

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 1980

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House Judiciary Committee
Subcommittee on Courts

Hershey Public Library
701 Cocoa Avenue
Hershey, Pennsylvania

Tuesday, March 7, 2000 - 9:42 a.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson
Honorable Jess Stairs
Honorable Frank Dermody, Minority Chairperson

ALSO PRESENT:

Brian Preski, Esquire
Majority Chief Counsel to the Committee

Beryl Kuhr, Esquire
Minority Chief Counsel to the Committee

C O N T E N T S

<u>WITNESSES</u>	<u>PAGE</u>
The Honorable Jess Stairs 59th Legislative District	5
Angela Hoyt, Director State Government Affairs Motion Picture Association	14
Richard Wyckoff, President Pennsylvania Association of Broadcasters	33
Mr. Charles Gallagher Reading Eagle Pennsylvania Newspaper Association	44
John Oney, Esquire International Management Group	52
Mr. John V.R. Bull Philadelphia Inquirer Pennsylvania Society of Newspaper Editors First Amendment Coalition Philadelphia Chapter of the Society of Professional Journalists and A.P. Managing Editors	72

Written Testimony Submitted By:

Joseph V. Paterno
Head Football Coach - Penn State

C O N T E N T S (cont'd.)

Written Testimony Submitted By:

Arnold Palmer
Professional Golfer

Kimberly L. Allman
Recording Industry Association of America

1 CHAIRPERSON CLARK: Good morning. My name is
 2 Representative Dan Clark. And I am the Chairman of the
 3 Judiciary Committee, Subcommittee on Courts. And today is
 4 the time and place advertised for the public hearing on
 5 House Bill 1980, which has been sponsored by Representative
 6 Jess Stairs.

7 I want to thank everybody for attending the
 8 Subcommittee hearing. And as -- as counsel becomes seated,
 9 why, we'll have them participate in the hearing and
 10 introduce themselves. Also, after Representative Stairs
 11 makes his comments, he's certainly welcome to join us for
 12 the rest of the -- rest of the hearing.

13 So I have reviewed the bill. And the analysis
 14 will not take any of your thunder, Representative Stairs.
 15 So with that, why, if you'd like to present your testimony
 16 to us, why, we'd certainly appreciate it.

17 REPRESENTATIVE STAIRS: Thank you,
 18 Representative Clark. I appreciate you inviting me to
 19 testify to the Subcommittee on, I think, some very
 20 important legislation. So -- and also appreciate
 21 your -- your good taste.

22 Oftentimes, we meet in Harrisburg, which we do
 23 have a very lovely capitol. But it's nice to get out maybe
 24 not quite to the hinterlands but certainly to see other
 25 parts of Pennsylvania and to be here today in Hershey. So

1 thank you for giving me this chance to be with you. I'd
2 like to talk a few moments.

3 And of course, there will be some presenters
4 later on to further -- maybe give further details. But I'm
5 not a lawyer. So I'm going to be talking, and there will
6 be some nonlawyer talk. So we can -- maybe I'll need some
7 people to follow up and to clarify the legalese of what I'm
8 trying to do.

9 So I hope you can bear with me. And I'm glad
10 that this bill is in your Committee because if we need any
11 work done on it or any fine-tuning, we are the people that
12 can do it. But first I would like to say that, you
13 know -- and I speak for myself -- I don't have to worry
14 probably about my name or my image being used to sell a
15 product.

16 I'm not -- I'm not a famous person. And most
17 of us are not famous. So to the average person, this is
18 really something that doesn't pertain to them. But I
19 am -- I am referring to celebrities in our midst. And, you
20 know, Pennsylvania over the years has -- we're a very
21 fortunate state.

22 We have many people who have been born in
23 Pennsylvania who have gone on to become quite famous. I
24 know each one of us from our hometown can list a number of
25 names. Two people come to my mind that really encouraged

1 me to introduce this legislation.

2 And two names that I think we all probably are
3 aware of in Pennsylvania quite well is Arnold Palmer and
4 Joe Paterno. So -- but I'm not just thinking of these two
5 people or many other famous Pennsylvanians. But I have a
6 feeling that somewhere out there as we speak today, there's
7 some young child growing up or some young adult who's going
8 to be the next famous person.

9 So I'm looking for the future of our -- of our
10 state and the future heroes and the celebrities that
11 Pennsylvania's going to produce. And my concern is that
12 without legislation like this, their likeness or their
13 names can be used to endorse products that, you know,
14 that's against their wishes or without compensation.

15 So House Bill 1980, it does very simply state
16 that if a celebrity is misused to endorse a product without
17 permission or payment, that person -- or even -- even more
18 important, maybe that famous person is deceased. And this
19 is probably where you may have it more than if they're
20 still living. Their estate can protect their name and stop
21 the commercial exploitation and, of course, seek damages.

22 Now, this -- this right of action to do this
23 does not exist in current law. I don't think the Judicial
24 Code in Pennsylvania really anticipated a person -- and
25 I'll use the word stealing a name or a likeness and, to be

1 quite frank, to hawk products. And so I think special
2 protections are needed.

3 So this bill, House Bill 1980, it spells out
4 the crime of publishing a name or image for commercial
5 purposes. Now -- and of course, without the consent of the
6 person or their estate. And it specifies legal procedures
7 for a person to protect -- to protect their name.

8 And I think this is becoming more complex as
9 we see the increase of the Internet and other televised
10 media to kind of misrepresent celebrities for advertising
11 purposes. Now, I guess you could say there's a TV event,
12 whether it be a sports event, and the TV cameras scan the
13 crowd and there's a famous person in the midst.

14 And obviously, the -- the announcer says Arnie
15 Palmer or some individual is in the crowd. This certainly
16 exempts that. I think that's part of the First Amendment,
17 and there's no endanger. It's just when you're trying to,
18 as I say the word, kind of, say, hawking products or
19 selling products that I think there's a problem.

20 So it does allow for that introduction to be
21 allowed. But the endorsement of the products is where I
22 think we have to have -- we'd have to draw the line then.
23 And -- and of course, the -- we know that advertising today
24 as we see advertising, when a product is -- is on the
25 screen and it is a celebrity or a famous person is the one

1 that says I use this product or I endorse this product, you
2 know, this does increase sales.

3 So there's that desire to get the famous
4 person's name with a product. And I have to really think
5 of John Wayne. When I was a small kid, John Wayne was kind
6 of an icon of the westerns and American youngsters. And,
7 you know, just recently, through the technology we have
8 today, his face, his body being dubbed in the commercial.

9 And, you know, I'm sure his -- his estate and
10 his heirs are, you know, really beside themselves to see
11 maybe Mr. Wayne being exploited, in my mind, in that way.
12 So really, I think it's more than just monetary reasons
13 that this legislation should be introduced.

14 But in this day and age, how does one go about
15 to protect their good name? And I think that's more
16 important than the -- the monetary thing and, of course,
17 protecting your good name when somebody wants to advertise
18 a product that they may disagree with or they would never
19 endorse.

20 Another example I'd like to use, Charlie
21 Chaplin. And I was not aware of this till I had done some
22 research and found this. But there was a dispute
23 between -- it would be his estate obviously, Charlie
24 Chaplin being deceased -- Charlie Chaplin and the Israeli
25 National Lottery.

1 And I'm told that Mr. Chaplin was opposed to
2 gambling and his estate did not want the Israeli Lottery or
3 any other gambling institution to use his name to attract
4 customers. And of course, a very intense legal struggle
5 came out of this between the Israeli -- Israeli Supreme
6 Court. And they wrote in Chaplin's favor regarding his
7 character of the Little -- of the Little Tramp.

8 So -- so, you know, this had to be drawn out
9 through many years of court proceedings. But so this
10 legislation, I think, would give Pennsylvania a role like
11 some other recent states, California and Ohio. And this
12 legislation's patterned pretty much after that of Florida
13 and would certainly, I think, strike a fair balance on the
14 public's right to know, the media's right to present
15 information, and also protect the individual from
16 exploitation, particularly when they're deceased, to have
17 their image and their good name altered in a great -- in a
18 great way.

19 So without a judicial remedy, I think we could
20 have this type of abuse occurring in Pennsylvania. And I
21 think we want to protect our favorite sons and daughters
22 and keep them in high esteem and not let anyone, for
23 financial reasons or for other reasons, tarnish their image
24 unless they or their estate agree to have this done. And I
25 think that would be their perfect right.

1 So I appreciate, Mr. Chairman, your giving me
2 the opportunity to speak in front of this Subcommittee.
3 And I know that with the legal staff and the members of the
4 Judiciary Committee having a legal background, that they
5 can maybe mold this legislation.

6 And as with any legislation, there's always
7 things need to be done, need to be changed and need to be
8 cleared up and to fine-tune it. And I would hope that -- I
9 give you this bill, which I think is in pretty good shape
10 to begin with. But certainly, as we work with other groups
11 trying to make it better to something we can make a statute
12 in our Commonwealth. So thank you very much.

13 CHAIRPERSON CLARK: Thank you, Representative
14 Stairs, particularly for bringing this matter to our
15 attention. As I reviewed this, I sort of thought that it
16 was common sense and decency for people not to abuse other
17 people's names and identity, whether they be alive or dead.

18 But, you know, maybe for us to clarify that
19 and put that into statute is certainly something that we
20 want to look at and do. One thing that I want to help you
21 out with is you didn't mention the stable of good pro
22 quarterbacks that came from Western Pennsylvania. And, you
23 know, you might want to mention those gentlemen --

24 REPRESENTATIVE STAIRS: That's right.

25 CHAIRPERSON CLARK: -- as you promote this

1 legislation.

2 REPRESENTATIVE STAIRS: Well, we have a very
3 proud tradition in this state. And athletics is no
4 exception. And particularly Southwestern Pennsylvania has
5 produced a long string of quarterbacks. And I'm sure
6 there's some young boy out there throwing the
7 ball -- football through a tower out in the backyard or
8 something getting ready to be the next great quarterback.

9 So we have many fine athletes as well as
10 people in the arts and other professions, too. So it's not
11 just for those who have -- who have a famous name but also
12 looking at those who will be famous soon.

13 CHAIRPERSON CLARK: And with that, I'll ask
14 the gentleman from Western Pennsylvania, the Democrat
15 Chairman of the Subcommittee on Courts, to introduce
16 himself.

17 REPRESENTATIVE DERMODY: I'm Frank Dermody
18 from Allegheny County.

19 MR. PRESKI: Brian Preski, Chief Counsel to
20 the Committee.

21 MS. KUHR: I'm Beryl Kuhr. I'm counsel to the
22 Minority on the Committee.

23 CHAIRPERSON CLARK: All right. And once
24 again, Representative Stairs, we thank you and welcome you
25 to --

1 REPRESENTATIVE STAIRS: And I'll join you in a
2 moment then.

3 CHAIRPERSON CLARK: Sure. Oh, excuse me,
4 Jess.

5 REPRESENTATIVE DERMODY: Just two questions,
6 Jess. Easy, easy. You mentioned there are other states
7 who have similar laws in place. Can you review those with
8 me again?

