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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-Chairmen McDonald and Lawlor:

I am writing to submit my written testimony on behalf of the Motion Picture Association, Inc. (MPAA) and its member companies in opposition to Raised House Bill 6818, which is scheduled for public hearing today before your Joint Committee on Judiciary.

On behalf of the MPAA and my members, I urge you and your members to review our written submission in the form of a memorandum in opposition, and I look forward to making condensed remarks and answer questions at the hearing.

Sincerely,

Copies: Members of the Joint Committee on Judiciary
Dan Glickman, Chairman & CEO, MPAA
Bob Pisano, President & COO, MPAA
CEOs of the MPAA Member Companies,
The Walt Disney Company
Twentieth Century Fox Film Corporation
Paramount Pictures Corporation
Sony Pictures Entertainment
Universal City Studios (NBC Universal), a General Electric subsidiary
Warner Bros.
Linda Aloe-Sobin

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MEMORANDUM IN OPPOSITION TO CONNECTICUT RAISED HOUSE BILL 6818

The Motion Picture Association of America, Inc. (MPAA), on behalf of its member companies, opposes Raised House Bill 6818. MPAA, a trade association, represents the leading producers and distributors of motion pictures in the U.S., which include Buena Vista Pictures Distribution, (Disney), Twentieth Century Fox, Paramount Pictures, Sony Pictures Entertainment, Universal City Studios (NBC Universal) and Warner Bros.

We respectfully submit that HB 6818 is unnecessary, contrary to established law, would severely regulate and restrict story-telling in audio-visual works in all distribution venues including the Internet, and would discourage motion picture production, particularly in Connecticut. This legislation, purportedly creating a right of publicity, would reverse over 500 years of common law jurisprudence by providing a weapon to control the content of expressive works such as motion pictures and television programs. In violation of the First Amendment to the U.S. Constitution, the concordant provisions of the Connecticut Constitution, and the commerce clause of the U.S. Constitution, this measure also would conflict with Federal copyright law in violation of the "supremacy clause." If enacted, the effect of the new law would be felt not only in Connecticut and the United States but throughout the world.

Rights at law to protect name, image or likeness, whether arising under statute or common-law decisions, run only to such use in connection with the sale of a product or service. However, this bill would extend its protections far beyond anything contemplated in common law or existing state right-of-publicity laws to bring "expressive" works within its scope.

HB 6818 attempts to categorize First Amendment protected works by type, improperly distinguishing between literary works (Section 6. (5)) and motion pictures. Section 5 (a) of the bill would authorize an injunction and/or damages for the use of a person's name, image or likeness when such

a use would not trigger any liability customary under laws of defamation. Section 5(c) permits a court to order the impounding of all materials (plates, molds, masters) before a final judgment. Preliminary injunctions enjoining expressive works raise serious free speech concerns. By expanding the right to persons domiciled outside of Connecticut, in contravention of customary law that the domicile of the complainant determines "rights of publicity," the bill would create impediments to the importation and exhibition of non-Connecticut works in Connecticut, violating the commerce clause. The net result of the bill would be to discourage motion picture production, creating a "chilling effect" on freedom of speech by interfering with a filmmaker's ability to tell a story not only by the use of public figures (living and dead for more than 70 years) as protagonists in the story, but through the use of iconic public figures to establish (without the use of dialogue) time, place, setting, mood, attitudes and other elements of the story.

1. The Bill Violates Freedom of Speech

The First Amendment to the United States Constitution and the Connecticut Constitution protects filmmakers and other storytellers. This includes comment, criticism and parody about public figures and personalities, as well as the use of iconic public figures. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Eronoznik v. City of Jacksonville, 422 U.S. 205 (1975); and Jenkins v. Georgia, 417 U.S. 153 (1974). The free flow of information and ideas is also protected from state and federal laws that would result in a chilling effect on speech, which includes motion pictures and television programs. The United State Supreme Court has ruled many times that laws that promote self-censorship because of the fear of legal consequences violate the First Amendment as much as laws that directly ban certain speech. See Smith v. California, 361 U.S. 147, 154 (1959).

