

March 18, 2007

To: Senator Andrew McDonald, Co-Chair, Representative Michael Lawlor, Co-Chair, and Members of the Joint Committee on Judiciary

From: Prof. J. Thomas McCarthy

Subject: Written Testimony In Opposition to Raised House Bill 6818

I am a Senior Professor at the University of San Francisco School of Law and the Founding Director of the McCarthy Institute of Intellectual Property and Technology Law. I am the author of the seven volume treatise "Trademarks and Unfair Competition," which has been cited in over 2500 judicial opinions by many courts, including the U.S. Supreme Court on nine occasions.

I am also the author of the two-volume treatise "The Rights of Publicity and Privacy." This is the only law book which focuses primarily on the right of publicity. This book has been relied upon as authority by courts across the nation.

I oppose the language in Connecticut Assembly Bill No. 6818 which purports to give every person the right to prohibit any performance which uses actors portraying that person to "speak or appear to speak words that the person did not speak" or to "place the individual or appear to place the individual in a place or circumstance in which the individual did not agree to be placed."

I oppose such an unwarranted expansion of the right of publicity to prohibit the making of dramas or docudramas which tell the story of history in dramatic form. This would be an unconstitutional infringement of artistic and creative rights. The right of publicity should never be stretched so as to give anyone the legal right to control the use of their identity in an expressive performance, such as in a filmed story.

The right of publicity cannot be used as a vehicle to stifle undesired discussion and legitimate commentary on the lives of public persons. The law should give to no living person the "exclusive right" to tell his or her life story. Similarly, the descendants of a deceased person have no "exclusive right" to tell a story about the deceased person. Thus, there is no such thing as a legal "exclusive right" to tell the story of some or all of your life or of the life of those deceased persons whose rights you own. Regardless of what popular folklore says, the media

can tell the story of events in your life without your permission and without paying you. (This assumes that the story told is not defamatory and that the disclosure privacy tort is not invaded in the process of telling the story.) The same thing applies to your deceased ancestors. (Their privacy and defamation rights died with them.)

A moment's thought about the relation between free speech, "news" and "history" reveals why this must be so. If the law mandated that the permission of every living person and the descendants of every deceased person must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told "their way." That would mean that those who are the participants in news and history could censor and write the story and their descendants could do the same. This would be anathema to the core concept of free speech and a free press. News should be written by free and independent reporters and history written by historians who tell the story the way they see it, not the way the participants and their heirs want it to be told. Legislators should not put in the hands of individuals the legal right to second-guess the author's or film-maker's artistic decisions on when to vary from what is strictly historically provable in order to dramatically tell the story of human events.

The law does not and should not give anyone the legal "right" to own history in this way. In a free society, there is and should be no such thing as the "official news" or the "approved version of history." Of course, if the person is living, defamation and privacy laws must be respected, but participants in history, or their relatives, cannot control the narrative of history.