9 REPRESENTATIVE STAIRS: Yes. I'm told there's
10 probably about 25 or 30 states that have laws of this type.
11 The most recent I understand -- I can be corrected on
12 this -- is California. And of course, California's kind of
13 unique because there are obviously many more celebrities
14 because of the native Californian's or people that moved
15 there.

16 So it's probably really acute in that state to
17 do that. But they tried to balance in California, you
18 know, the rights of the media and the press and so forth as
19 well as the rights of the individual. Ohio was a recent
20 state. And as I said, we're patterned after Florida.

21 So I don't know how long Florida's laws have
22 been in existence, but I think we're pretty much -- this
23 legislation is pretty much after Florida.

24 REPRESENTATIVE DERMODY: Thank you. I just
25 want to also commend you on at least starting the ball

1 rolling here. I think our -- everybody's right to privacy
2 is at risk these days. The Internet, while a beautiful and
3 wonderful thing and an economic generator and all those
4 things, very educational tool for our children and for all
5 of us also, it's susceptible to abuse, particularly on
6 people's identity.

7 As you know, I was just in a little ruckus
8 with the Allegheny County Board of Assessors where they're
9 reassessing Allegheny County and publishing a picture of
10 everyone's house. So not only celebrities' pictures but a
11 picture of their house would be available on the Internet.

12 And that's a whole other issue; however,
13 they're all related. And I think it's that issue of
14 identity, theft and everything else that's out there that
15 we have to wrestle with. So I wish us all luck on kind of
16 bringing this to a solution. Thanks, Jess.

17 REPRESENTATIVE STAIRS: Thank you.

18 CHAIRPERSON CLARK: The next individual to
19 provide testimony before the Committee is Angela Hoyt. She
20 is the Director of State Government Affairs for the Motion
21 Picture Association. You can feel free to correct me on
22 the pronunciation of your name.

23 MS. HOYT: Hoyt. No, that's easy. Actually,
24 I want to reiterate my thanks for you holding this in
25 Hershey. I have very fond childhood memories of being

1 here. So it's kind of fun to be back. Good morning, Mr.
2 Chairman -- I should say Chairman Clark. I know you're
3 here.

4 I'm Angela Hoyt, as you said, with the Motion
5 Picture Association. I'm Director of State Legislative
6 Affairs. On behalf of Jack Valenti and the Motion Picture
7 Association members, Disney, MGM, Paramount, Sony, Fox,
8 Universal and Warner Brothers, I want to thank you for the
9 opportunity to be here.

10 We have a couple of amendments that I want to
11 explain the need for in order to have our support for this
12 legislation. We support the intent of House Bill 1980 to
13 protect living and deceased personalities from commercial
14 exploitation without consent.

15 As you know, our companies produce and
16 distribute motion pictures and other audiovisual material
17 that are expressive works, not considered commercial
18 products. House Bill 1980 as drafted does not include
19 specific exemptions for audiovisual works, which we
20 respectfully suggest you adopt. Newspapers, news, and
21 broadcasts are exempt.

22 And I know Representative Stairs had made
23 illustration of that when you're talking about the -- a
24 basketball game and showing scenes. We're merely adding
25 audiovisual works to that. All of these are considered

1 expressive works protected by the First Amendment.

2 The goal of our proposed amendments is to make
3 clear motion pictures and television programs are exempt
4 from unwarranted legal claims that could have a chilling
5 effect on story-telling. We believe the sponsors of the
6 legislation did not intend to burden the production of
7 audiovisual works in the state with unnecessary legal
8 claims.

9 And we appreciate the Committee's
10 consideration of our proposed amendments. We respectfully
11 submit that without our proposed amendments, House Bill
12 1980 may unnecessarily burden the creative process and may
13 stymie the development of some kinds of motion pictures in
14 Pennsylvania.

15 And I don't know if you're aware that most
16 recently, Wonder Boys, which is out in the theatres now,
17 was filmed here in Pennsylvania. In essence, the proposed
18 right of publicity bill would require producers to seek
19 permission or face unwarranted lawsuits from the living or
20 heirs of deceased personalities to use their name,
21 likeness, or image in any motion picture or television
22 program.

23 For example, we do not think the sponsors
24 intended our companies to seek permission from the heirs of
25 Jimmy Hoffa to tell a story about the famous union leader.

1 Making movies is perhaps the riskiest business in the
2 world. It costs approximately \$55 million per picture.

3 If this bill becomes law, the risk of legal
4 claims could rise significantly. And just as an aside, one
5 of the things in movie making, when you're laying out \$55
6 million for a movie, you want to recoup that cost as soon
7 as possible.

8 And if you have legal claims standing in the
9 way, it's going to be a long time before that gain is
10 realized. And so that's why we want to limit the liability
11 up front. We believe our proposed amendments help to
12 strike the proper balance against unauthorized use of a
13 deceased personality's image in commercial products and
14 advertisements, at the same time protecting the use of
15 those images in motion pictures and television programs.

16 We understand and support laws that would
17 protect any Pennsylvanian whose persona has commercial
18 value, and our amendments do not affect that safeguard you
19 seek. Our amendments protect producers and distributors of
20 motion pictures and television productions from unnecessary
21 and unwarranted litigation.

22 CHAIRPERSON CLARK: Thank you.

23 MS. HOYT: I'd be happy to discuss amendments
24 or if you have any questions.

25 CHAIRPERSON CLARK: Do we have those

1 amendments?

2 MR. PRESKI: Yes.

3 MS. HOYT: I believe you have them right
4 there. And I also have a -- I have a list of the states,
5 if you wanted them, in terms of who has rights of publicity
6 in each of the states and the different types of rights of
7 publicity that those states are, if you care to have that
8 as well.

9 CHAIRPERSON CLARK: Okay. Are your -- do your
10 amendments come from any of those?

11 MS. HOYT: Yes. Actually, our amendments, as
12 Representative Stairs said, came from the Ohio statute that
13 we got enacted last year. And they -- they had the same
14 thing initially. And they incorporated our amendments
15 because they recognize the expressive works were protected
16 by the First Amendment.

17 And they fall in the same category as news,
18 newspapers, and things like that. So they did that also in
19 California and Ohio. I'm trying to think. Those are the
20 most recent. In my tenure there, I haven't seen any
21 others. But I know there have -- there are 11 states that
22 have statutes that recognize right of publicity for
23 deceased individuals.

24 Five have statutes for living individuals, and
25 another 10 labeled privacy but recognize a publicity right.

1 And I can get you those if you want.

2 CHAIRPERSON CLARK: Now, just what are
3 audiovisual works? Are they sound tracks? Or give me some
4 examples.

5 MS. HOYT: Anything like MTV videos, music
6 videos, any movies, television, any production -- trailers,
7 things like that. It just encompasses the whole breadth of
8 technology now and in the future also. DVDs, I mean,
9 anything that --

10 CHAIRPERSON CLARK: And your amendment
11 would -- would do what, exempt those items --

12 MS. HOYT: What we're saying in the language
13 that we're recommending on page 2 is to strike the
14 language. The problem that we saw in the one section that
15 we wanted to delete on page 2 was getting the actual
16 consent from the heirs. And that's where the issue comes
17 in.

18 I mean, our -- our companies are very
19 conservative. I mean, they air on the side of
20 conservatives because they want to make sure that they're
21 not going to have any litigation and legal claims and
22 things like that.

23 So they would probably go and seek that where
24 there's a borderline whether or not they should do a story
25 or something like that. And they do that more often than

1 not. But under the First Amendment, we already have the
2 existing rights because those expressive works are included
3 in the First Amendment protection.

4 So we're just saying that we don't want to
5 have to go to the heirs to get their consent because
6 perhaps if there's a story, it could be an unflattering
7 story about something or you're portrayed in a light that
8 you didn't perform a certain task when -- if you've seen
9 the movie -- I know you said you don't go to movies.

10 But Forrest Gump was an Academy Award-winning
11 movie. And Forrest Gump shook hands with three Presidents.
12 If Paramount had to go to the heirs of the Presidents, to
13 find out who are the actual bona fide heirs of those
14 Presidents to get the actual permission, it's going to be a
15 little difficult.

16 And let's say they didn't -- they didn't want
17 their President shaking hands with Forrest Gump but you're
18 telling a story and to put it in a historical perspective,
19 you want to show that shaking hands with the President, it
20 gives you a time era and things like that.

21 So that's what -- we don't want to have to get
22 consent for those because they feel that that's a
23 story-telling. It's like a newspaper article. You're
24 writing an article about it. It's all in the same
25 category.

1 So that's why we just want to delete that
2 section that asks -- says consent. And then the
3 exempt -- it exempts the -- all the audiovisual works. And
4 as I said, this language was done in Ohio and in
5 California.

6 And as Representative Stairs has said,
7 California has infinitely more celebrities out there that
8 they're trying to protect. And the commercial exploitation
9 is just as much. And just to give you some background,
10 what happened in California was Fred Astaire's widow
11 had -- they had used a similar thing.

12 He had movie videos that -- dance videos or
13 something. And it had gotten out of hand of who was
14 getting that and the royalties and things like that. And
15 she wasn't getting what she thought were proper royalties.
16 And one of the things that I think people get confused is
17 when you see Fred Astaire doing the vacuum ad up on the
18 ceiling, that was actually -- she was paid for a
19 commercial, you know, to do that.

20 It's like when Arnold Palmer is doing, you
21 know, the -- but those are all -- they're all being paid.
22 But the commercial exploitation is something that is
23 outside of that because you can actually sue to go after
24 that anyway, but it's probably a lot harder without a
25 statute.

1 So we're not saying that we agree that they
2 should not be commercially exploited. But we want to have
3 those safeguards so that when we're making movies and
4 television programs and music videos, we want to have -- we
5 want to know that we're not going to have people coming in
6 and clogging the courts with litigation against that.

7 CHAIRPERSON CLARK: How was Fred Astaire used
8 that caused the widow concern?

9 MS. HOYT: It wasn't how he was used.
10 Apparently, they had given permission to a certain dance
11 company. And they -- Fred Astaire teaches you how to
12 dance. And somehow there was some problem with the
13 royalties that had come out of that.

14 And it was not that they were using Fred
15 Astaire on a coffee mug or things like that. It was not
16 blatant like that. It was more or less -- it was -- it
17 became a royalty issue. And I think it kind of snowballed
18 into other people.

