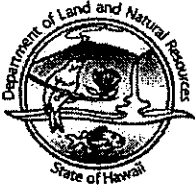


NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the House Committee on
JUDICIARY**

**Tuesday, March 1, 2011
2:00 PM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 548, HOUSE DRAFT 2
RELATING TO TRESPASS**

House Bill 548, House Draft 2 holds the authors and publishers of visitor websites and publications liable to readers who suffer injury and death as a result of being enticed onto private and public lands that are not open to the public. The Department of Land and Natural Resources (Department) supports this measure, and offers the following amendment.

The Department supports this measure because it may discourage the publishers of these types of websites and publications from promoting areas that are either culturally or environmentally too sensitive for public use, or that are potentially detrimental to public safety due to the physical conditions and are absent of any type of feature that is in place and maintained for public access and use. While private landowners generally have smaller parcels of private land and the resources to either sign and fence their specific property boundaries, public land is too extensive and access is too porous for either fencing or signing to actively "prohibit" the public from gaining access at all unauthorized areas. There are portions of public land throughout the State that are managed and actively promoted by government specifically for public use.

The Department is therefore requesting the Committee to amend the measure in all sections that have the repetitive language that states: "on privately or publicly owned land from which the public is excluded" to now read as:

"on privately owned land from which the public is excluded and on publicly owned land which the public is either excluded from, or is not promoted or managed for public use".

The Department supports this measure and appreciates the Committee's consideration of the proposed amendment.

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAUULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



NEIL ABERCROMBIE
Governor

MIKE MCCARTNEY
President and
Chief Executive Officer

Hawai'i Tourism Authority

Hawai'i Convention Center, 1801 Kalākaua Avenue, Honolulu, Hawai'i 96815
Website: www.hawaii-tourismauthority.org

Telephone: (808) 973-2255
Fax: (808) 973-2253

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

on
H.B. 548, H.D. 2
Relating to Trespass

House Committee on Judiciary
Tuesday, March 1, 2011
2:00 p.m.
Conference Room 325

The Hawai'i Tourism Authority (HTA) strongly supports H.B. 548, H.D. 2, which holds the authors or publishers of visitor guide websites and visitor guide publications civilly 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.

As stated in our Hawai'i Tourism Strategic Plan: 2005-2015, one of the goals is to “achieve a safe Hawai'i visitor experience.” To achieve this goal, both public and private entities are encouraged to collaborate to ensure visitor safety by, “Providing accurate and responsible information via public sources including websites, vacation planners, in-room videos, and warning signage to counter inaccurate information about health and safety issues in Hawai'i.” As a government entity, we share the responsibility of ensuring a safe experience for our visitors, which will help maintain their desire to return to Hawai'i for future travels.

The bill also requires the authors or publishers to defend and indemnify the landowner from any liability arising from the injury or death.

We urge you favorable consideration of this measure.



Hawaii Farm Bureau
F E D E R A T I O N

2343 Rose Street, Honolulu, HI 96819

Phone: (808) 848-2074; Neighbor Islands: 1-800-482-1272

Fax: (808) 848-1921; e-mail: info@hfbf.org

Committee on Judiciary

Tuesday, March 1, 2011

Room 325

2 pm

Testimony

HB 548 HD2 RELATING TO TRESPASS

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

Hawaii Farm Bureau Federation, on behalf of our commercial farm and ranch families and organizations across the islands, is in **strong support** of HB 548 HD2, holding authors of publications and websites liable for readers who suffer injury or death during the conduct of trespass, and requiring indemnification for landowners sued by those unfortunate persons lured to trespass by irresponsible authors.

Many farms and ranches have been victimized by trespassers who read about scenic and recreational locations that can be approached by trespassing through farm and ranch lands. Farms are not public places and have inherent dangers such as large animals, heavy equipment, barbed wire and electric fencing, reservoirs, and naturally hazardous areas. We cannot possibly hire and post security guards 24 hours a day to protect our farms from trespassers. We strongly support the intent of this measure to help protect our farmers and ranchers from liability for injuries to trespassers.

Something must be done to protect against loss of life and to protect landowners/lessees from liability. This bill **is** appropriate. It is NOT referring to a situation where tourists read an article or advertising for Hawaii or see photos of a beautiful landscape or a natural wonder and decide on their own to trespass. Most tourists are law-abiding people who are just looking for a pleasant adventure and wonderful scenery. **They would not trespass but for the advice and instructions from publications that specifically tell readers to ignore no trespass or private property signs.**

We appreciate your consideration of this measure and are willing to work with you to identify language that will protect both unwitting trespassers and farmers/ranchers. We ask your support in moving this bill forward.