While motion pictures and other material are exempt from the commercial product applications of the proposed law, these expressive works are not exempt, if:

Section 6 (6)..."the individual's image, voice, likeness, performance or appearance of an individual (other than an elected or appointed public official) is modified electronically, digitally or by other means so as to (A) cause the 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;"

This provision is so broad and all-inclusive that it captures biographies, parody and satire in virtually any expressive work. Works that range from an editorial cartoon in the *Hartford Courant* featuring a caricature of former Speaker Newt Gingrich (not a candidate or an elected official) to a segment on NBC's Saturday Night Live about Speaker Gingrich, as well as scores of biographical motion pictures and television shows about public figures, actors, criminals, and past elected officials, would be subject to liability under the proposed measure. Moreover, in this day and age, many figures in the public eye, from Tom DeLay and Al Gore to Donald Trump and Rosie O'Donnell, should not be immune to public comment, ridicule or use to establish time, place or other elements of a story. If they believe they have been slandered or defamed, state law provides a civil remedy. Connecticut should not create a new civil action for anyone who thrust themselves in the public eye.

To the extent that this provision of the bill is intended primarily to curtail the electronic or digital modification of an individual's voice, likeness, performance, or appearance as it was previously fixed or recorded in some medium such as audio, video, or a still photograph, the bill is a direct attempt to censor speech, in violation of the First Amendment. Electronic or digital modification is merely the contemporary equivalent of substituted sound tracks, artistic re-renderings, graffiti on a photograph, or other tools by which critics skewer public figures to make cultural commentary. Indeed, it is hard to imagine an episode of *The Daily Show*, *Saturday Night Live*, or numerous other expressive works that do not make use of such techniques to comment upon the issues and personalities of the day.

Because of its breadth, HB 6818 strikes directly at the heart of biographical story telling on film. The recent motion picture *Capote* would be subject to a lawsuit under this proposed statute since the motion picture created a modification of Capote's appearance (i.e., he was played by an actor). The filmmaker used Capote's distinctive mannerisms and gestures and his unique voice, and the actor uttered words he did not utter, and placed him in circumstances in which he did not agree to be placed. (See an attached list of a sampling of other motion pictures that could be targets of such civil action under HB 6818.)

2. The Bill Expands Settled Principles of Civil Procedure and Common Law

The procedural aspects of the bill are a dramatic departure from established law. Any public figure, except elected and appointed public officials or candidates for public office, could bring a lawsuit in Connecticut if the motion picture or television program was exhibited or shown in the state, including on the Internet. This legislation establishes a worldwide venue for civil legal action. HB 6818 contravenes established law, since a right of publicity is a property right determined by the domicile of the complainant.

HB 6818 invites all individuals and heirs to sue in state court, using Connecticut law no matter where the individual or deceased personality lived or died. This is contrary to the general rule of conflicts of most states. In the case of a deceased person, the law of the state of the decedent's domicile applies to determine whether there is a post mortem right of publicity.

For reasons of comity and established principles of law both in the United States and in the international territories, we respectfully submit that Connecticut should not apply its own law to personalities who were domiciled in other jurisdictions. States generally enact laws for the benefit and protection of their own residents, and allow other states to do the same.

3. The Bill Is Unnecessary and Is Not Designed to Respond to a Specific Problem

The majority of states do not have this kind of statute and are guided by common law. In fact, a 1983 Connecticut Supreme Court case, Venturi V. Savitt, 191 Conn. 588; 468 a.2d 933, an invasion of privacy case, construes Connecticut law as including a privacy claim for the "appropriation of a person's name or likeness." The Connecticut high court affirmed the trial court's dismissal of the plaintiff's claim that the defendant used his likeness without his permission for the defendant's commercial advantage. Therefore, we conclude Connecticut recognizes an action for the misappropriation of another's name or likeness under its "invasion of privacy" common law interpretations, and a specific right of publicity law is not necessary.

