

THE MEDIA COALITION INC

139 FULTON STREET • SUITE 302 • NEW YORK, NEW YORK 10038 • TELEPHONE: 212-587-4025

FACSIMILE: 212-587-2436 • E-MAIL: MEDIACOALITION@MEDIACOALITION.ORG

WEBSITE: WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
Executive Director

Memorandum in Opposition to Utah House Bill 257

The members of The Media Coalition believe that House Bill 257 likely violates the First Amendment rights of retailers and producers of content and others. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and sound, video and video game retailers in Utah and the rest of the United States.

H.B. 257 would expand the definition of material harmful to minors to include certain violent content. This would make it illegal to distribute or exhibit to a minor such material. A violation would be a felony subject to a fine for a first offense and a fine and no less than a year in prison for a subsequent violation.

This bill is clearly constitutionally suspect. 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.1382, 1389 (2002). None of the types of speech cited by the Supreme Court include speech with violent content alone. Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation for adults or minors. A series of recent court decisions has reaffirmed this legal doctrine. Laws barring sale or rental of video games with violent content to minors were enacted in 2005 in California, Illinois and Michigan. The laws were all successfully challenged with U.S. District Court judges’ granting injunctions barring the enforcement of these restrictions. *See VSDA v. Schwarzenegger*, No. C05-4188 RMW (N.D. Cal. Dec. 22, 2005) (granting preliminary injunction); *ESA v. Blagojevich*, 2005 WL 3447810 (E.D. Ill. Dec. 2, 2005)(granting a permanent injunction); *ESA v. Granholm*, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005) (granting preliminary injunction). Every prior 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. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent arcade video games. *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) enjoined enforcement of a county ordinance that barred the sale or rental to minors of video games with violent content. *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 118 (W.D. Wash. 20004) barred enforcement of a state law that barred dissemination

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Software
Association

Freedom to Read
Foundation

Interactive Entertainment
Merchants Association

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Video Software Dealers
Association

Chair
Sean Devlin Bersell
Video Software Dealers
Association

Immediate Past Chair
Judith Krug
Freedom to Read
Foundation

Treasurer
Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

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

to minors of video games that included violence against "peace officers." *Bookfriends v. Taft*, 233 F.Supp. 932 (S.D. Ohio, W. Div. 2002) 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."

H.B. 257 would have a profound chilling effect on the sale of First Amendment protected material. It forces store owners and librarians to guess what material is appropriate for teenagers. Violent themes and visual images are common in books, movies and music covering a wide range of subjects. Under H.B. 257, book, movie and music retailers would be forced to decide whether to sell a minor material ranging from Homer's *The Odyssey* to *The Passion of the Christ* to many country and western songs. Different adults can have diametrically opposed views of what violent content is suitable for teenagers. Some believe that movies like *Schindler's List* and *Saving Private Ryan* should be seen by teenagers. Yet, there were objections about both movies being shown on television. To comply with H.B. 257, retailers and librarians will have to evaluate the content of thousands of books, movies and music recordings. Many larger retailers carry more than 100,000 titles. They do not have the staff, resources or legal expertise to review and assess the legality of every title they carry. Inevitably, retailers and librarians will not risk prosecution and choose not to sell, rent or loan much material that is constitutionally protected for minors and adults and does not meet the definition in H.B. 257.

Finally, we believe that the rationale for restricting access to media with violent content - the belief that it causes actual violence - is based on evidence that is inconclusive at best. The Surgeon General's report, *2001 Youth Violence: A Report of the Surgeon General*, was an extensive study of the many causes of youth violence. In this lengthy report, the authors briefly addressed the impact of consumption of media on children's behavior. They concluded that despite a "diverse body" of research, it was not

possible to come to a conclusion about the effect of media consumption on minors in either the short- or long-term.

Passage of this 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 several recent successful challenges to video game legislation, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees in each litigation.

We ask you to please protect the First Amendment rights of all people of Utah and oppose this legislation.