

## Memo in Opposition to Hawaii House Bill 548

The members of Media Coalition believe that House Bill 548 is clearly unconstitutional. 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.

H.B. 548 would impose civil liability on any author or publisher of any visitor guide or website that “invites, attracts, or encourages” a person to illegally trespass if a person does so in reliance on the guide and suffers an injury or dies. “Visitor guide publication” is defined as any book, magazine, pamphlet, mailer, handout or advertisement that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii. “Visitor guide website” is defined as any website, blog, twitter account, forum, or other wireless communication that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii.

This legislation raises serious Constitutional problems. Clearly, the speech at issue is fully protected by the First Amendment. 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). H.B. 548 singles out a certain type of fully protected speech for regulation; such a content-based regulation of speech is “presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Any constitutional infirmities of H.B. 548 are not cured by the fact that the legislation would create a private civil tort action, rather than imposing a direct government sanction on the speaker. It is well established that the First Amendment does not allow application of state tort law in a way that violates free speech. *See, New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute.”)

Third-party liability creates a substantial chilling effect on the producers and distributors of such material. The prospect of being responsible for the behavior of each viewer, reader or listener is likely to frighten producers and distributors to the point where it will severely chill the dissemination of constitutionally protected works. Due to this potential chilling effect, courts have repeatedly held that absent an actual incitement to imminent lawless action, those who produce or sell First Amendment-protected material may not be subjected to financial liability

for the unlawful or violent acts of third parties, even if they were influenced by specific media. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In cases where the perpetrator or victim had copied what they saw or read, courts have barred or thrown out suits seeking civil damages. See, *DeFilippo v. NBC* 446 A.2d 1036 (R.I. 1982) (parents of deceased minor brought wrongful death action after their son hanged himself copying a stunt he saw on the Tonight Show); *Herceg v. Hustler Magazine, Inc.* 814 F.2d 1017 (5<sup>th</sup> Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent's death allegedly caused by article which described autoerotic asphyxia); *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624 (1989) (wrongful death action brought by father of person killed by perpetrator who had just seen the movie *The Warriors* even though he quoted lines from the movie while committing the crime); *Zamora v. CBS, Inc.*, 480 F.Supp. 199 (S.D. Fla. 1979) (teenager sued the television networks for violent programming that he alleged caused him to commit criminal acts). Even in cases where the victim did not engage in criminal activity, courts have thrown out such suits. See, *Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1036-38 (9th Cir. 1991) (affirming on First Amendment grounds the grant of summary judgment to publishers of mushroom encyclopedia who had been sued by mushroom enthusiasts who were sickened by mushrooms that the book said were safe).

The members of Media Coalition consider third party liability so deadly to free speech, they challenged an Indianapolis ordinance in 1984 that sought to give victims of sex crimes a cause of action against producers and distributors of the material that allegedly caused the crime. The ordinance was struck down. The decision was upheld unanimously by a three-judge panel of the appeals court and summarily affirmed by the U.S. Supreme Court. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The members challenged a virtually identical ordinance enacted in Bellingham, Washington which was also struck down. *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb 9, 1989).

Finally, imposing third-party liability for injuries on producers or distributors of First Amendment protected material is a questionable policy for two reasons: first, it makes innocent third parties responsible for the acts of those who break the law and, second, it diminishes the responsibility of the criminal, since he can claim that something he saw or heard "made me do it."

If you would like to further discuss our position on this bill, please contact me at 212-587-4025 #11 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org). If enacted, H.B. 548 will suppress speech protected by the First Amendment. Please protect free speech and oppose this legislation.

Respectfully submitted,

/s/ David Horowitz

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