

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1415

2005 HOUSE JUDICIARY

HB 1415

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1415

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/31/05

Tape Number	Side A	Side B	Meter #
1	xx		0-12.7
Committee Clerk Signature <i>Lauren Penrose</i>			

Minutes: 12 members present, 2 members absent (Rep. Zaiser, Rep. Charging).

Chairman DeKrey: We will open the hearing on HB 1415.

Rep. Todd Porter: HB 1415, comes by way of a constituent that had a problem or complaint in the Bismarck/Mandan area, and they felt that in order to fix the problem, that the best way to do it would be to move the objectionable material into close view of the cashiers, or behind the counter. Their complaint was in a larger retail store, that the area where the material was presently kept, was back towards the back part of the store, even though it was in the wrapper, that is already mandated by law, it wasn't very well supervised or able to be observed by the employees of the store, and they felt that by moving it either behind the counter, or to a controlled access area, that that would help bring a little more control over the materials.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Jack McDonald, ND Newspaper Association and ND Broadcaster's Association: Opposed (see written testimony).

Representative Delmore: One of the problems seems to be with whatever may be deemed as objectionable? It seems like the definition is vague, what may be objectionable to me may not be objectionable to someone else.

Jack McDonald: That is correct. That's exactly the problem. What could be objectionable to one person, is certainly not objectionable to another. This could cover the swim suit cover from Sports Illustrated, it could cover a lot of fitness magazines that have pictures of men and women doing exercises on them, it could cover a lot of books. You have to remember that this is not just about magazines, but also covers books. Any written or printed material, whether it be album covers or covers of CD's, books, magazines. That is exactly the problem, what is objectionable to one, may not be to another.

Representative Kretschmar: I see this is an amendment to current law. Are you aware of any prosecutions that have occurred under current law, in our current statutes.

Jack McDonald: No, I am not.

Chairman DeKrey: Thank you. Further testimony in opposition.

Russ Hanson, ND Retail Association: Opposed. Retailers are very cognizant of their customer base, and in placing their product accordingly. They use poly-bagging on things that would have a questionable nature. We voice our opposition to this bill. I would like to note that Tom Woodmansee, ND Grocers Association, was not able to be here, but is in opposition as well.

Chairman DeKrey: Thank you.

Representative Koppelman: You talk how you have the packaging, how would this really change what you do then.

Russ Hanson: Essentially this would mandate that anything that would be of a questionable nature, would be forced to go behind the counter, so you have to 1) to interpret what objectionable is; and 2) you may have over 140,000 pieces of material, what could those numbers be, based upon the numbers of interpretation that may be out there of different nature.

Representative Koppelman: Except that has to do with the physical placement, it says other access controlled area. There again, you don't know what that means. Does that mean you could supervise it, oversee it, etc. It seems like, as has been mentioned, what we're looking at as objectionable, what they're objecting to here in the testimony is already in law. What real difference would this make, because it is already in state law that you have to do that already, to determine what is objectionable. You could have an area that's within eye shot of the cashier.

Russ Hanson: I agree.

Representative Klemin: It looks to me like there is another way of looking at this too, is that the way this bill reads, is that you can probably display anything you want to as long as it's behind the counter, or in an access controlled area. Wouldn't that be more liberal than the current law.

Russ Hanson: Yes.

Representative Delmore: Are you aware of any complaints of these issues that have gone to retailers where, at least an attempt has been made to pacify the very common objections to this.

Russ Hanson: I've been with the Association for five years, and I received one call, and I did go to that particular location and did a walk-thru, and in my interpretation, I didn't see a problem.

Chairman DeKrey: Thank you. Further testimony in opposition.

Carol Two Eagles: Opposed. I buy diesel at truck stops, and the truck stops are places where you might have a problem with this, I was raised if you don't like it, don't go there. I don't have to look. It's sitting right here where I walk in to pay, do I have to look there. I don't have to look there. I don't have to see it. I don't have to take the grandkids in, nobody else does either. I think this is unnecessarily invasive. You can determine in advance, what kinds of places are going to sell what kinds of material. I don't have to patronize that, even though I have to buy my diesel there, I would like to see this bill, not passed.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing. What are the committee's wishes in regard to HB 1415.

