THE MEDIA COALITION INC

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Memo in Opposition to Washington House Bill 2103

The members of Media Coalition believe that House Bill 2103 which imposes a sales tax on "adult entertainment material" threatens the distribution of First Amendment-protected material in Washington. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers and their consumers in Washington and the rest of the United States.

H.B. 2103 would impose an 18.5% sales tax on "adult entertainment materials." "Adult entertainment materials" is defined as any material that is primarily oriented to an interest in sex. The tax would not be imposed on books or magazines that contain no photos or graphics or movies in various forms or cable television that do not contain sex acts that would merit an "X" rating under the Motion Picture Association of America (MPAA) rating system.

This bill is very likely unconstitutional for many reasons. The material at issue is not legally obscene and therefore is fully protected by the First Amendment. Given that this restriction would apply to media based on its content, it is immediately constitutionally suspect. The U.S. Supreme Court has repeatedly held that a content-based restriction is presumptively invalid. *See, e.g. R.A.V. v. City of St Paul*, 505 U.S. 377, 382 (1992). In order to avoid invalidation, the restriction must satisfy strict constitutional scrutiny. *See, U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-7 (2000). Specifically, the Supreme Court has struck down legislation to tax or otherwise financially punish First Amendment-protected speech based on its content. Here, the tax is triggered when any retailer or distributor sells or rents certain material based expressly on its content. In 1983, the Court ruled that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment, *Minneapolis Star v. Minnesota Commission of Revenue,* 460 U.S. 575. In 1991, it held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, *Simon and Schuster, Inc. v. Members of the New York State Crime Board,* 502 U.S. 105. In 1987, it ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230.

Further, the state cannot place special burdens on retailers of First Amendment-protected material. As the Supreme Court has said, the government can neither require a license of speakers of protected communication not generally

imposed nor levy a business tax specifically on the dissemination of protected speech not generally levied. See, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150 (2002); *Grosjean v. American Press,* 297 U.S. 233 (1936). See also, *Big Hat Books v. Prosecutors*, 08-CV-596 (USDC D. Ind. 7/1/08) (court struck down Indiana's financially punitive licensing regime of retailers who sell sexually oriented material).

Also, H.B. 2103 would base the tax on revenue derived from material "primarily oriented to an interest in sex" which is only further defined in relation to a rating in a voluntary, privately trademarked system that is based on the judgments of various movie raters. This definition is both ambiguous and subjective. How does a retailer decide what material must be taxed and what not? This degree of vagueness is not constitutionally acceptable. The Supreme Court has established that when First Amendment rights are at issue a more exacting degree of scrutiny is appropriate. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 45 U.S. 489 (1982).

It is also an inappropriate delegation of power from the state of Washington to a private voluntary rating system. The government can neither enforce nor adapt a voluntary rating system for First Amendment-protected content and particularly not to restrict or punish speech based on its content. *ESA v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff'd* 519 F. 3d. (8th Cir. 2008). Also, courts in numerous states have ruled it unconstitutional specifically to enforce the MPAA's rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also, *Swope v. Lubbers,* 560 F.Supp.1328 (W.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F. 2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Even if the sales tax was limited to material that is illegal or illegal for minors under Washington law, it is the job of the courts, not an owner of a book or video store or a staff person in the Department of Revenue, to determine if material is illegal. 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). In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court struck down a similar scheme of regulation as a form of "informal censorship."

Finally, this tax is meant to raise revenue for Washington. However, if it is enacted it will be vulnerable to a court challenge. If a court declares it unconstitutional, there is a strong possibility that the state would be ordered to pay the plaintiffs' attorneys' fees. In our recent *Big Hat Books* case the state of Indiana paid in excess of $150,000 in attorneys' fees and expenses. 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. Please protect the First Amendment rights of all the people of Washington by rejecting this legislation.