KFVE Opposes A New Overly-Broad Performance Fee For Pre-1972 Sound Recordings

- The Hawaii Senate's approach to pre-1972 sound recordings is overbroad, harmful to the very platforms whose song-play continues to benefit older artists, and – as a practical matter – is nearly impossible to implement.

This Pre-1972 Legislation Is Significantly Broader Than The California Statute It Intends To Emulate

- The draft bill is based on a California court's novel interpretation of an existing statute. That statute grants an "exclusive ownership interest" in pre-1972 sound recordings with no specific mention of public performance. Prior to this decision, no court – and as a result - no business that publicly performs sound recordings – interpreted this California statute to include a performance right.
- This proposed Hawaii legislation goes further than simply replicating the California statute. It actually codifies the novel interpretation as well. This is problematic since this litigation has yet to finish its journey through courts. It could be overturned on appeal or narrowed, and will likely spawn additional litigation.
- This Senate bill actually creates an even broader public performance right than the California court recognized. This legislation arguably implicates over-the-air radio broadcasts, television broadcasts, and music played in bars, restaurants, shopping centers, festivals, YMCAs, churches and more. Today, none of these entities are even subject to performance royalties for post-1972 sound recordings under Federal law. Even the litigation in California has been limited to satellite radio and digital services.

This Legislation Risks Harming The Entire Music Ecosystem, Including The Artists It Aims To Benefit

- This legislation fails to directly benefit the constituency it intends to help – artists. Unlike post-1972 royalties, which get distributed to artists based on a federal statutory fiat, 100% of these royalties would go to the copyright owner itself, which is most frequently a large foreign-owned record label.
- For businesses, including television and radio broadcasters that do not directly control the syndicated programming, ambient music (e.g. at sporting events), and commercials that air on local TV stations – this legislation is particularly problematic. These stations have no ability to full control the sound recordings that they publicly perform on their airwaves, and as such cannot fully eliminate the possibility of infringement in the event that they cannot obtain rights to certain sound recordings.
- Creating a new right of this magnitude under state law also fails to carry with it the various limitations and exceptions that are essentials of Federal Copyright law. This includes fair use, exemptions for libraries and archives, the protections to online services afforded by the Digital Millenium Copyright Act.
- In light of this breadth and complexity, the practical impact of this legislation is that businesses throughout Hawaii – including television and radio broadcasters – would simply stop playing pre-1972 sound recordings altogether, to the extent they are able. This harms the entire music ecosystem. The substantial penalties for infringement are simply too large a deterrent. National networks and syndicators would opt to not air programs through local broadcast stations in Hawaii rather than risk fines.

This Pre-1972 Legislation Is Nearly Impossible To Implement

- Practically speaking, this legislation fails to address the significant

question of how these new sound recording rights would be licensed. Under Federal law, SoundExchange serves as a collective for the performance royalties paid by digital services. But absent Federal Congressional action, SoundExchange could not serve that role here.

- As a result, this means that every business in Hawaii would be responsible for directly negotiating sound recording rights; something they are unequipped to do. Businesses would have to identify each pre-1972 song that is played, find its owner/multiple owners (which could be a record label, the artist himself, songwriter relatives, or another entity), and negotiate terms and conditions for song play. No country in the world has granted a right of this type without some sort of licensing mechanism.

Testimony of Chris Leonard
President / General Manager – New West Broadcasting Corp.
President – Hawaii Association of Broadcasters

Before the House Judiciary Committee
March 24, 2015

RELATING TO COPYRIGHTS

Good afternoon Chairman Rhoads and members of the Committee. For the record, my name is Chris Leonard. I am the President of New West Broadcasting Corp. We are a locally-owned broadcast company that owns and operates five radio stations in Hilo and Kona. I am also the President of the Hawaii Association of Broadcasters. The Association represents 55 Television & Radio stations that serve local communities across the State of Hawaii. I am providing my testimony in opposition to the overly-broad performance fee for Pre-1972 sound recordings proposed in SB1287 SD2.

The approach to pre-1972 sound recordings contained in SB1287 SD2 very broad and harmful to the very platforms whose song-play benefits older artists. It would be nearly, if not impossible to implement as proposed.

