

# THE MEDIA COALITION INC

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## MEMO IN OPPOSITION TO SENATE BILL 32

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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The members of The Media Coalition believe that Missouri Senate Bill 32 threatens the distribution of First Amendment-protected material in Missouri. The members of The Media Coalition are trade associations and professional organizations that represent most of the publishers, booksellers, librarians, periodical wholesalers and distributors, recording, movie and video game manufacturers, and recording and video retailers in Missouri and the rest of the United States. They neither produce nor sell works that are legally obscene. However they do disseminate a wide variety of material with sexual content, including art and photography books, mainstream movies and music, sex education material and literary and artistic works.

S.B. 32 would define a business as a "sexually-oriented business" if 10 percent of display space is used for "sexually-oriented material." "Sexually-oriented material" is defined as any material containing nudity or sexual activity in a patently offensive manner to the average person applying contemporary community standards with respect to what is suitable for minors. If a business is deemed a "sexually-oriented business" it must collect a \$5 per person entrance tax, pay a 20 percent gross revenue tax, not admit any patron under 21 years old, nor hire anyone under 21 and may only operate from 10 a.m. to 10 p.m. Monday to Saturday and must close Sunday and all federal holidays.

The government has the power to regulate the "secondary effects" of sexually oriented businesses but the Supreme Court has established limits on this power. The regulation must be designed to further an important or substantial government interest; the governmental interest must be unrelated to the suppression of speech; and the regulation must be narrowly tailored to further the government interest in preventing the unwanted secondary effects. *City of Erie v. Pap's A.M.*, 529 U.S.277 (2000); *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

It is very unlikely that S.B. 32 would meet this test. Given the low threshold to be deemed a "sexually-oriented business" it is very likely that many mainstream books, music and video stores will be at risk for being subject to these regulations. However, there is little reason to believe these punishments on mainstream stores will prevent unwanted secondary effects this bill seeks to reduce. Conversely, S.B. 32 would have a serious chilling effect on many mainstream retailers. The extremely broad definition of "sexually oriented business" would impose the

onerous regulation and tax scheme on many, if not all, of these stores. Whether it is romance books, hit movies, or pop records, book, record and video stores all carry mainstream material that includes “nudity” as defined in the bill. Many retailers would drastically limit their inventory rather than be classified as a “sexually-oriented business” and have to charge an admission fee to their store, pay a 20 percent gross revenue tax and limit their customers to those at least 21 years old. Also, many would prefer to avoid the negative connotations that go with the label. Beyond the severe financial penalty store owners fear that they would likely lose customers unwilling to shop at a “sexually oriented business.”

Additionally, the Supreme Court has struck down legislation to tax First Amendment protected speech based on its content. The 20 percent gross revenue tax and \$5 admission tax are both triggered when the contents of 10 percent of a store's display space are considered sexually-oriented material. However, the material used to determine the 10 percent threshold is not legally obscene and therefore is protected speech. To the contrary much of the material that might meet the definition of sexually-oriented is very much mainstream books, music and movies. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment, *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. In 1991, it held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. In 1987, the court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press," *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230.

Finally, the prohibition on anyone under 21 years old entering a “sexually-oriented” business is clearly overbroad. Unless material is legally obscene, it is unconstitutional to bar access by adults to material legal for adults. The government cannot restrict access to such material by creating an arbitrary age restriction.

Please protect the First Amendment rights of all Missourians and defeat S.B. 32.