MEDIA COALITION, INC.
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

April 27, 2015

Senator Phil Williams
Alabama State Senate
State Capitol
Montgomery, Alabama 36130

Re: Senate Bill 197 as passed by the House – Opposed

Dear Senator Williams,

Media Coalition believes that Senate Bill 197 as passed by the House will threaten the First Amendment rights of creators, producers and distributors of non-commercial content. It makes them more vulnerable to litigation, which will have a chilling effect on their protected speech. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Alabama: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

S.B. 197 as passed by the Senate would create a right of publicity in an individual's "indicia of identity" including, but not limited to, name, signature, photograph, image, likeness, voice or other "similar imitation." Section 4 of the Senate bill provided an exception to the right for a wide range of expressive uses. It protects artistic and creative works and allows books, plays, magazines, newspapers, music, film, radio, television and other media to use the "indicia of identity" of a living or deceased person in fictional and non-fictional works. This exception for artistic and creative uses has generally been included in state laws granting a statutory right of publicity. The House version removes from this exception any artistic work that is "a replica as to constitute a copy" of a person's "indicia of identity." Those non-commercial uses are only exempt from the right of publicity to the extent they are protected by the U.S. and Alabama Constitutions. It also lowers the standard of proof to receive damages for a violation from "substantial" evidence to a "preponderance" of the evidence.

The purpose of the exception for artistic and creative uses in Section 4 of the Senate bill is to avoid or reduce the burden of litigation for creators and distributors of what is plainly non-commercial speech. Instead, the carve out in the House version for certain uses will increase the likelihood that publishers, filmmakers and others will be forced to litigate to vindicate their First Amendment rights in court, which will have a substantial chilling effect on their free speech. It will require the creator of the speech to prove in court that it is not subject to the right of publicity because the First Amendment protects the use rather than being able to rely on the exception to seek dismissal of litigation in a more timely fashion. As a result, a noted public

figure, or his or her heirs, upset about an uncomplimentary book or film, could force the publisher or producer to defend the work in court, rather than being able to rely on the list of exceptions in the Senate bill to lessen the time and cost of the litigation. Such lawsuits can take months or years to decide and cost hundreds of thousands of dollars or more. Many producers and distributors of biographies, histories, documentaries and other important social commentary may not have the financial resources to endure a lengthy litigation. In some cases, they will self-censor to avoid the mere threat of a costly and prolonged legal fight. Also, if the House version of S.B. 197 becomes law, Alabama could become a magnet for plaintiffs looking to sue producers and publishers of media content that has been carved out of the artistic and creative use exception, because almost every other state that grants a statutory right of publicity has the list of exceptions for non-commercial uses without this carve out.

The chilling effect of an expensive lawsuit is compounded by the amendment to the House bill that lowers the standard of proof required in establishing a violation of the right of publicity from "substantial" to a "preponderance" of the evidence. This low standard of evidence means a a claimant can be victorious by showing that a violation is more likely than not to have occurred to receive a wide array of damages. If the claimant wins, the bill provides monetary, special and punitive damages and any other damages provided under Alabama law. It also allows a court to grant injunctive relief. The potential consequences of losing a case make the risk of litigation even higher for authors, publishers, filmmakers and others. It will make it more likely that authors, publishers and filmmakers will censor their work to avoid risking a lawsuit.

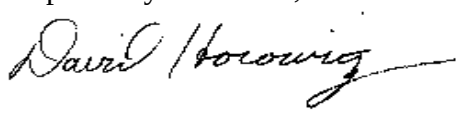
The legislation may also be unconstitutionally vague because it does not define "a replica as to constitute a copy." Certainly most photographs are replicas that constitute a copy. The term could include the use of historic footage in films such as *Forrest Gump* or *Zelig*. A broad reading of the term could apply to an uncanny impersonation like Tina Fey's portrayal of Sarah Palin in a *Saturday Night Live* skit. Also, the "indicia of identity" is defined as "including but not limited to" the common examples of elements of identity such as name and likeness. What these other indicia are is not defined and leaves a creator or distributor of content vulnerable to being sued.

Since these are core elements used to determine whether such speech is protected by the creative use exception, they must be clearly defined to give speakers advance notice of their obligations under the law. The vagueness in the legislation likely violates the Due Process Clause of the Constitution. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

If you would like to discuss further our concerns about this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.

We urge you to protect the First Amendment rights of the people of Alabama and reject the House amendments to S.B. 197 that will undermine the constitutional rights of creators, producers and distributors of media.

Respectfully submitted,



David Horowitz
Executive Director