April 30, 2012

Memorandum in Opposition to Rhode Island Senate Bill 2647

The members of Media Coalition believe that Senate Bill 2647 violates the First Amendment for multiple reasons. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Rhode Island: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

Section 2 of S.B. 2647 would criminalize the knowing and intentional dissemination of graphic images of the genitals or pubic area or of actual sexual activity by means of the Internet, listserves and public chatrooms to a person known or believed to be a minor.

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). 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 in the legislation of what images are illegal to disseminate to a minor is 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 that is First Amendment protected for adults but is unprotected as to minors. Under that test, in order for sexual material to be constitutionally unprotected 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 images are illegal to disseminate to minors in Section 2 lacks any of the prongs 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). Similarly, a recent Illinois law barred the sale to minors of video games with sexual content but omitted the third prong of the Miller/Ginsberg test. The law was permanently enjoined by the U.S. District Court and the ruling was vigorously affirmed by the Seventh Circuit Court of Appeals. Entertainment Software Ass’n v. Blagojevich, 469 F.3d 642 (7th Cir. 2006) aff’g 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

Even if this section applied only to sexual images that met the three-prong test in Miller/Ginsberg, it would be unconstitutional if the restriction was applied to general communication on the Internet, on listserves and in public chatrooms and social networking sites. To do so treats material disseminated in this manner as if there were no difference between a computer transmission and a brick and mortar retailer of books, magazines or movies. But cyberspace communication is different. When a person speaks generally through a website or in a chatroom, there is no way to know whether the recipient of the sexual material is a minor or an adult. At the same time, anyone who makes material available on the Internet through a website, listserv or public chatroom knows that there likely is a minor accessing his or her content. That general knowledge satisfies the knowledge requirement in a criminal statute. As a result, the effect of banning the computer dissemination of images of sexual conduct 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 only exceptions to these decisions have been laws that were limited to speech that meets the Supreme Court’s three prong test for sexual material “harmful to minors” and that was intended to be communicated to a specific person that the speaker has actual, rather than general,
knowledge is a minor or believes to be a minor. While this may be the intent of the statute, it is not the plain language of the text, and 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).

We also believe that Section 3 is overly vague and may impact constitutionally protected speech. It prohibits intentionally contacting a person or causing a person to be contacted in a manner that annoys or bothers that person, serves no legitimate purpose and that would cause a reasonable person to suffer substantial emotional distress. While protecting people from harassment is a worthy goal, legislators cannot do so by criminalizing speech protected by the Constitution. Speech that annoys or bothers the listener is not necessarily outside the First Amendment, even if it causes emotional distress. The Supreme Court said in Texas v. Johnson, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 491 U.S. 397, 414. Under Section 5 a newspaper could be at risk of prosecution if readers contacted the subject of an unfavorable article and caused that person emotional distress. The legislation does not define “substantial emotional distress” so a jury must determine if the article or some fact in the article was legitimate, if it caused emotional distress and, if so, was it sufficiently substantial. This vagueness is likely impermissible in a criminal law limiting First Amendment guarantees. See Baggett v. Bullitt, 370 U.S. 360 (1964).

Finally, we are concerned that Section 6 may limit the distribution of images protected by the First Amendment. It criminalizes dissemination of an image without the subject’s approval even if it was taken with his or her permission. This could allow the subject of an unflattering or controversial image to have veto power over its dissemination, even if it were taken with his or her explicit permission. Again, we presume that this may not be the intent of the legislation, but the intent may not cure the constitutional concerns.

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 past challenges to such legislation, states have paid plaintiffs as much as $500,000 in legal fees.

We believe Rhode Island can protect minors while also respecting First Amendment rights. 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. Again, we ask you to please protect the First Amendment rights of all the people of Rhode Island and reconsider S.B. 2647.

Respectfully submitted,

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