

March 3, 2011

The Honorable Carl Gatto, Chair  
The Honorable Steve Thompson, Vice-Chair  
Chair, House Judiciary Committee  
Alaska State House of Representatives  
Juneau, AK 99801

Delivered by email

Re: Memo in Opposition to Section 9 of House Bill 127 and proposed amendments

Dear Chairman Gatto and Vice Chairman Thompson,

The members of Media Coalition have asked me to communicate their concerns regarding H.B. 127 sec. 9. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. Some of our members are plaintiffs in *American Booksellers Foundation for Free Expression (ABFFE) v. Burns*, a First Amendment challenge to 11.61.128(a). (D. Alaska 3:10-CV-193 Oct. 20, 2010). A preliminary injunction was granted October 20, 2010 barring enforcement of the law as enacted last spring.

Section 9 of H.B. 127 would narrow AS 11.61.128(a) to only criminalize the distribution of material “harmful to minors” by an adult if the recipient is under 16 years old and the adult is reckless regarding the recipients age or the adult believes the recipient is less than 16 years old. The legislation would also add a knowledge requirement as to the content being sent to the minor.

This bill is an improvement on AS 11.61.128(a), but even with these changes the law would still violate the First Amendment. We welcome the opportunity to work with the Committee to amend Section 9 to make it constitutionally sound. We believe that small changes to the bill would cure the constitutional problems in Section 9 while still providing law enforcement with the means to protect minors from adults looking to prey on them. I have attached to this letter our proposed changes to the bill which we ask the Committee to consider.

In addition to *ABFFE v. Burns*, there is a substantial body of case law striking down similar state and federal legislation that restricted such content on the Internet. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of sexual matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032

(2009). In addition to the ruling in the Third Circuit Court of Appeals, four other U.S. Courts of Appeal have struck down laws banning material harmful to minors on the Internet. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Three more state laws have been struck down by U.S. District Courts. *See, Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D. S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Most recently, Massachusetts enacted a law very similar to AS 11.61.128(a). A legal challenge to the law was brought by some of the same plaintiffs as challenged Alaska's law and a preliminary injunction has been granted barring the statute's enforcement. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010). The legislature is considering a bill supported by the Attorney General, similar to what we are proposing to this Committee, that the communication must directed to specific which the sender has actual knowledge or believes is a minor. If passed, this bill will resolve this case.

The reckless standard does not overcome the First Amendment case law cited above. It is an inadequate knowledge requirement for criminalizing distribution of harmful to minors material, particularly on the Internet. Unlike a brick and mortar store, there is no way to know whether a particular person receiving sexually frank material is a minor or an adult. So there is no reasonable way to restrict access to such material solely to adults. As the Supreme Court found, anyone who makes material available on the Internet through a website, listserve or chat room knows that there is a reasonable likelihood that there are minors accessing their content. With hundreds or thousands of people accessing a website or chat room, it is inevitable that a minor is among the visitors. To assume there are no minors accessing a site would be reckless regarding a minor's presence. Thus, the effect of banning the dissemination on the Internet of material "harmful to minors" is to force a provider of such material to deny access to both minors and adults, depriving adults of their First Amendment rights or to risk being prosecuted.

We appreciate the chance to share our concerns with the Judiciary Committee. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Respectfully submitted,

/s/ David Horowitz

David Horowitz  
Executive Director

cc: Representative Keller  
Representative Lynn  
Representative Pruitt  
Representative Gruenberg  
Representative Holmes  
Representative Cheneault, Alternate