

April 4, 2008

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Dear David:

Perhaps it would help if I provided a brief letter of support for the “Girls Gone Wild” bill that we have been working on.

Advertising Obscene Material

Amending Section 39-17-902(a) should be a “no-brainer.” There is no constitutional right to advertise an illegal product – in this case, obscene material. Two federal obscenity laws specifically prohibit advertising obscene material (18 U.S.C. 1461 & 1462), as do many state obscenity laws [see, e.g., New York Penal Law, Section 235(4) (definition of “promote”)]. In *Ginzburg v. United States*, 383 U.S. 463 (1966), the Supreme Court affirmed convictions both for mailing obscene material and for using the mail to advertise matter that was obscene

Some “Girls Gone Wild” videos reportedly now contain depictions of “hard-core” sexual conduct. If the proposed amendment to Tennessee Code Section 39-17-902 is adopted, TN will not only be able to prosecute those who knowingly distribute hardcore pornographic videos but also those who knowingly advertise them.

I will add that 18 U.S.C. 1468 states specifically:

Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television or subscription services on television.

If Section 39-17-902(a) is so amended, it might be wise to take this opportunity to clarify that 902(a) applies to cable (satellite) transmissions by adding the word “transmit” or “transmission.” Keep in mind that the term “distribute” is defined in the law [901(3)] in a way that could be construed as not applying to a cable or

satellite transmission (no transfer of possession). Adding the words “transmit” or “transmission” would clarify that it is a crime to show or advertise the showing of obscene films on cable or satellite TV. I assume that the phrase “electrical reproduction” in Subsection 39-17-901(7) encompasses both broadcasting and cable (satellite) transmission. Section 902(a) might then read as follows:

It is unlawful to knowingly produce, broadcast, transmit, distribute, send, cause to be sent, or bring or cause to be brought into this state for sale, broadcast, transmission, distribution, exhibition or display, **or to advertise or promote in this state the sale, broadcast, transmission, distribution, exhibition or display**, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter...

Dissemination of ads that are themselves harmful to minors

At first glance, it might seem that this proposed change to the Tennessee Code (“Proposed Amendment”) would be unconstitutional under the Supreme Court’s holding in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000). As I see it, however, there are two important differences between the Proposed Amendment and the law at issue in the Playboy case.

First, the Proposed Amendment involves commercial speech, which enjoys less protection than other constitutionally guaranteed expression [*Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, at 563 (1980)]. The courts have not applied strict scrutiny to commercial speech.

Second, unlike a cable TV pay channel, which can be blocked by a subscriber, to my knowledge no technology now provided by cable/satellite TV operators enables viewers to block ads. Nor does the V-Chip enable viewers to block ads. Nor am I aware of any plans to enable viewers to block ads in the future.

The time channeling approach in the Proposed Amendment (ads are prohibited between 6 am and 10 pm) is consistent with the approach utilized by the FCC in regulating broadcast indecency. In *Action for Children’s TV v. FCC*, 58 F.3rd 654 (1995), cert. den., 516 U.S. 1043 (1996), the D.C. Circuit held that the FCC can prohibit indecency in broadcasting between the hours of 6 am and 10 pm. That court indicated that Congress could have extended the ban until 12 midnights had it not exempted PBS stations. That court, however, also had before it evidence indicating that many children were still watching broadcast TV until midnight.

There is also the matter of preemption.

On its face, the preemption clause in 18 U.S.C. 1468 (see above) applies to the restriction on ads that are themselves “harmful to minors” because the term “harmful to minors” is for all practical purposes a synonym for “obscene for minors;” and speech that is “obscene” for minors is also “unprotected” for minors.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court upheld a New York law that also used the term, “harmful to minors.” The Ginsberg Court said:

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute that prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults. [At 631]

The NY Court of Appeals "upheld the Legislature's power to employ variable concepts of obscenity" ...In sustaining state power to enact the law, the Court of Appeals said..."Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed..." [At 635-636]

Appellant challenges subsections (f) and (g) of § 484-h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity "harmful to minors" is so vague...But the NY Court of Appeals construed this definition to be "virtually identical to the Supreme Court's most recent statement of the elements of obscenity..." [At 643]

If a court holds that the preemption clause does not apply to ads that are themselves harmful to minors, the State must be prepared to argue on other grounds that states are not preempted from regulating such ads on cable and satellite TV. A court could determine that the regulation of these ads is not preempted for cable but is preempted for satellite, for the reason that satellite is a form of broadcasting. I have not, however, researched the preemption issue.

Dissemination of ads for materials that are obscene for minors

This is a trickier proposition. Once again, however, we are dealing with commercial speech, and there is no means to block ads. Cable TV advertising is also transmitted into the home where, according to the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726, at 748 (1978), “the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.”

Because these ads can be transmitted after 10 pm on cable and satellite TV and disseminated in other media, the Proposed Amendment would not restrict adults to viewing only those ads that sell products that are suitable for children.

If I were to research this, I would begin by looking to see if the courts have upheld restrictions on ads for alcohol or smoking as a means to protect children.

Once again, there is also a preemption issue.

Sincerely,

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cc. Tiffany Helfrich