

# Hawai'i Tourism Authority

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LINDA LINGLE  
Governor

MIKE MCCARTNEY  
President and  
Chief Executive Officer

Testimony of  
**Mike McCartney**  
President and Chief Executive Officer  
Hawai'i Tourism Authority

on  
**H.B. 548, H.D. 1**  
**Relating to Trespass**

House Committee on Water, Land & Ocean Resources  
Monday, February 14, 2011  
9:00 a.m.  
Conference Room 325

The Hawai'i Tourism Authority (HTA) strongly supports H.B. 548, H.D. 1, which holds visitor guide websites and visitor guide publications liable for the injury or death of individuals who are enticed to trespass on private property as a result of representations in a website or publication describing attractions or activities.

Visitors frequently rely on guide websites or guide publications that encourages or invites a person to commit trespass on or through privately owned land and visitors are often injured or die as a result of trespass on private land to an attraction or activity described in the website or publication.

A guidebook, describes access Kipu Falls on the island of Kauai this way:

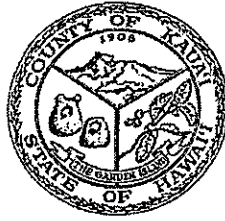
“To get to the falls, walk the trail on your left just before the bridge on Kipu Road (see map). The land was formerly used for growing sugar. Although the land company has posted NO TRESPASSING signs on their land, it hasn't stopped locals – who have visited this waterfall for generations – from walking to it. In fact, according to the local newspaper, community activists contend that access has occurred for so long, a “prescriptive easement” exists. Regardless, we'll just have to tell you where it is and leave the rest to you.”

It does not adequately describe the inherent dangers associated with the attraction, where numerous people have been injured and where a few have died, resulting in the landowner being sued.

The bill also requires the guidebook or website that is liable to defend and indemnify the landowner for any liability arising from any injury or death of a visitor.

We urge you favorable consideration of this measure.

**Bernard P. Carvalho, Jr.**  
Mayor



**George K. Costa**  
Director

**Gary K. Heu**  
Managing Director

**OFFICE OF ECONOMIC DEVELOPMENT**

**County of Kaua'i, State of Hawai'i**

4444 Rice Street, Suite 200, Lihu'e, Hawai'i 96766  
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February 11, 2011

Committee on Water, Land, and Ocean Resources  
Representative Chang (Chair) and Members of the Committee

**HB 548, HD1 Relating to Trespass**

Testimony of the Office of Economic Development, County of Kaua'i  
George K. Costa, Director in SUPPORT

HEARING DATE: February 14, 2011 – Committee on Water, Land and Ocean Resources,  
Room 325, 9:00am

The Office of Economic Development, County of Kaua'i **strongly supports H.B. 548** which holds visitor guide websites and visitor guide publications liable for the injury or death of individuals who are enticed to trespass on private property as a result of representations in a website or publication describing attractions or activities.

Visitors frequently rely on guide websites or guide publications, that encourages, or invites a person to commit trespass on or through privately owned land and visitors are often injured or die as a result of trespass on private land to an attraction or activity described in the website or publication.

Our intent and support of this bill is to address authors who specifically tell readers to ignore trespass or private property signs in order to experience "secret" or "off the beaten track" locations and may result in serious or tragic consequences.

Please lend your support to HB548. Mahalo for your consideration.

Sincerely,

George K. Costa  
Director – Office of Economic Development, County of Kauai  
gcosta@kauai.gov

xc: Mayor Bernard P. Carvalho, Jr.



## Testimony

### COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

February 14, 2011

Room 325

9 am

### HB 548 RELATING TO TRESPASS

Chair Chang and Members of the Committee,

Maui County Farm Bureau on behalf of our commercial farm and ranch families and organizations on the island is in **strong support** of the intent of HB548, holding authors of publications and websites liable for readers who suffer injury or death during the conduct of trespass, while exempting property owners from liability for these incidents.

As one of the most publicized tourist destinations in the world, Maui's farmers and ranchers face significant trespass challenges, possibly more than elsewhere in the State. Some of the visitor publications are blatant in their disregard of private property, encouraging visitors to ignore any signs that warn people not to trespass. Note this excerpt from the very popular 2009, 4<sup>th</sup> (most recent) edition tour guide book, "Maui Revealed, The Ultimate Guidebook":

**"...an awkward, potentially injurious five-minute walk, and a NO TRESPASSING sign. Is it worth going to? To us, it sure is!..."**

This type of completely irresponsible and potentially dangerous enticement used by tourist publications must stop.

