SB

216

Alaska State Legislature

Legislative Research Agency

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May 20, 1993

MEMORANDUM

TO: Senator Georgianna Lincoln

FROM: Christine M. Cheff
Legislative Analyst

RE: **Restrictions on the Display of Pornographic Material**
Research Request 93.213

You asked if legislation to restrict the places and manner in which pornographic material may be displayed has been introduced previously in Alaska. You also asked if there are any local ordinances in Alaska, or laws in other states, which impose such restrictions.

Pornography is protected under the First Amendement of the United States Constitution. It is generally defined as material which is erotic in nature and may or may not have artistic merit. The United States Supreme Court, however, has defined certain other materials as obscene and, therefore, not protected under the First Amendment. Such materials are measured against the following three-part test enunciated in *Miller v. California*, [413 U.S. 15 (1973)]:

Supreme Court Test

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Because there is no other national standard for obscenity, its regulation is left to the discretion of individual states and communities. According to Paul McGeady, director of the National Obscenity Law Center--a clearinghouse for obscenity law information--42 states have obscenity laws and there are 46 states with pornography laws to limit the display, distribution, and sale of material considered harmful to minors. As you know, Alaska does not have an obscenity law or one that pertains to harmful materials.

Our search of legislation introduced in Alaska from the 13th through 17th legislatures resulted in the identification of two bills--HB 449 (1988) and HB 133 (1989)--which refer to the display of materials harmful to minors (Attachment A). Both bills were sponsored by the same legislator and are essentially identical. The only committee that heard the bills was House Judiciary and neither of the bills was passed. During the committee hearing on HB 133, proponents argued that it would bring Alaska's law into conformity with other states' laws. Committee members and the public primarily objected to the bill because of its broad language, i.e., the adoption of "contemporary community standards" as a determinant of whether material would be considered "harmful to a minor." Although not discussed in the hearing, the bill generally required that businesses where such materials were exhibited or displayed must restrict their access, including viewing, by minors who were not supervised by a parent.

Following are overviews of three local Alaska ordinances (Attachment B) and the laws of a sample of three states--Montana, New Jersey and South Dakota (Attachment C)--that pertain to the display of materials harmful to minors. Also reviewed is a Minneapolis, Minnesota ordinance which Mr. McGeady believes would serve as a good model obscenity law (Attachment D).

Local Ordinances

From our search of the local ordinances for Alaska's major cities, it appears that Anchorage, Ketchikan, and Palmer are the only ones with obscenity provisions. None of the ordinances provide specific guidelines concerning the display of obscene materials.

The Anchorage ordinance (AMC 8.05.420) makes it unlawful for any person to knowingly disseminate, distribute or exhibit indecent materials that may be harmful to persons less than 18 years old. Included in the definition of indecent materials are: pictures, photography, drawings, sculpture, motion picture, books, pamphlets, and magazines. "Harmful" is described as the representative or descriptive quality of a conduct or abuse based on the U.S. Supreme Court's three-part test.

Under the Ketchikan (9.24.010) and Palmer (9.28.010) municipal codes, obscene materials such as books, pictures, articles, drawings, or statuary may not be published, printed, engraved, sold, offered for sale, given away, or exhibited in public places. Additionally, possession of such materials for any of those stated purposes is unlawful. Neither ordinance, however, includes a restriction on materials harmful to minors.

State Laws

The Montana, New Jersey and South Dakota statutes summarized below are examples of the various ways in which states have restricted the display of obscene materials.

Commercial establishments or newsstands in **Montana** must keep obscene material "behind devices commonly known as blinder racks so that two-thirds of the material is not exposed to view" or make "other reasonable efforts" to prevent minors from viewing the material (45-8-206). Persons who violate this statute may be fined an amount not to exceed $500, or be imprisoned for not more than six months, or both.

Under **New Jersey** statutes (2C:34-3.2), municipalities may enact ordinances which provide that obscene materials in a retail store, newsstand, booth, concession or similar business to which persons under 18 years old have "unimpeded access," may not be displayed at a height of less than five feet or without covering over the front. Fines of up to $1,000, 30 days imprisonment, or both may be imposed against violators.

In **South Dakota**, magazines, books or newsprint which display or contain obscene material on the cover may not be distributed, displayed, sold or exhibited for sale in any public place unless wrapped and sealed so that no more than the title, name, price or date is exposed (22-24-29.1).

The Minneapolis Ordinance

In 1985 the U.S. District Court in Minnesota upheld a Minneapolis ordinance which requires that sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with an opaque cover.[1] The court ruled against the plaintiffs who contended that the ordinance was broad and restricted adult access to materials protected under the First Amendment of the U.S. Constitution. As a result of this decision, states and municipalities may place stricter controls on materials available to youth than on those available to adults if the materials fall within the determinants of obscenity as defined by the U.S. Supreme Court in *Miller v. California*. The court also determined that the "harmful to minors" standard was not subject to a constitutional challenge for vagueness.

I hope this information will be useful. Please do not hesitate to call if we may be of further assistance on this matter.

Attachments

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[1] *Upper Midwest Booksellers v. City of Minneapolis*, 602 F.Supp 1361 (1985).

American Family Association Law Center

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February 9, 1994

Via Facsimile (907) 465-3810

Deborah Luper
Legislative Aid to
Senator Loren Leman
State Capitol
Juneau, AK 99801

Dear Ms. Luper:

Your recent facsimile to Pat Truemen, dated February 1, 1994, was forwarded to me for review. I appreciate very much the efforts of Senator Leman on behalf of children and families. If time and resources permit, the AFA Law Center is available to help your efforts in any way we can.

With regard to Senator Leman's attempt to label sexually explicit and/or violent video and music materials, I am not optimistic considering your time constraints. Efforts such as Senator Leman's have met with great opposition and often resulted in constitutionally defective statutes or amendments. Typically, they are subject to successful attack on the grounds that they are either underinclusive and overbroad or they are unlawful delegations of legislative authority.

I mention this because I believe the time frame under which you are working may be prohibitive in carefully drafting an amendment that will stand up to legal attack. If Senator Leman desires to present an amendment no later than this session, I suggest that you review the draft materials included with this letter. I am not recommending them but simply suggesting you review them in formulating your language.

I regret that we do not have the time to be involved more directly in this process. Please feel free to call on future matters. We will look forward to working with you.

Very truly yours,

Bruce W. Green

Bruce W. Green
Legal Counsel

BWG:jeg
Enclosure

DIVISION OF LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM February 10, 1994

SUBJECT: Sectional Summary of SB 216. (Work Order No. 18-LS1121\A)

TO: Senator Georgianna Lincoln
Attn: Annie

FROM: Jerry Luckhaupt JEL
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1. The bill amends AS 11.61 by adding a new section prohibiting the sale or display of material harmful to minors where minors are present or allowed to be present and where minors are available to view the material unless each item of the material is sealed in an opaque wrapper. It describes the requirement of an opaque wrapper, provides exceptions from the reach of the statute, provides a definition of material harmful to minors, prescribes that a violation is punishable as a class B misdemeanor, subject to sentencing under AS 12.55.135 (imprisonment) and 12.55.035 (fine).

GPL:pl
94-121.plm

Sectional Analysis

Fairbanks North Star Borough
PUBLIC LIBRARY
1215 Cowles Street • Fairbanks, Alaska 99701 • 907/459-1020

MEMORANDUM

TO: Portia Babcock, Senate State Affairs Committee Clerk

FROM: Greg Hill, Library Director GH

DATE: March 3, 1994

SUBJECT: CS for SB 216

I want to express my extreme concern about the wording in the Committee Substitute for Senate Bill 216. Removal of the exemption for libraries in this legislation seriously weakens the ability of public libraries to act as a forum for ideas and knowledge. I believe that the language in Section 11.61.127, paragraph (c), part (1) (A) (iii), "taken as a whole, lacks serious literary, artistic, political, or scientific value" is much too vague to protect the wide variety of materials that can be found in most libraries. Please reconsider exempting libraries from this legislation.

Fairbanks North Star Borough PUBLIC LIBRARY
1215 Cowles Street • Fairbanks, Alaska 99701 • 907/459-1020

Facsimile Cover Sheet

To: Portia Babcock
Company: Senate State Affairs Committee
Phone: 465-2095
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From: Greg Hill, Director
Company: Fairbanks North Star Borough Libraries
Phone: 459-1020
Fax: 459-1024

Date: 03/03/94
Pages including this cover page: 2

Comments: Regarding Committee Substitute for Senate Bill 216

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March 7, 1994

Senator Loren Leaman
Chairman
Senate Community and Regional Affairs Committee
Pouch V
Juneau, Alaska 99801

Re: Opposition to Proposed Committee Substitute for Senate Bill No. 216

Dear Senator Leaman:

We are writing to offer you our opinion that Proposed Committee Substitute for Senate Bill 216 ("PCSSB 216"), an Act relating to the sale, display or distribution of sound recordings and related materials, is unconstitutional. PCSSB 216 requires mandatory labeling, places restrictions on display, and criminally penalizes the sale of musical sound recordings deemed "harmful to minors." Because PCSSB 216's provisions are in direct contradiction to both the history and principles of the First Amendment and the separate and distinct guarantees of Article I, Section 5 of the Alaska State Constitution, as more fully explained below, we urge you to withdraw it from consideration by the Alaska State Legislature.

I. PCSSB 216 Abridges the Right of Free Speech and Expression.

"Music, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790, reh'g denied, 492 U.S. 937 (1989). See also Schad v. Mount Ephriam, 452 U.S. 61, 65 (1982); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1976). While the constitutional protections afforded to music under the First Amendment are broad, those protections are even greater in Alaska under Article 1, Section 5 of the Alaska Constitution which, "protects speech in a more explicit and direct manner than the federal constitution." Messerli v. State, 626 P.2d 81 (Alaska 1980).

The United States Supreme Court has emphasized the special role music serves in our society and the importance of protecting music against government censorship:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order.

Ward, 491 U.S. at 790. Particularly invidious is censorship of expression based on its content, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992), or "simply because society finds the idea offensive or disagreeable." Texas v. Johnson, 491 U.S. 397 (1989).

Your consideration of PCSSB 216 seems to assume that it does not fun afoul of either the United States or Alaska Constitutions because it purportedly regulates only "obscene" or "violent" speech. This position suffers from several significant flaws. First, expression having social and/or artistic value enjoys and always has enjoyed full constitutional protection. As the U.S. Court of Appeals for the Eleventh Circuit stated in the leading case to subject music to the Miller test, "we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene." Luke Records, Inc. v. Navarro, 960 F.2d 134, 135 (11th Cir. 1992).

The inherently subjective nature of a piece of music, i.e., the various meanings understood by different listeners, makes it especially intolerable to regulate music. Constitutional speech protections cannot depend upon determinations whose inherent subjectivity "would allow a jury to impose liability on the basis of the juror's tastes or views." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988). Indeed, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). Further, music does not lose its constitutional protection by virtue of sexually explicit lyrics any more than

movies and books lose protection simply because they contain some scenes of nudity. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.7 (1975).

Second, even if some musical expression could in theory be "obscene" or "violent," simply because the State purportedly aims to regulate obscene or violent speech does not vitiate the First Amendment and Article I, Section 5. The State's efforts must be clearly, carefully, narrowly and fairly drawn so as not to infringe on protected expression. PCSSB 216 is not so drawn, and it therefore substantially and unconstitutionally infringes on protected musical expression. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1993) (finding that even "fighting words" cannot be regulated).[1]

Also unavailing is any reliance on Ginsberg v. New York, 390 U.S. 629 (1968), to argue that PCSSB 216 affects only speech that is obscene as to minors and is, therefore, constitutionally permissible. In Ginsberg, the Court did not consider the statute's effects on adults' access to expression that is not obscene as to them or the indirect chilling effect on expression that is not obscene as to anyone. As the Eleventh Circuit has recognized, the Court in Ginsberg "did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them." American Booksellers v. Webb, 919 F.2d 1493, 1502 (11th Cir. 1990), cert. denied 111 S. Ct. 2237 (1991).

Alaska cannot, by enacting a law for the protection of minors, "prohibit an adult's access to material that is obscene for minors but not for adults." Id.; see also Butler v. Michigan, 352 U.S. 380, 383 (1957) (legislation must not "reduce the adult population ... to reading only what is fit for children"). A statute that prohibits such access or deters protected expression, directly or indirectly, is unconstitutionally overbroad: it restricts more speech that the Constitution permits. See R.A.V., 120 L. Ed. 2d at 316-17 n.3. An overbroad statute must be struck down on its face and held

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[1] Regardless of the State's alleged ability to regulate obscenity, there is absolutely no authority for the State to regulate "violent" speech. See R.A.V., 112 S. Ct. 2538 (1993).

incapable of any constitutional application.[2] See Osborne v. Ohio, 495 U.S. 103, 112 & n.8 (1990); Erznoznik, 422 U.S. at 215-17.

The statute by definition regulates material that "appeals to the prurient interest of minors in sex." AS 11.61.127(c)(1)(A) (emphasis added). Because this definition of obscenity under Miller -- and because the category of materials that appeals to the prurient interest of minors is larger than that which appeals to the prurient interest of adults -- PCSSB 216 necessarily reaches expression that is not obscene in constitutional terms. Thus, the statute's prohibitions on sale, distribution, and exhibition of erotic material directly apply to some material that is not obscene. The clearest example of this direct application is the statute's display restriction, which prohibits all distributors and dealers from displaying a sound recording found "harmful to minors" "in any place where minors are present or are allowed to be present and where minors are able to view such material." AS 11.61.127(a). This prohibition directly affects the access of everyone, including adults, to such sound recordings simply because they have been found "harmful" with respect to minors.

Third, regulations designed for the protection of minors must embody the least restrictive means of furthering the government's interest in protecting minors. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

The display restriction is not the least restrictive means of furthering the government's interest in keeping the contents of sound recordings away from minors. Indeed, it is wholly unrelated to furthering that interest. The prohibition on displays might make sense for a magazine which a naked body on the front cover. As applied to a compact disc, whose contents can only be heard and not seen, the requirement is absurd. This

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[2] The overbreadth doctrine is predicated on the danger that "persons whose expression is constitutionally protected may well refrain form exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." New York v. Ferber, 458 U.S. at 769-73 (quoting Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980)).

aspect of PCSSB 216 is unquestionably overbroad and unconstitutional.[3]

II. PCSSB 216 Constitutes an Invalid Prior Restraint.

PCSSB 216 explicitly authorizes suppression before the sound recording is played. AS 11.61.128(a) and (b) empower prosecutors to institute a criminal action when someone merely displays or "sells or offers to sell [to anyone] an audio recording, phonograph record, magnetic tape, compact disc, or music video recording that contains lyrics that include or are descriptive of material harmful to minors." A sound recording need not have become available to minors in order for prosecutors to initiate the process; it is enough, for example, that a sound recording has been sold or distributed by a record company to a particular store. As the statute authorizes censorship before the sound recording at issue is heard, it constitutes an unconstitutional prior restraint.

Just as clearly, PCSSB 216 operates as a prior restraint as to all affected individuals not provided notice that the sounding recording is considered "harmful to minors" under PCSSB 216. For example, the risk of denied access to an entire market of consumers -- which accounts for a significant percentage of sales of popular music -- carries serious enough consequences for record producers and musical artists that artistic decisions may be compromised to avoid even approaching the ambit of PCSSB 216. Record store owners and distributors will be restrained from distributing potentially erotic sound recordings for fear of incurring the substantial costs of defending an erotic determination hearing or facing the substantial penalties for violating an erotic music recording determination -- which they may not even have knowledge of. The effect of the prior restraint is thus a dramatic curtailment of protected expression.

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[3] This chilling of free speech is patently the product of state action, which exists if "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (self-censorship under threat of even informal government sanctions deemed state action). "When the state acts directly or even indirectly and its influence is significant, then constitutional restraints must be observed." Ginn v. Mathews, 533 F.2d 477, 479 (9th Cir. 1976).

Finally, PCSSB 216 provides that music deemed "harmful to minors" but never found to be obscene -- i.e., speech and expression fully protected by the United States Constitution -- cannot be distributed to its adult audience without meeting specific preconditions. It enforces these conditions through the threat of criminal proceedings that leave the speaker two choices: comply or be silent. This is precisely the sort of prior restraint[4] the Supreme Court of the United States struck down in its landmark decision of Near v. Minnesota, 283 U.S. 697 (1931). The laws struck down in Near threatened the publisher with contempt proceedings for resuming distribution of speech that failed to meet certain preconditions. Id. at 712-13. Such a prior restraint, the Court declared, is "the essence of censorship," id. at 713, and is "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

III. PCSSB 216 Unlawfully Compels Speech as Part of the System of Prior Restraint.

Under PCSSB 216, without the benefit of judicial guidance on what is considered "harmful to minors," all copies of sound recordings deemed "harmful to minors" by prosecuting attorneys, sold in any community in the State, must be labeled on the front cover with a **PARENTAL ADVISORY**. AS 11.61.128(c). PCSSB 216 thus compels artists, producers, distributors, and retailers to carry a state-mandated message, upon threat of criminal penalties. AS 11.61.128(c), (g) & (h). This message should not be confused with the voluntary labeling system that has been developed by the recording industry. First, the label applied is different, and, second, and far more fundamentally, it is compelled by the government.

Compelling speech violates the constitutional guarantees of free speech just as surely as does censoring speech. In Wooley v. Maynard, 430 U.S. 705 (1977), the Court heard a First Amendment challenge to a New Hampshire law requiring all automobile license plates to carry the state motto "Live Free or

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[4] Prior restraints include "injunctions and related judicial processes enforced through contempt proceedings." J. Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409, 421 (1983). See also Alexander v. United States, 113 S. Ct. 2766 (1993).

Die." The court held it unconstitutional, stating: "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714.; see also Pacific Gas & Elec. v. California P.U.C., 475 U.S. 1, 9-18 (1986).

PCSSB 216 infringes even more deeply on Alaska residents' free speech rights than did the statute in Wooley. By imposing its message on particular speakers, rather than all citizens of the state, PCSSB 216 makes it more probable that the speaker will be understood to endorse that message. It also will stigmatize the artists and distributors associated with the work. PCSSB 216 thus not only compels speech, but interferes with artists' rights to communicate freely with their audiences. The labeling scheme imposed by the statute abridges the right of free expression, wholly apart from the other constitutional flaws in the statute's scope and procedures.[5]

IV. PCSSB 216 is Underinclusive.

The United State Supreme Court has made clear that a State's interest in regulating speech is suspect if the State ignores other potential sources of an alleged harm. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993). Here, the State does not even attempt to address the many other avenues, such as books and movies, on which similar allegedly harmful words are spoken. This suggests the lack of seriousness in the State's purpose as well as discrimination among media.

V. PCSSB 216 Violates Due Process Under The Federal and State Constitutions.

The essence of due process is notice and an opportunity to be heard. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Due process protections are even more critical when First Amendment freedoms are threatened under a law that attempts to curtail speech the State deems indecent or obscene. Smith v. California, 361 U.S. 147, 149-50 (1959). Indeed, the Supreme Court has maintained a special "insistence that regulations of

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[5] It acts as a disincentive for compliance with the voluntary labeling schemes already in place by the recording industry.

obscenity scrupulously embody the most rigorous procedural safeguards ..." Id. (emphasis added; citations omitted); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975) ("rigorous procedural safeguards" required).

Of the numerous constitutional infirmities of PCSSB 216, the bill's failure to provide minimal due process protections for free speech is the most blatant. Notably, PCSSB 216 does not require that a prosecutor prove the central element of its criminal provisions -- that the sound recording is "harmful to minors" -- before a criminal action is undertaken. AS 11.61.127. Without such a requirement, there is no way a person of "common intelligence" can determine, without guessing, whether or not a particular sound recording is "harmful to minors." This is due, in part, to the legal definition of "obscene" and the state's ability to regulate this area of speech. Indeed, for this reason any reliance on Ginsberg v. New York, 390 U.S. 629 (1968), as support for the constitutionality of PCSSB 216's definition of prohibited materials, is misplaced. Ginsberg's finding was based on the fact that the state statute regulating obscenity as to minors at issue was "virtually identical to the Supreme Court's most recent statement of the elements of obscenity." Id., 390 U.S. at 643. In this case, however, PCSSB 216's definition of prohibited materials is not of "obscene" materials, but rather of "harmful to minor" materials. As such, the statute's definition of prohibited materials does not conform to the Supreme Court's "most recent statement of the elements of obscenity" and is unconstitutionally vague.

PCSSB 216 also fails to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid. Without such guidance, classic words such as "To be or not to be, that is the question?" (a potentially "violent" message), or the sexual context of Shakespeare's Romeo and Juliet, read aloud or captured on a sound recording, could be criminalized and, therefore, banned in Alaska. Thus, PCSSB 216's failure to list or provide specific subjects that are prohibited violates Alaska citizens' right to due process under both the

Alaska and United States Constitutions. See McKinney v. Alabama, 424 U.S. 669 (1976).

Further, PCSSB 216 fails to provide notice to all those who may be subject to criminal prosecution under AS 11.61.127 and 11.61.128. On its face, this provision imposes criminal penalties on those who sell sound recordings deemed harmful to minors even if they were never notified of a judicial determination that the sound recording was "harmful to minors." This constitutes a violation of the right to due process. To prosecute someone for selling a sound recording that the accused does not know has been declared "harmful to minors" is fundamentally unfair.

Given the numerous constitutional infirmities of PCSSB 216, and the very real threat that the State of Alaska would be liable for all attorneys fees and costs incurred in a legal challenge to PCSSB 216 pursuant to 42 U.S.C. § 1988, see Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (1992) (similar unconstitutional bill was enacted into law, challenged and reversed, costing taxpayers over $200,000), we urge you to remove PCSSB 216 from consideration by the Alaska State Legislature.

Very truly yours,

DAVIS WRIGHT TREMAINE

Debora Kristensen

Daniel M. Waggoner
Debora K. Kristensen

Of Counsel:

RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
David E. Leibowitz

ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

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Takotna
Tanacross
Tanana
Tatitlek
Tazlina
Telida
Tetlin
Tok
Toyuna
Tonsina
Tulukak
Tyonek
Upper Kalskag
Valdez
Venetie
Whittier
Wiseman

March 10, 1994

MEMORANDUM

TO: Senator Loren Leman, Chair
Senate State Affairs Committee

FROM: Senator Georgianna Lincoln

RE: SB 216- Display of Sex Explicit Materials Near Minors

To clarify our earlier discussion, I would entertain amendments to the original version of SB 216 if they fit under the title of the bill. As I have stated, my intent in introducing the legislation was to prohibit the display (a visual term) of sexually explicit materials near minors.

ALASKA STATE LEGISLATURE

Senator Georgianna Lincoln

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Committees:
Transportation
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Valdez
Venetie
Whittier
Wiseman

SPONSOR STATEMENT
SB 216

SB 216 would make illegal the display of certain pornographic materials in locations where children may be exposed to them. Although municipalities may adopt ordinances to deal with this issue, most have not done so. Without statutory prohibitions, the display of pornography is legal in locations accessible by children and this display is inarguably a form of child abuse.

SB 216 has been introduced in response to the outcry of concerned citizens in my district whose children have been subjected to the display of pornography in stores. As a safety and well-being measure, SB 216 would place into Alaska Statute prohibition of this type of action.

Pornography is harmful to children. This statement is not simply a feeling on my part, it is the unanimous conclusion of the United States Attorney General's Commission on Pornography. The commission found further that pornography can lead to the lowering of a child's inhibitions to engage in child pornography.

