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March 25, 2015

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04471.0060

Via Hand Delivery

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

Re: MPAA - Arkansas Right of Publicity Bill
Request Veto – Senate Bill 79

Dear Governor Hutchinson:

I am writing on behalf of my clients, the MPAA and its members, the Walt Disney Company, Paramount Pictures, NBC Universal, Twenty-First Century Fox, Sony Pictures Entertainment and Warner Bros. My clients respectfully request that you veto Arkansas Senate Bill 79, which would unduly burden creative commerce and create unwarranted civil liability for story telling in motion pictures, television programs as well as in newspapers, books and magazines.

As noted below, SB79 will also open the doors to extensive class action litigation by former NCAA and professional athletes, now engaged in litigation in California, Minnesota and Tennessee and elsewhere who are looking for a new forum to promote their new damage theories.

I am fully aware of the right of publicity (ROP) laws of this country, the effects on litigation and the potentially chilling effects on creative works. I have been engaged in the practice of law since 1966, especially with concerns about copyright infringement, right of publicity, defamation, privacy, trademark and idea submission litigation as they impact on the financing and production of creative works. I am a Fellow in the American College of Trial Lawyers and the immediate past President of the Defense Counsel Section of the Media Law Resource Center (MLRC). I have argued copyright cases to the U.S. Supreme Court and the U.S. Courts of Appeal for the Second, Fifth, Sixth, Ninth and Eleventh Circuits. I also am involved on a daily basis on advising film and television productions concerning all these matters. In 1999, I helped draft the exemptions in Cal. Civil Code section 990 (regarding post-mortem right of publicity), now numbered Cal. Civil Code section 3344.1. I counsel MPAA regarding all state efforts to amend or promulgate ROP legislation, including the South Dakota

bill just enacted this week. I am representing one of the defendants in the pending Nashville litigation discussed below brought by former NCAA players.

SB79 began as a simple attempt to protect Arkansas citizens such as Frank Broyles from exploitive merchandising or false implied endorsements. In fact, Mr. Broyles was already protected by Arkansas common law from use of his name and likeness for purposes commercial purposes. See e.g., *Milam v. Bank of Cabot*, 327 Ark. 256, 263 (1997). The initial purpose of the bill was to transform that right into a property right so it could endure for 50 years after death, and to add very stringent penalties for misuse.

The bill has been transformed by special interest groups who have planted the seeds of their special causes in the bill like so many landmines. They want to use Arkansas to push their notion of the right of publicity to new extremes: supposedly to argue for compensation for college athletes, to argue for compensation for athletes for the use of film clips and to argue that a new right to censor truthful, unauthorized biographies ought to exist.

By drafting the bill to allow suits by anyone as long as there is some “use” in the State, the bill will encourage forum shopping and Arkansas will become a magnet or dumping ground for every disgruntled person (or heirs) in the world who happens to be named or whose likeness is used in any expressive work or work not obviously exempted by the Sports Broadcast exemption. In fact, we have seen this phenomenon elsewhere: when the Jimi Hendrix and Marilyn Monroe estates learned that their decedents had no post-mortem ROP in NY (because the New York statute only applies to living persons), their heirs sued in Washington State and California. Recently former Panamanian dictator Noriega tried to invoke California’s ROP statute and for several years the actress Lindsay Lohan has sued for what she claims are implied references to her in a commercial, a song and a video game.

By eviscerating the expressive works exemption regarding movies, TV and radio programs, Arkansas is being asked to take sides in on-going disputes about the uses of names and likenesses in sporting related works, including video games, a dispute which is still percolating thru the various courts: *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (ND Cal. 2014)(claim that failure to pay NCAA players violates anti-trust and ROP laws), just argued last week in the 9th Circuit; *Marshall v. ESPN*, Civ. No. 3:14-cv-1945 KHS (MD. Tenn.) (claims by former NCAA players that broadcasting of college sporting events and advertising of the events constitutes anti-trust violations) (hearing on motions by Conferences, Networks and Licensees set for hearing on April 13, 2015); *Dryer v. NFL*, Civ. No. 09-2185, 2014 WL 5106738, 2014 WL 5106738 (D. Minn. Oct. 10, 2014)(claims by former NFL players that use of film clips of games violates rights of publicity), on appeal to 8th Circuit.

As a result of these pressures, the bill is flawed in many ways and a veto would provide a breathing space for the Legislature to formulate a more measured response to th uses of names and likenesses.

- SB79 is unprecedented in several respects:

- Whereas ROP statues impose liability for unlicensed use of a name or likeness for advertising purposes, or for merchandising uses, or for false implied endorsements, SB defines as unlawful commercial use any use for “obtaining money, goods, or services.”
 - The Supreme Court has repeatedly held commercial speech is speech that proposes a commercial transaction, e.g., “buy this car, engage our services, etc. Movies and other expressive works are considered non-commercial uses.
 - Non-commercial uses do not lose their First Amendment treatment just because they are done for profit, e.g., movies, TV programs, newspapers, broadcasts, plays, books, etc.
 - SB79 obliterates the distinction between commercial and non-commercial uses so long as their purveyors obtain “money or goods or services.”
- SB79 thus makes every use of a name or likeness (without consent) presumptively a violation of the statute, subject to draconian penalties, including injunctive relief, and confiscation of goods and their means of production. This is not the common law of Arkansas.
- Arkansas common law so far has not provided a post-mortem ROP. The Act will create a right regarding everyone who died within the past 50 years. For example the following Arkansas citizens would be included:
- Johnny Cash
 - General Douglas Mac Arthur
 - Gov. Orville Faubus
 - Rep. Wilbur Mills
 - Martha Mitchell
- SB79 makes every use a violation unless expressly exempted, principally by section 4-75-1010 regarding so-called “fair uses.”
- Subsections (A), (C) AND (D) of 4-75-1010 exempt uses
 - (A) in connection with a news broadcast, a public affairs broadcast or a sports broadcast. (including promotion and advertising for a sports broadcast) an account of public interest; or a political campaign;
 - (C) use of a face in the crowd;
 - (D) a use by an institution of higher education.

