IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 00-3643

AMERICAN AMUSEMENT MACHINE ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

TERI KENDRICK, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Indiana, No. IP00-1321-C H/G
The Honorable David F. Hamilton, District Judge

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION, GREAT LAKES BOOKSELLERS ASSOCIATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, AND VIDEO SOFTWARE DEALERS ASSOCIATION,
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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DIPursuant to 7th Cir. R. 26.1, the a*mici curiae* make the following disclosure:

1. The full name of every party that the attorney represents in the case: American Booksellers Foundation for Free Expression; Association of American Publishers, Inc.; Freedom to Read Foundation; Great Lakes Booksellers Association; International Periodical Distributors Association; Motion Picture Association of America, Inc.; National Association of Recording Merchandisers; Periodical and Book Association of America, Inc.; Publishers Marketing Association; Recording Industry Association of America; and Video Software Dealers Association.

2. The names of all law firms whose partners or associates have appeared for *amici curiae* (including proceedings in the district court or before an administrative agency) or are expected to appear for *amici curiae* in this court: Sonnenschein Nath & Rosenthal, 1221 Avenue of the Americas, New York, New York 10020-1089.

3. *Amici* do not have any parent corporations and/or any publicly-held company that owns 10% or more of the stock of any of them.

SCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Michael A. Bamberger
Counsel for *Amici Curiae*

Dated:November 8, 2000

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation ("FTRF"), Great Lakes Booksellers Association, International Periodical Distributors Association, Motion Picture Association of America, Inc., National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, Recording Industry Association of America, and Video Software Dealers Association submit this joint amicus brief in support of appellants, urging that this Court find Indianapolis-Marion City-County Ordinance No. 72, 2000 ("the Ordinance) unconstitutional and therefore, reverse the decision of the court below.[1] This brief is submitted upon written consents, attached hereto, of counsel to both appellants and appellees.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

The materials published, distributed and sold by *amici* include depictions of violence, bloodshed and other actions described by the Ordinance as "graphic violence." These range from popular motion pictures such as "The Terminator," "Rambo" and "Platoon," starring well known actors such as Arnold Schwarzenegger, Sylvester Stallone and Charlie Sheen, to documentaries about wars and the Holocaust.

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[1] A description of the *amici* is attached as Appendix A.

These expressive materials are and should be protected by the First Amendment. Were this Court to affirm the decision below, such materials would be subject to regulation which need only survive an altogether too lax "reasonable basis" standard, substantially chilling the activities of *amici* that heretofore have been clearly protected by the First Amendment. *Amici* have a significant interest in ensuring that the body of law regarding "harmful to minors" speech on sexual matters not be wrongly applied to graphic violence.

The district court's unprecedented holding that violent material enjoys no greater constitutional protection than sexual material as to minors carves an enormous new exception into the First Amendment bedrock upon which *amici* depend for the creation and dissemination of a wide variety of constitutionally protected material in all media. It represents nothing less than a sea change in constitutional law, with implications far beyond the factual setting of this case. It places at risk a staggering array of mainstream films, videos, television programs, books, magazines, and works in other media that contain violent imagery no more shocking than that available every day on the news. The current violence in the Middle East, for example, is gruesome, gut-wrenching, and tragic, but it is real, and few would contend that it should be excised from the media to spare the sensibilities of minors. Likewise, the realistic violence in movies like "Saving Private Ryan" or in books about the Civil War and World War II should not be denied full constitutional protection because some fear its effect on minors.

Amici believe that we do ourselves, our children, and the First Amendment a grave disservice by allowing the government, based on deeply flawed studies, to usurp

the choice of private individuals to determine the material to which minors can be exposed. Rather than allowing the mantra "harmful to minors" to shield from meaningful judicial scrutiny restrictions on any speech that lawmakers deem unsuitable for children, this Court should reaffirm the consistently recognized limitation of "obscenity" to sexual material.

Amici have, to date, been comfortable with the existing constitutional "variable obscenity" framework so long as the access of adults to speech that is constitutionally protected as to them is not impaired. But however carefully the drafters of the Ordinance hewed to *Ginsberg v. New York*, 390 U.S. 629 (1968), and however sanguine the District Court may be as to the limited impact of its ruling, the decision below explodes the carefully crafted doctrine of variable obscenity and, if not reversed, surely will inspire even broader restrictions on violent content, thereby chilling the creation and dissemination of a huge amount of mainstream speech that contains at least some "graphic violence."[2] The effect on *amici* will be profound, with dire consequences for the vibrant dialogue the First Amendment was intended to foster. The First Amendment is gravely weakened, and the communicative businesses of *amici* adversely impacted, when courts defer so readily to legislative efforts to sanitize the world to which minors are exposed.

