



# THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

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

## Memo Re: Statutory Exemption for non-Commercial Speech in Louisiana House Bill 415

Media Coalition believes that it is essential for House Bill 415 as passed by the House, which creates a right of publicity, to retain the present protections in the legislation for 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 Louisiana: authors, publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games.

H.B. 415 creates a right of publicity for a deceased person in his or her name, voice, signature, image or likeness. Section 470.8 provides a statutory exemption to the right for non-commercial speech.

To spare creators the burden and expense of lawsuits that target their exercise of First Amendment rights, any right of publicity statute must include unambiguous safeguards for expressive works. The exemption in §470.8 of H.B. 415 as passed by the House is a sensible approach. This focused language protects free expression and discourages frivolous claims, while preserving individuals' right to prevent the unauthorized use of their names and likenesses in advertising (other than for an expressive work) or on merchandise.

Last year, an identical exemption to §470.8 was included in Arkansas' right of publicity law. The legislature added stronger protections for non-commercial speech in response to Governor Asa Hutchinson vetoing the right of publicity bill in 2015. In his veto letter to the legislature, Governor Hutchinson, explained that "the absence of a clear exemption for ... expressive works will result in unnecessary litigation in Arkansas courts and will suppress Arkansans who engage in artistic expression from photography to art work."

The right of publicity protects individuals against the unauthorized commercial use of their names, likenesses, and similar attributes. While it is important to prevent the exploitation of an individual's identity, any legislation that does so must include robust protections for the First Amendment rights of creators, producers, and distributors of expressive works that include real-life individuals' names or likenesses, including motion pictures, television programs, books, magazine articles, music, video games and works of art. Importantly, these works enjoy full constitutional protection regardless of whether they are sold, rented, loaned or given away, and whether they are intended to entertain or to inform (or both).

An explicit exemption for non-commercial uses of speech is essential to protect non-commercial speech because the right of publicity is a legal morass. Presently, there is no federal law providing such a right, but more than half of the states have enacted one. In other states, courts have recognized a common law right of publicity that provides the same protection to

Executive Director: David Horowitz Chair: Chris Finan, American Booksellers Association  
Immediate Past Chair: Tom Foulkes, Entertainment Software Association Treasurer: Steven Gottlieb, Recording Industry Association of America, Inc.  
General Counsel: Michael A. Bamberger and Richard M. Zuckerman, Dentons US LLP

individuals. In some states, the right is extended to the deceased; in others, it is limited to soldiers. Other jurisdictions grant the right only to celebrities whose names or likenesses have commercial value.

Courts have done little to clarify the law. The U.S. Supreme Court issued its only opinion addressing the right of publicity nearly forty years ago. That ruling addressed a television station's appropriation of a live entertainer's entire act (he was a human cannonball). The Court's opinion provides lower courts with no meaningful guidance because virtually all contemporary right of publicity cases arise from the use of an individual's name or likeness within an expressive work (for example, the use of Cardinal Bernard Law's name and likeness in the film *Spotlight* or Mark Zuckerberg's name and likeness in *The Social Network*).

Since the case law is so muddled and conflicted, the broad and clear exemption for non-commercial speech in §470.8 will help producers and distributors of content avoid expensive litigation brought by a person, his or her heirs or their estate that is unhappy with their portrayal in a book, movie, article or show. Without the exemption, such litigation will have a substantial chilling effect on their constitutionally protected speech even if the speaker is likely to be ultimately vindicated. This threat is not hypothetical; the number of right of publicity claims targeting expressive works has risen in recent years, with pernicious effects on the exercise of free speech.

In 2013, a soldier who believed the main character in *The Hurt Locker* was based on his life sued the author of an article the movie was based on, the screenwriter, the movie producer and the magazine that published the article claiming violations of his right of publicity. His claim was eventually dismissed, but only after several years of litigation. A publisher or movie producer would have to consider the cost of litigation when deciding to publish an unflattering biography or make a critical documentary about important public figures such as the Martin Luther King, J. Edgar Hoover, Richard Nixon or the Kennedys. A lawsuit filed by their heirs could take years to decide and cost hundreds of thousands of dollars, or more. Even the threat of costly and prolonged litigation can prompt self-censorship by producers and distributors of biographies, historic fiction, documentaries and other important discussions.

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](mailto:horowitz@mediacoalition.org).

We urge you to please protect the First Amendment rights of all the people of Louisiana and retain important protections for free speech in §470.8 of H.B. 415.

Respectfully submitted,

A handwritten signature in black ink that reads "David Horowitz". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Horowitz  
Executive Director

Memo re: Louisiana H.B. 415

May 21, 2017

Page 3