



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

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

Memo in opposition to Alabama House Bill 179

House Bill 179 violates the First Amendment and should be withdrawn or defeated. Also, a law right of publicity law was enacted in 2015 that makes this legislation redundant and unnecessary. 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.

H.B. 179 would create a statutory right to one's likeness, which is defined as one's "name, voice, signature, photograph, or likeness in any manner." It would bar the use of any form of likeness of a person for the "defendant's advantage, commercially or otherwise" if done without the person's consent. A violation is a misdemeanor crime. The person who violates the right would also be liable for actual damages or \$750, whichever is greater plus profits generated by the unauthorized use. A court can also award punitive damages and legal fees. If a member of the military is the person whose right of likeness has been violated, the damages are trebled. There is a very limited exception to the right for use of a person's likeness in "news, public affairs, or sports broadcast or account." There is no exception for any other media or other type of content. Essentially, H.B. 179 creates a right of publicity that is not limited to commercial speech and has criminal sanctions in addition to serious financial penalties.

The right of publicity is a tort that allows a person to control the use of their likeness in commercial speech. It allows an individual to prevent the unauthorized commercial use of their names, likenesses, and similar attributes in advertisements. The Supreme Court has defined commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Non-commercial speech is an expressive work or use in any medium even if sold for profit. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

Since this legislation is not limited to commercial speech, it clearly violates the First Amendment. H.B. 179 would force newspapers, filmmakers, book authors, artists and illustrators to obtain permission to use the name, likeness, voice or other manner of likeness in any speech other than on limited subject matter. This would result in wide scale censorship of history, entertainment, cultural commentary, historic fiction and art.

This restriction is clearly unconstitutional so we only provide a brief legal analysis. H.B. 179 is a content-based regulation of speech because it requires permission to publish if one uses a name or likeness of another person. *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based); *United States v. Playboy*, 529 U.S. 803, 811 (2000) ("The speech in question is

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defined by its content; and the statute which seeks to restrict it is content based.”). A content-based restriction on speech is presumed to be unconstitutional unless it fits in one of the few historic exceptions to the First Amendment. “[T]he Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *Playboy*, 529 U.S. at 817 (2000).” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). This is very high bar to overcome, and it is very uncommon that any content-based restriction on speech survives this legal framework. As the Court said, “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Playboy*, 529 U.S. at 818.

Content-based regulations of non-commercial speech are subject to strict scrutiny, which is the most exacting level of judicial review. *See, Playboy*, 529 U.S. at 813. To satisfy this test, the government must (1) articulate a legitimate and compelling state interest; (2) prove that the restriction actually serves that interest and is “necessary” to do so (i.e., prove that the asserted harms are real and would be materially alleviated by the restriction); and (3) show that the restriction is the least restrictive means to achieve that interest. *See id.*; *R.A.V.*, 505 U.S. at 395-96; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65 (1994) (state interest must actually be served by challenged statute); *Simon & Schuster, Inc.*, 502 U.S. at 118; *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 799 (“The State must specifically identify an ‘actual problem’ in need of solving and the curtailment of free speech must be actually necessary to the solution.”)(internal citations omitted).

The compelling state interest standard is a very high one. In *New York v. Ferber*, the Supreme Court described a compelling state interest as “a government objective of surpassing importance.” 458 U.S. 747, 757 (1982). It is very unlikely that there is any compelling interest that would justify forcing non-commercial speakers to obtain permission to use the name of well-known business, entertainment and cultural figures. If the intent of the bill is to protect citizens of Alabama from commercial exploitation of their likenesses, the bill is wildly over-inclusive as it goes far beyond commercial speech to apply to artistic uses. *See Brown* 564 U.S. at 801 (discussion of over and under inclusiveness).

Even laws that are limited to commercial speech 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).

Unlike the limited exemption language in H.B. 179, any right of publicity statute should expressly exempt such expressive works from liability in any content and every media. Without such protection, these and other works will be vulnerable to expensive and lengthy litigation, which has a substantial chilling effect on their creators’ constitutionally protected speech. 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.

Finally, this legislation is redundant and unnecessary. In 2015, Alabama passed a right of publicity law to give individuals the right to control their likeness in commercial speech with broader protections for artistic expression than H.B. 179 provides. The law was extensively vetted in both houses of the legislature and robustly negotiated by the various stakeholders. There is no basis to believe that the existing law is inadequate to protect an individual's right to protect their likeness or that it needs to be revised.

We urge you to protect the First Amendment rights of the people of Alabama and amend or defeat H.B. 179. If you would like to discuss further our concerns with the House version of the bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org.