MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

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 Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

March 2, 2011

Memorandum in Opposition to Arkansas Senate Bill 668

The members of Media Coalition believe that Senate Bill 668 violates the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including in Arkansas: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They have asked me to explain their concerns.

S.B. 668 would apply Arkansas's law barring dissemination to minors of material harmful to minors to content distributed generally on the Internet. Presently, Arkansas Code § 5-68-501(6)(B) specifically excludes matter displayed, transmitted, retrieved, or stored on the Internet or other network for the electronic dissemination of information from the definition of "material" for the purpose of determining what media is subject to Arkansas Code § 5-68-502 barring the display or dissemination to a minor of material harmful to minors. This legislation would explicitly include such means of distribution as material subject to § 5-68-502(2)(A), the part of the law criminalizing the dissemination to a minor of material harmful to minors.

Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to such material.

To apply § 5-68-502(2)(A) to material on the Internet is to act as if there was no difference between a computer transmission and a book or video. But cyberspace is not like a bookstore or video store. There is no way to know whether the person receiving the sexually frank material is a minor or an adult. At the same time, anyone who makes material available on the Internet should know that there could be 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. As a result, the effect of banning the computer dissemination of material "harmful to minors" is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. 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). Last year, Massachusetts and Alaska each enacted a law very similar to S.B. 668. Legal challenges were brought against each law and in both cases 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); *American Booksellers Foundation for Free Expression v. Sullivan* (D. Alaska 3:10-CV-193 Oct. 20, 2010).

The only state laws that restrict access to content on the Internet that have not been struck down in court were laws limited to speech illegal for minors that was intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor and the speaker directed the speech to that person. States have also passed laws to outlaw such speech if it is tied to an otherwise illegal activity such as luring or enticing a minor

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In the successful challenge to the Virgnia legislation, the state paid the plaintiffs almost $500,000 in legal fees and expenses.

If you would like to discuss further our concerns about this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. Again, we ask you to please protect the First Amendment rights of all the people of Arkansas and reconsider S.B. 668.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.