

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

Memo in Opposition to Rhode Island House Bill 7751 Substitute A

DAVID HOROWITZ
Executive Director

The members of The Media Coalition believe that Rhode Island House Bill 7751 Substitute A threatens the distribution of First Amendment-protected material in Rhode Island. The members of Media Coalition, who represent most of the producers, distributors and retailers of books, magazines, recordings, movies, videos and video games in Rhode Island and the rest of the country, have asked me to explain their concern.

H-7751 Sub A has clear constitutional defects. It appears to change the definition of child pornography in the Rhode Island child pornography statute to include material fully protected by the First Amendment. H-7751 Sub A extends the definition of child pornography to include “a digital image, computer image or computer-generated image of a minor engaging in sexually explicit conduct.” It also allows an affirmative defense to some of the violations that the material was produced using actual person who is an adult. A violation of H-7751 Sub A is punishable by a significant fine, a period of confinement or both.

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 law criminalizes material protected by the First Amendment and that does not sexually exploit minors. In a clear and resounding decision from last year, 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 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 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.

H-7751 Sub A is constitutionally suspect in light of *Free Speech Coalition* and *Ferber*. Clearly, 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.

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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Interactive Electronic
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Additionally, H-7751 Sub A It would require that the defendant prove that the subject of an image was an adult at the time the image was created. The Supreme Court in *Free Speech Coalition* made clear that this would be an impermissible shift of the burden of proof of an essential element of the crime of possession of child pornography. In a recent case the First Circuit Court of Appeals upheld a decision vacating a conviction under the CPPA because the state of Maine had failed to prove that the subject of the images at issue were of minors. *U.S. v. Hilton* No. 03-1741 (April 2, 2004).

Passage of H-7751 Sub A could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the attorneys' fees of the parties who challenged the law. Fees in such cases are often in excess of \$250,000.

The members of Media Coalition urge you to protect the First Amendment rights of all the citizens of Rhode Island and defeat H-7751 Sub A.