The war against child abuse must be waged on multiple levels. Restricting the display of pornography to children must be a part of our strategy against child abuse. We must do all in our power to protect our children and SB 216 would be one step in that direction.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 216

Revision Date: February 11, 1994
Title: "...sale, display or distribution of material harmful to minors..."
Sponsor: Senator Lincoln
Requestor: Senate State Affairs Committee

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: February 11, 1994

Approved by Commissioner: Richard L. Pegues for Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 11, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 216

ANALYSIS CONTINUATION:

This bill adds a new section to AS 11.61 that provides that a person commits the crime of sale or display of material harmful to minors if the person knowingly sells, displays, or distributes any material, including the cover or packaging of the material, that is harmful to minors in any place where minors are present or are allowed to be present and where minors are able to view such material unless each item of the material is sealed in an opaque wrapper. The bill defines material harmful to minors to mean a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it:

(1) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(2) is potently offensive to contemporary standards in the adult community with respect to what is suitable sexual material for minors; and

(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The bill would not apply to:

(1) recognized and established schools, religious institutions, museums, medical or psychological clinics, hospitals, public libraries, and government agencies in making available or providing material harmful to minors to a minor as an official function; or

(2) a parent or guardian of a minor who provides material harmful to minors to the minor.

Sale or display of material harmful to minors would be a class B misdemeanor. The Department of Law does not believe that there would be fiscal impact, because the incidence of violations would be relatively low.

8-LS1121\E
Luckhaupt
2/17/94

CS FOR SENATE BILL NO. 216(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR LINCOLN

A BILL

FOR AN ACT ENTITLED

"An Act relating to the sale, display, or distribution of material harmful to minors at places where minors are present or allowed to be present and where minors are able to view such material; and prohibiting the sale or display of certain audio recordings, phonograph records, magnetic tapes, compact discs, or music video recordings, without warning labels and opaque wrappings."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 11.61 is amended by adding new sections to read:

Sec. 11.61.127. SALE, DISPLAY, OR DISTRIBUTION OF MATERIAL HARMFUL TO MINORS. (a) A person commits the crime of sale, display, or distribution of material harmful to minors if the person knowingly sells, displays, or distributes any material, including the covers and packaging of the material, but not including audio or music video recordings, that is harmful to minors in any place where minors are present or are allowed to be present and where minors are able to

view such material unless each item of the material is sealed in an opaque wrapper.

(b) In this section, the requirement of an opaque wrapper shall be satisfied if the portions of the covers or packaging of the material that visually depict material harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

(c) In this section,

(1) "material harmful to minors" means a

(A) description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(i) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(ii) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors; or

(B) graphic description, representation of, or incitement to violent behavior that if acted out would constitute felonious behavior that is morally repugnant to the community as a whole;

(2) "music video recording" means a visual depiction of a song or songs that is not voluntarily rated by the Classification and Rating Administration (CARA).

(d) Sale or display of material harmful to minors is a class B misdemeanor.

Sec. 11.61.128. UNLAWFUL SALE OR DISPLAY OF AUDIO OR MUSIC VIDEO RECORDING. (a) A person commits the crime of unlawful sale of audio or music video recording if the person knowingly sells or offers to sell an audio recording, phonograph record, magnetic tape, compact disc, or music video recording that contains lyrics that include or are descriptive of material harmful to minors, unless the cover of such recording, record, tape, or disc contains a warning label that the lyrics contain material harmful to minors.

(b) A person commits the crime of unlawful display of audio or music video recording if the person knowingly displays an audio recording, phonograph record,

magnetic tape, compact disc, or music video recording, whose packaging uses words, symbols, or pictures that include or describe material harmful to minors unless the recording is sealed in an opaque wrapping.

(c) In this section, the requirement of a warning label shall be satisfied if the label is affixed to the front cover, beneath any cellophane or other clear wrapping material or above any opaque wrapping material, of the audio recording, phonograph record, magnetic tape, compact disc, or music video recording and for (1) cassette tapes and compact discs or other recordings the same size or smaller than cassette tapes or compact discs, is printed with black letters of eight point type or larger, except that the words "WARNING" and "PARENTAL ADVISORY" shall be of 10 point type or larger on a fluorescent yellow background; or (2) all other audio or music video recordings larger than cassette tapes or compact discs, is printed with black letters of 12 point type or larger on a fluorescent yellow background, except that the words "WARNING" and "PARENTAL ADVISORY" shall be printed in letters which are of 48 point type or larger, and the label reads substantially as follows:

"WARNING:

May contain explicit lyrics that include or describe material harmful to minors.

PARENTAL ADVISORY".

(d) In this section, the requirement of an opaque wrapper is satisfied if the portions of the packaging of the audio recording, phonograph record, magnetic tape, compact disc, or music video recording that describe, advocate, or encourage the conduct described in (b) of this section are blocked with an opaque wrapper and the wrapper is sealed.

(e) In a prosecution under this section, each day that a violation occurs and each audio recording, phonograph record, magnetic tape, compact disc, or music video recording that is found in violation of this section is a separate offense.

(f) In this section, "material harmful to minors" and "music video recording" have the meanings given in AS 11.61.127.

(g) Except as provided in (h) of this section, a violation of (a) or (b) of this section is a class B misdemeanor.

(h) A person convicted under this section is guilty of a class A misdemeanor if the person has previously been convicted of a violation of this section.

SENATE BILL NO. 216

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY SENATOR LINCOLN

Introduced: 5/9/93
Referred: STA, HES, JUD

A BILL

FOR AN ACT ENTITLED

"An Act relating to the sale, display, or distribution of material harmful to minors at places where minors are allowed to be present and where minors are allowed to view such material."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 11.61 is amended by adding a new section to read:

Sec. 11.61.127. SALE OR DISPLAY OF MATERIAL HARMFUL TO MINORS. (a) A person commits the crime of sale or display of material harmful to minors if the person knowingly sells, displays, or distributes any material, including the covers and packaging of the material, that is harmful to minors in any place where minors are present or are allowed to be present and where minors are able to view such material unless each item of the material is sealed in an opaque wrapper.

(b) In this section, the requirement of an opaque wrapper shall be satisfied if the portions of the covers or packaging of the material that visually depict material harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

(c) This section does not apply to

(1) recognized and established schools, religious institutions, museums, medical or psychological clinics, hospitals, public libraries, and governmental agencies in making available or providing material harmful to minors to a minor as an official function; or

(2) a parent or guardian of a minor who provides material harmful to minors to the minor.

(d) In this section, "material harmful to minors" means a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(1) predominateiy appeals to the prurient, shameful, or morbid interest of minors in sex;

(2) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(e) Sale or display of material harmful to minors is a class B misdemeanor.

Sen. Lincoln would be fine if this were taken out.

Chapter 7

Anti-Display Laws

Anti-display laws regulate the method by which pornographic materials can be publicly displayed. Statutes or ordinances may be enacted to restrict the display of sexually explicit materials to minors. In order to withstand constitutional challenges, such laws should apply only to materials that are obscene as to minors.[738] The regulations also should contain reasonable time, place, and manner restrictions.[739]

In M S. News Co. v. Casado,[740] the United States Court of Appeals for the Tenth Circuit upheld a Wichita, Kansas, ordinance which restricted the display of material "harmful to minors."[741] The Wichita ordinance defined "harmful to minors" as any

> description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when the material or performance, taken as a whole, has the following characteristics:
>
> (a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and

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738 See, Ginsberg v. New York, 390 U.S. 629, 645-47(1968).

739 See, Young v. American Mini-Theatres, 427 U.S. 50, 63(1976).

740 721 F.2d 1281(10th Cir. 1983).

741 Wichita, Kan., Ordinance no. 36-172, S5.68 156(1985).

(b) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.742

The ordinance also provided criminal penalties.

The penalties may be imposed when any person having custody, control or supervision of any commercial establishment shall knowingly:

(a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material is not exposed to view.743

The court of appeals found that the definition of "harmful to minors" properly tracked the standards enunciated in Ginsberg v. New York[744], and Miller v. California.[745] The requirement that the lower two-thirds of the material be covered was neither

742 Id.

743 Id.

744 390 U.S. 629, 645-47(1968).

745 413 U.S. 15, 24(1973).

overbroad nor vague.[746] While the ordinance did restrict an adult's opportunity to view the materials, it did not prevent an adult from purchasing them.[747] The Court found the ordinance to be a reasonable time, place, and manner restriction justified by the government's interest in protecting minors.[748]

A Minneapolis, Minnesota, ordinance[749] which was more restrictive than the one enacted in Wichita withstood a constitutional challenge in Upper Midwest Booksellers v. City of Minneapolis.[750] The Minneapolis Ordinance provided,

> It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.
>
> (a) It is also unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are able to view such material unless each item of such material is blacked from view by an opaque cover. The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are

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746 721 F.2d 1281, 1287(10th Cir.1983).

747 Id. at 1288-89

748 Id.

749 Minneapolis, Minn., Ordinances S385.131(1985).

750 602 F. Supp. 1361(D. Minn. 1985).

blocked from view by an opaque cover."[751]

The Booksellers maintained that the requirement of a sealed wrapper was unduly restrictive as to an adult's right to peruse the materials which were harmful to minors but not to adults.[752] The Court concluded that any inconvenience suffered adult patrons was not sufficient to render the restrictions unconstitutional.[753] If adults wanted to peruse the materials covered by the ordinance, the Court reasoned that they would be able to do so in one of several ways: 1) ask a clerk to remove the wrapper; 2) view an "inspection copy" kept behind the store counter, or 3) view the material in an "adults only" pornography outlet that excludes minors.[754]

Display laws which define "harmful to minors" with language other than the Ginsberg standard have been found unconstitutional.[755]

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751 Minneapolis, Minn., Ordinances S385.131(6)(a)(1985).

752 602 F. Supp. at 1370.

753 Id. at 1372.

754 Id.

755 See, Hillsboro News Co. v. City of Tampa, 451 F. Supp. 952(M.D. Fla. 1978) (ordinance restricted display of "offensive sexual material" found unconstitutionally vague); American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition extends to material not obscene as to minors); American Booksellers Ass'n, Inc. b. Superior Court, 129 Cal. App. 3d 197, 181 Ca. Rptr. 33(1982) (ordinance overbroad because it required sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors);

While opaque covers and sealed wrappers are a permissible means of restricting the display of sexually explicit materials to minors, a Virginia statute which simply made it unlawful to display material harmful to minors in a manner "whereby juveniles may examine and peruse it" was found unconstitutional.[756] The Virginia statute contained no provisions for the use of opaque covers and the court found that outlets would face unreasonable burdens in complying with the statute.[757] They would have to deprive adults of the material, remove it from their shelves or ban minors from their stores.[758] The Court also found the idea of outlets restructuring their premises and creating an "adults only" section to be unreasonable.[759] The Court concluded the statute was overbroad as a time, place and manner restriction.[760] A requirement of opaque covers or "blinder racks" would have narrowed the scope of the restriction and could have provided the

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Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685(1978) (ordinance overbroad because it prohibited sale and exhibition to juveniles of material that was not obscene as to juveniles); Oregon v. Frink, 60 Or. App. 209, 653 P.2d 553(1982) (statute prohibiting dissemination of all nudity to minors overbroad because it does not limit prohibition to material that is obscene as to juveniles).

756 American Booksellers Ass'n v. Strobel, 617 F. Supp. 699 (E.D. Va. 1985).

757 Id. at 706.

758 Id. at 702-03.

759 Id.

760 Id. at 706.

basis for the court upholding the statute in this case.[761]

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761 Id. at 706-07.

engage. To the extent that such implicit or explicit coercion takes place as a result of these materials, we all agree that it is a harm. There has been other evidence, however, about the extent to which such material might for some be a way of revitalizing their sex lives, or, more commonly, simply constituting a part of a mutually pleasurable sexual experience for both partners. On this we could not agree. For reasons relating largely to the question of publicness in the first sense discussed above, some saw this kind of use as primarily harmful. Others saw it as harmless and possibly beneficial in contexts such as this. Some professional testimony supported this latter view, but we have little doubt that professional opinion is also divided on the issue.

Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least such, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. Exposure to sexuality is commonly taken, and properly so, to be primarily the responsibility of the family. Even those who would disagree with this statement would still prefer to have early exposure to sexuality be in the hands of a responsible professional in a controlled and guided setting. We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children

themselves and to notions of family control over a child's introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.

We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we all agree about the question of the desirability of exposing children to most of this material, and on that our unanimous agreement is that it is undesirable. For children to be taught by these materials that sex is public, that sex is commercial, and that sex can be divorced from any degree of affection, love, commitment, or marriage is for us the wrong message at the wrong time. We may disagree among ourselves about the extent to which the effect on children should justify large scale restrictions for that reason alone, but again we all agree that if the question is simply harm, and not the question of regulation by law, that material in this category is, with few exceptions, generally harmful to the extent it finds its way into the hands of children. Even those in society who would be least restrictive of sexually explicit materials tend, by and large, to limit their views to adults. The near unanimity in society about the effects on children and on all of society in exposing children to explicit sexuality in the form of even non-violent

and non-degrading pornographic materials makes a strong statement about the potential harms of this material, and we confidently agree with that longstanding societal judgment.

Perhaps the largest question, and for that reason the question we can hardly touch here, is the question of harm as it relates to the moral environment of a society. There is no doubt that numerous laws, taboos, and other social practices all serve to enforce some forms of shared moral assessment. The extent to which this enforcement should be enlarged, the extent to which sexual morality is a necessary component of a society's moral environment, and the appropriate balance between recognition of individual choice and the necessity of maintaining some sense of community in a society are questions that have been debated for generations. The debates in the nineteenth century between John Stuart Mill and James FitzJames Stephen, and in the twentieth century between Patrick Devlin and H.L.A. Hart, are merely among the more prominent examples of profound differences in opinion that can scarcely be the subject of a vote by this Commission. We all agree that some degree of individual choice is necessary in any free society, and we all agree that a society with no shared values, including moral values, is no society at all. We have numerous different views about the way in which these undeniably competing values should best be accommodated in this society at this time, or in any society at any time. We also have numerous different views about the extent to which, if at all, sexual morality is an essential part of the social glue of

this or any other society. We have talked about these issues, but we have not even attempted to resolve our differences, because these differences are reflective of differences that are both fundamental and widespread in all societies. That we have been able to talk about them has been important to us, and there is no doubt that our views on these issues bear heavily on the views we hold about many of the more specific issues that have been within the scope of our mission.

Thus, with respect to the materials in this category, there are areas of agreement and areas of disagreement. We unanimously agree that the material in this category in some settings and when used for some purposes can be harmful. None of us think that the material in this category, individually or as a class, is in every instance harmless. And to the extent that some of the materials in this category are largely educational or undeniably artistic, we unanimously agree that they are little cause for concern if not made available to children are foisted on unwilling viewers. But most of the materials in this category would not now be taken to be explicitly educational or artistic, and as to this balance of materials our disagreements are substantial. Some of us think that some of the material at some times will be harmful, that some of the material at some times will be harmless, and that some of the material at times will be beneficial, especially when used for professional or nonprofessional therapeutic purposes. And some of us, while recognizing the occasional possibility of a harmless or

beneficial use, nevertheless, for reasons stated in this section, feel that on balance it is appropriate to identify the class as harmful as a whole, if not in every instance. We have recorded this disagreement, and stated the various concerns. We can do little more except hope that the issues will continue to be discussed. But as it is discussed, we hope it will be recognized that the class of materials that are neither violent nor degrading is at it stands a small class, and many of these disagreements are more theoretical than real. Still, this class is not empty, and may at some point increase in size, and thus the theoretical disagreements may yet become germane to a larger class of materials actually available.

5.2.4 Nudity

We pause only briefly to mention the problem of mere nudity. None of us think that the human body or its portrayal is harmful. But we all agree that this statement is somewhat of an oversimplification. There may be instances in which portrayals of nudity in an undeniably sexual context, even if there is no suggestion of sexual activity, will generate many of the same issues discussed in the previous section. There are legitimate questions about when and how children should be exposed to nudity, legitimate questions about public portrayals of nudity, and legitimate questions about when "mere" nudity stops being "mere" nudity and has such clear connotations of sexual activity that it ought at least to be analyzed according to the same factors that we discuss with respect to sexually explicit

properly found that the case was aggravated, particularly since the defendant was on felony probation at the time that he committed the new offenses, and his prior conviction was for a more serious class of felony offense, the judge could not properly impose a sentence greater than five years, the maximum sentence for a class C felony. Bayne v. State, 799 P.2d 1347 (Alaska Ct. App. 1990).

Decision to increase presumptive sentence upheld. — The sentencing court did not err in increasing, pursuant to AS 12.55.155 (c)(9), the defendant's presumptive term of imprisonment due to aggravating factors. Given that the plea agreement authorized the court to broaden its consideration from the specific criminal act for which the defendant was convicted to the totality of the defendant's criminal misconduct when issuing a sentence, and because the defendant's acts were closely related in time and circumstances, the court's decision to find that the defendant knew that the offense involved more than one victim was permissible as a matter of law. Mills v. State, 839 P.2d 417 (Alaska Ct. App. 1992).

B. First-Offenders.

Election to impose consecutive term. — Where judge understood that he had discretion to impose first felony offender's sentences either consecutively or concurrently and explained his decision to impose consecutive terms, thedecision establisned good cause. Jerrel v. State, 851 P.2d 1365 (Alaska Ct. App. 1993).

Sentence for first-time offender in excess of presumptive sentence for second or third offenders.

Composite term of eight years with four years suspended, for a first felony offender convicted for selling cocaine in 1/16 or 1/8 ounce packages on nine occasions, was clearly mistaken, and the sentence was therefore remanded for imposition of a composite term not exceeding six years with three years suspended. Major v. State, 796 P.2d 341 (Alaska Ct. App. 1990).

Justification not to suspend. — One-year unsuspended portion of composite sentence for first felony offender was justified where defendant's separate acts of perjury were not particularly mitigated, since they exposed an officer to potential harm and defendant's motivation might have been characterized as vindictiveness or spite. Jerrel v. State, 851 P.2d 1365 (Alaska Ct. App. 1993).

Standard for finding exception to Austin rule. — The clear and convincing evidence standard should be applied to finding an exception to the rule in Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981), which held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. Buoy v. State, 818 P.2d 1165 (Alaska Ct. App. 1991).

When conduct amounting to a probation violation is the sole basis for a finding of extraordinary circumstances, the conduct should be established by clear and convincing evidence (not merely a preponderance of the evidence) before an exceptional sentence under Austin (i.e., a sentence for a first offender which is greater than the presumptive sentence for a second offender) is imposed. Andrew v. State, 835 P.2d 1251 (Alaska Ct. App. 1992).

Use of circumstance established by preponderance of evidence. — In probation violation cases, because the defendant's poor potential for rehabilitation, and not the probation violation itself was the circumstance justifying an Austin rule exception, it was the former, not the latter, that had to be established by clear and convincing evidence. Hence, even when established by a mere preponderance of evidence, a probation violation could be factored together with other evidence concerning the defendant's rehabilitative potential. Andrew v. State, 835 P.2d 1251 (Alaska Ct. App. 1992).

Sec. 12.55.135. Sentences of imprisonment for misdemeanors. (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

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Class B — Misdemeanor Sentence

(c) A defendant convicted of assault in the fourth degree committed in violation of the provisions of an order issued under AS 25.35.010 or 25.35.020 shall be sentenced to a minimum term of imprisonment of 20 days.

(d) A defendant convicted of assault in the fourth degree upon a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the assault shall be sentenced to a minimum term of imprisonment of 30 days.

(e) Except as provided in AS 12.55.055(f), if a defendant is sentenced under (c), (d), or (f) of this section,

(1) execution of sentence may not be suspended and probation or parole may not be granted until the minimum term of imprisonment has been served;

(2) imposition of a sentence may not be suspended except upon condition that the defendant be imprisoned for no less than the minimum term of imprisonment provided in the section; and

(3) the minimum term of imprisonment may not otherwise be reduced.

(f) A defendant convicted of criminal mischief in the third degree in violation of AS 11.46.484(a)(2), whose conviction is not a felony under AS 11.46.484(c), shall be sentenced to a definite term of imprisonment of at least 72 hours but not more than one year. (§ 12 ch 166 SLA 1978; am § 2 ch 139 SLA 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 31 ch 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983; am §§ 5, 6 ch 53 SLA 1991)

Cross references. — For legislative findings and purpose in connection with the enactment of subsection (f), see §§ 1 and 2, ch. 53, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1991 amendment, effective September 13, 1991, rewrote subsection (e) and added subsection (f).

NOTES TO DECISIONS

Sentence disapproved. — Trial court's sentencing decision was clearly mistaken where the sentence fell near the bottom of the authorized range of sentences for fourth-degree assault and the evidence concerning defendant's background and personal characteristics provided little basis for characterizing his case as particularly mitigated, including two prior misdemeanor convictions. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

Sec. 12.55.145. Prior convictions.

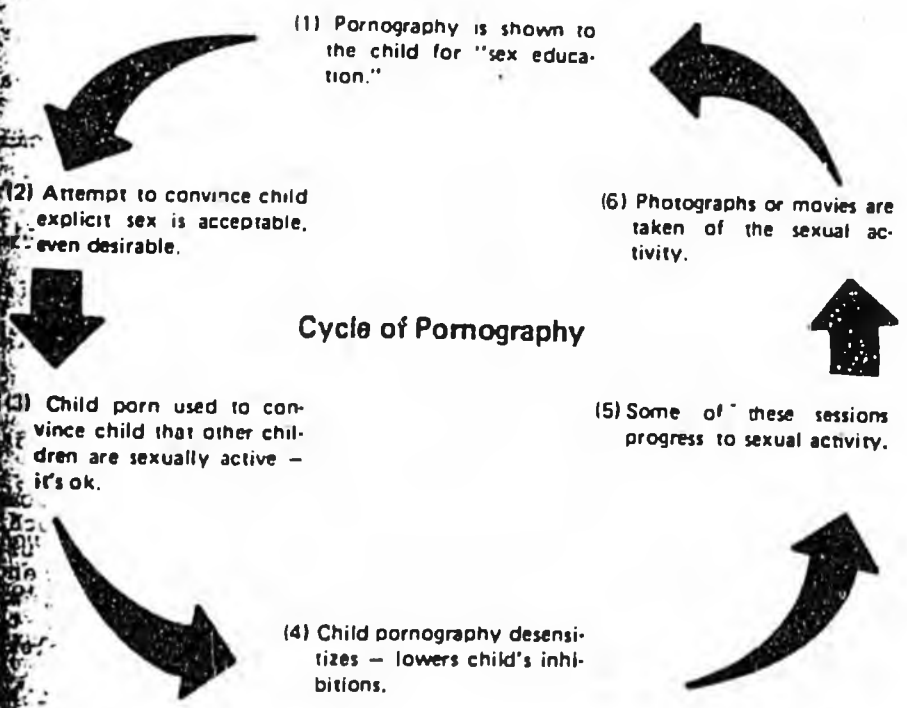
NOTES TO DECISIONS

Applicability. — Section applied in defining what a "prior felony conviction" is for purposes of AS 12.55.155(c)(15). Mancini v. State, 841 P.2d 184 (Alaska Ct. App. 1992).

TABLE 3

CYCLE

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:



Cycle of Pornography

SOURCE: S. O'Brien, Child Pornography, 89, (1983).

SOURCE: U.S. Department of Justice, Federal Bureau of Investigation, CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement, 25, (1986).

METHOD OF OPERATION | SEDUCTION PROCESS | NON-VERBAL SEXUAL CONTACT | LURE OR FORCE

Other Back-up

STAG'S

SHAVED

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Smooth Shaven

HOT PINK UP CLOSE!

Samantha Strong

LATHERS UP!

TRINITY LOREK

Spreads To Shear it off!

See TWO GIRLS Give Each Other SCREAMING ORGASMS!

VOL. 4, NO. 8 FOCUS ON THE FAMILY® FEBRUARY 1994

Parental Guidance™

Information, analysis and commentary on the world of popular youth culture

WHAT'S HOT

Evangelism Conference Helps Teens Live to Tell

Youth for Christ is "goin' coastal with the cause" this summer, offering young people a mega-event destined to change their lives—and their world—for the *better*.

In an age of overhyped and morally bankrupt entertainment, DC/LA '94 may be the finest alternative families have had in years. It's more than a Christian music festival. It's a youth evangelism *superconference* designed to ignite a spirit of revival in students from across America. Attendance should exceed 20,000.

