

HB 548, HD3

TESTIMONY

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 Senate Committee on
TOURISM**

**Tuesday, March 22, 2011
1:20 PM
State Capitol, Conference Room 224**

**In consideration of
HOUSE BILL 548, HOUSE DRAFT 3
RELATING TO TRESPASS**

House Bill 548, House Draft 3 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 and establishes a task force to further evaluate lands in all counties featured in visitor guides where there exists dangerous conditions. The Department of Land and Natural Resources (Department) supports this measure, with amendments.

The Department supports this measure with amendments because it may discourage the publishers of these types of websites and publications from promoting areas that are either:

1. Culturally or environmentally too sensitive for frequent public use, or
2. Potentially detrimental to public safety due to the physical conditions and the absence of features 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 extensive and access is too porous for either fencing or signing to actively "prohibit" the public from gaining access at all unauthorized areas that are either unsafe or too sensitive due to the condition of the resources. There are portions of public land throughout the State that are managed and actively promoted via government websites and publications specifically for public recreational use.

The Department is therefore requesting the Committee to consider amending the measure in all sections that have the repetitive language that states:

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

GUY H. KAULUKUKUI
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
KAIHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

“on privately or publicly owned land from which the public is excluded”
to 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 where general public access is not promoted or managed for public use”.

The Department also has reservations regarding the creation of the task force provision of this measure. The subject matter is so broad, and the ability of an eight member panel to identify and assess lands in all counties that have been or are featured in visitor guide publications and websites that may have either dangerous conditions, or in the case of the Department, natural or cultural resources too sensitive and areas with no ancillary and maintained trails or routes for general public access - is too subjective and broad for accurate quantification.

Just as an example - the skill of the user must also be taken into consideration when determining “dangerous”. There are many forested areas adjacent to parks and trails throughout the State where the general recreational user is not encouraged to go. However, public hunters are encouraged to access remote areas due to their general superior backcountry skill and the fact that the environmentally damaging wildlife is located in remote areas. A visitor may be at risk while a public hunter would not be – due to different training and subsequent skill levels.

The Department does not support the creation of the task force and prefers to have the authors of the sites that promote private and public areas, as amended, be held responsible in cases of public injury or death associated with the promotion land not managed for general public recreation.

The Department supports this measure, with the suggested amendments and appreciates the Committee’s consideration of the proposed amendment.



NEIL ABERCROMBIE
Governor

MIKE MCCARTNEY
President and
Chief Executive Officer

Hawai'i Tourism Authority

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Testimony of
Mike McCartney
President and Chief Executive Officer
Hawai'i Tourism Authority
on
H.B. 548, H.D. 3
Relating to Trespass

Senate Committee on Tourism
Tuesday, March 22, 2011
1:20 p.m.
Conference Room 224

The Hawai'i Tourism Authority (HTA) strongly supports H.B. 548, H.D. 3, which holds the authors or publishers of visitor guide websites and visitor guide publications, where the publisher participates as an author, 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, requires the authors or publishers to defend and indemnify the owner or occupier of the land from any liability, and creates a task to identify and assess lands that may pose a risk of serious injury or death if visited by tourists.

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:

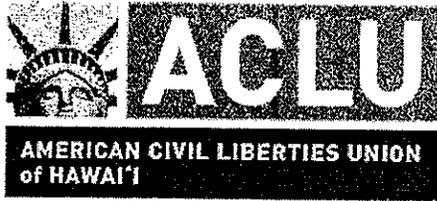
"To get to the falls, walk the trail on your left just before the bridge on Kipu Road (see map). The land was formerly used for growing sugar. Although the land company has posted NO TRESPASSING signs on their land, it hasn't stopped locals – who have visited this waterfall for generations – from walking 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.

We urge you favorable consideration of this measure.



Committee: Committee on Tourism
Hearing Date/Time: Tuesday, March 22, 2011, 1:20 p.m.
Place: Conference Room 224
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 548, HD3,
Relating to Trespass

Dear Chair Kim and Members of the Committee on Tourism:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 548, HD3, 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, HD3, poses a litany of constitutional issues. The subject material, visitor guides and visitor guide websites, are protected by the First Amendment and 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 and are unlikely survive a constitutional challenge. Accordingly, the ACLU opposes H.B. 548, HD3.

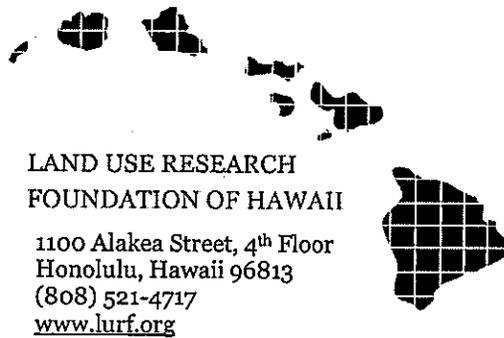
The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that 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

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FOUNDATION OF HAWAII

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March 22, 2011

Senator Donna Mercado Kim, Chair and Senator Ronald D. Kouchi, Vice Chair
Senate Committee on Tourism

Support for HB 548, HD 3 Relating to Trespass. (Visitor-Guide Publications and Websites; Liability; Private and Public Lands.)

Tuesday, March 22, 2011 at 1:20 p.m. in CR 224

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 HD 3**, and to offer comments.

HB 548 HD 3. 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, HD 3 proposes to impose on any author or publisher of a visitor-guide website or visitor-guide publication, a duty to warn the public of dangerous conditions typical of the area if the conditions pose a risk of serious injury or death, provided that a publisher shall have a duty to warn only if the publisher participates in authoring the website or publication. Under this bill, the author or publisher must also defend and indemnify the owner or occupier of private or public "land in the State from which the public is excluded" in any cause of action or proceeding arising on account of serious injury or death.

