OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB1005, SD2
RELATING TO PUBLICITY RIGHTS

House Committee on Economic Revitalization, Business, and Military Affairs
House Committee on Tourism, Culture, & International Affairs

March 19, 2009 10:30 a.m.
Room 312

Aloha Chairs McKelvey and Manahan, Vice Chairs Choy and Tokioka, and Members. **OHA strongly supports, with an amendment, Senate Bill No. 1005, SD2, 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 or 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 Section 3 of the bill to make the Act effective upon its approval.

Mahalo for the opportunity to testify.

From: Eric Keawe [ekeawe@msn.com]
Sent: Wednesday, March 18, 2009 2:12 PM
To: EBMtestimony
Cc: Rep. Angus McKelvey; Rep. Joey Manahan; jimm@oha.org; haunania@oha.org; clyden@oha.org; ronm@oha.org; davidr@oha.org
Subject: EBM/TCI hearing on SB1005 S.D.2 on March 19, 2009, 10:30 a.m., Room 312. WRITTEN TESTIMONY

Genoa Keawe Records, Inc.
&
Genoa Keawe Revocable Trust

Honolulu, HI 96813

TESTIMONY IN SUPPORT OF **SENATE BILL No. 1005 S.D.2**

RELATING TO PUBLICITY RIGHTS

COMMITTEE ON ECONOMIC REVITALIZATION, BUSINESS, & MILITARY AFFAIRS

COMMITTEE ON TOURISM, CULTURE, & INTERNATIONAL AFFAIRS

Committee Hearing: March 19, 2009, 10:30 a.m., Room 312

Genoa Keawe Records, Inc., is based in Honolulu and is known for its releases of Genoa Keawes recordings on the GK Record label. **Genoa Keawe Records strongly supports SB1005 S.D.2** 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 statue 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 S.D.2 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 S.D.2), 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 S.D.2 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 to market and promote (i.e., to publicize) sales of the recording. 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, telling the artists or heirs the token compensation is "generous" since "none is owed". Genoa Keawe Records refrains from such conduct, but would certainly welcome the level playing field provided by a publicity rights statute such as SB1005 S.D.2.

As noted in Senate JUD Committee Report No. SSCR770, SB1005 S.D.2 "tempers the exploitation of the names, signatures, voices, and photographs of a deceased individual or personality without any compensation to their heirs." The Washington State publicity rights statute is the basis for SB1005 S.D.2, and that statute is widely respected as striking a clear and fair balance between rights owners and rights users.

SB1005 S.D.2 does not alter rights in sound recordings in any way. Sound recordings are protected by federal copyright law. SB1005 S.D.2 addresses the *use* of sound recordings of an individual's or of a personality's voice in the promotion and marketing of various new media of the day, e.g. CDs, books, movies, and other forms of entertainment and updates in audio visual technology; 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.

SB1005 S.D.2 recognizes the exemptions as outlined in Section 7a. This means that organizations who recognize our past personalities, either who are living or who have passed on are free to do so as they have always done. "...with matters of cultural, historical, political, religious, educational, newsworthy or public interest, including without limitation, comment, criticism, sattire, and parrody relating thereto, shall not constitute a use for which consent is required under this chapter. " The First Amendment protects these rights.

Genoa Keawe Records, Inc., urges that the Committee maintain the effective date of the Publicity Rights Act as August 1, 2009 (Sections -5(a) and -6(a)). Hawaii needs this law now, not in the distant future, to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. The Committee may wish to delete the artifact, "Effective 7/1/2050" in the descriptive header of SB 1005 S.D.2.

# # #

Eric K. Keawe - President
Genoa Keawe Records, Inc.

From: George E. Darby KRI [gdarby@kanikapilarecords.com]
Sent: Wednesday, March 18, 2009 9:01 AM
To: EBMtestimony
Subject: EBM/TCI hearing on SB1005 S.D.2 on March 19, 2009, 10:30 a.m., Room 312. WRITTEN TESTIMONY

KANIKAPILA RECORDS, INC.

