



**Senate Bill No. 1005
RELATING TO PUBLICITY RIGHTS**

Committee on Economic Development and Technology

February 9, 2009
Room 016

1:15 p.m.

Aloha Chair Fukunaga, Vice Chair Baker, and Members. **OHA strongly supports Senate Bill No. 1005 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" and has often been appropriated by promoters and marketers of the music of Hawaii, without the permission of the artists and their heirs, to sell 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.

Mahalo for the opportunity to testify.

fukunaga4 - Michelle

From: Sen. Carol Fukunaga
Sent: Friday, February 06, 2009 3:50 PM
To: fukunaga4 - Michelle; Jared Yamanuha
Subject: FW: Publicity Rights Bill SN-1005
Attachments: SB1005_.pdf

For 2/9/09 hearing testimony

----- Forwarded Message

From: Eric Keawe <ekeawe@msn.com>
Date: Thu, 5 Feb 2009 18:47:15 -1000
To: <ekeawe@msn.com>
Cc: Carol Fukunaga <senfukunaga@capitol.hawaii.gov>, Rosalyn Baker <senbaker@capitol.hawaii.gov>, Clayton Hee <senhee@capitol.hawaii.gov>, David Ige <sendige@capitol.hawaii.gov>, Sam Slom <senslom@capitol.hawaii.gov>
Subject: Publicity Rights Bill SN-1005

Dear Friends,

I would like to share with you information about a "Publicity Rights" Bill now pending in the Legislature. The Publicity Rights Bill (attached to this email) would define a right to control the commercial use of one's name, likeness, and other identifying attributes, legally called "publicity rights", not only while a person is alive, but also through one's estate after one dies.

There have been many music albums released in Hawaii, especially those of Hawaiian Music, after the death of a recording artist, and sometimes before their death, by companies who promote the albums using the fame, name, and photographs of the artist but without any permission by (or payment to) the artist or the heirs of the artist. Although most states on the mainland with an active "music industry" have publicity rights statutes, Hawaii does not. What is illegal in California today is legal in Hawaii. Mainland companies are today freely exploiting the lack of publicity rights in Hawaii, to the detriment of writers, composers, and recording artists in Hawaii.

I, and many others in Hawaii, have suffered from such exploitation of Hawaiian music and want your help in supporting the passage of the Publicity Rights Bill (Senate Bill 1005).

Unless Hawaii has a Publicity Rights law, the exploitation will continue. We appreciate that others love our music, and its history, and want to share it with all the world, but please connect with the family to make everything pono.

I encourage you to review the bill SB-1005 which I have attached for your education and knowledge.

I ask for your support on this Bill as it goes through its first hearing in committee. Please submit testimony in support of the Bill by 4 p.m. on Sunday, February 9, 2009. Submitting testimony by 4 p.m. on Friday, February 6th, is even better. How to submit the testimony is covered on page 2 of the Notice of Hearing available by clicking the web link below.

The hearing will be held:

DATE: Monday, February 9, 2009

TIME: 1:15 p.m.

PLACE: Conference Room 016 State Capitol 415 South Beretania Street

Here is a list of other bills to be on the agenda. SB-1005 is third on the agenda. You are welcome to attend to give your testimony.

http://www.capitol.hawaii.gov/session2009/hearingnotices/HEARING_EDT_02-09-09_.HTM
<http://www.capitol.hawaii.gov/session2009/hearingnotices/HEARING_EDT_02-09-09_.HTM>

Mahalo nui loa,

Eric K. Keawe

Private Citizen

----- End of Forwarded Message

fukunaga4 - Michelle

From: blondeink@aol.com
Sent: Saturday, February 07, 2009 3:24 PM
To: EDTTestimony
Cc: blondeink@sbcglobal.net; blondeink@aol.com
Subject: Related to Senate Bill No.1005 (The Publicity Rights Bill)

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

February 7, 2009

From: To:

Subject: SB1005

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 (SB No. 1005 – re: Publicity Rights), I see some problems in having such legislation enacted without a rewrite but can truly state that I am neither for nor against ‘publicity rights’ for Hawaiians.

