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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

POWELL'S BOOKS, INC., et al.,

Plaintiffs,

v.

HARDY MYERS, in his official capacity as
ATTORNEY GENERAL OF THE STATE
OF OREGON, et al.,

Defendants.

Civil No.

CV '08 - 0501 - MC

DECLARATION OF KEN LIZZI

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Ken Lizzi, declares under penalties of perjury:

Background

1. I am the General Counsel and Assistant Secretary of Dark Horse Comics, Inc. ("Dark Horse"), a plaintiff in this action. I submit this affidavit on behalf of Dark Horse in support of plaintiffs' motion for a preliminary injunction to enjoin the State from enforcing ORS 167.051 to 167.057 (collectively referred to as the "Statute"), an unconstitutional censorship law.

2. Dark Horse is a privately held Oregon company established in 1986 with its corporate headquarters in Milwaukie, Oregon. It has grown to become the third-largest comics publisher in the United States and is acclaimed internationally for the quality and diversity of its line. Dark Horse's flagship retail operation is Things From Another World, Inc. ("TFAW") which has three stores throughout the state of Oregon. I also serve as counsel for TFAW.

3. Dark Horse has proven to be a solid example of how integrity and innovation can help broaden a unique storytelling medium and establish a small, homegrown company as an industry giant. In addition to publishing comics from top industry talent like Frank Miller, Mike Mignola, Gerard Way, and comics legend Will Eisner, Dark Horse's highly successful line of comics and products based on popular properties includes *Star Wars*, *Indiana Jones*, *Aliens*, *Conan*, *Buffy the Vampire Slayer*,

and *Emily the Strange*. Dark Horse currently publishes titles for all ages, ranging from 8 to 55, with a three to one ratio of male to female readership.

4. TFAW is a retail chain that specializes in the sale of trade paperbacks, toys, collectibles and other pop culture material. With five physical stores in Oregon and California it is one of the largest comic retailers on the west coast. Additionally its internet store is considered an industry leader and a “must visit” for any pop culture collector. Its clientele ranges from children to adult with an average age of 27 and has a three to one ratio of male to female customers.

Fear Of Prosecution Under the Statute

5. Dark Horse fears that it may be at risk of criminal prosecution under the Statute for permitting minors to access constitutionally-protected material published by Dark Horse, which could be deemed “sexually explicit” or to appeal to a person’s “sexual desires” under the meaning of the Statute. It also fears that TFAW may be at risk for selling such material. Dark Horse, however, does not know how to determine what material may cross the vague lines established under the Statute.

6. Under the Statute, it is a crime to furnish “sexually explicit material” to anyone under the age of 13 if the person “intentionally furnishes a child, or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material.” ORS 167.054. Such material includes that which contains visual images -- including paintings and drawings -- of masturbation, intercourse or genital/oral/anal contact between people and animals. See ORS 167.051. “[F]urnish” is

defined broadly, including “to sell, give, rent, loan or otherwise provide.” See ORS 167.051.

7. There are two exceptions under ORS 167.054. First, certain persons, including employees of museums, schools, or public libraries, are not liable. Dark Horse does not fall into this exception. Second, Dark Horse would not be liable if the sexually explicit portions of the material furnished, or permitted to be viewed, “form merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation.” I believe this exception is vague and do not understand what specific material would fit under this exception.

8. Under the Statute, it also is a crime if a person disseminates to anyone under the age of 18 a “visual representation or explicit verbal description or narrative account of sexual conduct” for the purpose of “arousing or satisfying the sexual desires of the person or the minor. . . .” ORS 167.057. I understand this to be a very broad provision encompassing material with textual descriptions, as well as visual depictions. I also believe that the phrase “arousing or satisfying the sexual desires,” which is undefined under the Statute, is vague. In addition, this provision contains the same undefined and vague “incidental part” exception.

9. My understanding is that Dark Horse and TFAW risk criminal prosecution for furnishing constitutionally-protected materials, including those described herein, to persons “under 13 years of age” under ORS 167.054. It would be difficult, if not impossible, to determine whether a child is under 13 years of age at our retailers.

Under ORS 167.057, furnishing a 17 year-old minor with such material is a crime if furnished for the purpose of satisfying the sexual desire of the 17-year old. Again, determining whether a user is 17 with any accuracy is not feasible. In addition, Dark Horse publishes comics and other books containing sexually-related content, specifically, in most instances, visual depictions, that may be sexually arousing, depending on the individual. Dark Horse would be committing a felony if a 17 year-old purchased material it publishes to satisfy his or her sexual desire or to become sexually aroused while reading such material -- an act that individual has a right to do.

10. Dark Horse publishes over thirty comics or other books per month. On Exhibit A are listed just a few examples of the multitude of material published by Dark Horse and sold at TFAW likely to contain sexually-related narrative or pictorial content, including, in some instances, nudity, that could be considered by some "sexually explicit" or "visual representation[s] or explicit verbal description[s] or narrative account[s] of sexual conduct" that may appeal to a person's "sexual desires." I believe the only way for Dark Horse to ensure compliance under the Statute would be to refrain from publishing this material entirely. Attempting to determine, book by book, what may fall under the purview of the Statute, including whether there are any "sexual explicit" portions and if so whether such portions "serve some purpose other than titillation" (even if I knew what that meant) is totally impractical, unduly burdensome and surely would result in our overinclusive self-censorship.

11. Further, if the Statute is not enjoined and Dark Horse must self-censor the books it publishes, it undoubtedly will have an adverse effect on the economic viability of our company. Given the vague and overbroad nature of the Statute, even if Dark Horse were to continue to publish "sexually explicit" materials, its retail stores, including TFAW, also subject to the Statute, likely would cease substantially or altogether selling such materials, resulting in a significant chilling effect. As importantly, adults and older teenagers will be impeded from access to constitutionally-protected materials.

Conclusion

12. For all the reasons stated above, I fear prosecution under the Statute. If it is not enjoined, Dark Horse and TFAW will be forced either to self-censor our comics and books to a great degree or risk criminal liability. (The only reason we have not self-censored in response to the Statute to date is that we have been advised that it is unconstitutional.)

 4/11/08
KEN LIZZI

Exhibit A

Leroy Neiman's: Femlin (afterword by Hugh Hefner)

Berserk, by Kentaro Miura

Grendel: Behold the Devil, by Matt Wagner

Empowered, by Adam Warren

Lone Wolf and Cub, by Kazuo Koike

Sin City, by Frank Miller