"The media believes this is a lost generation apathetic to social issues," said conference director Geoff Cragg. "DC/LA '94 trains and motivates teenagers to share the Gospel. We want them to have a great time while they focus on *knowing* what they believe, *living* what they believe and *telling* others what they believe."

Contemporary Christian musician Geoff Moore believes strongly in this superconference. In fact, he and his band, The Distance, wrote and recorded the event's theme song, "Live to Tell."

"Revival, historically, has started among the young," Moore told *Parental Guidance*. "America is fertile ground for revival, so I'm excited about being associated with an event that equips young people to share their faith."

Scheduled for July 27-31 in Washington, D.C., and August 17-21 in Anaheim, Calif., this triennial event includes general teaching sessions, small-group activities, music, comedy, drama and other character-building opportunities for teens and adults alike. Youth Specialties will even present seminars specifically for youth leaders.

Focus on the Family's youth culture specialist Bob DeMoss, *Breakaway* editor Greg Johnson and *Brio* editor Susie Shellenberger will join Miles McPherson, Josh McDowell, Ken Davis, Duffy Robbins and other popular youth speakers. DeMoss will challenge teens to rethink their media diets and "learn to discern" in an effort to make godly entertainment choices.

DC/LA '94 will also feature concerts by contemporary Christian artists including Petra, Lisa Bevill, Steven Curtis Chapman, Newsboys, Rachel Rachel, DC Talk, Geoff Moore and the Distance, DeGarmo and Key, PFR, Kim Boyce and many others.

Another important facet of the Washington, D.C., event is the culmination of "True Love Waits," a much-publicized, national campaign promoting sexual abstinence among adolescents. On July 29, as many as 1 million "covenant cards" will be placed in the mall area between the Capitol Building and the Washington Monument. Each card represents a young person somewhere in the U.S. who has pledged sexual purity until marriage as part of a covenant relationship with God.

First-time faith. Radical recommitment. Energized evangelism. Strength to abstain. DC/LA '94 intends to meet a broad spectrum of needs by pointing teens to Jesus Christ. And it's one extravaganza more interested in *help* than *hype*. To find out more, call 1-800-735-DCLA.

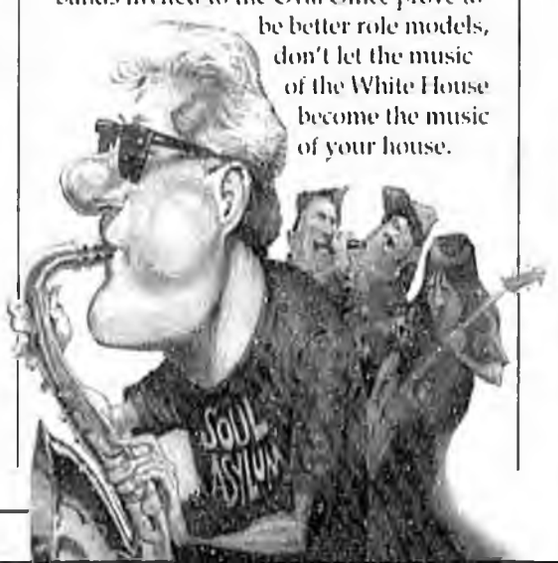
Clinton Sounds Sour Note

Sex. Drugs. Offensive language. Teens tempted to indulge practically have a presidential "seal of approval" now, based on Bill Clinton's choice of musical role models. Affectionately dubbed "The Rock & Roll President," Clinton has reinforced his MTV image by inviting Soul Asylum and Boyz II Men to perform concerts at the White House. Both groups espouse unhealthy worldviews at odds with traditional values.

Rolling Stone epitomized Soul Asylum as "forever being a half-step away from a number of 12-step programs," describing the band members' alcohol and hallucinogenic mushroom abuse. One member, Dave Pirner, also confessed, "I can't deny that there's a real sexuality about [our] music that I'm totally addicted to."

Likewise, Boyz II Men sings crude, lusty lines such as "it's my duty to rub that booty" (from the appropriately titled "Uuh Aah").

Throughout his 1992 presidential campaign, candidate Clinton insisted that character was not the issue. It would appear that he chooses his music with the same lack of discretion and discernment. But parents still have a vote. Until the bands invited to the Oval Office prove to be better role models, don't let the music of the White House become the music of your house.



Waiving the Right to Remain Silent

Someone once said, "Tis better to remain silent and be thought a fool, than to open your mouth and remove all doubt." Celebrities—musicians in particular—have a penchant for doing just that in interviews. What comes out is often a revelation as to the attitudes and agendas *behind* the individual. Consider the following evidence:

STEPHEN BOCHCO: creator of ABC-TV's steamy cop show *NYPD Blue*
"Pushing at the edge of broadcast standards is something I've always done. America has a real strong Puritan ethic. I don't like it. Broadcast standards simply are whatever they'll finally let you do. That becomes the new standard." *TV Guide, 8/14/93*

TUPAC SHAKUR: gangsta rapper/actor who has tangled with the law
"The fact is, unless I want to turn into an Uncle Tom, I will be a statistic. There's no way around it . . . I will either be in jail or dead or be so f—ing stressed out from *not* going to jail or dying or on crack that I just pop a vessel." *Premiere, 8/93*

GERALDO RIVERA: host of the TV talk show, *Geraldo*
"I'm not well-educated. When I was young, I never read the things most people did. So now I'm trying to re-educate myself. . . . Currently, I'm reading Howard Stern's new book, *Private Parts*."
Entertainment Weekly, 11/26/93

SHARON STONE: actress, *Basic Instinct, Sliver*
"I have to straighten out my karma. I've become a sex symbol, which is an absurd thing for me. Particularly since I symbolize a kind of sex I don't believe in." *Premiere, 5/93*

ROSEANNE ARNOLD: television actress
"I don't give a d— about the Emmys. Five, six years they never nominated the *Roseanne* show . . . so they can just kiss my butt!" *The Tonight Show, 11/9/93*

MIKE INEZ: member of Alice in Chains
"We're pretty much Satan's penis incarnated into a band." *RIP, 12/93*

TIM BURTON: producer of Disney's *Nightmare Before Christmas*
"If we can disturb just one child, it will have been worth it."
Entertainment Weekly, 9/3/93

KEITH RICHARDS: member of The Rolling Stones
"You're 30 feet up [on stage]. You have everyone *down* there. It's already a kind of submission—like sacrificial lambs. You have people looking up with exposed throats, and it's very primal s—t." *Spin, 5/93*

HOWARD STERN: radio host fined for indecency, author of *Private Parts*
"I hop into the gutter because I genuinely think it's funny. . . . I never worry about the people out there [in the radio audience]. I feel no responsibility whatsoever. . . . I don't find anything offensive."
CBS This Morning, 10/93

MIKE JUDGE: creator of the tasteless cartoon *Beavis and Butt-head*
"You know what's weird? Every now and then I'll say, 'Well, that's pretty cool,' and I can't tell if that's something I would have said before or if I'm doing Butt-head." *Newsweek, 10/11/93*

Member of the band STONE TEMPLE PILOTS
"Originally we wanted to just play drive-in theaters . . . if we couldn't get a drive-in theater, we wanted to have [the concert] next to a lake so people could take off their clothes and roll around in the sand all naked and everything."
MTV: Week in Rock, 8/93

ROB CAMP: creative director for *The Ren & Stimpy Show*
"Ren and Stimpy laugh, they cry, they get mad at each other. And they stick together through thick and thin. Just because they fart . . . everybody farts! The kids think that's funny."
Family Life, Sept/Oct '93

JONATHAN DEMME: director of the Tom Hanks film *Philadelphia*
"There is a terrible void of positive gay characters in American movies."
Entertainment Weekly, 12/11/92

Spotlight

PFR

Grammy and Dove nominee PFR (formerly Pray for Rain) specializes in quirky-yet-catchy pop/rock melodies. Vocals, at times, bring to mind the Beatles and ELO. The group's sophomore release, *Goldie's Last Day*, doesn't trade on deep theology, but it is a light, fun album that makes subtle arguments for the gospel (the title track honors a Labrador retriever). One of the more direct messages reminds us that the storms of life are only temporary, and that God's Son is returning ("Wait for the Sun"). Available from Sparrow.

Whitecross

Teens with a hankering for high-test rock now have a powerful alternative built around uplifting, godly messages. *To the Limit/The Best of Whitecross* delivers a dozen electrifying, Christ-centered tunes destined to reach young people tuned in to the genre. Dedicated to truth, the band shakes a fist at Satan while encouraging listeners to radically commit themselves to Jesus.

This disc unmasks the emptiness of sin ("When the Walls . . ."), urges unity in Christ ("In America") and testifies to God's unfailing love ("You're My Lord," "Because of Jesus"). "No Second Chances" relates the story of the rich man and Lazarus from Luke 16. Greatest hits that really hit home from Star Song.

Michael James

Closer to the Fire is the perfect album for country music buffs who enjoy biblically relevant tunes of family and faith. Inviting comparison to Paul Overstreet ("Weather the Storm," "Handfuls of Dust"), James' songs are catchy and lyrically rock-solid. "Family Tree" talks of home-grown roots anchored firmly in God, as well as the shelter and shade provided by loved ones ("Life is sweet under this family tree"). On the title track, a humble heart draws nearer to God. James also includes the tender Skip Ewing ballad "It Wasn't His Child." An outstanding two-step alternative from Reunion.

CHART WATCH

Good news and bad news on the pop music scene. Michael Bolton's latest album debuted strong, but a mangy Dogg clings to the top spot.

The One Thing
Michael Bolton
Columbia

Genre: Adult Contemporary
Chart Action: Number-3 debut pop album.
Pro-Social Content: Eight of the ten tracks on this hot album express uncompromising romantic commitment. Even the Top-15 single "I Said I Loved You . . . But I Lied" defies its title by stating, "I lied 'cause this is more than love I feel inside." He expresses his devotion to a *future* partner on "Completely." "Ain't Got Nothing If You Ain't Got Love" claims "fortune and fame [are] just things that ya leave behind," a sentiment Bolton models through his Foundation, which supports children and women at risk, and provides access to education for underprivileged young people. That theme also permeates the lyrics to "In the Arms of Love," which would sound equally at home if played on a Christian radio sation.

Objectionable Content: None.
Summary/Advisory: Bolton's passionate vocals and belief in enduring romantic love make *The One Thing* an uplifting effort from start to finish.

Doggystyle
Snoop Doggy Dogg
Death Row/Interscope

Genre: Gangsta Rap
Chart Action: Debuted as number-1 *pop* album, selling 802,000 copies in one week.
Pro-Social Content: None
Objectionable Content: Misogynistic, violent, sexually explicit lyrics take center stage on this offensive collection. "Ain't No Fun" brags about oral and group sex, valuing women no further than the act itself ("The b— ain't s—t to me . . . give me ten b—s, then I'll f— all ten"). As the record's thinly veiled title suggests, Snoop also hounds after anal intercourse. Marijuana use (often referred to by the street term "chronic") is glorified on at least five tracks. "The Shiznit" and "Who Am I" advocate murdering police officers.

Summary/Advisory: This Dogg has *fleas*, but no one seems to care. The media has praised the album as urban art, and more than a million copies followed listeners home in record time. Avoid this trash at all costs.

Very Necessary
Salt-N-Pepa
London

Genre: Rap/Reggae
Chart Action: Album reached number 13 on R&B chart. The single "Shoop" hit number 5.
Pro-Social Content: None
Objectionable Content: The opening song from this popular female rap trio prepares the listener for a "rumpshaker flavor with the nasty rhymes." On that sorry promise, it delivers. Like the male artists who dominate the genre, these bad girls seek, perform and boast about sex in a variety of immoral contexts. They refer to prostitution ("If she wants to be a-freakin' and sell it on the weekend, it's none of your business"), masturbation and acts of violence ("Ask me any questions and my Smith & Wesson will answer," etc.). The album ends with several minutes of pro-condom propaganda under the guise of an AIDS message.

Summary/Advisory: The girls attempt to get spiritual in the liner notes, giving thanks to Jesus for "guidance." But it's safe to say He had absolutely nothing to do with this hedonistic smut. Pass on the Salt-N-Pepa.

Everybody Else Is Doing It, So Why Can't We?
The Cranberries
Island

Genre: Alternative Rock
Chart Action: Top-20 pop album
Pro-Social Content: On "Pretty," the lead singer reinforces someone's innate value by repeating the lyric "You're so pretty the way you are." She also practices "tough love" when the man in her life demonstrates a lack of respect or faithfulness ("Linger," "Wanted," "Put Me Down," "Still Can't . . ."). "Sunday" examines the shortcomings of one sided love. These tunes are honest about the trials some relationships endure, if not terribly optimistic.

Objectionable Content: Several songs present dysfunctional relationships without offering positive alternatives. Depending on how it's taken, the album's title could inspire young people to experiment with risky behavior.
Summary/Advisory: The Cranberries rely on a brooding, at times eerie, musical style typical of their Irish rock roots. Lyrically, the band does an admirable job of defining social ills. Unfortunately, *Everybody Else Is Doing It, So Why Can't We?* comes up short of providing hopeful solutions.

Yes I Am
Melissa Etheridge
Island

Genre: Rock
Chart Action: Album peaked at number 16.
Pro-Social Content: Not much. One song expresses relational commitment ("I'm the only one who'll walk across the fire for you"). ***Objectionable Content:*** "Silent Legacy" considers prayer worthless. Right and wrong are irrelevent in the quest for a man's love ("I could dance with the devil on a Saturday night . . . smoke, drink, swear"). Several cuts also appear to be "anti-parent" ("Come to My Window," "Silent Legacy"). A woman caves in to sexual temptation on "Resist." "All American Girl" encourages perseverance, but with no solutions. Amid despair and alienation, it could also be suggesting abortion for a young mother-to-be.

Summary/Advisory: Earthy vocals carry worldly messages. Here, soul searching usually leads to hedonistic nihilism. Skip it.

I'm Alive
Jackson Brown
Elektra

Genre: Acoustic Rock
Chart Action: Top-40 pop album
Pro-Social Content: On "Sky Blue and Black" and "I'll Do Anything," the artist expresses his love and devotion to a woman. A line from the latter states, "I make your happiness my responsibility." The object of his affection dominates his thoughts on "Everywhere I Go." Marital reconciliation is the focus of "Too Many Angels" ("I want to watch the children as they run; I want this darkness gone"). Other song involve facing lost love with a spirit of optimism and perseverance ("I'm Alive," "Take This Rain").

Objectionable Content: "My Problem Is You" abdicates behavioral responsibility, stating, "For some kinds of pleasure there are no defenses."
Summary/Advisory: Adults may remember Brown from 1978 when he was "Running on Empty." Whether or not he can stage a comeback remains to be seen. Overall, *I'm Alive* is a solid effort, weaving together pro-social poetry and acoustic guitar melodies.

Parental Guidance's review of album or film content is not intended as an endorsement by Focus on the Family. It is provided as a service to parents to assist them as they set their own standards for acceptable music and movie entertainment in their homes.

What Does Disney Have Against Mothers?

by Bob DeMoss Jr., Editor

You might recall the delightful children's book, *Are You My Mother?* by P.D. Eastman. As the story goes, a baby bird hatches but can't find his mom, who is searching for their food. Instinctively, the little chick knows he must have a mother and sets out to locate her. Leaving the nest, not knowing what to look for in a mother, he asks a cat, a hen, a dog, a cow—even a boat, plane and crane—that famous question, "Are you my mother?" In the end, this tiny fellow finds—and cherishes—his mom.

Through stories such as this one, we teach youngsters the value of motherhood—a concept that Walt Disney, apparently, never fully grasped. For years, the Disney name has been synonymous with family-oriented films. But a closer look at Disney's roster of animated motion pictures actually leaves me wondering if the company has something against motherhood. A recent letter to the editor of *TV Guide* regarding Disney's routine exclusion of mothers from its animated classics makes my point.

Margaret O'Neil commented, "What is Disney Studios' aversion to mothers? Aladdin originally had a mother, according to your article but 'Katzenberg [Disney Studios head] wasn't wild about the mother, so Mom disappeared.' Jasmine doesn't have a mother either. Neither does Belle or Ariel. Snow White and Cinderella have wicked stepmothers. Pinocchio doesn't have a mother and Peter Pan doesn't even know what a mother is! Sleeping Beauty's mother is only briefly referred to as 'King Stefan and his queen.' And everybody knows what happened to Bambi's mother!" [She was shot]. And, don't forget *The Jungle Book*, in which Mowgli was an orphan.

With Mom out of the picture, marriage takes another slap. Not one of these pictures portrays two happily married, well-adjusted parents involved in their children's lives. Disney's situation is sort of like Murphy Brown's—but in reverse. In these pictures, it's Dad holding down the home. Which brings us to Disney's new picture, currently on the animation table, *Pocahontas*. Rumor has it the American Indian princess Pocahontas may not have a mother, either.

Now, I don't want to sound overly picky by addressing this matter. I doubt it's some calculated conspiracy by the board at Disney Studios. It's just that this pattern of omission is conspicuous, and hard to explain—especially in light of the family-friendly image Disney commands.

There's an important reason to consider the implications of motherless Disney characters. When we watch a film, we voluntarily give over the control of our eyes to the producer of what we're watching. We only see what he or she desires us to see. His values, priorities and point of view take center stage. In my book, *Learn to Discern*, I describe this phenomenon as "the directed eye." In other words, what we *don't* see can be as important—or *more* important—as what we *do* see. Unfortunately, few of us have polished our thinking skills to consider both what is shown *and* what has either been overlooked or consciously edited out.

Helping our young people realize that movies frequently fail to portray a healthy picture of reality is a small but vital step in their journey to becoming critical thinkers. Given Disney's dismal track record of affirming mothers, you have a host of examples with which to begin this learning process.

Bob DeMoss

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A Generation At Risk

At last! Help for "A Generation at Risk." If you've had questions about popular music, if you're agitated over explicit advertisements, and if gory horror movies are haunting your home, don't miss this powerful multimedia presentation hosted by Focus on the Family's youth culture specialist, Bob DeMoss. Learn how to set the right stage for your kids! Come and bring a friend. In those cities where you cannot attend, your presence through prayer is greatly appreciated. This program is for adults only. Contact the local sponsor for specific time and location.

WORCESTER, MASS.	February 22, 1994	(508) 777-5860
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IF YOU KNOW PARENTS WHO ARE STRUGGLING TO PROTECT THEIR CHILDREN FROM HARMFUL MEDIA INFLUENCES, CONSIDER SENDING THEM A GIFT MEMBERSHIP TO PARENTAL GUIDANCE TODAY.

Alaska Municipal Codes
Other State Codes
Minneapolis Code

ATTACHMENT B
Anchorage Municipal Code - AMC 8.05.420
Ketchikan Municipal Code - 9.24.010
Palmer Municipal Code - 9.28.010

a. the character and content of any material which is reasonably susceptible of examination by the defendant; and

b. the age of a minor, provided however than an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor. (AO 91-53)

3.05.420 Minors--Disseminating indecent material to.

A. In construing and applying this section, the following definitions shall apply:

1. A "minor" is a person less than 18 years old.

2. "Sexual conduct" is any sexual act, normal or perverted, or any act of masturbation, excretory functions or lewd exhibition of the genitals.

3. "Sexual excitement" is the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

4. "Sado-masochistic abuse" if flagellation or torture by or upon a person, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

5. "Harmful to minors" is that quality of any description or representation, in whatever form, of sexual conduct, sexual excitement or sado-masochistic abuse if, when taken as a whole, it:

a. according to contemporary community standards appeals to the prurient interest in sex; and

b. portrays sexual conduct, sexual excitement or sado-masochistic abuse; and

c. does not have serious literary, artistic, political or scientific value.

6. "Indecent material" is a picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body which depicts sexual excitement, sexual conduct or sado-masochistic abuse which is harmful to minors; a book, pamphlet, magazine, printed

matter, however produced, or sound recording which contains any matter enumerated above in this definition or explicit and detailed verbal description or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse, and which is harmful to minors; or an enactment of sexual conduct or sado-masochistic abuse, or exhibition of sexual excitement, by one or more persons.

B. Prohibited dissemination. It is unlawful for any person to knowingly:

1. disseminate, distribute, offer to distribute or exhibit indecent material to a minor; or

2. sell or give to a minor an admission ticket or pass to premises whereon indecent material is exhibited or to be exhibited; or

3. admit a minor to premises whereon indecent material is exhibited or to be exhibited.

C. Affirmative defenses in prosecution.

In a prosecution for disseminating indecent material to minors, it is an affirmative defense that:

1. the defendant had reasonable cause to believe that the person involved was 18 years old or more, and such person exhibited to the defendant a driver's license, birth certificate or other official or apparently official document purporting to establish that such person was 18 years old or more; or

2. the defendant is the parent of the minor, or has parental consent. (Adapted from CAC 8.48.010-.030 and new).

8.05.425 Sexual exploitation of minors.

A. It shall be unlawful for any person to knowingly employ, use, persuade, induce, entice or coerce any minor to engage in, or to have a minor assist any other person to engage in any sexual excitement or sexual conduct for the purpose of producing any film, photograph, negative, slide, book, magazine, audio tape or live performance that depicts that conduct.

B. It shall be unlawful for any person to photograph, film, tape or televise a minor engaged in nudity, sexual excitement or sexual conduct, for the purpose of producing a film, photograph, negative, slide, book, audio tape or magazine depicting that conduct for sale or distribution to other persons.

C. It shall be unlawful for any person to engage in nudity, sexual excitement or sexual conduct with a minor for the purpose of producing any film, photograph, negative, slide, book, magazine, audio tape or live performance that depicts that conduct.

D. It shall be unlawful for any person to knowingly produce, publish, distribute, sell or disseminate any film, photograph, negative, slide, book, audio tape or magazine or other printed, visual or audio medium if such person knows or has reason to know that such works are or contain graphic representations, films, photographs, negatives or slides that depict a minor engaged in nudity, sexual excitement or sexual conduct in a patently offensive way and if:

1. the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; and if

2. the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

E. For the purpose of this section, the term:

1. "minor" means any person under the age of 18 years;

2. "sexual conduct" means actual or simulated:

a. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

b. bestiality;

c. masturbation;

d. sado-masochistic abuse (for the purpose of sexual stimulation); and

e. lewd exhibition of the genitals or pubic area of any person.

3. "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

4. "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernible turgid state. (AO 77-332A, AO 89-52, AO 90-5, AO 91-53).

8.05.430 Minors--Sale of firearms to.

It is unlawful for any person to give, barter, sell, lease or otherwise make available to any person under the age of 18 years any firearm, including but not limited to pistols, rifles and shotguns, or any ammunition therefor, without consent of the parent or guardian of the minor. (Adapted from GAAB 18.05.060).

8.05.440 Children--Curfew.

A. It is unlawful for any person under 16 years of age to be upon the public streets, alleys, parks, public buildings, places of amusement and entertainment, vacant lots, or other unsupervised places, between the hours of 10:00 p.m. Sunday through Thursday, and 11:00 p.m. Friday and Saturday, during school term, and 11:00 p.m. otherwise, and 5:00 a.m. of any day, unless such person shall be accompanied by and in the charge of his/her parent or other competent and adult person, or upon an emergency errand or at the direction of his or her parent, guardian or other adult person having the care and custody of the child.

B. It is unlawful for any parent, guardian or other person having custody and control of children under the age of 16 years to allow such child to go or be upon any public street, or other places as listed in this section, between the hours of 10:00 p.m. Sunday through Thursday, and 11:00 p.m. Friday and Saturday,

9.20.020 Engaging in. Any person or persons shall be deemed guilty of a misdemeanor who shall:

(1) Engage in prosti ution, lewdness, or assignation; or

(2) Solicit, induce, entice, or procure another to commit an act of lewdness, assignation, or prostitution with himself or herself; or

(3) Reside in, enter, or remain in any house, place, building, or other structure, or to enter or remain in any vehicle, trailer, or other conveyance, for the purpose of prostitution, lewdness or assignation. (Prior code §13-22).