126 Queen, Rm 302

Honolulu, Hawaii 96813

TESTIMONY IN SUPPORT OF **SENATE BILL No. 1005 S.D.2**

RELATING TO PUBLICITY RIGHTS

COMMITTEE ON ECONOMIC REVITALIZATION, BUSINESS, & MILITARY AFFAIRS

COMMITTEE ON TOURISM, CULTURE, & INTERNATIONAL AFFAIRS

Committee Hearing: March 19, 2009, 10:30 a.m., Room 312

Kanikapila Records, Inc., is based in Honolulu and is known for its releases of Peter Moon Band albums. **Kanikapila Records strongly supports SB1005 S.D.2** 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 statue 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 S.D.2 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 S.D.2), 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 S.D.2 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 to market and promote (i.e., to publicize) sales of the recording. 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, 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 S.D.2.

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Kanikapila Records, Inc., urges that the Committee maintain the effective date of the Publicity Rights Act as August 1, 2009 (Sections -5(a) and -6(a)). Hawaii needs this law now, not in the distant future, to address current and ongoing abuse of publicity rights of authors, composers, and artists in Hawaii. The Committee may wish to delete the artifact, "Effective 7/1/2050" in the descriptive header of SB 1005 S.D.2.

# # #

From: nakahiliprdctns@aol.com
Sent: Wednesday, March 18, 2009 1:36 AM
To: EBMtestimony
Subject: *****SPAM***** SUPPORT FOR SB1005
Attachments: Senate_letter_3_12_09_(2).pdf

March 17, 2009

House Committee on Economic Revitalization, Business & Military Affairs:
Chair, Angus McKelvey, Vice-Chair, Isaac Choi
Committee Members Berg, Evans, Manahan, Tokioka, Tsuji, Wakai, Wooley, Ward

House Committee on Tourism, Culture & International Affairs:
Chair, Joey Monohan, Vice-Chair, James Kunane Tokioka
Committee Members Berg, Choy, Evans, McKelvey, Tsuji, Wakai, Wooley, Marumoto

Subject: Testimony IN SUPPORT OF [SB1005 SD2] RELATING TO PUBLICITY RIGHTS
Hearing: Thursday, 03-19-09 10:30AM in House Conference Room 312

Aloha e to you Respective Committee Chairs, Vice-Chairs and Committee Members:

My name is Palani Vaughan, Jr., and I am music-composer, music-publisher, music-copyright owner, recording artist, record-producer, and record-label owner, and as a long-standing Writer Member and Publisher Member of the *American Society of Composers, Authors, and Publishers (A.S.C.A.P.)*, and as a 20-year member of both the *National Music Publishers' Association (N.M.P.A.)* and *The Harry Fox Agency (H.F.A.)*.

As such, I am keenly aware of the constant attention I must give to both legally-licensed and illegally-licensed uses of all of my copyrighted musical compositions, as well as, the legally-licensed and illegally-licensed reproduction of copyright-protected pre-recorded tracks of my music contained in musical recordings, produced by me, and, which were known, formerly, as, Long-Playing (LPs), or Record Albums.

I must also pay attention to any and all devised methods of reproduction that have been developed or may be developed in the future.

I also urge this committee to understand that, no matter how many songs I write as a composer, a written song has no "life", until someone sings or performs it. In the same way, a written song has no "perpetual life", until it is sung or instrumentally performed in a musical-recording by a recording-artist, whether that artist is a *vocalist* or an *instrumentalist*.

Each featured or starring recording-artist that performs a song, he, or she, will give that song his, or her, own interpretative performance signature, which, his, or her, fans will identify with the recording-artist.

Therefore, recording-artists are essential to the commercial success, or failure, for that matter, of any song.

In my case, I have the unique ability to enjoy monetary benefits form my creative labors as a musical-composer and publisher, whenever, I may have the opportunity to issue a mechanical-license for my copyrighted-music to other record-labels.