19 And I think it brought an awareness in
20 California that yes, indeed we do need some protection
21 because you don't have -- you know, you don't want,
22 especially in California, to have commercial exploitation
23 of these famous celebrities and things.

24 And so we worked very closely. The language
25 that we worked was signed off on the Screen Actors Guild.

1 In California, we worked very closely with them to make
2 sure that that was something that everybody was happy with.
3 And -- but it wasn't a blatant commercial exploitation. It
4 was more of a royalties issue with the videotapes.

5 CHAIRPERSON CLARK: Any questions?

6 REPRESENTATIVE DERMODY: Just one.

7 CHAIRPERSON CLARK: Representative Dermody.

8 REPRESENTATIVE DERMODY: Thank you, Mr.

9 Chairman. I was just wondering, the heirs of the three
10 Presidents in Forrest Gump, did they receive royalties for
11 the --

12 MS. HOYT: No, huh-uh. No. But they do -- I
13 will tell you, we had done a story -- Disney had a story, A
14 Civil Action. And they were telling the story about -- I
15 don't know if you're familiar with that. It was a John
16 Travolta --

17 REPRESENTATIVE DERMODY: Great book. The book
18 was better than the movie.

19 MS. HOYT: Right. And what happened -- what
20 happened was -- and one of our senior vice presidents was
21 living in Boston because they had an issue that came up
22 unrelated to right of publicity, but just to give you an
23 idea. The families of the victims -- the producer, Scott
24 Rudin, had gotten permission from the author of the book to
25 do a movie based on the book.

1 And the families of the victims said -- I
2 guess they -- there was a representative that was a movie
3 producer, and he wanted to do a story. And there became a
4 big fight over who should get the movie and who should do
5 the movie. And they were going to tell different stories,
6 but it was a story that should have been told.

7 So they wanted to tell the story. And they
8 did end up involving the families. And there was -- there
9 was compensation for the families and their stories and
10 things like that. So there are things that are done like
11 that. But for Forrest Gump, I don't know if Paramount went
12 to the heirs.

13 It's unlikely because if you think about doing
14 something like that for the History Channel or for Arts and
15 Entertainment Channel and things like that, it's virtually
16 impossible to get those consents from people. And then you
17 don't want to face the litigation if you can't because some
18 people don't like the fact that their ancestor had some
19 cork that somebody's going to bring out so -- but it's a
20 story that may want -- people may want to tell.

21 REPRESENTATIVE DERMODY: Thank you. It was
22 nice that those families in A Civil Action received
23 something anyway.

24 MS. HOYT: Yeah, they did.

25 REPRESENTATIVE DERMODY: All right. Thanks.

1 CHAIRPERSON CLARK: Counsel Preski.

2 MR. PRESKI: Ms. Hoyt, just I guess some
3 threshold questions. I assume when each actor is in a
4 movie, they have their own deal with the studio in which
5 the delineation -- or how their image from that movie is
6 going to be sold, portrayed or used forever.

7 My question is, the actor doesn't retain any
8 ownership over the movie or their images in the movie; but
9 that would be something that the motion picture studio I
10 assume would own. Like, you used the --

11 MS. HOYT: Well, it depends.

12 MR. PRESKI: Forrest Gump, you used that as
13 an example. I mean, when Tom Hanks signs on to do the
14 movie --

15 MS. HOYT: Right.

16 MR. PRESKI: -- and he makes his deal --

17 MS. HOYT: Right.

18 MR. PRESKI: -- he doesn't get then to say
19 later, You're not allowed to use my picture in the movie if
20 you ever want to play it again. I mean, that --

21 MS. HOYT: No, no, no. That's implicit in
22 contracts, I mean, because then you have -- I mean, there
23 are all sorts of things when you set up -- I don't know how
24 it was set up because a lot of the studios will set up a
25 separate production company. And then sometimes

1 they'll -- they do all sorts of things.

2 They'll sell all rights, title and interests
3 and copyrights sometimes back to -- from a separate
4 production company that they set up to do Forrest Gump or
5 whatever. They'll sell it back to Paramount, you know, for
6 tax or whatever reasons they do back and forth with
7 production company things.

8 But you don't get -- as an actor, you can't
9 really say to Paramount, I want to have my -- I don't want
10 my movie to ever be shown in China or in Greece or
11 something. You can't really dictate to the studio because
12 you're in that movie and, you know, it's going to run its
13 course of video and you can't really say.

14 I'm assuming when they did Toy Story, that
15 Buzz Lightyear, when they did the thing for McDonald's, one
16 of those things, you know, they can't say, Well, sorry.
17 You can't use Buzz Lightyear. I mean, there are things
18 like that but --

19 MR. PRESKI: Okay. Where I want to go is
20 this, is that when we talk about Forrest Gump where they
21 had the pictures of the Presidents, they were at a press
22 conference or some other event where the news -- the news
23 people came and they captured the images.

24 And then basically the studio went back to
25 those companies, I assume, bought the file footage and then

1 used it in the film.

2 MS. HOYT: Uh-huh.

3 MR. PRESKI: So there -- I'm trying to make a
4 distinction that what I see that this bill does is
5 basically you don't want to take the images of Tom Hanks as
6 he sits on the bus stop and put some kind of commercial
7 product next to him. Tony the Tiger, for example. And
8 he's now going to use --

9 MS. HOYT: Oh, and then use that?

10 MR. PRESKI: -- use that as a commercial, use
11 that for a commercial.

12 MS. HOYT: No. That is clear commercial
13 exploitation without consent.

14 MR. PRESKI: Right.

15 MS. HOYT: That is not -- because you're
16 selling -- if you're going to actually do a commercial,
17 that is, I believe, a commercial exploitation without
18 consent. But that's --

19 MR. PRESKI: Well, this is where my question
20 is going. I don't mean to interrupt. But when we talked
21 about Forrest Gump and you talked about your audiovisual
22 and the movies which you say were protected by the First
23 Amendment --

24 MS. HOYT: Right, right.

25 MR. PRESKI: -- the distinction I'm trying to

1 make is when you use the film footage of the President,
2 that comes from a place where the President -- or at the
3 time, the President. Now his heirs -- they had no
4 expectation for that footage at all. It was basically
5 someone was there; they were covering an event.

6 MS. HOYT: Right.

7 MR. PRESKI: They were capturing an image.

8 MS. HOYT: Right.

9 MR. PRESKI: When Hanks does the movie, his
10 assumption is -- and I'll speak for him, I guess -- that
11 when he's doing the movie, he assumes that when they
12 capture my image on film, it's going to be for the purposes
13 of this movie and then for distribution on videocassette,
14 DVD, so on and so forth.

15 What I see this bill does is this bill doesn't
16 go to what you talked about, the capturing -- you don't
17 want to have to go back and ask the President's heirs if
18 you can use the image. But you want to be able to go
19 back -- and I think you agreed to this. You said it would
20 be exploitation.

21 You don't want to have Tom Hanks sitting on
22 the bus stop in Forrest Gump next to Tony the Tiger hawking
23 Frosted Flakes.

24 MS. HOYT: Right. But you would have -- you
25 would go to the studio because I think the studio would

1 have recourse, you know, with Kellogg's or whatever it is,
2 Frosted Flakes. And that's for advertisement purposes.
3 And I guess I see your point, that you don't anticipate
4 that Forrest Gump sitting on a bench outside of Paramount,
5 that he was going to have Tony the Tiger sitting next to
6 him.

7 But if you're Kellogg's, you know darn well
8 that Paramount is going to come after you for using that
9 piece because that's actually for a commercial. You're not
10 telling a story. You're selling a product.

11 MR. PRESKI: Right. And this is my next
12 question: Who owns that piece of footage? That's owned by
13 the -- my assumption is it's owned by the studio.

14 MS. HOYT: Right. And you would have to
15 get -- you would have to get permission to use that footage
16 from the movie --

17 MR. PRESKI: From the studio.

18 MS. HOYT: -- because you're selling a
19 product. You're not telling a story. You're not
20 having -- you're not having that Tony the Tiger on the
21 History Channel talking about, Well, what if Forrest Gump,
22 you know, was eating Cheerios or eating Frosted Flakes.

23 MR. PRESKI: Well, this is my question: If
24 that footage is owned by the studio, does it ever get back
25 to the celebrity because if the studio -- if Paramount, who

1 made that picture, decides to sell that piece of footage to
2 Kellogg's or to anybody else, does that ever get back to --

3 MS. HOYT: I would have to get back to you on
4 that. I would never know if that would be an issue because
5 if it's -- if it's a famous scene, you're saying, and they
6 want to sell that because they think that's a famous scene
7 that can sell a product for them --

8 MR. PRESKI: Well, think about the one with
9 John Wayne selling beer. I mean, they took that actually
10 right out of a motion picture.

11 MS. HOYT: Right. And I think if you're using
12 someone to sell a product, that is something that you would
13 have to get permission. But it's not -- you're not telling
14 a story. There's a difference between selling a product
15 and telling a story.

16 CHAIRPERSON CLARK: I guess a follow-up to the
17 question is, if you want to sell that product, do you go to
18 the studio or do you go to the --

19 MS. HOYT: The actor.

20 CHAIRPERSON CLARK: -- heirs or do you go to
21 both?

22 MS. HOYT: If it's the Tom Hanks or if it's
23 the John Wayne, you would go to the studio to use that
24 footage. That would be -- because that's the rights,
25 title, interest. Whoever owns the rights, title and

1 interest to that movie because then they had
2 already -- whatever rights, whatever was done in the
3 beginning, that was part of the contract with the
4 celebrity.

5 But that's -- that's an interesting point.
6 But that is clearly -- if you're selling Frosted Flakes or
7 something, that's a sale. You're not telling a story in
8 history about something. And that's where we're trying to
9 make the distinction.

10 And we agree. You shouldn't be selling them
11 using Tom Hanks or anybody else to sell your Frosted Flakes
12 without permission because you're selling a product, and
13 you're making money off that product but --

14 CHAIRPERSON CLARK: But there could certainly
15 be a concern with the heirs of John Wayne that when he made
16 that movie, sold his rights to that motion picture, that he
17 didn't anticipate that somebody would use that to sell
18 beer, you know, 20 years from now.

19 MS. HOYT: Uh-huh, uh-huh.

20 MR. PRESKI: Correct.

21 CHAIRPERSON CLARK: And then that might be a
22 concern with them that that was never, you know, that they
23 couldn't -- they couldn't have foreseen a reasonable use --

24 MS. HOYT: Right. Down the road. I'm trying
25 to think of an instance where they would have used -- I

1 can't think of something off the top of my head.

2 MR. PRESKI: You talked about the Screen
3 Actors Guild where they signed off on the California
4 statute.

5 MS. HOYT: Yeah.

6 MR. PRESKI: Do you know if they've taken a
7 position on the other -- the Florida or the Ohio statutes
8 or --

9 MS. HOYT: No. The only one we even got
10 involved in -- they were not -- I didn't work on the Ohio
11 bill. My colleague did. And I know they must have worked
12 with someone up there. But California, definitely we
13 worked hand in hand with them daily on that.

