



**TESTIMONY OF HENRY S. HOBERMAN
IN OPPOSITION TO RAISED HOUSE BILL 6818
BEFORE THE JOINT COMMITTEE ON JUDICIARY
CONNECTICUT GENERAL ASSEMBLY
MARCH 21, 2007**

I am a Senior Vice President with ABC/Disney in New York responsible for overseeing litigation for ABC and The Walt Disney Company. I am also the immediate past Chairman of the Board of the Media Law Resource Center ("MLRC"), an independent, non-profit organization that supports and promotes free speech and free press rights, although I am not here to speak on behalf of the MLRC today. With the exception of a brief stint as a federal prosecutor, I have spent the entirety of my career as a First Amendment lawyer.

Disney, ABC and our sister company, ESPN, are opposed to Raised House Bill 6818. This bill has substantial and insurmountable problems. As written, this bill would arrogate to celebrities and other public figures the right to control what is said about them in motion pictures, television programs, docudramas, historical accounts and other expressive works. The expansive right of publicity cause of action created in this bill will be wielded like a weapon by those who seek to influence or curtail speech they perceive to be unflattering. Some of our most cherished free speech rights, including the right to comment, parody and satire, are imperiled by this bill.

This bill also runs afoul of established First Amendment principles by allowing celebrities and other public figures to obtain an injunction to quell expressive works and impound the implements of free expression, including plates, molds, tapes, films and negatives. In First Amendment parlance, such an overreaching injunction is called a "prior restraint." Over the years, the Supreme Court and many other courts around the country, including those in Connecticut, have reaffirmed the bedrock constitutional principle that "prior restraints" are disfavored and repugnant to the free speech rights of American citizens.

In addition to the severe damage it would cause to First Amendment principles, this bill would also expand and contort the existing right of publicity law further than courts have permitted. For years, courts have been careful to say that the right of publicity is a narrow one. In case after case, the courts have sought to protect expression by limiting right of publicity claims to truly commercial uses of a public person's identity or likeness without their permission in the sale of a product or service, such as a misleading advertisement suggesting that a celebrity endorsed a product or service. If the use of a public figure's identity or likeness is imbued with expressive elements that transform it

into a new work, it is fully protected speech. This bill contains none of these crucial limitations or protections.

Finally, the language of the bill is imprecise and will result in endless, costly litigation over its terms. For example, the bill purports to exempt “bona fide news” programs but does not define what constitutes “bona fide” news. It also invites a lawsuit when an individual believes that promotions or advertisements for news reports “reasonably suggest that the individual endorses the news reporting,” but does not define what constitutes an endorsement. When terms *are* defined, such as the word “persona,” the bill sweeps too broadly. “Persona” is defined to include, among other things, the “mannerisms and gestures” of celebrities, which would threaten impersonations and parodies familiar to viewers of television programs like NBC’s *Saturday Night Live*, ABC’s *Jimmy Kimmel Live* and Comedy Central’s *The Daily Show with Jon Stewart*.

In short, this bill represents a serious threat to First Amendment values, an unprecedented expansion of existing right of publicity law without the attendant limitations and safeguards, and a troubling mélange of language and definitional problems that portends years of expensive litigation. We respectfully urge that House Bill 6818 be defeated.

I. House Bill 6818 Threatens to Curtail Free Speech in a Variety of Motion Pictures, Television Programs and other Expressive Works.

Although this bill purports to provide an exemption from liability for theatrical works, musical compositions, film and radio and television programs, the exemption disappears if an individual’s persona is modified in any way to “cause the individual to speak or appear to speak words that the person did not speak” or “appear to place the individual in a place or circumstance in which the individual did not agree to be placed.” This provision is so broad that it would include a host of movies, television programs and other expressive works that satirize celebrities and public figures or portray historical events. An illustrative list of Disney motion pictures and ABC and ESPN television programs that potentially could be subject to civil litigation under the provisions of this bill is attached to this testimony.

Docudramas and motion pictures about historical events and real people would be prime targets for litigation under the language of this bill. Helen Mirren’s Academy Award-winning turn as Queen Elizabeth II in Miramax’s celebrated motion picture, *The Queen*, for example, could provide litigation fodder under this bill for any number of public figures portrayed in the movie, from Prime Minister Tony Blair to Prince Charles to the Queen herself. Significantly, and contrary to other state statutes, the bill is not limited to Connecticut residents, affording domiciliaries of other states and even foreign nationals an opportunity to bring a lawsuit here in Connecticut. Disney, ABC and ESPN have a long and rich history of developing, producing and airing compelling dramas about real people and events, including movies about the civil rights struggle (*Selma Lord Selma*), the holocaust (*Anne Frank: The Whole Story*) and alcoholism (*The Betty Ford Story*). Faced with the language of this bill, producers and filmmakers may decide to steer clear of some historical material or avoid using identifiable public figures in their works, at great cost to artistic expression and the public’s understanding of these events.