LURF believes that this bill represents a fair, equitable and reasonable balance between the landowner's duties, rights and responsibilities, and the rights and obligations of an author or publisher who induces trespass onto the private property should serious injury or death occur to the trespasser. The current draft of this bill now imposes a duty to warn (rather than civil liability) upon the author or publisher, and specifies that the land in question be either fenced or posted with "No Trespassing" signs in order to be eligible for the protections afforded by this measure. LURF also supports the proposed creation of a task force to assist with properly identifying and assessing the lands featured in visitor guides, and which may pose risks of serious injury or death.

Owners and occupiers of unimproved and unused lands (upon which many of these secret attractions are located), including farmers and ranchers, have, over the years, continued to

experience significant 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, HD 3 attempts to defend these innocent landowners and occupiers against liability resulting from the actions of authors and publishers of visitor guides and websites who may 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, and continues to cause, 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, encourage, and contribute to what amounts to clear violations of law and the flagrant commission of crimes.

LURF therefore **supports** **HB 548, HD 3** and respectfully urges your favorable consideration of this bill.

Thank you for the opportunity to present testimony regarding this matter.



KAMEHAMEHA SCHOOLS

TESTIMONY TO THE SENATE COMMITTEE ON TOURISM

Hearing Date: Tuesday, March 22, 2011
1:20 p.m., Conference Room 224

Good Afternoon Chair Mercado Kim and Vice Chair Kouchi:

RE: Testimony in Support of House Bill No. HB 548 HD3 - Relating to Trespass

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawaihoa Plantation in Waiialua, Oahu. I am here to testify in support of HB 548 HD3. 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 HD3 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 HD3.

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Founded and Endowed by the Legacy of Princess Bernice Pauahi Bishop

Committee on Tourism
Hearing
Tuesday, March 22, 2011, 1:30 p.m.
Conference Room 224

Senator Donna Mercado Kim, Chair

Testimony on HB548, HD3 Relating To Trespass



Dear Chair Kim and Members of the Committee:

My testimony is in **STRONG SUPPORT** of HB548, HD3. My name is Lynn McCrory and I am the President of PAHIO Development, Inc. We are a locally owned and operated time share development company on the island of Kauai. Unfortunately, I cannot attend this hearing and am submitting this testimony. **One of our companies is the owner of Queen's Bath in Princeville, Kauai.** Queen's Bath is a very dangerous location and we have placed signage along the shoreline indicating the dangers of high surf and being swept out to sea.

This bill attaches civil liability to the guidebooks or websites that knowingly encourage people to dangerous sites that are located on private property without providing a warning of the dangers. This inclusion of dangerous locations in order to sell books has resulted in far too many people losing their lives. There is a marker at the bottom of the Queen's Bath public access, before someone has to walk across one-quarter mile of private property to get to Queen's Bath, showing the number of people that have died at this site. Finding the public access is difficult, unless you are guided there by websites and guidebooks.

With the HD3 draft of this bill, we as the landowner, will now be able to fence our property to not allow access, along with posting exclusionary signage, and not have the liability for an injury or death. The current HRS protection provides no liability unless we neither fence nor post signage to exclude the public. For Queen's Bath, we could fence the property from west of the public access and hopefully substantially reduce the possibility of deaths at Queen's Bath, unless they came by sea.

This would also allow us to fence off access to the cliff portion of Queen's Bath where in 2010 we lost over 100 Wedge Tail Shearwater adults and fledglings to a loose household dog over a five month period. We may have lost the colony because someone didn't want to walk their dog.

I humbly ask for your consideration to SUPPORT HB548, HD3. Mahalo!

Me ke aloha pumehana
With warm aloha,

PAHIO DEVELOPMENT, INC.

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

Lynn P. McCrory
President



Via Capitol Website

March 21, 2011

Senate Tourism Committee
Hearing Date: Tuesday, March 22, 2011

Testimony in Support of HB 548 –
Relating to Trespass

Honorable Chair Donna Mercado Kim, Vice-Chair Ronald D. Kouchi and Tourism 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 support** of HB 548 HD3, which holds that an author or publisher of a visitor-guide website or publication describing attractions or activities on private or public land from which the public is excluded have a duty to warn of dangerous conditions; provides that the publisher shall have the duty to warn only if the publisher participates in authoring the website or publication; and requires the author or publisher to defend and indemnify the landowner in any cause of action arising on account of an injury or death.

Grove Farm's support is based on the fact that there are many visitor-guide 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. Visitors frequently rely on guidebooks and similar websites to learn about activities and attractions. Guidebooks and similar websites that encourage visitors to trespass to access an activity or attraction and do not adequately warn that the activity or attraction may be inherently dangerous are irresponsible. Such enticements to trespass and failure to warn can lead to disastrous results, and the publishers of these guidebooks and websites should be held accountable.

Grove Farm is **in support** of **HB 548 HD3**.

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

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www.grovefarm.com

MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

March 21, 2011

COMMITTEE ON TOURISM

Senator Donna Mercado Kim, Chair
Senator Ronald D. Kouchi, Vice Chair
State Senate
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: H.B. 548, H. D. 3 Relating to Trespass

Tuesday, March 22, 2011
1:20 p.m.
Conference Room 224
State Capitol
415 South Beretania Street

Testimony of Robert G. Klein

Dear Chairperson Kim and Vice-Chair Kouchi, Members of the Committee,

Aloha. My name is Robert G. Klein and I am **opposed** to this measure because it has a clear chilling effect on freedom of speech in violation of both the Hawai'i State Constitution (Art. I, Sec. 4.) and the United States Constitution (Art. I). In addition, the measure discourages the free promotion of tourism to Hawai'i by national and international travel writers and publishers at exactly the wrong time.

