

THE MEDIA COALITION INC

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DAVID HOROWITZ
Executive Director

January 28, 2005

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Software
Association

Interactive Entertainment
Merchants Association

Freedom to Read
Foundation

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

Chair
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

Representative Duane DeKrey, Chair
Judiciary Committee
North Dakota House of Representatives
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0360

Re: North Dakota House Bill 1415

Dear Chairman DeKrey,

The members of The Media Coalition believe that North Dakota House Bill 1415 threatens the distribution of First Amendment-protected material in North Dakota. Media Coalition members represent most of the book and magazine publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording and video retailers in North Dakota and the rest of the United States.

H.B. 1415 requires that any book, photograph, magazine or pamphlet with a cover or available content that includes nude images that are “posed or presented in a manner to exploit sex, lust or perversion for commercial gain” must be kept either behind a counter or segregated in a controlled area. This provision is onerous for retailers and is almost certainly unconstitutional because it restricts the access of adults to material that is constitutionally protected as to them.

H.B. 1415 has significant constitutional problems. Courts have allowed some limitations on the display of material “harmful to minors,” as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), but they have also ruled that these limitations may not unreasonably hinder the access of adults to such material. In the *Ginsberg* case, the Supreme Court established a three-prong test to determine what is legally “harmful to minors.” H.B. 1415 would restrict access to a much broader range of material than could arguably be deemed “harmful to minors” under the *Ginsberg* test. It would improperly restrict the display of this material to adults as well as minors despite the material being legal for both.

Even if H.B. 1415 only applied to material that is “harmful to minors,” the requirement that any photograph, book, magazine or pamphlet with a cover or content be

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.

Representative DeKrey
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kept behind a counter or in a controlled area would be an unreasonable hindrance on the right of adults to access such material. A retailer must be allowed to restrict access of minors to such material in a reasonable manner besides segregation. See, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). H.B. 1415 on the contrary would force a retailer to create an "adults only" area that would pejoratively label a part of their inventory. They would inevitably lose patrons who, without being aware that the material in the segregated section is protected by the First Amendment, will refuse to enter places that deal in "dirty books or magazines." Some retailers would have little choice but to stop carrying all work with any nudity, including much mainstream art, fashion, and health education material rather than to risk a prosecution. As a result, H.B. 1415 would exercise an unconstitutional "chilling effect" on the sale of legally protected speech and seriously impair adults' access to material which they have a First Amendment right to read or see.

Additionally, the bill presents great practical difficulty for retailers of books, magazines, and other images. Some bookstores carry hundreds of thousands of books and the task of reviewing thousands of new items received each year to determine whether they contain nude or partially denuded images that must be segregated is difficult, time consuming for staff, and expensive for the proprietor. In addition, requiring retailers to segregate such material behind the counter or in an area that physically prohibits access to minors would only add to the practical problems in allocating store staff, causing retailers to lose adult customers who may not want to purchase material without browsing.

Because it threatens the distribution of constitutionally protected material, H.B. 1415 will be vulnerable to a legal challenge if it is enacted. If it were to be overturned, the state could be ordered to pay the plaintiffs' attorneys' fees.

The members of Media Coalition strongly urge you to defend the First Amendment rights of retailers and all the citizens of North Dakota and vote against H.B. 1415.

Sincerely,

David Horowitz,
Executive Director

cc: Representative Maragos, Vice Chair
Representative Bernstein
Representative Boehning

Representative DeKrey

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Representative Charging

Representative Delmore

Representative Galvin

Representative Kingsbury

Representative Klemin

Representative Koppelman

Representative Kretschmar

Representative Meyer

Representative Onstad

Representative Zaiser