14 MR. PRESKI: Thank you, Mr. Chairman.

15 CHAIRPERSON CLARK: Okay. We thank you very
16 much --

17 MS. HOYT: Thanks.

18 CHAIRPERSON CLARK: -- for your testimony.

19 MS. HOYT: I'd be happy to share with you the
20 list of the states with the right of publicity. I just
21 have one copy, but I can get that to you.

22 CHAIRPERSON CLARK: Yes, yes. You can talk to
23 Brian and forward that to him. Now, the next individual to
24 testify before the Committee is Richard Wyckoff. He is the
25 President of the Pennsylvania Association of Broadcasters.

1 Good morning.

2 MR. WYCKOFF: Thank you, Mr. Chairman. Good
3 morning, members of the Committee. My name is Richard
4 Wyckoff. I am President of the Pennsylvania Association of
5 Broadcasters. We represent the free over-the-air radio and
6 television broadcasters licensed to serve Pennsylvania.

7 I appreciate this opportunity to present our
8 industry's views concerning House Bill 1980, an amendment
9 to Title 42, establishing a right of action for the
10 unauthorized commercial use of a person's name or likeness.
11 Now, as broadcasters, we routinely face decisions
12 concerning copyright and privacy.

13 We take our role in covering news events and
14 producing balanced programming very seriously, especially
15 in those instances which require us to weigh one's right to
16 privacy against the public's right to know. As users of
17 programming, we must first obtain proper licenses to
18 broadcast our music and video.

19 As program originators, we move quickly to
20 Pennsylvania's courts under the right of publicity to stop
21 any attempt by another to use our programming or our
22 employee's persona for commercial gain without our
23 permission.

24 By codifying these rights under common law,
25 this Committee has the difficult task of balancing the

1 right of publicity against the constitutional right
2 afforded a free news media. As gatherers and reporters of
3 news, public affairs, sports, informational and
4 entertainment programming, we appreciate Representative
5 Stairs' sincere efforts to provide an exception for the
6 news media in the legislation before us.

7 We are concerned, though, about the impact of
8 this legislation on broadcasters. Specifically, we're
9 concerned about the need to meet the test of bona fide,
10 current, and legitimate in order to secure exemption from
11 the amendment.

12 Proving that a broadcast is bona fide,
13 current, or legitimate is a test that's open to the widest
14 of interpretations. For example, as we celebrated coming
15 into the year 2000, broadcasters aired video and audio
16 programming of many events of the past century, programming
17 dealing with the serious matters such as natural disasters,
18 wars, assassinations, as well as the programming dealing
19 with the lighter side of life, including fashions and
20 mores.

21 Who is to judge whether such programming is
22 bona fide, current, or legitimate? We're concerned that
23 this legislation might risk our producers and force them to
24 compromise or cancel programming rather than face financial
25 loss, personal entanglement, and litigation.

1 Because so much of our programming depicts the
2 actions of people and the consequences of those actions, we
3 believe it would be impossible to obtain consent from the
4 appropriate representative of each and every person
5 depicted in our programming.

6 Therefore, we respectfully request that the
7 Committee delete Subsection (c)(1) as written and instead
8 exempt all forms of media from any requirements of previous
9 consent whenever someone's persona appears in a
10 noncommercial use of any news, public affairs, sports,
11 informational or entertainment programming.

12 The test of bona fide, current, or legitimate
13 is too broad and does not provide the protection we believe
14 you intend to extend to the news media. We also ask that
15 the Committee change the wording in Subsection (c)(3) which
16 exempts photographs to include video and audio coverage in
17 its exception.

18 Otherwise, a newspaper's coverage of a public
19 event by a photograph might be exempt, whereas a broadcast
20 television station's coverage may not. We urge you to
21 consider the news media's First Amendment protection in any
22 action you take to address the unauthorized commercial use
23 of a name or likeness.

24 We urge you not to report H.B. 1980 as it's
25 presently written, but we do welcome the opportunity to

1 work with you in addressing the delicate balance between
2 the First Amendment and the legislation before you. Thank
3 you very much for that opportunity. And I'll field any
4 questions if I can.

5 CHAIRPERSON CLARK: We thank you for your
6 testimony and the concerns that you raised. And do you
7 have any experience with the Ohio statute or the California
8 statute or Florida statute?

9 MR. WYCKOFF: I'm familiar with the Ohio
10 statute. And it does provide a broad exemption. A couple
11 things, though. In our previous testimony, we talked about
12 celebrity status. I don't see any definition of that term
13 in the legislation before us.

14 And our question -- our concerns come down to
15 any commercial exploitation. We obviously are very
16 sensitive to that. We work very hard to protect the
17 persona of our celebrities at our stations, obviously.
18 And -- but this -- this is very broad, this bill, because
19 it talks about any citizen, any person who views themselves
20 in a television program or whatever could have access to
21 the statute and claim my right as a person -- I may not be
22 a celebrity; but if I'm use for some commercial gain, there
23 are questions.

24 In our industry, all our programming is
25 designed to get as large a possible audience as possible to

1 view our programming or to listen to our programming. So
2 then is everything that we do a commercial venture? Or are
3 we specifically speaking about our 10-second, 30-second,
4 60-second paid-for advertisements, whether they have to go
5 to a deceased person or their rightful heirs in
6 entertainment programming?

7 Or what happens when someone is parodied on a
8 talk show or any of these type of things? There's a lot
9 that goes into it. I think the motion picture people have
10 hit upon a problem -- and I think the news people will as
11 well -- as to the breadth of what we're facing here today.

12 And that's what we look forward to working
13 with you and Representative Stairs on this to try and
14 tighten it up to achieve the goals that you want to as far
15 as commercial exploitation. Joe Paterno, Arnold Palmer and
16 our industries are very close and good friends.

17 The last thing we would do is, you know, when
18 we run our commercials, if it highlights Arnold Palmer,
19 trust us, there are contracts where he has been taken into,
20 you know, his people have been discussed and proper
21 authority has been given.

22 We don't -- we're more concerned about our
23 programming that's entertainment in nature where we go back
24 and we show high school athletes. We go back and we show
25 people in the -- in the area. Is that commercial

1 exploitation? And that's what we're -- we're worried
2 about.

3 CHAIRPERSON CLARK: Thank you very much.

4 REPRESENTATIVE DERMODY: I think you've raised
5 some great concerns, legitimate concerns. And I think the
6 Committee will work hard to work through them.

7 CHAIRPERSON CLARK: Counsel Preski.

8 MR. PRESKI: Again, I agree with
9 Representative Dermody. We use celebrity because you can
10 get your hands around it and everybody knows what it is.
11 But obviously, the bill goes further. Just a couple
12 general questions.

13 I mean, it seems that you agree with the
14 philosophy behind the bill, but you don't want to take
15 somebody's image or picture wherever it's been captured and
16 then because computers are so good now and we're able to
17 take that image and digitize it into something else and
18 then have that person hawk a product.

19 I think I got from your testimony that you
20 agree that you think that that's improper. But the concern
21 that you raised is if you have a picture of the high school
22 athlete who breaks the tackle and goes for the 50 yards,
23 then you then don't have to secure all the approvals from
24 them to do that because you might run that as part of a
25 promo for your news or for a high school sports show.

1 And obviously, your purpose in doing that is
2 commercial revenue for the broadcaster. What I'm trying to
3 say is I guess that I see the distinction. My question is
4 this: When we look at this bill and we tighten it up, it
5 seems pretty clear that everybody -- although, they
6 haven't said it so far -- understands what advertising is
7 and what advertising is not.

8 Do you think that there's a definition of
9 advertising out there that encompasses what Representative
10 Stairs is after and then basically exempts everything else
11 where we don't have to get into all these detailed issues
12 of what is news, what is not news, what is bona fide, what
13 is legitimate, what is current?

14 It seems that if we're able to identify what
15 advertising is and is not, that that might take care of the
16 whole problem.

17 MR. WYCKOFF: Well, I guess the definition of
18 advertising is whether that message is paid for or not.
19 But any time you try and -- and that's why I widely respect
20 your efforts to put to paper any rule. Any time someone
21 tries to -- to provide guidelines or something, it's not
22 easy to draft something that then will stand the test
23 of -- nothing's going to be easy, obviously.

24 Whether we limit it to a paid message, that
25 might be where we would view our commercials are, quote, We

1 are paid. It says, "Sponsored by", "Paid for by", or it's
2 clear that it's a McDonald's commercial or -- or something
3 to that effect.

4 But our entertainment programming and the rest
5 we pay producers, we pay the movie studios. We enter into
6 contracts where people are legitimate, who represent
7 athletes and celebrities. But we're more concerned about
8 how are you going to write something that will stop
9 someone, just a member of the public who says I was seen or
10 I was depicted in this or that, from challenging us.

11 And then -- and there are -- I mean, let's
12 face it, the court cases in Pennsylvania do provide people
13 with a right of avenue today. What you're doing is
14 codifying what the common law states. But we'd be glad to
15 work and use Ohio or California as an example clearly.

16 MR. PRESKI: My last question is this, is that
17 when you send a camera crew out, one of your broadcasters,
18 and they come back with a tape, it's the broadcaster's
19 position that that tape is owned by whoever sent them out,
20 correct?

21 If Channel 3, 6, 10 in Philadelphia sends a
22 camera crew out, when they come back with the tape, it's
23 Channel 3, 6 or 10's view that that tape is owned by them;
24 it's not anybody else's; it's not, you know, subject to
25 anything else?

1 MR. WYCKOFF: No. That tape would be owned by
2 the television station.

3 MR. PRESKI: Who shot it?

4 MR. WYCKOFF: Who shot it or the radio station
5 who covered an event or whatever. But use of that property
6 then comes into question, how we're going to use it and
7 what clearances we have. Many times in our programming, we
8 get releases from people who appear.

9 But as the motion picture industry stated this
10 morning, many times going back historically, it's
11 impossible to do. I wouldn't want to have to go after 26
12 heirs. And the 26th one realized that the first 25 have
13 signed off. And now if you want me to sign off, you're
14 going to pay me; and this is what you're going to pay me.

15 There's a lot of delay. There's litigation.
16 There's, you know -- so you've hit an area. And the
17 Internet, I mean, I wouldn't even begin to think
18 about -- I'm sure Coach Paterno is very concerned about his
19 likeness being used in an unauthorized -- I would not want
20 to go by a grocery store and see the stand-up of coach
21 Paterno, you know.

22 And it says, Kick into the fall season,
23 whatever. I mean, no one should have the right to
24 commercially exploit his persona. And I think your goals
25 are well-placed. And we'll work with you on achieving

1 that.

