

THE MEDIA COALITION INC

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Re: Indiana Senate Bill 238 – Memo in Opposition

The members of Media Coalition believe that Senate Bill 238 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 Indiana and the rest of the United States.

S.B. 238 would bar the sale or rental by a “video game retailer” or sales clerk to a minor of any video game rated “AO” or “M” by the Entertainment Software Ratings Board. Also, all retailers who sell or rent video games would have to post a sign in 30 point font in a prominent location that says: “It is against the law for a person under 17 to rent or purchase a video game rated “AO” or “M”.

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. 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. 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

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,
Inc.

National Association of
Recording Merchandisers

National Association of
Theatre Owners

Publishers Marketing
Association

Recording Industry
Association of America,
Inc.

Chair
Sean Devlin Bersell
Entertainment Merchants
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

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*, No. 06-431 (M.D. La. 2006) (granting a permanent injunction); *ESA v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005) (granting permanent injunction); *ESA v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (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 previously noted Illinois video game law also banned dissemination to minors of video games with sexually explicit content. The definition of sexually explicit content did not include all three prongs of the *Ginsberg* test. This law was found unconstitutional by U.S. District and the ruling was upheld by the Seventh Circuit Court of Appeals. *ESA v. Blagojevich*, 2006 WL 3392078 (7th Cir. Nov. 27, 2006) upholding 404 F. Supp 2d 1051 (N.D. Ill. 2005). 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.

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 successful challenge of a similar video game legislation, the state agreed to pay to the plaintiffs more than \$500,000 in attorneys' fees.

Please protect the First Amendment rights of all people of Indiana and defeat S.B. 238.