



EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

Friday, February 8, 2013
10:00 a.m.
State Capitol Room 016

Testimony of
NEIL ABERCROMBIE
Governor, State of Hawaii

Chair Hee, Vice Chair Shimabukuro and members of the Judiciary and Labor committee:

As someone who believes strongly in a person's right to privacy, I support the intent of SB 465. I also understand there may be legal concerns and implications which may need refining with respect to the current language in this bill. The Office of the Attorney General will articulate this area in its testimony.

I would like to urge the Committee to move this bill forward in the interests of further discussion on the issues that have been raised, which are serious and include legitimate concerns about invasion of privacy. Such issues deserve thoughtful consideration, as well as an opportunity to determine whether the bill could be amended to more clearly spell out the protections for individuals while respecting the constitutional issues involved.

Thank you for your kind attention.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

LATE TESTIMONY

**ON THE FOLLOWING MEASURE:
S.B. NO. 465, RELATING TO TORT ACTIONS.**

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 8, 2013 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General opposes this bill.

This bill seeks to create a new 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.

We do not believe that this bill is related to its stated purpose, which is to encourage celebrities to visit and reside in Hawaii by creating a civil cause of action of the constructive invasion of privacy. There is no evidence to suggest that celebrities are deterred from buying property or vacationing in Hawaii because of photographs being taken of them. Celebrities are photographed wherever they go and it is a consequence of their celebrity status.

In addition, this bill is vague and overly broad. Although the bill's justification seems to concentrate on paparazzi, the bill does not limit its scope to paparazzi or media. Nor is the bill limited to celebrities.

Subsection (b) of the new section to be added to chapter 663, Hawaii Revised Statutes, provides that:

A person is liable for a civil action of constructive invasion of privacy for a civil action of constructive invasion of privacy if the person captures or intends to capture, in a manner that is offensive to a reasonable person, through any means a visual image, sound recording, or other physical impression of another person while that person is engaging in a personal or familial activity with a reasonable expectation of privacy.

What is considered “offensive” or a “personal or familial” activity is not defined and open to subjective interpretation. For example, anyone, even an innocent tourist or fan who takes an unflattering picture of a vacationing celebrity who is with his or her family, regardless of where the celebrity is, even on public property, is subject to being sued under this bill.

Moreover, the bill, as worded, would not exclude legitimate law enforcement activities if visual images or sound recordings are captured as part of an investigation into criminal activity.

No image need actually be captured; just the intent to capture an image or recording is sufficient to create a claim. The bill also provides that constructive invasion of privacy includes an assault and false imprisonment committed with the capture of or intent to capture any type of visual image or recording. Allowing a tort claim against someone who does not do anything but merely intends to do something is extremely problematic, especially when subsection(j) of the new section provides, “It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.”

Finally, to the extent the bill attempts to limit or prevent publication by the media, there are First Amendment implications that may render parts of this bill unconstitutional.

We request that this bill be held.



HAWAII TOURISM
AUTHORITY

Hawai'i Convention Center
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kelepona tel 808 973 2255
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kahua pa'a web hawaitourismauthority.org

Neil Abercrombie
Governor

Mike McCartney
President and Chief Executive Officer

Testimony of
Mike McCartney
President and Chief Executive Officer
Hawai'i Tourism Authority
On
S.B. 465
Relating to Tort Actions
Senate Committee on Judiciary and Labor
Friday, February 8, 2013
10:00 a.m.
Conference Room 016

The Hawai'i Tourism Authority (HTA) supports S.B. 465, which proposes to create a civil cause of action for constructive invasion of privacy.

Embedded in the cultural fabric that makes Hawaii unique among visitor destinations is the practice of ho'okipa, the practice of welcoming and greeting people. It is part of Hawaiian behavior, which sustains and preserves the goodwill that enhances our cultural uniqueness.

We should protect a person's right to the enjoyment of life, liberty and the pursuit of happiness, and the right to privacy. S.B. 465 proposes to establish that a person has a cause of action for any infringement of a person's basic right of privacy.

Mahalo for the opportunity to offer these comments.