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383 (1988); *ACLU v.*

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[2] Already the St. Louis County Council has passed an ordinance, based on the Ordinance, but applicable also to computer games and videos sold at retail establishments. St. Louis County Bill No. 390,2000.

Johnson, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp.2d 1029 (D.N.M. 1998); *Video Software Dealers Ass'n v.* Webster, 968 F. 2d 684 (8th Cir. 1992); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986); American *Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham,* No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.,* 582 S.W.2d 738 (Tenn. 1979).

I.
THERE IS NO BASIS FOR THE DISTRICT COURT'S APPLICATION OF THE *GINSBERG/MILLER* TEST TO MATERIAL DEPICTING "GRAPHIC VIOLENCE"

Applying verbal sleight of hand and in defiance of all applicable precedents both in this Circuit and elsewhere, the district court upheld the Ordinance by creating a new exception to the First Amendment for "graphic violence." In doing so, the district court wrongly denied First Amendment protection to certain expressions of violent action conveyed to persons under eighteen.

A. Expression of Violent Action Is a Protected Form of Speech and Any Content-Based Regulation of Such Speech Must Pass Strict Scrutiny

There is no constitutional basis for regulation of "graphic violence." The depiction or description of violence is not one of the few narrowly delineated categories of speech excluded from the protection of the First Amendment:

> The traditional categories of speech subject to permissible government regulation include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v.*

> *State of New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). In addition, the Supreme Court has recently upheld legislation prohibiting the dissemination of material depicting children engaged in sexual conduct. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp 1316, 1331 (S.D. Ind. 1984), *aff'd,* 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

Every single court that has ever considered the issue (other than the court below) has invalidated attempts to regulate material solely based on violent content, regardless of whether that material is called "violence," "excess violence" or included within the definition of "obscenity." See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d at 330; *Eclipse Enterprises Inc. v. Gullota*, 134 F.2d 63 (2d Cir. 1997) (declining "any invitation to expand these narrow categories of speech to include depictions of violence"); *Video Software Dealers Ass'n.*, 968 F.2d at 684 (8th Cir. 1992) ("[V]ideos depicting only violence do not fall within the legal definitions of obscenity for either minors or adults."); *Interstate Circuit Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), vacated on other grounds, 391 U.S. 53 (1968).

Content-based regulation of violent expression such as the Ordinance must pass strict scrutiny – *i.e.*, it must "promote a compelling interest" and use the "least restrictive means to further the articulated interest." *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Moreover, even if the state has a compelling interest, the regulation must be "carefully tailored" to achieve the stated purpose. *Id*. The District Court's application of a watered-down "reasonable basis" standard provides no meaningful review of the statute at issue and defies the appropriate constitutional framework used to assess content-based regulations of protected speech. *See United*

States v. Playboy Enterprises Group, Inc., 120 S.Ct. 1878 (2000); *Sable Communications, Inc.* 492 U.S. at 129; R.*A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

B. The *Ginsberg/Miller* Analysis Only Applies to the Regulation of Obscenity

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court adopted the concept of "variable obscenity" or "obscenity for minors," which was subsequently engrafted onto the three-part obscenity test set forth in *Miller v. California*, 413 U.S. 15 (1972). The *Ginsberg/Miller* analysis rests on the fact that "obscenity is not within the area of protected speech." *Ginsberg,* 390 U.S. at 635, *citing Roth v. United States*, 354 U.S. 476, 485 (1957). Both *Ginsberg* and *Miller* involved the regulation of obscene materials – materials that have a "specific judicial meaning which derives from the *Roth* case, i.e., obscene material 'which deals with sex. "*Miller v. California,* 413 U.S. 15, 20 n.2 (1973), *citing Roth*, 354 U.S. at 487.[3] Obscene sexual material, not violent material, has been held unprotected by the First Amendment for over 40 years[4] -- and thus may be constitutionally regulated.

