



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memo in Opposition to Alabama House Bill 167 and Senate Bill 222

The members of Media Coalition believe that House Bill 167 and Senate Bill 222 threaten the distribution of First Amendment-protected material in Alabama. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Alabama: book publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. 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.

H.B. 167 and S.B. 222 would define a business as a "sexually oriented business" if it has "any business offering for sale, rent, or exhibit [sic], or the exhibit of, items or services intended to provide sexual stimulation or sexual gratification to the customer." To the extent this applies to First Amendment protected material, it means that any bookstore, video store or movie theater can be deemed an "adult" business and be subject to onerous restrictions on the business. Presently, the definition "sexually oriented business" is one that has as its primary purpose to offer such items or services. The rest of this legislation regulates massage businesses and is not a concern for Media Coalition members.

The government has the power to regulate sexually oriented businesses to minimize the impact of the "secondary effects" of such businesses, but the Supreme Court has established limits on this power. The regulation must be designed to further an important or substantial government interest; the governmental interest must be unrelated to the suppression of speech; and the regulation must be narrowly tailored to further the government interest in preventing the unwanted secondary effects. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The regulation imposed on sexually oriented businesses is not clear from the bills, but there is no way this legislation could meet the test established by the Supreme Court because it would deem almost any mainstream retailer of First Amendment protected material to be a sexually oriented business. There is no "secondary effect" for carrying a single item with sexual content. Typically, laws designed to regulate businesses are justified as intended to address the "secondary effects" caused by such business. Generally, such laws define adult bookstores or video stores as those with sexually explicit material that has as a primary business the sale, loan or exhibition of sexual material. The other common formulation is a business if sexual material is a "significant and substantial" part of the stock and trade, floor space, or revenue. "Significant

Executive Director: David Horowitz **Chair:** Chris Finan, American Booksellers Association
Immediate Past Chair: Tom Foulkes, Entertainment Software Association **Treasurer:** Sean Bersell, Entertainment Merchants Association
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

and substantial” part of stock and trade has generally been defined by courts to mean 30-40% of wares or revenue.

Stores carry large amounts of mainstream material that include descriptions of nudity or sexual activity. The broad definition could include films such as *Fast Times at Ridgemont High*, or *American Pie* that include images of nudity and frank discussion of sexual activity. Descriptions of “sexual activity” are common in most romance novels and mainstream books such as *Fifty Shades of Grey* and many photography and health books such as *Joy of Sex*. Popular music by such artists as Prince or Van Halen that could be considered intended for “sexual stimulation.”

Given the low threshold for material that would make a retailer a sexually oriented business, there is little reason to believe these restrictions on such businesses will prevent the unwanted secondary effects that the legislature is seeking to restrict. Conversely, this legislation would have a serious chilling effect on many mainstream retailers. It is likely that most mainstream bookstores, video stores and music stores would be at risk for being deemed a sexually oriented business. Many would have to drastically limit their inventory rather than be classified as an “adult business” and therefore, avoid the negative connotations that go with the label. Alternatively, they risk losing customers unwilling to shop at an “adult business.”

If you would like to discuss further our concerns with this bill, please contact David Horowitz at 212-587-4025 ext. 11 or at horowitz@mediacoalition.org.

We urge you to protect the First Amendment rights of mainstream retailers in Alabama and remove from this legislation any changes to the present definition of a sexually oriented business.