

February 25, 2004

Assemblyman Yee
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0012

Re: Letter in opposition to Assembly Bills 1792 and 1793

Dear Assemblyman Yee,

The members of The Media Coalition believe that Assembly Bills 1792 and 1793 restricting the display and dissemination of certain videogames violates First Amendment rights of adults and minors. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and recording and video retailers in California and the rest of the United States. They have asked me to explain their concerns.

The A.B. 1792 would bar the sale to minors of videogames with certain violent content by including them in the definition of material that is "harmful to minors." A.B. 1793 would require that all games rated "AO" by the Entertainment Software Rating Board be segregated in an adults only area and games rated "M" by the ESRB must be separate from teen appropriate games and be placed on shelves at least five feet from above the floor. Nor can games with either rating be sampled by customers unless they are age appropriate for the games rating.

A.B. 1792 and 1793 both would impermissibly regulate speech based on its content that is clearly protected by the First Amendment. Speech is presumed to be protected by the First Amendment unless it falls into one of 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. 255 (2002). None of the types of speech outside the protection of the First Amendment cited by the court includes speech with violent content by itself. To the contrary, every court that has addressed this issue has held

that speech with violent content, without exception, is constitutionally protected and not subject to regulation as to adults or minors. IDSA v. St. Louis County, 329 F.3d 954 (8th Cir 2003) enjoined enforcement of county ordinance barring dissemination of violent videogames. American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), cert. den. 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors' access to violent video games. Bookfriends v. Taft, 233 F. Supp. 2d 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 (the case was rendered moot while on appeal when Ohio enacted a constitutionally correct definition of material "harmful to juveniles" was enacted.) 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."

A.B. 1793 would also adopt the ESRB rating system. However, a legislature may not adopt or give legal force to a private rating system. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement of an existing rating system is impermissible. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or financially punish a movie that carries specific rating designations. MPAA v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of 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.

A.B. 1793 would require videogames be segregated or be restricted based on its rating designation. Beyond the principle that government may not regulate the content of speech for violence under these circumstances, 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

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minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), 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). It is worth noting that these cases, unlike A.B. 1792 and 1793, were challenges to laws that restricted access to sexually explicit material that is "harmful to minors" and, as previously noted, may be regulated to some extent by legislatures.

Finally, 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. There is no language in the opinion that could arguably suggest that material with violent content would be inappropriate for minors under the *Ginsberg* test. Therefore, a law barring sale, rental or access to such material would inevitably prevent minors from accessing 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 the above mentioned *A.A.M.A. v. Kendrick* case the state agreed to pay to the plaintiffs more than \$300,000 in attorneys' fees.

Please protect the First Amendment rights of all people of California and withdraw this legislation.

Sincerely,

David Horowitz
Executive Director

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