

# THE MEDIA COALITION INC

139 FULTON STREET • SUITE 302 • NEW YORK, NEW YORK 10038 • TELEPHONE: 212-587-4025

FACSIMILE: 212-587-2436 • E-MAIL: MEDIACOALITION@MEDIACOALITION.ORG

WEBSITE: WWW.MEDIACOALITION.ORG

**DAVID HOROWITZ**  
*Executive Director*

## Memo in Opposition to Michigan S. B. 416 as Amended by House Judiciary Cmte

The members of The Media Coalition believe that Michigan Senate Bill 416 threatens the distribution of First Amendment-protected material in Michigan. Media Coalition members represent most of the publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording and video retailers in Michigan and the rest of the United States.

S.B. 416 bars the dissemination or display to minors of video games that contain certain “ultra-violent” content. A person is not considered to have displayed such video games to minors in stores over 1000 square feet if they are segregated in an adults only area or for stores with 1000 square feet or less the video games are located in a way that keeps them from minors. A violation for dissemination would be subject to a fine of up to \$5,000 for a first offense, \$15,000 for a second offense, and up to \$40,000, two years in prison, or both for a third violation. A violation for display would be liable for a fine of up to \$25,000, 93 days in jail, or both. There is an affirmative defense available if a retailer enforces a video game rating system (or the movie rating system for sexually explicit material).

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 court includes speech with violent content alone. Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation for adults or minors. Merely grafting a restriction on violent content onto language allowed to restrict sexually explicit content to minors does not make this restriction acceptable. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8<sup>th</sup> Cir. 2003) enjoined enforcement of a county ordinance that barred the sale or rental to minors of video games with violent content. American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors’ access to violent video games. Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 2004) barred enforcement of a state law that barred dissemination to minors of

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

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Expression

Association of American  
Publishers, Inc.

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Entertainment Software  
Association

Freedom to Read  
Foundation

Interactive Electronic  
Merchants Association

Magazine Publishers of  
America, Inc.

Motion Picture  
Association of America,  
Inc.

National Association of  
Recording Merchandisers

Publishers Marketing  
Association

Recording Industry  
Association of America,  
Inc.

Video Software Dealers  
Association

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Judith Krug  
Freedom to Read  
Foundation

*Immediate Past Chair*  
Chris Finan  
American Booksellers  
Foundation for  
Free Expression

*Treasurer*  
Gail Markels  
Entertainment Software  
Association

*General Counsel*  
Michael A. Bamberger  
Sonnenschein Nath &  
Rosenthal LLP

of video games that included violence against “peace officers.” Bookfriends v. Taft, 233 F.Supp. 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. 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 (8<sup>th</sup> 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."

The further restriction on the display of “ultra-violent” material solely in a segregated area is also suspect. 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, 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 (4<sup>th</sup> 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, 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 restriction or regulation including display in a segregated manner. See also, Athenaco v. Cox 335 F. Supp. 2d 773 (E.D. Mich. 2004).

Finally, the affirmative defense that would require a retailer to enforce a voluntary rating system to avoid prosecution is constitutionally suspect. The enforcement of a rating system as an affirmative defense to the dissemination of sexually explicit material is equally suspect. 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 (4<sup>th</sup> Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

Because it threatens the distribution of constitutionally protected works, S.B. 416 will be vulnerable to a legal challenge if it is enacted. If the law is overturned, the state could be ordered to pay the plaintiffs' attorneys' fees. In the American Amusement Machine Ass'n v. Kendrick case, the state agreed to pay more than \$300,000 in legal fees to the plaintiffs.

The members of Media Coalition strongly urge you to defend the First Amendment rights of all the citizens of Michigan and defeat this bill.