9.20.030 Definitions. In construing Sections 9.20.010 and 9.20.020, the term "prostitution" includes the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire. The term "lewdness" includes any indecent or obscene act. The term "assignation" includes the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement. (Prior code §13-23).

9.20.040 Common fame to be competent evidence. In all prosecutions for crimes defined in Sections 9.20.010 and 9.20.020, common fame shall be competent evidence in support of any complaint or information. (Prior code §13-24).

Chapter 9.24

OBSCENITY

Sections:

9.24.010 Obscene books, pictures or articles. It is unlawful to print, engrave, sell, offer for sale, give away, exhibit, or publish or have in one's possession for any such purpose, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, pictures, cast, statuary, image, or representation, or other article of an indecent or immoral nature, or any book, paper, print, circular, or writing made up principally of pictures or stories of immodest deeds, lust, or crime, or to exhibit any such article within the view of any passerby or of any person in a public place. (Prior code §13-34).

Palmer Municipal Code 1979

Chapter 28

OBSCENITY

Sections:

9.28.010 Obscene language prohibited. Any person who uses any obscene language in the presence of another person shall be deemed an ordinance violator. (Ord. 210 §4(part), 1978: prior code §9.28(part)).

9.28.020 Selling obscene materials prohibited. Whoever brings within the limits of the city for the purpose of sale, or sells or offers for sale, or gives away or offers to give away, or makes, draws, prints or posts within the city, any obscene picture, pamphlet, newspaper, journal, magazine, printed publication, slip papers or writing of any kind or character or any obscene picture, drawing, engraving, card, photograph, medal, cast or instrument, or any article of an obscene character, with knowledge or reason to know the content thereof, shall be deemed an ordinance violator. (Ord. 210 §4(part), 1978: prior code §9.28(part)).

9.28.030 Obscene exhibitions prohibited. Whoever exhibits or performs or assists in exhibiting or performing, any obscene play, exhibition or other representation or permits the same to be performed in any building or premises owned or controlled by him, or in any other place within the city, shall be deemed an ordinance violator (Ord. 210 §4 (part), 1978: prior code §9.28(part)).

9.28.040 Obscene public writing and drawing prohibited. Whoever in any place open to the public view or to which the public has access, marks, writes, draws, cuts or makes any obscene word, sentence, design or figure, within the limits of the city, shall be deemed an ordinance violator. (Ord. 210 §4(part), 1978: prior code §9.28(part)).

ATTACHMENT C
Montana Code Annotated - 45.8.206
New Jersey Statutes Annotated - 2C:34-3.2
South Dakota Codified Laws - 22-24-29.1

MONTANA CODE ANNOTATED

Adopted by Chapter 1, Laws of 1979

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Part 2

Offensive, Indecent, and Inhumane Conduct

45-8-201. Obscenity. (1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, or other representation or embodiment of the obscene to anyone under the age of 18;

(b) presents or directs an obscene play, dance, or other performance, or participates in that portion thereof which makes it obscene, to anyone under the age of 18;

(c) publishes, exhibits, or otherwise makes available anything obscene to anyone under the age of 18;

(d) performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of 18;

(e) creates, buys, procures, or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of 18; or

(f) advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a) (i) it is a representation or description of perverted ultimate sexual acts, actual or simulated;

(ii) it is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated; or

(iii) it is a patently offensive representation or description of masturbation, excretory functions, or lewd exhibition of the genitals; and

(b) taken as a whole the material:

(i) applying contemporary community standards, appeals to the prurient interest in sex;

(ii) portrays conduct described in subsection (2)(a)(i), (ii), or (iii) in a patently offensive way; and

(iii) lacks serious literary, artistic, political, or scientific value.

(3) In any prosecution for an offense under this section, evidence shall be admissible to show:

(a) the predominant appeal of the material and what effect, if any, it would probably have on the behavior of people;

(b) the artistic, literary, scientific, educational, or other merits of the material;

(c) the degree of public acceptance of the material in the community;

(d) appeal to prurient interest or absence thereof in advertising or other promotion of the material; or

(e) purpose of the author, creator, publisher, or disseminator.

(4) A person convicted of obscenity shall be fined at least $500 but not more than $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(5) Cities, towns, or counties may adopt ordinances or resolutions which are more restrictive as to obscenity than the provisions of 45-8-206 and this section.

History: En. 94-8-110 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 407, L. 1975; R.C.M. 1947, 94-8-110; amd. Sec. 1, I.M. 79, app. Nov. 7, 1978; amd. Sec. 5, Ch. 571, L. 1989.

Cross-References
Knowingly defined, 45-2-101.
Purposely defined, 45-2-101.
Indecent exposure, 45-5-504.

45-8-202. Repealed. Sec. 7, Ch. 571, L. 1989.

History: En. Secs. 1 to 3, Ch. 463, L. 1973; amd. Sec. 2, Ch. 407, L. 1975; amd. Sec. 1, Ch. 391, L. 1977; R.C.M. 1947, 94-8-110.1.

45-8-203. Certain motion picture theater employees not liable for prosecution. (1) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, has no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed. "Employee" does not include a manager of the motion picture theater.

(2) No employee is liable to prosecution under 45-8-201 and 45-8-206 or under any city or county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employee is acting within the scope of his regular employment at a showing open to the public.

History: En. 94-8-110.3 by Sec. 1, Ch. 76, L. 1974; R.C.M. 1947, 94-8-110.3; amd. Sec. 6, Ch. 571, L. 1989.

45-8-204. Repealed. Sec. 18, Ch. 440, L. 1989.

History: En. Secs. 1 to 4, Ch. 430, L. 1973; amd. Sec. 32, Ch. 359, L. 1977; R.C.M. 1947, 94-8-110.2.

45-8-205. Definitions. As used in 45-8-205 through 45-8-208, the following definitions apply:

(1) "Display or dissemination of obscene material to minors" means that quality of a description, exhibition, presentation, or representation, in whatever form, of sexual conduct or sadomasochistic abuse when the material or performance, taken as a whole, has the following characteristics:

(a) its dominant theme appeals to a minor's prurient interest in sex;

(b) it depicts or describes sexual conduct or sadomasochistic abuse in a manner that is patently offensive to contemporary standards in the adult community with respect to what is suitable for minors; and

(c) it lacks serious literary, scientific, artistic, or political value for minors. If the court finds that the material or performance has serious literary, scientific, artistic, or political value for a significant percentage of normal older minors, the material or performance may not be found to lack such value for the entire class of minors.

(2) "Material" means a book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, recording tape, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America).

(3) "Minor" means a person under 18 years of age.

(4) "Newsstand" means a stand that distributes or sells newspapers or magazines.

(5) "Performance" means any motion picture, film, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America); phonograph record; compact disk; tape recording; preview; trailer; play; show; skit; dance; or other exhibition played or performed before an audience of one or more, with or without consideration.

(6) "Person" means any individual, partnership, association, corporation, or other legal entity of any kind.

(7) "Prurient interest in sex" means a shameful or morbid interest in sex or excretion.

(8) "Sexual conduct" includes:

(a) vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted. A sexual act is simulated when it gives the appearance of depicting actual sexual activity or the consummation of an ultimate sexual act.

(b) masturbation, excretory functions, or lewd exhibition of uncovered genitals or female breasts;

(c) sadomasochistic abuse, meaning an act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in a revealing or bizarre costume.

(9) "Ultimate sexual act" means vaginal or anal sexual intercourse, fellatio, cunnilingus, or bestiality.

History: En. Sec. 1, Ch. 571, L. 1989.

45-8-206. Public display or dissemination of obscene material to minors. (1) A person having custody, control, or supervision of any commercial establishment or newsstand may not knowingly or purposely:

(a) display obscene material to minors in such a way that minors, as a part of the invited public, will be able to view the material; provided, however, that a person is considered not to have displayed obscene material to minors if the material is kept behind devices commonly known as blinder racks so that the lower two-thirds of the material is not exposed to view or other reasonable efforts were made to prevent view of the material by a minor;

(b) sell, furnish, present, distribute, or otherwise disseminate to a minor or allow a minor to view, with or without consideration, any obscene material; or

(c) present to a minor or participate in presenting to a minor, with or without consideration, any performance that is obscene to minors.

(2) A person does not violate this section if:

(a) he had reasonable cause to believe the minor was 18 years of age. "Reasonable cause" includes but is not limited to being shown a draft card, driver's license, marriage license, birth certificate, educational identification card, governmental identification card, or other official or apparently official card or document purporting to establish that the person is 18 years of age;

(b) the person is, or is acting as, an employee of a bona fide public school, college, or university or a retail outlet affiliated with and serving the educational purposes of a school, college, or university and the material or perform-

ance was disseminated in accordance with policies approved by the governing body of the institution;

(c) the person is an officer, director, trustee, or employee of a public library or museum and the material or performance was acquired by the library or museum and disseminated in accordance with policies approved by the governing body of the library or museum;

(d) an exhibition in a state of nudity is for a bona fide scientific or medical purpose for a bona fide school, library, or museum; or

(e) the person is a retail sales clerk with no financial interest in the material or performance or in the establishment displaying or selling the material or performance.

History: En. Sec. 2, Ch. 571, L. 1989.

45-8-207. Notice of violation. Before a county attorney may prosecute a person for a continuing violation of 45-8-206, he shall determine that the material or performance is obscene to minors, give the alleged violator actual notice of the determination and notice that he will be prosecuted if he does not desist, and determine that the violation continued for at least 3 days after notice was received. The person may seek a declaratory judgment on the question whether the material or performance is obscene to minors. The statute of limitations for the offense is tolled while the declaratory judgment or an appeal from it is pending.

History: En. Sec. 3, Ch. 571, L. 1989.

45-8-208. Penalties. (1) A person who is convicted of violating 45-8-206 is guilty of a misdemeanor and may be fined an amount not to exceed $500 or be imprisoned for a term not to exceed 6 months, or both.

(2) For purposes of 45-8-206, multiple copies of the same title, monthly issue, volume and number issue, or other identical material constitutes a single offense.

History: En. Sec. 4, Ch. 571, L. 1989.

45-8-209. Harming a police dog — penalty. (1) A person commits the offense of harming a police dog if he purposely or knowingly shoots, kills, or otherwise injures a police dog being used by a law enforcement officer in discharging or attempting to discharge any legal duty in a reasonable and proper manner.

(2) A person convicted of the offense of harming a police dog may be fined an amount not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 1 year, or both.

(3) As used in this section, the following definitions apply:

(a) "Law enforcement officer" means a person who is a peace officer as defined in 46-1-202.

(b) "Police dog" means a dog that is:

(i) used by a law enforcement agency, as defined in 7-32-201, in the exercise of its authority;

(ii) specifically trained for law enforcement work; and

(iii) under the control of a law enforcement officer.

History: En. Secs. 1, 2, Ch. 536, L. 1985; amd. Sec. 1, Ch. 258, L. 1989; amd. Sec. 258, Ch. 800, L. 1991.

NEW JERSEY STATUTES ANNOTATED

Official Classification

Title 2C

Code of Criminal Justice
2C:14 to 2C:36

1992
Cumulative Annual Pocket Part

[For Use In 1992–1993]

Replacing 1991 Pocket Part in back of volume

INCLUDING LAWS
through the
1991 Second Annual Session

WEST PUBLISHING CO.
ST. PAUL, MINN.

9 N.J.S.A.—1
1992 P.P.

Historical and Statutory Notes

1982 Legislation

The 1982 amendment made a violation of this section a crime of the fourth degree rather than a disorderly persons offense and deleted the right to a trial by jury.

United States Supreme Court

Validity, penalty on incitement of lust, see Brockett v. Spokane Arcades, Inc., 1985, 105 S.Ct. 2794, 472 U.S. 491, 86 L.Ed.2d 394.

Notes of Decisions

Zoning ordinances 35

3. Construction and application

State v. Foglia, 182 N.J.Super. 12, 440 A.2d 16 (A.D.1981) [Main Volume] certification granted 89 N.J. 436, 446 A.2d 160, appeal dismissed 91 N.J. 523, 453 A.2d 848.

5. Preemption

Ordinance purporting to regulate the public display of magazines containing nudity was not part of zoning ordinance and did not control the location of the sale of obscene material, but rather attempted to control the manner of their sale, and thus ordinance attempted to regulate sale of obscene material which was preempted by state legislation and enforcement of such ordinance was prohibited. State v. Meyer, 212 N.J.Super. 1, 512 A.2d 1139 (A.D.1986).

Ordinance which prohibited newsrack from displaying nudity or offensive, sexually explicit material and which defined relevant terms conflicted with and was preempted by this section defining and regulating obscenity. News Printing Co. v. Borough of Totowa, 211 N.J.Super. 121, 511 A.2d 139 (L.1986).

14. Films

State v. Foglia, 182 N.J.Super. 12, 440 A.2d 16 (A.D.1981) [Main Volume] certification granted 89 N.J. 436, 446 A.2d 160, appeal dismissed 91 N.J. 523, 453 A.2d 848.

15. Men's magazines

This section which permits municipal corporation to adopt ordinance legalizing sale of obscene material did not authorize municipal corporation to pass ordinance which prohibited newsracks from displaying nudity or offensive, sexually explicit material. News Printing Co. v. Borough of Totowa, 211 N.J.Super. 121, 511 A.2d 139 (L.1986).

35. Zoning ordinances

Ordinance purporting to regulate public display of magazines containing nudity failed to meet constitutional standard established in *Miller v. California* and adopted by state Supreme Court in *State v. DeSantis* and thus ordinance was constitutionally defective even if it were an otherwise valid exercise of municipal authority. State v. Meyer, 212 N.J.Super. 1, 512 A.2d 1139 (A.D.1986).

2C:34–3. Obscenity for persons under 18

a. Definitions for purposes of this section:

(1) "Obscene material" means any description, narrative account, display, depiction of a specified anatomical area or specified sexual activity contained in, or consisting of, a picture or other representation, publication, sound recording, live performance or film, which by means of posing, composition, format or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.

(2) "Obscene film" means any motion picture film or preview or trailer to a film, not including newsreels portraying actual current events or pictorial news of the day, in which a scene, taken by itself:

(a) Depicts a specified anatomical area or specified sexual activity, or the simulation of a specified sexual activity, or verbalization concerning a specified sexual activity; and

(b) Emits sensuality sufficient, in terms of the duration and impact of the depiction, to appeal to prurient interest.

(3) "Specified anatomical area" means:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or

(b) Human male genitals in a discernibly turgid state, even if covered.

(4) "Specified sexual activity" means:

(a) Human genitals in a state of sexual stimulation or arousal; or

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(b) Any act of human masturbation, sexual intercourse or deviate sexual intercourse; or

(c) Fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast.

(5) "Knowingly" means:

(a) Having knowledge of the character and content of the material or film described herein; or

(b) Having failed to exercise reasonable inspection which would disclose its character and content.

(6) "Exhibit" means the sale of admission to view obscene material.

b. ~~Sale of~~ Promoting obscene material.

A person who knowingly sells, distributes, rents or exhibits to a person under 18 years of age obscene material is guilty of a crime of the fourth degree.

c. Admitting to exhibition of obscene film.

Any person who knowingly admits a person under 18 years of age to a theatre then exhibiting an obscene film is guilty of a crime of the fourth degree.

d. Presumption of knowledge and age.

The requisite knowledge with regard to the character and content of the film or material and of the age of the person is presumed in the case of an actor who sells, distributes, rents or exhibits obscene material to a person under 18 years of age or admits to a film obscene for a person under 18 years of age a person who is under 18 years of age.

e. Defenses.

(1) It is an affirmative defense to a prosecution under subsections b. and c. which the defendant must prove by a preponderance of evidence that:

(a) The person under age 18 falsely represented in or by writing that he was age 18 or over;

(b) The person's appearance was such that an individual of ordinary prudence would believe him to be age 18 or over; and

(c) The sale, distribution, rental or exhibition to or admission of the person was made in good faith relying upon such written representation and appearance and in the reasonable belief that he was actually age 18 or over.

(2) It is an affirmative defense to a prosecution under subsection c. that the defendant is an employee in a motion picture theatre who has no financial interest in that motion picture theatre other than his wages and has no decision-making authority or responsibility with respect to the selection of the motion picture show which is exhibited.

Amended by L.1989, c. 54, § 2, eff. April 14, 1989.

Historical and Statutory Notes

Statement: Committee statement to Senate, No. 1067—L.1989, c. 54, see § 2C:34–2.

2C:34–3.1. Retailer defined

"Retailer," as used in this act, means any person who operates a store, newsstand, booth, concession or similar business with unimpeded access for persons under 18 years old, who is in the business of making sales of periodicals or other publications at retail containing pictures, drawings or photographs.

L.1988, c. 17, § 1, eff. June 1, 1988.

Senate Law, Public Safety and Defense Committee Statement

Senate, No. 1254—L.1988, c. 17

The Senate Law, Public Safety and Defense Committee reports favorably Senate Bill 1254.

Senate Bill 1254 permits a municipality to enact an ordinance prohibiting as a petty disorderly persons offense the retail display of obscene material

as defined in N.J.S. 2C:34–3, at a height of less than five feet or without a covering over the front of the material. Any such ordinance is required to contain a provision stating that public display of obscene material constitutes presumptive evidence that the retailer knowingly made or permitted the display. "Retailer" is defined in the bill as a person who operates a store, newsstand, booth, concession, or similar business with unimpeded access to persons under the age of 18 and who is in the business of making sales of periodicals or other publications at retail containing pictures, drawings, or photographs.

Material which is obscene for persons under 18 years of age is defined in N.J.S. 2C:34–3 as any description, narrative account, display, or depiction of a specific anatomical area or sexual activity which, by means of posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.

The penalties for a petty disorderly persons offense include a fine of up to $1,000.00, imprisonment for up to 30 days, or both.

This bill was pre-filed for introduction in the 1988 session pending technical review. As reported, the bill includes the changes required by technical review which has been performed.

Historical and Statutory Notes

1988 Legislation

Section 3 of L.1988, c. 17, approved April 26, 1988, provides:

"This act shall take effect on the first day of the second month after enactment."

Title of Act:

An Act concerning the retail display of obscene material and supplementing chapter 34 of Title 2C of the New Jersey Statutes. L.1988, c. 17.

Library References

Words and Phrases (Perm.Ed.)

2C:34–3.2. Display by retailer of obscene material at height of less than five feet or without blinder or cover; authorization for ordinance to prohibit it

A municipality may enact an ordinance making it a petty disorderly persons offense for a retailer to display or permit to be displayed at his business premises any obscene material as defined in N.J.S. 2C:34–3, at a height of less than 5 feet or without a blinder or other covering placed or printed on the front of the material displayed. Any such ordinance shall contain a provision stating that public display of the obscene material shall constitute presumptive evidence that the retailer knowingly made or permitted the display.

L.1988, c. 17, § 2, eff. June 1, 1988.

Historical and Statutory Notes

Statement: Committee statement to Senate, No. 1254—L.1988, c. 17, see § 2C:34–3.1.

CHAPTER 35. CONTROLLED DANGEROUS SUBSTANCES

SOUTH DAKOTA CODIFIED LAWS

1988 REVISION

Comprising Statutes of a General and Permanent Nature
Including the Laws Passed at the Sixty-third
Session (1988) of the Legislature of
the State of South Dakota

VOLUME 8A

1988 REVISION

Titles 22 & 23

Cite as SDCL

PUBLISHED BY AUTHORITY OF THE LEGISLATURE
UNDER THE SUPERVISION OF
SOUTH DAKOTA CODE COMMISSION

THE MICHIE COMPANY
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relating to obscene or immoral publications, 76 ALR 1099.

Selling obscene literature as breach of peace bond, 54 ALR 393.

Validity and construction of federal statutes (18 USC §§ 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card, 11 ALR 3d 1276.

What amounts to an obscene play or book within prohibition of statute, 31 ALR 301.

Law Reviews.

Immorality, Obscenity and the Law of Copyright, 6 SD LRev 109 (1961).

Seizure of Allegedly Obscene Films, 15 SD LRev 399 (1970).

Venue: Its Impact on Obscenity, 11 SD LRev 364 (1966).

22-24-29. Possession, sale or loan as disseminating material harmful to minors. A person is guilty of disseminating material harmful to minors when he knowingly gives or makes available to a minor or promotes or possesses with intent to promote to minors, or he knowingly sells or loans to a minor for monetary consideration any material described in subdivision (4) of § 22-24-27.

Source: SL 1974, ch 165, § 18 (1).

22-24-29.1. Publications containing obscene material to be wrapped and sealed while on display — Violation as misdemeanor. It is unlawful for any person knowingly to distribute, display, sell or exhibit for sale in any public place any magazine, book or newsprint displaying or containing obscene material on the cover thereof or material unless said magazine, book or newsprint is wrapped and sealed so that no more than the title, name, price or date thereof is exposed to the public and said magazine, book or newsprint cannot be viewed or examined without breaking the seal, wrapping or covering. A person who violates this section is guilty of a Class 1 misdemeanor.

Source: SL 1978, ch 161.

22-24-30. Admission to show or exhibition as disseminating material to minors. A person is guilty of disseminating material harmful to minors when, with reference to a motion picture, show or other presentation which depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he knowingly:

(1) Exhibits such motion picture, show or other presentation to a minor;

(2) Sells or gives to a minor an admission ticket or pass to premises whereon there is exhibited such motion picture, show or other presentation; or

(3) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation.

Source: SL 1974, ch 165, § 18 (2).

DECISIONS UNDER FORMER LAW

Sufficiency of Evidence.

Testimony that defendant was running the projector, selling tickets, and was only person in theater exercising any visible control over management of theater was sufficient evidence of his intent to sell or distribute obscene matter. State v. Eakes (1973) 87 SD 247, 206 NW 2d 272, reversed on other grounds in 88 SD 46, 215 NW 2d 129, in conformity with remand and instructions in 414 US 1017, 38 LEd 2d 310, 94 Sup Ct 440.

22-24-31. Defenses for disseminating materials to minors. In any prosecution for disseminating material harmful to minors, it is an affirmative defense that:

(1) The defendant had reasonable cause to believe that the minor involved was eighteen years old or more. A draft card, driver's license, birth certificate, or other official or apparently official document is evidence establishing that the minor was eighteen years of age or older;

(2) The minor involved was accompanied by his parent or legal guardian, or by an adult and the adult represented that he was the minor's parent or guardian or an adult and signed a written statement to that effect;

(3) The defendant was the parent or guardian of the minor involved; or

(4) The defendant was a bona fide school, college, university, museum or public library, or was acting in his capacity as an employee of such an organization or a retail outlet affiliated with and serving the educational purposes of such an organization.

Source: SL 1974, ch 165, § 20.

22-24-32. Misrepresentation to obtain admission of minor as misdemeanor. A person is guilty of a Class 1 misdemeanor when he knowingly misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of any minor to any motion picture, show, or other presentation which is harmful to minors.

Source: SL 1974, ch 165, § 19 (1); 1976, ch 158, § 24-7.

22-24-33. Misrepresentation of age by minor as misdemeanor. A minor is guilty of a Class 2 misdemeanor if he misrepresents his age for the purpose of obtaining admission to any motion picture, show, or other presentation which is harmful to minors.

Source: SL 1974, ch 165, § 19 (2); 1976, ch 158, § 24-8.

ATTACHMENT D

Upper Midwest Booksellers v. City of Minneapolis

Includes Minneapolis Code of Ordinance
"Distribution of Materials Harmful to Minors"

Minneapolis Code

The UPPER MIDWEST BOOKSELLERS ASSOCIATION, a Minnesota corporation, and Harvey Hertz, d/b/a A Brother's Touch Bookstore, Plaintiffs,

v.

The CITY OF MINNEAPOLIS, a municipal corporation, Defendant.

No. Civ. 4-85-5.

United States District Court, D. Minnesota, Fourth Division.

Feb. 25, 1985.

Bookseller and trade organization brought suit challenging ordinance requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque cover. On plaintiffs' motion for preliminary and permanent injunction, the District Court, MacLaughlin, J., held that: (1) plaintiffs had standing; (2) ordinance was not overbroad; (3) ordinance did not unconstitutionally restrict adults' access to protected materials; and (4) section of ordinance exempting certain entities and individuals from criminal prosecution violated equal protection clause, and deficient provision could be severed from rest of ordinance.