H. B. 548, H.D.3 imposes a duty to warn of dangerous conditions on the authors and publishers of visitor guides who describe attractions or activities on private land or public land where the public is excluded via fencing or anti-trespassing signs. Putting aside the problem of determining the sufficiency of notice to the public that they are excluded from certain lands, there remains the issue of what warnings are sufficient? Must a guidebook detail each and every dangerous condition arising from such land? How specific does the warning need to be about the land around that particular destination (as opposed to conditions generally typical of the surrounding area)? What about obvious dangers, must they be detailed? How much of a "warning" is enough? Must a guidebook's description resemble the disclaimers used for prescription drugs? Must a publisher recall its guidebook if the activity or attraction becomes dangerous after the guidebook is published or the land is fenced or anti-trespass signs are erected

Senator Donna Mercado Kim, Chair
Senator Ronald D. Kouchi, Vice Chair
Committee on Tourism
March 21, 2011
Page 2

after the guidebook is published? How is the publisher to know what content satisfies the warning requirement? For example, does the description below satisfy the duty to warn requirement?

As you drive north on Highway 270 where the black lava landscapes of the Kohala Coast give way to the flourishing, green pastures of North Kohala, you'll be rewarded at the end of your journey with an unforgettable view from the Pololu Valley Overlook. Park your car in the small parking lot that is literally at the end of the road and treat yourself to an inspiring view of the verdant cliffs of Pololu Valley and the dramatic northeastern coastline. Horses graze on the hillside as you look out at the small island outcroppings sitting in the waters offshore and the lovely black sand beach at the mouth of the valley. You can take a steep hike down to the valley floor and the black sand beach, although swimming is discouraged because of strong currents. Along with the Waipio Valley Overlook, which also offers a view of the Big Island's northeastern tip but from the south side, this is one of the most spectacular panoramic views on Hawaii's Big Island.

Hopefully for the HAWAII VISITORS' BUREAU GUIDE WEBSITE (where one can find this excerpt), the hiking and swimming reference adequately warns a reader, otherwise under this measure the HVB would be liable to an injured Plaintiff for failure to warn and would have to defend and indemnify the landowner in a serious injury or death case.

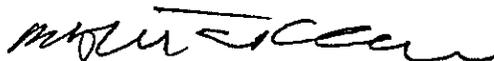
In short, a publisher publishes at its own peril because there is no way to tell, short of going to trial, whether its warnings are legally sufficient. Prudent publishers will not run the risk of civil liability; they simply will not publish a guidebook. This is exactly why H.B. 548, H. D. 3 chills freedom of speech and violates the first amendment to the United States Constitution. A well known publisher I represent has advised me that passage of this measure will drastically affect the publication of its famous Hawai'i guidebook and that it may then withdraw the title altogether.

Senator Donna Mercado Kim, Chair
Senator Ronald D. Kouchi, Vice Chair
Committee on Tourism
March 21, 2011
Page 3

Under existing case law, publications and the ideas they contain can never be defective. Publishers can never be censored directly or indirectly by the imposition of civil liability either. As the Hawai'i Supreme Court stated in Birmingham v. Fodor's Travel Publication, et. al., 73 Haw. 359, 370; 833 P.2d 70, 76 (1992) "[t]here are compelling policy reasons, apparently recognized by all jurisdictions addressing the issue, that militate against imposing a duty on a publisher to warn of the accuracy of its publication, absent authorship or warranty of the publication's contents. Therefore, we hold that a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication." While H.B. 548, H. D. 3 purports to include only publishers who participate "in the authoring of the website [sic]" again there is little guidance on this point for a publisher who must know what conduct is included and what is excluded from potential civil liability.

Lastly, assume that all publishers come to the conclusion that try as they may they cannot run the risk of liability and the concomitant duty to defend and indemnify a landowner under this legal regime. Publishers simply will not publish a Hawai'i guidebook or advertise Hawai'i as a destination for tourists on their websites. Their lawyers and insurers would never allow them to take such risks. Are the interests of large landowners in this state more important than the promotion of tourism, especially at this crucial time when our Governor is exhorting tourists to return to Hawai'i to boost our sagging economy? Isn't the right choice to encourage the publication of guidebooks to Hawai'i rather than saddle their publishers with liability if they fail to adequately warn of the dangers of all attractions and activities they describe in their books and websites? The free worldwide publicity these authors and publishers give our state is much needed now. We do not need to shoot ourselves in the foot with the passage of unconstitutional legislation. At least the Attorney General should be consulted about the legal merits of this measure before we find ourselves wondering why tourists are selecting destinations other than Hawai'i because Hawai'i guidebooks are no longer available. Mahalo.

Very truly yours,



Robert G. Klein

Debbie Hiramoto

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 21, 2011 11:17 AM
To: TSM Testimony
Cc: publisher@besspress.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM

Follow Up Flag: Follow up
Flag Status: Completed

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Benjamin Bess
Organization: The Bess Press
Address:
Phone:
E-mail: publisher@besspress.com
Submitted on: 3/21/2011

Comments:

I am writing in opposition to House Bill #548 as it is presently written. With all due respect to the sponsors of House bill #548, this is a terrible and unenforceable piece of legislation which specifically targets ALL authors and publishers. The bill is obviously motivated by and targeted at one individual author/publisher, and, with one broad sweep, attacks all writers and publishers. This bill appears, on the surface, to be pointed and vindictive.

As I testified in the senate hearing for this bill: "I suspect the sponsors of this bill are singling out one specific publisher and including the entire writing and publishing community." The Sunday Advertiser article entitled "Bill holds writers liable for trespass" affirms this.

