

# ATTACHMENT 5

UNITED STATES DISTRICT COURT  
DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

BIG HAT BOOKS, INC., et al.,

Plaintiffs,

v.

No. 1:08cv 596-SEB-TAB

PROSECUTORS, et al.,

Defendants.

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**DECLARATION OF SEAN DEVLIN BERSELL**

Sean Devlin Bersell declares under penalties of perjury:

**Background**

1. I am the Vice-President, Public Affairs, of the Entertainment Merchants Association (“EMA”), a plaintiff in this action. I submit this affidavit on behalf of EMA in support of plaintiffs’ motion for a preliminary injunction and/or motion for summary judgment to enjoin the State from enforcing House Enrolled Act 1042 (the “Statute”), a registration and taxing law that is unconstitutional.

2. EMA is a not-for-profit international trade association for the home entertainment industry. Its member companies operate approximately 500 retail outlets in the State of Indiana that sell and/or rent DVDs and/or computer and console video games. EMA’s members comprise the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores),

distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry. EMA members manufacture, distribute, sell, and rent a wide variety of expressive works in the motion picture and video game formats, some of which may contain depictions covered by the statute. EMA is incorporated in the State of Delaware and has its principal place of business in Los Angeles, California.

3. EMA's member-retailers are not what are colloquially referred to as "adult video stores."

#### Application of the Statute

4. Many retailers of DVDs, including some of EMA's Indiana members, offer for sale items containing sexual content that could be considered "harmful to minors," such as a DVD of the motion picture "The Brown Bunny" written and directed by the award-winning artist/filmmaker Vincent Gallo.

5. EMA's Indiana members (some of which are likely to move after July 1, 2008) seek to bring in a general clientele, including younger customers. Having to register as a purveyor of sexually explicit materials would be injurious to their businesses and reputations. The only way they avoid such a label would be to purge from their inventory DVDs and other materials protected by the First Amendment as to adults and older youths. These options impermissibly infringe on their constitutional rights. Moreover, the right of their patrons -- adults and minors alike -- to access and purchase such materials also will be seriously infringed.

6. The statute requires "a statement detailing the types of [sexually explicit] materials the person intends to offer for sale or sell." It is not clear how detailed this

statement must be. Even if EMA's Indiana members had the time to review each DVD individually before they shelved it, determining which of them fall under the Statute's proscriptions is not possible and would lead to over inclusive and unconstitutional self-censorship.

**Conclusion**

7. For all the reasons stated above, if the Statute is not held unconstitutional, EMA's Indiana members will be forced either to self-censor materials available in their stores or register as a purveyor of sexually explicit materials and pay a punitive fee, to their detriment.

Dated: May 21, 2008

  
SEAN DEVLIN BERSELL