Order accordingly.

1. Constitutional Law ⇐90(1)

Although language of First Amendment speaks in absolute terms, not all pure speech falls within protection of the Amendment. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐90.4(1)

Obscene material is not within area of constitutionally protected free speech or press. U.S.C.A. Const.Amend. 1.

3. Obscenity ⇐1

Under definition of obscenity, prohibitions on obscene materials must be limited to works which, taken as a whole, appeal to prurient interest in sex, which portray sexual conduct in patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐90.4(1)

While minors are entitled to significant degree of First Amendment protection, state or municipality may place stricter controls on materials available to youths than on those which are available to adults. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐90.4(1)

While children do not have First Amendment rights coextensive with adults, there are limits to government's ability to restrict freedom of speech on ground of protecting minors. U.S.C.A. Const.Amend. 1.

6. Federal Civil Procedure ⇐103.5

Plaintiffs must allege personal stake in outcome of controversy in order to establish standing.

7. Declaratory Judgment ⇐300

Bookseller had standing to seek declaratory and injunctive relief from ordinance requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque cover, since ordinance posed genuine threat to booksellers and other retailers. U.S.C.A. Const. Amend. 1.

8. Constitutional Law ⇐42.2(1)

Individuals may challenge legislation even when their own rights of free expression are not violated, so long as very existence of legislation may cause others not before court to refrain from constitutionally protected speech or expression. U.S.C.A. Const.Amend. 1.

9. Obscenity ⇐2.5

Standard for "harmful to minors," under ordinance prohibiting open display of sexually explicit materials deemed harmful to minors, was not subject to constitutional

challenge for vagueness. U.S.C.A. Const. Amend. 1.

10. Associations ⇐20(1)

Association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right; interests it seeks to protect are germane to organization's purpose; and neither claim asserted nor relief requested requires participation in lawsuit of each individual member.

11. Associations ⇐20(1)

Trade organization had standing, as representative of its member bookstores, to challenge ordinance requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque cover, where individual bookstore members would have standing, litigation was germane to organization's purpose and there was no need for individualized proof. U.S.C.A. Const.Amend. 1.

12. Obscenity ⇐1.1

While states and localities may adopt broader definition of obscenity for children, mere nudity is not obscene as to either adults or minors. U.S.C.A. Const.Amend. 1.

13. Obscenity ⇐1

Work must be considered as a whole, so that isolated scene or passage, which would be obscene if standing alone, will not render work obscene if it bears rational relationship to rest of work. U.S.C.A. Const.Amend. 1.

14. Constitutional Law ⇐90(1)

Context of speech is important factor in determining scope of permissible regulation. U.S.C.A. Const.Amend. 1.

15. Obscenity ⇐2.5

Ordinance requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque cover was not overbroad in failing to treat works "as a whole." U.S.C.A. Const. Amend. 1.

16. Constitutional Law ⇐90(1)

When government sheds its neutrality and undertakes selectively to shield public from some kinds of speech on grounds that they are more offensive than others, First Amendment strictly limits that power. U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⇐90(1)

Content-neutral regulation is fundamental principle of First Amendment law that should not be lightly abandoned. U.S.C.A. Const.Amend. 1.

18. Obscenity ⇐2

City had significant interest in shielding minors from sexually explicit material which fell within constitutional definition of obscenity for minors. U.S.C.A. Const. Amend. 1.

19. Obscenity ⇐2.5

Ordinance requiring that certain sexually explicit books, magazines, and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque cover did not unconstitutionally restrict adult access to materials protected by First Amendment, but rather was a reasonable time, place and manner regulation. U.S.C.A. Const.Amend. 1.

20. Constitutional Law ⇐250.1(2)
Obscenity ⇐2.5

Section of ordinance exempting certain entities and individuals from criminal prosecution for violation of prohibition against open display of sexually explicit materials deemed harmful to minors violated equal protection clause where classification created by exemption was not necessary to purported interest of allowing parents to expose their children to sexually explicit material in controlled context that was free of "pandering," and, since ordinance provided for criminal prosecution in only those cases in which there was commercial display, exemption provision could be severed from rest of ordinance. U.S.C.A. Const.Amend. 14.

Randall D.B. Tigue, Volunteer Atty., Minnesota Civil Liberties Union, Minneapolis, Minn., for plaintiffs.

Robert J. Alfton, Minneapolis City Atty., and David M. Gross, Asst. City Atty., Minneapolis, Minn., for defendant.

MEMORANDUM AND ORDER

MacLAUGHLIN, District Judge.

This matter is before the Court on plaintiffs' motion for a preliminary and permanent injunction[1] restraining the City of Minneapolis from enforcing that portion of a city ordinance which would prohibit the open display of sexually explicit materials which are deemed harmful to minors.

FACTS

The action before the Court is a first amendment challenge to a Minneapolis city ordinance which requires that certain sexually explicit books, magazines, and other materials[2] deemed harmful to minors be kept in sealed wrappers and that the covers of certain materials be blocked with an opaque cover. Minneapolis Ordinances, § 385.131. Plaintiffs are the Upper Midwest Booksellers Association, an incorporated trade organization of booksellers, publishers, and representatives with members in Minnesota, Wisconsin, North and South Dakota, and Iowa, and Harvey Hertz, doing business as A Brother's Touch Bookstore. The parties have stipulated that under defendant's construction of the ordinance, plaintiffs may have material on display in their stores which would fall within the restrictions of the ordinance.

The chailenged portion of the ordinance provides as follows:

(6) It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.

(a) It is also unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is blocked from view by an opaque cover. The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are blocked from view by an opaque cover.

§ 385.131(6).[3] The effect of the above provision is that the contents and the covers of

1. The Court's opinion incorporates the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52.

2. The provisions of the ordinance apply to "written, photographic, printed, sound, or published materials." Minneapolis Ordinances, § 385.131 (1),(2). The Court describes proscribed materials under the ordinace as "books and magazines" at various points in this opinion. These references are intended as stylistic conveniences rather than all-inclusive descriptions of the ordinance's coverage.

3. The challenged portion of the ordinance has been amended since the institution of this action. Subsection 6 of the ordinance, as originally enacted by the City Council and signed into law by the Mayor on June 13, 1984, provided as follows:

(6) It is unlawful for any person knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in an opaque sealed wrapper.

(a) The provisions of this subdivision shall also apply to each item of material visually depicting nudity, sexual conduct or sexual excitement, upon the cover, covers, or packaging of the material. The requirement of an opaque cover shall be deemed satisfied concerning the visual depictions of nudity, sexual

material are judged separately under the ordinance. If the contents of a book or magazine contain material that is deemed harmful to minors, the publication must be kept in a sealed wrapper. If the cover of a book or magazine visually depicts proscribed material, those portions of the cover must be blocked with an opaque cover. A publication could conceivably have a cover which falls within the ordinance and contents which do not, or vice versa. "Harmful to minors" is defined in the ordinance as follows:

> "Harmful to Minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, or sexual excitement, when it:
>
> (1) predominantly appeals to the prurient, shameful, or morbid interest of minors in sex; and
>
> (2) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and
>
> (3) taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. § 385.131(3)(e).

The ordinance contains two significant exemptions. First, the ordinance does not apply if minors are not able to view the proscribed material or the covers of such material. Businesses can comply with the ordinance by totally barring minors from the establishment or by physically segregating the proscribed materials so that minors do not have access to and cannot view the materials, and by posting a sign which reads "Adults Only—you must be 18 to enter." *Id.* § 385.131(6)(b). The second exemption applies to recognized and established schools, religious institutions, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies, and individuals in a parental relationship with the minor. *Id.* § 385.131(7)(a), (b).

There have been no prosecutions under the ordinance. Plaintiffs brought the instant action for declaratory and injunctive relief shortly after the ordinance took effect on January 1, 1985, and the Court issued a temporary restraining order enjoining enforcement of the ordinance on January 7, 1985.

DISCUSSION

[1–3] Although the language of the first amendment speaks in absolute terms, it is clear that not all pure speech falls within the protection of the amendment. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), the United States Supreme Court stated that

> [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571–572, 62 S.Ct. at 768–769 (footnotes omitted). It is now well settled that obscene material is not within the area of constitutionally protected free speech or press. *Miller v. California*, 413 U.S. 15,

conduct, or sexual excitement, if those portions of the cover, covers, or packaging containing the visual depictions are blocked from view by the opaque cover.

This portion of the ordinance took effect on January 1, 1985. Plaintiffs' complaint in the instant case was filed on January 2, 1985. The ordinance was amended to its current form subsequent to the hearing on plaintiffs' motion for preliminary and permanent injunctive relief which was held on January 22, 1985. The amendments were passed by the City Council on January 25, 1985 and signed by the Mayor on January 30, 1985, and are presently in effect.

The Court has given counsel an opportunity to comment upon the effect of the amendments on the present litigation. Neither side has any objection to the Court's determining the constitutionality of the ordinance as amended. Since there have been no prosecutions under the original ordinance, there is no case or controversy regarding the original ordinance. The Court will therefore determine the constitutionality of the amended ordinance.

23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Because of the inherent dangers involved in regulating any type of expression, however, the Supreme Court has on several occasions revised and refined the definition of obscenity, in order to develop appropriate limits on the permissible scope of regulation. *See, e.g., Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966); *Miller v. California*. Under the current definition of obscenity, as set forth in *Miller v. California*, prohibitions on obscene materials must "be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2614.

[4] The ordinance in question in the instant case is not, of course, aimed at regulating materials which are obscene as to adults. Rather, the ordinance is designed to protect children from being exposed to sexually explicit material. While minors are entitled to a significant degree of first amendment protection, *see Tinker v. Des Moines School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Supreme Court has squarely held that a state or municipality may place stricter controls on materials available to youths than on those which are available to adults. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). In *Ginsberg*, the Court upheld a New York law which prohibited the sale of non-obscene (as to adults), sexually explicit literature to minors under the age of 17. The Court approved the concept of "variable obscenity," holding that legislation may constitutionally adjust the definition of obscenity "to social realities by permitting the appeal of ... [sexually explicit] material to be assessed in terms of the sexual interests ...' of ... minors." *Id.* at 638, 88 S.Ct. at 1279, *quoting Mishkin v. New York*, 383 U.S. 502, 509, 86 S.Ct. 958, 963, 16 L.Ed.2d 56 (1966).

The Court in *Ginsberg* pointed to two governmental interests which justified the limitations on the availability of sexually explicit material to minors which were contained in the New York statute. First, the Court noted that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," and that parents and others responsible for children's well-being "are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639, 88 S.Ct. at 1280. Second, the Court stated that government "has an independent interest in the well-being of its youth." *Id.* at 640, 88 S.Ct. at 1281. The Court quoted with approval the comments of Chief Judge Fuld of the New York Court of Appeals, in his concurring opinion in *People v. Kahan*, 258 N.Y.S.2d 391, 392, 15 N.Y.2d 311, 206 N.E.2d 333 (1965):

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. ... It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

390 U.S. at 640, 88 S.Ct. at 1281.[4] After reciting the above two government inter-

4. The Supreme Court has recognized the significant governmental interest in the protection of minors on a number of other occasions. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944) ("[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (government's interest in "well-being of its youth" held to justify special treatment of indecent broadcasting received by

ests, the Court applied a mere rationality standard to determine whether the legislature could constitutionally determine that exposure to the materials in question was in fact harmful to minors. It found that the legislature's determination was not irrational because existing studies had neither proved nor disproved a "causal link" between exposure of minors to sexually explicit material and impairment of their ethical and moral development. *Id.* at 641–643, 88 S.Ct. at 1281–82.

Justice Stewart, in his concurring opinion in *Ginsberg*, provided an additional theoretical justification for stricter regulation of the dissemination of sexually explicit materials to minors:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

Id. at 649–650, 88 S.Ct. at 1286–1287 (footnote omitted). Thomas Emerson, a commentator who is committed to the notion that "[n]o general restriction on expression in terms of 'obscenity' can.... be reconciled with the first amendment," relies on a variant of this "diminished capacity" theme to support his view that government has a broader power to regulate literature sold to children:

> Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.

Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938–39 (1963).

[5] While children do not have first amendment rights co-extensive with adults, there are limits to government's ability to restrict the freedom of speech on the ground of protecting minors. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Supreme Court struck down as unconstitutionally overbroad an ordinance which prohibited the showing of films containing nudity by drive-in movie theaters with screens visible from a public street or place. The municipality attempted to support the ordinance as an exercise of its police power to protect children. The Court rejected this argument, reasoning that not all displays of nudity can be considered obscene even as to minors. The Court stated that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 213–14, 95 S.Ct. at 2274–75.

The challenged provision of the ordinance in the instant case, unlike the legislation in *Ginsberg*, deals primarily with the displaying of explicit sexual material rather than its distribution or sale,[5] and therefore raises slightly different first amendment questions.[6] Plaintiffs make four basic ar-

both children and adults); *New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 3355, 73 L.Ed.2d 1113 (1981) (government's interest in prevention of sexual exploitation and abuse of children justifies statute prohibiting distribution of visual materials depicting children engaged in sexual performances, regardless of whether material is obscene).

5. The ordinance does contain a prohibition against the sale to minors of materials deemed harmful to minors, § 385.131(4), but plaintiffs have not challenged this aspect of the ordinance.

6. The United States Supreme Court has yet to deal squarely with the issues raised by display regulations such as the one in the instant case. The United States Court of Appeals for the Tenth Circuit recently upheld an ordinance which required an opaque cover but not a sealed wrapper for materials deemed harmful to minors. *M.S. News v. Casado*, 721 F.2d 1281 (10th Cir.1983). At least two state courts have

guments for why the display ordinance should be held unconstitutional. First, plaintiffs argue that the ordinance is impermissibly overbroad because it allows for separate consideration of the contents and cover of a work, and therefore fails to treat the work "as a whole." Second, plaintiffs contend that the ordinance unduly restricts the first amendment rights of adults, because it impedes adult access to materials which, while harmful to minors, are not obscene as to adults. Third, plaintiffs argue that the provision of the ordinance which exempts public libraries, churches, schools, and doctors violates the equal protection clause of the fourteenth amendment. Finally, plaintiffs argue that the provision exempting religious organizations constitutes an establishment of religion in violation of the first and fourteenth amendments. The Court will discuss each of these contentions in turn,[7] after an examination of the threshold question of standing.

A. Standing

[6] Plaintiffs must allege a "personal stake in the outcome of the controversy" in order to establish that they have standing to invoke the jurisdiction of the federal courts." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The standing requirement is designed "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* In the instant case, defendant contends that plaintiffs have failed to demonstrate that they have standing to seek declaratory and injunctive relief. Defendant points to the following facts to support its argument that plaintiffs lack standing. First, individual plaintiff Harvey Hertz merely alleges that he is the owner of A Brother's Touch Bookstore, and that this store is located in the city of Minneapolis. Second, the stipulation of facts entered into by the parties simply provides that the plaintiffs "*may* have material on display in their stores which would fall within the restrictions of the ordinance." Stipulation of Facts, ¶ 4 (emphasis added). Third, one of the members of plaintiff Upper Midwest Bookseilers Associations[8] has stated in an affidavit that his bookstores do not contain any material which could be deemed "harmful to minors" as defined in the ordinance. Defendant contends that in light of the above facts, the claims of the plaintiffs are too speculative to justify the exercise of jurisdiction in this case. Defendant further argues that because the Upper Midwest Booksellers Association is a trade organization with merely economic purposes, it lacks standing to litigate the first amendment issues at stake in this case.

[7–9] The Court finds that plaintiffs do have standing to seek declaratory and injunctive relief. Plaintiffs' allegations in the instant case are clearly more than "generalized grievances" which all citizens share. *See, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). The Supreme Court has recognized that in first amendment cases involving a criminal penalty,

upheld similar display legislation. *American Booksellers Ass'n, Inc. v. Rendell*, — Pa.Super. —, 481 A.2d 919 (1984); *Capitol News Co., Inc. v. Nashville*, 562 S.W.2d 430 (Tenn.1978). A number of courts have, however, struck down such legislation as unconstitutionally overbroad when it sought to regulate material that is not obscene as to minors. *See, e.g., Rushia v. Town of Ashburnham*, 582 F.Supp. 500 (D.Mass.1983); *American Booksellers Ass'n, Inc. v. Superior Court*, 129 Cal.App.3d 197, 181 Cal.Rptr. 33 (1982); *Calderon v. Buffalo*, 61 App.Div.2d 323, 402 N.Y.S.2d 685 (1978). *See also American Booksellers Ass'n, Inc. v. Webb*, 590 F.Supp. 677 (N.D.Ga.1984) (display provision of ordinance containing constitutionally adequate definition of obscenity for minors temporarily enjoined).

7. Because the Court has determined that the exemption violates the equal protection clause, it does not reach the establishment arguments advanced by plaintiffs.

8. Don Blyly, proprietor of Uncle Edgar's Mystery Bookstore and Uncle Hugo's Science Fiction Bookstore, both located in the city of Minneapolis.

> [i]t is not necessary that ... [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.

Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974).[9] The ordinance poses a genuine threat to booksellers and other retailers, since it obliges them to make judgments about whether to seal and cover materials in their store if they want to avoid criminal liability. This burden is a substantial one for both individual plaintiff Harvey Hertz and the Minneapolis member stores of plaintiff Upper Midwest Booksellers Association. While the ordinance's standard for "harmful to minors" is not subject to a constitutional challenge for vagueness, *see Miller v. California; Ginsberg v. New York*, neither is it simple to apply. The fact that the parties' stipulation states that plaintiffs *may* have proscribed materials in their stores, rather than that they *do* have such material, is not significant. Plaintiffs face criminal prosecution under the ordinance and would therefore understandably be reluctant to admit that they have materials that are harmful to minors in their stores. This is especially true given the ordinance's requirement that violations be "knowing." Finally, regardless of whether the plaintiffs ultimately prevail on their constitutional claims, the existence of the ordinance has a *potential* chilling effect on speech, so that the standing requirement is satisfied in this case. *See Cruz v. Ferre*, 571 F.Supp. 125, 129 (S.D.Fla.1983). The Court therefore finds that the plaintiffs possess the requisite "personal stake" in the outcome of this litigation.

[10, 11] Defendant focuses much of its standing argument on the question of whether plaintiff Upper Midwest Booksellers Association has standing to sue as a representative of its member bookstores. An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 342–43, 97 S.Ct. 2434, 2440–41, 53 L.Ed.2d 383 (1977). The prerequisites for associational standing set forth in *Hunt* are clearly present in the instant case. The Court has already discussed the question of whether individual bookstore members of the Upper Midwest Booksellers Association would have standing. With respect to the second part of the *Hunt* test, the present litigation is clearly germane to the purpose of Upper Midwest Booksellers Association—"improving the climate for bookselling, increasing the flow of information and encouraging more people to read." Plaintiffs' Complaint, ¶ 3. Finally, since the present action for declaratory and injunctive relief is a facial challenge to the constitutionality of the Minneapolis ordinance, made on the basis of a set of stipulated facts, there is no need for individualized proof, so that plaintiffs have satisfied the third part of the *Hunt* test. The Court notes that at least one other federal court has explicitly held that a bookseller's association similar to the plaintiff in the instant case has standing to raise the first amendment claims of its members, *American Booksellers Ass'n v. McAuliffe*, 533 F.Supp. 50 (N.D.Ga.1981). *See also American Booksellers Ass'n v. Rendell*, — Pa.Super. —, 481 A.2d 919, 932 (1984). Accordingly, the Court must reject defendant's standing arguments and proceed to determine the merits of this litigation.

9. The standing requirement has been considerably relaxed in the area of first amendment litigation. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611–13, 93 S.Ct. 2908, 2915–16, 37 L.Ed.2d 830 (1973). Individuals may challenge legislation even when their own rights of free expression are not violated, so long as the very existence of the legislation "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612, 93 S.Ct. at 2915.

B. Overbreadth

[12] Plaintiffs initially argued that the ordinance is unconstitutionally overbroad because it prohibits the display of materials which are not obscene as to either adults or minors. While states and localities may adopt a broader definition of obscenity for children, *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), the Supreme Court has clearly held that mere nudity is not obscene as to either minors or adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). Plaintiffs contended that under the plain language of section 385.131(6)(a), as originally enacted,[10] the ordinance applied to any material with mere nudity on its cover, regardless of whether that nudity is harmful to minors. Defendant argued that subdivision (6)(a) was intended to incorporate the harmful to minors standard, and that it was therefore not unconstitutionally overbroad. Subsequent to the hearing on plaintiffs' motion for preliminary and permanent injunctive relief, the Minneapolis City Council enacted an amendment to subdivision (6)(a) which explicitly provides that in order to trigger the requirements of the ordinance, the cover of a book or magazine must be harmful to minors. Accordingly, plaintiffs' argument that the ordinance is overbroad as to minors because it prohibits the display of material which is not obscene as to minors is now moot.[11]

[13,14] Plaintiffs make a second argument that the ordinance is unconstitutionally overbroad which is unaffected by the recent amendment to subdivision (6)(a) of section 385.131. Plaintiffs contend that since the Supreme Court's decisions on obscenity require consideration of a work as "a whole," the ordinance's provision for separate consideration of the cover of a work and of its contents violates the first amendment. The Court recognizes that current constitutional standards do require that a work must be considered as a whole, so that an isolated scene or passage, which would be obscene if standing alone, will not render a work obscene if it bears a rational relationship to the rest of the work. *Miller v. California; Ginsberg v. New York*. Despite this general standard for obscenity, which applies to both minors and adults, the Court cannot accept plaintiffs' argument. The context of speech is an important factor in determining the scope of permissible regulation. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952) (each medium of communication presents particular problems and demands different rules). The "as a whole" standard has been developed by the Supreme Court in the context of legislation which banned outright the distribution or possession of certain materials deemed obscene to either minors or adults. In such a context, it makes sense to treat the work as a whole, since the issue is whether it is appropriate for individuals to *purchase* and read or view the entire work. In the instant case, by contrast, the primary concern which prompted the legislation was the *display* of materials which are harmful to minors. A child who walks into a store which openly displays material with sexually explicit covers may be harmed simply by viewing those covers. In effect, to a child who may never acquire and read or view the entire work, the cover of the book or magazine is the "work as a whole."

[15] Plaintiffs contend that the Supreme Court's decision in *Erznoznik* dictates a rejection of the argument that covers may be treated separately because a minor entering a store may only see the cover of a book. Plaintiffs maintain that a similar argument was made and rejected in *Erznoznik*: that to a motorist driving by a drive-in theater which has occasional displays of nudity, the nude scene constitutes

10. See footnote number 2 for the text of the original subsection 6(a).

11. Counsel for both parties have advised the Court that they agree that the effect of the amendment to the ordinance is to moot plaintiffs' argument that the ordinance is overbroad because it would prohibit the display of mere nudity.

the "whole work" to that viewer. The shortcoming in this argument is that the basis of the Supreme Court's decision in *Erznoznik* was that the drive-in movie ordinance was overbroad because mere nudity is not obscene as to adults *or* minors. In the instant case, under the plain language of the ordinance, the only covers which are regulated are those which *are* harmful to minors. The Court must therefore reject plaintiffs' argument that the ordinance is overbroad because it fails to treat works "as a whole."

C. Impact of the ordinance on adults' first amendment rights

Plaintiffs contend that the ordinance is overbroad as to adults because it unduly restricts the availability of materials which are clearly protected by the first amendment. Plaintiffs' argument is that there is a category of material which, while admittedly harmful to minors, is not obscene as to adults. Because of the ordinance's display restrictions, adult access to this category of material is circumscribed to some extent. First, plaintiffs contend that the requirement of an opaque cover restricts the ability of adults to view the cover of books or magazines that fall within the scope of the ordinance. Second, and more important, plaintiffs argue that the requirement of a sealed wrapper would prevent adults from thumbing through the book or magazine prior to deciding whether or not to purchase it.