There may be challenges to crafting this bill so that it will meet constitutional muster and not scare publishers away from writing about our islands. However, we believe that a law must be passed to protect both visitors to dangerous sites from potential DEATH, and landowners from liability for natural conditions or circumstances that they cannot control.

We appreciate your consideration of this measure and are willing to work with you to identify language that will not result in unintended consequences. We respectfully request dialogue between landowners, agriculture, the travel industry, and the attorneys involved in these cases; to identify workable language. We ask your support in moving this bill forward.

Thank you for this opportunity to provide our opinion on this important matter. If there are questions, please contact Warren Watanabe, Executive Director of MCFB at 2819718.



Committee: Committee on Water, Land & Ocean Resources  
Hearing Date/Time: Monday, February 14, 2011, 9:00 a.m.  
Place: Conference Room 325  
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 548, HD1,  
Relating to Trespass

Dear Chair Chang and Members of the Committee on Water, Land & Ocean Resources:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 548, HD1, Relating to Trespass, which purports to allow for civil liability against publishers of visitor guides if readers who trespass on private property are injured or killed.

H.B. 548 poses a litany of constitutional issues. The subject material, visitor guides and visitor guide websites, are protected by the First Amendment. Moreover, it is well-settled that state tort laws cannot circumvent or override the protections afforded by the First Amendment. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). State tort laws, which seek to impose civil liability on publications, have a substantial chilling effect on the publishers and distributors of such material. Accordingly, the ACLU opposes H.B. 548, HD1.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple  
Staff Attorney  
ACLU of Hawaii

American Civil Liberties Union of Hawaii  
P.O. Box 3410  
Honolulu, Hawaii 96801  
T: 808.522-5900  
F: 808.522-5909  
E: [office@acluhawaii.org](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)



## **Hawaii Cattlemen's Council, Inc.**

P O Box 437199 Kamuela HI 96743  
Phone (808) 885-5599 • Fax (808) 887-1607  
e-mail: [HCattlemens@hawaii.rr.com](mailto:HCattlemens@hawaii.rr.com)

### HOUSE COMMITTEE ON WATER, LAND & OCEAN RESOURCES

Monday February 14, 2011, 9:00 a.m. Room #325

#### HB 548 HD 1 RELATING TO TRESPASS

Holds authors and publishers of visitor websites and publications liable to readers who suffer injury or death as a result of being enticed to trespass; exempts property owners from liability.

Chair Chang, Vice Chair Har and Members of the Committee:

My name is Alan Gottlieb, and I am a rancher and the Government Affairs Chair for the Hawaii Cattlemen's Council. The Hawaii Cattlemen's Council, Inc. (HCC) is the Statewide umbrella organization comprised of the five county level Cattlemen's Associations. Our 130+ member ranchers represent over 60,000 head of beef cows; more than 75% of all the beef cows in the State. Ranchers are the stewards of approximately 25% of the State's total land mass.

The Hawaii Cattlemen's Council strongly supports the HB 548 HD1.

Landowners, including cattle ranchers statewide, have been having terrible problems over the years with trespassers. In some case, trespassers come on our lands to maliciously do damage to our property and in other cases cut fences or leave gates open, sometimes allowing cattle to get out onto the road. Often, when a car hits a cow it leads to disastrous results for both the cow and the car occupants leading to major liability for the cattle rancher. In other cases, trespassers sometimes get injured while trespassing, and then have the audacity to sue the landowner for the results of their illegal trespass activity. While in some cases the trespasser does not prevail in court, the landowner must nevertheless spend time and money to defend themselves. To add insult to injury, the publishers and authors of these guide books who encourage people to trespass on our private lands are immune to responsibility.

Some of these guide books imply that the trespassing won't hurt anyone, after all the landowner sometimes charges visitors to go on the same hike or activity. Of course the difference is people trespassing get no safety briefing or the benefit of an experienced guide or chaperone who can keep them away from dangerous areas or situations.

Thank you for giving me the opportunity to testify in favor of this very important issue.