Thank you for your continued support for agriculture in Hawaii.



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

HOUSE COMMITTEE ON JUDICIARY

Tuesday March 1, 2011, 2:00 p.m. Room #325

HB 548 HD 2 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 Keith-Agaran, Vice Chair Rhoads and Members of the Committee:

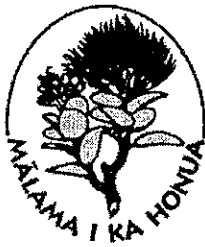
My name is Alan Gottlieb, and I am a rancher and the Government Affairs Chair for the Hawaii Cattlemen's Council. The Hawaii Cattlemen's Council, Inc. (HCC) is the Statewide umbrella organization comprised of the five county level Cattlemen's Associations. Our 130+ member ranchers represent over 60,000 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 HD2.

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.



Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803
808.538.6616 hawaii.chapter@sierraclub.org

HOUSE COMMITTEE ON JUDICIARY

March 1, 2011, 2:00 P.M.
(*Testimony is 2 page long*)

TESTIMONY IN OPPOSITION TO HB 548 HD2

Aloha Chair Keith-Agaran and Members of the Committee:

The Hawai'i Chapter of the Sierra Club, with 8,000 dues-paying members and supporters, *opposes* HB 548 HD1. This measure makes publishers of information regarding privately owned trails potentially liable for injuries or death. While we appreciate the past two Committees have attempted to reasonably narrow the impact of this measure, as drafted HB 548 is still too broad and could eliminate *legal* public access to some of the spectacular areas of Hawai'i.

The Sierra Club is on the forefront of restoring and maintaining current trails as well as leading hundreds of publicly accessible hikes each year, with thousands of high school students, residents, and tourists participating each year. These programs are incredibly popular and help tie Hawai'i's youth to our *aina* and the history of our islands.

Over the years, the Sierra Club has developed strong relationships with large landowners so as to get permission to lead publicly-accessible hikes on private property. It is because of the Sierra Club's history, extensive safety training for our outing leaders, and respect for private property rights that we have been able to cultivate relationships with private landowners and open up otherwise inaccessible areas of Hawai'i to our residents.

Even though the Sierra club *always* obtains landowner permission before hiking on private property, the scope of this bill could eliminate advertising of our hikes to the public and publication of any accounts or pictures of the hike afterwards. The phrase "encourages, invites, or attracts the person" is extremely broad. The specter of liability for simply describing an otherwise legal hike on private property would be chilling. As a practical matter, the passage of this bill could require the Club to consider terminating these types of hikes. This could eliminate the public's ability to legally access a large number of stunning and historical trails.

We respectfully request this Committee hold this bill. If this Committee must move this measure forward, we suggest restricting liability to "visitor-guides" that *knowingly* encourages a person to violate Haw. Rev. Stat. §§ 708-813, 814, and 814.5.

(a) Any author or publisher of a visitor-guide website or visitor-guide publication shall be civilly liable for injury or death to a person if the:

(1) Visitor-guide website or visitor-guide publication knowingly ~~[or negligently encourages or invites any person to enter, cross, or remain on privately or publicly owned land from which the public is excluded]~~ encourages a person to violate sections 813, 814, or 814.5; and

(2) Person is injured or dies ~~[as a result of [the person's entering, crossing, or remaining on privately or publicly owned land from which the public is excluded]~~ violating sections 813, 814, or 814.5 as a result of information or statements contained in the visitor-guide website or visitor-guide publication.

Mahalo for this opportunity to provide testimony.



Thomas H. Allen
President and
Chief Executive Officer

455 Massachusetts Ave., NW, 7th Floor
Washington, D.C. 20001
Telephone: (202) 347-3375
Fax: (202) 347-3690

February 28, 2011

To the House Committee on the Judiciary
Hawaii State Legislature

Memorandum in Opposition to HB548 HD2

I write on behalf of the Association of American Publishers, Inc. (AAP), the national trade association of the U.S. book publishing industry, and its 280 member publishing houses, to express strong opposition to HB548 HD2. The bill is an ill-conceived attempt to impose civil liability on publishers of "visitor guides" and "visitor guide websites" if readers who trespass on privately owned land are injured or killed. The proposed legislation is totally inconsistent with well-established tort law and First Amendment principles. Simply stated, publishers of general circulation works cannot be held liable for the actions of their readers.

