MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

March 22, 2011

Commerce Committee
New Hampshire Senate

Memo in Opposition to Proposed Amendments to New Hampshire Senate Bill 175

The proposed amendments to Senate Bill 175 threaten the rights of creators, distributors and producers of First Amendment protected material. The members of Media Coalition represent most of the publishers, booksellers, librarians, recording, film and video game manufacturers, recording, video, and video game retailers and film exhibitors in New Hampshire and the rest of the United States. They have asked me to explain their concerns.

S.B. 175 would create a right of publicity protecting a person's commercial property interest in his or her name, nickname, signature, photograph, image, likeness, voice, or any other attribute that serves to identify the person to an ordinary, reasonable viewer or listener. This right lasts for the life of the person, and continues for 70 years after their death. There is an exception from this right for informational or expressive works appearing in any medium provided the work is not a commercial advertisement. The bill then goes on to list types of works and media that are not subject to the right of publicity. The proposed amendment would specifically exclude video games from the list of exceptions in 359-K:6.

To the extent that the First Amendment protects non-commercial expressive works from liability based on a Right of Publicity, New Hampshire cannot impose such a liability on a specific media while statutorily exempting others. The First Amendment protects the right to portray and discuss real people in expressive works. This protection makes no distinction in the level of protection afforded by the Constitution between speech that informs and speech that entertains. *Winters v. New York*, 333 U.S. 507, 510 (1948). The Supreme Court has been reluctant to impose civil liability on First Amendment protected speech when discussing matters of public interest. *Hustler v. Falwell*, 485 U.S. 46 (1988); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Specifically removing video games from the list of exceptions in 359-K:6 raises serious constitutional concerns. It is well established that video games enjoy protection of the First Amendment. Every court to have addressed the question has held that video games are fully protected speech, and receive the same First Amendment protection as books, movies, and magazines. *See, e.g. Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003) (quotation omitted) (holding video games as protected as "the best of literature"); *James v. Meow Media, Inc.*, 300 F.3d 683 , 695-96 (6th Cir. 2002) (explaining that the First Amendment protects video games against attempts to regulate their "expressive content" or "communicative aspect"); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d

572, 577-78 (7th Cir. 2001) (describing in detail video games' expressive qualities, including their ability to convey "age-old themes of literature," messages, and ideologies, "just as books and movies do"); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 167, 181 (D. Conn. 2002) (holding that video games are fully protected where regulated based on "expressive elements"). Finally, the specific application of the Right of Publicity to expressive works in one media will only create unnecessary confusion. It suggests that video games that are expressive works are still subject to liability under the Right of Publicity regardless of the protections provided by the First Amendment. This will invite unnecessary and expensive litigation which amounts to excessive burden on constitutionally protected speech.

We think the way to protect the First Amendment is to reject the proposed amendment that would make changes to 359-K:6 in S.B 175.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.