As a recording-artist, who also happens to record for my own record-label, I am also in a position to enjoy the monetary benefits that I may derive from licensing opportunities for the reproduction uses of existing pre-recorded and previously-released musical sound-recording tracks owned and copyrighted by me.

These monetary benefits also extend to uses of my music, not only in all of the above forms, but also in commercially produced and released video-tapes, television programs, films.

As a song-writer and music-publisher, I am a dues-paying member of N.M.P.A. in good-standing. I recently was notified by N.M.P.A. that it is currently spear-heading a lobbying effort to press for legislation for Performing Rights for Musical Works in Audio-Visual Downloads and Protections for Copyright in any Government Effort to Expand Broadband Service. [See Attachment of Letter Submitted to the US Senate, which is identical to a Letter Submitted to the US House].

In terms of monetary benefits derived from commercially-recorded and released music, there are distinctions made between non-royalty-musicians and singers—[such as occur in the use of the professional musical services of studio-musicians and studio-background vocalists]—and royalty-musicians and singers—[who are featured, or are instrumentalist or vocalist stars of musical-recordings].

While the N.M.P.A. lobbying effort pertains to the rights of music-composers and publishers, I believe that recording-artists featured on recorded musical-performances deserve the same protections.

In contrast to their counterparts in both Los Angeles and New York cities, which have been long-recognized as major record-industry centers in America, Hawai'i's native-Hawaiian music-composers and recording-artists, alike, for more than 150 years, have been at a distinct disadvantage, in terms of receiving appropriate recognition and protection.

The disadvantage came as a result of Hawai'i's geographic distance from those major centers of music-production and from the US Copyright Office in Washington, DC.

I personally know of certain well-known musical-compositions, previously copyrighted by the original song-writers, which were lost to unscrupulous opportunists—individuals who took advantage both of Hawai'i's geographic distance from the US Copyright Office and the original song-writers' ignorance of their copyright-protection rights, as well as, the original song-writers inability to sustain copyright-protection rights that they precariously enjoyed under old out-dated legislation.

The result was that these unscrupulous opportunists filed copyrights to those songs in their own names, and it is their descendants, who, now, enjoy the monetary benefits to those songs, and, not the descendants of the true song-writers. It is, not only morally wrong, but it is grossly unfair to the descendants of the original song-writers, who should be the legal beneficiaries of any and all current, and future, uses of those songs.

I can attest that the un-named descendants of the opportunist copyright-owner referred to above, benefitted monetarily through recent music-licensing rights opportunities, which earned those descendants, as much as, $15,000.00 per song, per use in re-broadcasts of a once-popular 1980s television series.

I know this, because I was negotiating my own licensing rights for music I wrote, published, and performed for that above referred to once-popular television show and was given that information by the licensing-agent for the producers of that once-popular television show.

What happened to those original song-writers and their descendants fortunately didn't happen to me and won't negatively impact my descendants, because my music is protected.

In terms of the purposes of SB1005 SD2, I firmly believe that the legally-determined descendants, trusts, and estates of recording-artists of the early Hawai'i recording industry should be entitled to protection and certain performance-rights royalty benefits, as determined by existing law, that would be derived from the commercial re-sale of any and all musical reproductions of, as well as, negotiated licenses for, those recorded performances by those early-Hawai'i recording-artists.

I urge you all, as the members of your combined House committees to please consider passing this legislation, which not only speaks to protecting the rights of the recorded-musical performances of those recording-artists of early Hawai'i recording-industry era discussed above, but also addresses the protection of featured royalty-recording-artist rights, which may be derived from the reproduction, sale and commercial use of the photo-images, the names, or anything that, unquestionably, would be identified, in particular, with the early Hawai'i recording-industry recording-artists, who never would have imagined that their identities would be exploited in so many unpredicted ways.

Please pass SB1006 SD2.

