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Memorandum in Opposition to Council Bill 16-125

The members of The Media Coalition believe that Council Bill 16-125 likely violates the First Amendment rights of retailers and others. 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 Washington, DC and the rest of the United States.

Council Bill 16-125 would bar any business or individual from selling, renting or furnishing any videogame either rated “M” or unrated to anyone under 17 and any game rated “AO” to anyone under 18. The “M” and “AO” designations are part of the Entertainment Software Rating Board rating system. C.B. 16-125 would require any business that sells or rents videogames to obtain an “Entertainment” endorsement to a basic business license. All business that have the “Entertainment” endorsement must post at least one sign that states videogames rated “M” or unrated may not be sold or rented to anyone under 17 and no game rated “AO” may be rated to anyone under 18. A complete explanation of the ESRB rating system and a copy of the business license must also be posted. Also, no videogame may be displayed except in packaging that clearly identifies its rating. A violation of any of these provisions would make the retailer subject to a suspension of their business license, or substantial fines, or both.

The bar on the sale, rental or furnishment of videogames based on a 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

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.

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

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 of
America, Inc.

Video Software Dealers
Association

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Free Expression

Treasurer
Gail Markels
Entertainment Software
Association

General Counsel
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Rosenthal LLP

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 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. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. 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. 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. Video Software Dealers Association v. Maleng, No. C03-1245L (D. Wash. July 15, 2004) barred enforcement of a state law that barred dissemination to minors 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 (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.”

The portion of Council Bill 16-125 that requires posting of the ESRB rating system in stores and on all videogame packaging is potentially unconstitutional compelled speech. Voluntary ratings are provided by the videogame industry as a tool for parents and retailers, but they are just that: voluntary. The government cannot endorse the ESRB rating system by mandating that retailers post signage explaining the system. A retailer may participate fully, partially or not at all in the ESRB’s rating program. 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).

Requiring a retailer to post or provide information about the ESRB rating system and to restrict the display of videogames solely to those bearing an ESRB rating transforms a voluntary

rating system to one with the imprimatur of government endorsement. As noted above, courts in nine different states have ruled it unconstitutional for the government to impose a rating system, give legal force to an existing rating system or punish someone for not adopting a voluntary rating system.

The government requirement that retailers provide ratings for videogames will certainly have a serious chilling effect on consumers. A rating system pejoratively labels the content of a videogame in way that is outside the control of a retailer. The rating system may deem material as unsuitably violent, sexually explicit, blasphemous or otherwise unsuitable for some or all potential consumers. This will dissuade some people from buying or renting a game without having seen the content simply because an anonymous rating board has decided it may be inappropriate.

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 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 several recent successful challenges to videogame legislation, the state agreed to pay to the plaintiffs more than \$300,000 in attorneys’ fees in each litigation.

Again, we ask you to please protect the First Amendment rights of all people of Washington, DC and defeat this legislation.