

Nos. 06-1012, 06-1048, 06-1161 (cons.)

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ENTERTAINMENT SOFTWARE ASSOCIATION, et al.

Plaintiffs-Appellees,

vs.

ROD BLAGOJEVICH, in his official capacity as
Governor of the State of Illinois, et al.

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 05 C 4265
The Honorable Judge Matthew F. Kennelly

**BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.;
COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ
FOUNDATION; INTERACTIVE ENTERTAINMENT MERCHANTS
ASSOCIATION; NATIONAL ASSOCIATION OF RECORDING
MERCHANTISERS; NATIONAL ASSOCIATION OF THEATRE
OWNERS, INC.; PUBLISHERS MARKETING ASSOCIATION, INC.,
d/b/a PMA, the INDEPENDENT BOOK PUBLISHERS ASSOCIATION;
and RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AS
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

OF COUNSEL,
RACHEL BALABAN
BURTON JOSEPH

MICHAEL A. BAMBERGER
SONNENSCHN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, NY 10020
Tel.: 212-768-6756
Fax: 212-768-6800

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 06-1012

Short Caption: Entertainment Software Association v. Rod Blagojevich, et al., 05 C 4265

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American Booksellers Foundation for Free Expression; Association of American Publishers, Inc.; Comic Book Legal Defense; Freedom to Read Foundation; Interactive Entertainment Merchants Association; National Association of Recording Merchandisers; National Association of Theatre Owners, Inc.; Publishers Marketing Association, Inc., d/b/a PMA, the Independent Book Publishers Association; and Recording Industry Association of America, Inc.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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/s/ Michael A. Bamberger

Attorney's Printed Name: Michael A. Bamberger

Date: April 6, 2006

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

Address: 1221 Avenue of the Americas, 25th Floor
New York, NY 10020

Phone Number: (212) 768-6756

Fax Number: (212) 768-6800

E-Mail Address: mbamberger@sonnenschein.com

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation (“Freedom to Read”), Interactive Entertainment Merchants Association, National Association of Recording Merchandisers, Publishers Marketing Association, Inc. d/b/a PMA, the Independent Book Publishers Association, and Recording Industry Association of America, Inc. submit this *amicus* brief in support of plaintiffs-appellees, urging that this Court affirm the decision of the court below finding the Illinois Sexually Explicit Video Games Law, 720 ILCS 5/12B-1 et seq. (“SEVGL”) unconstitutional.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, exhibit 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 Freedom To Read provide such materials to readers and viewers.

The materials published, distributed and sold by *amici* include “sexually explicit” descriptions and depictions as defined by SEVGL, which materials have serious literary, artistic, political, scientific and other value. These include books of great art though the ages (which include depictions of “post-pubescent female breasts” and “sexual contact”), prize-winning novels by Toni Morrison, and *The Catcher in the Rye* by J.D. Salinger. These expressive materials are protected by the First Amendment to the U.S. Constitution. Were the reasoning proposed by the State of Illinois to be accepted by the Court, such materials could be subject to

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

regulation based on their content despite their protected status, thus substantially chilling activities of *amici* that heretofore clearly have been 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 watered down or circumvented, and that it not be expanded to restrict protected speech simply because legislators believe it is emotionally harmful to youth in the more common use of the phrase.

The State’s argument that sexual material can be restricted from minors even if it is not harmful to minors as defined by *Ginsberg* and *Miller* runs directly in the face of precedent and 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 a dramatic departure from settled constitutional law, with implications reaching 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 sexual descriptions or depictions no more shocking than that available every day on the news.

Amici believe that we would do ourselves, our children, and the First Amendment a grave disservice by allowing the State to regulate material that has hitherto enjoyed full constitutional protection. This Court should reaffirm the consistently recognized holding that communications containing descriptions or depictions of sexual conduct that fall outside the narrow *Miller/Ginsberg* test retain the protection of the First Amendment.

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 SEVGL eliminates one prong of that test — that of serious value

— which provides an essential First Amendment safety net for mainstream media such as *amici* and their members who produce and distribute protected speech. It also eliminates the requirement that material be considered “taken as a whole.” If these aberrations are permitted, it surely will inspire even broader restrictions on sexual content, thereby chilling the creation and dissemination of a huge amount of mainstream speech that contains sexual descriptions or depictions. The effect on *amici* will be profound, with dire consequences for the vibrant dialogue the First Amendment was intended to foster. The First Amendment would be gravely weakened, and the communicative businesses of *amici* would be adversely impacted, were courts to readily defer to legislative efforts to sanitize the world to which minors are exposed.