It appears that this bill intends to codify a recent controversial interpretation of a California statute that grants an "exclusive ownership interest" in pre-1972 sound recordings, however there was no mention in this decision of public performance. Prior to this decision, no court interpreted this California statue to include a performance right. SB 1287 SD attempts to go even further by creating an even broader public performance right than was recognized by the California court. SB1287 SD2, as written, is full of what I assume are unintended consequences. The bill would adversely impact over-the-air radio and television broadcasts, music played in bars, restaurants, shopping centers, festivals, churches, etc. None of these groups are subject to performance royalties for post-1972 sound recordings under Federal law. The litigation in California has been limited to satellite radio and digital services.

SB1287 SD 2 is especially problematic for our television and radio broadcasters that carry syndicated programming. These stations have little or no control over the sound recordings that are performed in this content. It would be virtually impossible to eliminate the possibility of infringement in the event that they are unable to obtain rights to these sound recordings. In addition to syndicated programs (classic tv, radio, etc.) commercials provided by advertisers, agencies and networks that have pre-1972 sound recordings would also expose our stations to infringement and litigation while we have little or no control over licensing agreements for this content. What makes SB1287 even more problematic is that this proposed legislation fails to address how these new sound recording rights would be licensed. SoundExchange serves as the collector of performance royalties paid by digital services under Federal law, but without Federal Congressional action, they could not serve in that role here. As a result, every business

in Hawaii including our radio and television broadcasters would be responsible for directly negotiating sound recording rights for each pre-1972 recording performance. We would be required to identify each pre-1972 song, find the owner(s) and negotiate terms and conditions for the performance(s). No country in the world has a granted a right of this type without a licensing mechanism and/or organization in place to implement it.

Chairman Rhoads and committee members, we appreciate your time and consideration of this matter and we ask you to oppose SB1287 SD2. It fails to directly benefit the constituency that it intends to benefit. It would have a huge adverse effect on broadcasters, because they have no way of knowing whether the music in a program is a "pre-1972" recording for which they would need to clear the rights or a "post-1972" recording for which there would be no license obligation and fails to provide a mechanism to for the clearing the rights for programs with "pre-1972" recordings.

Sincerely,

Chris Leonard
President
Hawaii Association of Broadcasters

President / General Manager
New West Broadcasting Corp.

Testimony of Andrew Jackson
President and General Manager KITV
Officer of the Hawaii Association of Broadcasters

Before the House Judiciary Committee
March 24, 2015

RELATING TO COPYRIGHTS

My name is Andrew Jackson and I am the President and General Manager of KITV. We are Hawaii's local ABC affiliate but more importantly KITV provides a vital service to local communities through our newsgathering operations for both television and our digital outlets. The news services we provide are of particular importance during times of crisis here in the islands such as major weather events and other natural disasters. I serve on the boards of the American Red Cross, the Cathedral of St. Andrew, the Hawaii Pops and Manoa Valley Theatre. I am also an officer of the Hawaii Association of Broadcasters that represents 55 television and radio stations serving our state. The below testimony is in opposition to SB1287 SD2.

We oppose this legislation because it appears on its face to be overly broad, vague, uncertain and, as others have testified, probably impossible to be implemented. At least in part it may well be preempted by Federal law that covers other works (such as audio-visual works) that embed sound recordings.

We agree that, however well intentioned, this bill would most likely have a significant adverse impact on broadcasters and others.

Chairman Rhoads and committee members we ask you to oppose SB1287 SD2.

Sincerely,

Andrew Jackson
President KITV 4

Officer, Hawaii Association of Broadcasters

SALEM
MEDIA of HAWAII

The Honorable Karl Rhoads
Chairman, House Committee on Judiciary
Room 302
Hawaii State Capitol

In Re: SB1287/SD2

Dear Chairman Rhoads:

As the General Manager of Radio Station KKOL-FM in Honolulu, also known as "Cool Gold 107.9", I am deeply concerned about efforts to create yet another performance royalty for my station to pay on top of royalties I already pay.

I am referring to SB-1287/SD2, "Relating to Copyrights", which seeks to extract sound recording performance royalties from those who publicly perform sound recordings from pre-1972 masters. Since Cool Gold is formatted "Oldies", this legislation would seriously threaten our ability to continue programming this very popular music in the Honolulu market. In addition to Cool Gold, I manage several other radio stations in the Honolulu market which would be adversely impacted by this proposed law.

