

THE MEDIA COALITION INC

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Memorandum in Opposition to Council Bill 16-125

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Publishers Marketing
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The members of the Media Coalition again would like to state their strong belief that Council Bill 16-125 violates the First Amendment rights of retailers and producers of content and others. We stand by our opinion and strongly disagree with the memorandum of the General Counsel of the District of Columbia.

Attached is a memo from our general counsel that more specifically rebuts the points in the memo. The members of the Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and video, recording and video game retailers in Washington, D.C. and the rest of the United States.

C.B.16-125 would require any business that sells or rents video games to obtain a "Video Games/Retail" license. No business may sell or rent a video game without such a license. No business with the license may sell or rent a video game with sexual content to a minor. A violation of C.B. 16-125 would be subject to a license revocation of at least one week and a fine of between \$1,000 and \$2,000 for a first violation. A subsequent violation would be subject to a license revocation and a fine of between \$4,000 and \$10,000.

This bill is clearly constitutionally suspect. A city cannot place special burdens on retailers of First Amendment-protected material outside of the zoning context. They can neither require a license of speakers of protected communication not generally imposed nor impose a business tax specific on the dissemination of protected speech not generally imposed. *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). C.B. 16-125 would impose significant burdens solely on retailers who carry protected speech. No retailer could sell or rent any video game without the license. The retailer could have their license suspended for renting or selling a game with content that is constitutionally protected for both adults and minors. The only time a city may regulate a retailer of protected speech based on the content of the speech is to address in a limited and focused way detrimental secondary effects such as an increase in crime, prostitution or drug use as a result of a type of business operating in a neighborhood. Here, the city offers no rationale for a special license that justifies this burden, let alone an actual study showing any harmful secondary effects on a neighborhood from operating a store that sells video games. The licensing scheme is merely an avenue to bar the sale or rental of video games with certain content.

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers in the United States.

The provision of this bill that would bar the dissemination to minors of any game that was “obscene for minors” is likely unconstitutional. 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 a government bar public dissemination of protected material to them.” *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Governments may restrict minors’ access to some sexually explicit speech but it is a narrow range of material determined by a specific test. 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 existing District of Columbia test for what is “obscene for minors” only includes one of the three parts of the *Ginsberg* test and, therefore, is much broader than what would meet the test set out by the Supreme Court. A similar law enacted in Illinois but lacking the third prong of the *Ginsberg* test was ruled unconstitutional. *ESA v. Blagojevich*, 404 F. Supp 2d 1051 (N.D. Ill. 2005) (permanently enjoined law barring sale or rental of “violent video games” or sexually explicit video games).

Passage of either bill 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. In a recent successful challenge to similar video game legislation, the state paid the plaintiffs more than \$500,000 in attorneys’ fees.

Again, we ask you to please protect the First Amendment rights of all people of Washington, D.C. and defeat this legislation.