- Oddly enough, even though we are told SAG and the Players justify their limitation on the subsection (B) exemption regarding movies and other expressive works to avoid the use of avatars or video games, NOTHING in (A), (C) or (D) creates an exception to the use of avatars or videogames in those categories;
 - A political campaign may use avatars
 - A sports broadcast may use avatars or broadcast videogames;
 - A news program may use avatars or broadcast videogames.
 -
- Subsection (B)(i) of 4-75-1010 provides a conditional exemption for a use of name or likeness in
 - a play, book, magazine, newspaper, musical composition, audiovisual work, or radio or television program, if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work
 - This exemption tracks the Restatement, Unfair Competition (3d 1995) section 47;
 - This wording is used in at least 6 state ROP laws.
 - What is different in SB79 is that SAG and Players insist that for the (B) exemption to apply, because of the “exception” in 4-75-1010(a)(2), it must be shown that the “use” is protected by the First Amendment of the US Constitution or the Arkansas Constitution.
 - Since those constitutional provisions, if proven, already exempt speech no matter what the statute states, it as though the exception makes exemption (B) irrelevant. This slight of hand reads (B) out of the list of exemptions.
 - If a defendant cannot show that a use is “protected by the First Amendment,” it is automatically a violation of SB79. This chills speech.
 - Because there are 5 or 6 tests to determine how to apply the First Amendment to ROP claims, it is highly unpredictable – chilling expensive or time-consuming projects.
 - Included in this group of expressive works are unauthorized biographies (even if they do not defame or invade privacy), or political commentary. Under SB79, Hillary Clinton would have had a sufficient claim against the film which was the subject of Citizen United case to bring the producers to court for a right of publicity violation. They

- might have prevailed, but they would not know the outcome until a jury verdict.
- Convicted criminals could have standing to sue for violation of their right of publicity for movies or television programs under SB 79. Producers would create such works at their peril.
 - This exception to the exemption is overkill: it applies without regard to whether a given (B) work is a videogame or uses avatars.
 - This exception puts magazines such as Sports Illustrated at risk of litigation by sports figures who have no legitimate claim for defamation or invasion of privacy but now have SB 79 as a new weapon to censor truthful, non-defamatory speech.
 - SB 79 creates two classes of exemptions- A, C & D which apply conditions and the B exemption whose protection requires proof that a use of name and likeness in a B work is already protected by the First Amendment. It thus sets up conflicts for works arguably in the B category and also in other categories, and anomalies.
 - A broadcast under (A) can also be a TV or radio program under (B); which rule applies?
 - A sports broadcast is under (A) but a talk show about sports showing video clips of a sports contest would seem to be under (B) or perhaps both.
 - A work may qualify under (A) as a sports broadcast or or public affairs program or under (B) as an audiovisual work or a radio or TV program.
 - CONCLUSION
 - MPAA has no objection a ROP law that covers the traditional uses: uses of name and likeness for advertising or promotional purposes, uses in merchandising and false implied endorsements of products or services.
 - Such a carefully drawn law which would not impose the risk of liability and draconian remedies on traditionally expressive works, would serve to protect the reasonable expectations of persons like Frank Boyles and allow free speech in books, plays, movies, magazines, TV and radio programs that do not defame or invade privacy.
 - The overreaching amendments to SB79, supposedly to prevent the use of avatars or videogames, are over-inclusive in the case of subsection (B) exemptions which involve neither videogames nor avatars. Those same amendments leave intact subsection A, C and D exemptions even if those works use avatars or videogames.

The Honorable Asa Hutchinson
March 25, 2015
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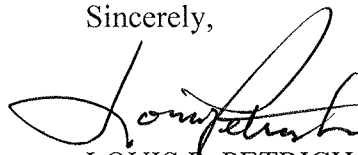
- SB79 should be vetoed so that the legislature may more carefully balance the appropriate interests, while observing the traditional distinction between commercial works that solicit a commercial transaction and non-commercial expressive works.

SB 79 would create a chilling effect on speech because of the threat of litigation and the potential destruction of that speech, including motion pictures, television programs, books, magazines and newspapers. Therefore, SB 76 raises serious constitutional issues and, by apparently placing the burden on the speaker to prove First Amendment protection (or suffer the consequences of SB 79) may contravene the First Amendment. The United States Supreme Court has ruled many times that any law that results in self-censorship is worse than a statute that specially bans or regulates protected speech. If a law "has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." *See Smith v. California*, USC 361 U.S. 147 (1959).

For all of the above stated reasons, the MPAA and its member companies respectfully request that you veto Senate Bill 79.

Thank you for your consideration.

Sincerely,



LOUIS P. PETRICH

LPP:ct