THE MEDIA COALITION INC

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Memo in Opposition to Proviso 89: Printed Graphic Material Surcharge

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.

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. This language itself is overly vague. Is the material prohibited to minors because it is illegal for minors? It is because the material is rated as inappropriate for minors? This degree of vagueness is not constitutionally acceptable. The Supreme Court has made clear that when First Amendment rights are at issue a more exacting degree of scrutiny is appropriate. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 45 U.S. 489 (1982).

Even if the surcharge was limited to material that is illegal for minors under South Carolina 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. This 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. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). 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.

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 a recent case brought by members of Media Coalition received in excess of $400,000 in attorneys' fees and expenses. If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

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