Extending the *Ginsberg/Miller* test to violent matter by equating graphic violence with obscene sexual explicitness does not resolve the constitutional infirmities inherent in this type of regulation, any more than fitting "political speech" into the *Miller* formula

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[3] The *Miller* Court further stated that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." Id. at 27 (emphasis added).

[4] *Roth v. United States*, 354 U.S. 476 (1957).

would validate a restriction on such speech.[5] *See Video Software Dealers Ass'n v. Webster*, 773 F. Supp. 1275 (W.D. Mo. 1991), *aff'd*, 968 F.2d 684 (8th Cir. 1992). As the Louisiana Supreme Court explained in *State v. Johnson*:

> In *Miller v. California, supra,* the United States Supreme Court declared:
>
> " * * * State statutes designed to regulate obscene materials must be carefully limited. * * * As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. at 23-24, 93 S. Ct. at 2614-15, 37 L.Ed.2d at 430-31 (emphasis supplied [by Louisiana Supreme Court]).
>
> Unquestionably, . . . [a statute], which facially purports to proscribe patently offensive violent materials, exceeds the limits placed upon the regulation of obscene materials by the United States Supreme Court in Miller.

343 So. 2d 705, 709-710 (La. 1977) (quoting *Miller v. California*, 413 U.S. at 23-24).

The district court ignored this uniform line of authority based on the novel premise that the First Amendment permits Indianapolis to regulate access of minors to expression by designating it "harmful," even if such regulation infringes on protected speech.

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[5] Even if the analysis were appropriate, the Ordinance does not comply with the *Ginsberg/Miller* test. First, the Ordinance blocks access to violent expressions that do have serious literary or artistic value for older, more mature minors. Id. at 527. Second, the Ordinance does not provide meaningful guidance to assess whether the targeted video game "taken as a whole, appeals to the prurient interest." *Miller*, 413 U.S. at 24 (emphasis added).

The district court based its analysis on the *Ginsberg* notion of "variable obscenity," but the court erred in finding that the concept is so malleable as to encompass violent material. It is not. Under prevailing Supreme Court precedent, minors have a constitutional right of access to material depicting or describing violent action unless the material also is erotic and therefore subject to regulation as obscenity under the *Ginsberg/Miller* analysis. However, the regulation cannot be based solely on the violent content of the material.

The concept of variable obscenity is that material may be obscene for children while not obscene for adults, or even for older children. Since obscenity is not protected speech, a regulation of matter which may be "obscene" for children is permissible as long as that prohibition does not impact on the access of those to whom the material is not "obscene" or "harmful." In *Ginsberg,* the regulation related to the sale of material to minors, and thus did not restrict adult access. *Ginsberg*, however, is limited to obscenity. There is not, nor could there be, a concept of "variable violence," since violent content is not a permissible subject of regulation.[6]

The fundamental error of the court below lay in misapprehending the meaning of the expression "harmful to minors" as used in *Ginsberg* and its progeny. The district court stated:

> To fall within the reasoning of *Ginsberg*, the City must have had a reasonable basis for believing the Ordinance would protect children from harm and the Ordinance must be limited in scope to such material. (R-36.)

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[6] The dictum in *Sable Communications, Inc.*, 492 U.S. at 125 does not provide support for the Ordinance, since that case dealt with sexually explicit material regulable under *Ginsberg*.

Ginsberg does not open the door to permit government to limit minors' First Amendment rights to any category of speech whenever government has a "reasonable basis for believing" such speech may be "harmful" to minors." Minors are within the penumbra of the First Amendment. Such a slippery slope would obviate the First Amendment rights of minors. Rather, "harmful to minors" is merely the formulation used by the New York legislature to define obscenity for minors in the statute under consideration in *Ginsberg*. It has nothing to do with actual harm, physical or otherwise, to a minor.

This Court should reject the reasoning of the district court and conclude, as has every other court to have addressed the issue of regulation of violent content, that regulation of material based solely on its description or depiction of violent action is unconstitutional.

II.
EVEN IF RESTRICTING ACCESS TO MATERIAL WITH VIOLENT CONTENT WERE PERMISSIBLE, BARRING OLDER MORE MATURE MINORS BASED ON THE INAPPROPRIATENESS OF THE MATERIAL TO YOUNGER MINORS IS CONSTITUTIONALLY UNACCEPTABLE

The district court justified the application of the "harmful to minors" standard based on an immature younger child since, to do otherwise, would leave "younger children with less than an appropriate level of protection and may severely frustrate the purpose of the Ordinance." (R-62.) However, the district court recognized that this approach is contrary to the holding of a number of courts across the nation, which found it unconstitutional to bar access to constitutionally protected materials by older minors to "protect" younger children. *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989) (on remand from the U.S. Supreme Court, 488 U.S. 905 (1988));

American Booksellers v. Webb, 919 F.2d 1493, 1505 (11th Cir. 1990); *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 520.

