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

Memo in opposition to Louisiana House Bill 377

We believe that H.B. 377 threatens the rights of creators, distributors and retailers of First Amendment protected material. It will have a chilling effect on biographies, historical fiction and discussions of current events by authors and playwrights in books, movies, music graphic novels and other media. 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. 377 creates a right of publicity for the life of the person plus 70 years post-mortem to control the use of his or her name, voice, signature, photograph, image or likeness in commercial speech (expressive works). Section 470.5 B provides a statutory exemption to the right for non-commercial speech. However, there is an exception to that section of the bill so the right of publicity applies to digital replicas even in expressive works if they are a substitute for "a performance by a professional actor, singer, dancer, musician or athlete." There is a second exception in §470.5 C for a use if it is "so directly connected to" a product, article or good "as to constitute an act of advertising" of the product, article or good, whatever that means. Both of these exceptions to §470.5 B are confusing and undermine the clarity of the protections in the bill for expressive works by creating a carve-out that allows the right to be enforced against expressive works.

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 §470.5 B would be a sensible approach if the bill did not muddy the waters by attempting to address the use of digital avatars in expressive works and creating ambiguous exception in §470.5 C. Without these carve-outs, this section is clear, focused language that 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.

The right of publicity protects individuals against the unauthorized use of their names, likenesses, and similar attributes in commercial speech. In this context, "commercial speech" is understood as speech that does no more than propose or invite a commercial transaction. An expressive work is non-commercial speech or use in any medium even if sold for profit. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

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'

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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, to inform or both.

An explicit exemption for non-commercial uses of speech is essential to protect expressive works 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 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 40 years ago. That ruling addressed a television station's appropriation of a live entertainer's entire act (he was a human cannonball). The Supreme 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"). In the absence of Supreme Court authority, lower federal courts and state courts have adopted various – and often conflicting – tests to reconcile the tension between the First Amendment and the right of publicity. Federal circuit courts of appeals have applied at least three different tests – the ad hoc balancing test, the transformative use test, and the Rogers/Restatement test.

Since the case law is so confused and conflicted, it is essential that §470.5 B of the bill includes a broad and clear exemption for expressive works to help producers and distributors of content avoid expensive litigation brought by a person, his or her heirs or their estate when they are unhappy with their portrayal in a book, movie, article or performance. If the exemption attempts to create carve outs to allow the right to apply to some expressive works, it will cause confusion about the reach of the right and open the door to lawsuits against books, movies and other media. This will have a substantial chilling effect on 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 2017, Olivia de Havilland filed a right of publicity lawsuit against FX Network and others over her portrayal in "Feud: Betty and Joan," which she believed was unflattering. Her claims were finally dismissed when the U.S. Supreme Court declined to hear the case, but only after several years of expensive litigation. Without strong statutory protections, a publisher or producer would have to consider the cost of litigation when deciding to publish a critical biography or to produce a hard-hitting documentary about important public figures such as the Johnny Cash, J. Edgar Hoover, Steve Jobs, Richard Nixon, Mark Zuckerberg or Truman Capote, all of whom were a subject of a recent biographical movie. A lawsuit filed by the individual or their heirs could take years to decide and cost hundreds of thousands of dollars, or more. Frequently, the mere threat of costly and prolonged litigation can prompt self-censorship by

producers and distributors of biographies, historic fiction, documentaries and other important discussions. This is a common tactic employed by deep pocketed individuals who are concerned about how they will be treated in a biography. H.B. 377 creates an additional risk for a producer of a film, video or performance about an actor or musician if the content uses a computer-generated image to recreate a part of the story. Such content could be deemed a digital replica and subject to the right of publicity even if it is a non-commercial use.

The risk of costly litigation against the creators and distributors of First Amendment protected speech is compounded by the broad jurisdictional reach of the legislation. If enacted, the Louisiana right of publicity would apply to any act or event that occurs in the state. As a result, any book that is sold or movie that is exhibited in the state can give rise to a claim. It would allow plaintiffs to sue for damages in Louisiana, even if none of the parties is a resident or citizen of the state.

H.B. 377 also has a muddled definition of "commercial purpose," which will invite needless litigation and might be unconstitutional. Section 470.2 (2) (a) defines the term as applying the use of a person's likeness "in connection" with a good or service. This is not limited to the use of a person's name or likeness in an advertisement or printed on a souvenir mug or hat. Rather, it suggests that it would apply to a reference to Steve Jobs as a founder of Apple computers even in an article about computers. The lack of a clear definition may be unconstitutionally vague because it gives speakers little guidance to determine what speech requires consent from the person in the digital replica. This vagueness is impermissible in a law limiting First Amendment guarantees. See *Baggett v. Bullitt*, 370 U.S. 360 (1964). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See 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.'")

Finally, if the legislature intends to protect the commercial uses of a person's name, portrait, voice or signature, we believe the best course is to do so in a narrow bill that directly addresses those concerns. This legislation must have a single broad and unequivocal exception for non-commercial uses to protect creators and producers of speech from the burden and expense of lawsuits that target their exercise of their First Amendment rights. Then, if the legislature wants to consider creating a new and distinct right for digital replicas, if can do so with by giving the matter a full vetting in the legislative process.

We urge you to protect the First Amendment rights of all the people of Louisiana and amend H.B. 377 so that it provides protections for artistic expression in §470.5 B. We believe the legislature is best advised to enact a right of publicity law to address concerns about the unauthorized exploitation of a person's likeness in commercial speech without muddying the waters by trying to address digital avatars in one bill.

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.