States that have enacted right of publicity statutes have addressed specific problems that have evolved. These matters usually involve the commercial exploitation of an individual's name in product advertising or promotion without permission.

In 1999, the California legislature amended its existing right of publicity statute based on negotiations and ultimately an agreement on language, including an expressive works exemption of motion pictures and television programs, between MPAA and the Screen Actors Guild. MPAA's over-riding concern is that motion pictures and other works of expression are not exempt from HB 6818 as is provided by law in California and other states, including the most recently enacted right of publicity statutes in Ohio and Pennsylvania.

The performances of actors in expressive works are already protected from re-use by the personal service and collective bargaining agreements that govern those performances, as well as existing right of publicity statutes governing commercial uses. Historically, actor personal service agreements limit the use of that actor's performance to a specified film. For those not in contractual privity with the performers or otherwise subject to existing laws, the provision attempts to control the content of new expressive works by those who would use those performances or other images for purposes of parody, commentary, or other fair use. For the motion picture industry in particular, the provision directly attacks the freedom to create expressive works, such as by incorporating actors into existing historical images that contain other individuals. Existing statutory and common law and First Amendment jurisprudence already address any possible concerns arising from such uses.

We also respectfully submit that this legislation would not be complementary to the economic development goals and objectives of the Connecticut Legislature to encourage and motivate a dramatic increase in location motion picture and television production. In fact, this law would discourage motion picture producers who are telling stories about public figures because of the direct threat of civil litigation under HB 6818.

For the aforementioned reasons, along with existing Connecticut case law, we respectfully submit that HB 6818 should be defeated.

March, 2007

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Sample List of Motion Pictures Subject to Civil Litigation Under the Provisions of Connecticut House Bill 6818

"54" – Studio 54 nightclub founder Steve Rubell (d. 1989)
"ALMOST FAMOUS" – rock critic Lester Bangs (d. 1982)
"ANGELS IN AMERICA" – attorney Roy Cohn (d. 1986)
"APOLLO 13" – astronaut Jack Swigert (d. 1982)
"AUTO FOCUS" – actor Bob Crane (d. 1978)
"BACKBEAT" – musicians Stuart Sutcliffe (d. 1962) and John Lennon (d. 1980)
"BEYOND THE SEA" – musician Bobby Darin (d. 1973)
"BLOW" – drug kingpin Pablo Escobar (d. 1993)
"BOBBY JONES: STROKE OF GENIUS" – golfer Bobby Jones (d. 1971)
"BOYS DON'T CRY" – transgender Brandon Teena/ Teena Brandon (d. 1993)
"BRIAN'S SONG" – football player Brian Piccolo (d. 1969)
"BUBBA HO-TEP" – musician Elvis Presley (d. 1977)
"BUDDY HOLLY STORY" – singer Buddy Holly (d. 1959)
"BUGSY" – mobster Bugsy Siegel (d. 1947) and actor George Raft (d. 1980)
"CALENDAR GIRL" – actress Marilyn Monroe (d. 1962)
"CAPOTE" – author Truman Capote (d. 1984)
"CHAPLIN" – actor Charles Chaplin (d. 1977)
"CHARIOTS OF FIRE" – Olympic athletes Harold Abrahams (d. 1978) and Eric Liddell (d. 1945)
"CINDERELLA MAN" – boxer Jim Braddock (d. 1974)
"CITIZEN COHN" – attorney Roy Cohn (d. 1986)
"COBB" – baseball player Ty Cobb (d. 1961)
"CRADLE WILL ROCK" – artist Diego Rivera (d. 1957)
"CRY FREEDOM" - activist Steve Biko (d. 1977)
"DALI" – artist Salvadore Dali (d. 1989)
"DE-LOVELY" – songwritier Cole Porter (d. 1964)
"DOMINO" – model Domino Harvey (d. 2005)
"DONNIE BRASCO" – gangsters "Lefty" Ruggeiro (d. 1995) and "Sonny Black" Napolitano (d. 1982)
"DRAGON: THE BRUCE LEE STORY" – actor Bruce Lee (d. 1973)
"ED WOOD" – actor Bela Lugosi (d. 1956)
"FAT MAN AND LITTLE BOY" – General Leslie R. Groves (d. 1970) – **starred Paul Newman**
"FIELD OF DREAMS" – baseball player "Shoeless" Joe Jackson (d. 1951)
"FINDING NEVERLAND" – author J.M. Barrie (d. 1937)
"FORREST GUMP" – musicians Elvis Presley (d. 1977) and John Lennon (d. 1980)
"FRANCES" – actress Frances Farmer (d. 1970)
"FREUD" – psychologist Sigmund Freud (d. 1939)
"FRIDA" – artist Frida Kahlo (d. 1954)
"FUNNY GIRL" – actress Fanny Brice (d. 1951)

