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 Consumers Association Entertainment Merchants Association Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

February 28, 2011

In the Judiciary Committee
Hawaii State House

Memo in Op. to H. B. 548 HD2

The members of Media Coalition believe that House Bill 548 HD 2 is clearly unconstitutional. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Hawaii: 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.

H.B. 548 HD 2 would impose civil liability on any author or publisher of any visitor guide or website that "knowingly or negligently encourages or invites" a person to "enter, cross, or remain on privately or publicly owned land from which the public is excluded" and the person suffers an injury or dies as a result of entering, crossing, or remaining on the property. The publisher or author must also indemnify the property owner or occupier for any civil liability as a result of an injury or death to the trespasser. A "Visitor guide publication" is defined as any book, magazine, pamphlet, mailer, handout or advertisement that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii. A "Visitor guide website" is any website, blog, Twitter account, forum, or other wireless communication that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii.

This legislation presents serious Constitutional problems. Travel guides are fully protected by the First Amendment. Speech is protected unless the Supreme Court tells us otherwise. As the Supreme 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). H.B. 548 singles out a certain type of fully protected speech for regulation; such a content-based regulation of speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Any constitutional infirmities of H.B. 548 are not cured by the fact that the legislation would create a private civil tort action, rather than imposing a direct government sanction on the speaker. It is well established that the First Amendment does not allow application of state tort law in a way that violates free speech. *See*, *New York Times v. Sullivan*, 376 U.S. 254, 265

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(1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute.")

Civil liability creates a substantial chilling effect on the producers and distributors of such material. The prospect of being responsible for the behavior of each viewer, reader or listener is likely to frighten producers and distributors to the point where it will severely chill the dissemination of constitutionally protected works. Due to this potential chilling effect, courts have repeatedly held that absent actual incitement to imminent lawless action, those who produce or sell First Amendment-protected material may not be subjected to financial liability for the unlawful or violent acts of third parties, even if they were influenced by specific media. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In third-party liability cases where the perpetrator or victim had copied what he or she read or saw, courts have barred or thrown out suits seeking civil damages. *See*, *DeFilippo v. NBC* 446 A.2d 1036 (R.I. 1982) (parents of deceased minor brought wrongful death action after their son hanged himself copying a stunt he saw on the Tonight Show); *Herceg v. Hustler Magazine*, Inc. 814 F.2d 1017 (5th Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent's death allegedly caused by article that described autoerotic asphyxia); *Yakubowicz v. Paramount Picutres Corp.*, 404 Mass. 624 (1989) (wrongful death action brought by father of person killed by perpetrator who had just seen the movie *The Warriors* even though the he quoted lines from the movie while committing the crime); *Zamora v. CBS, Inc.*, 480 F.Supp. 199 (S.D. Fla. 1979) (teenager sued the television networks for violent programming that he alleged caused him to commit criminal acts).

Courts have declined to impose liability on publishers even where a reader has relied on the content of a book that turned out to be inadequate or incorrect. In *Birmingham v. Fodor's Travel Publications, Inc.,* the plaintiff was a tourist injured swimming at a beach discussed in the defendant's travel book. The Supreme Court of Hawaii ruled that the defendant/publisher had no duty of care to the plaintiff and could not be held liable for failing to warn the plaintiff of dangerous conditions at the beach. 73 Haw. 359 (1992). *See also*, *Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1036-38 (9th Cir. 1991) (affirming on First Amendment grounds the grant of summary judgment to publishers of a mushroom encyclopedia who had been sued by mushroom enthusiasts who were sickened after eating mushrooms that the book said were safe).

The members of Media Coalition consider third party liability so deadly to free speech they challenged an Indianapolis ordinance in 1984 that sought to give victims of sex crimes a cause of action against producers and distributors of the material that allegedly caused the crime. The ordinance was struck down. The decision was upheld unanimously by a three-judge panel of the appeals court and summarily affirmed by the U.S. Supreme Court. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The members challenged a virtually identical ordinance in Bellingham, Washington which was also struck down. *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb 9, 1989).

We believe it is important to identify ways to prevent visitors from trespassing on private property and getting injured or dying, but the answer is not to impose liability for these injuries on writers and publishers of First Amendment protected material. Imposing liability is questionable policy for three reasons: first, it makes innocent third parties responsible for the acts of those who trespass; second, it diminishes the responsibility of the trespasser, since he or she can claim that something he saw or heard "made me do it;" and, it absolves property owners for injury or death of the trespasser even if the property owner is at fault. Instead, we respectfully suggest that this Committee amend the legislation to create a task force to identify where trespassing occurs and recommend ways to prevent it, as was done with Senate Bill 1207 the companion to HB 548.

Again, if enacted, H.B. 548 will suppress speech protected by the First Amendment. Please protect free speech and oppose this legislation. If you would like to further discuss our position on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

Respectfully submitted,

/s/ David Horowitz

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