

THE MEDIA COALITION INC

275 SEVENTH AVENUE • 15TH FLOOR • NEW YORK, NEW YORK 10001
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
Executive Director

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Consumers
Association

Entertainment Merchants
Association

Entertainment Software
Association

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Recording Industry
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Chris Finan
American Booksellers
Foundation for Free
Expression

Immediate Past Chair
Sean Devlin Bersell
Entertainment Merchants
Association

Treasurer
Sally Jefferson
Entertainment Software
Association

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

Memorandum in Opposition to Rhode Island Senate Bill 2156

The members of Media Coalition caution that Senate Bill 2156 would violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Rhode Island: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

2010--S 2156 would make it illegal for a retailer to sell, rent or permit another person to sell or rent a video game rated "M" to anyone under 17 years old or "AO" to anyone under 18. The bill would also make it illegal for a "sales clerk" to knowingly or intentionally sell or rent a "violent" or "sexually explicit" video game to anyone under 18. Neither the term "violent" nor "sexually explicit" is defined in the bill either explicitly or by reference. A violation is subject to up to a year in jail, a \$1000 fine or both.

Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories, there is no basis for the government to bar access or to make such material illegal.

Over the past decade numerous court decisions have created a significant body of case law that firmly establishes the principles that video games are protected speech and that speech with violent themes or images is fully protected by the First Amendment and may not be banned or restricted either for minors or adults. Most of the recent cases were challenges to laws specifically restricting video games with violent content and in each one the law was ultimately ruled unconstitutional. These cases include:

- *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F. 3d 950 (9th Cir. 2009) (cert. pending as *Entertainment Merchants Ass'n v. Schwarzenegger*), found unconstitutional a law that limited distribution of video games with certain violent content and barred the requirement that they carry an "18" label on the cover.
- *Entertainment Software Ass'n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008), enjoined a law that barred anyone under 17 from buying or renting a video game rated "Mature" or "Adults Only."

- *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), enjoined enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), enjoined enforcement of a city ordinance that limited minors' access to video games with violent content.
- *Eclipse Enterprises Inc. v. Gulota*, 134 F.2d 63 (2d Cir. 1997), found unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992), held that "unlike obscenity, violent expression is protected by the First Amendment."
- *Entertainment Merchants Ass'n v. Henry*, No. 06-675, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007), found unconstitutional a law barring the dissemination to minors of video games with "inappropriate" violent content.
- *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006), found unconstitutional a law barring the dissemination to minors of video games with certain violent content.
- *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d (E.D. Mich. 2006), struck down a law barring the dissemination to minors of video games with certain violent content.
- *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), found unconstitutional a law that banned the distribution to a minor of any video game with certain violent content, required such games be labeled as restricted to adults only, and required retailers to post signs explaining the industry rating system.
- *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp 2d 1180 (W.D. Wash. 2004), found unconstitutional a state law that barred dissemination to minors of video games that included violence against "peace officers."
- *Bookfriends v. Taft*, 233 F.Supp.932 (S.D. Ohio 2002), ruled speech with violent content as fully protected by the First Amendment and enjoining enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of any type of speech with violent content.

In addition, the restriction on "sexually explicit" materials in this bill is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Governments may restrict minors' access to some sexually explicit speech but it is a narrow range of material determined by a specific test. Merely containing sexual content is not enough to make a book, movie, magazine or sound recording illegal for minors. In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. The sexual material deemed illegal for minors in 2010--S 2156 does not reference any of the three prongs in the *Ginsberg* test. It does not have any definition to distinguish legal from illegal sexually explicit

material. Clearly it would criminalize a far broader range of material than is allowed under the First Amendment. A recent law enacted in Illinois barred the sale of video games with sexual content that contained only two of the three prongs of the *Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

Even if this bill were to limit sexually explicit material that could be restricted as “harmful to minors” under the three-prong test in *Ginsberg*, the application of such a law to Internet communication is still very likely unconstitutional. This treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a book or video store. There is no way to know whether the person receiving the “harmful” material is a minor or an adult. As a result, the effect of banning the computer dissemination of material “harmful to minors” is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. Already two federal laws that restrict the availability of matter inappropriate for minors on the Internet have been declared unconstitutional. *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), *cert. den.* 129 Sup. Ct. 1032 (2009). Similar state laws banning sexual speech for minors on the Internet have also been ruled unconstitutional. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2nd Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F.Supp 2d 1180 (D.S.C. 2003); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D. N.Y. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). In addition to First Amendment deficiencies, some courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

The section of the bill that would make it illegal to sell videogames rated “Mature” or “Adult Only” to minors contrary to their rating is also suspect. While voluntary ratings exist to help parents determine what is appropriate for their children, enforcement of an existing rating system would likely be a violation of the First Amendment. Even government pressure on industries to change or amend a voluntary rating regime veers alarmingly close to a government-mandated system. Most recently in *ESA v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006), the Eighth Circuit found unconstitutional a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. Courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent 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.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoining from prosecuting exhibitors for obscenity based on “R” or “X” rating).

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 the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000.

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.

Again, we ask you to please protect the First Amendment rights of all the people of Rhode Island and withdraw or defeat 2010--S 2156.