SB 1005

EDT

LATE

fukunaga4 - Michelle

From: Eric Keawe [ekeawe@msn.com]
Sent: Sunday, February 08, 2009 3:56 PM
To: EDTTestimony
Subject: Publicity Rights Bill

Dear Senators,

I am Eric K. Keawe. I am the President of Genoa Keawe Records, Inc. and trustee of the Genoa Leilani Keawe Estate Trust. I am the 11th child of the late Genoa Leilani Keawe. My mother is well known in the state of Hawaii, Nationally and throughout the world as Aunty Genoa Keawe. I represent the heirs of Aunty Genoa Keawe as a trustee of her personal Trust. Most of the people in the state, nation and world are aware of my mothers passing on February 25th, 2008. We are approaching the one year anniversary of her passing in a few weeks. As her son I support the passing of SB 1005 to protect the rights of my mother who is recognized as a recording artist, composer and a writer.

Four months after her passing in 2008 I was advised of a distribution of a re-release of a former project that my mother did in the mid 40's, then released in an album in 1956. To my surprise and without mentioning any names it was a project that mother objected to back in 2000 because the financial terms were unfair to her. Mother said that she was going to contact the family to obtain the rights to do the re-release on Genoa Keawe Record, Inc. label. She was told that they had the rights and it was a confidential agreement. The un-name label wished to compensate her a token amount as a good gesture and respect on their behalf. Mother was not happy with their offer. Mother did not have the funds to challenge their statement by taking them to court. The un-named label's position was that they did not have to compensate her for the project because she already recieved compensation from the original label. Today this label is still in business today re-issuing old Hawaiian recordings with our Hawaiian artists who have passed without any consideration on terms for the artist heirs or their estate. Whether or not a contract was done to own the rights of performance, name and or image with the original record label is part of the question today. To make a long story short, I will continue stand for my mother's position and stop the stealing of her name, image and performance rights on these old projects. She was totally shocked that things like this could go on while she was living. This un-named label sent a very irrational correspondence to my mother which I've kept in files. There also came a letter of apology later by his own attorney on his clients behalf. However, his 3rd to the last statement of an email dated September 8, 2000 was, "I would like to formally apologize for some of the comments and I will not be doing anything with the xxxxxx album for some time." Representatives, I think since then some time has come and gone. After my attempt to stop the release in communicating with his local attorney who said I had no protection in the state of Hawaii and if I took the un-named label to court I would be paying all attorney fees, and any loss of business because of my action.

I plead for your support to get this bill passed. I am not the only one who stands to lose the rights of my mother, the deceadant. I may be the only one speaking but I'm sure that I represent many others. I'm only dong this because I wish to continue my mother's wishes. There are some who are still living who do not know how to respond to this kind of theft. Just last week I helped another one of our kupuna obtain a contract that is rightfully theirs with Disney Productions. I respectfully ask for your support in this bill.

Regards,

Eric K. Keawe - Trustee.
Genoa L. Keawe Estate

LATE

February 7, 2009

The Honorable Chairperson Carolyn Fukunaga
Committee on Economic Development and Technology
The Hawaii State Senate

RE: Testimony in opposition to SB No 1005 (The Publicity Rights Bill)

Dear Chairperson Carolyn Fukunaga and members of the Economic Development and Technology Committee,

My name is Tim Mathre of Honolulu. I've been in involved in music retail, producing, music marketing and promotion in Hawaii for more than thirty years and I'm very passionate about preserving the history as well as promoting Hawaiian Music.

My concern is the unintended consequences of this bill in its current form. This bill in its opening statements says its purpose is to help protect in Hawaii the music of Hawaii by establishing a right of publicity. It also suggests that there have been numerous abuses by those who promote and market the music of Hawaii without the permission of the artists and their heirs. This bill appears to target specifically sound recordings. For more than thirty years I can only recall two instances of problems involving sound recordings. One was a cover that had pictures of people who did not appear on the recording, which was promptly corrected. The second was a disagreement between a record label and the artist's heirs who would not accept any royalty but instead wanted the master. So I'm not sure if that would qualify as a major issue that needs legislative redress. Unfortunately if this bill passes as written much of our recorded history will pass with it as well. No retail store, no label, no distributor will want to risk the burden of potential costly lawsuits of titles they own. In these tough economic times, we do not want to give retail more excuses for reducing the number of Hawaiian titles that they carry. The vagueness of this law could also allow background musicians and vocalists who were paid for the recording session to demand ownership of the masters as well.