Our family-owned record company, Tantalus Records, Inc., was originally owned and operated by Kimo Wilder McVay and my father, Sonny Burke, who was Don Ho’s record producer when Don recorded nearly all of his hit records for Reprise Records.

As a result of the good will that was generated out of Dad’s love affair with Hawaii and Hawaiian music, Tantalus Records, Inc. came into being and released its first album, “Hawaii’s Keola and Kapono Beamer”, an album that contained several hit singles and was the first album released by the famous Beamer Brothers. That success led to the release of numerous other albums featuring local Hawaiian artists. Along with that success, Kimo McVay and my father had the opportunity to buy an old Hawaiian record company, Bell Records of Hawaii, out of bankruptcy proceedings. Their intent was to ‘clean up’ the old, mostly 78 rpm shellac records and re-release them on Tantalus Records. Both my father and Kimo passed away before they were able to do so, although Kimo sold his interest in the Bell Records catalog and his partner share in Tantalus to my family before he departed this earth. I am now president of Tantalus Records, Inc.

I believe Bell Records of Hawaii and other record companies of that era (1940s – 1950s) that had no artist agreements with the performers recording and releasing records on those labels (considered employees for hire) had an implied consent from those artists to use their likeness, bio and vocal 'personality' in order to promote

the artist and further the artist's career. This is evidenced by such recordings being released at that time bearing the artist's likeness, bio, etc., without complaint and with the artist's full cooperation.

My opinion is that when the bankruptcy referee authorized Kimo and my dad to locate and re-release (our lawyer's interpretation of his words) as many of the old 78 rpm records as they could find, it was the State of Hawaii that gave them that permission and, following that thought with logic, also must have permitted them the same rights once enjoyed by Bell Records of Hawaii to use the name, bio, likeness and vocal 'personality' (aka publicity rights) of the various recording artists in order to sell records. Otherwise, the old Bell records would've had no value and certainly could not be reissued minus, say, Alfred Apaka's vocal, his name, etc.

Also, any of the artists (or their heirs) who benefited from having those recordings commercially released had the last 60 years, give or take, to dispute or challenge what was the accepted and prevailing practice of artists recording without a contract, and that was standard in the Hawaiian record business of that time, but they did not. This activity was conducted in Hawaii by Hawaiians and affected Hawaiian recording artists. It was not conducted by my family and perhaps other record companies that today have similar interests.

Should the new legislation granting publicity rights be approved, it should apply only to the Hawaiian products released from the date of enactment or should exclude (e.g.) recordings and publicity generated to sell products as described above.

These are only my thoughts but of course I hope they will be considered when the legislation comes up for a vote.

Me ka pono,

Peter S. Burke
Tantalus Records, Inc.

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fukunaga4 - Michelle

From: cordintl@aol.com
Sent: Sunday, February 08, 2009 9:06 AM
To: EDTTestimony
Subject: Testimony Re: Senate Bill No. 1005 (The Publicity Rights Bill)

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

February 7, 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 Sena te**

Dear Senator Fukunaga and Members,

My name is Michael Cord. I am a record producer, a music publisher, and owner of Cord International & Hana Ola Records. I am a member of the Hawaii Academy of Recording Arts, the National Academy of Recording Arts and Sciences, ASCAP, and BMI.

Many years ago I started buying or leasing the rights to long defunct Hawaiian record companies. The recordings from these companies had been unavailable to the public for many decades. The great bulk of them had been originally released on big thick scratchy 78-rpm discs that were played on a Victrola.

When I first started looking into the history of the old time Hawaiian music, artists, and songs, I was told on more than one occasion, by more than one Hawaiian music industry veteran, that the information that I was looking for did not exist. They told me, "Don't waste your time. It can't be done. All that history is lost. No one wrote it down so just forget about it." There was no reference place for me to go and look up the information. I couldn't believe that real classic Hawaiian music was disappearing and along with it, its history.

Since then, with an amazing team we have painstakingly worked with a huge amount of respect to bring back those lost recordings, restoring their sound quality through the magic of digital audio restoration, providing extensive historical liner notes, and including rare or previously unpublished photographs. The music is classic and should be preserved and cherished for more than just our lifetime.

Under the proposed language of this bill, it would not have been possible for us to have done the preservation work that we have done to date and would be impossible for us to continue.

