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MEMORANDUM IN OPPOSITION TO OHIO SENATE BILL 144

The Motion Picture Association of America, Inc. (MPAA) respectfully submits this memorandum in opposition to Senate Bill 144, legislation regarding, among other things, public library videocassette loan policies. While MPAA supports the right of parents to know and participate in what their children view, we must oppose Senate Bill 144 because it incorporates the voluntary Motion Picture rating system into law. We believe incorporating the voluntary motion picture rating system into law compromises its integrity and has the potential to jeopardize participation by filmmakers.

MPAA is a trade association whose members include the leading distributors of motion pictures in the United States*. All MPAA member companies distribute motion pictures for theatrical distribution and subsequent release on videocassette, DVD, pay-per-view, television, cable, satellite, and the Internet. MPAA also administers the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R, or NC-17 ratings to motion pictures. CARA was established in 1968 by the motion picture and theatre industries to provide parents with information to help them determine which motion pictures their children should see.

* MPAA member companies include: Buena Vista Pictures Distribution (an affiliate of The Walt Disney Company); Metro-Goldwyn-Mayer Studios, Inc.; Paramount Pictures Corporation; Sony Pictures Entertainment Inc; Twentieth Century Fox Film Corporation; Universal City Studios, LLLP; and Warner Bros.

OHIO SENATE BILL 144 VIOLATES THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

It is important to note that the MPAA's "R" ("restricted") rating is strictly an advisory and not a determination that a particular motion picture is obscene or harmful to minors. A motion picture may be given an "R" rating as a result of depictions of language and/or violence which are neither obscene nor harmful to minors based on U.S. Supreme Court decisions.

Motion pictures are a form of expression which are protected by the First Amendment to the U.S. Constitution, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Eronoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 417 U.S. 153 (1974). The library loan or other dissemination 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.

Regulations pertaining to restricting the loan or dissemination of a motion picture to a minor face similar constitutional scrutiny: access 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 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). It should be noted that Ohio Senate Bill 144 includes a constitutionally invalid definition of "harmful to juveniles" that was recently the subject of a court decision in Bookfriends, Inc. v. Taft, 223 F. Supp. 2d 932 (S. D. Ohio 2002).

Senate Bill 144 is unconstitutional in that it prohibits a library from loaning to a person under 17 any movie with an "R" rating without parental permission which would deny minors access to material that is not obscene as enunciated by the Supreme Court in Miller v. California, or harmful to minors

under the standards established by the Supreme Court in Ginsberg v. New York, and is thus protected by the First Amendment. See also Swope v. Lubbers, 560 F. Supp. 1328 (W.D. Mich. S.D. 1983); Engdahl v. City of Kenosha, 317 F. Supp. 1133 (E.D. Pa 1970); Rosen v. Budco, Inc., et al. 10 Phila. at 112 (1983). This 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); Engdahl v. Kenosha, 317 F. Supp. at 1133, (ordinance prohibiting the admission of unaccompanied children to films rated "R" or "X" struck down as unconstitutional).

In a lawsuit filed by MPAA and the Video Software Dealers Association challenging the constitutionality of a Tennessee rating enforcement statute similar in concept to Ohio Senate Bill 144, the Federal District Court ruled in a consent order that such restrictions violated the constitution of the State of Tennessee. MPAA v. McWherter, Civil Action No. 3-89-0316 (M.D. Ten. Nash.)

SENATE BILL 144 VIOLATES DUE PROCESS

The incorporation of MPAA ratings into Ohio law is also unconstitutional as a violation of the U.S. Constitution's Due Process clause. The delegation to a private association, including the Motion Picture Association of America, of local legislative authority to determine which motion pictures may be shown is a violation of the Due Process clause. Due Process is violated when a statute delegates the regulations for the operation and enforcement of a statute to a private association that is not subject to narrowly and reasonably drawn definitive standards. Rosen v. Budco, Inc., et al., 10 Phila. at 112; Motion Picture Association v. Specter, 315 F.Supp. 824 (E.D. Pa 1970)(statute that penalized exhibitors who showed films and previews that were "not suitable" for children as determined by MPAA ratings found unconstitutional for vagueness).

Courts throughout the country have invalidated the incorporation of MPAA ratings in a variety of statutory contexts. See Swope v. Lubbers, 560 F.Supp. 1328 (W.D. Mich, S.D. 1983)(use of MPAA ratings was improper as a criteria for determination of constitutional protection); State v. Watkins, 191 S.E. 2d 135 (1972) vacated and remanded on other grounds, sub nom. Watkins v. South Carolina, 413 U.S. 905 (1973) (exemption from state obscenity statute for films with the "MPAA code seal of Approval" [sic] violates Due

Process); Potter v. State, 509 P.2d 933 (1973) (obscenity statute that exempted films approved by the MPAA was improper delegation of legislative authority); Drive-In Theater v. Huskey, 305 F. Supp. 1232 (W.C.N.C. 1969) aff'd 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Proposed Section 3375.351(B)(3) in Senate bill 144 is wholly based on the recognition and widespread public reliance on the "R" rating, which is a trademarked property of the MPAA. Any attempt to disclaim the adoption, incorporation or reference to the MPAA's ratings must fail because the basis of the legislation would be null and void if it succeeded, i.e. if the legislation did not refer to the "restricted" rating, then the suggested prohibition would have no substance.

OHIO TAXPAYERS WOULD BE LIABLE

Since a statute that singles out constitutionally protected speech is a violation of rights (particularly when based on the content of the speech), the plaintiffs who succeed in invalidating the law would be entitled to an award of court costs and attorneys' fees, based on Title 42 U.S.C. Section 1983. This would be true for all successful plaintiffs, whether they are libraries, theatre owners, motion picture producers, distributors and/or trade associations. Thus, Ohio taxpayers would not only bear the cost of defending an invalid law, but also the cost of successful challenges. In a successful challenge to a Missouri statute that attempted to regulate Constitutionally protected motion picture videos, the United States Court of Appeals ruled that the state had to pay the plaintiffs nearly \$200,000 in court costs and attorneys' fees.

CONCLUSION

MPAA supports and applauds any efforts to encourage increased parental responsibility in their children's viewing selections. However, because the MPAA Rating System is voluntary and strictly an advisory with no force of local, state or federal law, it should not be incorporated into governmental regulation. Therefore, the MPAA respectfully urges that the Ohio Legislature defeat Senate Bill 144.

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