2 We just are concerned that we're going to be
3 dragged in as, you know, unfortunate bystanders and that
4 will impede our ability to serve our audience, be it
5 through entertainment, news, information, or public affairs
6 programming, which I don't think is where you want to go.
7 That's not your goal.

8 MR. PRESKI: Thank you, Mr. Chairman.

9 CHAIRPERSON CLARK: Representative Stairs.

10 REPRESENTATIVE STAIRS: Yes. Thank you, Mr.
11 Chairman. Being the Chairman of the Education Committee, I
12 thought we had all the controversial and all the difficult
13 decisions to make in our committee; but I see the Judiciary
14 is not without controversy also.

15 So when I introduced the legislation, I, you
16 know, I just out of simplistic hope that we could, you
17 know, protect people from being exploited, particularly
18 people that we are very proud of and we hold in high
19 esteem. And little did I realize that it's not that
20 simple.

21 And so it's not my intent to, you know,
22 prevent the media from, you know, enlightening people and
23 being educational and presenting news. And I don't want
24 to, you know, to hinder you from doing that because I think
25 we all value the First Amendment rights.

1 And certainly, your role in -- is not only
2 entertaining us but also in enriching us and enlightening
3 us. So I would hope, as in many pieces of legislation
4 that's introduced, we have an intent and also -- but that
5 intent is -- sometimes is vague. Or I mean, it's
6 interpreted differently by different people.

7 And it's -- it's very encompassing to many
8 controversial parts. So I would hope that as this
9 legislation progresses, that we can certainly work out
10 these differences. And in Pennsylvania, we'll indeed have
11 a -- a legislation to protect -- protect our citizens
12 whether they are alive or they're deceased.

13 So I hope we can -- I'm more than cooperative
14 to work with you. Certainly, we can --

15 MR. WYCKOFF: Thank you.

16 REPRESENTATIVE STAIRS: We have a very strong
17 beginning. And there's no reason why we can't sit down and
18 work things out, which we -- which we do very well in
19 Harrisburg most times. Thank you.

20 CHAIRPERSON CLARK: Yeah. I would just -- I
21 would just mention one observation. You know, every time a
22 piece of legislation is considered or there's hearings, you
23 know, there's always the hypothetical of "what if." And I
24 don't -- and I think that happens with every bill.

25 And what we'll need to do is sit down and say,

1 Well, you know, we're not going to cover every possible
2 brain scheme that someone may come up with, I mean, as
3 society progresses. But I think we'll be able to come up
4 and address something that will cover 99 percent of the
5 situations and hopefully that everybody is comfortable
6 with.

7 But, you know, we never cover every
8 hypothetical situation that someone can think of as we
9 proceed through life. So, you know, I think that we're
10 more than willing to sit down with you. And I think we'll
11 all need to be happy with the final result.

12 MR. WYCKOFF: Thank you.

13 CHAIRPERSON CLARK: Thank you. The next
14 individual to provide testimony to the Committee is Charles
15 Gallagher from the Reading Eagle. And he's here on behalf
16 of the Pennsylvania Newspaper Association.

17 MR. GALLAGHER: Good morning.

18 CHAIRPERSON CLARK: Good morning.

19 MR. GALLAGHER: As you indicated, sir, I'm
20 indeed Charles Gallagher. I use Chuck. And I'm Managing
21 Editor of the Reading Eagle and the Reading Times in
22 Reading, Pennsylvania. I appreciate the opportunity to
23 present the Pennsylvania Newspaper Association's position
24 on House Bill 1980 -- I bear with you as I read from the
25 script that you're all also reading with me -- the proposed

1 Judicial Code amendment prohibiting the public use for
2 trade, commercial or advertising purposes of the name,
3 portrait, photograph or other likeness of any natural
4 person without expressed written or oral consent.

5 The Pennsylvania Newspaper Association, PNA,
6 recognizes and appreciates Representative Jess Stairs'
7 interest in protecting a person's name or likeness from the
8 unauthorized use in the commercial or advertising context.
9 However, PNA and its more than 220 newspaper members have a
10 well-founded concern that certain aspects of this proposed
11 legislation would inhibit news gathering and free
12 expression.

13 The right of an individual to control the use
14 of his name and likeness in the commercial marketplace is
15 important, but it is not more important than protecting the
16 fundamental constitutional right of free expression in the
17 marketplace of ideas.

18 During the last century, the common law,
19 federal courts, approximately 16 other state legislatures
20 and legal scholars came to recognize the individual's right
21 to protect against the unauthorized appropriation or
22 exploitation of name and likeness by promoters of
23 commercial products and services.

24 Whether its rubric is the right of publicity
25 or the right of privacy, a well-settled legal doctrine

1 exists under which individuals are able to prevent the
2 unauthorized commercial exploitation of their names,
3 likenesses and, in some jurisdictions, other personal
4 attributes such as a nickname, voice or distinctive
5 persona.

6 For more than 61 years, Pennsylvania courts
7 have recognized a right to privacy that embraces the
8 unauthorized commercial appropriation of name and likeness
9 and provided a cause of action for any person who was
10 damaged by such conduct.

11 The common law principle recognized by
12 Pennsylvania's court does no violence to the fundamental
13 rights of free expression guaranteed by the First Amendment
14 and Article I, Section 7 of the Pennsylvania Constitution.
15 If the General Assembly finds it necessary after so many
16 years to codify this common law rights of privacy, it
17 should follow the example of the common law and avoid
18 unduly burdening the rights of free speech and free press.

19 PNA acknowledges that House Bill 1980 contains
20 an exemption that recognizes the imperative of preserving
21 rights of free expression. That exemption at proposed
22 Section 8313(c)(1) makes the bill's prohibition against
23 unauthorized appropriation and the related cause of action
24 inapplicable to the publication, printing, display, or use
25 of the name or likeness of any natural person in any

1 newspaper, magazine, books, news broadcast or telecast, or
2 other news media or publication as part of any bona fide
3 news report or presentation having a current and legitimate
4 public interest and where such names or likeness is not
5 used for advertising purpose.

6 In spite of the draftsman's apparent intent,
7 this section, especially the phrase "bona fide news report
8 or presentation having a current and legitimate public
9 interest", will have the effect -- chilling effect of
10 burdening free expression in this state, for the exemption
11 forces any author or publisher who would use the name or
12 likeness of a person, living or dead, to first assure
13 itself that that use is current, newsworthy, and of
14 legitimate public interest, as well as noncommercial.

15 Even worse, the exemption puts a court, an arm
16 of the government, in the position of having to make
17 similar judgments regarding the content of speech whenever
18 the exemption becomes an issue of litigation. If I may, if
19 you could place yourself in my position for a moment and
20 reflect on the impact of the bill's language.

21 The law may not affect the job of editing hard
22 news; for example, national, state, local, public affairs,
23 economics or foreign relations, for a daily newspaper such
24 as mine. But what about sports, entertainment, life-style
25 or community affairs reporting?

1 The bill would require me to decide on a daily
2 basis whether a court would defer with my judgment -- would
3 differ with my judgment and the judgment of other editors
4 that certain stories of these categories meet the criteria
5 of bona fide, current, and of legitimate public interest,
6 not to mention noncommercial.

7 Most newspapers, including mine, publish "year
8 in review." If I can show a few examples to you at this
9 point. And I'm not suggesting that any of the persona we
10 depicted at the end of this millennium such as da Vinci or
11 Abraham Lincoln or whatever would be there.

12 But if we were to take this and take a look at
13 the year in review in sports, the people from our county,
14 Berks County, such as Betsy King, who is now in the LPGA
15 Hall of Fame; Donyell Marshall, who's playing out in
16 California with the NBA; Kerry Collins, also one of Mr.
17 Paterno's products now with the Giants; Carl Furillo, who
18 is a native of our area, if we were to take all those and
19 put them here on this particular thing, do a year in review
20 follow-up on them, those are the kinds of things that we'd
21 be concerned with.

22 And where am I now? The bill would require me
23 to decide on that, whether or not that is a public
24 interest. Most newspapers, including mine as I said, do
25 the year in review. We publish stories highlighting

1 anniversaries of notable events such as the founding of a
2 local business or the advent of a community institution.

3 Are feature stories such as those bona fide
4 news reports? Are they current? Are they of legitimate
5 interest? Berks County residents are justifiably proud of
6 their high school athletes, as I said, and then to achieve
7 at the college and professional level. We enjoy extolling
8 what they have done, where they've gone.

9 Is a story of that nature a bona fide news
10 report protected by the consent requirements of H.B. 1980?
11 PNA has a justifiable concern that H.B. 190 -- 1980,
12 rather, would force editors such as me to be very cautious
13 about publishing stories and features that do not concern
14 breaking news.

15 When in doubt about the effects of the law, an
16 editor would be forced to decide between obtaining the
17 consent of the person or persons named or pictured in the
18 story or killing the story. Given the exigencies of daily
19 journalism, I'm afraid that all too often, Bill 1980's
20 effect would be to inhibit the publication of stories or,
21 at the very least, dictate the content of stories.

22 Ultimately, H.B. 1980 would chill the exchange
23 of information and ideas in the public forum. I happen to
24 think that every newspaper such as mine publishes bona fide
25 news; it is current and legitimate in public interest. But

1 consider for a moment the impact of the bill on a
2 university, charitable organization, or community group
3 that publishes a newsletter for a private audience, for
4 students, faculty and alumni.

5 Is a story about a fund-raising event or
6 distinguished graduate's career accomplishments a bona fide
7 news report and not advertising, considering that one of
8 the newsletter's primary purposes is to promote the
9 organization and encourage financial donations?

10 Is the story of current and legitimate
11 interest given the limited audience and the private status
12 of the subject of the story? In short, the chilling effect
13 on news gathering that this bill could produce should be a
14 matter of great concern to this Committee and to the entire
15 General Assembly.

16 Today, approximately 16 states have enacted
17 statutes recognizing the right to publicity. In a number
18 of these states, including Texas, California, Tennessee and
19 Ohio, the statute clearly differentiates between commercial
20 and news publications and exempts all forms of news media
21 from the consent to use requirements stipulated in the
22 statute when a name, voice, signature, photograph, or
23 likeness is used in connection with any news, public
24 affairs, or sports broadcast or account or any political
25 campaign.

1 These states do not require publishers to
2 establish that their stories are bona fide news reports or
3 current and legitimate public interest. In sharp
4 distinction to these sister states, H.B. 1980 invites a
5 test of the legitimacy of news gathering and in fact
6 infringes on the First Amendment rights of the news media
7 and the public at large.

8 Additionally, states, including California,
9 recognize the owners and employers of any medium used for
10 advertising including newspapers should not be held legally
11 liable for an advertisement unless it can be established
12 that they had knowledge of the unauthorized use of a
13 person's name or likeness.

