

THE MEDIA COALITION INC

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

Memorandum in Opposition to House Bill 360

DAVID HOROWITZ
Executive Director

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Software
Association

Freedom to Read
Foundation

Interactive Entertainment
Merchants Association

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Video Software Dealers
Association

Chair
Sean Devlin Bersell
Video Software Dealers
Association

Immediate Past Chair
Judith Krug
Freedom to Read
Foundation

Treasurer
Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

The members of The Media Coalition believe that House Bill 360 likely violates the First Amendment rights of retailers and producers of content and others. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and recording, video and video game retailers in Delaware and the rest of the United States.

H.B. 360 would add violence as a type of content that can be ruled harmful to minors. If material with violent content is found to be harmful to minors, it would be illegal to display or disseminate such material to a minor. However, the existing definition of harmful to minors does not include consideration of whether material lack serious value as required by the Supreme Court.

This bill is clearly constitutionally suspect. Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow classes. 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.1382, 1389 (2002). None of the types of speech cited by the Supreme Court include speech with violent content alone. Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation for adults or minors. A series of recent court decisions has reaffirmed this legal doctrine. Laws barring the sale or rental of video games with violent content to minors were enacted in 2005 in California, Illinois and Michigan. The laws were all successfully challenged with U.S. District judges granting injunctions barring the enforcement of each one. See, VSDA v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction); ESA v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (granting a permanent injunction); ESA v. Granholm, 404 F. Supp. 978 (E.D. Mich. 2005) (granting preliminary injunction). Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent arcade videogames. Interactive Digital Software Association v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) enjoined enforcement of a county ordinance that barred the sale or

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers in the United States.

rental to minors of video games with violent content. Video Software Dealers Association v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 20004) barred enforcement of a state law that barred dissemination to minors of video games that included violence against "peace officers." Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio, W. Div. 2002) deemed speech with violent content as fully protected by the First Amendment and enjoined enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content. Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) struck down a restriction on the sale to minors of material containing "excess violence." Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) held that "unlike obscenity, violent expression is protected by the First Amendment." State v. Johnson, 343 So. 2d 705, 710 (La. 1977) declared that prohibiting the sale of violent materials to minors exceeded the limits placed on regulation of obscene materials by the U.S. Supreme Court. Sovereign News Co. v. Falke, 448 F. Supp. 306, 400 (N.D. Ohio 1977), while remanded on other grounds, overturned a statute defining as "harmful to minors" material describing or representing "extreme or bizarre violence."

Also, there is a problem with Delaware's existing harmful to minors law. The definition used to determine what material is harmful to minors for sexually explicit material is likely unconstitutional. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. 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 the case of Ginsberg v. New York, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. Under Delaware law the test for what material can be deemed illegal for minors does not consider whether the material lacks serious value. This is the third prong of the test given in Ginsberg and would cause some material to be considered harmful even though it contains serious value and therefore would not be harmful under the test set out by the Supreme Court. The law at issue in ESA v. Blagojevich, cited above, included a similar prohibition on sexually explicit material without including the third prong of the Ginsberg test. This part of the law was also permanently enjoined. ESA v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

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 several recent successful challenges to similar legislation, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees in each litigation.

Again, we ask you to please protect the First Amendment rights of all people of Delaware and defeat this legislation.