



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.

March 25, 2015

The Honorable Asa Hutchinson
Governor
State of Arkansas
State Capitol
Little Rock, AR 72201

Re: Request for Veto of Senate Bill 79

Dear Governor Hutchinson,

Media Coalition asks that you veto Senate Bill 79. We believe that the bill as passed by the legislature 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 individual's 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, television and other media to use a living or deceased individual's name or likeness in a range of fictional and non-fictional works. This list of exceptions has been included in almost every recent state law granting a right of publicity. However, the list of exceptions in S.B. 79 includes 4-75-1010 (a)(2)(B), which provides that the exception for some of the media is dependent on whether that use is protected by the First Amendment to the Constitution and by the Arkansas Constitution. Further, 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.

Enactment of S.B. 79 with the inclusion of (a)(2)(B) will have a substantial chilling effect on First Amendment protected speech by increasing the likelihood of expensive litigation for publishers, filmmakers and others to vindicate their First Amendment rights. The purpose of the list of exceptions in 4-75-1010 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 does not provide any protection for these speakers. Instead, it requires a court to rule that the speech is not subject to the right of publicity because of the First Amendment as a predicate for gaining any benefit of the exceptions to the right under 4-75-1010. Once the Constitutional protection is

Executive Director: David Horowitz **Chair:** Barbara Jones, Freedom to Read Foundation
Immediate Past Chair: Tom Foulkes, Entertainment Software Association **Treasurer:** Sean Bersell, Entertainment Merchants Association
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established, any benefit provided by the statutory list is unnecessary. 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 or producer to validate their First Amendment rights in court to distribute it, rather than being able to rely on the list of uses in 4-75-1010 to lessen the time and cost of the litigation. Such lawsuits could take years to decide and cost hundreds of thousands of dollars. The mere threat of costly and prolonged legal battle will lead to self-censorship by producers and distributors of biographies, histories, documentaries and other important social commentary. This threat is compounded by the severe damages available to a claimant under S.B. 79.

Another factor that increases the threat posed by a lawsuit is the legislation's vagueness on who 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 & Shuster, 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 in which it appears. 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 certain broadcasts for preferential treatment while creating a higher likelihood of a financial burden from litigation on

Letter to Governor Hutchinson Requesting Veto
of Arkansas Senate Bill 79
March 25, 2015
Page 3

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 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 veto S.B. 79.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is written in a cursive style with a long, sweeping underline.

David Horowitz
Executive Director

cc: Michael Lamoureux, Chief of Staff