Respectfully, I submit that SB 1005 should not be passed in its current form. While Hawaii should have a codified right of publicity, it should be prospective rather than retroactive. The bill should only apply to new uses that do not fit into one of several broad exceptions. Existing uses should be exempt from the law.

Once the bill is passed, the right of publicity should only apply to individuals who actively exploit their name or likeness during their lifetime. Granting the right to everyone in the world is too broad. The right of privacy is adequate to protect most individual's rights to protect their name or likeness from unauthorized exploitation. Rights of publicity statutes primarily apply to celebrities who seek to control the exploitation of their name or likeness. Hawaii's right of publicity statute should apply to celebrities wishing to control new uses of their name or likeness. Existing rights and relationships should not be affected.

Typically, a state's right of publicity applies only to residents or domiciliaries at the time of death. The right of publicity should not reach back in time to try to retroactively give rights to deceased individuals who did not have the right during their lifetime. Individuals and businesses entered into binding contracts, both written and oral, defining each party's rights in light of the fact that the individual did not have a right of publicity. Retroactivity could potentially rewrite contracts that were thoughtfully negotiated, disrupting the business relationship that has existed for years. The State should avoid rewriting existing contracts between parties.

There should be an exemption for owners of musical compositions and sound recordings of artists created prior to the passage of the bill. Following passage of the bill, sound recordings and musical compositions should be exempt from the right of publicity for any use that accurately describes the source or content of the material (such as album art, liner note information, or the artist's name or likeness, including, but not limited to, advertising of the musical composition or sound recording). While the State may want to require future transfers of rights of publicity to be in writing, past transfers should not be required to produce any written evidence of the transfer because the right did not exist thereby not requiring a written transfer.

Given more time, we could more thoroughly evaluate the merits of a right of publicity bill. We urge you to reject SB 1005 as written. I respectfully submit to you that it is overbroad and overreaching.

Best regards,

Michael Cord

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From: George E. Darby KRI [gdarby@kanikapilarecords.com]
Sent: Friday, February 06, 2009 3:57 PM
To: EDTTestimony
Subject: TESTIMONY IN SUPPORT OF SENATE BILL No. 1005. EDT Committee Hearing: February 9, 2009, 1:15 p.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 Economic Development and Technology

Committee Hearing: February 9, 2009, 1:15 p.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 SB-1005 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, SB-1005 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 SB-1005), 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 SB-1005 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 SB-1005.

Kanikapila Records notes that SB-1005 uses the Washington State publicity rights statute as a template. The Washington State publicity rights statute is well-regarded and reflects years of experience in fine tuning the various rights, remedies, and exceptions that appear in SB-1005.



The committee may wish to entertain shortening the term of protection afforded an “individual”, as opposed to a “personality”, in section 4(b) of the Bill. Kanikapila Records suggests that the term of seventy years, as currently drafted, is appropriate for a “personality”, since 70 years is also the relevant copyright term. A “personality” is a person whose name has established commercial value before their death. An “individual” is a person whose name has *not* established commercial value before their death. A term of twenty years may be more appropriate for an “individual”.

**Testimony of  
Cordell Keith Haugen  
P.O. Box 1976  
Honolulu, Hawai`i 96805 USA  
(808) 951-4332 / [hakumele@aol.com](mailto:hakumele@aol.com)**

February 6, 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 Hawai`i State Senate

Dear Senator Fukunaga and members, aloha kakou:

I'm Keith Haugen of Honolulu. I'm a writer, photographer, poet, singer/songwriter, musician, performing and recording artist, producer of recordings, teacher, and I am involved in a variety of things that might be affected by this legislation. I've been in all of these various disciplines for most of my adult life, and I have won awards for my work in many musical genre. I am a member of ASCAP (American Society of Composers, Authors and Publishers), a member of several other professional organizations, and a retired Life Member of the American Federation of Musicians (AFM, Local 677).

I have mixed emotions regarding the proposed legislation (SB No. 1005), in that I see both good and bad. So I cannot say that I am for or against a 'publicity rights bill.' But I ask to have my testimony included to at least raise some questions and concerns about the bill as it is written. I hope my thoughts will help committee members who might not be familiar with our professions and our industry.