My name is Dina LaPolt and I am here in support of Senate Bill 465. I am an entertainment attorney in Los Angeles, CA. Sitting with me today are my two clients, Steven Tyler and Mick Fleetwood, both of whom are proponents of the bill. In fact, Steven Tyler was the initiator of the bill and I am honored to say that I helped draft it along with Senator Kalani English and his office, modeling it after California Civil Code Section 1708.8. Although the bill is aptly titled the "Steven Tyler Act," this is not a law just for Steven Tyler. This is a law that will protect a large class of people: all public figures.

As a professional who works very closely with public figures, I understand how much of an impact the paparazzi can have on their lives on a daily basis. As it is, public figures already have a highly diminished expectation of privacy. This makes the small amount of privacy they *do* have that much more precious. SB 465, if enacted, would give public figures peace of mind, knowing that a constructive right of privacy provides a strong deterrent to paparazzi intruding in their private lives. From experience, I know how crucial this sliver of normalcy is for public figures, their families, and their mental and physical wellbeing.

SB 465 would add a civil cause of action for constructive invasion of privacy in addition to the current physical invasion of privacy. In the simplest terms, the

proposed bill would provide a legal remedy for public figures photographed or recorded while they are engaged in "personal or familial activity" and have a reasonable expectation of privacy. The attempt to use a telephonic lens or use a high-tech audio recording device in a manner offensive to a reasonable person would give rise to civil liability. As it is a trend for paparazzi in Hawaii to take photos from offshore boats, SB 465 would also apply to a person situated within state marine waters.

This kind of law is necessary in the modern age where technology allows people to take high-resolution photographs, sound recordings and video from unprecedented distances and locations. SB 465 is important to the peace and wellbeing of public figures like Steven Tyler and Mick Fleetwood who come to Hawaii to escape the daily rat race of the mainland, to reconnect with nature, and to enjoy the tranquility that Hawaii has to offer. However that peace is often interrupted by the relentless paparazzi stalking them at all hours of the day while they try to go about their daily lives.

OPPOSITION

Opponents of SB 465 wrongly claim that the bill would violate the First Amendment. Under the landmark case of *Time, Inc v. Hill* (1967), the Supreme Court of the United States held that the act of intrusion (i.e. paparazzi constructively invading a public figure's privacy) does not itself raise First Amendment concerns because it does not involve speech or other expression.

There have been other cases in other states, including in the Court of Appeals for the Ninth Circuit, which is valid law in Hawaii, that have held the act of newsgathering was not the same as publishing the results of newsgathering.

Simply put, ***publishing*** the news may come under the First Amendment but ***the act of acquiring*** the information does not.

The Motion Picture Association of America, who filed a memo in opposition to SB 465 erroneously cites the United States Supreme Court case *Bartnicki v. Vopper* (2001), claiming that the First Amendment shields a third party media outlet from liability when it discloses an illegally obtained communication, even when the media outlet *knows* the communication was obtained illegally. The *Bartnicki* holding is easily distinguished here. First and foremost, the *Bartnicki* court explicitly stated that its holding was limited to the facts of that case. Next, *Bartnicki* dealt with a matter of great public importance: a dispute

between the local teacher's union and the school board. SB465 protects public figures against intrusion into their private lives, which are, by definition, *not* of public concern. Also notable is the fact that, in *Bartnicki*, the radio broadcasters who disclosed the illegally obtained communication did not have a role in encouraging the recorder to obtain the communication. In the case of paparazzi, there can be no question that the media outlets are the *only* reason to invade a public figures' privacy. The exorbitant sums paid for these pictures are the only incentive for photographers to take them.

Additionally, the MPAA misstates the liability that could attach when a press outlet publishes materials it received anonymously. A third party could only be liable for the publication of illegally-obtained materials if the third party had *actual knowledge* that the picture or recording was obtained illegally and that third party received compensation for the right to publish the picture or recording. This provision of SB 465 is particularly narrow and addresses how the paparazzi system generally works: a freelance photographer takes a picture and a media outlet purchases the rights to that picture. The scenario set forth by the MPAA does not fit these criteria.

Other opponents of SB 465 claim that it would have a chilling effect on speech.