## MAUI CATTLEMEN'S ASSOCIATION

*Maui Cattlemen's  
Association*

*P.O. Box 473*

*Kula, HI 96790*

*Board of Directors  
and Officers*

*Brendan  
Balthazar*

*Harry Cambra*

*Alex Franco*

*Greg Friel*

*Jimmy Gomes*

*William G. Jacintho*

*John Kim*

*Mike Murakami*

*Amber Starr*

*Toni Thompson*

*Sustaining  
ranching  
communities in  
Hawaii*

### TESTIMONY

February 12, 2011

Submitted via email: [WLOtestimony@Capitol.hawaii.gov](mailto:WLOtestimony@Capitol.hawaii.gov)

FROM: Maui Cattlemen's Association

TO: HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES  
Rep. Jerry L. Chang, Chair  
Rep. Sharon E. Har, Vice Chair

HEARING DATE: Monday, February 14, 2011

HEARING TIME: 9:00am, Conference Room 325

MEASURE #: HB 548, HD1 RELATING TO TRESPASS

The Maui Cattlemen's Association is a non-profit organization representing small and large Livestock producers in Maui County.

**We SUPPORT HB 548, HD1 RELATING TO TRESPASS.**

We strongly feel that Authors and Publishers of visitor websites and publications shall be liable to readers who suffer injury or death as a result of being enticed to trespass on private property. In addition, property owners should be exempted from liability. Some of these areas have naturally formed unsafe areas, and should not be recommended to anyone. It is unfair to a visitor to be put into this situation. When they realize that it's not where they want to be, matters get worst as they try to make their way around or back to their car. Equally important, people on Agriculture property, cause a disruption to the day-to-day operation.

Thank you for the opportunity to provide comment on this House Bill.  
You may reach the Maui Cattlemen's Association through the address provided above.

Sincerely,

William Jacintho, President

Amber Starr, Vice President

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) REGARDING H.B. NO. 548, H.D. 1**

February 14, 2011

To: Chairman Jerry L. Chang and Members of the House Committee on Water, Land, &  
Ocean Resources:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the  
Hawaii Association for Justice (HAJ) regarding H.B. No. 548, H.D. 1.

The provisions in Section 2 of this bill on page 2 states that an author or  
publisher of a visitor guide website or publication shall be civilly liable for a visitor's  
injury or death if it knowingly or negligently encourages or invites the visitor to trespass  
on privately owned land.

HAJ does not take a position on whether a visitor guide should be liable in those  
circumstances and that is a matter of public policy for the legislature to determine.

On the other hand, if this committee decides to pass this bill we support the  
provision on lines 3 to 7 on page 2 where by the guide shall defend and indemnify the  
owner or occupier of private land from any liability that may occur from the injury or  
death of a visitor under those circumstances.

Thank you for the opportunity to present testimony on this bill.



February 13, 2011

In the Water, Land, and Ocean Resources Committee  
Hawaii State House

Memo in Opposition to Hawaii House Bill 548 as Amended in the Tourism Committee

The members of Media Coalition believe that House Bill 548 as amended remains clearly unconstitutional. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including Hawaii: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

H.B. 548 would impose civil liability on any author or publisher of any visitor guide or website that “knowingly or negligently encourages or invites” a person to “enter, cross, or remain on private owned land from which the public is excluded” and the person suffers an injury or dies as a result of entering, crossing, or remaining on the property. The publisher or author must also indemnify the property owner or occupier for any civil liability as a result of an injury or death to the trespasser. A “Visitor guide publication” is defined as any book, magazine, pamphlet, mailer, handout or advertisement that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii. A “Visitor guide website” is any website, blog, twitter account, forum, or other wireless communication that provides information about a visitor destination, geographic destination, or natural attraction on privately owned land in Hawaii.

This legislation presents serious Constitutional problems. Travel guides are fully protected by the First Amendment. Speech is protected unless the Supreme Court tells us otherwise. As the Supreme Court said in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S.234, 241 (2002). H.B. 548 singles out a certain type of fully protected speech for regulation; such a content-based regulation of speech is “presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Any constitutional infirmities of H.B. 548 are not cured by the fact that the legislation would create a private civil tort action, rather than imposing a direct government sanction on the speaker. It is well established that the First Amendment does not allow application of state tort law in a way that violates free speech. *See, New York Times v. Sullivan*, 376 U.S. 254, 265

Executive Director: David Horowitz Chair: Judith Platt, Association of American Publishers  
Immediate past Chair: Chris Finan, American Booksellers Foundation for Free Expression Treasurer: Vans Stevenson, Motion Picture Association of America  
General Counsel: Michael A. Bamberger, SNR Denton US LLP



(1964) (“Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute.”)