When we choose to be in the public eye, as a performer or a politician, we accept the fact that we do not have complete control over who takes pictures of us and how they are used. Courts have ruled that those of us in the public give up the right to control others. I'm sure there are less than flattering pictures of me performing and I can only hope that editors will choose the best pictures for use in newspapers, magazines and other periodicals, or on television or other visual presentations.

As a photographer with thousands of pictures from which I am selecting hundreds that will appear in a book that I am currently writing for a local publisher, I hope you understand that it would be physically impossible for me, or the editor, or publisher, to put aside earlier court decisions and try to find the subjects of my photos or their heirs to get their permission. Nor would we want to. It is not only impossible, it is not necessary under the current laws. Also, I would hate to leave some Hawaiian music giant or icon out of a book on the history of Hawaiian music from pre-contact to the present, simply because someone's heirs objects to their

being included, or wants to be paid to have their family member included. And the threat of suits by heirs could discourage any publisher from putting out books about Hawaiian music and musicians.

As a songwriter, my protection is that we have a federal copyright law. No one may record or otherwise publish my songs without my permission, unless, of course the song has already been recorded at least once. And even then, federal law requires them to pay me royalties, and they may not publish my lyrics and translations without my permission. As long as the publisher is willing to send me a signed "Mechanical License," agreeing to the payment of royalties for the recording of my previously recorded and released song, they do not need my permission. They do need to pay me, as spelled out in federal law, and in the amounts set forth in the law.

I am concerned about those who record my songs without a "mechanical license" and who do not pay the statutory royalties. But a new law is not needed for those infractions of existing laws. I already have legal recourse. I can sue for payments due me.

When I sign an agreement to record my voice or my playing, on a label other than my own, I do so with the understanding that the finished product is the property of that label. And, unless there is a clause that prohibits the owner of the recording (not the song) from licensing it for other use, they may do so. If I hear my voice on MUZAK or other similar audio services, it is strictly legal, because of my signed agreement with the label on which I recorded the songs.

The inclusion of such things as "gestures" and "mannerisms" of an individual in the language of this bill is very vague and might make it illegal for any of us to ever picture ourselves on a CD cover making a "shaka" sign, since that is a "gesture" tied to my old friend, the late Lippy Espinda. This bill would enable Espinda heirs to sue us for using his "gesture."

On the first page of the bill, I read that the "right of publicity" has "often been appropriated by promoters and marketers of the music of Hawaii, without permission of the artists and their heirs, to sell products that are objectionable . . ." In my many roles in this industry – including producing and hosting an award-winning Hawaiian music program on radio, writing a Hawaiian music column on the Internet, and serving as entertainment editor for a leading Honolulu daily newspaper – I can't think of any of these so-called "objectionable" products or appropriations. For most of the past 40 years, I have received almost all of the new Hawaiian music releases, many of which I then reviewed, and I can't think of the objectionable recordings that have been "often" released. I think the Senate should ask the writer of this legislation to give examples before you ask unknowing legislators to vote on it.

Much of the language in this bill is what we used to call "gobblygook" when I was working for the government – both federal and state (I'm a former State Director of Information). In layman's language, no one who is voluntarily in the public eye (by choosing a profession where they might be photographed, for example) can later claim to own pictures taken of them in public. While I cannot cite legal cases, as a professional photographer for many years, I do know that the courts have ruled on that issue and a new State law cannot overrule federal court decisions.

If you pass this measure as it is written, the Emperor of Japan could say that I'm in violation of law when I release a CD single – later this year – that includes pictures that I took of the Emperor and the Crown Princess 50 years ago when he was the Crown Prince.

According to the language of this bill, those photos could be construed as advertising since they are part of the packaging of the recording and intended to help “sell” the package, and my CDs could be confiscated under Hawai`i law. Sounds pretty dumb, doesn't it?

If passed and signed into law, this bill will encourage frivolous lawsuits and put a lot of attorneys to work, but any benefits to those of us in the music business seem very questionable.

I think this bill needs major reworking and rewriting before it can be seriously considered by the Senate.

And a good place to start might be to ask the author of the bill to produce some of the objectionable practices that prompted it.

Me ka pono,

Keith Haugen