Humor and parody also stand to suffer if this bill becomes law. ABC's *Jimmy Kimmel Live*, for example, regularly features a segment called "This Week in Unnecessary Censorship." In this segment, the program pokes fun at public figures and censors by unnecessarily "bleeping" -- in strategic places -- the dialogue of celebrities, dignitaries, politicians and other public figures. The show also includes regular features that modify real footage of newsworthy public figures to create a parody or satire. In one recent example, the show responded to news that Paris Hilton's driver's license had been suspended -- requiring her to hire a driver -- by inserting an image of singer Bobby Brown as Paris Hilton's driver. This bill could embolden the subjects of Mr. Kimmel's parodies to sue for perceived violations of their right of publicity even though the speech is clearly protected by the First Amendment.

Of course, the universe of parodists on television and in other media today is wide. In addition to Mr. Kimmel, Jay Leno, David Letterman, Conan O'Brien, Jon Stewart, and the staff of *Saturday Night Live* -- to name only a few -- regularly modify real images of celebrities and public figures for comedic and satiric effect. In one ongoing gag, Mr. O'Brien superimposes someone else's lips onto a photograph of a celebrity and makes the celebrity appear to speak. The words, of course, are supplied by Mr. O'Brien. Under this bill, Mr. O'Brien could potentially be subject to civil litigation and, possibly, an injunction *prohibiting the broadcast of his show* because he "cause[d] the individual to speak or appear to speak words that the person did not speak."

In our society, criticism and commentary about public figures go to the very heart of the First Amendment. Providing celebrities and public figures with a weapon to strike back at speech they perceive as negative or unflattering, as this bill does, is certain to chill free speech.

Equally chilling is the prospect of injunctive relief that could prohibit the release of a movie, the broadcast of a television show, or the publication of a book. The proposed bill gives courts the unbounded statutory power to impose an injunction on films, television and radio programs, and theatrical works, as well as impound the material used to create them, without any regard to whether or not the material is protected by the First Amendment. The bill thus authorizes a "prior restraint" on expressive speech, which, according to the Supreme Court of the United States, is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Any proposed law that would restrict protected expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Courts, including the Supreme Court, have consistently rejected efforts to impose injunctions on expressive speech in all but the most "exceptional cases," such as the publication of military plans during wartime. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Under these legal guideposts, a statutory prior restraint that would prohibit the distribution, broadcast or publication of an expressive work in order to protect a celebrity from critical or unflattering portrayals cannot possibly pass constitutional muster.

II. House Bill 6818 Impermissibly and Unwisely Expands the Existing Law.

The law governing the right of publicity is well-established, and it has never been stretched as far as this bill would take it by any court or state legislature.

In fact, courts addressing the right of publicity have taken great pains to point out that the cause of action must be narrowly tailored to avoid covering expressive works. As one court observed:

[B]ecause of the importance celebrities hold in our society, the right of publicity can potentially chill alternative versions of celebrity images that are ‘iconoclastic, irreverent, or otherwise attempt to redefine celebrity meaning.’ Such prominence invites comment, and the right to publicity should not be used as a shield to caricature, parody and satire.

World Wrestling Federation Entertainment, Inc. v. Big Dog Holdings, Inc., 280 F. Supp.2d 413, 444-445 (W.D. Pa. 2003), citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

Yet this bill would reach far more than the sort of purely commercial conduct traditionally protected under a right of publicity, such as the use of a celebrity’s image to mislead the public into believing the celebrity endorsed a product, see *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), or the misappropriation of an artist’s entire performance without compensation. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-576 (1977). This bill would impact large swaths of parody, satire and commentary, and even historical works such as docudramas or biopics. See Attachment.

This bill also suffers from other problems related to scope. As discussed, unlike other right of publicity laws, this bill would create a cause of action that would extend even to individuals domiciled outside the state. And its conferral of post-mortem rights that would last for seven decades is breathtakingly broad.

The expansive cause of action contemplated by this bill is contrary to the general principle that an individual’s right of publicity must be narrowly construed to prevent a clash with free speech rights. Regrettably, the breadth and scope of this bill would trump free expression, not protect it.

III. The Language of House Bill 6818 Raises Serious Concerns.

House Bill 6818 contains a series of words and phrases that raise serious concerns. For example, although the bill purports to exempt “bona fide news or public affairs reporting and programs” from its reach, it does not define what kind of reporting would constitute “bona fide” news. It is easy to envision the legal wrangling that could ensue over this language. If the target of a John Stossel “Give Me a Break” segment on ABC’s *20/20* newsmagazine objects to Mr. Stossel’s often pointed barbs, he or she might well resort to civil litigation under this bill, arguing that Mr. Stossel’s unique brand of social commentary and criticism is not “bona fide” news. Or a prominent sports figure who

objects to the use of his image in a news segment on ESPN's *Sportscenter* could try to shoehorn himself into the provisions of this bill by contending that ESPN's signature program is not "bona fide" news.