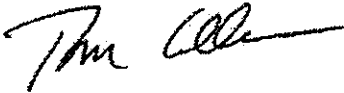
Because such a statute or any similarly worded law would inevitably be struck down on First Amendment grounds, we urge the legislature to consider alternative measures to deter illegal conduct. The answer does not lie in legislation that infringes upon constitutionally protected speech.

Many courts, including the Supreme Court of Hawaii, have rejected tort claims against book publishers that have attempted to impose liability for actions resulting from information that turned out to be erroneous. See *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 75 (1992). In rejecting such claims, the courts have recognized that a cause of action such as the one proposed by H.B. 548 HD 2 would inflict serious damage on publishers' First Amendment rights. In *Alm v. Van Nostrand Reinhold Co.*, 134 Ill. App.3d 716, 717 (1985), for example, the court noted the "chilling effect which liability would have upon publishers" if the publication of a "how to" book imposed a duty of care on the publisher. In *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41 (D. Mass. 1994), the court expressed concern about the "pandora's box" that would be opened by such a cause of action.

It is evident from these rulings and the larger body of case law that imposing civil liability on a publisher for readers "enticed to trespass" is impermissible under the First Amendment. In addition, the harm caused by HB548 HD2 would ultimately extend beyond the publisher whose speech is stifled and reach the public, which will be deprived of valuable information about Hawaii.

AAP urges the legislature to reject the approach taken by HB548 HD2 and to focus on alternative means of discouraging the trespassing that is the actual wrong for which a remedy is sought. We support instead adoption of the approach taken in the amended companion bill, SB1207 SD1, as approved by the Senate Economic Development and Technology Committee, which calls for the creation of a task force to identify problem areas on the various islands related to trespass over privately held or public lands and to develop findings and recommendations to address the problem. We were particularly gratified to note that the proposed task force would include representatives of the publishing industry among its members.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tom Allen", with a long horizontal flourish extending to the right.

Tom Allen
President and CEO
Association of American Publishers

February 28, 2011

In the Judiciary Committee
Hawaii State House

Memo in Op. to H. B. 548 HD2

The members of Media Coalition believe that House Bill 548 HD 2 is 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. They have asked me to explain their concerns.

H.B. 548 HD 2 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 privately or publicly 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

(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 (5th 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 plaintiff was a tourist injured swimming at a beach discussed in the defendant’s travel book. The Supreme Court of Hawaii ruled that the defendant/publisher had no duty of care to the plaintiff and could not be held liable for failing to warn the plaintiff of dangerous conditions at the beach. 73 Haw. 359 (1992). See also, *Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1036-38 (9th 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 (7th 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).

We believe it is important to identify ways to prevent visitors from trespassing on private property and getting injured or dying, but the answer is not to impose liability for these injuries on writers and publishers of First Amendment protected material. Imposing liability is questionable policy for three reasons: first, it makes innocent third parties responsible for the acts of those who 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. Instead, we respectfully suggest that this Committee amend the legislation to create a task force to identify where trespassing occurs and recommend ways to prevent it, as was done with Senate Bill 1207 the companion to HB 548.

Again, if enacted, H.B. 548 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.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.



Via Capitol Website

February 28, 2011

House Judiciary Committee
Hearing Date: Tuesday, March 1, 2011

Testimony in Support of HB 548 –
Relating to Trespass

Honorable Chair Gilbert Keith-Agaran, Vice-Chair Karl Rhoads and Judiciary Committee Members:

My name is Marissa Sandblom, and I am the Vice President of Grove Farm Company, Inc. Grove Farm is headquartered in Lihue, and owns approximately 40,000 acres on Kaua'i, making it one of Kaua'i's largest private landowners. Throughout our transition from a sugar plantation to a sustainable community development and economic development company, we have remained committed to our island community.

Grove Farm appreciates this opportunity to testify and is **in strong support** of HB 548 HD2, which holds that authors or publishers of visitor-guide websites or visitor-guide publications who knowingly or negligently encourage or invite any person to enter or remain on private or public lands that are not open to the public, civilly liable for injury to or death of the person.