When the state of California adopted their Publicity Rights Bill, it was in response to the thousands of items with Marilyn Monroe's image on it and the millions of dollars that were made. I don't recall in the last thirty years thousands of images of Hawaiian music artists for sale. Including sound recordings in this bill makes it very problematic. I have no problem with a reworked bill with clarity of language that would exempt sound recordings and educational and historical books but provide publicity rights protection for the commercial use of their image. The only people that will benefit from this current bill will be lawyers and the cost will be the loss of our Hawaiian music history. Thank you for the opportunity to express my concerns.

Sincerely,

Tim Mathre
2653 Myrtle Street, Honolulu, HI. 96816 (808) 732-0188

LATE

Subject: FW: Supplemental Testimony RE: SB 1005

From: cordintl@aol.com [mailto:cordintl@aol.com]
Sent: Thursday, February 12, 2009 8:59 AM
To: EDTTestimony
Subject: Supplemental Testimony RE: SB 1005

-----Original Message-----
From: cordintl@aol.com
To: senfukunaga@capitol.hawaii.gov; senbaker@capitol.hawaii.gov; senige@capitol.hawaii.gov; senhee@capitol.hawaii.gov; senslom@capitol.hawaii.gov
Sent: Thu, 12 Feb 2009 10:53 am
Subject: Supplemental Testimony RE: SB 1005

Supplemental Testimony of
Michael Cord
1874 Terrace Drive
Ventura, CA 93001 USA
805-648-7881 / cordintl@aol.com

February 12, 2009

Related to Senate Bill No. 1005 (The Publicity Rights Bill)

Chair Carol Fukunaga, Vice Chair Rosalyn H. Baker,
and Members Committee on Economic Development and Technology,
The Hawaii State Senate

Dear Senator Fukunaga and Members,

After reviewing the testimony submitted on behalf of Senate Bill No. 1005, I believe it is necessary to clarify some of the misconceptions created by some of the testimony in support of the Bill.

Sound recordings created before January 1, 1978, paid for by a record company, record producer, or recording studio20were considered works for hire under the 1909 Copyright Act. While the work for hire doctrine was not codified in the 1909 Act , the common law work for hire doctrine vested authorship in the person or entity that commissioned and paid for the work. Along with ownership of the rights in the sound recording, the work for hire author (the record company) obtained a non-exclusive license to attribute the recording to the performing artist. In essence, the record company had the right to release the album with the name and likeness of the recording artist. Any other interpretation or result would produce and absurd result and render the recordings useless.

All works for hire include the right to use the name, likeness, and factual biographical information concerning the recording artist. Artists who recorded under this industry scheme were paid for their work as employees for hire. Writings (contracts) were not required. That industry model has withstood several legal challenges. Senate Bill No. 1005 threatens to undermine industry-wide practices and deprive the public of classical, heritage music with its retroactivity and other provisions that do not take into account industry custom.

The 1976 Copyright Act codified the work for hire doctrine requiring a writing for a specially commissioned work to be considered a work for hire. This Bill primarily affects pre-1978 works because recording agreements entered into after January 1, 1978, would comply with the codified provision of the Copyright Act. It is standard in all recording contracts, written or oral, for the artist to grant the record company a non-exclusive license to use the artist's name, likeness, and factual biographical information. Again, a recording without such a right would be useless and unreleaseable.

The statement that California prohibits uses that are allow ed in Hawaii misstates California law. California specifically exempts the use of an individual's name, likeness, and biographical information when it is used truthfully to identify the performer on the sound recording. This exception is designed to ensure20that when a company pays for a sound recording, they can advertise the artist who recorded it.

