

LATE TESTIMONY



**Senate Bill No. 1005, Senate Draft 1  
RELATING TO PUBLICITY RIGHTS**

**Committee on Judiciary and Government Operations**

March 2, 2009  
Room 016

10:30 a.m.

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Aloha Chair Taniguchi, Vice Chair Takamine, and Members.  
**OHA strongly supports, with an amendment, Senate Bill No. 1005, SD1, Relating to Publicity Rights.**

The purpose of this bill is to help protect in Hawaii the music of Hawaii, and all other works of authorship, by establishing a property right in the commercial use of a person's name, voice, signature, photograph, or likeness. This right is generally called a "right of publicity." It protects an individual or personality from the unauthorized appropriation by promoters and marketers of the music of Hawaii, without the permission of the artists and their heirs, and the sale of products that are objectionable to the artists and heirs, yet feature the artist's name, voice, signature, photograph, or likeness.

The bill is detailed, including provisions relating to transfer of the right, injunctions and damages for infringement of the right, and exemptions for situations where the law would not apply. We believe the bill strikes a reasonable balance between protecting the right and recognizing that the right is not absolute.

We respectfully request that your Committee amend the bill to make it effective upon its approval.

Mahalo for the opportunity to testify.

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**From:** George E. Darby KRI [gdarby@kanikapilarecords.com]  
**Sent:** Sunday, March 01, 2009 8:31 PM  
**To:** JGO Testimony  
**Subject:** TESTIMONY IN SUPPORT OF SENATE BILL No. 1005. JGO hearing on March 2, 2009, 10:30 a.m., Room 016

## **KANIKAPILA RECORDS, INC.**

126 Queen, Rm 302

Honolulu, Hawaii 96813

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TESTIMONY IN SUPPORT OF **SENATE BILL No. 1005**

RELATING TO PUBLICITY RIGHTS

Committee on Judiciary and Government Operations

Committee Hearing: March 2, 2009, 10:30 a.m., Room 016

Kanikapila Records, Inc., is based in Honolulu and is known for its releases of Peter Moon Band albums. Kanikapila Records strongly supports SB1005 as a major step is putting the publicity rights of Hawaii's writers, composers, and recording artists on a par with such rights in other states that have significant music industries. A publicity rights statute requires that anyone wishing to use another person's name, signature, voice, or photograph *commercially* must have a license granted by the other person (directly or from the person's estate or assignee). If enacted, SB1005 would provide much needed clarity about the "freely allowed uses" of other persons' names, signatures, voices, and photographs (i.e., the exemptions in Section 7 of SB1005), and those uses that require a license.

Using an author's or recording artist's name and photograph (and other likenesses, such as drawings or paintings depicting the author or recording artist) is critically important in the promotion and marketing of CDs, books, movies, and other forms of entertainment. If SB1005 were enacted, and using the music industry as an example, a license of publicity rights would be required for the commercial exploitation of a living or deceased recording artist's name, signature, voice, and photographs. This is similar to a record label needing a license of a song's copyright before releasing a CD of a song.

In the absence of a publicity rights statute, some record labels choose to exploit the names, signatures, voices, and photographs of artists in Hawaii without any compensation to artists or heirs, while some other labels offer token compensation while telling the artists or heirs the token compensation is "generous" since "none is owed". Kanikapila Records refrains from such conduct, but would certainly welcome the level playing field provided by a publicity rights statute such as SB1005.

As noted in the EDT Committee Report No. SSCR397, SB1005 does not alter rights in sound recordings in any way. Sound recordings are protected by federal copyright law. SB1005 addresses the *use* of sound recordings of an individual's or a personality's voice; SB1005 does not create any new or conflicting rights in sound

recordings. An “individual” is someone who has not established commercial value in their name, voice, signature, photograph, or likeness as of the time of his or her death; in contrast, a “personality” has established such commercial value as of the time of his or her death.

Kanikapila Records, Inc., urges that the Committee revise SB1005 SD1 to make the effective date of the Publicity Rights Act the date of its approval. Hawaii needs this law now, not in 2050 (as the last sentence of SB1005 SD1 currently reads), to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. Making the effective date of the Publicity Rights Act the date of its approval will not cause any injustice or hardship. Section -3(c) of SB1005 SD1 provides that “causes of action, and related damages, inter alia, relating to misappropriation of the rights established by this chapter may only be enforced as of the effective date of this chapter”, thereby preventing claims for retrospective damages.