As attorney Jeff Portnoy points out in the Sunday 3/20/11 Honolulu Star Advertiser, the House Bill 548 is unenforceable and violates the U.S. Constitution. At the very least it is a chilling piece of legislation that will inhibit authors and publishers from writing about Hawaii and will ultimately hurt tourism. At the most this bill smacks of censorship.

The state itself spends millions of dollars to lure visitors to Hawaii, and many of the supposed "kapu" areas of mountains, waterfalls and other areas that reflect the natural beauty of Hawaii are undoubtedly attractive nuisances to many landowners.

As the publishing industry decentralizes, the definitions of "publisher" and "writer" become increasingly meaningless and problematic to define leastwise enforce.

From the mountains to the sea Hawaii's extraordinary beauty, climate, foods, and people and will always attract visitors, surfers, adventure seekers, writers, artists, hang gliders, divers, hikers, photographers, nature lovers, etc. The state itself encourages this by spending millions of our tax dollars on state advertising and marketing support. Often tourists AND kama'aina alike are drawn to remote and sometimes dangerous sites. Private property owners should not be held liable if those areas are properly fenced and have

"no trespassing" signs on them. Individuals need to assume a certain amount of personal responsibility when visiting any area of the world.

Sincerely,

Benjamin "Buddy" Bess
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www.besspress.com

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March 21, 2011

The Honorable Donna Mercado Kim
Hawaii State Senate Tourism Committee
415 South Beretania Street
Honolulu, HI 96813

Re: Opposition to HB548 and SB1208

Madam Chairwoman and Members of the Committee:

Thank you for this opportunity to testify in opposition to HB548 and SB1208. It is clear that these two bills are attempts to stifle the right to a free press that is afforded to us in the First Amendment of the United States Constitution and the Constitution of the State of Hawaii. The potential liability for publishers inherent in these bills would put restrictions on what we can and cannot publish.

Publishers of any type become immediate targets for unwarranted litigation once it is known that they are solely liable in the event of an accident. These bills give those who were referred to these destinations by word-of-mouth the ability to sue a publisher because they are the only ones being held liable. Publishers should not be held to different laws simply because our voice is in print.

Just as the HB548 indicates that "landowners may be unable to reasonably prevent intruders," it is just as unreasonable for publishers to be held responsible in the modern day of social media. Content does not always come directly from the publisher, yet they would be held responsible according to these bills.

Finally, the additional language in HB548 to establish a task force does not include a member of the visitor-guide industry. This does not allow the press to have a voice in this process should either of these bills be passed.

We strongly urge you to reject HB548 and SB1208. Thank you for considering this testimony.

Sincerely,

A handwritten signature in black ink that reads 'Craig Furuya'.

Craig Furuya
Director of Operations
This Week Magazines

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Pleasant Hawaii Magazine
Queens' MarketPlace Magazine
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Debbie Hiramoto

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 21, 2011 12:55 PM
To: TSM Testimony
Cc: steveh@islandergroup.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM

Follow Up Flag: Follow up
Flag Status: Completed

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Steve Holmberg
Organization: The Islander Group
Address:
Phone:
E-mail: steveh@islandergroup.com
Submitted on: 3/21/2011

Comments:
Dear Madam Chair:

Re: HB548 HD3

My name is Steve Holmberg. I am President of the Islander Group, Hawaii's largest distributor of books of and about the people and places of Hawaii. We distribute the majority of books that are brought to market by Hawaii's publishers. I have spoken with numerous publishers about this proposed bill, and most agree that this will harm our industry significantly if allowed to pass in its current form.

Myself and a number of Hawaii's publishers attended the Senate hearing conducted by Senator Fukanaga about a month ago regarding this bill, for which we all expressed our strong opposition. At the end of that day I was pleased with the results of our efforts, and I assumed that the committee would kill the bill. To my surprise, I read in the Sunday paper that the bill has remerged with different verbiage.

The first bill was very vague, and I expressed my concerns about this to Senator Fukanaga's committee. In my opinion, this new version of the bill is equally vague. If enacted, Hawaii's publishers will become the target of attorneys looking for deep pockets to file suits against. Their litigation will be able to claim that their clients were enticed to engage in risky behavior because of the publisher. Regardless of the validity of a claim filed against a publisher, they will need to hire council to defend each and every claim. The cost of publishers defending themselves against claims brought against them will create substantial financial hardship.

Hawaii's publishers have been reeling from current events....be it the digital era of book readers to the recent filing of bankruptcy by Border's, and now this bill. What was once one of the most vibrant regional publishing communities in the nation now finds itself under attack from every direction. There must be a better way to find resolution to this problem.

Our publishers in Hawaii as a whole are a responsible group of entrepreneurial men and women who have done much good by enticing people to come to Hawaii with their words and pictures in

their publications. If there is a need to police this industry, then I respectfully ask that our publishers be allowed to attempt to resolve this problem with out the need of passing a bill that potentially will do as much harm as I believe this bill will cause our people.

Respectfully,

Steve Holmberg
President
The Islander Group



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

2343 Rose Street • Honolulu, Hawaii 96819
Phone: (808) 848-2074 • Neighbor-Islands: (800) 482-1272
Fax: (808) 848-1921 • Email: info@hfbf.org
www.hfbf.org

Senate Committee on Tourism

March 22, 2011

1:20 pm

Room 224

HB 548 HD3

Relating to Trespass

Aloha Chair Mercado Kim, Vice Chair Kouchi, and Members of the Committee:

The Hawaii Farm Bureau Federation, the largest general agriculture organization in Hawaii, on behalf of our commercial farm and ranch families and organizations across the State, is in **strong support of the intent** of this bill to protect landowners from liability for injuries to trespassers. However, we respectfully request that the bill be amended to indemnify and protect landowners from liability in those limited and very specific situations where a visitor guidebook or website instructs people to ignore no trespassing signs, fences, or other enclosures, to their peril.