Since U.S. copyright law is already very complicated and confusing, I would ask your permission to clarify some historical facts pertaining to the public performance of sound recordings:

Local AM/FM radio has, for decades, driven the sale of records and CDs, along with concert attendance, through which artists have been handsomely rewarded. It was not until the mid-nineties that Congress created a sound recording performance royalty to address specific, narrow, record company concerns about certain types of digital transmissions. The radio industry did not oppose this because we believed the record companies had the exclusive right to duplicate and sell albums, and that property right should not be harmed.

Three years later, similar legislation in the Digital Millennium Copyright Act of 1998, (the "DMCA") was passed, providing even more copyright protection for performers and record companies for the digital public performance of their sound recordings. Both times, Congress exempted AM/FM radio from paying this royalty, AND BOTH TIMES THE LABELS AND ARTISTS AGREED THAT THIS LIMITED RIGHT WOULD NOT APPLY TO FREE, LOCAL AM/FM RADIO. This was because they recognized that radio did not pose a risk, but instead helped record sales.

With all of this legislation, pre-72 recordings were not included, simply because no copyright existed on pre-72 recordings, period. There may have been good reasons

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why Congress in 1978 granted copyright status to sound recordings, but only retroactive to 1972. I would urge your Committee to investigate this fact.
I would like to also point out that radio broadcasters like KKOL-FM already pay public performance royalties on pre-1972 sound recordings (as well as post-72 sound recordings) on our digital streams, even though we are not required to do so by law. This is because it is impractical and expensive to identify them. Additionally, we pay royalties to ASCAP, BMI and SESAC for the public performance of all musical works -- the words and lyrics to songs -- that are copyrighted by composers and publishers. Thus, when the songwriter is also the performer, he or she gets paid from both royalty pools.

From a pragmatic standpoint, the proposed legislation would have an enormous chilling effect on all broadcasters, including Salem Media Group radio stations, because they would have no way of figuring out whether the music in their play lists is "pre-1972" or "post-1972". The proposed law also does not contain any ready mechanism for clearing the rights to broadcast "pre-1972" recordings.

Even if a station could identify whether the sound recording was created prior to February 15, 1972, there is no readily available repository of information concerning the ownership of the recording. Often, ownership rights in older recordings have been transferred many times over, and stations in most cases would not even know whom to contact for a license. There is no collective licensing organization that licenses the rights the proposed legislation would create.

Finally, it is my understanding that this legislation has been introduced based upon a California judicial decision which (a) pertains only to Sirius XM and digital-only music platforms, and not broadcasters, and (b) is currently on appeal and not yet finally adjudicated. Given the uncertainty regarding the California lawsuit, it may be premature to enact formal legislation at this time.
For the reasons set forth above, I urge your committee to withdraw consideration of this potentially harmful legislation. At a minimum, the case law should be settled before statutory proceedings move forward.

Respectfully yours,

Leilani Williams
General Manager

cc Chris Leonard, HAB

RICK BLANGIARDI'S TESTIMONY REGARDING HAWAII SB-1287

- Local television broadcasters do not select the music in most of the programming and advertisements they broadcast; most programming and advertisements is supplied to stations "in the can" and ready to broadcast, with the exception of the right to perform musical compositions synchronized with the program. The performance rights for musical compositions (as distinct from sound recordings) are not cleared by the program producer, but traditionally have been available to stations through industry-wide, blanket licenses negotiated with collective license organizations subject to federal regulation.

- In most cases, local stations do not even know what music is in the programs and advertisements that are supplied to them, let alone who owns the rights to the sound recordings.

- The proposed legislation would have an enormous chilling effect on Hawaii's broadcasters, because they would have no way of knowing whether the music in a program is a "pre-1972" recording for which they would need to clear the rights or a "post-1972" recording for which there would be no license obligation, or any ready mechanism for clearing the rights to broadcast programs with "pre-1972" recordings.

- Even if a station could identify what sound recording was used by the program producer, and whether the sound recording was created prior to February 15, 1972, there is no readily available repository of information concerning the ownership of the recording. Often, ownership rights in older recordings have been transferred many times over, and stations in most cases would not even know whom to contact for a license. There is no collective licensing organization that licenses the rights the proposed legislation to create.

- For music that has already been embedded in programming, or is selected by third parties, local television broadcasters in Hawaii would have no ability to obtain the licenses they would need in competitive-market transactions. Even if they could identify the rightsholder, the local stations would face the choice of paying whatever the licensor demands or foregoing its ability to broadcast the program. This is patently unfair and an unreasonable new fee obligation to impose on local television broadcasters in Hawaii.