Civil liability creates a substantial chilling effect on the producers and distributors of such material. The prospect of being responsible for the behavior of each viewer, reader or listener is likely to frighten producers and distributors to the point where it will severely chill the dissemination of constitutionally protected works. Due to this potential chilling effect, courts have repeatedly held that absent actual incitement to imminent lawless action, those who produce or sell First Amendment-protected material may not be subjected to financial liability for the unlawful or violent acts of third parties, even if they were influenced by specific media. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In third-party liability cases where the perpetrator or victim had copied what he or she read or saw, courts have barred or thrown out suits seeking civil damages. *See, DeFilippo v. NBC* 446 A.2d 1036 (R.I. 1982) (parents of deceased minor brought wrongful death action after their son hanged himself copying a stunt he saw on the Tonight Show); *Herceg v. Hustler Magazine, Inc.* 814 F.2d 1017 (5<sup>th</sup> Cir. 1987) (court reversed jury verdict in wrongful death action brought by parents against publisher for adolescent’s death allegedly caused by article that described autoerotic asphyxia); *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624 (1989) (wrongful death action brought by father of person killed by perpetrator who had just seen the movie *The Warriors* even though he quoted lines from the movie while committing the crime); *Zamora v. CBS, Inc.*, 480 F.Supp. 199 (S.D. Fla. 1979) (teenager sued the television networks for violent programming that he alleged caused him to commit criminal acts).

Courts have declined to impose liability on publishers even where a reader has relied on the content of a book that turned out to be inadequate or incorrect. In *Birmingham v. Fodor’s Travel Publications, Inc.*, the Supreme Court of Hawaii ruled that the publisher had no duty of care to the plaintiff and could not be held liable. 73 Haw. 359 (1992). *See also, Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1036-38 (9<sup>th</sup> Cir. 1991) (affirming on First Amendment grounds the grant of summary judgment to publishers of a mushroom encyclopedia who had been sued by mushroom enthusiasts who were sickened after eating mushrooms that the book said were safe).

The members of Media Coalition consider third party liability so deadly to free speech they challenged an Indianapolis ordinance in 1984 that sought to give victims of sex crimes a cause of action against producers and distributors of the material that allegedly caused the crime. The ordinance was struck down. The decision was upheld unanimously by a three-judge panel of the appeals court and summarily affirmed by the U.S. Supreme Court. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323 (7<sup>th</sup> Cir. 1985), *aff’d*, 475 U.S. 1001 (1986). The members challenged a virtually identical ordinance in Bellingham, Washington which was also struck down. *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb 9, 1989).

Finally, imposing third-party liability for injuries on producers or distributors of First Amendment protected material is a questionable policy for three reasons: first, it makes innocent third parties responsible for the acts of those trespass, second, it diminishes the responsibility of

the trespasser, since he or she can claim that something he saw or heard "made me do it," and, it absolves property owners for injury or death of the trespasser even if the property owner is at fault.

Again, if enacted, H.B. 548 as amended will suppress speech protected by the First Amendment. Please protect free speech and oppose this legislation. If you would like to further discuss our position on this bill, please contact me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

Respectfully submitted,

/s/ David Horowitz

David Horowitz  
Executive Director  
Media Coalition, Inc.

**Committee on Water, Land, & Ocean Resources  
Hearing  
Monday, February 14, 2011, 9:00 a.m.  
Conference Room 325**

**Representative Jerry L. Chang, Chair**



**Testimony on HB548, HD1 Relating To Trespass**

Dear Chair Chang and Members of the Committee:

My testimony is in SUPPORT, with Comments of HB548, HD1. My name is Lynn McCrory and I am the President of PAHIO Development, Inc. We are a locally owned and operated time share development company on the island of Kauai. One of our companies is the owner of Queen's Bath in Princeville, Kauai

This bill attaches civil liability to the guidebooks or websites that have knowingly encourages people to dangerous sites that are located on private property.

This inclusion of dangerous locations in order to sell books has resulted in far too many people losing their lives. There is a marker at the bottom of the public access, before someone has to walk across private property to get to Queen's Bath, showing the number of people that have died at this site. Finding the public access is difficult, unless you are guided there by websites and guidebooks. This portion of the bill I fully support.