Grove Farm's support is based on the fact that there are many guide books and visitor guide destination publications that seemingly invite potential visitors to trespass on remote private property to experience an attraction or activity. Grove Farm owns Kipu Falls and the land surrounding it and while the area is privately held, guide books and other publications constantly refer to the area and provide detailed information on how to access the area, enticing people to trespass.

Grove Farm's Position. As a longtime kama'aina company, Grove Farm is committed to continue being a responsible steward of our 'aina. We believe that visitor-guide websites and visitor-guide publications that encourage people to visit areas on private land are inherently irresponsible. Visitors frequently rely on guide books and similar websites to learn about available activities and attractions and describing how to access an area of private land can lead to disastrous consequences.

Grove Farm is **in strong support to HB 548 HD2**, which holds that authors or publishers of visitor-guide websites or visitor-guide publications who knowingly or negligently encourage or invite any person to enter or remain on private or public lands that are not open to the public, civilly liable for injury to or death of the person.

Thank you for the opportunity to express our support for this matter.

3-1850 Kaunualii Highway Lihue, HI 96766-8609

☎ 808.245.3678 ☎ 808.246.9470

www.grovesfarm.com



**SOCIETY OF
PROFESSIONAL
JOURNALISTS**
Hawaii Chapter

P.O. Box 3141
Honolulu, HI 96802
March 1, 2011

Gilbert S.C. Keith-Agaran, chairman
House Judiciary Committee
415 S. Beretania St.
Honolulu, HI 96813

Re: House Bill 548 HD 2, Related to Trespass

Rep. Keith-Agaran and Committee Members:

The Hawaii Chapter of the Society of Professional Journalists thanks you for the opportunity to testify against HB 548.

We believe the bill would impose an unconstitutional restriction on the First Amendment rights of publications. Although the bill targets visitor publications and websites, the definition appears broad enough to impose civil liability on conventional media as well. Government should not be dictating how publications report matters or how people talk about beautiful visitor locations on social media.

We want to point out the impracticality of enforcing this measure. Who is to say what comment made at different websites was intentionally made to cause people to linger or trespass on private property and become injured?

We hope you will hold this bill.

Thank you,

Stirling Morita
President
Hawaii Chapter, Society of Professional Journalists

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) REGARDING H.B. NO. 548, H.D. 2**

March 1, 2011

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

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. 2.

The provisions in Section 2 of this bill on page 2 state 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 website or publication 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 9 to 13 on page 3 whereby the guide shall defend and indemnify the owner or occupier of public or 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.

Testimony for HB548 on 3/1/2011 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Friday, February 25, 2011 3:27 PM

To: JUDtestimony

Cc: manneanderson@hotmail.com

Testimony for JUD 3/1/2011 2:00:00 PM HB548

Conference room: 325

Testifier position: oppose

Testifier will be present: No

Submitted by: Anne Anderson

Organization: Individual

Address:

Phone:

E-mail: manneanderson@hotmail.com

Submitted on: 2/25/2011

Comments:

The language of the bill is too broad. It is also vague and ambiguous. It could impose liability on innocent persons.

This bill will undoubtedly result in numerous lawsuits regarding its interpretation.

Law abiding citizens who just happen to mention a trail in an email or blog could be exposed to liability if someone decides to explore the trail. This is a well intended, but poorly drafted bill which is certain to have unintended negative consequences.



Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, March 1, 2011, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 548, HD2,
Relating to Trespass

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 548, HD2, 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, HD2, 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, HD2.

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, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org



KAMEHAMEHA SCHOOLS

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

Hearing Date: Tuesday, February 22, 2011
2:00 p.m., Conference Room 325

Good Afternoon Chair Keith-Agaran, Vice Chair Rhoads and Committee Members:

RE: Testimony in Support of House Bill No. HB 548 HD 1 - Relating to Trespass

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawaihoa Plantation in Waialua, Oahu. I am here to testify in support of HB 548 HD 1. As with many other landowners in Hawaii, we face daily trespass by those who ignore our private property signs. Unfortunately, there is a new category, "the visitor" who is provided specific directions to reach hiking trails, historic sites, and other cultural resources on private property.

In the case of Kawaihoa Plantation, one hiking guide book provides detailed directions on how to access two trails on Kamehameha Schools' property which is located six miles above Haleiwa Town. Although the author notes that these trails are on private property, his directions encourage the reader to follow his instructions and attempt access. It would have been far more appropriate for the author to note the existence of the trail and stop there.