These decisions, in which a number of *amici* were plaintiffs, arise from the U.S. Supreme Court decision in the *Virginia* case. Concerned as to the application of the *Ginsberg* test in the context of an access restriction rather than a restriction on sale, the Supreme Court requested the Virginia Supreme Court to advise it "what general standard should be used in determine the statute's reach in light of juveniles' differing ages and levels of maturity." 484 U.S. at 397. To comply with the U.S. Constitution, the Virginia Supreme Court developed the test quoted and rejected by the district judge here, that "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." 882 F.2d at 126 (quoting 372 S.E.2d 618, 625 (Va. 1988)). No court has since rejected this formulation until the decision of the court below.

Should this Court not be willing to invalidate the Ordinance, *amici* urge this Court, at a minimum, to endorse the formulation of the Virginia Supreme Court to protect the First Amendment rights of older minors.

III.
THE MODIFIED *GINSBERG* TEST IS SO VAGUE AND WITHOUT OBJECTIVE MEANING AS TO BE UNCONSTITUTIONAL

If the Court affirms the graphic violence/harmful to minors formula for the regulation of violent video games in public arcades, there would be no legal impediment to its application to other expressive media, such as those represented by *amici.* The application of the Indianapolis test to the vast panoply of the materials *amici* produce

illustrates the lack of any reasonably certain objective meaning for the Ordinance's operative terms:

1. What is a minor's "morbid interest" in violence? What does morbid mean in this context? Webster's Third New International Dictionary offers three definitions: not sound and healthful; abnormally susceptible to or characterized by gloomy or unwholesome feelings; or grisly and gruesome. Each of these reflects the subjective response of the observer of the material. How does an artist, publisher or producer know whether material predominantly appeals to such a "morbid interest", even if they had a clear understanding of the meaning of "morbid interest"?

2. The definition of "graphic violence" raises questions as to the meaning of "human-like being" and "bloodshed", among other words.

"Where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson,* 461 U.S. 352, 358 n.8 (1983). As the Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the due process clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 U.S. 104, 108 (1972). The Court provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

> arbitrary and discriminatory application. Third, but related, where a vague statue 'abut(s) upon sensitive areas of basis First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-109 (footnotes omitted). *See also Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the lower.")

The language of the Ordinance provides no opportunity for people, such as those represented by the *amici*, to determine whether a certain material falls under its criminal ambit. Further, because the definitions are so subjective, it is quite conceivable that a person may be criminally charged if an official vested with the right to enforce the Ordinance or similar legislation believes that the material appeals to a "morbid" interest. As a direct result of the quintessentially vague language, such legislation will have a chilling effect on distributors and others who deal with mainstream, valuable works. The Supreme Court has noted that "[u]ncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

CONCLUSION

By reason of the foregoing, *amici* respectfully urge this Court to reverse the order below and instruct the district court to enjoin enforcement of the Ordinance.

Dated: November 8, 2000

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B).

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Michael A. Bamberger

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APPENDIX A: THE *AMICI*

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States.

Freedom to Read Foundation ("FTRF") is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

Great Lakes Booksellers Association ("GLBA") is a trade association made up of booksellers and other book industry professionals in the Great Lakes region. Its primary membership area includes the states of Illinois, Indiana, Ohio and Michigan.

International Periodical Distributors Association ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Motion Picture Association of America ("MPAA") is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

National Association of Recording Merchandisers ("NARM") is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

Periodical and Book Association of America, Inc. ("PBAA") is an association of magazine and paperback book publishers who distribute their wares through independent national distributors, wholesalers, and retailers.

Publishers Marketing Association ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired.

Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

Video Software Dealers Association ("VSDA") is the trade association for the home video industry. It represents more than 3,000 member companies in North America and 22 countries worldwide. Membership comprises the full spectrum of retailers of motion picture videos and video games, as well as the home video divisions of motion picture

studios, video game and multimedia producers, and other related businesses which constitute and support the home entertainment industry.