As the landowner, if the language in HD1 (as it is not available on the website at this time) does not contain the wording "or remaining on privately owned land from which the public is excluded," there would only be the current HRS protection that provides no liability unless we do not fence or post exclusionary signage to exclude the public. For Queen's Bath, we could fence the property from west of the public access and stop all possibility of deaths at Queen's Bath, unless they came by sea. This is our comment.

I humbly ask for your consideration to SUPPORT HB548, HD1. Mahalo!

Me ke aloha pumehana  
With warm aloha,

PAHIO DEVELOPMENT, INC.

A handwritten signature in black ink, appearing to read "Lynn P. McCrory".

Lynn P. McCrory  
President

BEFORE THE  
HOUSE COMMITTEE ON  
WATER, LAND, AND OCEAN WATER RESOURCES

Representative Jerry L. Chang, Chair  
Representative Sharon E. Har, Vice Chair

HB548, HD1 RELATING TO TRESPASS

TESTIMONY OF  
ANDY DOUGHTY  
President

Wizard Publishing, Inc.  
P.O. Box 991  
Lihue, Hawaii 96766-0991

February 14, 2011, 9:00 am  
State Capitol, Room 325

Chair Chang & members of the Committee:

My name is Andy Doughty, President of Wizard Publishing, Inc. Wizard Publishing is a locally-owned company which publishes guidebooks for Oahu, Kauai, Maui and Hawaii. I appear before this Committee in STRONG OPPOSITION to HB548, HD1, which holds authors and publishers of visitor websites and publications liable to readers who suffer injury or death as a result of being enticed to trespass and exempts property owners from liability.

HB548, HD1 is overly broad, holding publishers and authors responsible for the acts of individuals it has no control over. In particular, we oppose HB548, HD1 for the following reasons:

- Protection for Landowners from injuries to trespassers already exists in HRS, Ch. 520, (Hawai'i's "Recreational Use Statute"), so the proposed legislation adds nothing in that regard, despite stating this is the purpose of this bill.

The purpose behind the Recreational Use Statute was to get landowners to be *more lenient* about letting visitors onto their land to go hiking, swimming, etc., by eliminating the landowners' liability and thereby promoting tourism. *See, e.g., Stout v. U.S.*, 696 F. Supp. 538, 539 (D. Haw. 1987). HB548, HD1 seeks to (1) protect landowners who are already protected and (2) impose strict liability on those who cannot account for whether a landowner who has previously allowed recreational use suddenly throws up a "No Trespassing sign." Nor does it account for public access which is lawful, notwithstanding signs.

To: Representative Jerry Chang, Chair, Representative Sharon Har, Vice Chair and Members of the House Committee on Water, Land and Ocean Resources

Re: Testimony of Andy Doughty, HB548, HD1 RELATING TO TRESPASS

Hearing: 2/14/11 @ 9:00 a.m., Rm. 325

Page 2

- The result of the legislation will very likely be to force guidebook publishers and others to altogether cease publications and information regarding Hawai`i, because:
  1. Any website, commercial wireless forum, blog or other social media communication, such as an online bulletin board, which has the capability for viewers to post/publish live, on-line comments (such as Frommer's website or Twitter or Facebook) would have to shut it down altogether, because they would be strictly liable for the content of their site even if they did not place the information on the site. The cost and effort necessary to constantly review and censor third-party reader posts would prohibit continued operation;
  2. The legislation would extend to Google, Yahoo, YouTube, Twitter, Bing, Flickr, Facebook, Wikimaps and Wikipedia, etc. and any other online search engines that bring up photographs or favorable descriptions of attractions which could be deemed as "enticing" visitors. A search on Google, for example, for "Kipu Falls" brings up 9,710 results;
  3. Publishers are liable even if the "NO TRESPASSING" signs are invalid, such as, erected by someone *other than* the landowner possessing the rights to control access;
  4. Tens of thousands, or more, of old editions of guidebooks are in circulation and beyond control of the publishers and cannot be modified to change their content or to include warnings; and
  5. Publishers would likely lose their Error and Omission Insurance for all Hawaii-related titles/websites, which would force them to drop those publications and sites;

Thus, the "big picture" result of the legislation will be impairment and diminishment of tourism in Hawaii.

