

**AMERICAN CIVIL LIBERTIES UNION  
OF UTAH FOUNDATION, INC.**

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

NATHAN FLORENCE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil No. 2:05CV00485 DB
vs.	)	
	)	Judge Dee Benson
MARK SHURTLEFF, et al.,	)	Magistrate Judge Samuel Alba
	)	
Defendants.	)	

**DECLARATION OF TERRY NATHAN**

I, Terry Nathan, pursuant to 28 U.S.C. § 1746, do declare:

1. I am the Executive Director of the Independent Book Publishers Association (“IBPA”), formerly known as Publishers’ Marketing Association, a plaintiff in this action. I submit this declaration on behalf of IBPA in support of the plaintiffs’ motion for summary judgment requesting a declaration of unconstitutionality and permanent injunctive relief

prohibiting enforcement of Sections 5 and 9 of House Bill 260, enacted on March 2, 2005, as applied through amended Utah Code § 76-10-1206 and Utah Code § 76-10-1233 (collectively the “Challenged Statutes”).

2. IBPA is a nonprofit trade association representing more than 4,200 publishers across the United States and Canada. The IBPA represents predominantly nonfiction book publishers and assists members in their marketing efforts to the trade. IBPA is incorporated in California, and has its principal office in Manhattan Beach, California.

3. IBPA was founded in California in 1983 to represent and serve book, audio and video independent publishers. It now has more than 3000 publisher members in the United States and Canada, primarily publishers of non-fiction. Thirty of its members are located in Utah.

4. Although their businesses are primarily based on the production and distribution of physical books and audio and video products, most of IBPA’s members are very actively involved in the Internet. Since the mid-1990’s, production and distribution of content, two of the most important functions carried out by IBPA’s publisher members, has included not just physical items, but electronic content distributed online. IBPA’s members communicate with authors and others, receive manuscripts, and edit, typeset, and design books electronically; transmit finished products to licensed end-user customers; communicate with bookstores and other wholesale and retail accounts; promote authors and titles; and market title, sell and distribute books and other related material online.

5. In addition, the use of the Internet for marketing is particularly important for smaller publishers, as are many of IBPA’s members. Given their often very limited resources, use of the Internet is crucial. Many of IBPA's members have webpages and provide information

to a global audience via the Internet. Some of the content provided by IBPA's members, including romance novels, sexual education material, and art or photography books, contains descriptions or depictions of nudity or sexual conduct, and other descriptions which might be considered to be "harmful to minors". If the Bill is not enjoined, members of IBPA will be forced either to risk criminal liability or to stop providing online access to constitutionally protected books and other related materials.

### **Fear Of Prosecution Under the Bill**

6. IBPA's members fear that they may be at risk of prosecution under the Bill challenged in this action for permitting minors to view or access constitutionally protected material which might be deemed "harmful to minors" under the meaning of the Bill.

7. IBPA members are active users of the Internet. **Most** IBPA member publishers currently have active Internet websites.

8. Many of IBPA's members are smaller, independent publishers, without access to traditional book distribution outlets. Some of IBPA's members rely exclusively on the Internet for the sale and distribution of books and related material, either direct to consumers or via online bookstores. Utilizing the Internet, the size of the publisher or location of the publisher is irrelevant. Online book buyers can purchase content provided by IBPA members on the Web anywhere in the world. Today, it is estimated that up to fifty percent of total member sales derive exclusively from online bookstore sales.

9. IBPA itself has a website, located at [www.ibpa-online.org](http://www.ibpa-online.org), on which - it discusses issues important to independent publishers and has links to other websites, including the websites' of its publisher members, on the Internet.

10. The online information that IBPA members provide serves both adults and minors.

11. Online users anywhere in the world can access the content provided by IBPA and its members on the Web and via email.

12. The only certain practical way for IBPA and its members to prevent making “harmful to minors” material available to minors is to entirely eliminate those materials from their websites.

### **Internet Use by IBPA Members is Interstate in Nature**

12. Much of the Internet use by publishers is interstate in nature. For example, any publisher’s webpage can be accessed by Internet users not only throughout the United States, but throughout the world. Similarly, IBPA members from across the country communicate with one another, as well as with Internet users, including booksellers, readers, authors and journalists, across the country, via email. Moreover, IBPA members cannot effectively prevent their websites or discussion groups from being accessed by Utah users. Thus, both in-state and out-of-state IBPA users -- who post information which may be considered “harmful to minors” as established by the Bill on websites, chat rooms and discussion groups -- must comply with the Bill or risk criminal prosecution in Utah.

13. The only certain method of compliance with the Bill is for IBPA and its members to exclude from their websites anything which might possibly fall under the purview of the Bill, thus severely constricting the usefulness and informational content of the websites. IBPA strongly believes that adults are constitutionally entitled to unrestricted access to all First Amendment-protected material.

14. The Internet, and the access it provides to books and other works, is an essential source of interstate business for the majority of IBPA members. As discussed above, publishers conduct business over the Internet in a variety of ways. If the Bill is not enjoined and IBPA members are forced to self-censor, they will suffer immeasurable injury through significant loss of sales and recognition otherwise generated by use of their websites with respect to both censored and uncensored materials and resources.

### **Conclusion**

15. For all the reasons stated above, IBPA's members fear prosecution under the Bill. If the Bill is not held unconstitutional, the members will be forced either to self-censor materials available on their Internet websites or to risk criminal liability.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3<sup>rd</sup> day of June, 2011.

s/ Terry Nathan

Terry Nathan