Plaintiffs contend that the restrictive impact of the ordinance places it squarely within the Supreme Court's holding in *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957). In *Butler*, a unanimous Supreme Court struck down a statute which made it unlawful "to make available for the general reading public ... a book ... found to have a potentially deleterious influence upon youth." 352 U.S. at 382–83, 77 S.Ct. at 525. The Court found that this legislation was "not reasonably restricted to the evil with which it is said to deal," *id.* at 383, 77 S.Ct. at 526, since it prohibited the distribution of protected material to adults. The effect of the statute, according to the Court in *Butler*, was "to reduce the adult population of Michigan to reading only what is fit for children." *Id.*

Plaintiffs clearly overstate their case somewhat when they claim that the instant case poses the same problem that the Supreme Court was faced with in *Butler*.[12] The Minneapolis ordinance, unlike the statute in *Butler*, does not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question. Moreover, adults may peruse these materials in "adults only" bookstores or in "adults only" sections of stores open to both minors and adults. Finally, adults may thumb through the contents of publications which are required under the ordinance to have only their covers blocked from view. Despite these factors which distinguish the instant case from *Butler*, the ordinance clearly does infringe to some extent on adults' access to materials which are protected under the first amendment. Defendant argues that the restrictions imposed by the ordinance are justifiable time, place, and manner regulations.

[16] The Supreme Court has held on a number of occasions that a state or municipality may protect individual privacy by enacting *content neutral* time, place, and manner regulations of speech. *Erznoznik v. City of Jacksonville; Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (limitation on use of sound trucks); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (ban on willful making, on grounds adjacent to school, of any noise which disturbs the good order of the school session). When government sheds its neutrality, however, and "undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik*, 422 U.S. at 209, 95 S.Ct. at 2272. Plaintiffs contend that the

12. *But see Hillsboro News Co. v. City of Tampa*, 451 F.Supp. 952, 954 (M.D.Fla.1978).

Minneapolis ordinance is such an impermissible attempt at content based regulation, since it selects a particular category of speech.

[17] While content neutral regulation is a fundamental principle of first amendment law that should not be lightly abandoned, the Supreme Court has on a number of occasions considered the content of speech in the course of determining the scope of permissible regulation. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (public transit system may accept product advertising and reject political advertising); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (Stewart, J. concurring) (difference between commercial advertising and ideological communication permits regulation of former that would be impermissible with respect to latter); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (city may enact restrictive zoning ordinance that applies only to "adult" movie theaters). "Selective" time, place, and manner restrictions have been upheld when the speaker intrudes on the privacy of the home, *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), or when it is impractical for a captive audience to avoid exposure, *Lehman v. City of Shaker Heights*. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. at 86–86, 96 S.Ct. at 2459–2460 (Stewart, J. dissenting) (first amendment requires "that time, place, and manner regulations that affect protected expression be content neutral *except in the limited context of a captive or juvenile audience*" (emphasis added)).

[18] The fact that the display regulations in the ordinance are not strictly content neutral, then, does not necessarily mean that they are constitutionally invalid. Plaintiffs' challenge to the display regulation requires the Court to balance the city's interest in protecting minors from sexually explicit material against adults' right to read or view material protected by the first amendment. In balancing these competing concerns, the significant issue is whether the display regulations are sufficiently narrowly tailored to the governmental interest. There is no question that the city has a significant interest in shielding minors from sexually explicit material which fails within the constitutional definition of obscenity for minors. *Ginsberg*. The requirement of an opaque cover directly furthers that interest. *See American Booksellers Association v. Rendell*, — Pa.Super. —, 481 A.2d 919, 942 (1984) ("regulation of sales without control over commercial displays of materials deemed harmful to minors would render" efforts to protect the psychological well-being of youth meaningless). Moreover, on the other side of the balance, the opaque cover requirement imposes a minimal infringement on adults' first amendment rights. Under the ordinance, adults may still view the contents of materials that have only covers which are harmful to minors. The Court agrees with the reasoning in *M.S. News v. Casado*, 721 F.2d 1281 (10th Cir.1983), in which the Tenth Circuit recognized that an opaque cover requirement would to some degree restrict the viewing by adults of protected material, but upheld such a restriction on the ground that it was reasonable, in that adults continued to have some access to this material and could still purchase such material.

[19] While the Court subscribes to the reasoning of the Tenth Circuit in *M.S. News*, it recognizes that the Minneapolis ordinance is more restrictive than the ordinance in that case, since the Minneapolis ordinance provides for sealed wrappers as well as opaque covers. A sealed wrapper obviously works a greater restriction on adult access than does a simple opaque cover. Nevertheless, adults who desire to peruse the contents of materials which are deemed harmful to minors prior to purchasing them do have a number of options under the ordinance. Adults continue to have wholly unimpeded access to sexually explicit materials in stores which exclude minors and in stores which have segregat-

ed "adults only" sections. Second, nothing in the ordinance precludes retailers from keeping "inspection copies" of proscribed material behind the counter. Finally, an adult customer can request that a sealed wrapper be removed in order to allow inspection of the contents of a particular book or magazine covered by the ordinance. The Court finds that these options represent an appropriate accommodation between the city's strong interest in protecting minors from exposure to sexually explicit material and adult first amendment rights.

The Court's determination that the Minneapolis ordinance is a reasonable time, place, and manner regulation is supported by the Supreme Court's decision in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). In *Young*, the Supreme Court was faced with a challenge to a zoning ordinance which required that "adult" motion picture theatres not be located within 1,000 feet of any other such establishment or within 500 feet of a residential area. A plurality of the Court recognized that this was content based regulation, but upheld the ordinance because the city had a sufficient interest in preserving the quality of urban life, because society's interest in protecting erotic speech is of a lesser magnitude than its interest in protecting political speech, and because the ordinance regulated the place of unlawful speech without suppressing it. Justice Powell concurred in the judgment. While he disagreed that erotic materials can be treated differently than other forms of speech, he voted to uphold the zoning ordinance because of the minimal impact which it had on the freedom of expression. Justice Powell noted that

> The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience.

427 U.S. at 78–79, 96 S.Ct. at 2456.

The opinion in *Young* provides strong support for the conclusion that the Minneapolis ordinance's sealed wrapper requirement presents a mere inconvenience to adults who wish to look at sexually explicit materials before purchasing them, rather than an unconstitutional restriction. The requirement of a wrapper does not limit the creators of sexually explicit materials in any way. Moreover, adults may continue to browse through sexually explicit materials in stores which are "adults only" or which have "adults only" sections; in a sense, the ordinance simply regulates the place in which adults may have totally unrestricted access to these materials, and the manner in which retailers may display such materials. While some adults may be minimally inconvenienced by the ordinance, any such inconvenience is outweighed by the city's strong interest in protecting minors from being exposed to sexually explicit material. The Court's determination in this regard does not rest on a judgment that erotic or sexually explicit materials are entitled to a lesser magnitude of first amendment protections than other types of speech.[13] Rather, the Court believes that the restrictions contained in the ordinance are sufficiently narrowly tailored to the governmental interest.

Plaintiffs argue that the most serious reduction in adult access to protected materials caused by the ordinance is that which will result from the self-censoring behavior of retailers. Plaintiffs contend that the ordinance imposes a particularly onerous burden on retailers since separate decisions must be made with respect to whether the covers and the contents of books or magazines are harmful to minors. The effect of

13. The Court does take note of the fact, however, that the expression involved in this case is not of the type in which the effectiveness or the content of the message depends upon where or how it is conveyed. *Cf. Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). *See Young v. American Mini Theatres*, 427 U.S. at 78, 96 S.Ct. at 2456.

the ordinance, according to plaintiffs, will be that retailers, wary of prosecution, will avoid all materials having anything to do with sex, thereby depriving adults of access to protected materials. This argument is of little merit. First, plaintiffs concede that the "harmful to minors" definition in the ordinance comports with the requirements of the Constitution as set forth in *Miller v. California* and *Ginsberg v. New York*, so that retailers are not being asked to make a particularly novel judgment. Second, the ordinance requires that violations of its provisions must be "knowing" before a retailer will be subject to criminal prosecution. § 385.131(6). This scienter requirement undercuts the argument that retailers would practice self-censorship, since retailers are not required by the ordinance to be aware of the contents of every book or magazine in their shop. *See American Booksellers Association, Inc. v. Rendell*, — Pa.Super. —, 481 A.2d 919, 941 (1984). The Court notes that the case which plaintiffs rely on to support their access argument, *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), involved an obscenity ordinance which did not contain a scienter requirement.

While the Minneapolis ordinance does impose some limitation on adult access to protected material, then, the Court finds that any such infringement on adults is minimal, and clearly outweighed by the city's substantial interest in protecting the well being of minors. Moreover, while the ordinance is content based in the sense that it regulates only sexually explicit materials, it does not place any limitations on the creators of such materials, and its restrictions are narrowly tailored to the city's interest in protecting children. The ordinance is therefore a constitutionally valid time, place, and manner restriction. Finally, since the ordinance's definition of "harmful to minors" is not subject to constitutional attack on vagueness or overbreadth grounds, and since the ordinance forbids only knowing violations, the Court must reject plaintiffs' argument that adult access to protected material will be unconstitutionally restricted as a result of retailer self-censorship.

D. Equal protection

The Minneapolis ordinance provides that the following entities and individuals are exempt from criminal prosecution under the ordinance:

> Recognized and established schools, religious institutions, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies or quasi governmental sponsored organizations, and persons acting in their capacity as employees or agents of such organization. For the purpose of this section "recognized and established" shall mean an organization or agency having a full time faculty and diversified curriculum in the case of a school; a religious institution affiliated with a national or regional denomination; a licensed physician or psychiatrist or clinic of licensed physicians or psychiatrist; and in all other exempt organizations shall refer only to income tax exempted organizations which are supported in whole or in part by tax funds or which receive at least one third of their support from publicly donated funds.

§ 385.131(7)(a). Plaintiffs argue that this classification violates the equal protection clause. They contend that the appropriate standard of review for the ordinance's classification is the strict scrutiny test, so that the classification must be struck down unless defendant can establish that it is necessary to a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). Plaintiffs argue that defendant has totally failed to meet this standard. Alternatively, plaintiffs argue that the classification would fail even under the more lenient rational basis test. Finally, plaintiffs contend that if the Court holds that the classification violates the equal protection clause, it should strike down the entire ordinance rather than simply sever the offending provision.

Defendant contends that the exemption should be upheld if it is found to be rationally related to a legitimate governmental interest. *M.S. News v. Casado*, 721 F.2d at 1291. Defendant argues that the city has a legitimate interest in controlling or limiting the effects on minors of commercialized obscenity. The exemption for churches, schools, libraries, and other groups is rationally related to this interest, according to defendant, because it allows parents to expose their children to sexually explicit materials in a controlled, non-exploitive manner. Defendant views the institutions that are exempt under the ordinance as "agents" of the parent.

In *M.S. News v. Casado*, the Tenth Circuit rejected an equal protection challenge to a display ordinance similar to the Minneapolis ordinance. The court in *M.S. News* applied the rational basis test to a section of the ordinance which provided an affirmative defense to churches, schools, libraries, and various other non-commercial entities.[14] It noted first that the Supreme Court has recognized that there are " 'legitimate state interests at stake in stemming the tide of commercialized obscenity....' " *M.S. News*, 721 F.2d at 1291, quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). The Court then held that the distinction between commercial and non-commercial institutions which was drawn by the ordinance bore a rational relationship to that legitimate governmental interest: "Commercial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors." 721 F.2d at 1291–92. The Tenth Circuit quoted the following passage from the Supreme Court's decision in *Ginsberg v. New York* to support its contention that the rational basis test was the appropriate equal protection standard:

> To sustain state power to exclude material defined as obscenity by § 484–h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.

390 U.S. at 641, 88 S.Ct. at 1281.

The Court believes that the Tenth Circuit applied the wrong equal protection standard in *M.S. News*. The Supreme Court has held on a number of occasions that the strict scrutiny test is the proper standard whenever government classifies individuals' ability to exercise a fundamental right such as speech. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). In *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (2d Cir.1975), a case cited by plaintiffs, the court applied the strict scrutiny standard and held that an ordinance which prohibited nude dancing in bars, lounges, coffee shops and discotheques, but not in theatres, opera houses, and concert halls, violated equal protection. The strict scrutiny standard should similarly be applied to the classification in the instant case. The Supreme Court's reference to a mere rationality standard in *Ginsberg* is not contrary to this conclusion. The passage from *Ginsberg* which the Tenth Circuit relied on simply means that courts should not second-guess a legislative judgment that exposure to sexually explicit material is harmful to minors. The question in the instant case is the entirely different one of the extent to which the court should scrutinize a legislative classification which permits certain groups and individuals to exhibit materials already judged to be harmful to minors.

[20] The exemption in the Minneapolis ordinance cannot withstand the strict scrutiny test. The purpose of the exemption, according to defendant, is to allow parents

14. For other decisions which applied the rational basis test to similar classifications, *see State v. Luck*, 353 So.2d 225 (La.1977); *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn.1979); *Wheeler v. State*, 281 Md. 593, 380 A.2d 1052 (App.1977) (all involving exemptions to general obscenity statutes). In each of these cases, however, the court found that there was no rational basis for an exemption for schools, libraries, churches, and other non-commercial institutions.

to expose their children to sexually explicit material in a controlled context that is free of "pandering." This asserted purpose harmonizes with the overall purpose of the ordinance—controlling the effects of commercialized obscenity on minors. While the Court does not question the substantiality of the governmental interest behind the ordinance's exemption, it cannot find that the classification created by the exemption is *necessary* to that interest. *Shapiro v. Thompson.* The ordinance provides for criminal penalties only in those cases in which an individual *commercially* exhibits or displays material that is deemed harmful to minors. § 385.131(6), (6)(a). The individuals and organizations listed in the exemption, then, are free to utilize sexually explicit material for sex education or other non-commercial purposes. The exemption from criminal liability is therefore wholly unnecessary to the governmental interest in allowing parents and their "agents" to expose children to sexual materials in a controlled setting, since such activity is permissible under the ordinance. If churches, schools, libraries, or any of the other exempt groups were to *commercially* display or exhibit material that is harmful to minors as defined in the ordinance, they would be engaging in the very conduct that the ordinance seeks to regulate. Defendant does not argue, and indeed there can be no rational argument, that a minor would suffer less harm from a commercial display of sexually explicit material by a school, library, or church than from the same display by a traditional retailer. In sum, the defendant has failed to demonstrate any substantial reason for the ordinance's exemption, let alone that the classification created by the ordinance is necessary to a compelling governmental interest. The exemption therefore violates the equal protection clause of the fourteenth amendment.

Plaintiffs argue that if the exemption provision is held to violate the equal protection clause, then the Court may not simply sever the exemption, but rather must strike down the entire ordinance. The Court cannot agree. In *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn.1979), the Minnesota Supreme Court invalidated a similar exemption to a general obscenity ordinance, and held that it was appropriate to sever the invalidated portion. The intent of the exemption provision in *Sarette* was to permit the exempt organizations to disseminate or utilize obscene material for legitimate educational, scientific, or artistic purposes without fear of criminal prosecution. The Minnesota Supreme Court held that in view of the test for obscenity set forth in *Miller v. California*, which includes a consideration of whether material has serious literary, artistic, political, or scientific value, the exemption was unnecessary. The court therefore held that it could sever the exemption without defeating the intent of the legislature. 283 N.W.2d at 537.

The analysis employed in *Sarette* is applicable to the instant case. As set forth above, the intent of the exemption provision in this case is to permit the exempt organizations to display sexual materials to minors in a non-commercial context, thereby furthering parental control over their children's sex education. Since the ordinance provides for criminal prosecution in only those cases in which there is a commercial display, the Court can sever the exemption provision without defeating the intent of the council. The constitutionally deficient provision is superfluous. Accordingly, the Court will sever section 381.131(7)(a) from the rest of the ordinance.

CONCLUSION

The people of Minneapolis, acting through their elected City Council, are entitled to provide protection to their children from materials that are harmful to minors. The Court finds, as construed by this opinion, that this ordinance affords such protection within the limits of the United States Constitution.

Therefore, IT IS ORDERED that:

1. section 385 .7)(a), the exemption provision of the ordinance, is declared unconstitutional and is severed from the remainder of Minneapolis Ordinance § 381.131;

2. defendant is preliminarily and permanently enjoined from enforcing section 385.131(7)(a); and

3. plaintiffs' motion for a preliminary and permanent injunction restraining the use and enforcement of the ordinance, together with its request for a declaratory judgment, is in all other respects denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX

Title 15, section 385.131 of the Minneapolis Code of Ordinances provides as follows:

Distribution of Materials Harmful to Minors

(1) In enacting this section, the city council declares its purposes and intent to be as follows:

There exists an urgent need to prevent commercial exposure of minors to sexually provocative written, photographic, printed, sound, or published materials as these are hereafter defined and which are hereby declared to be harmful to minors.

(2) It is in the best interest of the health, welfare, and safety of the citizens of this city and state, and especially of minors within the city and state, that commercial dissemination of such sexually provocative written, photographic, printed, sound, or published materials deemed harmful to minors be restricted to persons over the age of 17 years; or if available to minors under the age of 18 years, that the availability of such materials be restricted to sources within established and recognized schools, religious institutions, museums, medical clinics and physicians, hospitals, public libraries, the minor's home, or government sponsored organizations.

(3) As used in this section, the terms defined in this subdivision have the meanings given them:

(a) "Minor" means any person under the age of 18 years;

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state;

(c) "Sexual Conduct" includes any of the following depicted sexual conduct:

(i) Any act of sexual intercourse, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

(ii) Sadomasochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a revealing costume or the condition of being fettered, bound, or otherwise physically restricted on the part of one so clothed.

(iii) Masturbation or lewd exhibitions of the genitals including any explicit, close-up representation of a human genital organ.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(v) An act of sexual assault where physical violence or drugs are employed to overcome the will of or achieve the consent of a person to an act of sexual conduct and the effects or results of the violence or drugs are shown.

(d) "Sexual Excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(e) "Harmful to Minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, or sexual excitement, when it:

(1) predominantly appeals to the prurient, shameful, or morbid interest of minors in sex; and

(2) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

APPENDIX—Continued

(3) taken as a whole, lacks serious literary, artistic, political or scientific value.

(f) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(1) the character and content of any material which is reasonably susceptible of examination by the defendant; and

(2) the age of the minor, provided however that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

(4) It is unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, video tape, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sexual excitement and which is harmful to minors.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in clause (a), or which contains explicit and detailed verbal descriptions or narrative accounts of nudity, sexual excitement, or sexual conduct and which taken as a whole is harmful to minors.

(5) It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture show or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement and which is harmful to minors.

(6) It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.

(a) It is also unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is blocked from view by an opaque cover. The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are blocked from view by an opaque cover.

(b) The provisions of this subdivision shall not apply to distribution or attempt to distribute the exhibition, display, sale, offer of sale, circulation, giving away of material harmful to minors where such material is sold, exhibited, displayed, offered for sale, given away, circulated, distributed, or attempted to be distributed under circumstances where minors are not present, not allowed to be present, or are not able to view such material or the cover, covers, or packaging of such material. Any business may comply with the requirements of this clause by physically segregating such material in a manner so as to physically prohibit the access to and view of the material by minors, by prominently posting at the entrance(s) to such restricted area; "Adults Only—you must be 18 to enter," and by enforcing said restrictions.

(7) The following are exempt from criminal or other action hereunder:

(a) Recognized and established schools, religious institutions, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies or quasi governmental sponsored organi-

APPENDIX—Continued

zations, and persons acting in their capacity as employees or agents of such organization. For the purpose of this section "recognized and established" shall mean an organization or agency having a full time faculty and diversified curriculum in the case of a school; a religious institution affiliated with a national or regional denomination; a licensed physician or psychiatrist or clinic of licensed physicians or psychiatrists; and in all other exempt organizations shall refer only to income tax exempted organizations which are supported in whole or in part by tax funds or which receive at least one third of their support from publicly donated funds.

(b) Individuals in a parental relationship with the minor.

HONG KONG DEPOSIT AND GUARANTY COMPANY LIMITED, Michael J. Johnson and Eoghan M. McMillan, as Liquidators of Hong Kong Deposit and Guaranty Company Limited, Plaintiffs,

v.

Milton L. HIBDON and John M. Shaheen, Defendants.

HONG KONG DEPOSIT AND GUARANTY COMPANY LIMITED, Michael J. Johnson and Eoghan M. McMillan, As Liquidators of Hong Kong Deposit and Guaranty Company Limited, Bil (Vila) Bank Limited, and Stanley Uren, As Liquidator of Bil (Vila) Bank Limited, Plaintiffs,

v.

Bradford A. SHAHEEN, Defendant.

Nos. 83 Civ. 5895, 83 Civ. 5896.

United States District Court, S.D. New York.

Feb. 25, 1985.

The liquidators of an insolvent Hong Kong corporation filed action to recover alleged loans. The defendants filed a motion to dismiss for lack of subject matter jurisdiction. The District Court, Edward Weinfeld, J., held that the relevant citizenship for purposes of determining whether the District Court had subject matter jurisdiction was not that of the insolvent Hong Kong corporation, but rather, that of the individual liquidators, who were citizens or subjects of Great Britain, an entity which is clearly a "foreign state."

Motion to dismiss denied.

1. Federal Courts ⇐275

For purposes of determining whether district court had subject matter jurisdiction over action by liquidators of insolvent Hong Kong corporation to recover alleged loans, relevant citizenship was not that of Hong Kong corporation, but rather, that of individual liquidators who were citizens or subjects of Great Britain, an entity which is clearly a "foreign state" within meaning of pertinent constitutional and statutory provisions. 28 U.S.C.A. § 1332(a)(2); Fed. Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.; U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts ⇐275, 290

Where representative sues on behalf of another, it is representative's citizenship that determines diversity and alienage jurisdiction.

3. Federal Courts ⇐275

Hong Kong law did not control district court's subject matter jurisdiction over action by liquidators of insolvent Hong Kong corporation to recover alleged loans. 28 U.S.C.A. § 1332(a)(2); U.S.C.A. Const. Art. 3, § 2, cl. 1.

4. Federal Courts ⇐275

Hong Kong statute providing that liquidators may bring suit in name and on behalf of company did not preclude liquidators from asserting their British citizenship for purposes of determining whether dis-

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 352

(By Senators Burdette, Mr. President, Plymale, Minard, Sharpe, Ross, Schoonover, Anderson, Whitlow, Boley and Helmick)

[Originating in the Committee on the Judiciary; reported March 1, 1994.]

A BILL to amend and reenact article eight-a, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to prohibiting the preparation, dissemination or exhibition of obscene material to minors; definitions; injunctive relief; prohibiting hiring, employing or using minors in doing obscene acts; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That article eight-a, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 8A. PREPARATION, DISSEMINATION OR EXHIBITION OF OBSCENE MATERIAL TO MINORS.

§61-8A-1. Obscene material and exhibitions.

(a) For purposes of this article, the term "minor" means an individual under the age of eighteen years. It shall be unlawful for any person, firm or corporation to knowingly and intentionally disseminate obscenity to a minor. A person, firm or corporation disseminates obscenity within the meaning of this article if the person, firm or corporation:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides or offers or agrees to exhibit, present, rent or to provide any obscene still or motion picture, film, filmstrip or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance or publication of the obscene.

(b) For purposes of this article, any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying statewide contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) A reasonable person would find that the material taken as a whole lacks serious literary, artistic, political or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of West Virginia.

(c) As used in this article, "sexual conduct" means:

(1) Vaginal, anal or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to minors or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such minors or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material within the meaning of this article with the purpose and intent of disseminating it unlawfully to a minor.

(f) It shall be unlawful for a person, firm or corporation

to advertise or otherwise promote the sale of material to a minor which is represented or held out by said person, firm or corporation as obscene.

(g) It shall be unlawful for any person, firm or corporation, who with knowledge that an individual is under the age of eighteen years, or who should reasonably know that such individual is under the age of eighteen years, to hire, employ or use a minor in doing any of the acts which are for the purposes of this article obscene.