This is also inaccurate. SB 465 does not prohibit all speech; it only applies to visual images, sound recordings and other physical impressions that were obtained in a manner offensive to a reasonable person. The press is still free to write about these occurrences in as much detail as they wish.

For these reasons, I urge you to pass Senate Bill 465. Thank you for your time and consideration.



Committee: Committee on Judiciary and Labor
Hearing Date/Time: February 8, 2013 / 10:00 am
Place: Conference Room 016
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 465, Relating to Tort Actions

Dear Chair Hee and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 465, which seeks to create a civil cause of action for constructive invasion of privacy.

This proposal would punish photography and videography in the public sphere – activities and form of expression protected by the First amendment and routinely engaged in by Hawaii residents and visitors alike.

Current state laws regarding trespass, invasion of privacy, and harassment, e.g. can more than handle the privacy, free speech and safety concerns of Hawaii's residents and visitors. Vote no on S.B. 465 and instead support better enforcement of our current state laws to ensure that victims of stalking and other forms of abuse are safe in our communities.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney and Legislative Program Director
ACLU of Hawaii

The ACLU has been the nation's guardian of liberty since 1925 and the ACLU of Hawaii since 1965 and works daily in the courts, legislatures and communities to defend and preserve the individual rights and liberties equally guaranteed to all by the Constitutions and laws of the United States and Hawaii. The ACLU works to ensure that the government does not violate our constitutional rights, including, but not limited to, freedom of speech, association and assembly, freedom of the press, freedom of religion, fair and equal treatment, and privacy. The ACLU network of volunteers and staff works throughout the islands to defend these rights, often advocating on behalf of minority groups that are the target of government discrimination. If the rights of society's most vulnerable members are denied, everyone's rights are imperiled.

American Civil Liberties Union of Hawai'i
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E: office@acluhawaii.org
www.acluhawaii.org

LATE TESTIMONY

08 February 2013

Hawai'i State Senate
Committee on Judiciary and Labor
Sen. Clayton Hee, Chairman
Sen. Maile Shimabukuro, Vice Chairwoman
Friday, February 08, 2013
Conference Room 016 | 10:00AM



TESTIMONY IN SUPPORT Senate Bill 465

Chairman Hee, Vice Chairwoman Shimabukuro and members of the committee,

Pae 'Āina Communications and our subsidiaries, PAC|PR and HushPR Hawai'i, stands in strong support of Senate Bill 465. My staff and I have the pleasure of working with individuals and entities known throughout the world for their talents and abilities. Our society has titled these individuals and entities as celebrities; some derive this title by their profession, others by their inherent titles and wealth.

Some of these individuals and entities choose to spend their free time here, vacation with their families, and for some, call Hawai'i home – even if it is for a fraction of the year, many find Hawai'i to be their oasis – a calm respite away from the strains of their respective industries.

Having serviced this particular niche for eight years, it has taught us much and allowed us an opportunity to develop a method to managing these types of clients. Besides the public's interest in their favorite celebrity or star struck fan awaiting a photo opportunity, there are the exploitive photographers, commonly known as paparazzi that have incessantly created dangerous situations, invaded individuals' privacy and operates with no ethics or industry regulations by which they are required to practice.

We have had clients on their personal properties, with their friends and families and some photographers have stopped at nothing to capture those personal moments. We have filed police reports for photographers in trees; perhaps the most egregious has been the use of telephoto lenses to capture private moments from up to one mile away. One photo of a client sold to a news agency for over \$ 50,000.00.

While we understand that those who choose to make a living by the benefit of the public or whose inherent titles or wealth forces them into the public arena live less private lives than most, we continue to believe that these individuals and entities deserves the right to some level of privacy. Many of these individuals must heighten security measures when traveling to Hawai'i for a simple vacation or to spend time on their property, often times requiring careful planning in order to avoid the relentless actions of the paparazzi.

