



MEMO OF CONCERN REGARDING BALTIMORE COUNTY BILL 50-10

The members of Media Coalition believe that Baltimore County Bill 50-10 may threaten the distribution of First Amendment-protected material in Baltimore County. We appreciate the opportunity to express our views despite the passing of the open hearing on 50-10. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Baltimore: book and magazine 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.

Bill 50-10 would define a business as an "adult business" if as little as 15% of display space, usable floor area, or retail sales, lease or rental are derived from material that describes or depicts sexual activities. "Sexual activities" is defined as nudity, partial nudity, sexual conduct, sexual excitement or sadomasochistic abuse. If a business is deemed to be an "adult business" it is limited in where it can be located and restricted in how it may display its content and.

The government has the power to regulate the "secondary effects" of sexually oriented 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).

It is questionable if 50-10 would meet this test. Typically, local ordinances designed to limit "secondary effects" define adult bookstores or video stores as those where sexually explicit visual material is a significant and substantial part of the stock and trade, floor space, or revenue. Significant and substantial part of stock and trade has generally been defined by ordinance or interpreted 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 *Anchor Man*, *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 novels by authors such as Tom Wolfe and Phillip Roth and many photography and health books include nude images. Popular music by such artists as Prince or Van Halen frequently describes “sexual activity,” too. This creates a difficult situation for mainstream retailers.

Given the broad amount of material and low threshold 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, 50-10 would have a serious chilling effect on many mainstream retailers. It is likely that some if not many mainstream bookstores, video stores and music stores could 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.”

We acknowledge that there is a contrary opinion in a Maryland case that upheld an ordinance that included a 10% threshold for floor space devoted to sexually explicit material. *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 184 F. Supp.2d 445 (D. Md. 2002). However, *Bigg Wolf* is one of only a few cases where a court has allowed a threshold below 30-40%. Also, it was decided prior to the Supreme Court’s issuance of its opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which reaffirmed the principles that a secondary effects regulation must be based on some evidence of harm and must address that alleged harm.

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.

Please protect the First Amendment rights of all Baltimoreans and reconsider 50-10.