By doing otherwise, the author has led the visitor to the site and unfairly placed the liability for injury on the landowner. HB 548 HD1 correctly shifts the burden of this liability to the visitor publication by requiring the defense and indemnification of the landowner when this occurs.

Thank you for the opportunity to testify in support of HB 548 HD 1.

Testimony for HB548 on 3/1/2011 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Friday, February 25, 2011 1:43 PM

To: JUDtestimony

Cc: web@cartoonistforchrist.org

Testimony for JUD 3/1/2011 2:00:00 PM 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

Submitted on: 2/25/2011

Comments:

Mr. Chair and Members of the Committee on Judiciary:

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 of others. Rather than attempt to prosecute authors, the Legislature should strengthen laws protecting landowners. A landowner's responsibility should end after posting no trespassing signs. Trespassers are then responsible for their own actions, not authors. Information should be freely available without fear of legal reprisal. It is what an individual decides to do with that information that leads to actions that may violate the law. Thank you for the opportunity to testify on HB 548.

Testimony for HB548 on 3/1/2011 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Friday, February 25, 2011 1:33 PM

To: JUDtestimony

Cc: likehike@earthlink.net

Testimony for JUD 3/1/2011 2:00:00 PM HB548

Conference room: 325

Testifier position: oppose

Testifier will be present: No

Submitted by: Edwin Mersino

Organization: Individual

Address:

Phone:

E-mail: likehike@earthlink.net

Submitted on: 2/25/2011

Comments:

As a member of a number of hiking organizations, I must strongly oppose HB548. The definitions used would allow trespassers to hold the various hiking organizations liable for their injuries, if they read about the trails in their newsletters, websites and public notices. The organizations legally sponsor hikes on these trails with permission of the private landowners. In fact the Sierra Club indemnifies the private landowners with their insurance policy.

After reading some of the testimony given for this bill, I realized that some of those that testified could be held liable for the information they gave about various sites. Ironic isn't it?

HB548 is seriously flawed and should not be passed

JUDtestimony

From: randy ching [oahurandy@yahoo.com]
Sent: Monday, February 28, 2011 5:16 PM
To: JUDtestimony
Subject: In opposition to HB 548 HD 2

HB 548 HD 2
Judiciary Committee hearing
Tuesday, 03-01-11 2:00PM in House conference room 325.

Aloha Chair Keith-Agaran and Members of the Committee:

I write in opposition to HB 548 HD2. As drafted HB 548 is too broad and could eliminate *legal* public access to some of the spectacular areas of Hawai'i.

As an outings leader for the Sierra Club, Oahu Group for more than 17 years, I know that all of our hikes over private property are done with permission from the land owner. We do not trespass over private property. It is against Naational Sierra Club policy.

Even though the Sierra club *always* obtains landowner permission before hiking on private property, the scope of this bill could eliminate advertising of our hikes to the public and publication of any accounts or pictures of the hike afterwards. The phrase "encourages, invites, or attracts the person" is extremely broad. The specter of liability for simply describing an otherwise legal hike on private property would be chilling. As a practical matter, the passage of this bill could require the Club to consider terminating these types of hikes. This could eliminate the public's ability to legally access a large number of stunning and historical trails.

I respectfully request this Committee hold this bill. Mahalo for this opportunity to testify.

Randy Ching
Sierra Club, Oahu Group outings chair
oahurandy@yahoo.com

JUDtestimony

From: Reese Liggett [rliggett@hawaiiintel.net]
Sent: Monday, February 28, 2011 5:36 PM
To: JUDtestimony
Subject: Testimony for March 1, 1PM re HB 548 HD2

For testimony at scheduled hearing of House Judiciary Committee March 1, 2011 at 1PM.

Chair Keith-Agaran and members of the committee: **I testify in opposition to HB 548 HD2.**

Since state law (HRS§520-3) already says that:

“...an owner of land **owes no duty of care to keep the premises safe for entry or use by others** for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes...” *

It strikes me that HB 548 in SECTION 1. (2) is unnecessarily

“Require[ing] the authors or publishers to defend and indemnify the owner of the private or public land from any liability arising from injury to or the death of the person.”

Put another way: if state law **already** says they owe “...**no duty of care to keep the premises safe for entry or use by others...**”, how can it be necessary for a new law to defend and indemnify landowners against liability they cannot incur according to Hawaii Revised Statute §520-3*?

