



MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

Memorandum to the Senate in Opposition to Louisiana House Bill 153

Media Coalition believes that House Bill 153 violates the Constitution for several reasons and presents undefined and financially burdensome requirements on online publishers who may want to comply with it. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Louisiana: publishers, booksellers and librarians, as well as manufacturers and retailers of recordings, films, home video and video games. Their members sell or loan typical mainstream fare.

H.B. 153 requires any person or entity in Louisiana who publishes material harmful to minors on the Internet to make every visitor to their site “electronically acknowledge and attest” to being 18 years of age or older prior to gaining access to such material. Failure to do so is a crime even if the person accessing the material is an adult. How a person or entity is to “electronically acknowledge and attest” to being an adult is not defined in the legislation. A violation is punishable by a fine of \$10,000.

Our members include publishers who distribute books online, booksellers with online stores and librarians that make their collections available electronically. They are very concerned that the bill offers very little information in how to comply with it. They urge you to address these concerns before passing the bill. Among those problems are:

- “Electronically acknowledge and attest” is not defined in the bill. Generally it means to make a legally binding statement. The term normally is understood to mean more than clicking a button in a pop up window or screening page.
- It is reasonable to assume that more is required because merely clicking a box will do very little to prevent minors from accessing sexual material.
- If more is required, this presents significant technical challenges for many smaller publishers or booksellers..
- Credit card information may not be adequate because credit card companies refuse to confirm the age of the card holder or user and the card user may not be the card holder.
- Since the crime is the failure to seek age verification from any visitor who seeks to access sexual material, sites must maintain some record of asking visitors to acknowledge and attest to their age. Are websites required to keep some record of this action until the statute of limitations expires, which can be years or decades?
- Maintaining these records would also be a substantial technical and financial burden for many websites that do not have the computer storage capacity, money or technical knowledge of how to set up a system to collect and maintain these records and keep them matched with visitors who attempt to access the sexual material.

Executive Director: David Horowitz Chair: Barbara Jones, Freedom to Read Foundation
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Sean Bersell, Entertainment Merchants Association
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

- Is difficult to know who must comply with the law. Online publishers or booksellers can be considered to be an entity in Louisiana solely because their site is accessible in the state. Many states require websites to remit sales tax for any sales in a state even if the business is located elsewhere. Does an affiliate program make a site an entity in Louisiana?
- What is harmful to minors is judged based on the age of the minor. There is no way for a site to know if it must “ID” those trying to access sexual health books or art books because that may be legal for a 17 year old but illegal for a 12 year old.
- Must the sexual content in a book or movie be viewable on the site or does it apply to material that is for sale but the visitor cannot browse it on the site? This would make a big difference to an online bookseller.

Regardless of these practical problems, H.B. 153 is clearly unconstitutional. It impedes the First Amendment rights of adults and online booksellers, publishers and providers of video and other speech, without doing anything meaningful to prevent minors from accessing sexual material online. Instead, it creates the crime of failing to ask anyone attempting to access sexual material to “electronically acknowledge and attest” to being an adult prior to doing so. It does not bar minors from viewing such content nor is it presently illegal for minors to do so online (see discussion of case law below). The state cannot force retailers to “ID” adults as a condition for the adult or the retailer to exercise their First Amendment rights. Nor can it impede the distribution of material harmful to minors unless it makes it a crime to intentionally disseminate the material to a specific minor if the publisher knows the person is a minor.

A crime for failing to “ID” adults, in effect, forces online publishers to act like adult bookstores. They must create a segregated area within their website and “ID” every adult before they enter the section. This is far beyond what courts have said “brick and mortar” retailers must do to prevent minors from perusing material harmful to minors. It places an unacceptable burden on adults’ First Amendment rights in order to protect minors. Bookstores must take reasonable efforts to block minors from perusing sexual material that is illegal for them, but courts have also ruled that these limitations may not unreasonably hinder the access of adults. They cannot be forced to hide such material behind blinders or behind the counter or to segregate it in an adults-only area. *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d 125 (4th Cir. 1989). Government restriction on access to First Amendment protected material by adults or older minors in the interest of protecting younger minors would be “to burn down the house to roast the pig.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Also, in a prosecution for a violation of a law barring the display of such material to a minor, the business owner is only required to take reasonable steps to bar access to material that is illegal for the oldest minors. See, *Virginia v. ABA*, 488 U.S. 905 (1988), on remand 882 F. 2d 125 (4th Cir. 1989).