The requirement to label, post and provide brochures also violates the First Amendment, but in a different way. Each of these provisions implicate the compelled speech doctrine, in that they tell people what to say, whether or not they agree.

An additional flaw in the SEVGL is its incorporation of ratings issued by private voluntary associations into the criminal construct. Various private groups use ratings in connection with their members’ communicative products and *amici* deal with such products. Not only is the incorporation an unconstitutional delegation, but it will discourage future use of such ratings, depriving parents of the assistance they provide.

In the past, many of the *amici* and their members successfully 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*, 484 U.S. 383 (1988); *PSINet v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Booksellers Ass’n 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. C88-1470D (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n 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*, 582 S.W.2d 738 (Tenn. 1979).

ARGUMENT

I. The *Miller/Ginsberg* Standard Limits the Sexual Material that May Be Banned from Minors. The District Court Correctly Held that SEVGL's Failure to Meet that Standard Was Constitutionally Fatal.

The U.S. Supreme Court has recognized the First Amendment implications of attempts to “protect” minors from exposure to sexually explicit materials. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified in *Miller v. California*, 413 U.S. 15 (1973), the Court created a three-part test for determining whether material which is First Amendment protected as to adults is unprotected as to minors. Under that test, in order for sexual material to be constitutionally unprotected as to a minor, it must, taken as a whole,

- (i) predominantly appeal to the prurient, shameful or morbid interest of minors;
- (ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) lack serious literary, artistic, political or scientific value.

Material which is unprotected under the *Miller/Ginsberg* test can be barred from distribution to minors, so long as such prohibition does not unduly infringe on adult access. However, material that fall outside the narrow *Miller/Ginsberg* test has First Amendment protection, whether the recipient be adult or child. Most importantly, under the third prong of the test, material having serious value remains constitutionally protected as to minors, irrespective of its sexually explicit content.

SEVGL’s definition of “sexually explicit” (720 ILCS 5/12B-10(e)) fails to meet the *Miller/Ginsberg* standard in two significant respects. It does not require that material be taken as a whole and it totally eliminates the third prong relating to lack of serious value. The State contends that, “[b]ecause the SEVGL *merely* restricts the sale of sexually explicit video games to minors [and] ... does not prevent a single adult from enjoying this material,” the limitations of the *Miller/Ginsburg* standard do not apply. (Blagojevich Br. p. 13) (Feb. 24, 2006) (emphasis added). This wrongly twists the precedents to circumvent a clear bar to the enforcement of SEVGL.

Miller/Ginsburg is precisely about the sale of sexually explicit material to minors, and limits as to what material such sales can be prohibited. As this Court held not long after the decision in *Ginsberg*, government “may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity [set forth in *Ginsberg*] in regulating the dissemination of ‘objectionable’ material.” *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297, 1302 (7th Cir. 1973). There is nothing in the standard relating to burden on adult access. The issue of such burden arises in the cases only when materials “harmful to minors” under the *Miller/Ginsberg* test are restricted in a manner which impacts adult access. *See, e.g., American Booksellers Found.*, 342 F.3d at 101 (citing *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002) and *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

The State suggests that the *Cinecom* holding no longer is true, arguing that “the Supreme Court has never invalidated a law that expressly, and practically, limited *only minors* from accessing indecent sexual communications.” (Blagojevich Br. p. 17.) While the statement may be true, it is meaningless, since no such case has come before the Supreme Court since *Ginsberg*. If, in fact, the Supreme Court had ever considered and upheld a law banning sales of material

with sexual content to minors which did not comply with *Miller/Ginsberg*, other than in the context of broadcasting, it might have been meaningful. But the State has cited no such case, for good reason – there is no such case except in the broadcasting context, which the Supreme Court itself has recognized as unique and different. *See, e.g., Reno v. ACLU*, 521 U.S. at 866.

The lack of such cases reaching the Supreme Court is not surprising. Forty-five states and the District of Columbia have laws restricting the sale of sexually explicit materials to minors. Virtually all comply with *Miller/Ginsberg*. Those that do not are often stricken down in lower courts, which decisions usually are not appealed. *See, e.g., Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002). The few others have not been challenged.