Pae 'Āina Communications, A Limited Liability Company

Our Archipelago of Companies · PAC|PR · Hawai'i Redefined, LLC · HushPR Hawai'i · Archipelago Consulting, LLC

WWW.PAEAINAPR.COM

Kukui Plaza | Diamond Head Tower

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Senate Bill 465 will provide some structure to an industry that is largely unregulated. The proposed measure before you is almost a mirror reflection of California Civil Code § 1708.8 – which was adopted in 2010. For those claiming that the proposed measure is unconstitutional, we disagree. These instances mentioned in my testimony are not practices of one's constitutional liberties, these are flagrant abuses of constitutional rights and it is a pity that we allow the ability to hide behind the Constitution for these individuals who make large profits.

The ability to simply grab a cup of coffee, take a stroll with your pet, a simple day at the beach, talking-story at a coffee shop with a friend, enjoying your favorite meal by the beach, enjoying your yard in broad day light – what we may determine to be mundane, these are luxuries for those who live in the constant eye of the public and cameras.

Some may feel the bill is inconsequential to the many important legislative priorities set forth, we beg your indulgence and counter by saying we believe this legislation will add another exceptional reason to visit Hawai'i.

Mahalo nui in advance for your time and consideration and we ask for your strong support for Senate Bill 465.

Me ka mahalo ha'aha'a,



Adrian K. Kamali'i, MBA, APR, PRP
President & Chief Consultant
Pae 'Āina Communications

hee2 - Kathleen

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 07, 2013 8:59 PM
To: JDLTestimony
Cc: crystalkpaul@yahoo.com
Subject: Submitted testimony for SB465 on Feb 8, 2013 10:00AM

SB465

Submitted on: 2/7/2013

Testimony for JDL on Feb 8, 2013 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Crystal Kia Paul	Individual	Oppose	No

Comments: Aloha Honorable Chairs, Good morning, thank you for allowing me to submit testimony today. I strongly oppose this bill and ask you not to allow it to go any further. Celebrities know their dream jobs come with a certain amount of benefits and disappointments. Steven Tyler asking for this benefit because of his celebrity status is unfair to the people of Hawai'i. This bill brought unneeded media attention because it had Steven Tyler's name attached to it and as such the paparazzi will be on a feeding frenzy now. I believe this bill shows prejudice against non celebrity people of Hawai'i, who are harmed by stalkers who go to paparazzi extremes. There are celebrities who have lived and vacationed in Hawai'i now and in the past who are good stewards to the people of Hawai'i and as such the locals reciprocate by protecting the privacy of their neighbors. I firmly believe that this bill will cost the Counties and the State money by excessive emergency calls to police/fire and overburden the court system with frivolous lawsuits. Our Ali'i took care of ALL of the people of Hawai'i not just the elite. And I ask you to do the same take care of all the people not just some. Mahalo, Crystal Kia Paul Denton Texas

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

08 February 2013

Hawai'i State Senate
Committee on Judiciary and Labor
Sen. Clayton Hee, Chairman
Sen. Maile Shimabukuro, Vice Chairwoman
Friday, February 08, 2013
Conference Room 016 | 10:00AM

TESTIMONY IN SUPPORT

Senate Bill 465

Chair Hee, Vice Chair Shimabukuro and members of the committee:

Mahalo for allowing me the opportunity to provide testimony in support of Senate Bill 465. I have been blessed with an amazing career, I have been able to travel across the globe to take our mele Hawai'i, our stories and our way of life to places like Japan, China and in esteemed venues like the Grand Ole Opry, Carnegie Hall and our very own Hawai'i Theater among a myriad of other places just as storied and unique.

This nearly 25 year career would not be possible without my family, my Tutu, Jennie Nāpua Woodd, and everyone who has an affinity for Hawaiian music. For the most part, those who enjoy my music have been extremely respectful and full of aloha. There have been instances where I feel my privacy was invaded.

It is hard to fathom what other individuals with worldwide recognition deal with on a day to day basis. For myself, I love to perform and be able to interact with those who enjoy my music, but when I am at home, when I am being a mother, a sister, a friend or a daughter, that is my private time – it is my time to rejuvenate my energy so that I can get back up on a stage and continue to do what I love.

I support the proposed measure because no matter who you are, you should be allowed the ability to have your own space – certainly in your own yard, home, a hotel room or balcony, etc.

Please give strong consideration to this measure.