If more specific language is desired to protect land owners, merely add such phrase to existing 520-3. To wit: “...an owner of land owes no duty of care to keep the premises safe for entry **by trespassers for any reason**, or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes, or to persons entering for a purpose in response to a recreational user who requires assistance, either direct or indirect, including but not limited to rescue, medical care, or other form of assistance. **Further, nor does an owner of land incur liability for any fore mentioned situation.**”

And generally regarding the provision of a remedy of Liability to injured trespassers, I think that such is very unwise and smacks of related, litigious tragedies where wrong doers are irrationally granted a remedy of seeking liability for their imprudent/illegal behavior.

****§520-3 Duty of care of owner limited. Except as specifically recognized by or provided in section 520-6**, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes, or to persons entering for a purpose in response to a recreational user who requires assistance, either direct or indirect, including but not limited to rescue, medical care, or other form of assistance. [L 1969, c 186, §3; am L 1997, c 272, §2]**

****§520-6 Persons using land.** Nothing in this chapter shall be construed to:

(1) Create a duty of care or ground of liability for injury to persons or property.

(2) Relieve any person using the land of another for recreational purposes from any obligation which the person may have in the absence of this chapter to exercise care in the person's use of such land and in the person's activities thereon, or from the legal consequences of failure to employ such care. [L 1969, c 186, §6; gen ch 1985]

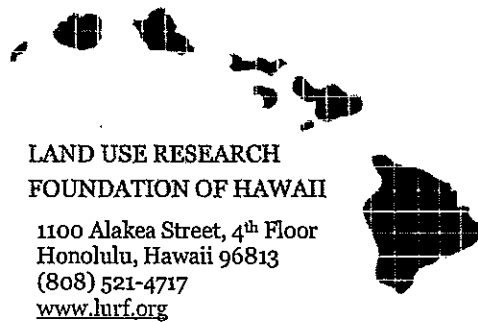
William Reese Liggett

Honolulu, Hawai'i

808.544.9553w

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March 1, 2011

Representative Gilbert S.C. Keith-Agaran, Chair and Representative Karl Rhoads, Vice Chair
House Committee on Judiciary

Support for HB 548, HD2 Relating to Trespass (Visitor-Guide Publications and Websites; Liability; Private and Public Lands).

Tuesday, March 1, 2011 at 2:00 p.m. in CR 325

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide testimony **in support of HB 548 HD2**, and to offer comments.

HB 548 HD2. This bill proposes to hold authors and publishers of visitor websites and publications liable to readers who suffer injury or death as a result of being enticed to enter onto private or public lands from which the public is excluded.

LURF's Position. HB 548, HD2 proposes to 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 privately owned land from which the public is excluded, and the person is injured or dies as a result. Under this bill, the author or publisher must also indemnify the property owner or occupier for any civil liability as a result of injury or death to the trespasser.

LURF believes that this bill represents a fair, equitable and reasonable balance between the landowner's duties, rights and responsibilities, and the rights of an author or publisher who induces trespass onto the private property should injury or death occur to the trespasser.

Owners and occupiers of unimproved and unused lands (where many of these secret attractions are located), including farmers and ranchers, have, over the years, continued to experience problems with trespass, yet have been defenseless against claims by trespassers for incidents and injuries suffered on their property, and have, in fact, had to protect trespassers from loss and injury despite their illegal entry.

HB 548, HD2 attempts to provide these innocent landowners and occupiers from liability resulting from the actions of authors and publishers of visitor guides and websites who

intentionally or irresponsibly entice and encourage their readers to disregard trespassing signs and violate trespassing laws to experience secluded sites which are often known to be unsafe and where tragic consequences, potential injury, or even death may occur.

Trespass encouraged by these publications and websites has also reportedly caused significant property damage (cut fences, opened gates, escaped and injured animals; vehicle and equipment damage), as well as disruption to agricultural and ranching operations and activity being conducted on the private property.

Members of the media opposing this bill attempt to shield themselves from liability using the constitutional right of free speech afforded by the First Amendment, however, LURF believes no such protection should be afforded to those who incite and encourage what amounts to clear violations of law and the flagrant commission of crimes.

LURF therefore **supports HB 548, HD2** and respectfully urges your favorable consideration of this bill. Thank you for the opportunity to present testimony regarding this matter.