The serious value prong of the *Miller/Ginsberg* test is a significant and necessary safety net for mainstream publishers, retailers, librarians and other media represented by *amici* and their members. If a work has serious value, whether it be art, literature or even entertainment, the publisher, distributor, retailer or librarian does not have to struggle with whether the material may appeal to the prurient interest of a teenager. Such clarity in an otherwise often less than clear context is a societal benefit in and of itself. More importantly, communications of value are and should be protected by the First Amendment. As Justice White stated in *Pope v. Illinois*, 481 U.S. 497, 500 (1987):

In *Miller* itself, the Court was careful to point out that ‘[t]he First Amendment protects works, which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.’

And as Justice Stevens said, dissenting in the same case:

Over 40 years ago, the Court recognized that

Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public

information, what is good art, varies with individuals as it does from one generation to another.... From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.” *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-158 (1946).

The purpose of the third element of the *Miller* test is to ensure that the obscenity laws not be allowed to “‘level’ the available reading matter to the majority or lowest common denominator of the population.... It is obvious that neither *Ulysses* nor *Lady Chatterley’s Lover* would have literary appeal to the majority of the population.” F. Schauer, *The Law of Obscenity* 144 (1976).

Pope, 481 U.S. at 512.

Similarly, the omission of the “taken as a whole” requirement constitutes a major deviation from the *Miller/Ginsberg* test. The absence of the third prong eliminates the consideration of the context of value; the absence of the “taken as a whole” requirement eliminates the consideration of the context of the whole. The State’s attempt to eliminate this requirement also is of particular concern to *amici*, as publishers, distributors and retailers of mainstream materials.

The State may argue that *amici* need not worry because this modification of the *Miller/Ginsberg* formulation is being applied by SEVGL only to video games. This Court has previously recognized that video games are equally entitled to protection with any other form of expression. *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001). Given that fact, any incursion on the *Miller/Ginsberg* standard for video games threatens an unconstitutional spread of that incursion to books, magazines, recordings, motion pictures, etc. published and sold by *amici* and their members. No reason has been given to limit it to video games.

In sum, the State’s argument that sales to minors of material with sexual content may be prohibited even though First Amendment protected under the *Miller/Ginsberg* test is not supported by precedent and therefore baseless. Thus this Court’s statement in *Cinecom Theaters* remains good law, and the decision below should be affirmed.

II. The Requirements to Label, Post and Offer Brochures Constitute Compelled Speech in Violation of the First Amendment.

Just as the First Amendment prohibits restrictions on what a speaker wishes to say, it also prohibits forcing “speakers to alter their speech to conform to an agenda that they do not set.” *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 9 (1986). As the Supreme Court said last month, “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights*, 2006 WL 521237 at *9 (U.S. Mar. 6, 2006). Speakers have a right not to say what they choose not to say.

SEVGL imposes on any retailer who sells or rents even one video game the following three obligations:

- (a) To physically affix a label with the number “18” (no less than two inches by two inches) on each “sexually explicit” video.²
- (b) To post a sign in the retail establishment that notifies customers that one specific voluntary private rating system — that created by the Entertainment Software Ratings Board (“ESRB”) — is available “to aid in the selection of a game;” and
- (c) To make available to customers on request a brochure explaining the ESRB rating system.

As the district court properly found, each of these obligations violates the constitutional prohibition on compelled speech.

² Effectively defined as one rated by the ESRB as M (mature) or AO (Adults Only), which raises a different constitutional problem discussed in point III below.

a. Labeling.

Although the statute does not give a meaning to the “18” label, it is likely to be understood to mean that the game can be sold only to purchasers 18 years old and older.³ Since the failure to so label any game deemed “sexually explicit” as defined in SEVGL is a criminal offense (§ 12B-25(b)), and since the state contends that the statutory exclusion from criminal liability for games rated EC, E10+, E or T by the ESRB (§ 12B-20(4)) applies to the labeling provision, a retailer may avoid liability simply by labeling with the large “18” all games rated M or AO. Even though the retailer may believe that the ESRB rating system is inaccurate and that all or certain of the M rated games are appropriate for persons 17 years of age, SEVGL practically requires him or her to affix the communicative label on all such games to avoid the risk of entanglement with the police.

b. and c. Posting Information and Making Available a Brochure.