Mahalo nui,

Amy Hānaiali'i Gilliom
President, MusicLand Hawai'i



LATE TESTIMONY

Dr. Myron Berney

SB 465 Support with Language Modifications for clarity.

JDL has scheduled a public hearing on 02-08-13 10:00AM in conference room 016.

Honorable JDL Committee Chair and members:

I support the Right of Privacy for all persons as does the Hawaii State Constitution. In Alaska this same language allows persons to enjoy Marijuana in the Privacy of their Home or residence. AS you know, the same language carries with it the Same Supreme Court Case Law, meaning that in Hawaii, like Alaska, this same language allows persons to enjoy Marijuana in the Privacy of their Home or residence.

The preamble is somewhat bogus in suggesting that more celebrities would purchase homes in Hawaii following passage of this bill. Such language is not necessary and suggest PANDERING by Law makers, bad form old chap! Delete please for the honor of our State.

It is not even clear if increased property values would favorably impact the majority of Hawaii's Local Residents. The obvious impact of would to be to further displace middle and low income families from home ownership and perhaps even renting. We wouldn't want to include Language that may upset Local Residents.

Celebrities' personal appearance and image is their "STOCK IN TRADE" and should be financially protected. Protection of all person's Privacy is an obligation of the State.

Celebrities are not the only persons victimized by these kinds of Invasion of Privacy.

Hawaii Lawmakers may want to consider allowing persons to "copyright" or in some other way financially protect their image, their voice and other aspects that others commonly exploited for profit and personal gain by thief by others. This may afford Celebrities additional protection in the other 49 states.

Please Modify Language as indicated below.

Although celebrity status may in fact, by law, does justify a lower expectation of privacy while in public places, all persons can expect and should enjoy Privacy in private places or in Public restrooms.

Not only the legislature, everybody knows, ~~finds~~ that commonly sometimes the paparazzi go too far to disturb the peace and tranquility afforded celebrities not just in Hawaii but anywhere and everywhere. Paparazzi seek to get the most private of personal activities including NUDE images. OMG! The more Private the capture the greater rewards and greater sums of \$\$\$\$\$ money.

DELETE on Page 2 line 3-5

~~{In honor of Steven Tyler's contribution to the arts in Hawai'i and throughout the world,~~

~~this Act shall be known as the Steven Tyler Act.]~~

DELETE on Page 2

~~{6 The purpose of this Act is to encourage celebrities to
7 visit and reside in our State by creating a civil cause of
8 action for the constructive invasion of privacy.}~~

INSERT

The purpose of this Act is to protect the Right of Privacy for all persons in the State of Hawaii by creating a civil cause of action for the constructive invasion of privacy.

DELETE ON PAGE 3

~~(a) This section shall be known and may be cited as
14 the "Steven Tyler Act".~~

Modify and insert as below

15 (b) A person is liable for a civil action of constructive
16 invasion of privacy if the person captures or intends to
17 capture, in a manner that is offensive to a reasonable person,
18 through any means a visual image, sound recording, by electronic, physical
impression or other means
19 of another person while that person is
20 engaging in a personal or familial activity with a reasonable
21 expectation of privacy.

Delete on Page 3

~~10 - (3) Punitive damages up to three times the amount of
11 general and special damages combined.~~

Ordinary people who are similarly injured and abused may not qualify for large special and general damages therefore limiting punitive damages is inappropriate for a punitive effect.

Delete on Page 5

~~SECTION 3. This Act does not affect rights and duties that
matured, penalties that were incurred, and proceedings that were
begun before its effective date.~~

Thank you Legislators for you concern with these issues.

hee2 - Kathleen

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 07, 2013 8:53 PM
To: JDLEstimony
Cc: marilynwick@pobox.com
Subject: Submitted testimony for SB465 on Feb 8, 2013 10:00AM

SB465

Submitted on: 2/7/2013

Testimony for JDL on Feb 8, 2013 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Mick	Individual	Oppose	No

Comments: This proposal clearly undermines rights granted by the First Amendment. Visual images, sound recordings, or other physical impressions of another person who is out in public where there is no reasonable expectation of privacy should not be added to that list. If enacted I feel it will be ruled unconstitutional and imposing costs upon the taxpayers.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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