherwise financially punish First Amendment-protected speech based on its content. Here, the surcharge on printed material is triggered when any retailer or distributor sells or rents certain material based specifically on its content. This material is clearly constitutionally protected for adults. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment, *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. In 1991, it held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. In 1987, the court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230.

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.

American Booksellers  
Foundation for Free  
Expression

Association of American  
Publishers, Inc.

Comic Book Legal  
Defense Fund

Entertainment Consumers  
Association

Entertainment Merchants  
Association

Entertainment Software  
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.

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Entertainment Merchants  
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Freedom to Read  
Foundation

Treasurer

Chris Finan  
American Booksellers  
Foundation for  
Free Expression

General Counsel

Michael A. Bamberger  
Sonnenschein Nath &  
Rosenthal LLP

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Also, the proviso would base the tax on revenue derived from material containing “frontal nudity” which is defined in part as material that is prohibited to minors under state law. It is the job of the courts, not an owner of a book store or newsstand or a staff person in the Department of Revenue, to determine if material is illegal for minors. That provision does not offer any legal proceeding to determine the legal status of such books or magazines. This means there are no due process safeguards in place for the determination of whether the material is prohibited for minors or any appeals process available to the retailer or distributor of the content. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court struck down a similar scheme of regulation as a form of “informal censorship.” In that case, the Rhode Island legislature had created a commission “to educate the public concerning any book or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of youth.” The commission would notify a distributor that a majority of its members had declared a particular work unsuitable for sale to minors and request his or her “cooperation” in withdrawing it from sale. Copies of the notice were then sent to local police departments with a recommendation that anyone selling the work would be prosecuted for obscenity. The Court made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults).

Finally, this proviso is meant to raise revenue for South Carolina. However, if it is enacted it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs’ attorneys’ fees. In these types of challenges plaintiffs have received in excess of \$100,000 in attorneys’ 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](mailto:horowitz@mediacoalition.org).

Please protect the First Amendment rights of all South Carolinians and withdraw this surcharge proviso.

Sincerely,



David Horowitz,  
Executive Director

cc: Dianne Carraway