The safety of our residents and tourists is at stake and we can do something to protect them. In addition, we strongly believe that landowners should be protected from liability to those people who disregard fencing, posted signs, or obvious indications of farming or ranching. We also believe that it is fair and equitable to hold authors of publications and websites liable for the injury or death of readers who are purposefully lured to trespass by those publications or websites. We further agree that requiring indemnification by the publications for landowners sued by those unfortunate persons is appropriate.

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.

Something must be done to protect against loss of life and to protect landowners/lessees from liability. Appropriate language must be found to assign liability to those who intentionally lead people to trespass. Of course liability should not be imposed in a situation where tourists merely read an article or advertising for Hawaii or see promotional photos of a beautiful landscape or a natural wonder and decide on their own to trespass. However, we believe that most tourists are law-abiding people looking for a pleasant adventure and wonderful scenery.

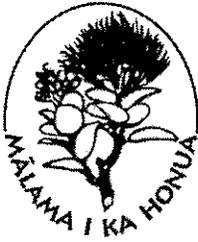
But for the advice and instructions from publications that specifically tell readers to ignore no trespass or private property signs, they likely would not trespass.

HFBF respectfully disagrees that a task force assigned to identify and assess all lands in all counties, featured currently or in the past in visitor-guide publications or websites, on which exist dangerous conditions posing a risk of serious injury or death, will be useful. Moreover, this is a daunting, pointless, and absurd burden on the members of the task force and the State. The onus should be on the publisher/author who identifies inherently dangerous locales and explicitly encourages people to trespass to gain access.

We adamantly object to the testimony of Andy Doughty in the previous hearing on this measure, which falsely claims that Hawaii landowners are already protected from injuries to trespassers under HRS Chapter 520, Hawaii's Recreational Statute. Landowners who try to prevent the public from access to their property are most certainly NOT protected by this statute and do need protection from this body, along with the members of the public who are being misled into believing that trespass of this nature is ignored or even condoned.

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 amending this bill so that it meets the original intent of the introducers and takes the burden off of the State and private landowners, by placing responsibility squarely on those who minimize the risk of, and promote illegal and dangerous trespass.

Thank you for your continued support of agriculture in Hawaii.



Sierra Club Hawai'i Chapter

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

HOUSE COMMITTEE ON TOURISM

March 22, 2011, 1:20 P.M.
(*Testimony is 2 pages long*)

TESTIMONY IN OPPOSITION TO HB 548 HD3

Aloha Chair Kim and Members of the Committee:

The Hawai'i Chapter of the Sierra Club, with 8,000 dues-paying members and supporters, *opposes* the current draft of HB 548. This measure makes publishers of information regarding privately owned trails potentially liable for injuries or death. While we appreciate previous 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's principle concern is principally with the broad possible interpretation of the words "author" and "publisher." These undefined terms could impose liability for descriptions of otherwise legitimate activities, such as permitted hikes on private property, state descriptions of natural area reserves, state inventories of land, etc.

There is also concern that the broad definition of "Land in the State from which the public is excluded" could infringe upon constitutionally-protected PASH and access rights.

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 “describing attractions or activities on private or public land” 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.

Mahalo for this opportunity to provide testimony.



March 9, 2011

The Hawaii Publishers Association strongly opposes HB548/SB1270.

First and foremost, this bill is clearly unconstitutional. The First Amendment protects the activity this bill seeks to restrict and penalize.

There are other issues with this bill –

Remedies already exist for those who trespass on private or restricted publically owned land.

There isn't a definitive way to determine how the trespasser obtained the information. It could have been from any variety of sources, including word-of-mouth, yet this bill only penalizes visitor publications and websites.

The definitions for visitor-guide publications and visitor-guide websites are written so broadly they include every form of media in the state and would include national and international media companies as well.

The HPA urges the legislature to reject HB548 and find another solution to reduce this risk. HB 548 is poorly written and will result in a bonanza for litigants until it is eventually thrown out as unconstitutional.

Ted Dixon
President
Hawaii Publishers Association



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Thomas H. Allen
President and
Chief Executive Officer

March 18, 2011

To the House Committee on Tourism
Hawaii State Legislature

Memorandum in Opposition to HB548 HD3

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 HD3. The bill is an ill-conceived and unconstitutional attempt to hold the publishers of "visitor guides" and "visitor guide websites" liable for injuries or deaths that befall readers who trespass on privately owned land. The bill would accomplish this by imposing on publishers a "duty to warn" and by requiring them to indemnify the property owners (although the bill fails to require any connection between the text of the guide and the injury or death.). Neither of these provisions is acceptable.

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 contained in the book. *See, e.g., Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 75 (1992). In rejecting such claims, the courts have recognized that creating a duty of care running from publishers to readers 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, and 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.

The legislature cannot circumvent the First Amendment bar against imposing a duty of care on publishers by instead enacting a duty to warn. In *Winter v. G.P. Putnam & Sons*, 938 F.2d 1037-38 (1991), for example, the court held that because the publisher of a wild mushroom reference guide did not have a duty of care to its readers, it could not be required to effectively assume such a duty by being forced to include a warning label on the book. HB548 is further flawed in that compliance with the (unconstitutional) duty to warn would not necessarily absolve the publisher from liability arising from the duty to indemnify.

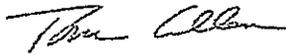
Imposing a duty to warn also violates the First Amendment by interfering with the editorial independence of authors and publishers. As the Supreme Court stated in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), in striking down a Florida "right of reply" statute:

The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Similar reasoning applies to the editorial decisions made by the authors and publishers of visitors guides. Hawaii cannot dictate the content of those guides without violating the First Amendment.

