MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

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.

June 24, 2011

Memorandum in Opposition to New York Senate Bill 5226

The members of Media Coalition believe strongly that the creation of §263.02 (3) violates the First Amendment. The section is almost identical §235.21 of the New York Penal Code which was struck down as unconstitutional in 1997. 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.

§263.02 (3) would criminalize the knowing and intentional dissemination of images sexually explicit conduct by means of the Internet, listserves and public chatrooms to a person known or believed to be a minor. S.B. 5226 also creates §263.04 (4) which provides several affirmative defenses to §263.02 (3) which make clear that the section would be intended to cover the general distribution of such content on the Internet rather than direct communication to a specific minor.

§263.02 (3) essentially would reenact §235.21 of the New York Penal Code that was struck down as unconstitutional. The language in this legislation is virtually identical to §235.21and §263.04 provides the same four affirmative defenses to §263.02 (3) as were available in §235.21. In 1997, U.S. District Judge Preska ruled that §235.21 violated the Commerce Clause of the U.S. Constitution. *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). This was the first case to rule on a state restriction on sexually explicit speech on the Internet. Since this decision, two federal laws and seven such state laws have been struck down and in two other cases preliminary injunctions have been granted barring their enforcement as violating the First Amendment. *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). 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* (D. Alaska 3:10-CV-193 Oct. 20, 2010) (preliminary injunction granted, cross motions for summary judgment pending). In addition to the New York law, the second federal law and several of the state laws at issue in these cases have allowed the use of

age verification systems, credit card verification or labeling as affirmative defenses as provided for in §263.04 (4)(C) and (D). The courts still found them unconstitutional infringements on the First Amendment rights of adults and older minors.

The only exceptions to these decisions have been laws that were limited to speech that was intended to be communicated to a specific person the speaker has actual knowledge, rather than general knowledge, is a minor or the speaker believes to be a minor. While this may be the intent of the statute, it is not enough that the government tells us it will only 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 ALA v. Pataki case, New York paid to the plaintiffs $450,000 in legal fees.

We believe New York can protect minors while also respecting the First Amendment. We are happy to work with the legislature to help it to do so. If you would like to discuss further our concerns about this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. We ask you to please protect the First Amendment rights of all the people of New York and defeat or amend §263.02 (3) of S.B. 5226.

Respectfully submitted,

/s/ David Horowitz

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