Other provisions of the bill raise similar issues. Advertisements for news reports, for instance, could be actionable if they suggest that an individual "endorse[d] the news reporting." News organizations using images of famous people to promote the content of their newscasts would now do so at their peril. Similarly, the bill seeks to exempt a broadcast about a "topic of general public interest," but does not define public interest. And, although the bill purports to exempt coverage of a public official or candidate, it paradoxically allows a cause of action by a public official or candidate if that individual's "persona" is used "for a commercial purpose without the consent of the individual." Commercial purpose is undefined, leaving room for mischief by public officials depicted in unflattering or compromising footage promoting a movie or television program. One colleague suggests that President Bush might have a cause of action under this language for the use of his image in advertisements for Michael Moore's *Fahrenheit 911*.

The inevitable result of these line-drawing and definitional problems is likely to be protracted and costly litigation. Unfortunately, the speakers – filmmakers, writers, reporters, editors, historians – are the ones who will bear the brunt. Many would no doubt be chilled from engaging in protected speech by threats and the prospect of burdensome and expensive litigation, even if – as we would hope – courts would ultimately vindicate the First Amendment interests at stake here and reject this sort of claim.

This result highlights the fundamental flaw in this bill – its lack of protection for expressive work. Whether the particular form of expression is a movie, television program, play or song, or the genre is parody, commentary, satire or docudrama, this bill threatens to chill and reduce core expressive speech rather than embrace and protect it.

For all of these reasons, we respectfully oppose the passage of House Bill 6818.

March 21, 2007



Sample List of Motion Pictures and Television Programs Potentially Subject to
Civil Litigation Under the Provision of Connecticut House Bill 6818

Walt Disney Motion Picture Group

- A Civil Action* Families of children who died sue companies for dumping toxic waste (1999)
- Calendar Girls* Women's fundraising effort by posing nude for a calendar (2003)
- Cool Runnings* Jamaican bobsled team (1993)
- Ed Wood* Film director (1994)
- Full-Court Miracle* Lamont Carr, basketball player and coach (2003)
- Glory Road* Don Haskins, first coach of all African-American NCAA basketball team (2006)
- Hollywoodland* Actor George Reeves, first star of television's *Superman* (2006)
- Invincible* Vince Papale, football player, and Dick Vermeil, football coach (2006)
- Miracle* U.S. men's hockey 1980 gold medalists (2004)
- My Left Foot* Christy Brown, disabled artist (1989)
- Pearl Harbor* (2001)
- Remember the Titans* Herman Boone, football coach (2000)
- Ruby Bridges* School girl who walked up southern school steps with armed guards (1998)
- Summer of Sam* Son of Sam murders (1999)
- The Aviator* Howard Hughes (2004)
- The Great Raid* Liberation of Japanese POW camp in the Philippines during WWII (2005)
- The Greatest Game Ever Played* Golfers Francis Ouimet and Harry Vardon (2005)
- The Hours* Virginia Woolf (2002)
- The Insider* Jeffrey Wigand, Brown & Williamson tobacco scientist (1999)
- The Queen* Queen Elizabeth II (2006)
- The Rookie* Jim Morris, oldest Major League rookie (2002)
- Under the Tuscan Sun* Writer Francis Mayes' trip to Tuscany (2003)
- Veronica Guerin* Irish journalist who was murdered (2003)

ABC Television Network

Docudramas

Anne Frank: The Whole Story (2001)

Child Star: The Shirley Temple Story (2001)

Don't Look Back Satchel Paige, Hall of Fame baseball pitcher (1981)

Dynasty: The Making of a Guilty Pleasure Behind the scenes look at the 1980's TV series (2005)

Gilda Radner: It's Always Something (2002)

Have No Fear: The Life of Pope John Paul II (2005)

Life with Judy Garland: Me and My Shadows (2001)

Mohammad Ali: King of the World (2000)

My Name is Bill W. Bill Wilson, founder of AA (1989)

Prince William (2002)

Rock Hudson (1990)

Selma Lord Selma Civil rights struggle in 1965 Alabama (1999)

The Amy Fisher Story Troubled Long Island teen (1993)

The Audrey Hepburn Story (2000)

The Beach Boys: An American Family (2000)

The Betty Ford Story (1987)

The Mystery of Natalie Wood (2004)

The Three Stooges (2000)

Trump Unauthorized (2005)

When Billie Beat Bobby Billie Jean King and Bobby Riggs (2001)

Programs

Jimmy Kimmel Live

ESPN

Docudramas

3 Dale Earnhardt, NASCAR driver (2004)

Bronx is Burning Yankees in the 1970's (July 2007)

Four Minutes Roger Bannister, runner (2005)

Hustle Pete Rose (2004)

Junction Boys Paul "Bear" Bryant, football coach (2002)

Season on the Brink Bobby Knight, basketball coach (2002)

Programs

Dream Season Eight fictional match-ups between 20 Super Bowl champions using footage from actual Super Bowls (1990-1992)