14 These states have wisely recognized that
15 advertisers are principally responsible for the content of
16 advertising and that newspapers rarely have the ability or
17 time to verify that an advertiser obtained consent from
18 someone depicted or named in advertising copy.

19 Based on these practical constraints, a
20 newspaper has only enough time to get verbal assurance that
21 the advertiser obtain the consent of the person named or
22 shown in the advertisement. PNA and its members
23 respectfully urge you not to report House Bill 1980 in its
24 present form.

25 Rather, we urge this Committee to consider

1 PNA's proposed amendments of the bill that addresses its
2 constitutional infirmity. Once again, thank you. Thank
3 you for the opportunity to present PNA's views on this
4 litigation. And I too would be happy to answer any
5 questions you may have.

6 CHAIRPERSON CLARK: Thank you very much. Do
7 we have copies of your proposed amendments?

8 MR. GALLAGHER: I believe they do. Do they
9 not? Yes, you do.

10 CHAIRPERSON CLARK: Thank you very much. Are
11 there any --

12 REPRESENTATIVE STAIRS: The only thing I would
13 add, when -- certainly, when you present the amendments to
14 us, we'd like to look at those. And certainly, as this
15 bill moves, we certainly would like to see those and work
16 with you as we develop an even better bill.

17 MR. GALLAGHER: I appreciate it.

18 CHAIRPERSON CLARK: Thank you very much for
19 your testimony.

20 MR. GALLAGHER: Thank you.

21 CHAIRPERSON CLARK: And the next individual to
22 provide testimony to the Committee, John Oney, Esquire. He
23 is from the International Management Group.

24 MR. ONEY: Chairman Clark, ladies and
25 gentlemen, I am pleased to be here today to speak on House

1 Bill 1980. I'm employed by International Management Group
2 or IMG. We're a company located in Cleveland, Ohio. Our
3 company has served as agent and representative for Arnold
4 Palmer since the beginning of his career when he first
5 turned pro.

6 I've had the honor and pleasure of working for
7 Arnold since 1977. I work in the legal department of
8 International Management Group. My career has been focused
9 on intellectual property. I've been involved in
10 trademarks, copyrights, right of publicity matters since
11 1977 not only on behalf of Arnold Palmer but also on behalf
12 of a very wide range of other athletes and celebrities.

13 Let's see. Joe Montana, Rod Laver, Billie
14 Jean King, at the moment Tiger Woods, also tennis players
15 Bjorn Borg, Pete Sampras and a wide, wide range of athletes
16 who are human beings. I've faced in that time period a
17 wide array of problems that come down the road for athletes
18 in their careers.

19 Obviously, it's a matter that's important to
20 athletes across the board. Mr. Palmer has -- wanted to be
21 here today. His schedule didn't permit him to be here to
22 speak on behalf of the bill. So I'm here in his stead. I
23 would like to say that this type of bill is very important
24 for athletes and artists and entertainers.

25 It is -- it is a matter of contention in

1 states across the country. Certainly, California has been
2 a lead state, New York, Florida. A great many states have
3 seen the need to have this kind of legislation to maintain
4 a balance between the -- the producers of advertising of
5 products on the one hand and the athletes and the
6 entertainers on the other.

7 So you have a situation which mirrors in some
8 way labor and management in the athletics and entertainment
9 field. We -- we are speaking in favor of the bill. We
10 believe that -- I believe that there's not a great need to
11 go into detail on the need for this bill.

12 Even individuals who have spoken earlier
13 asking for changes in the bill have spoke about the general
14 need for this type of legislation to protect against
15 unauthorized commercial exploitation of athletes. And I
16 think there's a general consensus on that -- on that view.

17 We -- we have seen -- and here I'd like to
18 give kind of a background for the Committee on what this
19 subject looks like from the side of the athlete or the
20 entertainer. There are two sides to the -- to the picture.
21 One side is the commercial side, that the athlete is being
22 asked to use -- to allow others to use his name and
23 likeness in advertising Kellogg's Corn Flakes, to use his
24 name and likeness to advertise a golf tournament in which
25 he's going to participate, a wide range of activities that

1 are profit making, compensated activities for that
2 individual.

3 That's one side that we look at on behalf of
4 management for Arnold Palmer, management for other
5 athletes. You want to maximize income, and you want to do
6 the right thing. The other very important side of
7 the -- of the management of this subject matter on behalf
8 of the athletes is that that person has an image.

9 They have their own personal moral feelings.
10 They have their own religious beliefs. They have a
11 lifetime in which they've interacted with every -- everyone
12 across the board. They have the same feelings as human
13 beings, that any of us in this room have.

14 And they often want to see those personal
15 beliefs carried through into the way they are portrayed in
16 the media and in commercial activities. We have -- we have
17 many athletes who refuse to be involved in advertising for
18 alcoholic beverages.

19 We have athletes -- years ago people stopped
20 doing any arrangements for tobacco products. We have
21 people who do not want to be involved in any gambling.
22 Muhammad Ali, for example, is a Muslim. And he wants that
23 carried through into the way he is portrayed in the media.

24 He could not -- no one could use him for
25 advertising barbecue sauce that's going to be used to

1 barbecue pork and so forth. So part of our job is
2 commercial. The other part of the job is to safeguard and
3 protect, as it were, the human rights of that athlete.

4 That human being doesn't want to be portrayed
5 in a way that's false to the public. That is why when we
6 receive proposals -- and I've gotten -- we get these every
7 day -- to have this athlete or that athlete show up to be
8 used in a movie, to be -- his image or whatever to be used
9 in a movie or a television program, television cartoon, a
10 music video, I mean, a wide variety of products, a wide
11 variety of audiovisual products, we look at the context in
12 which that person is going to be used.

13 How is Tiger Woods going to be portrayed in a
14 particular movie, in a particular scene? How is Arnold
15 Palmer going to be shown interacting with people in a -- in
16 a particular proposed movie or a television program? We
17 want to look at that.

18 What is he going to say? How is he going to
19 interact? Because we're very interested in protecting his
20 reputation, his -- carrying through his moral beliefs.
21 It's not about money. It's about how he's portrayed. The
22 bill as it's currently proposed we believe gives terrific
23 protection to both areas that I'm speaking about.

24 I think that there's some possibility of
25 looking at the description of the exclusion for First

1 Amendment to see if there's a way to give some comfort to
2 the people who are in the newspaper business, the magazine
3 business, people who are out there every day on the battle
4 line producing magazine articles, newspaper articles. They
5 need some assurance.

6 Where we have a fear in looking at
7 the -- looking at the proposed amendments is that the other
8 amendments proposed by MPA effectively amount to an
9 exception which is larger than the bill itself. The
10 exception will allow Arnold Palmer to be used in a music
11 video without our having the ability to say, Wait a minute.
12 What's in that music video? What's the Arnold Palmer image
13 going to be doing in that music video? What's the music
14 behind the music video?

15 And we know, as the Chairman spoke about
16 earlier, technology is rushing ahead of us. Technology is
17 making it possible to lift the image of Arnold Palmer out
18 of a recorded golf tournament, to lift his image out and
19 move it and do whatever you would like to do with it.

20 So unless we have this kind of protection for
21 Arnold Palmer, for Joe Paterno, for Fred Rogers, for others
22 who are resident in this state, it opens up the danger that
23 you'll see Joe Paterno showing up as a regular character in
24 a 30-minute sitcom produced in New York or Los Angeles.

25 And Joe will be sitting back going, How did

1 they do that? No one asked me. This is the danger. This
2 is the problem. It's an area and an issue which has become
3 more important as media has built up, as money in the
4 entertainment industry has exploded.

5 It's a matter of tremendous importance to
6 athletes. And it's a tremendous importance to fans, fans
7 of Joe Paterno, fans of Arnold Palmer. I think you would
8 all be very shocked if you saw Arnold showing up in a -- in
9 a rap music video.

10 People would come up to Arnold and say, How
11 could you have allowed that? And he'll have to say, Well,
12 I couldn't stop it. I don't think anybody wants to be in
13 that position. I do have some -- some suggested amendments
14 to the -- to the bill in its current form, which are
15 relatively minor.

16 And I think I would refer you to those if we
17 can save some time of the Committee and others present.
18 Our desire is to have a bill and to see a bill enacted in
19 this state which is consistent with other legislation in
20 other states. This legislation is consistent with Florida.

21 The suggested amendment is, as far as I know,
22 not a part of the California legislation. I would strongly
23 urge the Committee to keep the bill here in Pennsylvania
24 consistent and on a par with similar legislation in
25 important states like Florida, California, Illinois,

1 Indiana, et cetera.

2 So I'd like to conclude my remarks, open this
3 up to questions, and once again thank the Committee on
4 behalf of -- of an excellent golfer and a man who
5 loves -- loves his state and has lived here his whole life,
6 always comes back here and is never going to leave.

7 CHAIRPERSON CLARK: Thank you very much for
8 your testimony. And we all regret that Mr. Palmer's
9 schedule didn't permit him to be with us today, but he
10 certainly has an open invitation to come to Hershey and
11 play our great golf courses any day he'd like.

12 You touched on one thing that I was concerned
13 about earlier, is with the John Wayne --

14 MR. ONEY: Right.

15 CHAIRPERSON CLARK: -- selling beer and, you
16 know, how I guess John Wayne completely and absolutely gave
17 all his rights to that motion picture and then them having
18 exclusive rights of that, could do with it what they
19 wanted, which may very well impinge on -- on what his heirs
20 would like him to be depicted as, you know, not selling
21 beer, so to speak. Is that --

22 MR. ONEY: I don't think that that's an
23 accurate analysis of the way that these contracts work.
24 I've done contracts like this for some of our clients to
25 appear in -- in movies or other productions of that nature.

1 And we make -- I make this analysis every day when we look
2 at advertisers or others who are coming to us and wanting
3 to use footage.

4 And the analysis is basically the following:
5 There are two rights that are owned. One is the copyright
6 in the -- in the footage. And for a John Wayne movie, that
7 copyright would be owned by perhaps the studio that
8 produced the movie. So they own the copyright and the
9 footage.

10 The other right owned is the right of
11 publicity of John Wayne. And those rights would now be
12 owned by his estate. So if we were to substitute Arnold
13 Palmer in place of this analysis, there are people who come
14 to us now, they want to use footage of Arnold when he was
15 at the Masters.

16 And that footage would be owned by some
17 copyright owner, whoever sent the cameraman there to do the
18 filming. The other rights are the rights of Arnold Palmer.
19 So they come to us. And we say, Well, how would you like
20 to use the footage? And we give permission or not on
21 behalf of Arnold Palmer, which is his right of publicity.

