

THE MEDIA COALITION INC

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MEMO IN OPPOSITION TO HOUSE BILL 2178

The members of The Media Coalition believe that Washington House Bill 2178 would jeopardize the dissemination of First Amendment protected video and computer games by creating third-party liability for producers, distributors, and retailers of such material. 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 and the rest of the United States and they have asked me to explain their objections.

H.B 2178 would create a civil cause of action for any personal injury or wrongful death against the maker or retailer of a videogame with violent content if it was sold to anyone under 17 and it was “a factor in creating conditions that assisted or encouraged the person to cause injury or death to another person.”

Imposing third-party liability for injuries is wrong for two reasons: it makes innocent third parties responsible for the acts of criminals and it diminishes the responsibility of the criminal, since he can then claim that something he saw or heard “made me do it.” H.B. 2178 also raises serious First Amendment problems. The prospect of being responsible for each viewer, reader or listener is likely to frighten producers and distributors to the point where it will severely chill the dissemination of constitutionally protected works.

This speech clearly enjoys the full protection of the First Amendment both for adults and minors. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. 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.” 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 arcade videogames. 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.

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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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

Due to the substantial chilling effect of third-party liability, courts have repeatedly held that absent an actual incitement to lawless action, those who produce or sell First Amendment-protected material may not be subjected to financial liability for the unlawful or violent acts of third parties, even if they were influenced by specific media. Brandenburg v. Ohio, 395 U.S. 444 (1969). Even in cases where the perpetrator or victim had copied what they saw or read, courts have barred or thrown out suits seeking civil damages. See, DeFilippo v. NBC 446 A.2d 1036 (R.I. 1982) (parents of deceased minor brought wrongful death action after their son hanged himself copying a stunt he saw on the Tonight Show); Herceg v. Hustler Magazine, Inc. 814 F.2d 1017 (5th Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent's death allegedly caused by article which described autoerotic asphyxia); Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624 (1989), (wrongful death action brought by father of person killed by perpetrator who had just seen the movie The Warriors even though he quoted lines from the movie while committing the crime); Zamora v. CBS, Inc., 480 F.Supp. 199 (S.D. Fla. 1979) (teenager sued the television networks for violent programming that he alleged caused him to commit criminal acts).

H.B. 2178 is also unconstitutional as content specific legislation. This is not a general cause of action to sue a creator or distributor of speech. This only grants access to the court to sue a maker or seller of videogame with violent content if it is sold to anyone under 17 and it is a factor in creating conditions that assist or encourage the person to cause injury or death of another. Because the members of Media Coalition consider third party liability so deadly to free speech, they challenged an Indianapolis ordinance in 1984 that sought to give victims of sex crimes a cause of action against producers and distributors of the material that allegedly caused the crime. The ordinance was struck down. The decision was upheld unanimously by a three-judge panel of the appeals court, and summarily affirmed by the U.S. Supreme Court. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 192178), *aff'd*, 475 U.S. 1001 (1986). A virtually identical ordinance was enacted in Bellingham, Washington and was also struck down. Village Books v. City of Bellingham, No. C88-1470D (W.D. Wash. Feb 9, 1989).

If enacted, H.B. 2178 will suppress speech protected by the First Amendment. Please protect free speech. Oppose H.B. 2178.