



# THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund  
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

## Memo in Opposition to Wisconsin Assembly Bill 71

While Media Coalition is deeply concerned about the sexual exploitation of minors and supports laws that attempt to eradicate it, A.B. 71 violates the First Amendment because it would criminalize images of minors that contain no nudity or sexual conduct.

A.B. 71 would expand the definition of child pornography to include the language “depicting a child for the purpose of sexual stimulation or gratification of any person who may view the depiction” and lack serious value. Sexual stimulation is not defined but can be reasonably read as looking sexually attractive or appealing.

The Supreme Court has carefully limited the definition of child pornography to photographic images that contain actual minors engaging in sexual conduct or lascivious nudity. In *New York v. Ferber*, the U.S. Supreme Court announced that the First Amendment does not protect photographs of minors engaged in sexual conduct or with their genitals lasciviously displayed. 458 U.S. 747 (1982). However, to avoid being unconstitutionally overbroad, the Court stressed that “the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of ‘sexual conduct’ proscribed must also be suitably limited and described.” *Id.*, at 764. The Court concluded that the New York law was not overbroad because it was carefully limited to visual images of “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” *Id.*, at 765. Subsequently, the Court upheld an Ohio law that barred the lewd exhibition of the buttocks and breast of a female. *Osborne v. Ohio*, 495 U.S. 103, 114 fn. 11 (1990)

In addition to going beyond nude or sexual images, A.B. 71 is likely unconstitutionally vague. “It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.” *Winters v. New York*, 333 U.S. 507, 509 (1948). It is not clear who must have the purpose of “depicting a child for the purpose of sexual stimulation or gratification of any person who may view the depiction.” Is it the purpose of the photographer, photo editor who chooses the pictures, the writer who gives the pictures context, publisher, distributor or someone else? If a photographer takes a picture of a teen to capture an athletic accomplishment, does it become illegal if the editor or publisher puts the image on the cover of a magazine because he thinks teenagers will think the athlete is sexy and buy the magazine? Also, unlike images that are judged based on the content of the image, a librarian, bookseller or theater owner must guess the purpose of the photographer, editor or publisher to determine if the image is illegal. Their inability to know whether an image is illegal based on its content will have a significant chilling effect on protected speech. Courts are especially skeptical of statutes that attempt to regulate speech but their lack of specificity results in self-censorship beyond any speech that may be proscribed. See *Baggett v. Bullitt*, 370 U.S.

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360 (1964). This uncertainty is compounded by the lack of objective standard for what someone might find sexually stimulating. Even if the seller or distributor would be on notice that any “sexy” image of a minor could be illegal, any image can be sexually appealing to someone.

These problems cannot be cured by the “serious value” exception. In *U.S. v. Stevens*, the Supreme Court held that the “serious value” exception was limited to use in determining if material is obscene and that “*Miller* did not determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place.” 559 U.S. 460, 478 (2010).

Listed below are all depictions of minors from the mainstream media that are intended to make the minor appear physically attractive or sexually appealing:

1. Alicia Silverstone and Liv Tyler playing two school girls cutting class and cutting loose in the music video for the Aerosmith “Crazy.”
2. Christina Applegate playing the promiscuous daughter in the first three seasons of *Married with Children*
3. Musical performances by Justin Timberlake that created a frenzy among teen girls.
4. Justin Beiber appeared in hundreds of magazines consisting of pictures of him and little editorial content because a lot of teenage girls were obsessed with him.
4. Drew Barrymore playing a femme fatale in the “Amy Fisher Story” and “Poison Ivy.”
5. Winona Ryder and Shannen Doherty playing the “hot” cool girls in “*Heathers*.”
6. Britney Spears dressed in schoolgirl outfit in her video “...Baby One More Time”
7. *Vanity Fair*’s 2003 Young Hollywood issue that depicted several teenage actresses (Lindsay Lohan, Amanda Bynes, Evan Rachel Wood, Brittany Snow, Hillary Duff, among others) in “suggestive” poses and clothed to accentuate their figures.
8. Brooke Shields posed provocatively in ads for Calvin Klein jeans (which are now a coffee table book).

In addition to these images in the media, A.B. 71 would turn most pictures teenagers take of themselves and others into child pornography. Teenagers create and post pictures of themselves that they think make them look the most “sexy” with the intent that others will agree. Even images that are not conventionally alluring are potentially illegal because the range of things that people find attractive is limitless.

Finally, enactment of A.B. 71 could prove costly to the state. It is very likely that a facial challenge to the law would be successful and the state would be ordered to pay the plaintiffs’ attorney’s fees.