Other practicable and important considerations include:

- Guidebooks/websites promoting Hawai`i should not be treated differently than other forms of media, such as television, movies, cable, etc., that provide images and/or information on sites, thereby potentially "enticing" tourists to trespass to get there.
- Non-visitor-guides about Hawai`i that contain information and/or pictures of remote attractions on non-public lands (such as a coffee table book featuring Hawai`i's waterfalls) would fall within the definition of "visitor guide publication," thereby affecting photo-journalists, writers, etc., and extending much broader than it would appear the drafters intended. These publications would also likely lose insurance.

To: Representative Jerry Chang, Chair, Representative Sharon Har, Vice Chair and Members of the House Committee on Water, Land and Ocean Resources

Re: Testimony of Andy Doughty, HB548, HD1 RELATING TO TRESPASS

Hearing: 2/14/11 @ 9:00 a.m., Rm. 325

Page 3

- The same unintended consequences exist for various local businesses that run websites or distribute marketing materials, such as farms, ranches or dive companies. (See, e.g., Maui County Farm Bureau Submission re HB548 to Committee on Tourism dated January 31, 2011 and Fathom Five Divers Submission re HB548 and HB552) In fact, any newspaper or news agency that reports on a privately-situated attraction could be deemed to have “enticed” a trespasser who read the article or saw the report.
- If a visitor were to be hurt accessing an attraction on private land, he or she would only have to do minimal post-injury research to see if any “publishers” had ever featured the attraction and sue any or all of them. That the injured plaintiff did *not* in fact read the publication or visit the website and was *not* enticed by it would be virtually impossible to prove.
- There are much narrower and simpler means to curb trespassing at specific sites (such as Kipu Falls – which appears to be the most hot-topic spot), if that is the true motivation behind the bills. The current approach is overkill.
- No other state or federal jurisdiction in the United States has such a law.

HB548, HD1 also raises serious legal issues due to significant digressions from Hawai‘i’s historical common law on trespass, negligence and strict products liability, as well as, certain First Amendment principles, all of which follow the prevailing approaches from all other state and federal jurisdictions. For example:

- In 1992, the Hawai‘i Supreme Court expressly *rejected* an injured plaintiff’s attempt to impose liability on Fodor’s Travel Guides for failing to warn in its guidebook of inherently dangerous surf conditions at Kekaha Beach on Kauai. (See *Birmingham v. Fodor’s Travel Publications, Inc.*, 73 Haw. 359 (Hawaii 1992).) The Hawai‘i Supreme Court in *Fodor’s* held: (1) under Hawai‘i’s common law on negligence, the publisher owed no special duty to the reader to warn of dangerous conditions<sup>1</sup>, and; (2) even if it did, the reader’s decision to ignore indicated, potentially dangerous conditions was a superseding cause of the injury; (3) no claim for strict liability could be maintained because a guidebook disseminating opinions was not defective “product;” and (4) imposing liability on guidebooks presenting opinions and ideas would start down a thorny path regarding chilling of First Amendment freedom of speech. On this point, quoting favorably from *Alm v. Van Nostrand Reinhold Co.*, 134 Ill. App. 3d 716, 717, 480 N.E.2d 1263, 1264 (1985), the Hawai‘i Supreme Court in *Fodor’s* Court stated:

More important for our purposes, however, is the chilling effect which liability would have upon publishers . . . . Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such

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<sup>1</sup> Regarding the first point, *Fodor’s* limited its ruling to publishers who do not create or author their content, as those were the facts and parties before them.

To: Representative Jerry Chang, Chair, Representative Sharon Har, Vice Chair and Members of the House Committee on Water, Land and Ocean Resources  
Re: Testimony of Andy Doughty, HB548, HD1 RELATING TO TRESPASS  
Hearing: 2/14/11 @ 9:00 a.m., Rm. 325  
Page 4

liability upon the public's free access to ideas would be too high a price to pay.

*Id.*, at 368-369. See also *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9<sup>th</sup> Cir. 1991).

The existing legislation, thus, (1) imposes a duty of care on a publisher that was previously found by the Hawaii Supreme Court to not exist under the common law, (2) makes that duty one of strict liability, as opposed to reasonableness, which the Hawaii Supreme Court previously found to be inappropriate in the publisher-guidebook, free ideas context; (3) renders irrelevant any contributory or superseding negligence or recklessness by the reader/trespasser; and (4) stifles First Amendment freedom of idea principles that the Hawaii Supreme Court deems worthy of strong protection. This is surely cannot be what the drafters intended.