The legislature is not the place to air individual grievances and it is highly irregular for any state government to get involved in the contractual relationship between two parties. As I stated in my previous testimony, Hawaii should pass a right of publicity law to prospectively protect residents who use their names and likenesses to make a living. The unauthorized use of anyone's name or likeness is and should be proscribed. The right to prevent false attribution is currently protected by the common law right to privacy.

The current Bill is flawed and should not be passed in its current form. The new version of the Bill should not apply retroactively and it should include an exemption for musical compositio ns, sound recordings, and any other media created prior to January 1, 1978.

Thank you for your consideration.

Best regards,

Michael Cord
Cord International & Hana Ola Records

Supplemental Testimony of
Michael Cord
1874 Terrace Drive
Ventura, CA 93001 USA
805-648-7881 / cordintl@aol.com

February 13, 2009

Related to Senate Bill No. 1005 (The Publicity Rights Bill)

Chair Carol Fukunaga, Vice Chair Rosalyn H. Baker,
and Members Committee on Economic Development and Technology,
The Hawaii State Senate

Dear Senator Fukunaga and Members,

I respectfully submit that Senate Bill No. 1005 should not be drafted to mimic the recently amended Washington State Statute No. 63-60-101, 63-60-020, and 63-60-030. The Washington State Statute was passed specifically to protect the Estate of Jimi Hendrix and Getty Images. Both groups had existing publicity rights prior to the passage of the Statute. The issue that prompted the legislation did not have anything to do with sound recordings; it concerned the unauthorized use of Jimi Hendrix's name on a vodka brand. The State of Washington passed the legislation to allow the Estate to protect the Hendrix name and likeness from unauthorized use on products. The Washington Statute will not affect the sound recordings Jimi Hendrix produced in the 1960's. The Statute should open up the Washington State courthouses to litigation from forum shoppers who need a place with expansive publicity rights that may or may not withstand judicial challenge.

The Hawaii Statute will open up the Hawaii courts to forum shoppers who prefer the Hawaii venue over the Washington venue. This seemingly unintended result does not correspond to the stated legislative intent behind Senate Bill No. 1005. As I stated in prior testimony, the Hawaii Statute will potentially affect sound recordings and other media involving not only Hawaii residents, but everyone else in the world. The Bill as drafted is overbroad. Again, I respectfully submit that this does not seem to fulfill the stated legislative purpose of the Bill.

I reiterate my previous request that the Bill be amended so that it is not retroactive and so that it specifically exempts sound recordings and other media created prior to the passage of the Bill.

Thank you for your consideration.

Best regards,

Michael Cord
Cord International & Hana Ola Records

LATE

From: Bob Clarke <crclarke@prodigy.net>
Subject: S.B. No. 1005
To: EDTTestimony@Capitol.hawaii.com
Date: Sunday, February 8, 2009, 2:16 PM

RE: S.B. No. 1005 PUBLICITY RIGHTS Time of hearing: Monday, February 9, 2009 at 1:15 pm

Chair Carol Fukunaga, Vice Chair Rosalyn H. Baker and members
Committee on Econoic Development and Technology
The Hawaii State Senate

I am C Robert Clarke of Honolulu altho I now spread my time between Honolulu and California since my company has interests in both states. I am President of Surfside Hawaii, Inc doing business as Lehua and Mahalo Records. I purchased the company in 1965 when it was the state distributor for Capitol Records and subsequently expanded into the record recording business and eventually retail with the purchase of the House of Music stores. I am a member of the Hawaii Academy of Recording Arts and the Hawaii Music Hall of Fame.

Though a bill for Privacy Rights may be good for Hawaii, this bill as written is so one sided that it could have the effect of closing down some of us in the recording business. In the early 1970's we purchased the music master tapes of Makaha Records, Sounds of Hawaii Records, and Mahalo Records. All of these master tapes were recorded in the 1950's and 60's. During this period of time, few artists signed contracts, choosing to be paid in cash for services rendered rather than future royalties. This bill would allow heirs or others to claim royalty payments even tho the artist settled for cash at the time of recording rather than future royalties. Even today there are some artists who would rather take cash rather than future royalties. The reason for this is that it takes a reasonable amount of sales of LP's, cassettes, CD's, etc. before an artist receives any royalty. Cost of recording an album is normally charged to the artist as an advance and it is repaid to the record label thru royalties earned. Most artists do not earn enough royalty because of limited sales to repay the advance. Therefore, there is an advantage to taking an agreed cash payment at the time of recording.

Since starting Lehua Records in 1968, all artists who have recorded for us are on contract. The contract gives the record label all rights to commercial use of the artists name, voice, photograph, likeness, etc. in connection with the recording. It appears this conforms with the proposed bill as it should.

The $10,000 infringment liability minimum is a killer for most record labels in Hawaii. Especially in todays market where our sales are decreasing annually. It takes an awful lot of CD sales to generate $10,000 of royalty. Not logical for most releases of Hawaiian music. $2500 would be more appropriate.

This bill appears to be able to open the door for frivilous lawsuits. A small record label

such as ours could not accept such lawsuits.

There are other portions of this bill that bother me and are not right. However in the interest of time and brevity, I have outlined the several portions of this bill that would affect us most.

This bill needs to be reworded to be fair to all parties.

Bob Clarke

LATE

Peter S. Burke
Tantalus Records, Inc.
1336 Grant Street
Santa Monica, California 90405
(323) 469-0084
(323) 469-1020 – Fax

February 24, 2009

From: blondeink@sbcglobal.net

To: edttestimony@capitol.hawaii.gov

Subject: SB1005

Supplemental Testimony of Peter S. Burke Related to Senate Bill No.1005 (The Publicity Rights Bill)

To: Chair Carol Fukunaga, Vice-Chair Rosalyn H. Baker, and
Members, Committee on Economic Development and Technology
The Hawai`i State Senate

Dear Senator Fukunaga and members, aloha kakou:

With regard to the proposed legislation (SB1005 – re: Publicity Rights) and prior to a vote on the proposed bill, I think it would be a good idea for the committee to review our attorney's interpretation of Hawaii law and some of the language used in SB1005, the implications of enactment of the proposed bill as written, and his overall response to the effort by the committee to enshrine SB1005 into Hawaii law without rewrite.

The comments:

"Para 3 (2)(c) provides that the interest is subject to any existing contracts. This law means any deals are still in effect. This proposed law protects that which is not subject to contract. Mr. Keawe has the claim regarding his mother whether or not this bill passes. You have explained that much of the product was pursuant to oral agreements where there was a "buy out." This transfer is still valid, and with the passage of time, will be hard to contest. If there was no exploitation of the picture/likeness rights in the past, then there may be no visual rights, but the master rights are still validly transferred. One would also look to custom and usage in the industry. If there is a question and these visual rights are needed, then the heirs could license them. The law would stop current unauthorized uses.

Note Para 6 (f) the loser pays attorneys fees. This obviously cuts both ways.

These types of laws are common now throughout the US. They are protecting against unauthorized T-shirts, advertising and things of that nature. For those who don't own the rights but are exploiting, this law will put them out of business. For those with legitimate rights, life should go on as usual, but I can see families litigating saying the underlying deal did not give these rights away. There is a doctrine called "laches" which means the complaining party has waited too long. But this is new law, so the doctrine might not apply, still it would seem unfair to require a party to go back 40 years to establish rights.

This brings us to the concept of "ex post facto" laws: laws that have retroactive application. What I would ask the authors of the bill to do is establish a presumption of ownership (meaning the complaining party has the burden of proof to show that rights were not transferred) for works older than 25 years given the evidentiary issues.

Finally, note that the master rights we are talking about are not copyrights, as copyrights in sound recordings were not recognized until 1972; we are talking about state rights and unfair competition laws which protect the owners of these masters, Hawaii Revised Statutes 482C-1. This means that these rights are held in perpetuity.

[§482C-2] Sale of unlawfully recorded sounds. It is unlawful to advertise, offer for sale, or sell any article onto which sounds have been transferred as described in section 482C-1 with the knowledge that the sounds have been transferred without the consent of the owner. [L 1975, c 81, pt of §1]."

I hope the committee will take the time to review the legal points brought up in this letter and reconsider how and whether SB1005 should ultimately be worded.

Thank you for your time and consideration,

Peter S. Burke
TANTALUS RECORDS, INC.