Section 12B-30 requires that retailers notify customers that the ESRB game rating system is available to aid in the selection of a game by posting a sign to that effect. Section 12B-35 requires that retailers make available to interested customers a brochure explaining the ESRB rating system. A retailer is required to communicate this recommendation and description whether or not the retailer thinks the rating system helpful, whether or not the retailer desired to make a recommendation, and whether or not the retailer believes that there is a better resource for that purpose. This certainly is compelled speech, “telling people what they must say.”

³ The State contends that the “moniker ‘18’” is an indication to children, parents and sales clerks, that the content of the game includes material that is defined by State law to include sexually explicit material. (Blagojevich Br. pg. 53) There is no indication on what this statement is based.

The State contends that none of these requirements involve compelled speech. Rather, claims the State, they are like the required list of ingredients on a jar of jam, “the most benign type of commercial speech – mandated disclosure of product information...[which] has the effect of *enhancing* First Amendment values” by disseminating truthful information. (Blagojevich Br, p. 49) (emphasis in original). That simply is not the fact. The ratings represent the subjective evaluation of one private party – the ESRB – of certain aspects of the video game. This is not related to “the discovery of truth” (as cited by the Second Circuit in *National Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001)), any more than the Oscar-winning Best Picture of the year represents the discovery of the truth as to what was in fact the best picture in that year.⁴ Rather, it represents the considered opinion of a private group, like the ESRB.

Nor are the SEVGL requirements, like the recruiting assistance in *Rumsfeld*, incidental to regulation of conduct. The obvious and clear purpose of the labeling, posting and brochure provision requirements is communicative. With respect to the labeling, the purpose is to inform persons as to the view of the ESRB as to the subject-matter of the game; with respect to the poster and the brochure, the purpose is to inform persons as to the ESRB rating system and to give it the appearance of general acceptance in the business.

SEVGL requires retailers to be the communicators of these messages and to promote the private voluntary ESRB rating system as their own – whatever their views may be as to the totality of the system or the ratings of particular games. They may believe the system to be too lenient or too harsh; or they may believe that ratings are not something retailers should have to concern themselves with. Further, by mandating labeling, the statute requires retailers to

⁴ *Sorrell* involved a required label as to whether a lamp included mercury and, if so, how it could best be disposed of. The existence of mercury is an objective fact, far different from the compelled speech in SEVGL.

categorize games into categories with which they may very well disagree. This is compelled speech as defined in the Supreme Court precedents, as the district court correctly found.

III. The SEVGL Improperly Endorses and Incorporates a Private Organization's Rating System and Ratings.

The SEVGL directly endorses the video games rating system in two respects and incorporates it in a third. Section 12B-30 requires any retailer who sells or rents any video game to post a sign that notifies customers that one specific rating system — that created by the Entertainment Software Ratings Board — is available “to aid in the selection of a game.” Section 12B-35 requires any retailer who sells or rents any video game to make available to customers, upon request, a brochure explaining the ESRB rating system. Section 12B-20(4) gives an affirmative defense from prosecution for videos sold or rented which are rated *EC* (early childhood), *E10+* (everyone 10 and older), *E* (everyone) or *T* (teen), thus making it clear by the backdoor that videos rated *M* (mature) or *AO* (adults only) are deemed to be “sexually explicit” under SEVGL. The ESRB rating system was created by a trade association — the Entertainment Software Association — “a self-regulatory body for the interactive entertainment software industry” to help “parents and other consumers choose the games that are right for their families.” (<http://www.esrb.org>) (accessed on March 16, 2006). The ESRB rates video games submitted to it by game manufacturers as *E*, *EC*, *E10+*, *T*, *M*, or *AO*. These designations, developed privately and without any legislative direction, are endorsed by, and incorporated into, SEVGL as standards of harmfulness to children in a manner that constitutes an unconstitutional delegation of legislative power.

