THE MEDIA COALITION INC
275 SEVENTH AVENUE • SUITE 1504 • NEW YORK, NEW YORK 10001
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
*Executive Director*

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*

# Memo in Opposition to North Carolina Senate Bill 87

The members of Media Coalition believe that Senate Bill 87 very likely violates the First Amendment rights of producers and retailers of video games 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 North Carolina and the rest of the United States.

S.B. 87 would bar the sale or rental of a video game that was deemed "harmful to minors" due to its violent content. Such video games would have to be kept in a segregated "adults only" section of a store. Retailers would have to post signs indicating that there are video game rating systems and provide information about any system upon request. Also, video games that included "graphic violent" content would have to labeled with descriptions of the types of violence depicted.

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. In the case of *Ginsberg v. New York,* the U.S. Supreme Court established a three-part test for determining whether sexually explicit material is "harmful to minors" and may therefore be banned for dissemination to minors. 390 U.S. 629 (1968). The regulation of violent content is not made permissible by creating a three-part test that is parallel in structure to the test of material with sexual content that is harmful to 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 the past two years in California, Illinois, Louisiana, Michigan, Minnesota and Oklahoma and each was successfully challenged in federal court. *See ESA v. Blagojevich*, 2006 WL

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.

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."

The requirement that video games with violent content be kept in a segregated "adults only" area of a store is also likely unconstitutional. Generally, the case law makes clear that government restriction on access to First Amendment-protected material by adults or older minors in the interest of protecting younger minors would be "to burn down the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Although the courts have ruled that some limitation on the display of material harmful to minors, as defined by the Supreme Court in *Ginsberg v. New York*, is permissible, they have also ruled that these limitations may not unreasonably hinder the access of adults. See also, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). These cases make clear that the state's authority to require a retailer to restrict access to First Amendment-protected material based on its content is predicated on two principles. First, that the content is illegal for someone, generally minors under the test laid out by the Supreme Court for sexually explicit material in *Ginsberg v. New York*. Second, that minors may be able to browse or peruse the material that is illegal as to them in a store. As is clear from the case law, material with violent content is not illegal for minors and therefore is not subject to any kind of restriction or regulation including display in a segregated manner.

The demand that video games with violent content be labeled with descriptions of such content is also likely unconstitutional as compelled speech. Generally, 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). The requirement that video games with "graphic violence" must have labels that describe certain content is compelled speech. The laws passed in 2005 in

Illinois and California included similar requirements that video games with certain content carry an “18" label. In each case the judge barred enforcement under the compelled speech doctrine. *VSDA v. Schwarzenegger*, *ESA v. Blagojevich*.

Finally, the signage and informational requirements regarding rating systems in S.B. 87 are potentially unconstitutional as well. Voluntary ratings with suggested age restrictions are provided by the video game industry as a tool for parents and retailers, but they are just that: voluntary. Courts generally have been skeptical of government rating systems or linkage with existing voluntary rating systems. *ESA v. Hatch, VSDA v. Schwarzenegger*, *ESA v. Blagojevich*. Beyond these recent video game cases, in nine different states courts 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 criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 ($4^{th}$ Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

Passage of this ordinance could prove costly. If a court rules 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 a similar video game law, 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 North Carolina and defeat S.B. 87.