



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.

Memo in Opposition to Senate Bill 79

Media Coalition believes that the current version of Senate Bill 79 threatens the rights of creators, distributors and producers of First Amendment protected material. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Arkansas: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

S.B. 79 creates a right of publicity in an individuals' name, voice, signature, image or likeness. Section 4-75-1010 of the bill includes exceptions to the right for certain non-commercial uses. The exceptions protect expressive works and allow books, plays, magazines, newspapers, music, film, radio or television program and other material of political or newsworthy value to use a living or deceased individual's name or likeness. However, 4-75-1010 (a)(2)(B) provides that the exemption for some of the media is dependent on that use being protected by the First Amendment to the Constitution and the Arkansas Constitution. It is unclear if the burden of proving whether the use is protected is on the claimant or the speaker. Section 4-75-1010 includes two qualifiers to the list of exemptions. Section (a)(2)(A) specifically refers to the claimant bearing the burden of proof but (a)(2)(B) does not. The absence of the language suggests the burden is on the defendant/speaker.

The inclusion of (a)(2)(B) will have a substantial chilling effect of First Amendment protected speech by increasing the likelihood of expensive litigation for publishers and filmmakers to vindicate their First Amendment rights. Almost all right of publicity laws that have been enacted recently include the list of exemptions in 4-75-1010. The purpose of the list is to avoid the threat of costly litigation for creators and distributors of non-commercial speech but the qualifier in (a)(2)(B) means that the list of exemptions does not provide any protection to these speakers. It requires a court to rule that speech is not subject to the right of publicity under the First Amendment in order to be exempt from the law under 4-75-1010. Once the former is proven, there is no need for the list of exempted material. As a result, (a)(2)(B) effectively removes the specific, statutory list and replaces it with general constitutional protections that are already an inalienable element of every law enacted in Arkansas. The effect is that S.B. 79 raises the threat of an expensive lawsuit by any individual or surviving family that is unhappy with a book, movie, article or show. A noted public figure, or his or her heirs, upset about an uncomplimentary book or film, could force the publisher to go to court to vindicate their First Amendment rights to publish it rather than being able to rely on the list of exempted uses to lessen the time and cost. The threat of costly and prolonged litigation will have a serious chilling effect on producers and distributors of biographies, histories, documentaries and other important

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social commentary. Such a lawsuit could take years to decide and cost hundreds of thousands of dollars.

The threat of a suit is compounded by the legislation not clearly stating that the claimant bears the burden of proof to show that a use is not protected by the First Amendment. If the burden is on the speaker, then (a)(2)(B) is essentially an affirmative defense. Shifting the burden to the defendant/speaker makes the law constitutionally suspect. Generally, speech is considered protected by the First Amendment absent a showing that it is not. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). As Justice Kennedy wrote in *Ashcroft v. Free Speech Coalition*, “The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.” 535 U.S. at 255. While *Ashcroft v. Free Speech Coalition* was a criminal case, the financial penalties for violating an individual’s right of publicity are a serious threat to the speaker.

The law may also be constitutionally suspect since the financial penalty imposed by the invitation to sue is based on the content of the speech and the media it appears in. The Supreme Court has made clear that the government cannot place financial burdens on speech based on its content. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230. The state cannot punish a producer or retailer of such material by imposing a substantial additional tax on it. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. In 1991, the Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105.

The Supreme Court has also been skeptical of the government selectively imposing financial penalties on one media but not on another. S.B. 79 singles out broadcast for preferential treatment while creating a higher likelihood of a financial burden from litigation on all other media. Broadcasts of certain content are exempt from the right of publicity without having to show that the use is protected by the First Amendment or the Arkansas Constitution. The Supreme Court has allowed media to be treated differently in some contexts but not where the different treatment is based on the content of the speech and results in a financial penalty. It has condemned the selective imposition of a penalty imposed on one medium but not others or specific portions of a media but not others. See, *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a regulation that targeted “adult” cable channels, but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC*, 512 U.S. at 659 (1994) (“Regulations that discriminate among media … often present serious First Amendment concerns.”) “Selective taxation of the press — either singling out the press as a whole or

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targeting individual members of the press — poses a particular danger of abuse by the State.”
Arkansas Writers’ Project v. Ragland, 481 U.S. 221, 228 (1987).

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 please protect the First Amendment rights of all the people of Arkansas and defeat or amend S.B. 79.

Respectfully submitted,



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