Because HB548 HD3, or any similarly worded law, would inevitably be struck down on First Amendment grounds, we urge the legislature to confine itself to the approach taken in the amended companion bill, SB1207 SD1, as approved by the Senate Economic Development and Technology Committee, and in Part II of the HB548 HD3, which calls for the creation of a task force to study the problem related to trespass on privately held or public lands and to develop findings and recommendations. We urge, however, that, as in the Senate bill, the proposed task force include representatives of the publishing industry.

Respectfully Submitted,



Tom Allen
President & CEO
Association of American Publishers



MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression · Association of American Publishers, Inc. · Comic Book Legal Defense Fund · Entertainment Consumers Association · Entertainment Merchants Association · Entertainment Software Association · Freedom to Read Foundation · Motion Picture Association of America, Inc. · National Association of Recording Merchandisers · Recording Industry Association of America, Inc.

March 21, 2011

Committee on Tourism
In the Hawaii State Senate

Memo in Op. to H. B. 548 HD3

The members of Media Coalition believe that House Bill 548 HD 3 (H.B. 548) 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 would impose third party liability on the author or publisher of a guide book that describes activities or attractions on privately owned land or publicly owned land from which the public is excluded if a person suffers an injury or dies on such property. The bill also imposes a duty to warn of any dangerous conditions on any writer and publisher of such a guide book or website. 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). "If a less restrictive alternative would serve the government's purpose, the government must use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

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 impose 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

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

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 First Amendment protected speech. 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 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 network for violent programming that he alleged caused him to commit criminal acts).

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).

Writers and publishers do not have a duty of care to readers, and the state cannot impose such an obligation on them. Guide books or travel websites are not a product like aspirin or laundry detergent. Books and websites are protected by the First Amendment and the state cannot impose this obligation on authors or publishers. 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. 73 Haw. 359 (1992). 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. 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 incorrect. *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).

Finally, the imposition on publishers and authors of guidebooks of a duty to warn readers of potential dangers is also likely unconstitutional as compelled speech. The state cannot require an author tell an author how he or she must describe an attraction or activity. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The First Amendment allows speakers not only the right to communicate freely but creates the complimentary right "to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See also, *Pacific Gas & Elec. Co. v. Washington, DC Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (government cannot require a private electric company to include environmentalists' inserts in its monthly bills), *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to provide space to politicians to respond to editorials). In 2005, laws were enacted in California and Illinois that required video games with "graphic violence" or sexually explicit content to carry a warning label reading "18" to advise parents of potential danger to kids if they played such games. Both laws were struck down as unconstitutional as compelled speech. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *Entertainment Software Association v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006).

We agree that it is important to identify ways to prevent visitors from trespassing on private property and getting injured or dying. A task force is reasonable approach to resolving the problem, 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 of responsibility for injury or death of the trespasser even if the property owner is at fault.

Again, if enacted, H.B. 548 will suppress speech protected by the First Amendment. Please protect free speech and oppose this legislation.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

BEFORE THE
SENATE COMMITTEE ON
TOURISM

Senator Donna Mercado Kim, Chair
Senator Ronald D. Kouchi, Vice Chair

HB548, HD3 RELATING TO TRESPASS

TESTIMONY OF
ANDY DOUGHTY

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

March 22, 2011, 1:20 pm
State Capitol, Room 224

Chair Mercado & Members of the Committee:

My name is Andy Doughty, President of Wizard Publishing, Inc. Wizard Publishing is a locally-owned company which publishes guidebooks for Oahu, Kauai, Maui and Hawaii. I appear before this Committee in STRONG OPPOSITION to the current version of HB548, HD3, which (i) requires indemnification of landowners by authors/publishers of visitor websites and publications for claims by readers who allegedly suffered injury or death as a result of being enticed to trespass and exempts property owners from liability, (ii) creates a duty to warn by authors/publishers of dangerous conditions and hazards, and (iii) creates a task force to explore and deal with the issues identified in the measure but in limited fashion, excluding authors, publishers and members of the visitor guide industry.

HB548, HD3 is overly broad, creating duties to warn and holding publishers and authors responsible for the acts of individuals it has no control over. In particular, we oppose HB548, HD3 for the following reasons:

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

The purpose behind the Recreational Use Statute was to get landowners to be *more lenient* about letting visitors onto their land to go hiking, swimming, etc., by eliminating the landowners' liability and thereby promoting tourism. *See, e.g., Stout v. U.S.*, 696 F. Supp. 538, 539 (D. Haw. 1987). HB548, HD3 seeks to protect landowners who are already protected.

To: Senator Donna Mercado Kim, Chair, Senator Ronald D. Kouchi, Vice Chair and Members of the Senate Committee on Tourism

Re: Testimony of Andy Doughty, HB548, HD3 RELATING TO TRESPASS

Hearing: 3/22/11 @ 1:20 p.m., Rm. 224

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- The legislation imposes a duty on visitor guide authors/publishers to warn the public of "dangerous conditions typical to the area;" As drafted, the duty to warn illogically applies even to dangerous conditions which are UNKNOWN to the author/publisher. Naturally, one cannot warn of unknown hazards.
- The result of the legislation will very likely be to force guidebook publishers and others to altogether cease publications and information promoting Hawai'i, because:
 1. Tens of thousands, or more, of old editions of guidebooks are in circulation and beyond control of the authors/publishers and cannot be modified to change their content or to include warnings. No grandfather clause or carve-out for past editions is included in the proposed legislation, and, therefore, authors/publishers are retroactively liable for all past editions of their books;
 2. Any website, commercial wireless forum, blog or other social media communication which authors any of its content would have to shut it down, because they would be liable for the content of their site;
 3. Authors/publishers would be liable even if the "NO TRESPASSING" signs are invalid, such as, erected by someone *other than* the landowner possessing the rights to control access;
 4. Authors/publishers would likely lose their Error and Omission Insurance for all Hawaii-related titles/websites, which would force them to drop those publications and sites;
 5. Guidebook promoting Hawai'i should not be treated differently than other forms of media, such as television, movies, cable, etc., that provide images and/or information on sites, thereby potentially "enticing" tourists to trespass to get there;
 6. Non-visitor-guides about Hawai'i that contain information and/or pictures of remote attractions on non-public lands (such as a coffee table book featuring Hawai'i's waterfalls) would fall within the definition of "visitor guide publication," thereby affecting photo-journalists, writers, etc., and extending much broader than it would appear the drafters intended. These publications would also likely lose insurance;
 7. If a person were to be hurt accessing an attraction on land "from which the public is excluded," he or she would only have to do minimal post-injury