- Lastly, the proposed legislation would create far broader rights for "pre-1972" sound recordings under state law than federal copyright law has ever recognized for "post-1972" copyrights.

    - Federal performance rights in sound recordings are limited to "digital audio transmissions." There is no federal performance right in sound recordings for "terrestrial" broadcasts (like those made by local radio and television broadcasters), nor is there a federal performance right for sound recordings in relation to audio-visual materials, such as television programs, whether transmitted digitally or otherwise.

    - Federal performance rights in sound recordings are brigaded by compulsory licensing and rate-setting proceedings that eliminate the need for most users to identify the owners of the sound recordings they use and negotiate in individual license transactions.

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March 23, 2015

RE: Testimony of Mark D. Bernstein in support of SB1287 SD2
Hearing Date: March 24, 2015
Hearing Time: 2:00 p.m.
Hearing Place: Conference Room 325

To the Honorable Members of the Committee

My name is Mark D. Bernstein and I have been a member of the Hawaii State Bar since 1980 and the California State Bar since 1978. My practice has had a focus on intellectual property matters, specifically the recording industry and music licensing. I have for over 30 years represented Hawaii's largest recording and record distribution company and have been named as one of America's Best Lawyers in the field of music licensing for the past 20 years.

Recorded music did not exist and was thus not protected by the United States Copyright Act of 1906 and was not even addressed by U.S. copyright law until limited copyright protection was finally afforded recordings in February 1972. Omitted from copyright protection was the right of public performance and even today, the public performance of a sound recording for profit, such as background music at a major hotel in Waikiki does not require any compensation be paid to either the recording artist or the record company.

In 1995, the Federal Government provided a limited right of public performance to sound recordings which are publicly performed on line. However, this right does not apply to recordings made before 1972. These recordings, which include a myriad of Hawaii's golden era of post war recordings, are protected solely by Hawaii State Law, specifically, HRS Chapter 482C which was enacted in 1975 to protect against record piracy.

My personal experience with HRS Chapter 482C can be summarized thusly. I have never been able to interest Hawaii law enforcement in dealing with the issue of bootleg records and CDs, even though, ironically, most of the bootleg sound recordings that are made in Hawaii are sold at a State of Hawaii facility, the Aloha Stadium swap meet. But I'm not here to denigrate law enforcement. The reality of the situation is that the police (be they Federal, State or Local) have issues they consider to have a higher priority than someone selling a bootleg sound

recording. However, if this bill is passed, the authors of these sound recordings will have both the incentive to police the abuse of their rights and if the bill contains an adequate enforcement provision, the tools needed to do so.

What is needed is a declaration that the authors of pre February 15, 1972 sound recordings and their lawful successors in interest have, under the laws of Hawaii the exclusive right to publicly perform for profit their sound recordings, subject only to the "fair use" thereof by others, as the term "fair use" has been defined by the courts interpreting the Copyright Law of 1976. Also needed is an enforcement mechanism that enables the holder of this right to enforce it against those who take their property and use it without their permission and compensation. If infringers know they will have to pay the owners fair compensation plus the costs and attorney fees incurred in compelling them to do so a great step will be taken in support of some of Hawaii's most iconic recording artists, whose works are currently used without permission or compensation.

This is a critical time for the recording industry in general and Hawaii's recording industry in particular. Simply put, the need to purchase and own sound recordings in order to enjoy music whenever and wherever a consumer wants is going away, if it is not already gone. In its place is streaming, either legally through services such as Pandora or Spotify or illegally through illegal downloading.

The impact on recording artists and record companies is more than dramatic, it is monumental, as one Hawaiian recording artist had over 14,000,000 individual streams of his music in one year generate income of approximately $14,500. Had that artist's recording sold 14,000,000 singles (not albums) on line, revenues over $8,000,000 would have been generated. Had this recording been a 1972 recording, those 14,000,000 streams would have generated income of $0.00. That's correct, absolutely nothing would have been paid.

This can be and should be changed here in Hawaii, which, even before 1972, had a vibrant recording industry with many iconic performers such as Don Ho, Gabby Pahinui and the Sons of Hawaii to name, but a few. SB 1287 will address this shortcoming in the law and the resulting injustice. Therefore I urge you to pass it, unanimously.

Thank you for your attention.

Very truly yours,

/S/Mark D. Bernstein, Esq.