

THE MEDIA COALITION INC

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American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

National Association of
Theatre Owners

Publishers Marketing
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Chair

Sean Devlin Bersell
*Entertainment Merchants
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Immediate Past Chair
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March 20, 2007

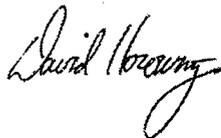
The Honorable Senator Andrew J. McDonald, Co-Chair
The Honorable Representative Michael P. Lawlor, Co-Chair
Joint Committee on Judiciary, Connecticut General Assembly
Legislative Office Building - State Capitol
Hartford, CT 06106

Re: Written Testimony in Opposition to Raised Bill HB 6818

Dear Co-Chairmen McDonald and Lawlor:

I am writing to submit my memo in opposition on behalf of Media Coalition in opposition to Raised House Bill 6818, which is scheduled to be heard before your Joint Committee on Judiciary.

Thank you for reviewing our submission,



David Horowitz

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, and librarians, recording, motion picture and video games producers, recording, video, and video game retailers, and motion picture exhibitors in the United States.

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Memo in Opposition to House Bill 6818

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House Bill 6818 threatens the rights of creators, distributors and producers of First Amendment-protected material. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers and film exhibitors in Connecticut and the rest of the United States. They have asked me to explain their concerns.

This bill would create a right of publicity protecting a person's name, voice, mannerisms, gestures, signature, image or likeness not only for the life of the person, but also continuing for 70 years after the person's death. The bill would bar the creation, publication or display of an electronic, digital or other modified use of an individual's image, voice, likeness, performance, or appearance that makes it appear that the person spoke or appeared to speak words that they actually did not speak or make an individual appear to be in a place or circumstance that they were not actually in. If either is done without permission, the person whose voice or likeness is used may bring a civil suit to get a temporary restraining order or preliminary injunction and may seek money damages. There are exemptions for certain uses but the bill would apply to theatrical works, musical compositions, film, radio and television programs. It would also apply to reporting and news other than "bona fide" news and reporting of an event or topic of "general interest."

Presently, Connecticut provides for a common law cause of action for misappropriation of a person's name or likeness for commercial or advertising purposes. H.B. 6818 would replace this longstanding legal understanding of the right of publicity and replace it with vague, undefined language that includes many conditions. It would also treat modes of protected speech differently, without any basis for the distinction.

H.B. 6818 presents significant constitutional problems. It would create a right to sue for speech that enjoys the full protection of the First Amendment. It would require any creator of a movie or television biography to prove that every line spoken by a character was historically exactly accurate and every scene was precisely as it occurred. This is a burden virtually impossible to meet. The threat of litigation would force many film makers to whitewash history to avoid endless legal fights and potential financial penalties. Movies such as *Hoffa*, *Forrest Gump*, *All That Jazz*, *Bonnie and Clyde* and *Butch Cassidy and the Sundance Kid* would all be subject to litigation under this bill. Further, the bill inexplicably

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treats movies, television shows, and music recordings differently than other types of media. Why is a written biography of Charles Lindbergh or Henry Ford that is not defamatory exempt from this cause of action, while a movie based on the book would be subject to litigation by their estates over any alleged historical inaccuracy?

H.B. 6818 is also unconstitutionally vague. Many of the essential terms in section 6 are not defined, leaving creators of First Amendment-protected material with no guidance on what content is subject to a cause of action and which is fully protected free expression. This will create a chilling effect for makers of movies and sound recordings. For example, who decides what news is "bona fide" and exempt? What constitutes a "commercial purpose;" are all motion pictures and television shows (other than newscasts) for a commercial purpose? Is the exemption for elected officials, candidates, or appointed public officials for present officials or candidates? Is Ross Perot permanently exempt from the law because he was a candidate but never elected? Would Hugo Chavez be considered an elected official or would Karl Rove be an appointed public official? What is a report on an "event or topic of general interest?" How is "fine art" distinguished from ordinary art? Are all books deemed "literary?" This lack of clarity about what is subject to litigation will cause great uncertainty and eventually lead to self-censorship. It also violates the requirement of the U.S. Constitution that particularly strict standards as to vagueness are applied to a statute having a potentially inhibiting effect on speech. *Smith v. California*, 361 U.S. 147, 151 (1959).

Yet another problem with this bill is the proposed remedies. The availability of injunctive relief prior to publication is antithetical to the First Amendment. Generally a court will grant a temporary restraining order or preliminary injunction prohibiting the dissemination of First Amendment-protected material only in the most extreme cases such as national security emergencies. This remedy, as well as the "impounding" of First Amendment-protected material prior to final judgment, is unconstitutional. It is akin to using a sledgehammer to kill a fly.

Even the mere threat of litigation and money damages could force a creator of First Amendment-protected speech to self-censor. A film maker would have to consider the risk of a money award when deciding to make an unflattering biography or documentary about a subject with deep pockets like Donald Trump, Bill Gates, or the late Anna Nicole Smith that could result in a lawsuit filed by the respective person or estate that could take years to decide and cost hundreds of thousands for lawyers and more if a ruling is unfavorable.

We think the way to protect the First Amendment rights of all the residents of Connecticut (and those of the rest of the country as well, since the grant of a right of publicity is not limited to Connecticut residents) is to defeat H.B. 6818.