To: Senator Donna Mercado Kim, Chair, Senator Ronald D. Kouchi, Vice Chair and Members of the Senate Committee on Tourism

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research to see if any author/publishers had ever featured the attraction and sue any or all of them. That the injured plaintiff did not in fact read the publication or visit the website and was not enticed by it would be virtually impossible to prove;

8. There are much narrower and simpler means to curb trespassing at specific sites (such as Kipu Falls – which appears to be the most hot-topic spot), if that is the true motivation behind the bills. The current approach is overkill.
9. No other state or federal jurisdiction in the United States has such a law.

HB548, HD3 also raises serious legal issues due to significant digressions from Hawai`i's historical common law on trespass, negligence and strict products liability, as well as, certain First Amendment principles, all of which follow the prevailing approaches from all other state and federal jurisdictions. For example:

- In 1992, the Hawai`i Supreme Court expressly *rejected* an injured plaintiff's attempt to impose liability on Fodor's Travel Guides for failing to warn in its guidebook of inherently dangerous surf conditions at Kekaha Beach on Kauai. (*See Birmingham v. Fodor's Travel Publications, Inc.*, 73 Haw. 359 (Hawaii 1992).) The Hawaii Supreme Court in *Fodor's* held: (1) under Hawaii's common law on negligence, the publisher owed no special duty to the reader to warn of dangerous conditions¹, and; (2) even if it did, the reader's decision to ignore indicated, potentially dangerous conditions was a superseding cause of the injury; (3) no claim for strict liability could be maintained because a guidebook disseminating opinions was not defective "product;" and (4) imposing liability on guidebooks presenting opinions and ideas would start down a thorny path regarding chilling of First Amendment freedom of speech. On this point, quoting favorably from *Alm v. Van Nostrand Reinhold Co.*, 134 Ill. App. 3d 716, 717, 480 N.E.2d 1263, 1264 (1985), the Hawaii Supreme Court in *Fodor's* Court stated:

More important for our purposes, however, is the chilling effect which liability would have upon publishers Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.

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

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

To: Senator Donna Mercado Kim, Chair, Senator Ronald D. Kouchi, Vice Chair and Members of the Senate Committee on Tourism

Re: Testimony of Andy Doughty, HB548, HD3 RELATING TO TRESPASS

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The existing legislation, thus, (1) imposes a duty of care on a publisher that was previously found by the Hawaii Supreme Court to not exist under the common law and (2) stifles First Amendment freedom of idea principles that the Hawaii Supreme Court deems worthy of strong protection. This is surely cannot be what the drafters intended.

Other cases from around the nation have similarly rejected efforts to pin liability to the creators of various forms of social media for allegedly enticing, promoting or attracting viewers and users to commit crimes or do harm to themselves or others. For example, courts have routinely dismissed claims that violent video games enticed or encouraged players to commit acts of violence harming themselves and/or others. In *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003), heavily cited by both state and federal courts, the Sixth Circuit Court of Appeals held that the maker of several (admittedly) violent video games could not be held liable for the criminal acts of a high school student who played those games and later shot and killed several co-students. The Court explained that for liability to attach, the defendant must have given the actor the direct instrument that caused the harm and that, in video game cases, the injuries were too far removed. *Id.*, at 695.

Thus, I STRONGLY OPPOSE HB548, HD3, and urge you to amend the measure by:

1. Deleting from PART I, the statutory provisions related to visitor guide liability;
2. Enacting PART II establishing a task force to identify problem areas on the various islands related to trespass over privately held or public lands as the result of information published on visitor guide websites and in visitor guide publications in the form proposed in SB1207, SD1, which includes a broader array of members to the proposed task force and includes representatives from the visitor guide publication industry and publishing industry;
3. Authorizing the Legislative Reference Bureau to provide assistance to the Task Force in the compilation and publication of the findings and recommendations of the task force; and
4. Requiring a report to the Legislature prior to the Regular Session of 2012.

Thank you for the opportunity to testify on this matter.



Honolulu Publishing Company, Ltd.

707 RICHARDS ST., SUITE 525 HONOLULU, HAWAII 96813 (808) 524-7400 FAX (808) 531-2306 honolulupublishing.com

March 21, 2011

Re: HB 548

I am opposed to HB 548.

Aside from the obvious violation of First Amendment rights, the proposed bill seeks to add another law on top of already existing laws designed to deal with the real issue - that of trespassing on private property. If passed, the proposed bill will eventually be challenged in court and found to be unconstitutional. But not before some writers or publishers will go broke defending themselves in the process.

More laws are not the answer. Perhaps the task force can take the lead and continue the dialog between the landowners and writers/publishers to arrive at a common-sense approach.

Aloha,

N.C. Tinebra
President and Chief Executive Officer
Honolulu Publishing Company, Ltd.

