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Fox Television
Twentieth Century Fox Film Corporation

March 21, 2007

The Honorable Senator Andrew J. McDonald, Co-Chair
The Honorable Representative Michael P. Lawlor, Co-Chair
Joint Committee on Judiciary, Connecticut General Assembly
Legislative Office Building – State Capitol
Hartford, CT 06106

Re: Written Testimony In Opposition to Raised HB No. 6818

Dear Co-Chairs McDonald and Lawlor:

I am writing on behalf of Twentieth Century Fox Film Corporation in opposition to Connecticut Raised House Bill 6818, which is scheduled for public hearing today before the Joint Committee on Judiciary.

Twentieth Century Fox Film Corporation is a leading producer and distributor of theatrical motion pictures and television programming. We also license and distribute older “library” titles for syndicated television, in home entertainment media (e.g., DVD) and for viewing on pay and free cable television channels. Fox Searchlight Pictures produces and acquires for distribution low-budget feature motion pictures, including many that have premiered at independent film festivals.

Fox shares all of the First Amendment and other concerns that are addressed in the MPAA Memorandum in Opposition to the Bill, and that are raised by Professor J. Thomas McCarthy in his letter of March 18, 2007 and by Robert Corn-Revere in his letter of March 19, 2007. It is impossible to overstate the practical and Constitutional infirmities that HB 6818 would create. In addition to Fox’s endorsing the MPAA Memorandum, as well as the Written Testimony submitted by Professor McCarthy and Mr. Corn-Revere, I would like to offer concrete examples of just a few of the innumerable untenable effects on filmed entertainment of the Bill if enacted.

Film is, of course, a visual medium. To tell a story effectively on film requires the use of visual images, just as to tell a story effectively in a novel requires the use of print and text. The Connecticut statute exempts “literary works in print and text” without limitation. Yet, storytelling in *audio-visual* works is severely restricted. Except for the very narrow exemption for public officials or candidates for public office, the Bill would prohibit filmmakers from digitally or otherwise modifying a person's persona “so as to (A) cause the

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individual to speak or appear to speak words that the person did not speak, or (B) place the individual or appear to place the individual in a place or circumstance in which the individual did not agree to be placed" although the portrayal is not defamatory or invasive of the person's privacy. Thus, the author of a novel sold in a Hartford bookstore could create a fictional character who as a young girl is transformed by a dream in which she is visited by Albert Einstein and Eleanor Roosevelt, and grows up to win the Nobel Peace Prize. Yet, unless a children's film maker was able to obtain the prior written consent of the heirs or other licensees of Einstein's and Roosevelt's publicity rights, the filmmaker could not tell the same story using even fleeting images of those inspirational public figures to depict the girl's life-changing dream in a film to be shown on Hartford public television. Docudramas would be similarly burdened by the restrictions and potential expense of obtaining the required consents. Moreover, it is unlikely that a living person or a deceased person's heirs would give consent at any price to a critical portrayal or a parody.

Nor is the scope of the Bill limited to celebrities or other persons in the public eye. Every person, living or deceased, regardless of residency or citizenship, is covered. Many films intentionally include individuals and crowds filmed on the street or in other public venues. Many others capture such people incidentally when filming is taking place in areas open to the public. The names and identities of such persons are rarely known, or able to be known. Yet as soon as that footage is edited to alter any aspect of the locale or "circumstance" (including timing, weather conditions, etc.) or to alter any element of their "performance," including the chronology in which events on the street took place, the statutory publicity rights of every person in the footage would be violated.

Further, creators and distributors of lower-budget, independent films would be especially chilled by, among other constraints of the Bill, the sheer costs that would be imposed. In addition to costs of obtaining express consents to use specific people in their films, the cost of including large crowd scenes would be prohibitive. For instance, if an independent filmmaker wanted to shoot a movie in which the Prophet Mohammed returned to Mecca in 2007 to address the millions of people making the annual pilgrimage to Hajj, he could license footage of the real pilgrims from the copyright owner of the footage, and digitally make the actor who plays Mohammed appear among the crowd. Yet, HB 6818, if enacted, would make that use impossible because any of those persons, or anyone to whom they licensed their publicity rights, could enjoin the exhibition of the movie in Connecticut theaters, the sale of the movie on DVD within the state and the broadcast of the movie on any television network or cable channel that could be seen in Connecticut, and would give those persons a claim to a portion of the profits of the film or, in the alternative, damages in the amount of two thousand dollars per person in the crowd. The only option available to the filmmaker would be to pay thousands of people to render services as "extras" playing the pilgrims, and to shoot them in Mecca or at a location representing Mecca.

