

March 25, 2011

Memorandum in Opposition to Iowa Senate File 410 Section 12

The members of Media Coalition caution that Senate File 410 could violate the First Amendment rights of producers and retailers of First Amendment protected material. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Iowa: 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.

Iowa S.F. 410 Section 12 would require public libraries to adopt a policy to limit access to electronic media, videos, or video game resources by a minor under seventeen years of age if the media, video, or resource has been assigned a rating of “R,” “NC=17”, or “a comparable rating,” by the Motion Picture Association of America, “the film advisory board,” or the Entertainment Software Rating Board.

The creation of a policy designed to limit minors’ access to movies, videogames or other content with a rating of “R,” “NC=17,” or anything comparable is constitutionally suspect. Voluntary ratings exist to help parents determine what is appropriate for *their* children but a government body violates the First Amendment if it enforces these rating systems. The government cannot delegate to a non-governmental third-party organization the responsibility of determining what movies and video games are permissible for minors. Also, a government cannot bar access to any speech beyond what the constitution allows and, even then, it must do so by allowing the speaker full due process protections. These protections are not available when the determination is delegated to a private non-governmental body. Most recently in *Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008) *aff’d* 443 F. Supp. 2d 1065 (D. Minn. 2006) the Eighth Circuit upheld the district court ruling that found unconstitutional a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. Courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *Engdahl v. City of Kenosha*, 317 F. Supp 1133 (E.D. Wis. 1970), the court threw out a Kenosha ordinance that used MPAA ratings to bar minors from accessing certain films. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent on all admissions to view movies that are rated either “X” or are unrated was an unconstitutional delegation of legislative power to a private trade association. *See also Swope v. Lubbers*, 560 F. Supp. 1328

(W.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. 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). Movies and video games are given “R,” “NC=17,” or a comparable rating based on a wide range of criteria. A rating may be given for a single scene, image, or word; for multiple or repeated types of content; or certain themes. Much of the content that would earn a film or video game such a rating is, nonetheless, still fully legal for minors under 17 years old under the First Amendment. The most common example is movies and video games with violent content. Many are rated “R” or “M” as inappropriate for minors under the age of 17. Over the past decade numerous court decisions have created a significant body of case law that firmly establishes that speech with violent themes or images is fully protected by the First Amendment and may not be banned for minors. These cases include:

- *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F. 3d 950 (9th Cir. 2009) found unconstitutional a law that limited distribution of video games with certain violent content and barred the requirement that they carry an “18” label on the cover.
- *Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008), enjoined a law that barred anyone under 17 from buying or renting a video game rated “Mature” or “Adults Only.”
- *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), enjoined enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), enjoined enforcement of a city ordinance that limited minors’ access to video games with violent content.
- *Eclipse Enterprises Inc. v. Gulota*, 134 F.2d 63 (2d Cir. 1997), found unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992), held that “unlike obscenity, violent expression is protected by the First Amendment.”

Even with sexual speech, it is very unlikely that content rated “R” or a comparable rating is illegal for minors. While it is true that the government can make some sexually frank material illegal for minors, it is unlikely that any movie or video game given an “R” or comparable rating would meet the test for what content may be banned. Governments may restrict minors’ access to some sexually explicit speech but it is a narrow range of material determined by a specific test. *Erznoznick v. City of Jacksonville*, 422 U.S. 212 (1975). Merely containing sexual content sufficient to warrant an “R” or comparable rating is not enough to make a movie or video game illegal for minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court established a three-part test for determining whether material is “harmful to minors” and may therefore be banned for sale to minors. *See also, Powell’s Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *Entertainment Software Ass’n v.*

Blagojevich, 469 F.3d 642 (7th Cir. 2006). Criminalizing material based on an “R” or comparable rating would criminalize a far broader range of material than is allowed by the First Amendment under the *Miller/Ginsberg* test.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

We ask you to please protect the First Amendment rights of all the people of Iowa and remove the reference to private voluntary rating systems in S.F. 410.

Respectfully submitted,

/s/ David Horowitz

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