

MEDIA COALITION HIGHLIGHTS: 2010 – 2011

Major Victory in Supreme Court for Media Coalition Members in Violent Content Case

In June, the Supreme Court held in *Brown v. Entertainment Merchants Ass'n* that there was no exception to the First Amendment for violent content in video games or other media. The case was the Court's first consideration of whether violent images and descriptions can be banned for minors, a proposition that the majority emphatically rejected. Media Coalition submitted the primary amicus brief representing content producers and retailers; the brief argued that the First Amendment bars restrictions on violent content and that upholding the law could lead to censorship of other media. Justice Scalia drew from examples in the brief when he asked California's deputy attorney general whether the state would criminalize classic but brutal literature like *Grimm's Fairy Tales*. Media Coalition members Association of American Publishers, American Booksellers Foundation for Free Expression, Freedom to Read Foundation, National Association of Recording Merchandisers, and Recording Industry Association of America were joined on the brief by Association of National Advertisers, Recording Academy, PEN Center USA, and Amusement & Music Operators Association. Other members submitted individual briefs. Media Coalition opposed the law since its introduction in 2005, submitting memoranda of law to the legislature and governor and filing an amicus brief when the case reached the Ninth Circuit Court of Appeals, which found the law unconstitutional in 2009.

The decision in *Brown* was the result of years of work by Media Coalition and its members that started in the 1990s to establish that violent content is fully protected by the Constitution and to affirm the idea that video games are speech. This effort was fought in legislatures and courts across the country. Successful challenges to government restrictions on violence in Ohio, Louisiana, Michigan, Oklahoma, Indiana, Illinois, Minnesota, Missouri, and Washington created a substantial body of law that culminated in the *Brown* decision.

Internet Censorship Laws Struck Down in Alaska and Massachusetts

This year, Media Coalition successfully challenged two separate but similar laws enacted in Alaska and Massachusetts that effectively limited the content available to adults on the Internet to what is appropriate for minors. In Massachusetts, speakers on the Internet could have faced five-year prison terms for posting sexually frank book excerpts, streaming racy music or video, and hosting other "harmful" material online. Alaska's law imposed penalties including prison terms, fines, sex offender registration, and forfeiture of one's business. Media Coalition vigorously opposed both laws in the respective legislatures, advising lawmakers that it was possible to protect minors without infringing on the First Amendment.

Upon passage, Media Coalition members joined local businesses and others in challenging the statutes, and in a single week U.S. District Courts in both states granted injunctions to block enforcement of the laws. After U.S. District Judge Rya Zobel enjoined Massachusetts' law, the legislature enacted a narrowed version that does not violate the Constitution. In Alaska, U.S. District Judge Ralph Beistline struck down the state's harmful to minors law for Internet and non-Internet communication. These victories add to a string of favorable court decisions. Media Coalition previously challenged comparable Internet censorship laws in Arizona, New Mexico, New York, Ohio, South Carolina, Vermont, and Virginia, with a challenge still pending against a similar law in Utah that also requires ISPs to filter the Internet to block sexual material. Despite Media Coalition establishing a significant body of law in this area, bills restricting Internet content continue to be introduced in state legislatures.

Media Coalition Halts Hawaii Bill to Impose Third Party Liability on Publishers and Writers

In May 2011, the Hawaii Senate Judiciary Committee voted to hold House Bill 548 for this year. H.B. 548 would have allowed landowners and injured tourists to sue travel writers and publishers of

“visitors guides,” including guidebooks, websites, and advertisements, for readers’ actions. The bill also required the guides to include warnings about “dangerous” conditions in the areas they described. The bill had substantial support from wealthy landowners and the Hawaiian agricultural industry. Media Coalition alerted allies to the problems with the bill; built a coalition with publishers, newspapers, and others to oppose the legislation; submitted testimony in opposition to the bill explaining why it violated the First Amendment at hearings in the House and Senate; and generated local and national news coverage that questioned the proposal. While the bill died in the Senate Judiciary Committee for this year, its sponsor has vowed to bring it back in 2012.

Media Coalition Defeats Overbroad Censorship Law in Oregon

In September, the Ninth Circuit in *Powell’s v. Kroger* struck down an Oregon law that barred the sale of material with any sexual images or descriptions to minors younger than 13 under any circumstances and to older minors in some cases. Media Coalition argued vigorously to legislators that the law was overbroad and lacked the safeguards required by the First Amendment. The Ninth Circuit agreed, emphasizing that retailers could be prosecuted for selling classic titles such as Judy Blume’s *Forever*, age-appropriate educational texts, and mainstream films and other works featuring even incidental nudity. Retailers might choose not to stock such items, and publishers and production companies might reduce their output of sexually-themed content. Plaintiffs included Media Coalition members Association of American Publishers, American Booksellers Foundation for Free Expression, Comic Book Legal Defense Fund, and Freedom to Read Foundation; five local bookstores; publisher Dark Horse Comics; and others.

Media Coalition Leads Amicus Strategy in Important Ruling by Supreme Court

In 2010, the Supreme Court ruled in *U.S. v. Stevens* that a federal law banning depictions of intentional harm to animals represented an unconstitutional restriction on speech. The law was written so broadly that it could have applied to books with pictures of bullfighting (including Ernest Hemingway’s *Death in the Afternoon*), hunting magazines, and documentaries about animal welfare. The Court also rejected the government’s proposed balancing test that weighed the value of the speech against purported “societal harms.” Media Coalition worked with the defendant’s counsel to develop a comprehensive amicus strategy. In addition to Media Coalition’s amicus brief, there were 11 amicus briefs filed representing journalists, the National Rifle Association, pet owners, Cato Institute, hunting advocates and others. Media Coalition also implemented a media campaign to change the coverage of the case from one of banning “crush videos” and “dog fighting videos” to one focused on whether the government should have the power to ban speech that it deems “low value.”

Media Coalition Tracks Emerging Censorship Trend in Anti- Cyberbullying Legislation

Over the last two years, there has been an increasing effort to restrict speech that annoys, frightens, or causes emotional distress as part of an effort to stop online bullying and harassment. This legislation is often well-intentioned but is frequently overbroad with little thought given by legislators to its impact on free speech. Some of the legislation is limited to speech by minors directed to minors, but much is not limited in this way. Since 2010, Media Coalition has tracked cyberbullying bills in over 20 states. A recent example was Louisiana House Bill 1259, which would have criminalized electronic communications intended to “frighten,” “embarrass,” or “cause emotional distress to another person.” Because the bill did not define these terms or limit their scope to that of traditional harassment laws, it could have applied to a person frightened by reading a Stephen King novel on an e-reader or watching a scary movie streamed on Netflix, or to an unflattering expose that caused embarrassment to the subject of the article. A violator could have received jail time or a fine. Media Coalition strongly opposed the bill and, in response, lawmakers narrowed H.B. 1259 to protect minors from real bullying without threatening protected speech.