Mahalo nui loa,

Palani Vaughan, Jr. [Member ASCAP, NMPA, HFA; 1974 *"Nani"* Award-Winning & 1977, 1981, 1983 *"Na Hoku Hanohano"* Award-Winning Recording-Artist, Song-Composer, Music-Publisher, Record-Label Owner; 2006 and 2009 *"Na Hoku Hanohano Life-time Achievement"* Award-Winning Recording-artist; 2007 *"Legacy Award"* Male-Vocalist Winner; 2008 Inductee *"Hawaiian Music Hall of Fame"*] &
nbsp;

March 10, 2009

Honorable Patrick Leahy
Chairman of the Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Ranking Member Arlen Specter
Ranking Member of the
Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20515

Dear Chairman Leahy and Ranking Member Specter:

We are keenly aware of your deep appreciation of the central role that has been played by intellectual property in driving the U.S. economy; that the creation of American music has spread American culture to the far corners of the globe, and at the same time earned significant amounts for the U.S. in our increasingly globalized economy. In fact, America's music remains one of the bright spots in our balance of payments.

We thank you for all of your past support on behalf of the over 750,000 songwriters, composers and copyright owners who are concerned about the continued economic viability of songwriting and composing in America. Your legislative actions consistently have shown a commitment to a strong copyright regime conducive to continuation of our success in this creative part of the world economy. We know, too, that you are committed to fairness as legislation is considered in the area of copyright. We suggest that the concern for fairness also should apply to providing America's music creators with rights equivalent to those enjoyed by their counterparts in other countries with strong copyright regimes.

To that end, we respectfully present for your consideration the following description of two of our legislative priorities in the 111th Congress.

While there are two priorities listed below that reflect the urgent needs and concerns of songwriters, composers and music publishers, the most important of the following priorities is the Performing Right in Audio-Visual Downloads.

- **Performing Right for Musical Works in Audio-Visual Downloads**:

  "Public performance" and "distribution of copies" are two distinct rights granted to copyright owners, providing two separate revenue streams on which they depend for their livelihoods. Technological changes, however, have blurred the differences inherent in the methods of delivery of copyrighted entertainment programming, including audiovisual entertainment, to consumers. Songwriters and composers now receive public performing right royalties for their musical works when they are transmitted as part of audiovisual broadcast and cable programming. However, as delivery of such content shifts to online platforms, and often in the form of transmissions via digital downloads, these music creators are concerned that they will not receive compensation for the performances of their works as they would

from broadcast, satellite and cable distribution. The mere choice by a consumer to view his or her favorite movie or television show in a non-linear, time- or space-shifted fashion, whether "streamed" online or from a downloaded digital file accessed while commuting or viewing in a coffee shop, should not determine whether a songwriter or composer of the music accompanying such programming receives public performing right royalties. This is a critical issue because public performing right royalties comprise the largest source of compensation for most of our professional songwriters and composers of musical works. And, it is an especially serious matter with respect to television programs and movies, because songwriters and composers do not receive "mechanical" royalties when audiovisual works containing their music are distributed. If a public performing right is not recognized in the digital delivery of such program files, songwriters and composers may receive no royalties at all.

There is no question that copyright should be technology neutral. Technology should not be used to strip rights from songwriters, composers and music publishers. The choice of certain audiovisual delivery systems or methods over others should not result in a diminution of creators' rights or royalties. A federal trial court recently held, however, that there is no copyright protection for the public performance right when a work containing music is digitally transmitted for future playing or viewing. It has been and continues to be our position that all transmissions implicate the public performing right, and we are optimistic that this right will be vindicated on appeal and the original intentions of the 1976 Copyright Act be fulfilled.[1] However, the ruling presently poses grave risks of unintended consequences to the livelihoods of songwriters and composers of the musical works embodied in or accompanying audiovisual works.