(h) Any person who knowingly violates subsection (a), (e), (f) or (g) of this section is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for not less than one year nor more than five years or fined not less than five hundred dollars nor more than ten thousand dollars or both fined and imprisoned. A corporation or firm that violates said subsections is guilty of a felony and, upon conviction thereof, shall be fined not less than five thousand dollars nor more than twenty-five thousand dollars. The sentence provided herein upon conviction for a violation of said subsections are mandatory and shall not be subject to suspension or probation

§61-8A-2. Injunctive relief.

The circuit court has jurisdiction to issue an injunction to enforce the purposes of this article upon petition by the prosecuting attorney or any citizen of the county who can show reasonable cause for making such application. No bond may be required unless for good cause shown.

§61-8A-3. Reasonable belief that a minor is eighteen years of age.

No person, firm or corporation shall be guilty of distributing or exhibiting obscene material to a minor when such person has reasonable cause to believe that the minor involved was eighteen years of age or more and such minor exhibited to such person a driver's license, draft card or other official or apparently official document purporting to establish that such minor was eighteen years of age or more.

(NOTE: The purpose of the bill is to define obscenity and provide new mandatory criminal penalties for those who disseminate or promote obscene material to minors or use minors in obscene acts.)

NEW YORK

§ 235.20. Disseminating indecent material to minors; definitions of terms

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

HISTORY:

Add, L 1967, ch 791, § 34, eff Sept 1, 1967. Substance derived from § 484-h(1)(a-f).
Former § 235.20, add. L 1965, ch 1030, eff Sept 1, 1967. Substance derived from § 484-h. Repealed, L 1967, ch 791, § 33, eff Sept 1, 1967.
Sub 6, amd, L 1974, ch 989, eff Sept 1, 1974.
Sub 6, par (a), add, L 1974, ch 989, eff Sept 1, 1974.
Former sub 6, par (a), deleted, L 1974, ch 989, eff Sept 1, 1974.
Sub 6, par (c), add, L 1974, ch 989, eff Sept 1, 1974.
Former sub 6, par (c), deleted, L 1974, ch 989, eff Sept 1, 1974.

NOTES:

Commission Staff Notes:

Sections 235.20, 235.25 and 235.30 are derived from former Penal Law §§ 484-h, 484-f and 484-g, respectively. Except for the formal change of conforming the punishment to the scheme of this revision, the language of these sections is identical with the former law. The subject matter was thoroughly investigated over a period of years by the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material. As a result of that committee's work, these sections were enacted in 1963. Therefore, no changes have been suggested here, although stylistically these sections differ from this revision.

212-870 3222

PRINTER'S NO. 2042

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1689 Session of 1989

INTRODUCED BY GAMBLE, DeLUCA, KAJUNIC, FLEAGLE, SEMMEL, FEE, GIGLIOTTI, PITTS, MARSICO, JACKSON, SAURMAN, CARLSON, WOGAN, CLYMER, J. L. WRIGHT, PHILLIPS, MRKONIC, LEE, DIETTERICK, FARGO, MAIALE, HOWLETT, BELARDI, MELIO, SERAFINI, TRELLO, GRIST, JOHNSON, E. Z. TAYLOR, BILLON, DEMPSEY, JADLOWIEC, COLAIZZO, HESS, BURD, BUNT, DOMBROWSKI, ROBINSON, BISHOP, BECKLER, LAUGHLIN, ADOLPH, FOSTER, CIVERA, HARPER, MICHLOVIC AND OLASZ, JUNE 13, 1989

REFERRED TO COMMITTEE ON JUDICIARY, JUNE 13, 1989

AN ACT

Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, providing for an offense relating to the sale of certain recordings.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 18 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5905. Sale of certain recording prohibited.

(a) Offense defined.--No person shall sell or offer to sell in this Commonwealth any phonograph record, magnetic tape or compact disc which contains lyrics descriptive of, advocating or encouraging suicide, sodomy, incest, beastiality, sadomasochism, adultery or other forms of sexual activity in a violent context or advocating or encouraging murder, morbid violence or the use of illegal drugs or alcohol, unless the cover of such material

contains a parental warning that the lyrics contain such violent messages.

(b) Required label.--The label required by this section shall be placed on the front cover of the phonograph record, magnetic tape or compact disc. Such label shall not be readily removable and shall be printed with black letters of number 12 type or more on a yellow fluorescent background, except that the words "WARNING" and "PARENTAL ADVISORY" shall be printed in letters which are one-half inch high. The warning shall read substantially as follows:

"WARNING: May contain explicit lyrics descriptive of or advocating one or more of the following:

Suicide

Sodomy

Incest

Bestiality

Sadomasochism

Adultery

Sexual activity in a violent context

Murder

Morbid violence

Use of illegal drugs or alcohol.

PARENTAL ADVISORY"

(c) Grading.--Any person who violates subsection (a) commits a misdemeanor of the third degree.

(d) Injunction.--The attorney for the Commonwealth may institute proceedings in equity in the court of common pleas of the county in which any person violates or is about to violate this section for the purpose of enjoining such violation.

Section 2. This act shall take effect in 60 days.

HLS 94-103

Regular Session, 1994

HOUSE BILL NO.

BY REPRESENTATIVE MALIK

RECORDINGS: Requires labeling of certain recordings and prohibits sale thereof to minors

AN ACT

To enact R.S. 14:91.11.1, relative to the sale, exhibition, or distribution of lyrics harmful to minors; to prohibit the sale, exhibition, or distribution of those items which encourage certain behavior; to enact Chapter 19-D of Title 51 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 51:1748 through 1750, relative to the sale of certain labeled recordings; to require the labeling of recordings which advocate or encourage certain behavior; to exempt broadcasters from the provisions of the Act; to provide civil penalties for violations; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 14:91.11.1 is hereby enacted to read as follows:

§91.11.1. Sale, exhibition, or distribution of lyrics harmful to minors

A.(1) The unlawful sale, exhibition, or distribution of lyrics harmful to minors is the intentional sale, distribution, exhibition, or display of lyrics harmful to minors to any unmarried person under the age of seventeen years, or the possession of lyrics harmful to minors with the intent to sell, distribute, exhibit, or display such material to any unmarried

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HLS 91-103

person under the age of seventeen years, at any commercial establishment which is open to persons under the age of seventeen years.

(2) "Lyrics harmful to minors" is defined as any phonograph record, album, audio cassette, compact disc, or audio tape recording, which has as its basic theme the advocation or encouragement of rape, incest, bestiality, sadomasochism, prostitution, homicide, unlawful ritualistic acts, suicide, the commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin, the use of any controlled dangerous substance scheduled in the Louisiana Uniform Controlled Dangerous Substances Law, or the unlawful use of alcohol and which contains thereon a label or other indicator suggesting that its lyrics may be explicit.

B. Lack of knowledge of age or marital status shall not constitute a defense, unless the defendant shows that he had reasonable cause to believe that the minor involved was either married or seventeen years of age or more and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such a minor was either married or seventeen years of age or more.

C. Nothing in this Section shall make an activity which is otherwise prohibited by law a legal activity.

D. The provisions of this Section shall not apply to the activities of broadcasters in connection with the operation of radio or television stations licensed by the Federal Communications Commission.

E. Whoever is found guilty of violating the provisions of this Section shall be fined not more than one thousand dollars or imprisoned for not more than six months, or both.

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Section 2. Chapter 19-D of Title 51 of the Louisiana Revised Statutes of 1950, comprised of R.S. 51:1748 through 1750, is hereby enacted to read as follows:

CHAPTER 19-D. UNLABELED RECORDINGS

§1748. Definitions

(1) "Person" means any producer, manufacturer, or distributor of a recording, but does not include a retailer who has a commercial establishment in this state which sells directly to the ultimate consumer.

(2) "Recording" means any phonograph record, album, audio cassette, compact disc, or audio tape recording.

§1749. Unlabeled recordings; prohibitions

A. No person shall sell or offer to sell in this state any recording containing lyrics which have as their basic theme the advocation or encouragement of rape, incest, bestiality, sadomasochism, prostitution, homicide, unlawful ritualistic acts, suicide, the commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin, the use of any controlled dangerous substance scheduled in the Louisiana Uniform Controlled Dangerous Substances Law, or the unlawful use of alcohol, unless the cover thereof contains a parental warning label.

B.(1) The label required by this Chapter shall be placed on the front cover of the recording by the manufacturer or distributor prior to the application of any wrapping that is intended to be removed by the consumer before use.

(2) Such label shall not be readily removable and shall be printed in black letters in twelve point typeface or more. The warning shall read substantially as follows: EXPLICIT LYRICS -- PARENTAL ADVISORY.

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§1750. Violations; civil remedies

A. Any person who violates a provision of this Chapter is liable for a civil penalty in an amount not to exceed the sum of three thousand dollars for each violation. Each recording which is sold or offered for sale in violation of this Chapter is considered a separate violation.

B. The district attorney may institute legal proceedings to enforce the civil penalties in the district court for the parish in which the violation occurred.

C. The district attorney may also institute civil proceedings seeking injunctive relief to restrain or prevent violations of this Chapter in the district court for the parish in which a violation occurred.

D. For purposes of this Chapter, a violation occurs in either the parish in which the recording entered this state or the parish in which the recording was sold or offered for sale.

E. Any civil penalty imposed and collected pursuant to this Chapter shall be deposited in the criminal court fund of the parish in which the violation occurred.

F. When a corporation is charged with violating this Chapter, the corporation and its president, vice president, secretary, and treasurer may all be named as defendants. Upon finding that a violation of this Chapter occurred, the corporation and all corporate officers who are named as defendants may be liable for any civil penalty imposed pursuant to this Chapter.

G. Nothing in this Chapter shall make an activity which is otherwise prohibited by law a legal activity.

Section 3. This Act shall become effective on January 1, 1992.

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HLS 91-183

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the bill.

Haik Act HB No.

Proposed law makes it a crime to sell, exhibit, or distribute certain harmful lyrics to an unmarried person under the age of 17.

Proposed law defines harmful lyrics as any phonograph record, album, audio cassette, compact disc, or audio tape recording which has as its basic theme the advocacy or encouragement of the following:

(1) Rape.
(2) Incest.
(3) Bestiality.
(4) Sadomasochism.
(5) Prostitution.
(6) Homicide.
(7) Unlawful ritualistic acts.
(8) Suicide.
(9) The commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin.
(10) The use of any controlled dangerous substance.
(11) The unlawful use of alcohol.

Proposed law provides penalties of a fine of not more than $1,000, or imprisonment for not more than six months, or both, for a violation of the foregoing.

Proposed law would prohibit producers, manufacturers, or distributors from selling or offering to sell any recording, such as phonograph records, albums, cassettes, compact discs, and wire or tape recordings, if the lyrics have as their basic theme the advocacy or encouragement of the foregoing enumerated types of behavior, including any form of sexual conduct in a violent context, unless the cover thereof contains a label such as "EXPLICIT LYRICS -- PARENTAL ADVISORY".

Proposed law requires that the label be prominently placed on the recording by the manufacturer or distributor and not readily removable.

Proposed law provides a civil penalty not to exceed $3,000 for each violation and authorizes the naming of officers of a corporation violating proposed law as defendants and liable for any civil penalty imposed.

Proposed law provides an effective date of January 1, 1992.

(Adds R.S. 14:91.11.1 and R.S. 51:1748-1750)

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HLS 91-162

Regular Session, 1991

HOUSE BILL NO.

BY REPRESENTATIVE HAIK

RECORDINGS: Criminalizes sale of certain recordings to minors

AN ACT

To enact R.S. 14:91.11.1, relative to the sale, exhibition, or distribution of lyrics harmful to minors; to prohibit the sale, exhibition, or distribution of those items which encourage certain behavior; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 14:91.11.1 is hereby enacted to read as follows:

§91.11.1. Sale, exhibition, or distribution of lyrics harmful to minors

A.(1) The unlawful sale, exhibition, or distribution of lyrics harmful to minors is the intentional sale, distribution, exhibition, or display of lyrics harmful to minors to any unmarried person under the age of seventeen years, or the possession of lyrics harmful to minors with the intent to sell, distribute, exhibit, or display such material to any unmarried person under the age of seventeen years, at any commercial establishment which is open to persons under the age of seventeen years.

(2) "Lyrics harmful to minors" is defined as any phonograph record, album, audio cassette, compact disc, or audio tape recording, which has as its basic theme the advocation or encouragement of rape, incest, bestiality, sadomasochism,

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prostitution, homicide, unlawful ritualistic acts, suicide, the commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin, the use of any controlled dangerous substance scheduled in the Louisiana Uniform Controlled Dangerous Substances Law, or the unlawful use of alcohol and which contains thereon a label or other indicator suggesting that its lyrics may be explicit.

B. Lack of knowledge of age or marital status shall not constitute a defense, unless the defendant shows that he had reasonable cause to believe that the minor involved was either married or seventeen years of age or more and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such a minor was either married or seventeen years of age or more.

C. Nothing in this Section shall make an activity which is otherwise prohibited by law a legal activity.

D. The provisions of this Section shall not apply to the activities of broadcasters in connection with the operation of radio or television stations licensed by the Federal Communications Commission.

E. Whoever is found guilty of violating the provisions of this Section shall be fined not more than one thousand dollars or imprisoned for not more than six months, or both.

Section 2. This Act shall become effective on January 1, 1992.

ORIGINAL

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HLS 91-102

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the bill.

Haik Act HB No.

Proposed law makes it a crime to sell, exhibit, or distribute harmful lyrics to an unmarried person under the age of 17.

Proposed law defines harmful lyrics as any phonograph record, album, cassette, compact disc, or tape recording which has affixed thereto a parental advisory warning and which has as its basic theme the advocation or encouragement of the following:

(1) Rape.
(2) Incest.
(3) Bestiality.
(4) Sadomasochism.
(5) Prostitution.
(6) Homicide.
(7) Unlawful ritualistic acts.
(8) Suicide.
(9) The commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin.
(10) The use of any controlled dangerous substance.
(11) The unlawful use of alcohol.

Proposed law provides penalties of a fine of not more than $1,000, or imprisonment for not more than six months, or both, for a violation of the foregoing.

Proposed law provides an effective date of January 1, 1992.

(Adds R.S. 14:91.11.1)

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HLS 94-943

Regular Session, 1994

HOUSE BILL NO. 153

BY REPRESENTATIVE HAIK

ORIGINAL

CRIME: Prohibits sale to minors of materials which encourage certain behavior

AN ACT

To amend and reenact R.S. 14:91.11(A)(2), relative to the sale, exhibition, or distribution of material harmful to minors; to include within the prohibition those items which encourage certain behavior; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 14:91.11(A)(2) is hereby amended and reenacted to read as follows:

§91.11. Sale, exhibition, or distribution of material harmful to minors

A.

* * *

(2) "Material harmful to minors" is defined as any paper, magazine, book, newspaper, periodical, pamphlet, composition, publication, photograph, drawing, picture, poster, motion picture film, video tape, figure, phonograph record, album, cassette, compact disc, wire or tape recording, or other similar tangible work or thing which:

(a) Exploits, is devoted to, or principally consists of descriptions or depictions of illicit sex or sexual immorality for commercial gain, and when the trier of fact determines that the average person applying contemporary community standards

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HLS 90-963
DIGEST

(8) Suicide.
(9) The commission of a crime upon the person or property of another because of his sex, race, color, religion, or national origin.
(10) The use of any controlled dangerous substance.
(11) The unlawful use of alcohol.

(Amends R.S. 14:91.11(A)(2))

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MLS 90-944
Regular Session, 1990

HOUSE BILL NO. 154

BY REPRESENTATIVE HAIK

ORIGINAL

CRIME: Requires labeling of recordings and prohibits sale to minors of items which encourage certain behavior

AN ACT

To amend and reenact R.S. 14:91.11(A)(2), relative to the sale, exhibition, or distribution of material harmful to minors; to include within the prohibition those items which encourage certain behavior; to enact R.S. 14:106.2, relative to the sale of certain recordings; to require the labeling of recordings which describe or encourage certain behavior; to provide penalties for failure to label; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 14:91.11(A)(2) is hereby amended and reenacted to read as follows:

§91.11. Sale, exhibition, or distribution of material harmful to minors

A.

* * *

(2) "Material harmful to minors" is defined as any paper, magazine, book, newspaper, periodical, pamphlet, composition, publication, photograph, drawing, picture, poster, motion picture film, video tape, figure, phonograph record, album, cassette, compact disc, wire or tape recording, or other similar tangible work or thing which:

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NLS 90-544

distributor prior to the application of any wrapping that is intended to be removed by the consumer before use.

(2) Such label shall not be readily removable and shall be printed in block letters in twelve point typeface or more on a yellow fluorescent background, except that the words "warning" and "parental advisory" shall be printed in ten point typeface. The warning shall read substantially as follows:

WARNING: May contain explicit lyrics descriptive of or advocating one or more of the following: rape, incest, bestiality, sadomasochism, violent sex, prostitution, murder, satanism, suicide, ethnic intimidation, or use of illegal drugs or alcohol. PARENTAL ADVISORY.

C.(1) On a first conviction, whoever violates a provision of this Section shall be fined not less than one thousand dollars nor more than two thousand dollars or imprisoned with or without hard labor for not more than one year, or both.

(2) On a second conviction, whoever violates a provision of this Section shall be fined not less than two thousand dollars nor more than five thousand dollars or imprisoned with or without hard labor for not less than six months nor more than three years, or both.

D.(1) If any employee of a retail establishment acting in the course or scope of his employment is arrested for violating a provision of this Section, the employer shall reimburse the employee for all attorney fees and other costs of defense of such employee. Such fees and expenses may be fixed by the court exercising criminal jurisdiction.

(2) The imprisonment provided in Subsection C may be imposed at the court's discretion if the court determines that the offender, due to his employment, could not avoid engagement in the offense, unless the offender is a manager or other person

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HLS 98-944
Digest

(11) The unlawful use of alcohol.

Proposed law would require the labeling of recordings, such as phonograph records, albums, cassettes, compact discs, and wire or tape recordings, if the lyrics described, advocated, or encouraged the foregoing enumerated types of behavior, including any form of sexual conduct in a violent context.

Proposed law requires that the label be prominently placed on the recording by the manufacturer or distributor and not readily removable.

Proposed law provides upon a first conviction, a penalty of a fine not less than $1,000 nor more than $2,000 or imprisonment for not more than one year, or both. Upon a second conviction, provides a penalty of a fine not less than $2,000 nor more than $5,000 or imprisonment for no less than six months nor more than three years, or both.

Proposed law allows the employee of a retail establishment who was arrested for a violation of proposed law to be reimbursed by his employer for the cost of his defense and, additionally, allows the judge discretion in imposing sanctions upon the employee, unless the employee is acting in a managerial capacity.

Proposed law provides that the officers of the corporation which violate proposed law can also be named as defendants.

(Amends R.S. 14:91.11(A)(2); Adds R.S. 14:106.2)

ORIGINAL

American Family Association Law Center

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Tupelo, Mississippi 38803

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DATE: 2-9-94

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CONFIDENTIALITY NOTICE

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FROM: Bruce Green

PAUL D. RUSSINOFF
Assistant General Counsel and
Director of State Relations

RIAA

Re: Memorandum in Opposition to Substitute Senate Bill No. 216, An Act Relating to the Sale Display or Distribution of Material "Harmful to Minors".

This memorandum of law has been prepared by the Recording Industry Association of America, Inc. (RIAA), a trade association representing record companies who produce, manufacture or distribute over 90% of all authorized sound recordings in the United States.

Under established Supreme Court precedents, S.B. 216 could be found to be both vague and overbroad and an impermissible example of compelled speech and prior restraint all in violation of both the First Amendment of the Constitution of the United States and Article 1, Sec. 5 of the Constitution of the State of Alaska which, according to the Alaskan Supreme Court, "protects speech in a more explicit and direct manner than the federal constitution", Messerli v. State, 626 P.2d 81 (Alaska 1980).

S.B. 216 attempts to regulate material "harmful to minors" which "means a graphic description, representation of, or incitement to violent behavior that if acted out would constitute felonious behavior that is morally repugnant to the community as a whole," S.B. 216, Sec 1, (c)(1)(B). The above language lacks any guidelines or definitions of "violent behavior" and impinges upon protected expression. Depictions of violence receive the complete and unimpeded protection of the First Amendment. The Supreme Court has stated that "...deeds of bloodshed, lust or crime..." receive full First Amendment protection, Winters v. New York, 333 U.S. 507, 508 (1948). In fact, a lower court has even stated that "...material limited to forms of violence is given the highest degree of (First Amendment) protection...", American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

While S.B. 216 contains the Constitutionally permissible "harmful to minors" test as found in Ginsberg v. New York, 390 U.S. 629 (1968), there is no specific listing of prohibited acts or a detailed listing of prohibited areas of the human anatomy, the exposure of

which may be a violation under the statute. S.B. 216 simply prohibits " a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it (1) predominately appeals to the prurient, shameful, or morbid interest of minors in sex: (2) is patently offensive to contemporary community standards in the adult community as a whole with respect to what is suitable sexual material for minors: and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.", S.B. 216 Sec. 1 (c)(1)(A).

The above complex and subjective test is designed to be undertaken by a judge or jury in a court of law under judicial rules of evidence and requires the assistance of counsel in its interpretation. As set out in S.B. 216, this test would presumably be performed by someone in the sales and or distribution chain without the above safeguards. As such, S.B. 216 may fail to give the ordinary person notice as required by the Supreme Court in NAACP v. Button, 317 U.S. 415 (1963) and will thus be unconstitutionally vague. Additionally, the requirement that the material taken as a whole must lack serious literary, artistic, political or scientific value for minors will force record retailers to examine their entire inventories, consisting of thousands of titles, album by album, cassette by cassett, and CD by CD to determine whether any of the sound recordings may possibly fall within S.B. 216's labeling requirements.

Moreover, speech may be regulated by the state only after that particular example of speech has, by judicial determination, been determined to violate a constitutional statute. Requiring a private party to make a determination as to what material is "harmful to minors" invites that party, at the threat of criminal prosecution, to be more inclusive than would be necessary so as not to offend the statute. A statute structured like S.B. 216, by requiring that the "harmful to minors" test be performed on otherwise protected expression, outside a court of law, may be thus unconstitutionally overbroad.

Section 11.61.128 (a) and (b) may also be challenged as overbroad. Here, the statute attempts, respectively, to regulate lyrics which "include or are descriptive of material harmful to minors" and "packaging which uses words symbols, or pictures that include or describe material harmful to minors". Reviewing the plain meaning of the words of the bill, both sections will cover protected expression which "may be descriptive of material harmful to minors", but which may not itself be "harmful to minors".

Vagueness and overbreadth aside, S.B. 216 via its labeling requirement, will compel speech and operate as a prior restraint in violation of the Alaskan and United States Constitutions. The government may not compel speech, i.e. the labeling of what is otherwise protected artistic expression. Requiring a lable or opaque covering of material which has not been deemed indecent or obscene under a constitutionally correct statute by a court of law is an example of the type of compelled speech which has been found unconstitutional in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Further, a labeling or covering requirement like that mandated in S.B. 216 will also operate as an unconstitutional prior restraint on speech. Here, the fact that otherwise protected expression must be labeled or covered to be disseminated, without any judicial determination as its harmful character, may be seen as a prior restraint of speech in violation of the First Amendment of the United States Constitution and Art. 1 Sec. 5 of the Alaskan Constitution.

Most importantly, S.B. 216 is simply unnecessary. Largely in response to the interest that various local governments and parental groups, such as the National Parents and Teachers Association, have shown in this issue, the recording industry has implemented a tremendously sucessful labeling program that accomplishes what S.B. 216 has set out to do: it alerts parents to the explicit contents of some recordings so that they may interpret them in the context of individual family values.