"GABLE AND LOMBARD" – actor Clark Gable (d. 1960) and actress Carole Lombard (d. 1942)
"GANDHI" – activist Mohandas Gandhi (d. 1948)
"STONED" – rocker Brian Jones (d. 1969)
"SURVIVING PICASSO" - artist Pablo Picasso (d. 1973)
"SYLVIA" – poet Sylvia Plath (d. 1963)
"THE AVIATOR" – aviator/businessman Howard Hughes (d. 1976)
"THE BABE" – baseball player Babe Ruth (d. 1948)
"THE DIARY OF ANNE FRANK" – author Anne Frank (d. 1945)
"THE DOORS" – singer Jim Morrison (d. 1971)
"THE GENE KRUPA STORY" – musician Gene Krupa (d. 1973)
"THE HELEN MORGAN STORY" – singer/actress Helen Morgan (d. 1941)
"THE HOURS" – author Virginia Woolf (d. 1941)
"THE JOLSON STORY" and "JOLSON SONGS AGAIN" – singer Al Jolson (d. 1950)
"THE JOSEPHINE BAKER STORY" – singer Josephine Baker (d. 1975)
"THE LAST KING ON SCOTLAND" – Uganda President Idi Amin (d. 2003)
"THE MOTORCYCLE DIARIES" – revolutionary Ernesto "Che" Guevara (d. 1967)
"THE PIANIST" – musician Wladyslaw Szpilman (d. 2000)
"THE PRIDE OF THE YANKEES" – baseball player Lou Gehrig (d. 1941)
"THE RIGHT STUFF" – astronaut Gus Grissom (d. 1967) and rocket engineer Wernher von Braun (d. 1977)
"THE SOUND OF MUSIC" – aristocrat Georg Ritter von Trapp (d. 1947) – **starred Christopher Plummer**
"THE UNTOUCHABLES" – mobsters Al Capone (d. 1947) and Frank Nitti (d. 1943)
"THE WORLD"S FASTEST INDIAN" – motorcyclist Burt Munro (d. 1978)
"THIRTY TWO SHORT FILMS ABOUT GLENN GOULD" – musician Glenn Gould (d. 1982)
"TOM & VIV" – poet T.S. Eliot (d. 1965)
"TUCKER: THE MAN AND HIS DREAM" – automaker Preston Tucker (d. 1956)
"VERONICA GUERIN" – journalist Veronica Guerin (d. 1996)
"WALK THE LINE" – musician Johnny Cash (d. 2003) and Elvis Presley (d. 1977)
"WHY DO FOOLS FALL IN LOVE" – musician Frankie Lymon (d. 1968)
"WINCHELL" – reporter Walter Winchell (d. 1972)
"WIRED" – actor John Belushi (d. 1982)
"WITHOUT LIMITS" – runner Steve Prefontaine (d. 1997)
"YANKEE DOODLE DANDY" – playwright/songwriter George M. Cohan (d. 1942)
"ZELIG" – baseball player Babe Ruth (d. 1948)