Accordingly, a clarification to the copyright law that articulates that the public performing right is implicated in digital downloads of motion pictures or other audiovisual works embodying a musical composition is necessary to ensure compensation for songwriters and publishers of such works, and to promote "platform parity" between the various competing services. We believe Congress intended the current law to be platform neutral. The conflicting interpretations demand clarification, for without it, performing right income of songwriters,

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[1] In particular, the legislative history sets forth the intended definition of a public performance via a transmission. As stated in the House Report: "[T]he definition of 'publicly' in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of 'transmit' – to communicate a performance or display 'by any device or process whereby images or sound are received beyond the place from which they are sent' – is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performances or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) and (5) of section 106." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659.

composers and publishers is seriously threatened, as is the incentive that has placed America's music at the pinnacle of world popularity. Moreover, the clarification would ensure that U.S. copyright law moves closer to harmonization with foreign laws and treaty obligations – which overwhelmingly provide copyright protection for this right. If U.S. law does not provide this copyright protection, foreign performing right organizations may very well claim that they are not required to pay U.S. songwriters and composers, since their creators are not paid when their works are performed in the U.S. It is important to note that the RIAA has informed Congress by letter of May 14, 2008 (copy attached) that, in the interests of supporting harmonization of U.S. law with international practices, it would not oppose such legislation if it were to be proposed.

- **Protections for Copyright in any Government Effort to Expand Broadband Service:**

Much attention is being paid by both the government and private interests to the need for "building out" the Internet to accommodate new broadband services. While a robust and widely available broadband Internet is a laudable and important goal, we must not ignore that an unintended and highly negative by-product of providing faster and greater connectivity could well lead to a significant increase in already rampant Internet piracy. As Congress addresses the issue of broadband expansion, we strongly urge that proper intellectual property and technological protection for songwriters and music publishers be incorporated into any such legislation.

We look forward to working with you and your staff on these important issues and on other legislation when necessary to protect the interest of the songwriters, composers and music publishers.

Sincerely,

Songwriter and Publishing Groups:

ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS ("AIMP")

By:
Cathy Meranda

BROADCAST MUSIC, INC. ("BMI")

By:
Del Bryant

HARRY FOX AGENCY ("HFA")

By:
Gary Chargin

NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL ("NSAI")

By:
Steve Bogart

SONGWRITERS GUILD OF AMERICA ("SGA")

By:
Rick Carnes

SOCIETY OF LYRICISTS AND COMPOSERS ("SCL")

By:
Dan Folart

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ("ASCAP")

By:
John A. LoFrumento

CHURCH MUSIC PUBLISHERS ASSOCIATION ("CMPA")

By:
Elwyn Raymer

NATIONAL MUSIC PUBLISHERS ASSOCIATION ("NMPA")

By:
David Israelite

SESAC, INC. ("SESAC")

By:
Pat Collins

MUSIC MANAGERS FORUM - US ("MMF-US")

By:
Barry Bergman

MITCH BAINWOL
CHAIRMAN AND CEO

May 14, 2008

Honorable Howard L. Berman
Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
2221 Rayburn House Office Building
Washington, D.C. 20515

Honorable Patrick Leahy
Chairman of the Senate
Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairmen:

This letter is to advise you that the Recording Industry of Association of America (the "RIAA") does not oppose a clarification and recognition of a public performing right under the United States Copyright Law in copyrighted musical compositions that accompany, and are embodied in, digital transmissions of copyrighted audiovisual works (no matter the method of delivery, now known or hereafter developed, including streaming, and wireless), without regard to whether such digital audiovisual transmissions are delivered, by way of illustration, and not limitation, for: (1) temporary use by the recipient, expiring within a particular time frame or contingent on maintenance of a subscription service, (2) use of the file tied to a particular device or subscription service, via digital rights management ("DRM") technology or other conditions or restrictions limiting use, or (3) use free of DRM or any other conditions or restrictions.

The RIAA takes this position because it supports recognition of the concept of harmonization, that is, bringing the law of the United States into closer alignment with international practices and further, because RIAA recognizes that songwriters, composers, lyricists and music publishers should be fairly compensated for such copyrighted works.

Very truly yours,

Mitch Bainwol

cc: The National Music Publishers' Association
The Harry Fox Agency, Inc.
American Society of Composers, Authors and Publishers
Broadcast Music, Inc.
SESAC, Inc.
Songwriters Guild of America
Nashville Songwriters Association International

RECORDING INDUSTRY ASSOCIATION OF AMERICA
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