Moreover, in light of the now ubiquitous employment of digital technology in bringing a film to an audience, it is almost certain that the voice and/or image of every person in the film will be digitally or electronically modified to some extent. Because HB 6818 appears to apply to existing product as well as filmed entertainment created in the future, any editing or remastering of library titles containing extras or other persons from whom written consent was not obtained

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at the time is potentially a prohibited alteration of their performance under the statute. Accordingly, Fox's extensive print and audio remastering of Joseph Mankiewicz's 1963 classic *Cleopatra* (which contains very large and opulent crowd scenes) for release a few years ago as a collector's edition deluxe DVD, for example, would likely not have been possible if the Bill had been in effect.

The use of music in filmed entertainment would also be restricted severely under the Bill. For instance, music sung by a church choir and previously recorded could not be used under license from its copyright owner in a film depicting the music being sung by a different choir played by actors, in a different church from that in which the music was actually sung, without the prior written consent of every member of the original choir. In the absence of such consent, the modification of the original choir's voices to appear to place them in a place or circumstance where they did not agree to be placed would violate the statute. Likewise, the use in a rap film of "samples" of pre-existing recorded music - licensed from the copyright owner of the music - for the film's new, original soundtrack would be prohibited without the express written consent of every person whose voice is contained in the recorded sample.

Even where a work itself is in complete compliance with the statute, the ability to advertise and promote such a work would be restricted by the Bill. Currently under right of publicity laws across the country, where the work itself does not violate a person's right of publicity, the person may also be portrayed in promotions for the work in order to inform the public of the work's contents. Every state's right of publicity statute that I am aware of permits such promotional uses, as does case authority addressing the issue. HB 6818, however, appears to contain onerous restrictions even on the truthful advertising of a work that does not itself violate a person's right of publicity. Although the limitations are confusing and vague, it seems clear that only "past editions" of a filmed work may be used in advertising, and only if the promotional use "does not convey or reasonably suggest that the individual endorses the news reporting or entertainment medium." This would unduly restrict, for example, Fox Broadcasting Company's promotions of its extremely popular television show "American Idol." If a contestant's family members were filmed in the audience reacting to the judges' critiques of the contestant's performance one week, a clip of them could not be shown in promotions for the next show where that contestant might be voted off.

It is conceivable, also, that few foreign films would be available to Connecticut residents. Those films would be produced under the laws of the local country of origin without consideration of the publicity rights in Connecticut of persons in the film whose written consent therefore would not have been obtained. Yet anyone in the film, regardless of citizenship, could bring suit in Connecticut if the film were exhibited there. It is foreseeable that errors and omissions insurers might exclude from coverage right of publicity claims arising from the distribution of foreign films in Connecticut because of the difficulty in obtaining certainty that the necessary consents were obtained. Similarly, any dubbing into English - without express written consent of every person who said any word that was dubbed from the original - could violate the statute in that the person's voice and performance would be modified to make it appear that he or she was speaking words that the person did not speak.

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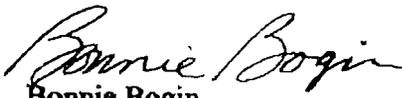
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Even if filmmakers and producers were determined to seek prior written consents, it is not at all clear under the Bill who is entitled to give such consents. The Bill permits a person's right of publicity to be divided among any number of people and any owner of any portion of that right may bring a lawsuit to enforce the right, so long as the part-owner gives notice to a majority of the owners and those owners do not object to the lawsuit within the time specified under the statute for doing so. Yet nowhere does the Bill state whether a single owner of less than a majority share is authorized to grant the necessary consent.

HB 6818 would give a right of publicity under Connecticut law to anyone in the world (including the heirs or licensees of persons who are deceased for less than seventy years) rather than only for the residents of the state or those domiciled in the state at the time of their death, and would make the courts of the state available to any person in the world whose rights under the statute are claimed to be violated. For all intents and purposes, if enacted, HB 6818 would create a national right of publicity law eviscerating the protections for filmed entertainment uniformly recognized by federal and state courts, and state statutes throughout the country. (This includes Indiana's right of publicity statute, which is considered by many to be the most protective of publicity rights of any statute in the United States, and yet expressly exempts from its reach motion pictures and television programming.) In light of national network broadcasting of television shows, and distribution of films through nationwide chains and channels, and over the internet, it would not be possible, even if it were otherwise economically practical, to produce any motion picture or television show that would violate Connecticut's right of publicity laws.

We respectfully request that the Committee reject Bill 6818. Thank you for your consideration.

Sincerely,


Bonnie Bogin