22 On the other hand, we say to them, Okay.
23 You've got to be sure that you get permission from the
24 copyright owner of that footage. So when the producer of
25 the material has those two permissions, then they can go

1 ahead; and they're free to use what they'd like to use.

2 That's an instance where John Wayne's estate
3 agreed to the footage being used in that way. So the same
4 is true of still photographs where you have a single
5 photograph taken by a sports photographer. That copyright
6 will be owned by one party, and the athlete or the
7 celebrity will own his personal rights.

8 CHAIRPERSON CLARK: So that's already taken
9 care of?

10 MR. ONEY: That's already taken care of. It
11 works every day. People come and ask for permission. And
12 it's been operating smoothly for residents of all sorts of
13 other states and seems to work well.

14 CHAIRPERSON CLARK: Also, if I could draw on
15 some of your experience. Have you ever had any problems
16 with newspapers or TV broadcasts or news programs as far as
17 impinging on a celebrity's right?

18 MR. ONEY: I -- in 22 years, I think we only
19 objected to one newspaper. Only once in the years that
20 I've been representing hundreds of clients, many, many
21 golfers, tennis players. Only once. And that -- that one
22 time was a newspaper that took a full page of their sports
23 section, and they reprinted 10,000 copies.

24 And they put it in a giant plaque, and they
25 were selling it at the entrance to the golf tournament. So

1 that was a newspaper that kind of went into the business of
2 making memorabilia. Aside from that example, we've never
3 done it. We never raised any claim against any newspaper
4 for any matter that I can remember.

5 CHAIRPERSON CLARK: So that wasn't part of
6 their -- of their newspaper function, so to speak, of
7 reporting the news --

8 MR. ONEY: That's right.

9 CHAIRPERSON CLARK: -- and reporting sports or
10 broadcasting sports?

11 MR. ONEY: That's right. Our -- let me just
12 say on that subject that -- that we are very, you know, we
13 are managing our athletes. Our athletes like to be covered
14 in the news media. The more they're covered --

15 CHAIRPERSON CLARK: I would think so, yes.

16 MR. ONEY: -- the happier they are. They
17 don't want to bring claims against newspapers. They want
18 to be friends with newspapers. And so it takes a lot -- I
19 mean, believe me, I got to tell you, it takes a lot before
20 we would ever encourage an athlete to argue with the guy
21 who's the editor of the sports section that reports on our
22 client.

23 So the fact is, we have -- we have very little
24 incentive or interest and our clients have zero incentive
25 or interest in arguing with -- with the news media, the

1 sports reporters. You know, they get mad about somebody
2 said something about them on the sports pages but
3 not -- not on this subject matter. Believe me.

4 CHAIRPERSON CLARK: And I didn't think you
5 would object if Mr. Gallagher's Reading Times depicted
6 Arnold Palmer there with the athlete of the century column
7 on the front of his newspaper.

8 MR. ONEY: Well, again, that's -- at the end
9 of the year, when you have the annual review of that year,
10 that's a current news story. And at that time, it's
11 current as of that moment that you're reviewing the year,
12 which is something that, again, we're terribly happy to see
13 that -- see that done. We've never had any problem.

14 CHAIRPERSON CLARK: Have you ever had any
15 problem with -- I watch A & E Biography. And sometimes
16 they -- however they do that, they depict the good side and
17 the bad side. Is there -- is there a problem with how they
18 put those programs together and how they -- did they need
19 consents or, you know, that's --

20 MR. ONEY: I would -- let me give you the
21 analysis that we go through and which is the following:
22 And I would say that the analysis started back before media
23 exploded. And our analysis goes back to the days when
24 print media was all there was. And you had books and
25 magazines and newspapers, and that's kind of all the people

1 looked at.

2 And our analysis is that if an author wants to
3 write a book about Arnold Palmer and write his -- his
4 biography or tell a story about -- about him or about what
5 it was like, what happened with him at the Masters, you
6 know, to give an account, that that's protected by the
7 First Amendment; that's a truthful telling of events which
8 happened in this world; and that anyone -- any publisher
9 and author is free to write at length in a factual way
10 about the events of his life.

11 Now, if you simply change the media to a
12 television documentary as you described, the analysis
13 doesn't change. It's still a program about the life of
14 Arnold Palmer. And usually, we don't even -- we aren't
15 even asked. Producers who produce this don't bother to ask
16 because they know it's protected by the First Amendment.

17 If they ask us, we always tell them go right
18 ahead because what you're doing is telling a true store.
19 Now, the other end of the extreme is if somebody wants to
20 write a book and -- or produce a television production and
21 they want to put Arnold Palmer in it and they want to make
22 him a character where suddenly he's an undercover agent for
23 the CIA and he's spying for the CIA when he goes to foreign
24 golf tournaments, then our analysis is you're not telling
25 the truth anymore. You're making things up. It's totally

1 fictional. You're putting him into a fictional invented
2 context.

3 Yeah, you need permission. You need
4 permission because not only does that implicate his
5 commercial interests, again, it implicates his personal
6 human side of him. Something like that could suggest that
7 he used drugs. It could suggest anything that might
8 be -- reflect badly on him.

9 We think that that producer should get
10 approval. He should have to come to Arnold Palmer and get
11 approval of how they want to use him in an invented
12 context.

13 CHAIRPERSON CLARK: But if there was a film
14 clip -- and heaven forbid this would happen -- that they
15 would have a film clip of Arnold throwing a club, why, that
16 could make it into A & E Biography without objection?

17 MR. ONEY: Yes, it could if it did happen.
18 And believe me, there's plenty of athletes who have done
19 some things that they wish there hadn't been any cameras
20 around when they did it. John McEnroe is maybe one of the
21 few who is still unapologetic about that.

22 John doesn't worry about what he's said or
23 done. But if it did happen and a camera captured it, it's
24 a matter of public record. And the First Amendment freely
25 permits that to be broadcast.

1 CHAIRPERSON CLARK: Are you familiar with the
2 common law in Pennsylvania? And some previous people have
3 testified that that might be adequate or that that has been
4 developed and is well-established. Would you care to
5 comment on that versus, you know, trying to put this in
6 some kind of codified form?

7 MR. ONEY: I think that as a general
8 observation, the common law in most states has been
9 reasonably supportive of the interests that we are
10 concerned about. If this legislation was never enacted and
11 if we only fell back on the common law, I think there would
12 be -- there would be some concerns.

13 It would not be a terrible tragedy. On the
14 other hand, I think that having the legislation is very
15 desirable. Part of the -- the open areas are posthumous
16 rights. It's open to question what posthumous rights
17 exist, whether a person who dies who is a resident here
18 would truly be protected.

19 It's open to question whether nonresidents
20 would be protected in the state, which is -- which is
21 something to be concerned about for the legislature. You
22 don't want Pennsylvania to become a haven for infringers
23 where if you're a Pennsylvania company, it's open season on
24 every celebrity as long as they don't live in Pennsylvania
25 or they didn't die in Pennsylvania.

1 You don't want to be in that position either.
2 So I think on balance, the trend in America is for states
3 to adopt reasonable balanced bills. And I think overall,
4 it would be beneficial for Pennsylvania.

5 CHAIRPERSON CLARK: Are you satisfied with
6 Ohio's law?

7 MR. ONEY: Not satisfied at all, no. No. The
8 exceptions that are in the bill are, frankly, shocking.
9 And I'm -- as an Ohio resident, I'm concerned. I'm very
10 concerned because I'm thinking about -- I'm thinking about
11 John Glenn, thinking about Neil Armstrong. Those men are
12 not clients of our firm.

13 I know, for example, that Neil Armstrong
14 during his life has been absolutely adamant that he not
15 commercialize his name and image. He has never permitted
16 his name or image to be commercialized. And during his
17 lifetime, he's been able to enforce that because he
18 has -- he does have rights under the common law in the
19 state of Ohio.

20 I'm concerned that once he is no longer on the
21 scene, once he passes on, that the Ohio statute will allow
22 movies about him, television programs, a wide exploitation
23 of his -- of his image after his death in a way that isn't
24 possible prior to his death.

25 CHAIRPERSON CLARK: Is there a particular

1 state law that you are comfortable with and feel that
2 that's good as far as your industry?

3 MR. ONEY: I think that the Committee's
4 selection of Florida is an excellent -- excellent choice.
5 Florida is a state that has, on the one hand, a lot of
6 athletes and entertainers, celebrities resident there. It
7 also has a lot of production facilities. Studios have
8 production facilities at Orlando.

9 It is an area that there has been a balancing,
10 as I say. The California statute itself, which I think
11 does not contain this language, is quite a balanced -- a
12 much more balanced legislation.

13 CHAIRPERSON CLARK: Thank you. Are there --

14 REPRESENTATIVE DERMODY: I have no questions.

15 CHAIRPERSON CLARK: Representative Stairs.

16 REPRESENTATIVE STAIRS: Yes. Mr. Oney,
17 talking about athletes, certainly they are in this bill.
18 But, you know, we talk about Arnie Palmer in Latrobe. A
19 classmate of Mr. Palmer's is Fred Rogers. And of course,
20 those of us who used to watch Fred Rogers and still do on
21 TV on Mr. Rogers' Neighborhood and so forth, you know, he
22 has an image that's very true.

23 And it's very, very child-centered, very
24 loving. And it's something I think we all admire in the
25 individual. But, you know, I can imagine that if there

1 would ever be a time -- and heaven forbid that would be
2 the case -- that some, you know, unscrupulous individuals
3 or groups exploited his image with anti-children's, you
4 know, advertisement or literature.

5 And it would be very, you know, it would be
6 very traumatic to his memory that this would happen. So
7 it's not just athletes that we're talking about. I can
8 imagine even clergy, even politicians that have a lifetime
9 of caring and giving to their community and to their
10 Commonwealth that in some way be depicted later on in
11 advertising or so forth that would be certainly detrimental
12 not only to them but to the Commonwealth.

13 So I would hope that we can, you know,
14 certainly move this. And, you know, current event
15 information, as Mr. Oney mentioned, you know, at the end of
16 the year or daily newspapers reporting on the events of
17 that area or that -- that decade or millennium or so forth,
18 that we just -- that, you know, newsworthy is the First
19 Amendment.

20 So it behooves us. If we don't have it
21 perfectly very black and white and very clear, then we
22 certainly endeavor to make some changes so that we do have
23 the First Amendment for protection but still protect those
24 in our Commonwealth from exploitation, which is really
25 hawking of things.

1 And I think that is really a very serious
2 crime to their memory. Thank you.

3 CHAIRPERSON CLARK: Counsel Preski.

4 MR. PRESKI: Mr. Oney, I guess one question.
5 In point number four of your testimony, you talk -- you say
6 this: "We believe the bill should contain the language
7 making it clear that the protection provided under this
8 bill is available both to residents of the state of
9 Pennsylvania and also to nonresidents. The similar
10 legislation recently enacted in the state of Ohio has the
11 unfortunate provision that the protection under the
12 legislation is only extended to those who are domiciled in
13 Ohio at the time of their death."