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 **SOCIETY OF
PROFESSIONAL
JOURNALISTS**
Hawaii Chapter

P.O. Box 3141
Honolulu, HI 96802
March 22, 2011

Donna Mercado Kim, chairwoman
Senate Tourism Committee
415 S. Beretania St.
Honolulu, HI 96813

Re: House Bill 548 HD 3, Related to Trespass

Sen. Kim and Committee Members:

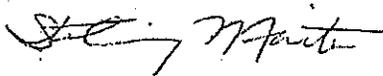
The Hawaii Chapter of the Society of Professional Journalists thanks you for the opportunity to testify in opposition to HB 548.

We believe this bill would impose an unconstitutional restriction on the First Amendment rights of publications: The state is telling publications what they or may not print and holding them responsible in the case of injury.

Although the bill purports to cover visitor publications and websites, the definition is broad enough to impose liability or requirements on a publication or website that provides information about private or public land from which the public is barred. This would appear to cover almost any publication or website, including conventional media and probably mainstream websites. This vague language would cover articles or blogs written about people injured on such a site who were lured by the beauty of the site. In our view, government should not dictate how publications or bloggers report matters.

We hope you will shelve 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. 3**

March 22, 2011

To: Chairperson Donna Mercado Kim, Vice Chair Ronald Kouchi and Members of the
Senate Committee on Tourism:

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. 3.

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 have a duty to warn of dangerous
conditions under certain circumstances. HAJ does not take a position on whether a
visitor guide website or publication should be required to warn of dangerous conditions.
HAJ feels that this 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 6 to 10 on page 3 whereby the author or publisher shall also defend
and indemnify the owner or occupier of public or private land from any cause of action
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.

Debbie Hiramoto

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 17, 2011 2:26 PM
To: TSM Testimony
Cc: will@pagemarketing.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM

Follow Up Flag: Follow up
Flag Status: Completed

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: oppose
Testifier will be present: No
Submitted by: Will Page
Organization: Page Marketing, Inc.
Address:
Phone:
E-mail: will@pagemarketing.com
Submitted on: 3/17/2011

Comments:

HB548 is well intended. Some visitor publications have created liabilities for themselves and endangered our visitors. But HB548 infringes on the freedom of the press, lacks enforcement funding, and may add to the problem rather than solving it. I oppose this measure. Mahalo.

Debbie Hiramoto

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 17, 2011 8:19 AM
To: TSM Testimony
Cc: blackink329@gmail.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM

Follow Up Flag: Follow up
Flag Status: Completed

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: oppose
Testifier will be present: No
Submitted by: Brad Williamson
Organization: Individual
Address:
Phone:
E-mail: blackink329@gmail.com
Submitted on: 3/17/2011

Comments:

Aloha Tourism Committee,

I am opposed to the HB 548, as a similar bill, SB 1207, was already heard and decided upon by the senate committee to form a task force to examine trespassing.

HB 548 is clearly unconstitutional. Testimony on the mirror bill SB 1207 showed that this type of law has already been tried in courts and lost. Many cases were cited in testimony on the bill from ACLU and other credible sources.

Further, the committee proposes in this bill a task force, but NO publishers are allowed on the task force? This idea 'smacks of regulation without representation.

This is not a feasible bill nor a solution to trespassing or tourists being hurt.

Respectfully,

Brad Williamson
Wailua

kim3 - Samantha

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 21, 2011 1:49 PM
To: TSM Testimony
Cc: wmdowns2000@yahoo.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: support
Testifier will be present: No
Submitted by: Monty Downs, M.D.
Organization: Individual
Address:
Phone:
E-mail: wmdowns2000@yahoo.com
Submitted on: 3/21/2011

Comments:

Dear Ladies and Gentlemen of the Senate Tourism Committee:

I am an ER physician here on Kauai and I have seen far too many dead or maimed visitors, and ruined families, who have been led to exotic and dangerous locales by some (not all!) of our guide books. I am very much in favor of a tether being put on the recommendations that guide books can put out there for our unwitting visitors.

Please vote in favor of HB 548.

Respectfully, Monty Downs, M.D.

kim3 - Samantha

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 22, 2011 9:45 AM
To: TSM Testimony
Cc: grogan.steve@gmail.com
Subject: Testimony for HB548 on 3/22/2011 1:20:00 PM
Attachments: Opposition to HB548 HD3 -- Please read into record.docx

Testimony for TSM 3/22/2011 1:20:00 PM HB548

Conference room: 224
Testifier position: oppose
Testifier will be present: No
Submitted by: Stephen Grogan
Organization: Individual
Address:
Phone:
E-mail: grogan.steve@gmail.com
Submitted on: 3/22/2011

Comments:

My name is Stephen Grogan.

I am the author of Captain Cooked, a Hawaiian Mystery of Romance, Revenge, and Recipes. (www.CaptainCooked.com), distributed by Honolulu based, Islander Group.

The book showcases Hawaiian culture of chefs, restaurants, artists and music. The plot brings a tourist heroine to the islands and through her eyes sees what is great about Hawai'i attractions.

But what is of serious concern is that the plot, as example, does a tour of the Big Island using GPS coordinates, which would put tourists by my direction out into the field. Would I now be held responsible for any accident, even though tourists have already been at these locations without any incident? Would my publisher and property owners be liable? There is a large tourist base who come to the islands and go out beyond tourist attractions looking for GPS 'caches'. You would be damaging and forestalling this tourist base by this legislation.

Am I also at risk for recommending a restaurant to visit? In first glance this legislation looks very vague in its construction and more problematic, and might only pad the pockets of liability attorneys.

Please do not allow this legislation to move forward. If passed I may have to suspend book sales of what's becoming an island best seller.

Very truly yours,
Stephen Grogan, author of Captain Cooked and Vegas Die
Cell: 702.303.5915

March 22, 2011