

# THE MEDIA COALITION INC

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## Legal Analysis of Missouri Senate Bill 5

American Booksellers  
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Association of American  
Publishers, Inc.

Comic Book Legal  
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Association of America,  
Inc.

The members of Media Coalition believe that Missouri Senate Bill 5 threatens the distribution of First Amendment-protected material in Missouri. 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 Missouri and the rest of the United States. They have asked me to analyze the bill in light of these concerns.

S.B. 5 has clear constitutional defects in the changes to sections 573.025 and 573.035. Additionally, the change to 573.037 gives legal force to the constitutional defect with the existing definition of child pornography in 573.010 (2)(B)(b). The existing law deems a matter is illegal in sections 573.025 and 573.035 if it is obscene material that contains an image of a person or what appears to be a person younger than 14 or 18 respectively engaged in certain nudity or simulated or actual sexual activity. S.B. 5 would broaden these sections to make illegal any digital or computer image that contains such content, even if it is not obscene. S.B. 5 would also change 573.037 from barring possession of material that is obscene and contains an image of a person or what appears to be a minor engaged in certain nudity or simulated or actual sexual activity to any child pornography as defined in 573.010 (2). This definition includes any digital or computer-generated image that is or appears to be a minor engaging in certain nudity or simulated or actual sexual activity.

While the members of Media Coalition are deeply concerned about the sexual exploitation of minors and support laws that attempt to eradicate it, they believe this bill would criminalize material that is fully protected by the First Amendment and that does not sexually exploit minors. In a clear and resounding decision, the Supreme Court in *Free Speech Coalition v. Reno*, 122 S.Ct. 1389 (2002) found unconstitutionally overbroad a similar statute, the Child Pornography Prevention Act of 1996 (CPPA). The CPPA criminalized depictions of computer generated images that appear to be of a minor engaging in real or simulated sex or with genitals lasciviously displayed. The Supreme Court ruled that unless the material included actual minors engaged in prohibited activity the material was protected by the First Amendment and could only be banned if found to be obscene under the three prong tests enunciated in *Miller v. California*, 413 U.S. 15 (1973). *Free Speech Coalition* reaffirmed *Ferber v. New York*, 458 U.S. 747 (1982), the landmark case that upheld a ban on actual child pornography, but

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.

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where the U.S. Supreme Court made it clear that these laws should strike only at pictures of children being sexually abused, not at all depictions of nude children or representations of children.

The changes in S.B. 5 are constitutionally suspect in light of *Free Speech Coalition* and *Ferber*. These cases make very clear that it is impermissible to criminalize material that was created without using an actual minor. Computer-generated images created without a minor may not be treated differently than drawings or sculptures regardless of whether they are lifelike or not. However, the changes in S.B. 5 would make content illegal in 573.025, 573.035 and 573.037 that do not contain an actual minor. As noted in *Free Speech Coalition*, such material may be banned if it is first judged to be obscene under the *Miller* test, but S.B. 5 specifically removes this requirement.

Missouri could ban material that contains digital images that appear to be a minor under at least three conditions. First, if they retain the requirement that the material also must be judged obscene. Second, Missouri could ban the material if it were tied to another illegal activity; for example, if the material was used to groom or lure a minor with the intent of having illegal sexual contact with a minor or with the intent of taking sexually explicit pictures of the minor. Finally, the material could be made illegal if it was found by a court to be harmful to minors under the test in *Ginsberg v. New York*, 390 U.S. 629 (1968) and it was given to a minor.