14 With your other three, you've provided us with
15 proposed language. You don't seem to do it here. Do you
16 have any proposed language because I don't see in the
17 Pennsylvania statute proposed by Representative Stairs the
18 same kind of domicile requirement or any other kind of
19 residence requirement for the plaintiff or the person who
20 brings the action?

21 MR. ONEY: Yes. I -- when I reviewed the
22 legislation -- and I apologize. I received it rather late
23 last week. And I did study it, and there seemed to
24 be -- it was a little bit questionable in my mind whether
25 the legislation already accomplished what is indicated

1 there.

2 And I simply wanted to suggest to the
3 Committee that it might be helpful to make it absolutely
4 clear, crystal clear that it does apply both to individuals
5 who are residents of the state at the time of death and
6 also to others who are nonresidents simply to remove an
7 element of uncertainty and thereby reduce potential
8 litigation down the road.

9 Certainly, one goal here is to have a bill
10 that minimizes litigation and that is just clear and useful
11 to citizens in the future.

12 MR. PRESKI: As you review this, if you come
13 up with language, please let me know. If not, then from
14 what your answer was, I assume we might be able to take
15 care of that simply in the legislative history, in the
16 floor debate, or any other kind of discussion on the bill.

17 MR. ONEY: I would be pleased to go back and
18 review and see if there's a way to suggest language.
19 Either way I think might be helpful.

20 MR. PRESKI: Thank you.

21 CHAIRPERSON CLARK: We thank you very much for
22 your testimony. And as we develop the legislation and the
23 various amendments, why, we'll certainly include you in the
24 loop and be in touch with you.

25 MR. ONEY: Thank you very much,

1 Representative. Thank you.

2 CHAIRPERSON CLARK: The next individual to
3 testify to the Committee is Mr. John V.R. Bull. He is with
4 the Philadelphia Inquirer and represents the Pennsylvania
5 Society of Newspaper Editors, the First Amendment
6 Coalition, the Philadelphia Chapter of the Society of
7 Professional Journalists, and A.P. Managing Editors.
8 Welcome.

9 MR. BULL: Thank you, Mr. Chairman. As my
10 letterhead says, I'm assistant to the editor of the
11 Inquirer. But I would like to emphasize for you that I am
12 not here representing my newspaper. I give you that
13 position that I have only for identification purposes.

14 I am here representing the four organizations,
15 three of them statewide, one of them regional, which I
16 listed in my prepared testimony. While House Bill 1980
17 appears well-intentioned in our viewpoint, it is not, in
18 the view of the Commonwealth's news-gathering
19 organizations, an inspired piece of legislation.

20 From our viewpoint, it has serious potential
21 for causing great harm from what we presume are unintended
22 consequences. We have grave concerns on two levels:
23 Philosophical and practical. Philosophically, our main
24 worry is the one you've already heard about before from
25 Chuck Gallagher.

1 And that's over the provision that exempts
2 newspapers and presumably broadcasters from liability when
3 a person's image is used as part of a bona fide news report
4 or in a presentation having a current and legitimate public
5 interest. They are very wide-ranging, undefined categories
6 that often depend on an individual judgment as to what is
7 news and what is not news.

8 And as all of us recognize, what's news for
9 one person may very well not be considered news for
10 another. I hear that every day on the telephone from
11 readers who object to a particular story in the paper. And
12 oftentimes, they call up and they complain. They say it's
13 not news.

14 While we understand that this exemption
15 appears to be trying to protect the First Amendment, it
16 unfortunately sets up a situation that ultimately would
17 require a judge to determine whether an image used with a
18 report, whether the report is news or not news.

19 And as if that were not difficult enough, the
20 judge would have to decide furthermore whether the story
21 was bona fide news. To us, that scenario is not only scary
22 but unconstitutional. Courts should not be in the business
23 of deciding what a newspaper, book, or magazine publisher
24 should print or what a television station should broadcast.

25 Clearly, there would be a serious chilling

1 effect on the presentation of the news. Moreover, the
2 legislation creates an injunctive process whereby a court
3 could prevent, quote, unauthorized publication, in the
4 words of the bill, which would be an unconstitutionally
5 restrictive order contrary to the judicially guaranteed
6 doctrine of prior restraint which has long held that courts
7 cannot prevent a newspaper from publishing a story.

8 Furthermore, permitting actions to be brought
9 for an astonishing 40 years after a plaintiff's death is
10 unbelievable. Lawyers tell me that there is no analogy in
11 tort law to a 40-year statute of limitations. We
12 understand that this legislation is prompted by concern
13 that the names of celebrities such as Arnold Palmer and Joe
14 Paterno may be capitalized upon for commercial use.

15 We understand that. We have no quarrel
16 whatsoever. The intent of this legislation is laudable and
17 understandable. But if that's the intent, we feel this
18 legislation is not needed, for celebrities already have in
19 the common law ample opportunity to sue for any
20 exploitation of their name or image.

21 The bill, however, also may extend the right
22 to sue to those of us who are not celebrities, to those of
23 us who have no obvious property value attached to our names
24 or images. We might be able to sue even when our
25 photograph would be used in a clearly innocuous or generic

1 way.

2 On the practical side, let me give you a few
3 quick examples that may illustrate what worries us. Could
4 newspapers still publish weather photos showing people at
5 random out on the street shielding themselves from the rain
6 by an umbrella?

7 How about a crowd scene at a 4th of July
8 parade or someone -- group of people at the State Farm Show
9 or some similar public event? Could we as private
10 non-celebrity citizens claim commercial exploitation?
11 Could newspapers still publish yesteryears columns without
12 fear of a lawsuit?

13 Could we publish retrospective stories using
14 photos of the Phillies' 1980 National League team picture
15 or the Eagles' team picture that played in the 1981 Super
16 Bowl? What about pictures from the Vietnam War, the
17 Kennedy assassination, the moon walks, or some of the civil
18 rights demonstrations of the '60s and '70s, all of which
19 occurred within the past 40 years?

20 Do we really want to put such historical
21 images off limits? Could newspapers publish or television
22 stations broadcast biographies of people in the news
23 presently or in the past without their permission? Mr.
24 Oney made some references to that.

25 I'm not sure that it's as simple a matter as

1 his testimony might suggest. Could newspapers sell
2 archival materials such as old photographs? Would those
3 pictures still be considered news long after the event they
4 depicted? Could newspapers still output -- still put out
5 weekend or entertainment sections with photos of
6 entertainers coming to town to give a concert?

7 What if the entertainer did not like the image
8 published by the newspaper? Would they have a right to
9 sue? And what about a newspaper photographer who exhibits
10 his or her best work in an art gallery? Can a person whose
11 photo appears on the wall of that gallery sue for damages?

12 Could the photographer sell his photographs
13 without opening himself to a lawsuit? The common
14 denominator to these examples is that each would require a
15 court to determine whether it is a bona fide news report.
16 That clearly cannot be in anyone's best interest.

17 Resolving these questions would needlessly
18 clog our court system with cases that should not be there.
19 Decisions about what is or is not news should be left to
20 editors, not judges. We in the news industry strongly urge
21 you to vote against House Bill 1980.

22 CHAIRPERSON CLARK: We thank you very much for
23 your testimony. Are there any -- Counsel Preski.

24 MR. PRESKI: Mr. Bull, your discussion of
25 prior restraint, as we've talked about the bill today, it

1 seems that there might be a move to limit it to only
2 commercials or advertisements. Do you think that that same
3 analysis holds true for those types, that this -- this
4 legislation is -- it amounts to almost a prior restraint if
5 all we're talking about is commercial speech or
6 advertisements?

7 MR. BULL: I don't think so, no. I mean, see,
8 with newspapers, it's much more difficult because we don't
9 particularly publish commercial stories of images. But we
10 could easily get picked up in the fallout from this kind of
11 bill. I think the basic problem, in addition to deciding
12 what is news and what isn't and what's current and what is
13 in the public interest and all those problems, which are
14 really problematic for us, I think the bigger problem
15 is -- just as big anyway -- is that this opens the door
16 to what I would call frivolous lawsuits.

17 But it might depend upon what is the
18 definition also. But I think it would give some incentive
19 to people looking for a pot of gold at the end of the
20 rainbow. And the problem is that for newspapers to fight
21 or oppose or contest these liable suits or damage suits on
22 average in this country costs a quarter of a million
23 dollars.

24 Whether the paper wins or loses, the cost of
25 fighting them is an average of a quarter million dollars,

1 which is absolutely prohibitive for a paper the size of the
2 Reading Eagle Times. And even for my giant paper, it's a
3 daunting proposition.

4 So there would be a definite chilling effect.
5 And this would give some opening to people to sue, who, in
6 our rational thought, wouldn't have a leg to stand on; but
7 they would still be able to sue.

8 MR. PRESKI: Thank you.

9 CHAIRPERSON CLARK: I thank you very much for
10 your testimony.

11 MR. BULL: Thanks, Mr. Clark.

12 CHAIRPERSON CLARK: And we have two letters
13 that we would like to have introduced into testimony. One
14 is from Joseph V. Paterno, the Head Football Coach of Penn
15 State University; and the other one is from Arnold Palmer.
16 So we will add both of those letters, which are in support
17 of Representative Stairs' House Bill 1980, into the record
18 and will be disseminated with the record.

19 With that, that will conclude our testimony
20 for today. It will also conclude the Subcommittee on
21 Courts hearing on House Bill 1980. We want to thank
22 everyone for coming out today and providing us their
23 insight on this important piece of legislation. Thank you
24 very much.

25 (Discussion off the record.)

1 CHAIRPERSON CLARK: Excuse me one minute. We
2 also have another letter that we would like to put in the
3 record and to be distributed with the testimony, and that
4 letter is forthcoming. And that is from Kimberly L. Allman
5 with the Recording Industry Association of America.

6 And those are comments on her analysis and
7 some concerns that that industry has with House Bill 1980.
8 Thank you.

9 (Whereupon, at 11:24 a.m., the hearing
10 adjourned.)

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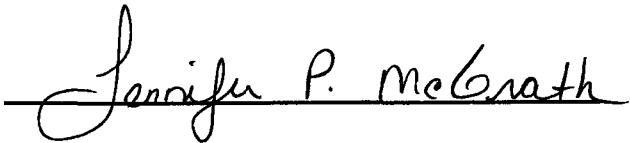
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I hereby certify that the proceedings and
evidence are contained fully and accurately in the notes
taken by me during the hearing of the within cause and that
this is a true and correct transcript of the same.



JENNIFER P. McGRATH

Registered Professional Reporter

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