Representative Galvin: I move a Do Not Pass.

Representative Bernstein: Seconded.

12 YES 0 NO 2 ABSENT

DO NOT PASS

CARRIER: Rep. Bernstein

Date: 1/31/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1415

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Galvin Seconded By Rep. Bernstein

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	A	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Bernstein

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 31, 2005 1:23 p.m.

Module No: HR-20-1440
Carrier: Bernstein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1415: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS
(12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1415 was placed on the
Eleventh order on the calendar.

2005 TESTIMONY

HB 1415

DeKrey, Duane L.

Ladies and Gentlemen of the House,

Mr. Porter is sponsoring this bill for me due to my inability to receive what I feel to be acceptable co-operation on the part of the retailer. I would like to give a brief explanation of what brought this to my attention, and why I feel it needs to be addressed.

While in the bathroom of a local branch of a national chain bookstore, with my two young children, I found approximately 10 adult content magazines, out of the plastic, and stuffed under the sink. The magazines were the type that showed actual penetration. Upon presenting this to the manager, I was told it had happened before and they try to have the employees check under the sink. She agreed that it was a concern, and from a loss prevention standpoint also. I asked if they had considered moving the adult magazine display to an area behind the counter or at least in view of it, and was told that those decisions are made on a corporate level. After several calls to the corporate office, I was told that "we comply with the current ND law". Their stance was that they felt that having the magazines on the top shelf was enough of a deterrent, combined with the plastic cover which blocks out the nudity. They stated that it was illegal for people to remove the cover without paying for it, and that was the problem.

I work at the ND Youth Correctional Center with adolescent boys, as well as having a teenager myself. I could tell all kinds of stories about adolescents having less than perfect judgment, but I'm sure we're all aware of this. Also, at work, I get to see first hand the growing number of adolescent sexual perpetrators. One of the main contributing factors of this is exposure to pornography. While we can't hope to eliminate youths access to pornography all together, there is one simple step we can take to help with this matter.

HB 1415 is asking for a fairly simple accommodation on the part of retailers, to place their adult materials in an area that would eliminate, or at the minimum, discourage youthful access to these materials in their stores, while not affecting adult access to the materials for purchase. All of the convenience stores that I can think of already do this with adult magazines. I believe they also place tobacco products in an area that is behind the counter, if not in full view or on the counter. Liquor is placed in a whole separate retail area, not accessible to youths, regardless that it is illegal for them to buy it. I have a friend who plays a good devils advocate and stated, "so because of a few incidents, the stores need to change their display"? I explained to him that when he has a child, he will understand that even one preventable incidence is too many. Having worked retail, I know that displays are constantly changed to maximize exposure of the latest hit, or the biggest seller. I think I am making a reasonable request that we change a display to remove that bit of temptation from an adolescent. The adolescent who may be contemplating doing something illegal to gain acceptance, or out of curiosity, or because of raging hormones.

I thank you for your time and consideration
Sincerely
Richard Makelky

1/31/2005

January 31, 2005

HOUSE JUDICIARY COMMITTEE
HB 1415

CHAIRMAN DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose this bill as a vague and unnecessary form of censorship.

Our current law is vague and unenforceable at best, and most likely could be challenged in court if push came to shove. However, it seems to work and the businesses that now sell what some may describe as objectionable materials already comply with the intent of this bill.

This bill, however, goes much further and requires the creation of a whole new area of many stores, such as bookstores and super markets, to sell whatever it is that may be deemed as objectionable.

Not only is this a bill trying to fix a problem that doesn't really exist, but it also will set up a situation that is almost certain to result in a court challenge that will cost the state and whatever political subdivision is involved a considerable amount of time and money.

If ever there was a bill that isn't needed, it's this one. We respectfully request that you give it a DO NOT PASS. If you have any questions, I will be happy to try to answer them.

THANK YOU FOR YOUR TIME AND CONSIDERATION.

THE MEDIA COALITION INC.

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January 28, 2005

DAVID HOROWITZ
Executive Director

American Booksellers
Foundation for
Free Expression

Association
of American
Publishers, Inc.

