



MEDIA COALITION, INC.

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 Amended Senate Bill 676

We believe that Senate Bill 676 as amended still violates the First Amendment protections for free speech. We appreciate the legislature's concern about the distribution of images that is a malicious invasion of privacy, but we respectfully ask you to amend or reconsider this legislation so that this concern can be addressed without infringing on protected speech. The trade associations that comprise Media Coalition have many members throughout the country, including California: publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games.

The amended version of S.B. 676 that we have reviewed expands the privacy element of the crime to "person distributing the image knows or should know that the depicted person had a reasonable expectation that the image would remain private." The privacy element in the existing law, passed last year, is "under circumstances in which the persons agree or understand that the image shall remain private." The other elements of the crime are that it bars dissemination of an image depicting nudity or sexually explicit conduct if the person in the image did not consent to the distribution, the person who distributed the image knew or should have known that the person depicted would suffer emotional distress or harm as a result of the distribution and the person depicted in the image did suffer harm. The bill would also add an exception to the law if a "distribution is made in the course of a news account on a matter of legitimate public concern."

We are concerned about this legislation because we fear it could allow publishers, booksellers, librarians and others to be prosecuted for the publication or distribution of important newsworthy, historic and educational images. It could allow the prosecution of any publisher or distributor of an image rather than only those who maliciously violate the privacy of a person he or she knows and has an agreement. A news publisher could be liable for printing the pictures Anthony Weiner sent of himself to women he regularly communicated with online if a jury deemed that he had a reasonable expectation that the pictures would remain private. Some Media Coalition members are plaintiffs in a challenge to a similar law enacted last year in Arizona. In the Arizona case, *Antigone Books v. Horne* (<http://mediacoalition.org/antigone-books-v-horne/>), U.S. District Court Judge Bolton granted a stay of the litigation and a stay of enforcement of the law at the request of the parties to allow the legislature an opportunity to amend the law. The plaintiffs in the case are four national trade associations representing publishers, news photographers, booksellers and librarians; five Arizona booksellers; and the publisher of a Phoenix newspaper.

This memo is limited to the discussion of the present version of S.B. 676. As we explained in our memo in opposition to the bill as introduced, banning the publication of certain nude images without consent of the person depicted is a content-based restriction on speech that

Executive Director: David Horowitz Chair: Barbara Jones, Freedom to Read Foundation
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

is unconstitutional under strict scrutiny analysis. We believe that analysis applies to the bill as amended and adopt them without restating them.

The legislation lowers the knowledge standard for determining if the pictures should stay private. The present law is limited to pictures obtained when the parties had an actual or tacit agreement that they would remain private. S.B. 676 changes the scope of the law to one where the publisher must guess the circumstances in which the pictures were originally created or obtained, even if they have no knowledge of those circumstances. This is a negligence standard. The First Amendment prohibits the use of negligence-based standards in regulating speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it... .”); *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (“[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”).

Also, the insertion of an exception for images that are newsworthy or of interest to the public does not save the bill, rather it makes it more likely to be unconstitutional. This bill restricts speech based on its content and, therefore, it is immediately constitutionally suspect. The Supreme Court has repeatedly held that a content-based restriction on speech is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). An exception for “newsworthy” material is creating a content based exception to a content based law. It only makes the law more likely to be deemed unconstitutional as a content-based restriction. Also, such an exception is predicated on some images having greater value than others. In *U.S. v. Stevens*, the Supreme Court dismissed the notion that speech may be subjected to a test balancing “the value of the speech against its societal costs.” As Chief Justice Roberts wrote, “As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.” 559 U.S. 460, 472.

The legislature may intend that this bill apply only to malicious invasions of privacy or to websites that invite the posting of such pictures but there is nothing in the bill that limits to those targets. An unconstitutional statute is not cured by a narrower intent or a promise by legislators or prosecutors that the statute will be used in such a limited fashion. As the Supreme Court held in *U.S. v. Stevens*, “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” 559 U.S. at 480.

We ask you to protect the First Amendment rights of all the people of California and defeat or further amend S.B. 676. If you would like to discuss our concerns raised in this memo or in our previous memo, please contact David Horowitz, Executive Director, at 212-587-4025 #3 or horowitz@mediacoalition.org.