



American Booksellers Foundation for Free Expression 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.

May 14, 2012

Memo in Opposition to New York Assembly Bill 290

The members of Media Coalition believe that Assembly Bill 290 threatens the distribution of First Amendment-protected material in New York. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including New York: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They neither produce nor sell works that are legally obscene. However, they do disseminate a wide variety of material with nude images, including art and photography books, mainstream movies and music, sex education material, and literary and artistic works.

A.B. 290 would impose a \$2 surcharge on each magazine, video, DVD, or website registered in New York that contains “nude” images. “Nude” is defined as any display of the breasts of a female or any portion of the buttocks or genitals of any person. Such images are not illegal as to adults or minors. There is no requirement that the images even be sexual in nature.

This bill has multiple constitutional defects. Given that it would apply to material based on its content, it is immediately constitutionally suspect. The Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-7 (2000). To do so the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is narrowly tailored to achieve that interest. *See, R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). It is very unlikely that this legislation could satisfy any part of the strict scrutiny test, let alone each part of the test.

The tax in A.B. 290 is likely unconstitutional as it singles out speech regardless of the nature of the content being taxed. The Court has held that the First Amendment is not limited to barring criminal sanctions against speakers. It bars the state from taxing the press whether as a whole or individual speakers unless the tax is generally imposed. *See, Grosjean v. American Press*, 297 U.S. 233 (1936). It also bars the state from placing a special burden on retailers or producers of First Amendment-protected material such as requiring a special license that is not otherwise imposed on businesses generally. *See, Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

**Executive Director:** David Horowitz **Chair:** Judith Platt, Association of American Publishers  
**Immediate past Chair:** Chris Finan, American Booksellers Foundation for Free Expression **Treasurer:** Vans Stevenson, Motion Picture Association of America  
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Imposing a tax on speech based on its content is also unconstitutional. The \$2 surcharge applies to speech because it contains nude images. To determine what material is taxed, the state would have no choice but to scrutinize the content of material sold or rented. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230. The state cannot punish a producer or retailer of such material by imposing a substantial additional tax on it. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. In 1991, the Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. In a more recent case brought by members of Media Coalition, an Indiana law was struck down that imposed a special license on any business that carried any material that is obscene for minors. Judge Barker held that the law was an unacceptable license on speech and an unconstitutional tax. *Big Hat Books v. Prosecutors*. 565 F. Supp. 2d 981 (S.D. Ind. 2008).

This legislation is also likely unconstitutional as it imposes the sales tax on specific media. It imposes a surcharge on magazines but not books and on DVDs but not movies in theaters. The Supreme Court has also condemned the selective imposition of a punishment on one medium but not others or specific portions of a media but not others. *See, United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted "adult" cable channels but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media ... often present serious First Amendment concerns."). "Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 228 (1987).

This tax may be meant to raise revenue for New York. However, if it is enacted, it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs' attorneys' fees. In a recent case brought by members of Media Coalition, plaintiffs received in excess of \$200,000 in attorneys' fees and expenses. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Please protect the First Amendment rights of all New Yorkers and defeat this tax on constitutionally protected speech.

Respectfully submitted,



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