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TESTIMONY IN SUPPORT OF SENATE BILL No. 1005  
RELATING TO PUBLICITY RIGHTS

Committee on Judiciary and Government Operations  
Committee Hearing: March 2, 2009, 10:30 a.m., Room 016

I strongly support SB1005 as a major step is putting the publicity rights of Hawaii's writers, composers, and recording artists on a par with such rights in other states that have significant music industries. A publicity rights statute requires that anyone wishing to use another person's name, signature, voice, or photograph *commercially* must have a license granted by the other person (directly or from the person's estate or assignee). If enacted, SB1005 would provide much needed clarity about the "freely allowed uses" of other persons' names, signatures, voices, and photographs (i.e., the exemptions in Section 7 of SB1005), and those uses that require a license.

Using an author's or recording artist's name and photograph (and other likenesses, such as drawings or paintings depicting the author or recording artist) is critically important in the promotion and marketing of CDs, books, movies, and other forms of entertainment. If SB1005 were enacted, and using the music industry as an example, a license of publicity rights would be required for the commercial exploitation of a living or deceased recording artist's name, signature, voice, and photographs. This is similar to a record label needing a license of a song's copyright before releasing a CD of a song.

In the absence of a publicity rights statute, some record labels choose to exploit the names, signatures, voices, and photographs of artists in Hawaii without any compensation to artists or heirs, while some other labels offer token compensation while telling the artists or heirs the token compensation is "generous" since "none is owed". I would certainly welcome the level playing field provided by a publicity rights statute such as SB1005.

As noted in the EDT Committee Report No. SSCR397, SB1005 does not alter rights in sound recordings in any way. Sound recordings are protected by federal copyright law. SB1005 addresses the *use* of sound recordings of an individual's or a personality's voice; SB1005 does not create any new or conflicting rights in sound recordings. An "individual" is someone who has not established commercial value in their name, voice, signature, photograph, or likeness as of the time of his or her death; in contrast, a "personality" has established such commercial value as of the time of his or her death.

I urge that the Committee revise SB1005 SD1 to make the effective date of the Publicity Rights Act the date of its approval. Hawaii needs this law now, not in 2050 (as the last sentence of SB1005 SD1 currently reads), to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. Making the effective date of the Publicity Rights Act the date of its approval will not cause any injustice or hardship. Section -3(c) of SB1005 SD1 provides that “causes of action, and related damages, inter alia, relating to misappropriation of the rights established by this chapter may only be enforced as of the effective date of this chapter”, thereby preventing claims for retrospective damages.

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**From:** Bob Clarke [rcclarke@prodigy.net]  
**Sent:** Sunday, March 01, 2009 11:44 AM  
**To:** JGO Testimony  
**Subject:** SB 1005, SD 1 Relating to Publicity Rights

Testimony of C Robert Clarke of Surfside Hawaii Inc dba Lehua and Mahlo Records to Senate Bill 1005, SD 1.

Committee on Judiciary and Government Operations  
Senator Brian T Taniguchi, Chair  
Senator Dwight Y Takamina, Vice Chair

Date: Monday, March 2, 2009  
Time: 10:30 am.

Dear Senator Taniguch and Committee Members:

I along with others in the Hawaiian music industry submitted written testimony recommending a revised version of SB 1005 to the Senate Committee on Economic Development and Technology. The bill was passed by the Committee with amendments which did not incorporate any of the proposed revisions suggested by those of us outlining recommended changes.

Prior to my following comments, I want to bring to your attention what appears to me to be a discrepancy between the actual language in the amended bill and the statement in the Committee report that the amended bill clarifies that it does not interfere with existing copyright laws for sound recordings. Note the amended committee report, Section 1, 1st paragraph ("notwithstanding any existing copyright law concerning sound recordings, etc") and the letter from Senator Fukunaga to Senator Hanabusa, reporting the amended measures, item 1 (".....this measure does not interfere with existing copyright for sound recordings"). I assume the statement in Senator Fukunaga's letter is the intended language.

1. It was 1972 which was the first year you could have a federal copyright in a sound recording. Starting with 1978, under the revised Federal Copyright Act, unless a performer was actually on the payroll of the recording company and treated as an employee, the record company had to get a written or acknowledgement from the artist that the record company owned the copyright in his/her performance. It's really the pre-1978 recordings that would be affected by this legislation.

