

THE MEDIA COALITION INC.

139 FULTON STREET - SUITE 302 - NEW YORK, NY 10038 - 212-587-4025 - FAX 212-587-2436
FACSIMILE: 212-587-2436 - E-MAIL: MEDIACOALITION@MEDIACOALITION.ORG

Memorandum in Opposition to Minnesota Senate Bill 1140

The members of Media Coalition believe that Minnesota Senate Bill 1140 violates First Amendment rights of minors. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and recording and video retailers in Minnesota and the rest of the United States. They have asked me to explain their concern. The members of Media Coalition are

The American Booksellers Foundation for Free Expression
The Association of American Publishers
The Freedom to Read Foundation
The Interactive Digital Software Association
The International Periodical Distributors Association
The Magazine Publishers of America
The Motion Picture Association of America
The National Association of Recording Merchandisers
The Publishers Marketing Association
The Recording Industry Association of America
The Video Software Dealers Association.

S.B. 1140 would make it a petty misdemeanor for anyone under the age of 17 to possess any video game rated “AO” or “M” by the Entertainment Software Rating Board.

While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement of an existing rating system is constitutionally impermissible. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America’s rating system or financially punish a movie that carries specific rating designations. MPAA v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of 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.Sd 228 (4th Cir. 1970)

(sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

Further, when these ratings are applied to violent content the problem created by government adoption of ratings is compounded. Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow classes. As the Supreme Court said in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S. ___ (2002). Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), cert. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent video games. *Bookfriends v. Taft*, 2002 U.S. Dist. Lexis 18373 deemed speech with violent content as fully protected by the First Amendment and enjoined enforcement of Ohio’s “harmful to juveniles” law that would have criminalized dissemination to a minor of speech with violent content. *Davis-Kidd Booksellers, Inc. v. McWherter*, 886 S.W. 2d 705 (Tenn. 1993) struck down a restriction on the sale to minors of material containing “excess violence.” *Video Software Dealers Assn. v. Webster*, 968 F.2d 684 (8th Cir. 1992) held that “unlike obscenity, violent expression is protected by the First Amendment.” *State v. Johnson*, 343 So. 2d 705, 710 (La. 1977) declared that prohibiting the sale of violent materials to minors exceeded the limits placed on regulation of obscene materials by the U.S. Supreme Court. *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 400 (N.D. Ohio 1977), while remanded on other grounds, overturned a statute defining as “harmful to minors” material describing or representing “extreme or bizarre violence.”

Finally, while minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them.” *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is “harmful to minors” and may, therefore, be banned for sale to minors. The mere presence of an “adult” rating alerting parents that a video game might be inappropriate for minors is no basis for assuming that the material meets the *Ginsberg* test. In fact, it is likely that most rated material would not meet the *Ginsberg* test for harmfulness. Therefore, a law imposing a fine for the sale or rental of such material would inevitably prevent minors from purchasing works that they have a First Amendment right to possess.

Passage of S.B. 1140 could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the attorneys' fees of the parties who challenged the law. In the above mentioned *A.A.M.A. v. Kendrick* case the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees.

Please protect the First Amendment and reject S.B. 1140.