The incorporation of private ratings into criminal statutes repeatedly has been found to be constitutionally unacceptable. *See, e.g., Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969), *aff'd* 435 F.2d 228 (4th Cir. 1970); *Motion Picture Ass'n of Am. v. Specter*,

315 F. Supp. 824 (E.D. Pa. 1970); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970). The U.S. Supreme Court has held that an enforcement scheme which gives even an implied legal effect to standards set outside the state's own criminal regulation of illegal conduct, as is the case here, is just as improper as express adoption of those standards. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Courts have approved delegation of authority for making rules or defining terms to governmental administrative bodies where such bodies are given legislative standards to follow in developing or enforcing regulatory provisions. *See Potter v. Oklahoma*, 509 P.2d 933, 934 (Okla. Crim. App. 1973); *see also, South Carolina State Hwy. Dep't v. Harbin*, 226 S.C. 585, 594 (S.C. 1955). But here, the industry ratings pre-date the SEVGL and the rating agencies are private. The ESRB is not a willing participant in the State's enforcement scheme and no coherent legislative standards have been provided.

Thus, even if the definition of "sexually explicit" complied with the constitutional mandate of *Miller/Ginsberg*, SEVGL would be unconstitutional because of its incorporation and endorsement of an entirely private rating system.

CONCLUSION

For the reasons set forth above, *amici* respectively urge that the decision of the court below, finding the SEVGL unconstitutional, be affirmed.

April 6, 2006

OF COUNSEL,
RACHAEL BALABAN
BURTON JOSEPH

/s/ Michael A. Bamberger
MICHAEL A. BAMBERGER
SONNENSCHN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, NY 10020
Tel.: 212-768-6756
Fax: 212-758-6800

CERTIFICATE OF COMPLIANCE WITH CIR. R. 31(E)

Counsel for *amici curiae* certifies that they complied with Circuit Rule 31(e) by submitting a digital PDF version of the Brief of Amici on CD-ROM to the Seventh Circuit and by furnishing a digital PDF version of the Brief of Amici on CD-ROM to each represented Appellant and to Appellees.

/s/ Michael A. Bamberger
Michael A. Bamberger
Attorney for *amici curiae*
Sonnenschein Nath & Rosenthal, LLP
1221 Avenue of the Americas
New York, NY 10020

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)

1. The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 4,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2002 in Times New Roman font, 12-point font size.

/s/ Michael A. Bamberger
Michael A. Bamberger
Attorney for *amici curiae*
Sonnenschein Nath & Rosenthal, LLP
1221 Avenue of the Americas
New York, NY 10020

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APPENDIX A: THE *AMICI*

The 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.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Comic Book Legal Defense Fund (“CBLDF”) is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and the readers located in Illinois, throughout the country and the world.

The 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.

The Interactive Entertainment Merchants Association (“IEMA”) is a non-profit trade association dedicated to serving the business interests of leading retailers that sell interactive entertainment software (including video and computer games, multimedia entertainment, peripherals and other software). Member companies of the IEMA collectively account for approximately seventy-five percent of the \$10 billion annual interactive entertainment business in the United States.

The 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.

The National Association of Theatre Owners, Inc., (“NATO”) is the largest exhibition trade organization in the world, representing over 500 members with nearly 28,000 movie screens in all 50 states, and additional cinemas in more than 40 countries worldwide. NATO’s membership includes the largest cinema chains in the world, as well as hundreds of small, independent theaters.

The Publishers Marketing Association , Inc., d/b/a PMA, the Independent Book Publishers Association, (“PMA”) is a trade association representing more than 4,000 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.

The Recording Industry Association of America (“RIAA”) is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Its members are the record

companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA® also certifies Gold®, Platinum®, Multi-Platinum™, and Diamond sales awards, as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served a true and accurate copy of the foregoing Brief of Amici American Booksellers Foundation for free Expression, et al., to the below listed counsel by having one digital PDF version of the Brief in CD-ROM form and two paper copies of the Brief first class U.S. mail, postage prepaid on April 6, 2006.

Michael J. Kasper
222 North LaSalle Street
Suite 300
Chicago, IL 60601

Patrick E. Deady
Laura C. Liu
Hogan Marren Ltd.
160 N. Wacker Drive
Suite 600
Chicago, IL 60606

Nadine J. Wichern
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, IL 60601

Paul M. Smith
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Suite 1200
South Washington, D.C. 20005

David P. Sanders
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611

Andrew Dryjanski
Office of the Illinois Attorney General
100 West Randolph Street
13th Floor
Chicago, IL 60601

Stephen L. Garcia
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, IL 60601

/s/ Michael A. Bamberger