It is possible that to avoid penalties record producers may either distribute no recordings in Alaska, or lable all recordings, rendering the law futile and impotent. Second, there will be massive and costly disruption of the distribution of recordings in Alaska, resulting in higher costs to Alaskan consumers. Recordings are marketed and distributed on a national level. No other state in the union requires sound recordings to be labeled. Alaska's singular regulation would require creation of special handling procedures, a separate operation to review and lable recordings, separate inventories and separate return centers. All of these requirements would significantly increase the cost of recordings in Alaska, and would have a similar impact on mail-order and record club sales.

Finally, if enacted and declared unconstitutional, S.B. 216 could cost Alaskan taxpayers hundreds of thousands of dollars, as the state could be ordered to pay the attorneys fees of those who challenged the law under Section 1988 of the Civil Rights Act, Title IX, U.S.C. A similar unconstitutional bill which was enacted into law cost

Missouri taxpayers over $200,000 in Video Software Dealers Assn. v. Webster, 968 F.2d 684 (1992).

These are only some of the more obvious problems and complications relating to S.B. 216. If you have further questions, or would like more information, please do not hesitate to contact RIAA.

THE RECORDING INDUSTRY'S VOLUNTARY LYRICS LABELING PROGRAM

Since 1985, the recording industry has responsibly addressed the concerns of the public, and parents in particular, regarding the explicit nature of certain sound recordings. In that year, the RIAA reached an agreement with the National Parent Teacher Association and the Parents Music Resource Center under which record companies would voluntarily identify and label newly released sound recordings with lyrics that reflect explicit violence, explicit sex or explicit substance abuse.

In 1990, the RIAA greatly enhanced the effectiveness of this voluntary program as a tool for parents and guardians who wish to monitor what their children purchase and listen to by implementing a uniform parental advisory logo that continues in use today. The Parental Advisory program allows record companies and their artists to exercise their artistic rights and, at the same time, exercise their social responsibilities to the community as well.

The black and white logo, shown here, is made part of the each record's permanent packaging, beneath the shrink-wrap, and is now widely used not only by RIAA members, which represent approximately 90 percent of the music industry, but also by most non-member companies as well, particularly those releasing rap and heavy metal music.

While the decision to label a particular sound recording is properly left to each company, in conjunction with the artist, there is little question that the industry has taken this program seriously. Indeed, virtually every recording that has been the target of public controversy, either because of its sexually-explicit or violently-explicit nature, has a voluntary Parental Advisory on its cover. And the Parental Advisory also has served as an important tool for radio stations and record retailers when considering whether specific explicit recordings should be broadcast or made available for sale to minors.

Given the increased public attention to violence in America, and the desire of all Americans to eliminate it, the recording industry may well hear calls for a government censorship system or for a voluntary ratings system similar to the one currently in use by the motion picture industry and those now being considered for the video game industry as well.

While a voluntary ratings system may be appropriate for motion pictures, its application to sound recordings would be both inappropriate and impractical. First, the lyrical content of musical recordings is far more subjective than the explicit visual images of motion pictures. In the context of violence for example, what some may perceive as a "call to arms" may in fact be a cry for help to address the hard realities of the artist's social environment. Second, given the vast number of songs (over 10,000) released each year, compared with the 577 films rated in 1993, developing a ratings board to review and rate each and every recording would be a near impossible task.

And of course, a government mandated censorship system would run afoul of the full and unimpeded protection of artistic expression given by the First Amendment.

Accepting a difference of values among people is part of living in a free society. Simply put, the voluntary Parental Advisory Program balances the rights of free expression with the desires for social responsibility. The recording industry has made great strides implementing its voluntary Parental Advisory Program and educating the public about its intended use. It vows to continue to do so in the future.

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MEMORANDUM IN OPPOSITION TO ALASKA SENATE BILL 216

The Motion Picture Association of America, Inc. (MPAA) submits this memorandum in opposition to Alaska Senate Bill 216, which prohibits the dissemination of motion pictures on video cassettes to minors that contain depictions of violent behavior. The bill also prohibits the sale or rental of video material that depicts or describes sexual conduct or violent behavior "harmful to minors" unless permanent warning labels are affixed in specified type size and are covered by opaque wrappers.

The MPAA and its member companies*, who are the leading distributors of motion pictures for theatrical exhibition and subsequent release on video cassette, believe that both key provisions of this legislation are both unnecessary and contravene the First Amendment to the United States Constitution.

SB 216 IS UNNNECESSARY BECAUSE OF INDUSTRY POLICIES

SB 216 is unnecessary because the overwhelming majority of video tapes available in retail outlets either display the official MPAA rating and/or contain information for the parent to determine whether the video is appropriate for their children's viewing. For over 25 years, MPAA has administered the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R and NC-17 to motion pictures. The rating system has been successful in guiding parents' decisions about their movie viewing. In the most recent nationwide survey, over 75% of parents surveyed said they found the rating system fairly helpful to helpful. Moreover, the overwhelming majority of video stores in Alaska enforce the voluntary rules and regulations of the motion picture rating system, restricting access to movies that parents may find inappropriate for their children's viewing.

SB 216 would undermine the voluntary enforcement of the rules and regulation of the MPAA-administered rating system, and would cause severe damage to mainstream businesses, including motion picture distributors.

This bill also has the potential to cause retailers that rent and sell videos to provide only information and entertainment

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* MPAA member companies include: Buena Vista Pictures Distribution, Inc. (Disney); Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corp.; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; and Warner Bros., a division of Time Warner Entertainment Company, L.P.

options that are appropriate for children due to the criminal liability associated with this bill if it is enacted.

Moreover, businesses like MPAA member companies and independent video manufacturers that distribute movies to video stores in Alaska may also simply decide not to do business in the state because they want to avoid the criminal liability associated with this bill. In addition, due to the relatively small size of the Alaska market, the risk may be too great for the volume of business that is generated.

SB 216 IS UNCONSTITUTIONAL

SB 216 is unconstitutional because it establishes a standard for material that is "harmful to minors" that is overbroad and violates the time-honored, court approved United States Supreme Court standards for motion pictures on video cassette that may be restricted from minors under the United States Constitution. MPAA also believes the labeling requirements on materials containing mere sexual conduct that have not been found by a court of law to be either obscene or harmful to minors by the court-approved guidelines, are unconstitutional because they infringe upon the First Amendment.

Motion pictures are a form of expression which is protected by the First Amendment to the U.S. Constitution, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 417 U.S. 153 (1974). The exhibition of a motion picture to an adult may be proscribed only if the motion picture is obscene, which requires a finding that such films "if taken as whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value...", Miller v. California, 413 U.S. 15,21 (1973). The more recent U.S. Supreme Court ruling in Pope v. Illinois, 481 U.S. 497 (1987), affirmed the Miller test, specifying that the proper inquiry in an obscenity prosecution is whether a "reasonable person," as opposed to the "community," would find that the material possesses serious value.

Regulations pertaining to restricting a minor's access to a motion picture face similar constitutional scrutiny: it may be prohibited only if the motion picture is "harmful to minors," which requires a finding that the motion picture depicts nudity, sexual contact, sexual excitement, or sadomasochistic abuse in a manner which "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." Ginsberg v. New York, 390 U.S. 629 (1968). In Interstate Circuit v. City of Dallas, 391 U.S. 53 (1968), decided on the same day as Ginsberg, a Dallac ordinance that prohibited the admission

of minors to films defined as not suitable for minors including motion pictures, "describing or portraying brutality, criminal violence, depravity, nudity, sexual promiscuity or abnormal sexual relations", was found unconstitutionally vague and over broad. The Court found that the absence of narrowly drawn, reasonable and definite standards was fatal and that, while the Constitution does not grant absolute freedom, restrictions imposed cannot be so vague as to set the censor "adrift upon a boundless sea."

VIOLENT VIDEO MOVIE RESTRICTIONS ARE UNCONSTITUTIONAL

The attempt in SB 216 to retrict minors from access to motion picture videos which contain depictions of violent behavior and require a parental advisory warning label on motion picture videos that contain depictions of violence goes well beyond obscenity guidelines established by U.S. Supreme Court decisions. While the Supreme Court stated in Miller that obscenity was not protected by the First Amendment and could be regulated by the states, it has repeatedly held that virtually all other portrayals of behavior are protected by the First Amendment.

In Interstate Circuit, Inc. v. City of Dallas, 366 F2d 590 (5th Cir. 1966), remanded 391 U.S. 53, 88 S.Ct. 1649, 20 L.Ed.2d 415 (1968), the Fifth Circuit struck down as overbroad and unconstitutional an ordinance which classified as "not suitable for young persons" any film which described or portrayed excessive brutality or criminal violence. The Court found that the restriction on brutality or violence was invalid and held that "the standard for classification must be restricted to the control of obscenity". The Supreme Court in Sovereign News Co. v. Falke, 448 F. Supp. 306 (U.S.DC Ohio 977), remanded 610 F. 2d, 428, cert. denied Warner V. Sovereign News Co., 447 U.S. 923, rehearing denied, 448 U.S. 912, appeal after remand, 674 F. 2d. 484, cert. denied 459 U.S. 864, and 459 U.S. 883 (1982), confirmed a lower court ruling which held that materials containing non-obscene violence, brutality, or cruelty cannot be banned. The Court held that materials involving violence are given the highest degree of constitutional protection and may not be restricted unless they constitute a clear and present danger to society. More recently, the Supreme Court held that an Indianapolis ordinance that prohibited the depiction of non-obscene sexual violence was unconstitutional because the ordinance proscribed speech based on content. American Booksellers Association, Inc., et. al. v. William Hudnut III 771 F. 2d 323 (1985) aff'd, 106 S.Ct. 1172 (1986). The Court reasoned that the First Amendment preserves the right of every speaker in this nation to advocate even unpopular views. Therefore, restrictions or regulations placed upon the depiction of distasteful, upsetting or socially unacceptable behavior restrain free expression and are unconstitutionally overbroad.

Depictions and descriptions of violence have never been

included among the categories of unprotected speech. The Supreme Court has declined to create such a category in cases in which it has considered such depictions and descriptions. In Winters v. New York, 333 U.S. 507 (1948), the Court had before it magazines that were "nothing but stories and pictures of bloodshed and lust." 333 U.S. at 512. The Court further recognized that the magazines have no serious literary or other value, but it nevertheless held them fully protected by the First Amendment:

> "We do not accede to (New York's) suggestions that the constitutional protection for a free press applies to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instance of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are entitled to the same protection of free speech as the best of literature." 333 U.S. at 510.

More recently, the United States District Court for the Western District of Missouri declared a Missouri violence statute unconstitutional and permanently barred its enforcement. The Missouri statute, which was signed into law June 20, 1989, would have forbidden the sale or rental of "violent" video cassettes to minors. In his order ruling the law unconstitutional, Judge Bartlett recognized the distinction between obscene materials that are beyond the scope of the First Amendment and materials depicting violence:

> "The Supreme Court has not held that violent speech is unprotected by the Constitution...unlike obscenity, violent expression is protected by the First Amendment." Video Software Dealers Association, et. al. v. William L. Webster, et. al, 773 F. Supp. 1275 (1991), aff'd 968 F.2d 684 (1992).

The Court of Appeals upheld the District Court, and recognized the distinction between materials depicting violence and those that are beyond the scope of First Amendment protection "...videos depicting only violence do not fall within the legal definition of obscenity for either adults or minors", 968 F.2d 684, 688 (1992). The State of Missouri has been ordered to pay nearly $200,000 in legal fees, resulting from their loss in the constitutional challenge, to the MPAA and VSDA.

In addition, this bill is impermissively vague because it does not specifically define the kind of violence that can be banned. The MPAA submits it would be impossible for video retailers to

determine which videos would be required to be restricted, labeled and/or packaged in an opaque wrapper. For example, a documentary that contains news footage from Bosnia, certain cartoons, like "Superman" and "Teenage Mutant Ninja Turtles," and sporting events, like football highlights, on video cassette could be deemed to contain depictions of violent behavior.

This legislation could subject video retailers who distribute mainstream motion pictures which are acceptable by the majority of Alaska residents to criminal prosecution. A movie with a message to discourage drug usage that utilizes a dramatic element in the content of the film which depicts "violent behavior" to illustrate the realities of the drug culture would subject video store owners to prosecution if disseminated to a minor. This bill as drafted would establish an unreasonable burden and potential criminal liability on video retailers.

VIDEO LABELING REQUIREMENTS ARE ALSO UNCONSTITUTIONAL

Alaska SB 216 will not pass constitutional scrutiny because it prohibits the distribution of motion pictures on video cassette, without a permanent warning label in a.. opaque wrapping, that are protected under the First Amendment. The Supreme Court has never approved of a regulation or prohibition against the depiction of sexual conduct, even for minors, unless the Miller or Ginsberg tests are met. Further, violence is a class of speech that has never been permitted to be regulated, even for minors.

Further, SB 216 makes it a criminal act to sell, rent or distribute video cassettes without warning labels, which contravenes the First Amendment to the United States Constitution. The statutory prohibition constitutes an impermissible prior restraint of expression and bears a heavy presumption against its constitutional validity. Bantam Books v. Sullivan, 372 U.S. 58 (1963). The very concept of prior restraints on speech is repugnant to the First Amendment. Near v. Minnesota, 283 U.S. 697 (1931).

Since warning labels are required, MPAA also submits that this bill is unconstitutional because the courts have long held that the freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. This principle is illustrated by the case of Miami Herald Publishing v. Tornillo, 418 US 241 (1974) where the Supreme Court held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates they had criticized. The court found that the requirement deprived a newspaper of the fundamental right to decide what to print or omit. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." Tornillo at 258. The First Amendment guarantees freedom of speech a term which necessarily comprises the decision of both what

to say and what not to say. See Riley v. National Federation of the Blind, 108 S.Ct 2667 (1988). This proposed bill compels film distributors to affix warning labels and create opaque packaging for certain video cassettes or to cease the distribution of videos in the State of Alaska. Such action constitutes impermissible forced speech which violates the First Amendment.

MPAA believes that the courts would strike down SB 216 as they did an order that compelled a utility to place a newsletter containing views of a third party in its billing envelopes because in both cases the freedom not to speak publicly does not lose its protection because of the corporate identity of the speaker. See Pacific Gas Electric v. P.V.C. of California, 106 S.Ct 903 (1986).

Under this bill, video stores would be required to identify motion pictures which contain depictions that are "harmful to minors" in order to determine those on which to place the permanent "warning" label and cover with an opaque wrapper and restrict from minors' access. The existence of such a list would likely lead to self-imposed censorship as motion picture distributors and video stores fear that the list could become public and thus falsely identify them as purveyors of pornography to minors which may result in unwarranted prosecution. In 1969, the United States Supreme Court struck down a Rhode Island law that authorized a commission to maintain a list of objectionable works. See Bantam Books v. Sullivan 372 US 58 (1969). In addition, the bill requires motion picture distributors to incriminate themselves by admitting their films contain depictions that are "harmful to minors" which might be subject to prosecution.

CONCLUSION

SB 216 is unnecessary and contravenes the United States Constitution.

This bill undermines the voluntary procedures and policies of the video industry which provides parents specific information about the content of the movies available for sale and rent so they can determine what is suitable for their children's viewing. In addition, the overwhelming majority of video retailers in Alaska enforce the voluntary rules of the MPAA-adminstered motion picture rating system, restricting access to video movies rated R to children under 17 without parental permission and to movies rated NC-17 under any circumstances.

SB 216 is unconstitutional because it restricts minors' access to constitutionally protected material, mandates warning labels which are a form of prior restraint, forced speech and because the bill requires that video cassettes be labeled "harmful to minors" before there has been any determination that the material has been found to be obscene or harmful to minors based on United States Supreme Court standards.

The "harmful to minors" standards contained in the bill, which include the depiction of violent behavior, go well beyond the guidelines permitted by the United States Supreme Court. See Ginsberg v. New York, 390 U.S. 629 (1968). Moreover, this may result in self censorship because it would force video stores to identify movies that contain depictions of sexual conduct which might also cause self incrimination. Bantam Books v. Sullivan 372 US 58 (1969). The bill is also overbroad and vague, based on constitutional standards, because it does not identify the "person" required to be identified on the label or who is to affix it.

In addition, unless a motion picture film meets the narrow definition of obscenity for adults set forth by the Supreme Court in Miller v. California or for minors in Ginsberg v. New York, it may not be prohibited. The proposed legislation, which would require a permanent warning label on motion pictures on video cassette in an opaque wrapper containing non-obscene sexual conduct and restrict minors' access, exceeds the parameters of the Miller and Ginsberg decisions. Such government regulations are constitutionally invalid.

For both practical and legal reasons, we ~~urge the~~ oppose passage of Alaska Legislature to defeat SB 216.

CS

March, 1994

8-LS1745\E
Luckhaupt
2/22/94

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 487

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE KOTT

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to the sale, display, or distribution of material harmful to minors at places where minors are present or allowed to be present and where minors are able to view such material; and prohibiting the sale or display of certain audio recordings, phonograph records, magnetic tapes, compact discs, or videotapes, without warning labels and opaque wrappings."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.61 is amended by adding new sections to read:

Sec. 11.61.127. SALE, DISPLAY, OR DISTRIBUTION OF MATERIAL HARMFUL TO MINORS. (a) A person commits the crime of sale, display, or distribution of material harmful to minors if the person knowingly sells, displays, or distributes any material, including the covers and packaging of the material, but not including audio recordings, music video recordings, or rated video recordings, that is harmful to minors in any place where minors are present or are allowed to be present

New Text Underlined [DELETED TEXT BRACKETED]

and where minors are able to view such material unless each item of the material is sealed in an opaque wrapper.

(b) In this section, the requirement of an opaque wrapper shall be satisfied if the portions of the covers or packaging of the material that visually depict material harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

(c) In this section,

(1) "material harmful to minors" means a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(A) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(B) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors;

(2) "music video recording" means a tape or other recorded visual depiction of a song or songs that is not voluntarily rated by the Classification and Rating Administration (CARA);

(3) "rated video recording" means a tape or other recorded visual depiction that is voluntarily rated by the Classification and Rating Administration (CARA).

(d) Except as provided in (e) of this section, sale or display of material harmful to minors is a class B misdemeanor.

(e) A person convicted under this section is guilty of a class A misdemeanor if the person has previously been convicted of a violation of this section.

Sec. 11.61.128. UNLAWFUL SALE OR DISPLAY OF AUDIO OR MUSIC VIDEO RECORDING. (a) A person commits the crime of unlawful sale of an audio recording or music video recording if the person knowingly sells or offers to sell an audio recording, phonograph record, magnetic tape, compact disc, or music video recording that contains lyrics that include or are descriptive of material harmful to minors, unless the cover of the recording, record, tape, or disc contains a warning label

that the lyrics contain material harmful to minors.

(b) A person commits the crime of unlawful display of an audio recording or music video recording if the person knowingly displays an audio recording, phonograph record, magnetic tape, compact disc, or music video recording, whose packaging uses words, symbols, or pictures that include or describe material harmful to minors unless the recording is sealed in an opaque wrapping.

(c) In this section, the requirement of a warning label shall be satisfied if the label is affixed to the front cover, beneath any cellophane or other clear wrapping material or above any opaque wrapping material, of the audio recording, phonograph record, magnetic tape, compact disc, or music video recording and for (1) cassette tapes and compact discs or other recordings the same size or smaller than cassette tapes or compact discs, is printed with black letters of eight point type or larger, except that the words "WARNING" and "PARENTAL ADVISORY" shall be of 10 point type or larger on a fluorescent yellow background; or (2) all other audio or music video recordings larger than cassette tapes or compact discs, is printed with black letters of 12 point type or larger on a fluorescent yellow background, except that the words "WARNING" and "PARENTAL ADVISORY" shall be printed in letters which are of 48 point type or larger, and the label reads substantially as follows:

"WARNING:

May contain explicit lyrics that include or describe material harmful to minors.

PARENTAL ADVISORY".

(d) In this section, the requirement of an opaque wrapper is satisfied if the portions of the packaging of the audio recording, phonograph record, magnetic tape, compact disc, or music video recording that use words, symbols, or pictures that include or describe material harmful to minors are blocked with an opaque wrapper and the wrapper is sealed.

(e) In a prosecution under this section, each day that a violation occurs and each audio recording, phonograph record, magnetic tape, compact disc, or music video recording that is found in violation of this section is a separate offense.

(f) In this section,

(1) "material harmful to minors" means a

(A) description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(i) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(ii) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors; or

(B) graphic description, representation of, or incitement to violent behavior that if acted out would constitute felonious behavior that is morally repugnant to the community as a whole;

(2) "music video recording" has the meaning given in AS 11.61.127.

(g) Except as provided in (h) of this section, a violation of (a) or (b) of this section is a class B misdemeanor.

(h) A person convicted under this section is guilty of a class A misdemeanor if the person has previously been convicted of a violation of this section.

8-LS1745\A
Luckhaupt
2/12/94

HOUSE BILL NO. 487

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EIGHTEENTH LEGISLATURE - SECOND SESSION

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such material unless each item of the material is sealed in an opaque wrapper.

(b) In this section, the requirement of an opaque wrapper shall be satisfied if the portions of the covers or packaging of the material that visually depict material harmful to minors are blocked with the opaque wrapper and the wrapper is sealed.

(c) In this section, "material harmful to minors" means a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(1) predominately appeals to the prurient, shameful, or morbid interest of minors in sex;

(2) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(d) Sale or display of material harmful to minors is a class B misdemeanor.

Sec. 11.61.128. UNLAWFUL SALE OR DISPLAY OF AUDIO OR VIDEO RECORDING. (a) A person commits the crime of unlawful sale of audio or video recording if the person knowingly sells or offers to sell an audio recording, phonograph record, magnetic tape, compact disc, or videotape that contains lyrics that include or are descriptive of material harmful to minors, unless the cover of such recording, record, tape, or disc contains a warning label that the lyrics contain material harmful to minors.

(b) A person commits the crime of unlawful display of audio or video recording if the person knowingly displays an audio recording, phonograph record, magnetic tape, compact disc, or videotape, whose packaging uses words, symbols, or pictures that include or describe material harmful to minors unless the recording is sealed in an opaque wrapping.

(c) In this section, the requirement of a warning label shall be satisfied if the label is affixed to the front cover, beneath any cellophane or other clear wrapping material or above any opaque wrapping material, of the audio recording, phonograph record, magnetic tape, compact disc, or videotape and for (1) cassette tapes and compact discs or video recordings the same size or smaller than cassette tapes or compact discs, is printed with black letters of eight point type or larger, except that the

words "WARNING" and "PARENTAL ADVISORY" shall be of 10 point type or larger on a fluorescent yellow background; or (2) all other audio recordings larger than cassette tapes or compact discs, is printed with black letters of 12 point type or larger on a fluorescent yellow background, except that the words "WARNING" and "PARENTAL ADVISORY" shall be printed in letters which are of 48 point type or larger, and the label reads substantially as follows:

"WARNING:

May contain explicit lyrics that include or describe material harmful to minors.

PARENTAL ADVISORY".

(d) In this section, the requirement of an opaque wrapper is satisfied if the portions of the packaging of the audio recording, phonograph record, magnetic tape, compact disc, or videotape that describe, advocate, or encourage the conduct described in (b) of this section are blocked with an opaque wrapper and the wrapper is sealed.

(e) In a prosecution under this section, each day that a violation occurs and each audio recording, phonograph record, magnetic tape, compact disc, or videotape that is found in violation of this section is a separate offense.

(f) In this section, "material harmful to minors" has the meaning given in AS 11.61.127.

(g) Except as provided in (h) of this section, a violation of (a) or (b) of this section is a class B misdemeanor.

(h) A person convicted under this section is guilty of a class A misdemeanor if the person has previously been convicted of a violation of this section.

Suggested definition for proposed AS 11.61.128:

(f) In this section, "material harmful to minors" means

(1) a description or representation, in any form, of nudity, sexual conduct, or sexual excitement when it

(a) predominantly appeals to the prurient, shameful, or morbid interest of minors in sex;

(b) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and

(c) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors; or

(2) a graphic description, representation of, or incitement to violent behavior which, if acted out, would constitute felonious behavior [illegible] that is considered morally repugnant to the community as a whole.

include