Freedom to Read
Foundation

Entertainment Software
Association

Interactive Entertainment
Merchants Association

International
Periodical Distributors
Association, Inc.

Magazine Publishers
of America, Inc.

Picture Association
of America, Inc.

National Association
of Recording
Merchandisers

Publishers Marketing
Association

Recording Industry
Association of
America, Inc.

Video Software
Dealers Association

Chair
Judith Krug
Freedom to Read
Foundation

Immediate Past Chair
Christopher Finan
American Booksellers
Foundation for
Free Expression

Treasurer
Gail Markels
Entertainment Software
Association

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal

Representative Duane DeKrey, Chair
Judiciary Committee
North Dakota House of Representatives
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0360

Re: North Dakota House Bill 1415

Dear Chairman DeKrey,

The members of The Media Coalition believe that North Dakota House Bill 1415 threatens the distribution of First Amendment-protected material in North Dakota. Media Coalition members represent most of the book and magazine publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording and video retailers in North Dakota and the rest of the United States.

H.B. 1415 requires that any book, photograph, magazine or pamphlet with a cover or available content that includes nude images that are "posed or presented in a manner to exploit sex, lust or perversion for commercial gain" must be kept either behind a counter or segregated in a controlled area. This provision is onerous for retailers and is almost certainly unconstitutional because it restricts the access of adults to material that is constitutionally protected as to them.

H.B. 1415 has significant constitutional problems. Courts have allowed some limitations on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), but they have also ruled that these limitations may not unreasonably hinder the access of adults to such material. In the *Ginsberg* case, the Supreme Court established a three-prong test to determine what is legally "harmful to minors." H.B. 1415 would restrict access to a much broader range of material than could arguably be deemed "harmful to minors" under the *Ginsberg* test. It would improperly restrict the display of this material to adults as well as minors despite the material being legal for both.

Even if H.B. 1415 only applied to material that is "harmful to minors," the requirement that any photograph, book, magazine or pamphlet with a cover or content be kept behind a counter or in a controlled area would be an unreasonable hindrance on the right of adults to access such material. A retailer must be

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, periodical wholesalers and distributors, recording, motion picture and video games producers, and recording and video retailers in the United States.

Representative DeKrey

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allowed to restrict access of minors to such material in a reasonable manner besides segregation. See, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d 125 (4th Cir. 1989). H.B. 1415 on the contrary would force a retailer to create an "adults only" area that would pejoratively label a part of their inventory. They would inevitably lose patrons who, without being aware that the material in the segregated section is protected by the First Amendment, will refuse to enter places that deal in "dirty books or magazines." Some retailers would have little choice but to stop carrying all work with any nudity, including much mainstream art, fashion, and health education material rather than to risk a prosecution. As a result, H.B. 1415 would exercise an unconstitutional "chilling effect" on the sale of legally protected speech and seriously impair adults' access to material which they have a First Amendment right to read or see.

Additionally, the bill presents great practical difficulty for retailers of books, magazines, and other images. Some bookstores carry hundreds of thousands of books and the task of reviewing thousands of new items received each year to determine whether they contain nude or partially denuded images that must be segregated is difficult, time consuming for staff, and expensive for the proprietor. In addition, requiring retailers to segregate such material behind the counter or in an area that physically prohibits access to minors would only add to the practical problems in allocating store staff, causing retailers to lose adult customers who may not want to purchase material without browsing.

Because it threatens the distribution of constitutionally protected material, H.B. 1415 will be vulnerable to a legal challenge if it is enacted. If it were to be overturned, the state could be ordered to pay the plaintiffs' attorneys' fees.

The members of Media Coalition strongly urge you to defend the First Amendment rights of retailers and all the citizens of North Dakota and vote against H.B. 1415.

Sincerely,


David Horowitz,

Executive Director

cc: Representative Maragos, Vice Chair
Representative Bernstein
Representative Boehning
Representative Charging
Representative Delmore
Representative Galvin
Representative Kingsbury

Representative Klemin
Representative Koppelman
Representative Kretschmar
Representative Meyer
Representative Onstad
Representative Zaiser