

# THE MEDIA COALITION INC

275 SEVENTH AVENUE • 15<sup>TH</sup> FLOOR • NEW YORK, NEW YORK 10001  
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ  
Executive Director

## Memorandum in Opposition to Alaska House Bill 298 as Amended

American Booksellers  
Foundation for Free  
Expression

Association of American  
Publishers, Inc.

Comic Book Legal  
Defense Fund

Entertainment Consumers  
Association

Entertainment Merchants  
Association

Entertainment Software  
Association

Freedom to Read  
Foundation

Independent Book  
Publishers Association

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

Recording Industry  
Association of America,  
Inc.

Chair  
Chris Finan

American Booksellers  
Foundation for Free  
Expression

Immediate Past Chair  
Sean Devlin Bersell  
Entertainment Merchants  
Association

Treasurer  
Sally Jefferson  
Entertainment Software  
Association

General Counsel  
Michael A. Bamberger  
Sonnenschein Nath &  
Rosenthal LLP

The members of Media Coalition believe that House Bill 298 is significantly improved by the amendments to the bill adopted by the Judiciary Committee but two aspects of sections 6 and 9 remain that likely violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Alaska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Section 9 of H.B. 298 would amend AS 11.61.128(a) to bar the distribution of material harmful to minors by an adult to anyone under 16 years old or someone the adult believes is less than 16 years old. Presently, 11.61.128(a) applies only to electronic distribution but to a much broader range of sexually explicit content. Section 6 of the bill would make illegal to disseminate sexually explicit material that depicts adults or computer generated images that appear to be minors but are not obscene for adults.

We believe the limiting of material subject to prosecution in 128(a) to material harmful to minors is a significant improvement. However, the application to material generally available on the Internet and on open listserves remains a concern. In *Ginsberg v. New York*, 390 U.S. 629 (1968) (as subsequently 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. Limiting the prohibition in the amended version of S.B. 298 to material that meets this three-part test is appropriate in a “brick and mortar” store. However, the application to Internet communication in the bill, and in the present law, is almost certainly unconstitutional even if it is limited to material that could be restricted as harmful to minors. The application to the Internet treats material as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a book or video or video game store. There is no way to know whether the person receiving the “harmful” material is a minor or an adult. As a result, the effect of banning the computer dissemination of material “harmful to minors” is to force a content provider, whether a publisher or an on-line carrier, to deny or restrict access to both minors and adults, depriving adults of their First Amendment rights or risk prosecution.

Two federal laws that restrict the availability of matter inappropriate for minors on the Internet have been declared unconstitutional violations of the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (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 also been ruled unconstitutional as well. *See, PSINet v. Chapman*, 63 F.3d

227 (4<sup>th</sup> Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2<sup>nd</sup> Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999); *Southeast Booksellers v. McMasters* 282 F.Supp. 2d 1180 (D.S.C. 2003); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D. N.Y. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). In addition to First Amendment deficiencies, some courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

While the members of Media Coalition are deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, section 6(a)(2) of the bill would criminalize material that is fully protected by the First Amendment and that does not exploit minors. In a resounding and unambiguous decision, the Supreme Court in *Free Speech Coalition v. Reno*, 535 U.S. 234 (2002) found unconstitutionally overbroad a similar federal statute, the Child Pornography Prevention Act of 1996 (CPPA). The CPPA criminalized non-obscene sexually explicit images of adults that appear to be minors and computer generated images that appear to be of a minor engaging in real or simulated sex or with genitals lasciviously displayed. *Free Speech Coalition* reaffirmed the holding in *Ferber v. New York*, 458 U.S. 747 (1982), that a state may ban sexually explicit images of actual children, but, at the same time, the Court made clear that these laws could not criminalize images that only appear to be minors. The Supreme Court ruled that material which included only images that appear to be minors engaged in prohibited activity was fully protected by the First Amendment and could only be banned if found to be obscene under the three prong test enunciated in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test for adult obscenity applies to descriptions or representations of lascivious nudity or sexual conduct which:

- 1) an average person applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest in sex;
- 2) the work depicts or describes such nudity or conduct in a patently offensive manner; and
- 3) the material, considered as a whole, lack serious literary, artistic, political, or scientific value.

*Miller*, 413 U.S. at 24-25.

However, the definition of “appears to be a child” in section 8 of amended House Bill 298 only includes two of the three prongs in the *Miller* test. The bill omits the second prong that requires that material depict or describe sexual conduct or nudity in a patently offensive manner. Absent this prong the test is incomplete and does not properly judge whether material is obscene as a legal matter. Again, if the material is not legally obscene, it cannot be criminalized as child pornography unless it depicts an actual child engaged in sexual activity.

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' attorneys' fees. In the

successful challenges to such state laws plaintiffs have received as much as \$450,000 in legal fees.

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](mailto:horowitz@mediacoalition.org).

Again, we ask you to please protect the First Amendment rights of all the people of Alaska and amend this legislation to address these concerns.