- Other cases from around the nation have similarly rejected efforts to pin liability to the creators of various forms of social media for allegedly enticing, promoting or attracting viewers and users to commit crimes. For example, courts have routinely dismissed claims that violent video games enticed or encouraged players to commit acts of violence harming themselves and/or others. In *James v. Meow Media, Inc.*, 300 F.3d 683 (6<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003), heavily cited by both state and federal courts, the Sixth Circuit Court of Appeals held that the maker of several (admittedly) violent video games could not be held liable for the criminal acts of a high school student who played those games and later shot and killed several co-students. The Court explained that for liability to attach, the defendant must have given the actor the direct instrument that caused the harm and that, in video game cases, the injuries were too far removed. The *Meow Media* Court, further, held that the video games, like guidebooks, were not to be considered defective "products" giving rise to strict liability and discussed at length the same First Amendment issues as in *Fodor's*. *Meow Media* mimicked the *Fodor's* decision, stating:

the Court is loath to hold that ideas and images can constitute the tools for a criminal act ... or even to attach tort liability to the dissemination of ideas. Attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided.

*Id.*, at 695.

- The legislation also improperly mixes the concepts of civil and criminal trespass. (See Submission of Hawaii Association for Justice dated January 31, 2011 in opposition to HB548.)

I STRONGLY OPPOSE HB548, HD1, and urge you to hold this bill. Thank you for the opportunity to testify on this matter.

**har3 - Megan**

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**From:** Michele Nihipali [nihipalim001@hawaii.rr.com]  
**Sent:** Sunday, February 13, 2011 12:55 PM  
**To:** WLOtestimony  
**Subject:** Testimony in Opposition to HB 548 (HD1)

I strongly oppose HB 548 (HD1). Many groups currently have permission to hike across private lands without the fear of extreme lawsuits. This bill goes too far. Prosecuting authors and publishers will be extremely difficult.

Thank you for your consideration in this matter,  
Michele Nihipali  
54-074 A Kam Hwy  
Hauula, HI 96717



### har3 - Megan

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, February 13, 2011 11:57 AM  
**To:** WLOtestimony  
**Cc:** clk@quixnet.net  
**Subject:** Testimony for HB548 on 2/14/2011 9:00:00 AM

Testimony for WLO 2/14/2011 9:00:00 AM HB548

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Carolyn Knoll  
Organization: Individual  
Address:  
Phone:  
E-mail: [clk@quixnet.net](mailto:clk@quixnet.net)  
Submitted on: 2/13/2011

**Comments:**

This bill would severely limit the ability of groups like the Sierra Club and Hawaii Trail Mountain Club -- who have permission to lead hikes on popular, private trails -- to continue offering these hikes in the future. Everyone that hikes is told the risks and understand that they are responsibility for themselves. Please reconsider. . .this bill goes to far.

### har3 - Megan

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, February 11, 2011 8:07 PM  
**To:** WLOtestimony  
**Cc:** web@cartoonistforchrist.org  
**Subject:** Testimony for HB548 on 2/14/2011 9:00:00 AM

Testimony for WLO 2/14/2011 9:00:00 AM HB548

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Lee McIntosh  
Organization: Individual  
Address:  
Phone:  
E-mail: [web@cartoonistforchrist.org](mailto:web@cartoonistforchrist.org)  
Submitted on: 2/11/2011

**Comments:**

Mr. Chair and Members of the Water, Land, & Ocean Resources Committee:  
Aloha, my name is Lee McIntosh. I live in Kau on the Big Island. I am not in favor of HB 548, which holds authors responsible for the actions taken by their readers. This bill sets a dangerous precedent by removing individual responsibility. At first, HB 548 sounds like a good idea, but upon deeper reflection, a number of problems arise. How will authors and publishers prove their innocence? They have never met these people, nor do they have the opportunity to dispel any misunderstanding that might arise from their writings. A trespasser can abuse this bill by arbitrarily stating that they read about the area, and then they would no longer be liable for their own actions. A landowner's responsibility ends after posting no trespassing signs. Trespassers are then responsible for their own actions. Individual responsibility is the foundation of our justice system, which HB 548 defies. Thank you for the opportunity to testify on HB 548.