

October 23, 2003

Tim Hughes, Director  
Legislative Affairs Division  
P.O. Box 30013  
111 South Capitol Avenue  
Lansing, MI 48909

Re: Michigan House Bill 4360 as sent to Governor Granholm

Dear Mr. Hughes,

The members of The Media Coalition appreciate the legislature's desire to enact reasonable measure to protect children. However we believe that Michigan House Bill 4360 as passed out of the Senate Judiciary Committee still presents concerns for retailers of First Amendment protected material in Michigan. Media Coalition members represent most of the publishers, booksellers, librarians, periodical wholesalers and distributors, recording, movie and video game manufacturers, and recording and video retailers in Michigan and the rest of the United States.

H.B. 4360 requires that any material set out to view that contains a visual depiction of sexual intercourse or sadomasochistic abuse and is harmful to minors be displayed behind blinder racks, or segregated in an "adults only" area that is inaccessible to minors.

Our objection to H.B. 4360 is that the failure to limit the applicability of the display provision to the cover of a book, magazine or other material would be a significant burden on retailers and would inhibit distribution of First Amendment protected material. Retailers accept the notion that it is inappropriate to display to minors material that on its cover is harmful to minors that has contents that is harmful to minors and such material should be displayed in a way that is not visible to minors. However, retailers are concerned that the definition of display is unclear and likely will be construed to require any book, magazine or music recording on a shelf that *contains* a visual depiction of proscribed material be will be considered to be displayed for the purpose of the statute even if the cover or packaging is not harmful. Retailers agree that minors should not be allowed to page through such material but that it is unreasonable to treat such material the same. This uncertainty about the definition of "display" will force retailers to segregate material either in a separate room or behind a counter that cannot be accessed by an employee who is a minor.

Generally, the case law makes clear that government restriction on access to First Amendment protected material by adults or older minors in the interest of

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protecting younger minors would be "to burn down the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Although the courts have ruled that some limitation on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), is permissible, they have also ruled that these limitations may not unreasonably hinder the access of adults. See also, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4<sup>th</sup> Cir. 1989).

It is difficult enough for retailers to determine what material contains depictions of intercourse or sadomasochistic abuse and is harmful to minors when they receive thousands of new items every year. Certainly a bookstore owner might feel compelled to segregate or blinder books such as *Joy of Sex* or the photography books of Robert Maplethorpe and Helmut Newton. This creates practical problems for retailers who are not equipped to keep books behind blinders but do not have the option of displaying shrink wrapped copies of the book or taking other reasonable measure to prevent access to minors. Also it could cause them to lose adult customers who may not want to purchase material without browsing. Alternatively, retailers would be required to create an "adults only" section that which would force them to pejoratively label a part of their inventory. Again, they would inevitably lose patrons who, without being aware that the material in this section is protected by the First Amendment, will refuse to enter places that deal in "dirty books or magazines." Some retailers would have little choice but to stop carrying all work with sexual content, including much mainstream art, health and sex education material rather than risk a 90-day jail sentence, a \$5,000 fine, or both. As a result, H.B. 4360 would cause an unconstitutional "chilling effect" on the sale of legally protected speech.

Passage of the existing version of H.B. 4360 could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. The members of Media Coalition strongly urge you to defend the First Amendment rights of retailers and all the citizens of Michigan and either amend or defeat H.B. 4360.

Sincerely,

David Horowitz,  
Executive Director

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