

THE MEDIA COALITION INC

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Comic Book Legal
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Entertainment Merchants
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Entertainment Software
Association

Freedom to Read
Foundation

Magazine Publishers of
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Association of America,
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July 7, 2008

Governor David Patterson
Executive Chamber
State Capitol
Albany, NY 12224

Re: Request for Veto of Assembly Bill 11717

The members of Media Coalition believe that Assembly Bill 11717 potentially violates the First Amendment rights of producers, retailers and their customers. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game producers, recording, video, and video game retailers in New York and the rest of the United States.

A.B. 11717 would bar any retailer from selling or renting any video game unless its rating is prominently displayed on its cover or jacket if the video game has been rated. The bill would also require all video game consoles sold in New York to have personal identification technology or password protection to allow blocking of video games or portions of video games that contain certain undefined content or by rating. The Attorney General would be allowed to seek an injunction to bar future sales by a retailer and seek a fine if the retailer was in contempt.

The provision of A.B. 11717 that bars the sale of any rated game if the rating is not displayed on the game's case or cover is likely unconstitutional compelled speech. Voluntary ratings are provided by the video game industry as a tool for parents and retailers, but they are just that: voluntary. The government cannot endorse a rating system by mandating that retailers post signage explaining the system. A retailer may participate fully, partially or not at all in an industry rating program or a private rating system. Retailers may not be obligated by the state to post labels on games or in their stores. *ESA v. Blagojevich*, 469 F.3d 641. The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills), *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials).

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 in the United States.

The requirement that all video game consoles include personal identification or password technology to block all or part of video games with “certain content” or to block by the video game’s rating presents legal and practical problems. First, this provision is overly vague. A manufacturer or retailer has no guidance from A.B. 11717 as to what parts of video games or what content must be subject to the mandated password restriction. Nor does the manufacturer know what rating systems the law would apply to. Second, this provision is under-inclusive. If the password protection is meant to prohibit minors from certain content, there is no justification for applying it to console games but not to Internet, computer or handheld console games. Finally, it is unclear that the technology exists to allow console video games to be password protected for portions of video games or for “certain types of content.” Many existing consoles have password protection for allowing their use but there is no existing console that allows password protection for portions of video games.

We should add that with either government imposed enforcement of rating systems by console mandates or a bar on the sale of games that do not display ratings, it is important to remember that voluntary ratings exist to help parents determine what is appropriate for their children, but they are just that: voluntary. There are numerous cases that make clear that the government can neither enforce nor adapt a voluntary rating system for First Amendment-protected content. *ESA v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff’d* —F. 3d. — , No. 06-3217, 2008 WL 696550 (8th Cir., March 17, 2008). Also, courts in numerous states have ruled it unconstitutional either to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either “X” or unrated was an unconstitutional delegation of legislative power to a private trade association. See also, *Swope v. Lubbers*, 560 F.Supp.1328 (W.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), *Drive-In Theater v. Huskey*, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

Passage of this ordinance could prove costly. If a court declares it unconstitutional, there is a strong possibility that the state will be ordered to pay the plaintiffs’ attorneys’ fees. In a recent successful challenge to a similar video game law, the state agreed to pay the plaintiffs more than \$550,000 in attorneys’ fees. If you would like to discuss this matter further, please contact me at 212-587-4025 x11 or horowitz@mediacoalition.org.

Please protect the First Amendment rights of all people of New York and veto this legislation.

David Horowitz,
Executive Director

cc: Terry Brown-Clemons, Chief Counsel
Timothy B. Lennon, Assistant Counsel to The Governor