Prior to 1972, sound recordings were protected by common law copyright, which was protection under state rather than federal law. The status of those common law copyrights are still not 100% clear, although the prevailing view appears to be that those common law copyrights are still valid.

For me, the question is -- if a recording company has what is a valid pre-1978 copyright in a sound recording even though it did not have a written recording agreement, does the State of Hawaii now have the right to undermine the value of that copyright by retroactively granting the performer a right of publicity in that recording that was never previously recognized?

2. #8209;6: This section pertains to liability for damages and profits which in my opinion is opening the door to frivolous lawsuits because it makes the recording company the one to prove innocence. That is, the defendant has the job of proving there was an implied or written contract. The plaintiff does not have to prove the same,

therefore enabling plaintiff to file a frivolous lawsuit to, if nothing else, hopefully obtain \$10,000. The recording industry in Hawaii is made up of a majority of small companies, probably 5 employees or less, and could not afford this open type of lawsuit.

3. This is a very bad bill for us, for the Hawaii music industry, and for the continued availability to the community of the old Hawaiian music. Clearly 50% of our catalog of master tapes were purchased from Makaha, Mahalo, and Sounds of Hawaii Records, all masters recorded in the 1960's. In the 30 - 40 years we have released many of these recordings we have not had a single complaint from an artist or heir. This bill as it now stands would make it questionable as whether we would want to continue distribution of any of the older recorded Hawaiian music. We couldn't afford a single law suit under the conditions as written. That would remove the "oldies" from the market forever.

Thank you for giving me the opportunity to convey this message to your committee.

C Robert Clarke  
President  
Surfside Hawaii Inc dba Lehua and Mahalo Records  
PO Box 1207  
Honolulu, Hawaii 96807  
Ph (530) 676-0108  
[www.surfside-hawaii.com](http://www.surfside-hawaii.com)

**GENOA KEAWE RECORDS, INC. & GENOA L. KEAWE TRUST**  
Honolulu, Hawaii 96813

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**TESTIMONY IN SUPPORT OF SENATE BILL No. 1005**  
**RELATING TO PUBLICITY RIGHTS**

Committee on Judiciary and Government Operations  
Committee Hearing: March 2, 2009, 10:30 a.m., Room 016

Genoa Keawe Records, Inc., is based in Honolulu and is known for its releases of Genoa Keawe albums. Genoa Keawe Records, Inc. and the Genoa L. Keawe Trust strongly supports SB1005 as a major step in putting the publicity rights of Hawaii's writers, composers, and recording artists on a par with such rights in other states that have significant music industries. A publicity rights statute requires that anyone wishing to use another person's name, signature, voice, or photograph *commercially* must have a license granted by the other person (directly or from the person's estate or assignee). If enacted, SB1005 would provide much needed clarity about the "freely allowed uses" of other persons' names, signatures, voices, and photographs (i.e., the exemptions in Section 7 of SB1005), and those uses that require a license.

Using an author's or recording artist's name and photograph (and other likenesses, such as drawings or paintings depicting the author or recording artist) is critically important in the promotion and marketing of CDs, books, movies, and other forms of entertainment. If SB1005 were enacted, and using the music industry as an example, a license of publicity rights would be required for the commercial exploitation of a living or deceased recording artist's name, signature, voice, and photographs. This is similar to a record label needing a license of a song's copyright before releasing a CD of a song.

In the absence of a publicity rights statute, some record labels choose to exploit the names, signatures, voices, and photographs of artists in Hawaii without any compensation to artists or heirs, while some other labels offer token compensation while telling the artists or heirs the token compensation is "generous" since "none is owed". Genoa Keawe Records Inc. refrains from such conduct, but would certainly welcome the level playing field provided by a publicity rights statute such as SB1005.

As noted in the EDT Committee Report No. SSCR397, SB1005 does not alter rights in sound recordings in any way. Sound recordings are protected by federal copyright law. SB1005



addresses the *use* of sound recordings of an individual's or a personality's voice; SB1005 does not create any new or conflicting rights in sound recordings. An "individual" is someone who has not established commercial value in their name, voice, signature, photograph, or likeness as of the time of his or her death; in contrast, a "personality" has established such commercial value as of the time of his or her death.

