

THE MEDIA COALITION INC

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Memo in Opposition to Nebraska Legislative Bill 97

The members of Media Coalition believe that Nebraska Legislative Bill 97 threatens the distribution of First Amendment-protected material in Nebraska. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Nebraska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers. They have asked me to express these concerns.

L.B. 97 has clear constitutional defects in the changes it would make to sections 28-1463.03 and 28-1463.05. The existing sections 1463.03 and 1463.05 bar the production, dissemination or possession with the intent to disseminate sexually explicit material which has an actual minor as a participant or portrayed observer. This bill would change both of these sections to also apply to any sexually explicit image that appears to be a minor as a participant or portrayed observer. In addition to the penalties for a conviction under 1463.03 or 1463.05, a person convicted of either section would be deemed a sex offender. L.B. 97 would add restrictions on use of the Internet by sex offenders to the existing requirements for anyone convicted of a sex offense.

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 bill would criminalize material that is fully protected by the First Amendment and that does not sexually exploit minors. In a clear and resounding decision, the Supreme Court in *Free Speech Coalition v. Reno*, 535 U.S. 1382 (2002) found unconstitutionally overbroad a similar statute, the Child Pornography Prevention Act (CPPA) passed by Congress in 1996. The CPPA criminalized depictions of 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 representations of minors.

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers and consumers in the United States.

American Booksellers
Foundation for Free
Expression

Association of American
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Comic Book Legal
Defense Fund

Entertainment Consumers
Association

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Independent Book
Publishers Association

Magazine Publishers of
America, Inc.

Motion Picture
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Treasurer
Sally Jefferson
Entertainment Software
Association

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

The changes in L.B. 97 are constitutionally suspect in light of *Free Speech Coalition* and *Ferber*. These cases make very clear that it is impermissible to criminalize material that was created without using an actual minor. Clearly, the changes to 1463.03 and 1463.05 would criminalize significant mainstream material including many art books that contain painting, drawings or sketches that have a sexual theme and popular recent movies such as *Traffic*, *The Reader* and *American Beauty* that depict minors but do not involve an actual child. Since none of this material is legally obscene under the *Miller* test, it cannot be banned under any of the provisions of this bill. As the court said in *Free Speech Coalition*, “Protected speech does not become unprotected merely because it resembles the latter.” 535 U.S. 1399 (2002).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees. In recent successful challenges to laws that are contrary to the First Amendment awards of legal fees have been in excess of \$300,000.

If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

Please protect the First Amendment rights of all Nebraskans and amend or defeat L.B. 97.