

March 15, 2011

Committees on Public Safety, Government Operations, and Military Affairs and
Economic Development and Technology
Hawaii Senate

Memorandum in Opposition to Hawaii House Bill 1007 HD1

The members of Media Coalition believe that House Bill 1007 and existing Hawaii statute §712-1215 are unconstitutional for several reasons. The definition of “pornographic for minors” used in §712-1215 violates the First Amendment. Applying §712-1215 to the Internet violates the First Amendment and would even if the definition of “pornographic for minors” was constitutionally correct. H.B. 1007 also gives a “heckler’s veto” regarding sexual material to any adult who claims to be a minor. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Hawaii: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Presently, HRS §712-1215 bars anyone from disseminating to a minor material that is “pornographic for minors.” “Pornographic for minors” is defined in HRS §712-1210 as any material that is primarily devoted to narrative accounts of sexual activity or contains images of sexual activity or specific nudity; and: (a) It is presented in such a manner that the average person applying contemporary community standards, would find that, taken as a whole, it appeals to a minor’s prurient interest; and (b) Taken as a whole, it lacks serious literary, artistic, political, or scientific value. H.B. 1007 would criminalize the dissemination of such material to an adult if the adult has represented him or herself to be a minor.

Speech is protected by the First Amendment 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.

The definition of “pornographic for minors” in the existing law is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the Supreme Court has ruled that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them.” *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Governments may restrict minors’

access to some sexually explicit speech but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court created a three-part test for determining whether material which is First Amendment protected for adults but is unprotected as to minors. Under that test, in order for sexual material to be outside the First Amendment as to a minor, it must, when taken as a whole,

- (i) predominantly appeal to the prurient, shameful or morbid interest of minors in sex;
- (ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) lack serious literary, artistic, political or scientific value.

Even material that meets this definition may be barred for minors only as long as the prohibition does not unduly burden the rights of adults to access it.

The definition used to determine what material is “pornographic for minors” in §712-1210 and is made illegal for minors in §712-1215 lacks the second or “patently offensive” prong from the *Miller/Ginsberg* test. A recent law enacted in Oregon barring dissemination of sexual material to minors was struck down by the Ninth Circuit Court of Appeals as overbroad for making illegal material that was beyond the scope of the *Miller/Ginsberg* test. *Powell’s Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). In Illinois, a law was enacted that barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test. It was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff’d* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

To the extent prosecutors apply §712-1215 to Internet communication or intend to, it would still be unconstitutional even if the definition of “pornographic for minors” used the three-prong test in *Miller/Ginsberg*. Applying the law to the Internet treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person receiving the “pornographic” material is a minor or an adult. At the same time, anyone who makes material generally available on the Internet should know that minors could be accessing their content. That general knowledge satisfies the knowledge requirement in a criminal statute. 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. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of 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). New York Revised Penal Law §235.21, the law §712-1215 was based upon, was found unconstitutional when New York amended it to apply to content available on the Internet. *American Libraries Ass’n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. See, *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE 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); *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). Such laws were also enacted last year in Massachusetts and Alaska. Legal challenges were brought against both laws and in each case a preliminary injunction has been granted. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 3:10-CV-193 (D. Alaska Oct. 20, 2010).

The only exceptions to these decisions have been laws that were limited to speech illegal for minors that were intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor. 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

Finally, H.B. 1007 is overbroad in that it would make it illegal for an adult to communicate to another adult material that is legal for adults if the recipient adult simply claims to be less than 16 years old. It does not require that the sender of the material believe that the recipient is less than 16 years old. Even if the speaker knows the recipient is an adult, this legislation would make that speech a crime. This, in essence, creates a “heckler’s veto” in that it would allow any adult to subscribe to a list serve discussing sexual health or visit a website with photography or paintings and claim to be a minor. Then, the site or participants on the list serve would be forced to either restrict the discussion to what is suitable for minors or risk prosecution. While this may not be the intent of the statute, it is the plain language of the text and it is not enough that the government tells us that it will not be used in such a manner. As Justice Roberts wrote last year, “But the 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. *U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

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 Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000.

We believe Hawaii can protect minors while also respecting the First Amendment. We are happy to work with the Committees and the Attorney General to do so. If you would like to discuss further our concerns with this bill or the underlying law, 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 Hawaii and reconsider §712-1210 and H.B. 1007 HD1.

Respectfully submitted,

/s/ David Horowitz

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