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Memo in Opposition to Delaware House Bill 77

The members of Media Coalition believe that House Bill 77 likely violates the First Amendment rights of retailers and their customers. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video and video game retailers and film exhibitors in Delaware and the rest of the United States.

H.B. 77 would bar the sale or rental of any video game rated “AO” or “M” by the Entertainment Software Ratings Board (ESRB) to anyone under the ages of 18 or 17 respectively. Any customer seeking to buy or rent either game must be asked for age identification. Also, all video games rated by the ESRB must have the rating clearly displayed on the outer covering and any unrated game must be prominently marked as “not rated.”

The bar on the purchase or rental of video games based on any rating system is very likely unconstitutional. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Minnesota passed a similar law giving legal force to the ESRB rating system that was struck down last year. *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (granting permanent injunction (since re-captioned *ESA v. Swanson*)). Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a 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 speech with violent content the problem created by government enforcement of a ratings system 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.*

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

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,
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National Association of
Recording Merchandisers

National Association of
Theatre Owners

Publishers Marketing
Association

Recording Industry
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Inc.

Chair
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Immediate Past Chair
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Freedom to Read
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Treasurer
Chris Finan
American Booksellers
Foundation for
Free Expression

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

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. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. A series of recent decisions has reaffirmed this legal doctrine. Laws barring sale or rental of video games with violent content to minors were enacted in 2005-6 in California, Illinois, Louisiana, Michigan, Minnesota and Oklahoma and each was successfully challenged in federal court. *See ESA v. Blagojevich*, 2006 WL 3392078 (7th Cir. Nov. 27, 2006) upholding 404 F. Supp 2d 1051 (N.D. Ill. 2005); *VSDA v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction); *ESA v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (granting a permanent injunction); *ESA v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2005) (granting permanent injunction); *ESA v. Hatch*, (granting permanent injunction (since re-captioned *ESA v. Swanson*)); *EMA v. Henry*, Civ. 06-675-C (W.D. Okla. 2006) (granting a preliminary injunction). Other recent decisions that have addressed this issue have 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 an Indianapolis 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. 2004) barred enforcement of a state law that barred dissemination to minors of video games that included violence against “peace officers.”

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 this legal threshold test for harmfulness. Therefore, a law barring the sale or rental of such material would inevitably prevent minors from getting works that they have a First Amendment right to possess. *See, ESA v. Blagojevich*.

Even the requirement that video games clearly display their rating or be marked “not rated” is at risk for attaching legal effect to a voluntary rating system. A government cannot mandate labels on material indicating that it is illegal for minors prior

to a judicial determination with appropriate procedural safeguards. Absent these safeguards, this restriction is an unconstitutional prior restraint. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Even if the bill only required video games to be labeled with the ESRB rating or as “not rated” but without any prohibitions on their sale or rental, there are potential constitutional problems. The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right “to refrain from speaking at all,” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm’n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists inserts in its monthly bills), *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials). A retailer or video game creator may participate fully, partially or not at all in the ESRB’s rating program.

Passage of this ordinance 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 recent successful challenge of a similar video game legislation, the state agreed to pay to the plaintiffs more than \$550,000 in attorneys’ fees.

Please protect the First Amendment rights of all people of Delaware and defeat H.B. 77.