I urge that the Committee revise SB1005 SD1 to make the effective date of the Publicity Rights Act the date of its approval. Hawaii needs this law now, not in 2050 (as the last sentence of SB1005 SD1 currently reads), to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. Making the effective date of the Publicity Rights Act the date of its approval will not cause any injustice or hardship. Section -3(c) of SB1005 SD1 provides that "causes of action, and related damages, inter alia, relating to misappropriation of the rights established by this chapter may only be enforced as of the effective date of this chapter", thereby preventing claims for retrospective damages.

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TESTIMONY IN SUPPORT OF **SENATE BILL No. 1005**  
RELATING TO PUBLICITY RIGHTS

Committee on Judiciary and Government Operations  
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I strongly support SB1005 as a means to protect the publicity rights of Hawaii's writers, composers, and recording artists. The bill would provide much needed clarity about the "freely allowed uses" of other persons' names, signatures, voices, and photographs (i.e., the exemptions in Section 7 of SB1005), and those uses that require a license. I do, however, urge the Committee to revise SB1005 SD1 in order to make the effective date of the Publicity Rights Act the date of its approval. The bill should be enacted now, rather than in 2050 (as the last sentence of SB1005 SD1 currently reads), to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. Section -3(c) of SB1005 SD1, providing that "causes of action, and related damages, inter alia, relating to misappropriation of the rights established by this chapter may only be enforced as of the effective date of this chapter", prevents claims for retrospective damages, and allows fair negotiation for such use rights to begin immediately.

Mahalo,

M. Puakea Nogelmeier

2667 'Anu'u Place

Honolulu, HI 96819

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 02, 2009 7:45 AM  
**To:** JGO Testimony  
**Cc:** sako@kbhmaui.com  
**Subject:** Testimony for SB1005 on 3/2/2009 10:30:00 AM

Testimony for JGO 3/2/2009 10:30:00 AM SB1005

Conference room: 016  
Testifier position: support  
Testifier will be present: No  
Submitted by: Samuel  
Organization: Individual  
Address: 19 Kaniau Road Lahaina, HI 96761  
Phone: 808.6614331  
E-mail: [sako@kbhmaui.com](mailto:sako@kbhmaui.com)  
Submitted on: 3/2/2009

**Comments:**

I support SB1005 As an entertainer with over 20 recorded compositions I oppose those who feel it is okay to use my works without my permission. It is unfair to those of us that have crafted our skills only to have our works pilfered. Please help us stop this kind of practices.

Samuel K. Ako

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*Aloha ia 'olua e* Chairman Senator Taniguchi and Vice-Chairman Senator Takamine, and *aloha kakou* to you, the members of the Senate Committee on Judiciary and Government Operations, and *mahalo nui loa* for receiving this Testimony I am submitting by e-mail transmission to the Hawai'i State Legislature for your committee's review and consideration.

As a professional award-winning recording-industry musician, music-composer, music-publisher, recording-artist, record-label owner and producer, published-author, graphic-artist, and also as a television and motion-picture actor, narrator and singer, I strongly support SB1005 as a major step is putting the publicity rights of Hawaii's writers, composers, and recording artists on a par with such rights in other states that have significant music industries. A publicity rights statute requires that anyone wishing to use another person's name, signature, voice, or photograph *commercially* must have a license granted by the other person (directly or from the person's estate or assignee). If enacted, SB1005 would provide much needed clarity about the "freely allowed uses" of other persons' names, signatures, voices, and photographs (i.e., the exemptions in Section 7 of SB1005), and those uses that require a license.

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the token compensation is “generous” since “none is owed”. I would certainly welcome the level playing field provided by a publicity rights statute such as SB1005.

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Additionally, I would like to emphasize the importance of this legislation for all of us, who are professionals in the fields of the fine arts, written arts, motion picture and film arts, performing arts, and the recording arts, etc. It is significant to our descendants, both living and those yet to be born into this world. Our descendants, or “*na pua*”, should be able to benefit from our legacies. Therefore, I am submitting this testimony in the names of my children, whose names are listed below, after my name, and in the names of their children, my grandchildren, known, as well as, those unknown, or yet to be born.

*Mahalo nui loa* again for providing me the opportunity to submit this written testimony to you, the members of the Senate Committee on Judiciary and Government Operations.

Submitted By: Palani Vaughan, Jr., and on behalf of my daughter, Allison-Ka’ilihiwa Vaughan, and my son, Kilipaki K. F. Vaughan.

March 2, 2009