Even if the legislation only criminalized minors from viewing sexual content, it would still violate the First Amendment. Courts have repeatedly ruled that laws that restrict non-obscene sexual speech online violate the First Amendment because they infringe on the speech rights of adults. A federal law, the Child Online Protection Act (COPA), and eight similar state laws have been held unconstitutional as violating the First Amendment. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff’d sub nom. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009); *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *American*

Booksellers Foundation for Free Expression v. Dean, 342 F.3d 96 (2d Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMaster* 282 F. Supp. 2d 1180 (D.S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. Feb. 21, 2002); *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. Oct. 26, 2010); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011). A ninth state law was struck down solely as violating the Commerce Clause of the Constitution. *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Two other state laws were substantially narrowed as not to apply to general dissemination of speech on the Internet. *Florence v. Shurtleff*, No. 2:05cv000485 (D. Utah May 16, 2012); *American Booksellers Foundation for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010). Many of these cases were brought by Media Coalition members and the cases were litigated by our general counsel. The court opinions in all of these cases are available on the litigation page of our website at: <http://mediacoalition.org/category/litigation/litigation-internet/>

COPA barred commercial websites from allowing minors to access material harmful to minors. The law included an affirmative defense to avoid prosecution similar to the “ID” requirement in H.B. 153. It provided several ways that a website could “ID” a visitor seeking to access sexual material, including age-verification services, use of a credit card, use of a digital certificate that verifies age, or by any other reasonable means available under existing technology. Courts repeatedly dismissed these options to verify a user’s age and enjoined the law. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff’d sub nom. Mukasey v. ACLU*, 534 F.3d 181 (3d Cir.2008). After the third time the Third Circuit Court of Appeals held the law unconstitutional, the Supreme Court denied the government’s petition for certiorari. *ACLU v. Mukasey*, 555 U.S. 1137 (2009). Despite the “ID” provision, the law was found unconstitutional because it was not the least restrictive or most effective means for protecting adults’ access to sexual speech while preventing minors from accessing sexual content. Filtering software and other user-empowerment tools were cited as a less restrictive means of protecting minors without limiting the speech of adults. *See, Ashcroft v. AC LU*, 542 U.S. 656, 666-669 (2004) (affirming findings of facts by the U.S. District Court that filtering software is a less restrictive and more effective means of preventing minors from accessing sexual material in the challenge to COPA).

Following the ruling, the Court then remanded the case to the U.S. District Court for further fact finding to determine if the state of age verification technology had changed since the District Court first considered it. Judge Lowell again considered different ways of screening of websites users for age. He found:

“Many people wish to browse and access material privately and anonymously, especially if it is sexually explicit. Web users are especially unlikely to provide a credit card or personal information to gain access to sensitive, personal, controversial, or stigmatized content on the Web. As a result of this desire to remain anonymous, many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners such as the plaintiffs will be deprived of the ability to provide this information to those users.”

ACLU v. Gonzales, 478 F. Supp. 2d 775, 805-6 (E.D. Pa. 2007), *aff'd sub nom. Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009). Judge Lowell then affirmed his earlier issuing of a permanent injunction. The Third Circuit Court of Appeals affirmed the granting of the injunction stating, “We conclude that the District Court correctly found that implementation of COPA's affirmative defenses by a Web publisher so as to avoid prosecution would involve high costs and also would deter users from visiting implicated Web sites. It is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis.” *Mukasey v. ACLU*, 534 F.2d 181, 197 (3d Cir. 2008), cert. den. 555 U.S. 1137 (2009), *aff'g sub nom. ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

H.B. 153's requirement that adults “electronically acknowledge and attest” to their age suffers the same constitutional defect as COPA's affirmative defense for different types of age verification systems. As described in the COPA case, asking adults to provide their electronic “ID” drives away traffic from websites, which causes a substantial chilling effect on their exercising their First Amendment right to access certain speech. The legislation would also impose an unconstitutional chilling effect on websites by forcing them to risk losing visitors to their sites or not carrying material that could be deemed harmful to minors. This chilling effect is compounded by the significant technical and financial burdens necessary to comply with the law. They must create a system for online users to “acknowledge and attest” their age and a way to archive and catalog the information.

The legislation is likely also violates the First Amendment because it forces websites or publishers to pejoratively identify content as illegal for minors. Speech is presumed legal for adults and minors until it is found to be illegal by a court. This determination can only be made by a court with the full protections of due process. The Supreme Court has made clear that a state cannot create a non-legal process for determining if material is illegal for minors (or adults). This is true regardless of whether it does so itself or if it forces the publisher to do so under threat of criminal prosecution. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down a similar scheme of regulation as a form of “informal censorship.”

H.B. 153 is also likely unconstitutional for vagueness for some of the practical problems noted above, most notably the failure to define or explain “acknowledge and attest.” This term is central to complying with the law, but it is not clear if it means simply to click a button claiming to be at least 18 years old or if it means satisfying the more common use of the term as a legally binding statement of having reached the age of majority. What age is to be used to determine if the material meets the definition of harmful to minors? Since the legislation creates the crime of failing to “ID” adults, how is the publisher to know how to judge whether the material is illegal for a minor? The legislation does not describe what information must be gathered, i.e., a name, date of birth, address, any form of official identification, etc. Nor does it say how long the information must be retained or in what fashion. This vagueness likely violates the Due Process Clause of the Constitution. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371

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U.S. 415, 432-33 (1963)) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).

Passage of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs’ attorney’s fees. In past challenges to such legislation, states have paid to the plaintiffs as much as \$450,000 in legal fees.

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.

We ask you to please protect the First Amendment rights of all the people of Louisiana and withdraw or defeat H.B. 153.