

STAND. COM. REP. NO. **635**

Honolulu, Hawaii

MAR - 1 2013

RE: S.B. No. 465
S.D. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred
S.B. No. 465 entitled:

"A BILL FOR AN ACT RELATING TO TORT ACTIONS,"

begs leave to report as follows:

The purpose and intent of this measure is to create a civil cause of action for constructive invasion of privacy against any person who captures or intends to capture, in a manner that is offensive to a reasonable person, a recording or visual image of another person while that person is engaging in a personal or familial activity.

Your Committee received testimony in support of this measure from the Governor; Hawai'i Tourism Authority; Pae 'Āina Communications, LLC; and seventeen individuals. Testimony in opposition to this measure was submitted by the Department of the Attorney General; American Civil Liberties Union of Hawai'i; Society of Professional Journalists, Hawaii Chapter; Motion Picture Association of America, Inc.; and five individuals.

Your Committee finds that Hawaii is a popular visitor destination and is home to many celebrities who are subjected to harassment from photographers and reporters seeking photographs and news stories. Public figures, such as celebrities, already have a diminished expectation of privacy. Thus, private moments while vacationing and engaged in activities with family and friends are even more precious for public figures. Existing laws are silent on a civil cause of action for the constructive



invasion of privacy. This measure creates a civil cause of action for constructive invasion of privacy against any person who captures or intends to capture, in a manner that is offensive to a reasonable person, a recording or visual image of another person while that person is engaging in a personal or familial activity.

Your Committee notes the testimony in opposition that this measure is vague and overly broad and may violate the First Amendment rights under the United State Constitution and article I, section 4, of the Hawaii State Constitution. Concerns were raised regarding the meaning of certain terms in this measure, such as offensive to a reasonable person, personal and familial activities, and reasonable expectation of privacy as well as concerns that this measure applies to any image taken any place at any time in Hawaii as long as a reasonable expectation of privacy exists. Furthermore, testimony in opposition to this measure purported that existing laws regarding trespass, invasion of privacy, and harassment are sufficient to address privacy, free speech, and safety concerns of Hawaii's residents and visitors.

Your Committee further notes that section 1708.8 of the California Civil Code is commonly known as California's "anti-paparazzi" legislation. This law provides that a defendant is liable for physical invasion of privacy when the defendant knowingly trespasses on a plaintiff's land with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff while the plaintiff is engaging in personal or familial activity. In order to impose liability, the invasion must occur in a manner that is offensive to a reasonable person. The California law also establishes that defendants can be liable for constructive invasion of privacy. Your Committee further finds that the California physical and constructive invasion of privacy law aligns with the intent and purpose of this measure.

Your Committee believes that further clarity is needed to address the concerns raised in the written testimony in opposition to this measure. First, your Committee believes that the cause of action should be limited to personal and familial activities taking place on property owned or leased by the plaintiff. Second, in order to address the constitutional concerns, your Committee believes that an immediate interlocutory appeal process should be provided to allow an interested party to file a motion to dispose of a claim in a judicial proceeding on the grounds that the claim is barred by a defense based on the First Amendment of



the United States Constitution or article I of the Hawaii State Constitution. Third, your Committee believes that further clarity is needed to specify the types of activities that constitute a personal and familial activity. Lastly, your Committee believes that this measure merits further discussion as it moves through the legislative process.

Accordingly, your Committee has amended this measure by:

- (1) Deleting sections 1 and 2 and inserting language that is modeled after section 1708.8 of the California Civil Code to:
 - (A) Establish that a defendant is liable for physical invasion of privacy when the defendant knowingly trespasses on a plaintiff's land that is owned or leased by the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff while the plaintiff is engaging in personal or familial activity;
 - (B) Establish that a defendant is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity on land owned or leased by the plaintiff and under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used;
 - (C) Establish that an assault or false imprisonment committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff is subject to damages and equitable relief;

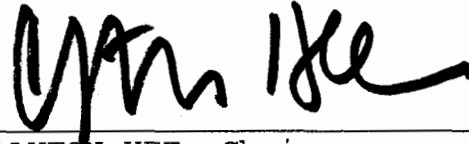


- (D) Provide general, special, and punitive damages for committing physical or constructive invasion of privacy, including disgorgement if the plaintiff proves that the invasion of privacy was committed for a commercial purpose;
 - (E) Specify certain circumstances that do not constitute a physical or constructive invasion of privacy;
 - (F) Specify that the new civil cause of action applies to only images, recordings, or physical impressions that are taken or captured in the State and applies after the effective date;
 - (G) Provide an immediate interlocutory appeal process to file a motion to dispose of a claim in a judicial proceeding on the grounds that the claim is barred by a defense based on the First Amendment of the United States Constitution or article I of the Hawaii State Constitution;
 - (H) Establish that it is not a defense that no image, recording, or physical impression was captured or sold;
 - (I) Add definitions of "for a commercial purpose" and "personal and familial activity"; and
 - (J) Provide that the rights and remedies are severable cumulative and in addition to any other rights and remedies provided by law;
- (2) Inserting an effective date of July 1, 2050, to encourage further discussion; and
 - (3) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 465, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 465, S.D. 1, and be placed on the calendar for Third Reading.



Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,




CLAYTON HEE, Chair



The Senate
 Twenty-Seventh Legislature
 State of Hawai'i

Record of Votes
Committee on Judiciary and Labor
JDL

Bill / Resolution No.:*	Committee Referral:	Date:		
SB 465	JDL	2/08/13		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
HEE, Clayton (C)	✓			
SHIMABUKURO, Maile S.L. (VC)	✓			
GABBARD, Mike	✓			
IHARA, Jr., Les				✓
SLOM, Sam		✓		
TOTAL	3	1		1
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes