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109TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 109–33, Part 1

FAMILY ENTERTAINMENT AND COPYRIGHT ACT OF 2005

APRIL 12, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 167]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 167) to provide for the protection of intellectual property rights, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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39–006

PURPOSE AND SUMMARY

S. 167 penalizes those who camcord motion pictures in movie theaters; creates civil and criminal penalties for those who willfully distribute pre-release works; clarifies the legal status of certain services and technologies that enable individuals to skip and mute content on certain works in the privacy of their own home; reauthorizes the National Film Preservation Board and Foundation; and corrects a technical error in the "Sonny Bono Copyright Term Extension Act" that limited library and archive access to certain works during the last 20 years of term.

BACKGROUND AND NEED FOR THE LEGISLATION

Testimony received at several Congressional hearings highlighted the need for the different Titles of this legislation, which is similar to portions of H.R. 4077, H.R. 4586, and S. 2391 of the 108th Congress. The legislation is also a companion to H.R. 357, introduced by Congressman Lamar Smith during the 109th Congress.

Title I of the Act is similar to S. 1932 and § 8 of H.R. 4077 from the 108th Congress. This title is the "Artists Rights and Theft Prevention Act of 2005." Section 102 of Title I creates a new § 2319B in Title 18, of the United States Code prohibiting the act of using or attempting to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work in a motion picture exhibition facility. The new section is modeled after the existing "anti-bootlegging" statute found in § 2319A of Title 18, of the United States Code which prohibits the unauthorized recording of, and trafficking in, sound recordings and music videos from live musical performances.

This new provision deals with the very specific problem of illicit "camcording" of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening "screening" or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy. This misuse of camcorders is a significant factor in the estimated $3.5 billion in annual losses the movie industry suffers because of hard-goods piracy.

Causing greater financial harm, these camcorded versions are posted on the Internet through certain peer-to-peer networks and made available for millions of users to download. According to studies by the Motion Picture Association of America ("MPAA"), camcorded versions of movies in theatrical release account for more than 90 percent of the first copies of motion pictures illegally distributed on the Internet. S. 167 will provide prosecutors with resources to stem the piracy of commercially valuable motion pictures at its source.

The Act would not, and is not intended to, reach the conduct of a person who uses a camera, picture phone, or other photographic device to capture a still photo from an exhibition of a motion picture. Rather, the Act reaches the conduct of a person who uses an audiovisual recording device to capture or transmit a "series of related images that are intrinsically intended to be shown by the use

of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any."[1]

Notwithstanding this clarification, nothing in this legislation shall be interpreted to suggest that taking photographs in a movie theater is in any way condoned. Engaging in such conduct could still subject a person to civil or criminal liability under the Copyright Act. However, this provision is drafted narrowly to address the specific and pernicious problem of "camcording" copyrighted motion pictures.

In addition, the bill makes clear that "possession of an audiovisual device in a motion picture exhibition facility may be considered as evidence in any proceeding involving this offense, but shall not, by itself, constitute sufficient evidence to support a conviction of this offense." The Committee recognizes that the fact that someone has brought an audiovisual device may be critical evidence in a case against that person under this section. For example, smuggling a high-quality miniature camera and recording equipment into a movie theater may be highly probative of the intent to camcord. However, the Committee does not intend that the "attempt" language be used to convict, for example, a tourist who ends a day of sightseeing by bringing his camcorder to a motion picture theater but does not attempt to use it to record or transmit a motion picture. This language is intended to guard against such an injustice.

Further, the bill is not intended to permit a prosecution of, for instance, a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television. The offense is only applicable to transmitting or copying a movie in a motion picture exhibition facility, which has to be a movie theater or similar venue "that is being used primarily for the exhibition of a copyrighted motion picture." In the example of the salesperson, the store is being used primarily to sell electronic equipment, not to exhibit motion pictures. (For the same reason, the statute would not cover a university student who records a short segment of a film being shown in film class, as the venue is being used primarily as a classroom, and not as a motion picture exhibition facility.)

Moreover, § 102 is not intended to permit prosecution of individuals making camcorded copies of movies off their television screens. The definition of a motion picture exhibition facility includes the concept that the exhibition must be "open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances." This definition makes clear that someone recording from a television in his home does not meet that definition.

It is important to emphasize that the clause "open to the public" applies specifically to the exhibition, not to the facility. An exhibition in a place open to the public that is itself not made to the public is not the subject of this bill. Thus, for example, a university film lab may be "open to the public." However, a student who is watching a film in that lab for his or her own study or research would not be engaging in an exhibition that is "open to the public."

[1] 17 U.S.C. § 101.

Thus, if that student copied an excerpt from such an exhibition, he or she would not be subject to liability under this Section.

The Committee will oversee the Justice Department to ensure that it exercises appropriate prosecutorial discretion when enforcing § 102 of S. 167. While "fair use" is not a defense against a § 2319(B) violation, Federal prosecutors should use their discretion not to bring criminal prosecutions against activities within movie theaters that would constitute fair use under the copyright laws. Additionally, prosecutors should consider whether a potential defendant was on notice that camcording violated the law. The Committee appreciates the commitment by the National Association of Theatre Owners (NATO) and MPAA to make available to every motion picture theater in the United States a conspicuous sign informing patrons that camcording in the theater is punishable by a Federal criminal penalty. The Committee fully expects that NATO and the MPAA will abide by that commitment. The posting of such a warning will serve as an important factor to help authorities determine whether a prosecution under this statute would be appropriate.

An immunity provision has been included for good faith efforts by theater owners and other associated individuals to detain in a reasonable manner those they suspected of camcording. This provision and the reasonableness test should be viewed as a companion to shopkeeper privilege statutes found in all States. This section does not pre-empt any State laws.

Section 103 creates a criminal penalty for the willful distribution of works being prepared for commercial distribution. The Committee has been made aware of numerous examples of efforts to camcord new movies during their opening days of release followed immediately by either mass duplication and distribution of DVD copies or Internet distribution of the same movie. Although the harm to the distribution of physical or Internet copies of works when legal copies are available has long been established, the Committee notes the larger harm caused by those who distribute copies of works even before they are legally available to the consumer. Moreover, the Committee is aware of pre-release activity surrounding the creation and duplication of physical advertising signs prior to their initial installation. Finally, the Committee is aware of, and encouraged by, Department of Justice investigations and prosecutions of pre-release cases involving motion pictures, sound recordings, business software, videogame software, and book publications once the works have been released in final form. Section 103 will ensure that there is a specific penalty for such illegal pre-release activity.

Section 104 expressly requires the Register of Copyrights to issue regulations to establish a preregistration system for copyrighted works. Since works are generally not formally copyrighted until they are in final form and ready for distribution to the public, civil remedies for the distribution of pre-release works are lacking. This section will give the Register flexibility to determine which classes of works are appropriate for preregistration. The Committee believes that a class of work with only a few instances of infringement prior to authorized commercial distribution do not meet the test of a "history of infringement," but otherwise leaves the decision to the discretion of the Register.

To encourage and ensure that preregistered works are formally registered when they are ready for such a filing, the new 17 U.S.C. § 408(f)(4) created by § 104 limits civil suits in certain circumstances. By its express terms, the prohibition on infringement suits contained in § 408(f)(4) does not apply to suits concerning infringements commencing later than 2 months after first publication of a copyrighted work that had been preregistered with the Copyright Office. Therefore, notwithstanding a failure to meet the deadlines set forth in § 408(f)(4)(A) and (B), a copyright owner of a preregistered work can register his or her work under current law and bring infringement actions for infringements occurring more than 2 months after first publication.

Further, a preregistration of a sound recording does not by itself constitute preregistration of the musical works embodied in the sound recording. Accordingly, a later infringement of a musical work contained in a preregistered sound recording would not be subject to the dismissal provision in § 408(f)(4) based on the preregistration of the sound recording.

Section 105 directs the United States Sentencing Commission to review and update, if appropriate, the sentencing guidelines and policy statements surrounding several intellectual property rights crimes. The Commission has previously and successfully updated the guidelines to account for changes in the manner of intellectual property piracy. The Committee has included § 105 because of the unique harms and aspects related to the infringement of pre-release works. The existing guidelines allow for an increase in the base level offense in certain circumstances.[2] Although the guidelines highlight two reasons for consideration of upward departures, the specific and magnified harms caused by the display, performance, publication, reproduction or distribution of a pre-release work appear to warrant their inclusion as a third reason for upward departure.

Title II of the legislation includes text based upon legislation from the 108th Congress, H.R. 4586, the "Family Movie Act of 2004." The Committee strongly believes that, subject to certain conditions, copyright and trademark law should not be used to limit a parent's right to control what their children watch in the privacy of their own home. A dispute involving this issue is currently being heard in the U.S. District Court for the District of Colorado.[3] Testimony provided by the Register on June 17, 2004, makes clear that some parties to the suit should not face liability for their current actions, while others appear to be in violation of existing copyright law. The "Family Movie Act" clarifies the liability, if any, for the companies that are a party to this case and to other companies not a party to this case that may be interested in providing such services in the future.

Objections to this legislation centered on four issues:

1. A desire to limit the content that could be skipped to a narrow type of content for specific reasons and/or purposes;
2. The for-profit nature of some of the companies that offer such services;

[2] § 2B5.3 (b).
[3] *Huntsman v. Soderbergh,* 180 F.3d 1072 (9th Cir.)

3. The impact upon television advertising in commercial, over-the-air broadcasts;
4. The impact upon the moral rights of the director.

To respect the First Amendment of the Constitution, the "Family Movie Act" is drafted in a content-neutral manner so that its operation and impact do not depend upon whether the content that was made imperceptible contains items that are often viewed as offensive, such as profanity, violence, or sexual acts. This content-neutrality also pertains to content made imperceptible that is rarely, if ever, viewed as offensive. The goal of the legislation has been to give the viewer the ability to make imperceptible limited portions of work that he or she chooses not to see for themselves or their family, whether or not the skipped content is viewed as objectionable by most, many, few, or even one viewer. Efforts to limit the application of the legislation to specific types of content were rejected by the Committee for First Amendment reasons.

The for-profit nature of the entities providing services to the public that the legislation addresses has no bearing on the operation of the immunity from liability. The Committee is unable to discern a credible basis for creating a distinction between the for-profit or non-profit nature of companies that offer services covered by the Act. The vast majority of movies are made by for-profit companies. In addition, many motion picture companies now partner with advertisers to embed advertising within a movie. Television broadcasts of major sporting events often contain embedded advertising that in some cases appear to be part of the stadium hosting the event. Few, if any, disclosures are even made to all of the viewers that this is occurring and that they are seeing a modified version of the actual event. There is of course no option given to viewers to stop these for-profit entities from making such changes.

One difference between this version of the "Family Movie Act" and the version that passed the House in the 108th Congress is the deletion of a reference in § 112 of H.R. 4077 to commercial advertisements and network or station promotional announcements. The Committee is aware of some dispute concerning automated television commercial-skipping devices. A copy of an exchange of letters between the Committee and the Register is attached. The Committee concurs with the Register's determination that this Act has no bearing on either the legality or illegality of such services or any litigation over the issue.

Although the Committee has not adopted a specific percentage or quantity of time test in place of the "limited portions" language, the Committee will rely upon judicial determination for what is a "limited portion" of the work *as a whole.* It would be contrary to the legislation to interpret the "limited portions" test in a manner that would exclude actions that result in making imperceptible of 20 minutes of a particular type of content (violence, sexual scenes, profanity, etc.) from a 100-minute motion picture. The 20-minute exclusion may in fact remove 100 percent of one or more types of such content in a movie, but it represents only 20 percent of the total running time of the movie, easily satisfying the plain meaning of "limited portions."

The plain meaning of S. 167 exempts actions brought under U.S. copyright and trademark law the "making imperceptible . . . of

limited portions of audio or video content" provided no fixed copy is created. The Act does not create an exemption for actions that result in fixed copies of altered works. The Committee is aware of services and companies that create fixed derivative copies of motion pictures and believes that such practices are illegal under the Copyright Act.

The Committee is aware of concerns regarding the legislation's impact upon moral rights, particularly those of movie directors. The Committee had hoped to receive testimony from a representative of the director's community on this issue at one of the Committee hearings on the issue, but no director was willing to testify. The Committee is aware of numerous motion pictures being edited for screen size, content, and time purposes with or without the director's consent so that a motion picture can be displayed on the 4×3 aspect ratios of standard definition televisions, on an airplane with objectionable language removed, and on television channels in the traditional 90 or 120-minute time slots. The Committee sees no difference between the impact upon the moral rights of directors of such modifications and someone wanting to prevent certain content from being displayed on their television.

Finally, the Committee notes the failure of private sector negotiations with respect to one editing service to resolve the *Huntsman v. Soderbergh* civil suit. Although private sector negotiations and out-of-court settlements are an important part of the legal process, they cannot be expected to create a lasting solution when one party to the case is repeatedly burdened with the sole responsibility of traveling to all of the parties in the case to seek a settlement. Had some of the parties to the litigation have been more willing to act in good faith and resolve their differences out of court, the need for this legislation for at least one party would have been eliminated.

Title III of the legislation reauthorizes the National Film Preservation Board ("Board") and makes changes to the structure of the Board. It also reauthorizes the National Film Preservation Foundation ("Foundation") with a corresponding authorization of Congressional funding for the program. The authorization for both had expired previously. The Committee expects the Board and Foundation to continue their effort to preserve older works and hopes that those companies and individuals who work in the motion picture business will be the primary source of donations to the Foundation.

Title IV of the legislation fixes a technical, cross reference error in § 104 of the 1998 "Sonny Bono Copyright Term Extension Act"[4] that inadvertently limited access by libraries and archives to certain categories of works during the last 20 of a term. The Committee has confirmed with the relevant groups that the addition of "(h)" to § 108(i) of Title 17 is appropriate and that it was inadvertently omitted from the 1998 Act. This is important because it limited library and archive access to certain works.

[4] P.L. 105–298.

MATERIALS SUBMITTED FOR THE RECORD

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

November 15, 2004

Dear Chairmen Sensenbrenner and Smith:

I am pleased to respond to your letter of November 4 in which you ask for my views on three questions relating to the proposed Family Movie Act and the automated skipping of television commercials that appear during breaks in performances of television programs. I will respond to your questions in the order in which they were asked.

1. Does the Family Movie Act contained in Section 12 of H.R. 4077 as reported by the Committee on September 8, 2004 provide for a limitation of liability for automated commercial skipping devices?

The short answer is "No."

Although it is my understanding that the primary purpose of the Family Movie Act is to address the skipping and muting of limited portions of motion pictures released in the form of DVDs or videocassettes, it would also apply to motion pictures that are transmitted on broadcast or cable television. A "motion picture" could be a feature length motion picture that was first released for exhibition in theaters,[1] or a made-for-television movie, or an episode of a television series, or even a television commercial. However, although the Family Movie Act would exempt from liability the making imperceptible of limited portions of a motion picture, and although it would exempt from liability the making imperceptible of limited portions of a television commercial, I do not believe that it can reasonably be read to exempt skipping past commercials that appear before, after, or during breaks from the performance of a movie or other television program.

The version of the Family Movie Act that was reported by the Committee as Section 12 of H.R. 4077 provides, in pertinent part, that the following are not infringements of copyright:

> (A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use

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[1] To distinguish such a motion picture from other works that fall into the statutory definition of a "motion picture" I will refer to such feature motion pictures as "movies" in the remainder of this letter.

> in a household, by means of consumer equipment or services that--
>
> (i) are operated by an individual in that household;
> (ii) serve only such household; and
> (iii) do not create a fixed copy of the altered version; and
>
> (B) the use of technology to make such audio or video content imperceptible, that does not create a fixed copy of the altered version.

The provision exempts from liability the activity of making imperceptible – *i.e.*, skipping past or muting – of *limited portions* of the audio or video content of a *motion picture* in the course of private home viewing when certain circumstances are met. It also exempts the use of technology to accomplish such acts when no fixed copy of the altered version of the motion picture is made.

In order for the exemption to be construed as extending to the "making imperceptible" of a television commercial, one of two things must be true:

> (1) the commercial is a "motion picture" and "limited portions" of the commercial are made imperceptible; or
>
> (2) the commercial is part of the "motion picture" that is being performed; therefore, when the commercial is skipped, it constitutes the "making imperceptible" of a "limited portion" of the motion picture.

A television commercial certainly qualifies as a "motion picture" as defined in the Copyright Act. 17 U.S.C. § 101 defines "motion pictures" as:

> "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."

That definition extends beyond what one might ordinarily consider to be a motion picture. It includes not only a feature length motion picture that was first released for exhibition in theaters, or made-for-television movies, but also episodes of television series and even television commercials. In each case, there is a *series* of *related images* which, when *shown in succession,* impart an *impression of motion.*

Therefore, the Family Movie Act as reported by the Committee would exempt from liability the making imperceptible of limited portions of a television commercial, but it would not exempt the making imperceptible of the entire commercial. I can think of no reason why this result should be a matter of particular concern to broadcasters, advertisers or motion picture studios. As I understand it, the concern about commercial skipping relates to technologies that, in the process of performing a recording or transmission of a motion picture, skip past commercials in their entirety, thereby threatening the economic model that supports free over-the-air broadcast television. But the Family Movie Act would not exempt from liability a technology that skips past an entire commercial; the exemption extends only to skipping past "limited portions" of a motion picture.

It is my understanding that the proponents of a provision that would exclude commercial skipping from the scope of the exemption are more concerned with the second scenario: the theory that a commercial that is performed before, after, or in the middle of the performance of a movie or a television program is somehow considered to be part of the "motion picture" *(i.e.*, the movie or television program) that is being performed. However, I do not believe that the Family Movie Act could reasonably be read to exempt from liability the making imperceptible of the entire commercial on the theory that it is a part of the "motion picture" that is being performed before and/or after the commercial.

The requirement that a "motion picture" consist of a "series" of "related images" precludes an interpretation that would include, as part of a motion picture which happens to be performed for viewing in the home, the commercial advertisements that are performed before, after, or during breaks from the performance of the movie itself.

Related images. The images in a television commercial are not in any way related to the images in the movie, situation comedy, etc. The only relationship between a television commercial and the program before, after or during which it is broadcast is that (1) one appears just before, after, or during a break from the performance of the other, and (2) the revenue generated by one (the commercial) pays for the broadcast of the other the (the movie, situation comedy, etc.). It is hardly credible to argue that such a "relationship" makes the images in the commercial "related" to the images in the movie, sitcom, etc. See *WGN Continental Broadcasting Co. v. United Video,* 693 F.2d 622, 629 (7th Cir. 1982) (holding that teletext transmitted simultaneously with a television news program is "related" for purposes of the definition of an "audiovisual work,"[2] "provided

[2] As the statutory definition of "motion pictures" quoted above states, motion pictures constitute a species of audiovisual work. Moreover, both the definition of "audiovisual works" and the definition of "motion pictures" use the identical "series of related images" language.

the teletext is intended to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which that news is broadcast, *and as an integral part of the news program.*"). Again, it is hardly credible to argue that a television commercial that happens to be broadcast before, after, or during a break from the broadcast of a movie, sitcom, etc. is an *integral part* of that movie, sitcom, etc. Indeed, common sense and experience tell us that each time that a movie or an episode of a television series is broadcast, it is unlikely that the identical commercials will be broadcast at the identical intervals during the performance of the movie or episode. The commercial is not in any way a part of the motion picture and its images are not related to those of the motion picture.

Series. A "series of related images" "may refer to any set of images displayed as some kind of unit." *Midway Mfg. Co. v. Arctic International,* 704 F.2d 1009, 1011 (7th Cir. 1983). While the *Midway* court considered this to be a "broad" construction of "series of related images," it appears to be too narrow to encompass a "series" that includes both the images in a television commercial and the images in a movie, situation comedy, or other program that precede or succeed (or both) those in the commercial. In other words, the commercial and the actual television program (movie, sitcom, etc.) can hardly be described as a "unit." Again, the case law is simply an application of common sense.

Moreover, the television commercials are clearly works that are distinct and separate from the movie. The commercial was not filmed or even conceived as part of the movie; it was created at a separate time and separate place from the movie, and by a separate person. Almost always, it will have been created to promote the sale of a particular product or service that is unrelated to the movie. It will have a different author and a different copyright owner, which means that it cannot be considered to be the same work as the motion picture that is performed before or after the commercial. Typically, it is broadcast any number of occasions before, after or during breaks from the broadcast of any number of television programs. It defies common sense as well as the statutory definitions to consider the commercial to be a part of – rather than distinct from – the motion picture that happens to be broadcast before or after (or both) the commercial.

In short, there is no reasonable argument that a television commercial can be considered part of the motion picture before, after, or during a break from which it is broadcast. Nor is there any reasonable argument that the Family Movie Act's exemption for "making imperceptible ... of limited portions of audio or video content of a motion picture" could be construed as exempting the skipping of entire television commercials. Any fears that the version of the Family Movie Act that was reported by the Committee on September 8 could be construed as exempting technology that skips past television commercials is unreasonable.

2. Does the Family Movie Act contained in Section 12 of H.R. 4077 as passed by the House on September 28, 2004 provide for a limitation of liability for automated commercial skipping devices?

Again, the short answer is "No."

The version of the Family Movie Act that passed the House as part of H.R. 4077 includes language that was added to allay the concerns of those who feared that the earlier language might be construed as including within the scope of the exemption the making imperceptible of commercials that are performed before, after or during the performance of a motion picture. Specifically, the following condition was added:

> (B) no changes, deletions or additions are made by such computer program or other technology to commercial advertisements, or to network or station promotional announcements, that would otherwise be performed or displayed before, during or after the performance of the motion picture.

That language makes explicit what I believe was already clear in the previous version of the bill: that the exemption does not extend to the deletion of (or, for that matter, changes or additions to) commercials that are performed before, during or after the performance of a motion picture.

3. What savings clause or other legislative language, if any, would you suggest is necessary to assure interested parties that the Act, in either version, does not imply and cannot be read to imply Congressional judgment or views on the automated commercial skipping issue?

I do not believe that a savings clause is necessary, but I also believe that it would do no harm. If Congress wishes to make clear that it is taking no position in this legislation on whether the automated skipping of commercials can be an infringement of copyright (an issue on which I express no views at this time), I would suggest that it add the following language.

> Nothing in this Section shall be construed as implying whether, but for the operation of this Section, the conduct addressed in this Section would be an infringement of copyright.

It would be my recommendation that such language not be codified as part of 17 U.S.C. § 110, or as any other part of title 17, but that it be enacted as uncodified statutory text.

In addition to making clear that this legislation is not intended to affect whether automated commercial skipping is unlawful, it would also make clear that it is not necessarily the view of Congress that the primary conduct that is the focus of the Family Movie Act – the making imperceptible of limited portions of a motion picture in the context of private home viewing – would be unlawful but for the passage of this legislation. As I testified before the Subcommittee on Courts, the Internet, and Intellectual Property on June 17, I do not believe that such conduct is unlawful under current law, and one of my concerns about the Family Movie Act is that it could be construed as an expression of the sense of Congress that if the Family Movie Act were not enacted, that conduct would be unlawful.

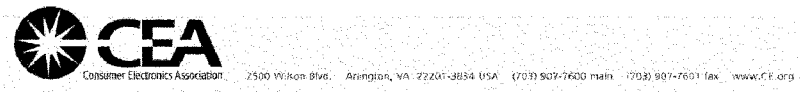
If you require any further assistance in connection with this or any other matter, please do not hesitate to call upon me.

Sincerely,

Marybeth Peters
Register of Copyrights

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet,
and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515



March 9, 2005

Via Fax to (202) 225-3190
The Honorable Jim Sensenbrenner Jr.
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Via Fax to (202) 225-0072
The Honorable John Conyers Jr.
Ranking Minority Member
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Sensenbrenner and Congressman Conyers:

I am writing to express CEA's views on intellectual property legislation currently before this committee.

As you know, we represent an intellectual property-based industry. We have a strong interest in the responsible enforcement of intellectual property laws, and we stand firmly against commercial piracy.

Wherever possible, our industry seeks to join with the content community to strike a balance between protecting the rights of copyright holders, and preserving the ability of America's innovators to bring new and ingenious products to market for the ebefit of all Americans.

In the 108th Congress, CEA was pleased to work closely with committee staff and content industry representatives on the legislation that now makes up S. 167 (the Family Entertainment and Copyright Act of 2005). We have no objection to the passage of this legislation in its current form.

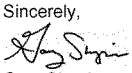
At the same time, It is my hope that you and this committee share our commitment to protect the *Betamax* principles set forth by the Supreme Court in the case of *Universal Studios v. Sony*.

The *Betamax* standard is the foundation of America's explosive technological growth over the past twenty years. *Betamax* has made possible an unprecedented transformation in the way Americans express themselves, communicate, create, and experience the world.

For two decades, *Betamax* has brought about enormous new revenues for innovators and the content community, contributed billions of dollars to the U.S. economy, and generated enormous benefits to society. I look forward to working with you to ensure that these benefits endure.

Thank you for your time and consideration.

Sincerely,



Gary Shapiro
President and CEO

Cc: Members of the Committee on the Judiciary

March 2, 2005

The Honorable Lamar Smith, Chairman
Subcommittee on the Courts, the Internet, and Intellectual Property
Committee on Judiciary
B-351A Rayburn House Office Building
Washington, D.C. 20515-5741

Dear Chairman Smith:

We write to express our support for the Family and Entertainment Copyright Act of 2005, S. 167. Title III's reauthorization of the National Film Preservation Board and the National Film Preservation Foundation will help ensure the preservation of our national film heritage. Title IV will assist libraries to engage in preservation, scholarship and research of musical works, motion pictures, and other audiovisual works during the last 20 years of their copyright term. Title II reflects a careful balancing of the interests of copyright owners, consumers, and technology companies to enable consumers to skip over offensive material in entertainment content. Finally, we appreciate the amendments made to Title I to address concerns raised by libraries and educational institutions concerning the breadth of the legislation when it was first introduced in the last Congress.

We look forward to working with you and your staff on this and other copyright and intellectual property legislation. Please let us know if there is additional information that we can provide.

Sincerely,

Robert L. Oakley

Robert Oakley
American Association of Law Libraries

Miriam Nisbet
American Library Association

Prudence S. Adler
Association of Research Libraries

Carla Funk
Medical Library Association

Doug Newcomb
Special Libraries Association

American Medical Association
Physicians dedicated to the health of America

Michael D. Maves, MD, MBA
Executive Vice President, CEO

515 North State Street
Chicago, Illinois 60610

312 464-5000
312 464-4184 Fax

March 8, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Chairman:

I am writing to express the support of the American Medical Association (AMA) for Title II of S. 167, the "Family Movie Act of 2005." Physician and student members of the AMA have been increasingly concerned that exposure to violence in entertainment media, including television, movies, music and video games, is a significant risk to the physical and mental health of children and adolescents.

Violence in all forms has become a major medical and public health epidemic in the United States. The AMA strongly opposes, and has actively condemned and worked to reduce violence in our society, including violence portrayed in entertainment media. The AMA has long been concerned about the prevalent depiction of violent behavior on television and in movies, especially in terms of its "role-modeling" capacity to potentially promote "real-world" violence. A vast body of research has concluded that viewing "entertainment" violence can lead to increased aggression in attitudes, values, and behavior—particularly in children.

As part of its strategy to reduce violence, the AMA has supported past efforts by network broadcasters to adopt parental advisories prior to airing programs that are unfit for children, strong and effective television and movie rating systems, and "V-Chip" technology that can screen out violent programming. New technology, such as DVD-filtering devices, is now available and is a logical extension of V-Chip technology. This technology can empower parents with the means to exercise their appropriate role and responsibility in determining the types of entertainment media to which their children are exposed.

The "Family Movie Act of 2005" would protect companies that produce movie-filtering technology from liability for copyright infringement. Such protection would enable Americans to have additional tools to filter out at least some of the increasingly graphic violence in movies while in the privacy of their own homes. As we did last year, we are pleased to support the "Family Movie Act" and urge its approval during mark-up by the House Judiciary Committee.

Sincerely,

Michael D. Maves, MD, MBA

cc: Members of the Committee

HEARINGS

The Committee's Subcommittee on Courts, the Internet, and Intellectual Property held a hearing in the 108th Congress on H.R. 2517 on July 17, 2003, and received testimony from one witness on the issues addressed in Title I of S. 167. The Subcommittee held an oversight hearing in the 108th Congress on the issues addressed in Title II of S. 167 on May 20, 2004, with testimony received from five witnesses representing five organizations. The Subcommittee subsequently held a legislative hearing in the 108th Congress on a very similar version of Title II of S. 167. Testimony was received from four witnesses representing four organizations.

COMMITTEE CONSIDERATION

On March 3, 2005, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill S. 167, by a voice vote, a quorum being present. On March 9, 2005, the Committee on the Judiciary met in open session and ordered favorably reported the bill S. 167 without an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the Committee consideration of S. 167.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, S. 167, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 14, 2005.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 167, the "Family Entertainment and Copyright Act of 2005."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for Federal costs), who can be reached at 226–2860, and Page Piper/Bach (for private-sector mandates), who can be reached at 226–2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

S. 167—Family Entertainment and Copyright Act of 2005.

SUMMARY

S. 167 would make several changes to current law regarding copyrighted works. The bill would specifically authorize the appropriation of $530,000 each year over the 2005–2009 period to the Library of Congress for preserving films in the Library's collection. Assuming appropriation of the specified amounts, CBO estimates that implementing the bill would have no significant cost in 2005 and would cost nearly $3 million over the 2005–2009 period. Enacting the bill would not have a significant effect on revenues or direct spending.

S. 167 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments. S. 167 would impose private-sector mandates as defined in UMRA. CBO estimates that the direct cost of those mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($123 million in 2005, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of S. 167 is shown in the following table. For this estimate, CBO assumes that the bill will be enacted in fiscal year 2005. CBO assumes that the amounts authorized by the bill will be appropriated for each fiscal year and that outlays will follow the historical rate of spending for these activities. The costs of this legislation fall within budget function 370 (commerce and housing credit).

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009	2010
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Authorization Level	1	1	1	1	1	0
Estimated Outlays	*	1	1	1	1	0

BASIS OF ESTIMATE

S. 167 would make several changes to laws affecting copyrighted materials. Assuming the appropriation of the specified amounts, CBO estimates that implementing the act would not have a significant cost in 2005 and would cost nearly $3 million over the 2005–2009 period. Enacting this legislation would not have a significant effect on direct spending or revenues.

Spending Subject to Appropriation

Filtering Technology. Title II of S. 167 would specify that technology used to filter certain material out of movies for private viewing would not constitute a violation of copyright or trademark law. CBO estimates that implementing title II would have no effect on Federal spending.

Film Preservation. Title III would authorize the appropriation of nearly $3 million over the 2005–2009 period to the Library of Congress for preserving films in the Library's collection. It also would make technical changes to current law regarding film preservation. CBO estimates that implementing title III would not have a significant cost in 2005 and would cost about $3 million over the 2005–2009 period.

Revenues and Direct Spending

Title I would establish new Federal crimes for the unauthorized recording of motion pictures in movie theaters or other venues and would provide for increased penalties for other acts relating to copyright infringement. Because those prosecuted and convicted under the act could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as revenues (i.e., governmental receipts), which are deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would be less than $500,000 annually because of the relatively small number of cases likely to be affected.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 167 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of States, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

S. 167 would impose two private-sector mandates as defined in UMRA. CBO estimates that the direct cost of those mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($123 million in 2005, adjusted annually for inflation).

First, the bill would impose a private-sector mandate on copyright owners. Section 202 would limit the right of copyright owners to collect compensation under copyright law from persons using or manufacturing a technology that enables making limited changes to a motion picture for a private home viewing. According to testimony from the Patent and Trademark Office and other sources, no such compensation is currently received by copyright owners. Therefore, CBO estimates that the direct cost of the mandate, measured as net income forgone, would be small or zero.

Second, section 202 would impose a private-sector mandate on manufacturers, licensees, and licensors of technology (manufactured 6 months or more after the bill's enactment) that enables the making of limited portions of audio or video content of a motion picture imperceptible. Such manufacturers, licensees, or licensors would be required to ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. Complying with the mandate would exempt such manufacturers, licensees, or licensors from liability under section 32 of the Trademark Act of 1946. The direct cost of the mandate on those private-sector entities would be the total cost of providing the notice less the direct savings achieved by limiting their liability. CBO has no basis for determining the direct savings for the exemption from trademark liability. However, according to government and other sources, the technology to provide the required notice is readily available and is currently used by some manufacturers. Thus, CBO expects that the direct cost to comply with the mandate, if any, would be minimal.

ESTIMATE PREPARED BY:

Federal Costs: Melissa E. Zimmerman and Mark Grabowicz (226–2860)
Impact on State, Local, and Tribal Governments: Theresa Gullo (225–3220)
Impact on the Private Sector: Paige Piper/Bach (226–2940)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, S. 167 will assist the Department of Justice in its efforts to prosecute intellectual property theft; clarify the legal status of certain services and technologies that enable individuals to skip and mute content on certain works in the privacy of their own home; reauthorize the National Film Preservation Board and Foundation at the Library of Congress; and extend the availability of copyrighted works to libraries and archives.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, Section 8, Clause 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. This section states that the legislation may be cited as the "Family Entertainment and Copyright Act of 2005."

Title I. The Artists' Rights and Theft Prevention Act of 2005. Title I contains two primary components: the first creates new criminal penalties for those who camcord motion pictures in motion picture exhibition theaters; the second creates new civil and criminal causes of action for the willful distribution of works being prepared for commercial distribution.

Subsection (a) of the new § 2319B created by Title I of S. 167 sets forth the substantive elements of the offense. Under this subsection, a person violates the statute when he or she, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device in a motion picture exhibition facility to transmit or make a copy of a motion picture or other audiovisual work protected under Title 17 or any part thereof. The legislation creates a new definition for the term "motion picture exhibition facility." Other terms used in the legislation are defined in Section 101 of Title 17.

Subsection (d) creates an immunity from liability for theater owners and associated individuals for their good faith efforts to reasonably detain someone they suspect of violating this Section in their theater(s). This provision is modeled upon numerous shopkeeper privilege statutes that exist in state and local laws.

Subsection (f) clarifies that States may regulate the use of audiovisual recording devices in specific locations through the use of their police powers without impermissibly interfering with Federal copyright policy. The Committee is aware that several states have enacted legislation with proscriptions similar to those in the Federal law against using or attempting to use the recording functions of a camcorder or similar device without the express consent of a theater owner.[5]

Preemption of State criminal statutes may occur under either § 301 of Title 17 where the gravamen of the state cause of action contains an element in addition to an allegation of wrongful copying or under the doctrine of conflict preemption. The Committee believes that statutes such as those above are qualitatively different for purposes of the "extra element" statutory preemption test under § 301. They contain the extra elements of operation or attempted operation of a device, which does not involve copying at all and, perhaps more importantly, the entry onto property to perform an act that is both unauthorized by the real property owner and harmful to the lawful use of that property. Nonetheless, the purpose of this section is to make it unequivocally clear that neither § 301 nor the non-statutory doctrine of conflict preemption precludes the en-

[5] *See, e.g.,* Ariz. Rev. Stat.13-3723(a); Cal. Penal Code 653z (a). Other states have added the copyright owner to the permission chain. *See, e.g.,* Ohio Rev. Code Ann. 2913.07(A)(1) (requiring consent of the licensor).

forcement of such statutes on the basis that they interfere with the express or implicit policies of the Copyright Act.

Section 105 directs the United States Sentencing Commission to review and update, if appropriate, the sentencing guidelines and policy statements surrounding several intellectual property rights crimes.

Title II. The Family Movie Act. Section 202(a) of the legislation creates a new subsection § 110 (11) of Title 17. This new subsection ensures that U.S. copyright law does not prohibit sanctions the use of any filtering service or technology that mutes or skips content, provided the service or technology:

1. is confined to private, in-home use;
2. for the household of the purchasing consumer only; and
3. does not create a fixed copy of the alternate version.

Section 202(b) of the legislation clarifies existing U.S. trademark law to ensure that it cannot be interpreted to proscribe the operation of services identified in § 202(a) so long as they display a clear and conspicuous notice that the altered version is not the performance intended by the director or copyright holder of the motion picture.

The Committee believes that an on-screen disclaimer in large font at the beginning of a performance of a particular work that is displayed for a length of time suitable for the average viewer to read the notice is sufficient. Such notice would be similar to the FBI anti-piracy warnings shown at the beginning of most major motion pictures. This requirement begins 180 days after the legislation becomes law. Since the manufacturer of a physical device complying with the requirements maintains control over the device before the retail purchase point, consumer electronics manufacturers are the most likely point of inclusion of such notices.

Title III. National Film Preservation Act of 2005. Title III reauthorizes the National Film Preservation Board and Foundation and makes several changes to the operation of each. Section 312(a) also authorizes appropriations not to exceed $530,000 in each of the fiscal years 2005 through 2009.

Title IV. Preservation of Orphan Works Act. Title IV inserts a missing cross reference to 17 U.S.C. § 108(h) in 17 U.S.C. § 108(i). The inadvertent omission of the cross reference limited libraries and archives access to certain works during the last 20 years of term. This was not the Committee's intent when it passed the "Sonny Bono Copyright Term Extension Act of 1998."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 113—STOLEN PROPERTY

Sec.
2311. Definitions
* * * * * * *
2319B. Unauthorized recording of motion pictures in a motion picture exhibition facility.
* * * * * * *

§ 2319. Criminal infringement of a copyright

(a) [Whoever] *Any person who* violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsections (b) [and (c) of this section]*, (c), and (d)* and such penalties shall be in addition to any other provisions of title 17 or any other law.

(b) Any person who commits an offense under [section 506(a)(1)] *section 506(a)(1)(A)* of title 17—

(1) * * *

* * * * * * *

(c) Any person who commits an offense under [section 506(a)(2) of title 17, United States Code] *section 506(a)(1)(B) of title 17—*

(1) * * *

* * * * * * *

(d) Any person who commits an offense under section 506(a)(1)(C) of title 17—

(1) shall be imprisoned not more than 3 years, fined under this title, or both;

(2) shall be imprisoned not more than 5 years, fined under this title, or both, if the offense was committed for purposes of commercial advantage or private financial gain;

(3) shall be imprisoned not more than 6 years, fined under this title, or both, if the offense is a second or subsequent offense; and

(4) shall be imprisoned not more than 10 years, fined under this title, or both, if the offense is a second or subsequent offense under paragraph (2).

[(d)] *(e)*(1) * * *

* * * * * * *

[(e)] *(f)* As used in this section—

(1) the terms "phonorecord" and "copies" have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; [and]

(2) the terms "reproduction" and "distribution" refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 122, of title 17[.]*;*

(3) the term "financial gain" has the meaning given the term in section 101 of title 17; and

(4) the term "work being prepared for commercial distribution" has the meaning given the term in section 506(a) of title 17.

* * * * * * *

§ 2319B. Unauthorized recording of Motion pictures in a Motion picture exhibition facility

(a) OFFENSE.—Any person who, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof, from a performance of such work in a motion picture exhibition facility, shall—

(1) be imprisoned for not more than 3 years, fined under this title, or both; or

(2) if the offense is a second or subsequent offense, be imprisoned for no more than 6 years, fined under this title, or both.

The possession by a person of an audiovisual recording device in a motion picture exhibition facility may be considered as evidence in any proceeding to determine whether that person committed an offense under this subsection, but shall not, by itself, be sufficient to support a conviction of that person for such offense.

(b) FORFEITURE AND DESTRUCTION.—When a person is convicted of a violation of subsection (a), the court in its judgment of conviction shall, in addition to any penalty provided, order the forfeiture and destruction or other disposition of all unauthorized copies of motion pictures or other audiovisual works protected under title 17, or parts thereof, and any audiovisual recording devices or other equipment used in connection with the offense.

(c) AUTHORIZED ACTIVITIES.—This section does not prevent any lawfully authorized investigative, protective, or intelligence activity by an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or by a person acting under a contract with the United States, a State, or a political subdivision of a State.

(d) IMMUNITY FOR THEATERS.—With reasonable cause, the owner or lessee of a motion picture exhibition facility where a motion picture or other audiovisual work is being exhibited, the authorized agent or employee of such owner or lessee, the licensor of the motion picture or other audiovisual work being exhibited, or the agent or employee of such licensor—

(1) may detain, in a reasonable manner and for a reasonable time, any person suspected of a violation of this section with respect to that motion picture or audiovisual work for the purpose of questioning or summoning a law enforcement officer; and

(2) shall not be held liable in any civil or criminal action arising out of a detention under paragraph (1).

(e) VICTIM IMPACT STATEMENT.—

(1) IN GENERAL.—During the preparation of the presentence report under rule 32(c) of the Federal Rules of Criminal Procedure, victims of an offense under this section shall be permitted to submit to the probation officer a victim impact statement that identifies the victim of the offense and the extent and scope

of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

(2) CONTENTS.—A victim impact statement submitted under this subsection shall include—

(A) producers and sellers of legitimate works affected by conduct involved in the offense;

(B) holders of intellectual property rights in the works described in subparagraph (A); and

(C) the legal representatives of such producers, sellers, and holders.

(f) STATE LAW NOT PREEMPTED.—Nothing in this section may be construed to annul or limit any rights or remedies under the laws of any State.

(g) DEFINITIONS.—In this section, the following definitions shall apply:

(1) TITLE 17 DEFINITIONS.—The terms "audiovisual work", "copy", "copyright owner", "motion picture", "motion picture exhibition facility", and "transmit" have, respectively, the meanings given those terms in section 101 of title 17.

(2) AUDIOVISUAL RECORDING DEVICE.—The term "audiovisual recording device" means a digital or analog photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a copyrighted motion picture or other audiovisual work, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.

* * * * * * *

TITLE 17, UNITED STATES CODE

* * * * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * * * *

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

* * * * * * *

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. *The term "'motion picture exhibition facility'" means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled*

group of viewers outside of a normal circle of a family and its social acquaintances.

* * * * * * *

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) * * *

* * * * * * *

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections **[**(b) and (c)**]** *(b), (c), and (h)*, or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

* * * * * * *

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) * * *

* * * * * * *

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), Provided, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization; **[**and**]**

(10) notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose**[**.**]***; and*

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or

transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

* * * * * * *

For purposes of paragraph (11), the term "making imperceptible" does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.

* * * * * * *

CHAPTER 4—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

* * * * * * *

§ 408. Copyright registration in general

(a) * * *

* * * * * * *

(f) PREREGISTRATION OF WORKS BEING PREPARED FOR COMMERCIAL DISTRIBUTION.—

(1) RULEMAKING.—Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

(2) CLASS OF WORKS.—The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

(3) APPLICATION FOR REGISTRATION.—Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office—

(A) an application for registration of the work;

(B) a deposit; and

(C) the applicable fee.

(4) EFFECT OF UNTIMELY APPLICATION.—An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of—

(A) 3 months after the first publication of the work; or

(B) 1 month after the copyright owner has learned of the infringement.

* * * * * * *

§ 411. Registration and infringement actions

(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until *preregistration or* registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

* * * * * * *

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a)*, an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement,* or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) * * *

* * * * * * *

CHAPTER 5—COPYRIGHT INFRINGEMENT AND REMEDIES

* * * * * * *

§ 506. Criminal offenses

[(a) CRIMINAL INFRINGEMENT.—Any person who infringes a copyright willfully either—

[(1) for purposes of commercial advantage or private financial gain, or

[(2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000,

shall be punished as provided under section 2319 of title 18, United States Code. For purposes of this subsection, evidence of reproduc-

tion or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.]

(a) CRIMINAL INFRINGEMENT.—

(1) IN GENERAL.—Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

(2) EVIDENCE.—For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

(3) DEFINITION.—In this subsection, the term "work being prepared for commercial distribution" means—

(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution—

(i) the copyright owner has a reasonable expectation of commercial distribution; and

(ii) the copies or phonorecords of the work have not been commercially distributed; or

(B) a motion picture, if, at the time of unauthorized distribution, the motion picture—

(i) has been made available for viewing in a motion picture exhibition facility; and

(ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.

* * * * * * *

SECTION 32 OF THE TRADEMARK ACT OF 1946

SEC. 32. (1) * * *

* * * * * * *

(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act. This subparagraph does not preclude liability, nor shall it be construed to restrict the defenses or limitations on rights granted under this Act, of a person for conduct not described in paragraph (11) of section 110 of title 17, United States Code, even

if that person also engages in conduct described in paragraph (11) of section 110 of such title.

(B) A manufacturer, licensee, or licensor of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible as described in subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this Act, if such manufacturer, licensee, or licensor ensures that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. The limitations on liability in subparagraph (A) and this subparagraph shall not apply to a manufacturer, licensee, or licensor of technology that fails to comply with this paragraph.

(C) The requirement under subparagraph (B) to provide notice shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2005.

(D) Any failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption under subparagraphs (A) and (B) shall not be construed to create an inference that any such party that engages in conduct described in paragraph (11) of section 110 of title 17, United States Code, is liable for trademark infringement by reason of such conduct.

NATIONAL FILM PRESERVATION ACT OF 1996

* * * * * * *

SEC. 103. DUTIES OF THE LIBRARIAN OF CONGRESS.

(a) * * *

(b) USE OF SEAL.—The seal provided under subsection (a)(3) may only be used on ⟦film copies⟧ *film or other approved copies* of the Registry version of a film. Such seal may be used only after the Librarian has given approval to those persons seeking to apply the seal in accordance with the guidelines under subsection (a)(3). In the case of ⟦copyrighted⟧ *copyrighted, mass distributed, broadcast, or published* works, only the copyright owner or an authorized licensee of the copyright owner may place or authorize the placement of the seal on any ⟦film copy⟧ *film or other approved copy* of a Registry version of a film selected for inclusion in the National Film Registry, and the Librarian may place the seal on any ⟦film copy⟧ *film or other approved copy* of the Registry version of any film that is maintained in the National Film Registry Collection in the Library of Congress. Anyone authorized to place the seal on any ⟦film copy⟧ *film or other approved copy* of any Registry version of a film may accompany such seal with the following language: "This film was selected for inclusion in the National Film Registry by the National Film Preservation Board of the Library of Congress because of its cultural, historical, or aesthetic significance.".

(c) COORDINATION OF PROGRAM WITH OTHER COLLECTION, PRESERVATION, AND ACCESSIBILITY ACTIVITIES.—In carrying out the comprehensive national film preservation program for motion pictures established under the National Film Preservation Act of 1992,

the Librarian, in consultation with the Board established pursuant to section 104, shall—

(1) carry out activities to make films included in the National Film registry more broadly accessible for research and educational purposes, and to generate public awareness and support of the Registry and the comprehensive national film preservation program;

(2) review the comprehensive national film preservation plan, and amend it to the extent necessary to ensure that it addresses technological advances in the preservation and storage of, and access to film collections in multiple formats; and

(3) wherever possible, undertake expanded initiatives to ensure the preservation of the moving image heritage of the United States, including film, videotape, television, and born digital moving image formats, by supporting the work of the National Audio-Visual Conservation Center of the Library of Congress, and other appropriate nonprofit archival and preservation organizations.

SEC. 104. NATIONAL FILM PRESERVATION BOARD.

(a) NUMBER AND APPOINTMENT.—

(1) MEMBERS.—The Librarian shall establish in the Library of Congress a National Film Preservation Board to be comprised of ⟦20⟧ *22* members, who shall be selected by the Librarian in accordance with this section. Subject to subparagraphs (C) and (N), the Librarian shall request each organization listed in subparagraphs (A) through (Q) to submit a list of three candidates qualified to serve as a member of the Board. Except for the members-at-large appointed under subparagraph (2), the Librarian shall appoint one member from each such list submitted by such organizations, and shall designate from that list an alternate who may attend at Board expense those meetings to which the individual appointed to the Board cannot attend. The organizations are the following:

(A) * * *

* * * * * * *

(2) MEMBERS-AT-LARGE.—In addition to the members appointed under paragraph (1), the Librarian shall appoint up to ⟦three⟧ *5* members-at-large. The Librarian shall also select an alternate for each member at-large, who may attend at Board expense those meetings which the member at-large cannot attend.

* * * * * * *

(d) QUORUM.—⟦11⟧ *12* members of the Board shall constitute a quorum but a lesser number may hold hearings.

⟦(e) REIMBURSEMENT OF EXPENSES.—Members of the Board shall serve without pay, but may be reimbursed for the actual and necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Board.⟧

(e) REIMBURSEMENT OF EXPENSES.—Members of the Board shall serve without pay, but may receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

* * * * * * *

SEC. 106. NATIONAL FILM REGISTRY COLLECTION OF THE LIBRARY OF CONGRESS.

(a) * * *

* * * * * * *

(e) NATIONAL AUDIO-VISUAL CONSERVATION CENTER.—The Librarian shall utilize the National Audio-Visual Conservation Center of the Library of Congress at Culpeper, Virginia, to ensure that preserved films included in the National Film Registry are stored in a proper manner, and disseminated to researchers, scholars, and the public as may be appropriate in accordance with—

(1) title 17, United States Code; and

(2) the terms of any agreements between the Librarian and persons who hold copyrights to such audiovisual works.

SEC. 107. SEAL OF THE NATIONAL FILM REGISTRY.

(a) USE OF THE SEAL.—

(1) PROHIBITION ON DISTRIBUTION AND EXHIBITION.—No person shall knowingly distribute or exhibit to the public a version of a film or any copy *in any format* of a film which bears the seal described in section 103(a)(3) if such film—

(A) * * *

* * * * * * *

(2) PROHIBITION ON PROMOTION.—No person shall knowingly use the seal described in section 103(a)(3) to promote any version of a film [or film copy] *in any format* other than a Registry version.

* * * * * * *

SEC. 113. EFFECTIVE DATE.

The provisions of this title shall be effective for [7] *13* years beginning on the date of the enactment of this Act. The provisions of this title shall apply to any copy of any film, including those copies of films selected for inclusion in the National Film Registry under the National Film Preservation Act of 1988 and the National Film Preservation Act of 1992, except that any film so selected under either Act shall be deemed to have been selected for the National Film Registry under this title.

* * * * * * *

TITLE 36, UNITED STATES CODE

* * * * * * *

SUBTITLE II—PATRIOTIC AND NATIONAL ORGANIZATIONS

* * * * * * *

PART B—ORGANIZATIONS

* * * * * * *

CHAPTER 1517—NATIONAL FILM PRESERVATION FOUNDATION

* * * * * * *

§ 151703. Board of directors

(a) * * *

(b) MEMBERS AND APPOINTMENT.—(1) * * *

(2)(A) The board consists of [nine] *12* directors.

* * * * * * *

(4) The terms of office of the directors are 4 years. [An individual may not serve more than two consecutive terms.] *There shall be no limit to the number of terms to which any individual may be appointed.*

* * * * * * *

§ 151705. Powers

(a) * * *

(b) POWERS AS TRUSTEE.—To carry out its purposes, the corporation has the usual powers of a corporation acting as a trustee in the [District of Columbia] *the jurisdiction in which the principal office of the corporation is located*, including the power—

(1) * * *

* * * * * * *

§ 151706. Principal office

The principal office of the corporation shall be in the District of Columbia*, or another place as determined by the board of directors*. However, the corporation may conduct business throughout the States, territories, and possessions of the United States.

* * * * * * *

§ 151711. Authorization of appropriations

[(a) AUTHORIZATION.—There are authorized to be appropriated to the Library of Congress amounts necessary to carry out this chapter, not to exceed $250,000 for each of the fiscal years ending September 30, 2000–2005. These amounts are to be made available to the corporation to match private contributions (whether in currency, services, or property) made to the corporation by private persons and State and local governments.

[(b) LIMITATION RELATED TO ADMINISTRATIVE EXPENSES.—Amounts authorized under this section may not be used by the corporation for administrative expenses of the corporation, including salaries, travel, transportation, and overhead expenses.]

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Library of Congress amounts necessary to carry out this chapter, not to exceed $530,000 for each of the fiscal years 2005 through 2009. These amounts are to be made available to the corporation to match any private contributions (whether in currency, services, or property) made to the corporation by private persons and State and local governments.

(b) LIMITATION RELATED TO ADMINISTRATIVE EXPENSES.—Amounts authorized under this section may not be used by the cor-

poration for management and general or fundraising expenses as reported to the Internal Revenue Service as part of an annual information return required under the Internal Revenue Code of 1986.

* * * * * * *

COMMITTEE JURISDICTION LETTERS

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GEORGE SHEVLIN,
MINORITY STAFF DIRECTOR

April 5, 2005

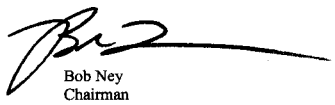
Speaker J. Dennis Hastert
United States House of Representatives
United States Capitol
H-232 U. S. Capitol
Washington, DC 20515

Dear Speaker Hastert:

I am writing to you regarding the Committee on House Administration's jurisdictional referral of S. 167, "The Family Entertainment & Copyright Act of 2005." Title III of this bill will amend, "The National Film Preservation Act of 1996." It reauthorizes the National Film Preservation Board (NFPB) and the National Film Preservation Foundation (NFPF) under the direction of the Library of Congress. The mission of these organizations is to help save America's film heritage. To date the NFPB has designated 400 culturally significant films to the National Film Registry, preserving them in the Library's collection. The NFPF, through federal matching funds and private contributions, supports independent efforts nationwide to preserve American films, raise awareness of the need for film preservation, and improve film access for study, education, and exhibition.

The Committee on House Administration supports Title III and in the interest of moving the legislation forward we waive our right to a referral.

Sincerely,



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ONE HUNDRED NINTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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CHRIS VAN HOLLEN, Maryland

April 5, 2005

The Honorable Robert W. Ney
Chairman
House Committee on House Administration
1309 Longworth HOB
Washington, D.C. 20515

Dear Chairman Ney:

This letter responds to your letter dated April 5, 2005, concerning S. 167, the "Family Entertainment and Copyright Act of 2005." I agree that the bill contains matters within the jurisdiction of the House Committee on House Administration and appreciate your willingness to waive your right to a referral of consideration of S. 167, so that we may proceed to the floor. Your waiver does not prejudice the jurisdictional interest and prerogatives of your committee.

Pursuant to your request, a copy of your letter and this letter will be included in the Committee report.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

cc: The Honorable J. Dennis Hastert, Speaker
The Honorable John Conyers, Jr.
The Honorable Juanita Millender-McDonald
The Honorable John V. Sullivan, Parliamentarian

FJS/db

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MARCH 9, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present comprised entirely of Members of the majority party. So rather than doing a ratification of minority Committee assignments, since there is no one here to make a motion to do that, we will now go to the next item on the agenda which is the adoption of S. 167, the "Family Entertainment and Copyright Act of 2005," and the Chair recognizes the gentlemen from Texas, Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property for a motion.

Mr. SMITH. Mr. Chairman, I ask unanimous consent that we consider the following bills en bloc: S. 167, H.R. 683, H.R. 1036, H.R. 1037, H.R. 1038.

Chairman SENSENBRENNER. How about House Concurrent Resolution——

Mr. SMITH. It's my understanding, Chairman, that needs to be considered separately.

Chairman SENSENBRENNER. Okay. Without objection, the 5 bills mentioned by the gentleman from Texas will be considered en bloc, and the Chair recognizes the gentleman from Texas to explain them.

Mr. SMITH. I'll try to be brief, Mr. Chairman. The first bill, S. 167 really consists of three previous bills that this Committee has approved and that passed the House last year. The first one is the Family Movie Act, and I think Members will recall that that simply gives parents the right to determine what their children see when they rent or buy a movie video.

The second part of this particular bill is the Art Act which creates new penalties for those who camcord movies in public theaters and who willfully infringe copyright law by distributing copies of prereleased works, movies or otherwise.

The Trademark Dilution Revision Act of 2005 simply, basically protects trademarks in a better way and also makes sure that people cannot infringe trademarks as easily as they do now. It also does a good job of trying to keep us out of court to determine some of the ambiguities of that particular subject.

The two technical correction bills are just that, technical corrections of the Satellite Viewer, Home Viewer Movie Act, and the technical corrections, in addition to the satellite corrections are technical corrections of the CARP bill, which we approved last year and which passed the House.

The last bill in the en bloc package, Mr. Chairman, is your bill, the Multidistrict Litigation Restoration Act of 2005, and I will yield to you to make any comments on that.

And that would be the quick summary of the five bills en bloc.
[The bill, S. 167, follows:]

109TH CONGRESS
1ST SESSION

S. 167

AN ACT

To provide for the protection of intellectual property rights, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Family Entertainment and Copyright Act of 2005''.

TITLE I—ARTISTS' RIGHTS AND THEFT PREVENTION

SEC. 101. SHORT TITLE.

This title may be cited as the ''Artists' Rights and Theft Prevention Act of 2005'' or the ''ART Act''.

SEC. 102. CRIMINAL PENALTIES FOR UNAUTHORIZED RECORDING OF MOTION PICTURES IN A MOTION PICTURE EXHIBITION FACILITY.

(a) IN GENERAL.—Chapter 113 of title 18, United States Code, is amended by adding after section 2319A the following new section:

''§ 2319B. Unauthorized recording of Motion pictures in a Motion picture exhibition facility

''(a) OFFENSE.—Any person who, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof, from a performance of such work in a motion picture exhibition facility, shall—

''(1) be imprisoned for not more than 3 years, fined under this title, or both; or

''(2) if the offense is a second or subsequent offense, be imprisoned for no more than 6 years, fined under this title, or both.

The possession by a person of an audiovisual recording device in a motion picture exhibition facility may be considered as evidence in any proceeding to determine whether that person committed an offense under this subsection, but shall not, by itself, be sufficient to support a conviction of that person for such offense.

"(b) FORFEITURE AND DESTRUCTION.—When a person is convicted of a violation of subsection (a), the court in its judgment of conviction shall, in addition to any penalty provided, order the forfeiture and destruction or other disposition of all unauthorized copies of motion pictures or other audiovisual works protected under title 17, or parts thereof, and any audiovisual recording devices or other equipment used in connection with the offense.

"(c) AUTHORIZED ACTIVITIES.—This section does not prevent any lawfully authorized investigative, protective, or intelligence activity by an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or by a person acting under a contract with the United States, a State, or a political subdivision of a State.

"(d) IMMUNITY FOR THEATERS.—With reasonable cause, the owner or lessee of a motion picture exhibition facility where a motion picture or other audiovisual work is being exhibited, the authorized agent or employee of

such owner or lessee, the licensor of the motion picture or other audiovisual work being exhibited, or the agent or employee of such licensor—

"(1) may detain, in a reasonable manner and for a reasonable time, any person suspected of a violation of this section with respect to that motion picture or audiovisual work for the purpose of questioning or summoning a law enforcement officer; and

"(2) shall not be held liable in any civil or criminal action arising out of a detention under paragraph (1).

"(e) VICTIM IMPACT STATEMENT.—

"(1) IN GENERAL.—During the preparation of the presentence report under rule 32(c) of the Federal Rules of Criminal Procedure, victims of an offense under this section shall be permitted to submit to the probation officer a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

"(2) CONTENTS.—A victim impact statement submitted under this subsection shall include—

"(A) producers and sellers of legitimate works affected by conduct involved in the offense;

"(B) holders of intellectual property rights in the works described in subparagraph (A); and

"(C) the legal representatives of such producers, sellers, and holders.

"(f) STATE LAW NOT PREEMPTED.—Nothing in this section may be construed to annul or limit any rights or remedies under the laws of any State.

"(g) DEFINITIONS.—In this section, the following definitions shall apply:

"(1) TITLE 17 DEFINITIONS.—The terms 'audiovisual work', 'copy', 'copyright owner', 'motion picture', 'motion picture exhibition facility', and 'transmit' have, respectively, the meanings given those terms in section 101 of title 17.

"(2) AUDIOVISUAL RECORDING DEVICE.—The term 'audiovisual recording device' means a digital or analog photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a copyrighted motion picture or other audiovisual work, or any part there-

of, regardless of whether audiovisual recording is the sole or primary purpose of the device.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 113 of title 18, United States Code, is amended by inserting after the item relating to section 2319A the following:

''2319B. Unauthorized recording of motion pictures in a motion picture exhibition facility.''.

(c) DEFINITION.—Section 101 of title 17, United States Code, is amended by inserting after the definition of ''Motion pictures'' the following: ''The term ''motion picture exhibition facility'' means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.''.

SEC. 103. CRIMINAL INFRINGEMENT OF A WORK BEING PREPARED FOR COMMERCIAL DISTRIBUTION.

(a) PROHIBITED ACTS.—Section 506(a) of title 17, United States Code, is amended to read as follows:

''(a) CRIMINAL INFRINGEMENT.—

''(1) IN GENERAL.—Any person who willfully infringes a copyright shall be punished as provided

under section 2319 of title 18, if the infringement was committed—

"(A) for purposes of commercial advantage or private financial gain;

"(B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or

"(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

"(2) EVIDENCE.—For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

"(3) DEFINITION.—In this subsection, the term 'work being prepared for commercial distribution' means—

"(A) a computer program, a musical work, a motion picture or other audiovisual work, or

a sound recording, if, at the time of unauthorized distribution—

"(i) the copyright owner has a reasonable expectation of commercial distribution; and

"(ii) the copies or phonorecords of the work have not been commercially distributed; or

"(B) a motion picture, if, at the time of unauthorized distribution, the motion picture—

"(i) has been made available for viewing in a motion picture exhibition facility; and

"(ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.".

(b) CRIMINAL PENALTIES.—Section 2319 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "Whoever" and inserting "Any person who"; and

(B) by striking "and (c) of this section" and inserting ", (c), and (d)";

(2) in subsection (b), by striking ''section 506(a)(1)'' and inserting ''section 506(a)(1)(A)'';

(3) in subsection (c), by striking ''section 506(a)(2) of title 17, United States Code'' and inserting ''section 506(a)(1)(B) of title 17'';

(4) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively;

(5) by adding after subsection (c) the following: ''(d) Any person who commits an offense under section 506(a)(1)(C) of title 17—

''(1) shall be imprisoned not more than 3 years, fined under this title, or both;

''(2) shall be imprisoned not more than 5 years, fined under this title, or both, if the offense was committed for purposes of commercial advantage or private financial gain;

''(3) shall be imprisoned not more than 6 years, fined under this title, or both, if the offense is a second or subsequent offense; and

''(4) shall be imprisoned not more than 10 years, fined under this title, or both, if the offense is a second or subsequent offense under paragraph (2).''; and

(6) in subsection (f), as redesignated—

(A) in paragraph (1), by striking ''and'' at the end;

(B) in paragraph (2), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

''(3) the term 'financial gain' has the meaning given the term in section 101 of title 17; and

''(4) the term 'work being prepared for commercial distribution' has the meaning given the term in section 506(a) of title 17.''.

SEC. 104. CIVIL REMEDIES FOR INFRINGEMENT OF A WORK BEING PREPARED FOR COMMERCIAL DISTRIBUTION.

(a) PREREGISTRATION.—Section 408 of title 17, United States Code, is amended by adding at the end the following:

''(f) PREREGISTRATION OF WORKS BEING PREPARED FOR COMMERCIAL DISTRIBUTION.—

''(1) RULEMAKING.—Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

"(2) CLASS OF WORKS.—The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

"(3) APPLICATION FOR REGISTRATION.—Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office—

"(A) an application for registration of the work;

"(B) a deposit; and

"(C) the applicable fee.

"(4) EFFECT OF UNTIMELY APPLICATION.—An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of—

"(A) 3 months after the first publication of the work; or

"(B) 1 month after the copyright owner has learned of the infringement.".

(b) INFRINGEMENT ACTIONS.—Section 411(a) of title 17, United States Code, is amended by inserting "preregistration or" after "shall be instituted until".

(c) EXCLUSION.—Section 412 of title 17, United States Code, is amended by inserting after "section 106A(a)" the following: ", an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement,".

SEC. 105. FEDERAL SENTENCING GUIDELINES.

(a) REVIEW AND AMENDMENT.—Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including any offense under—

(1) section 506, 1201, or 1202 of title 17, United States Code; or

(2) section 2318, 2319, 2319A, 2319B, or 2320 of title 18, United States Code.

(b) AUTHORIZATION.—The United States Sentencing Commission may amend the Federal sentencing guidelines in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note) as though the authority under that section had not expired.

(c) RESPONSIBILITIES OF UNITED STATES SENTENCING COMMISSION.—In carrying out this section, the United States Sentencing Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements described in subsection (a) are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses described in subsection (a), if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of ''uploading'' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed.

TITLE II—EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO AND VIDEO CONTENT IN MOTION PICTURES

SEC. 201. SHORT TITLE.

This title may be cited as the ''Family Movie Act of 2005''.

SEC. 202. EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO AND VIDEO CONTENT IN MOTION PICTURES.

(a) IN GENERAL.—Section 110 of title 17, United States Code, is amended—

(1) in paragraph (9), by striking ''and'' after the semicolon at the end;

(2) in paragraph (10), by striking the period at the end and inserting ''; and'';

(3) by inserting after paragraph (10) the following:

''(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.''; and

(4) by adding at the end the following:

''For purposes of paragraph (11), the term 'making imperceptible' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

"Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title, or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.".

(b) EXEMPTION FROM TRADEMARK INFRINGEMENT.—Section 32 of the Trademark Act of 1946 (15 U.S.C. 1114) is amended by adding at the end the following:

"(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act. This subparagraph does not preclude liability, nor shall it be construed to restrict the defenses or limitations on rights granted under this Act, of a person for conduct not described in paragraph (11) of section 110 of title 17, United States Code, even if that person also engages in conduct described in paragraph (11) of section 110 of such title.

"(B) A manufacturer, licensee, or licensor of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible as described in subparagraph (A) is not liable on account

of such manufacture or license for a violation of any right under this Act, if such manufacturer, licensee, or licensor ensures that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. The limitations on liability in subparagraph (A) and this subparagraph shall not apply to a manufacturer, licensee, or licensor of technology that fails to comply with this paragraph.

''(C) The requirement under subparagraph (B) to provide notice shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2005.

''(D) Any failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption under subparagraphs (A) and (B) shall not be construed to create an inference that any such party that engages in conduct described in paragraph (11) of section 110 of title 17, United States Code, is liable for trademark infringement by reason of such conduct.''.

(c) DEFINITION.—In this section, the term ''Trademark Act of 1946'' means the Act entitled ''An Act to provide for the registration and protection of trademarks

used in commerce, to carry out the provisions of certain international conventions, and for other purposes'', approved July 5, 1946 (15 U.S.C. 1051 et seq.).

TITLE III—NATIONAL FILM PRESERVATION

Subtitle A—Reauthorization of the National Film Preservation Board

SEC. 301. SHORT TITLE.

This subtitle may be cited as the ''National Film Preservation Act of 2005''.

SEC. 302. REAUTHORIZATION AND AMENDMENT.

(a) DUTIES OF THE LIBRARIAN OF CONGRESS.—Section 103 of the National Film Preservation Act of 1996 (2 U.S.C. 179m) is amended—

(1) in subsection (b)—

(A) by striking ''film copy'' each place that term appears and inserting ''film or other approved copy'';

(B) by striking ''film copies'' each place that term appears and inserting ''film or other approved copies''; and

(C) in the third sentence, by striking ''copyrighted'' and inserting ''copyrighted, mass distributed, broadcast, or published''; and

(2) by adding at the end the following:

"(c) COORDINATION OF PROGRAM WITH OTHER COLLECTION, PRESERVATION, AND ACCESSIBILITY ACTIVITIES.—In carrying out the comprehensive national film preservation program for motion pictures established under the National Film Preservation Act of 1992, the Librarian, in consultation with the Board established pursuant to section 104, shall—

"(1) carry out activities to make films included in the National Film registry more broadly accessible for research and educational purposes, and to generate public awareness and support of the Registry and the comprehensive national film preservation program;

"(2) review the comprehensive national film preservation plan, and amend it to the extent necessary to ensure that it addresses technological advances in the preservation and storage of, and access to film collections in multiple formats; and

"(3) wherever possible, undertake expanded initiatives to ensure the preservation of the moving image heritage of the United States, including film, videotape, television, and born digital moving image formats, by supporting the work of the National Audio-Visual Conservation Center of the Library of

Congress, and other appropriate nonprofit archival and preservation organizations.''.

(b) NATIONAL FILM PRESERVATION BOARD.—Section 104 of the National Film Preservation Act of 1996 (2 U.S.C. 179n) is amended—

(1) in subsection (a)(1) by striking ''20'' and inserting ''22'';

(2) in subsection (a) (2) by striking ''three'' and inserting ''5'';

(3) in subsection (d) by striking ''11'' and inserting ''12''; and

(4) by striking subsection (e) and inserting the following:

''(e) REIMBURSEMENT OF EXPENSES.—Members of the Board shall serve without pay, but may receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.''.

(c) NATIONAL FILM REGISTRY.—Section 106 of the National Film Preservation Act of 1996 (2 U.S.C. 179p) is amended by adding at the end the following:

''(e) NATIONAL AUDIO-VISUAL CONSERVATION CENTER.—The Librarian shall utilize the National Audio-Visual Conservation Center of the Library of Congress at Culpeper, Virginia, to ensure that preserved films included

in the National Film Registry are stored in a proper manner, and disseminated to researchers, scholars, and the public as may be appropriate in accordance with—

"(1) title 17, United States Code; and

"(2) the terms of any agreements between the Librarian and persons who hold copyrights to such audiovisual works.".

(d) USE OF SEAL.—Section 107 (a) of the National Film Preservation Act of 1996 (2 U.S.C. 179q(a)) is amended—

(1) in paragraph (1), by inserting "in any format" after "or any copy"; and

(2) in paragraph (2), by striking "or film copy" and inserting "in any format".

(e) EFFECTIVE DATE.—Section 113 of the National Film Preservation Act of 1996 (2 U.S.C. 179w) is amended by striking "7" and inserting "13".

Subtitle B—Reauthorization of the National Film Preservation Foundation

SEC. 311. SHORT TITLE.

This subtitle may be cited as the "National Film Preservation Foundation Reauthorization Act of 2005".

SEC. 312. REAUTHORIZATION AND AMENDMENT.

(a) BOARD OF DIRECTORS.—Section 151703 of title 36, United States Code, is amended—

(1) in subsection (b)(2)(A), by striking ''nine'' and inserting ''12''; and

(2) in subsection (b)(4), by striking the second sentence and inserting ''There shall be no limit to the number of terms to which any individual may be appointed.''.

(b) POWERS.—Section 151705 of title 36, United States Code, is amended in subsection (b) by striking ''District of Columbia'' and inserting ''the jurisdiction in which the principal office of the corporation is located''.

(c) PRINCIPAL OFFICE.—Section 151706 of title 36, United States Code, is amended by inserting '', or another place as determined by the board of directors'' after ''District of Columbia''.

(d) AUTHORIZATION OF APPROPRIATIONS.—Section 151711 of title 36, United States Code, is amended by striking subsections (a) and (b) and inserting the following:

''(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Library of Congress amounts necessary to carry out this chapter, not to exceed $530,000 for each of the fiscal years 2005 through 2009. These amounts are to be made available to the cor-

1 poration to match any private contributions (whether in
2 currency, services, or property) made to the corporation
3 by private persons and State and local governments.

4 ''(b) LIMITATION RELATED TO ADMINISTRATIVE EX-
5 PENSES.—Amounts authorized under this section may not
6 be used by the corporation for management and general
7 or fundraising expenses as reported to the Internal Rev-
8 enue Service as part of an annual information return re-
9 quired under the Internal Revenue Code of 1986.''.

10 TITLE IV—PRESERVATION OF 11 ORPHAN WORKS

12 **SEC. 401. SHORT TITLE.**

13 This title may be cited as the ''Preservation of Or-
14 phan Works Act''.

15 **SEC. 402. REPRODUCTION OF COPYRIGHTED WORKS BY LI-**
16 **BRARIES AND ARCHIVES.**

17 Section 108(i) of title 17, United States Code, is
18 amended by striking ''(b) and (c)'' and inserting ''(b), (c),
19 and (h)''.

Passed the Senate February 1, 2005.

Attest:

Secretary.

Chairman SENSENBRENNER. The Chair passes on this.

Without objection, all Members may place opening statements in the record on each of the bills being considered en bloc at this time. Hearing no objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I rise in support of this legislation with reservations about one part. At the outset, I strongly support efforts to make it more difficult to steal content and to encourage preservation of historic content.

As I have said before, the content industries are a boon to our economy, providing this country's number one export. Their products, which include music, movies, books, and software, survive on the protection given by copyright law. Without protection from rampant copying and other infringement, creators would have no reason to keep creating and investing in new content.

The success of copyrighted content, however, is also its Achilles' Heel. People now camcord movies in theaters to sell online or in DVD format. They obtain pre-release copies of content and sell it online. Of course, this is illegal because it is done without the permission of the content owners and without payment to them. This bill clarifies that these two acts are illegal even if technology makes it easy and fast and cheap. While I believe we should do more to stop piracy, S. 167 is a step in the right direction.

Having said that, I would like to clarify one issue. The civil enforcement side of the pre-release provision imposes a statute of limitations on certain copyright lawsuits. Because it imposes the limit only for infringements that occur *no more than* two months after pre-registered content is first distributed, it is clear that the bill *does not impose* any time limit on filing lawsuits for infringements that occur *more than* two months after distribution.

The bill also contains two provisions that will encourage the preservation of historically-significant content. First, it reauthorizes the National Film Preservation Board and National Film Preservation Foundation, which review initiatives to ensure the preservation of valued films and issue grants to libraries and other institutions that can save films from degradation. The Directors Guild of America and the Academy of Motion Picture Arts and Sciences have applauded these efforts. The program expired in 2003, so S. 167 extends it until 2009.

The second preservation piece, the "Preservation of Orphan Works Act," will empower libraries and archives to make additional copies of musical works, movies, and other content.

My one objection to S. 167, however, is with the "Family Movie Act," which would allow private companies to sell movie editing software without permission from the filmmakers. This was proposed in response to a lawsuit between one company and filmmakers. From our consideration of this provision last year, we know this section will take away the copyrights and artistic rights of filmmakers to the financial benefit of one private company. It is important to note that the bill does not immunize those who make fixed copies of edited content; such copies would still be illegal, as they are today, and the legislative history should reflect that.

I urge my colleagues to vote "Aye" on this legislation.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman, thank you for scheduling a mark-up of S. 167. S. 167 strives to protect copyright owners from rampant infringement and is overall a good bill. However, it does little to confront many of the important issues we addressed last year with the passage of H.R. 4077. I am disappointed that with this bill we seem to have moved backwards, but I have been convinced that at this point, a bird in hand is better then two in the bush.

S. 167 attempts to prevent the first step for those distributing pirated movies—obtaining the first copy. Copies of brand new movies—still showing in the theaters—are available on street corners throughout the world for two dollars as a result of people using a camcorder in theaters. Therefore, as did H.R. 4077, S. 167 criminalizes the recording of a movie in a theater with a camcorder. The bill extends to the

theater owner the right to detain an individual suspected of copying a movie. Furthermore, it provides for the confiscation of the property used to commit the crime.

However, preventing the camcording of movies does not solve the piracy problem. Pirates will always seek treasure, and where they have truly found gold is in obtaining a pre-released copy of a movie, sound recording or video game. In testimony on this issue almost two years ago, industry representatives testified that two weeks before the motion picture THE HULK was to be released in theaters, an incomplete work print version of the film had been illegally uploaded onto the internet. In fact, reviews for THE HULK were available before its release in theaters. The harm to the market of a copyrighted work exponentially increases if the work is released before the editing or promotion for the product is completed. Therefore, S. 167 imposes civil and criminal penalties for the willful distribution of a work being prepared for commercial distribution.

A very important provision of S. 167 is the reauthorization of the National Film Preservation Board and the National Film Preservation Foundation. These organizations play a vital role in maintaining the history of film. Finally, included in S. 167 is a bill I introduced with Mr. Smith and Ms. Lofgren, in the last Congress. The orphan works provision is designed to allow libraries and archives to use certain copyrighted materials during the last 20 years of term of the copyright, under specific conditions. In this way, we have addressed concerns by the user community and made copyrighted works more accessible.

What I find problematic about S. 167 is that it fails to address core problems facing copyright owners today, including the effect of Peer-to- Peer Networks, lack of resources for prosecution of intellectual property crimes, and the paucity of education on these subjects. Instead of protecting an owner's copyright by addressing the problems caused by Peer-to-Peer Networks, the bill shields a technology which is harmful to an intellectual property owner. (Clearplay)

In addition, the drafters of this bill have chosen not to add an education provision from H.R. 4077 which would establish a program in the Department of Justice to educate public users of the internet of the risks involved in downloading illegal copies of copyrighted works. Such education would go a long way toward protecting our children from pornography, security and privacy threats. What the drafters have chosen to include instead is the Family Movie Act, under the guise that an exception for this technology provided by Clearplay is adequate to shield minor children from violence, sex or profanity. What the bill in fact does is provide an exemption from copyright liability for a company like Nissam, the claimed owner of the patent to the Clearplay technology, which offers a movie viewer the option of *enhancing* the level of violence, sex or profanity.

Ironically, in H.R. 4077, we had worked out a compromise relating to modernizing the Net Act. However, today's legislation remains silent on necessary fixes to the Net Act. These fixes could help copyright owners deal with 21st Century problems.

While I am disappointed that this legislation does not go far enough to protect against piracy, at least it is a starting point. Overall, I am pleased with most of the provisions in the bill. However, I look forward to working with the Chairman of the Subcommittee in drafting a bill later in this Congress that further protects the rights of copyright holders. In the meanwhile, I urge my colleagues to support this bill.

Chairman SENSENBRENNER. Are there any amendments to any of the bills?

[No response.]

There being no amendments, without objection, the previous question is ordered on reporting the bills favorably and the vote on reporting these bills favorably will be taken when a reporting quorum is present.

Without objection the order for the previous question is vitiated. There is a Subcommittee amendment on H.R. 683, the Dilution Bill. Without objection, the Subcommittee amendment is agreed to. Hearing none, so ordered.

And now without objection, the previous question is ordered on reporting the bills favorably with H.R. 683 being reported favorably as amended. And the vote will be taken at the time that a reporting quorum appears.

[Intervening business.]

Chairman SENSENBRENNER. The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. Could I ask unanimous consent that we, I guess, rescind the motion to close debate on S. 167 so I could simply seek to raise an issue to get into the Committee report on that bill?

Chairman SENSENBRENNER. Without objection, the motion on the previous question to order favorably reported S. 167 is vitiated, and the gentleman from California is recognized for 5 minutes to strike the last word.

Mr. BERMAN. Thank you, Mr. Chairman. I appreciate that. I will simply incorporate by reference all critical comments about that portion of S. 167, known as the Family Movie Act, but I would like to bring to the Chairman both of the full Committee and the Subcommittee's attention, an issue involved in this part of the bill. We had a conversation last year about whether the bill might be read to provide a defense to manufacturers of ad-skipping devices. You at that time argued that it could not, but promised to work with me to make that clear. We did that, and it resulted in the explicit language for H.R. 4077, from which this provision comes, which was in the bill last year that passed the House.

That specific language did not come over in the Senate bill, and I was wondering if you would be willing to commit, as you did last year, to make sure the Committee's report on the bill underscores the removal of the language in H.R. 4077 in no way renders the bill applicable in litigation over ad skipping.

Chairman SENSENBRENNER. If the gentleman will yield?

Mr. BERMAN. I will be happy to.

Chairman SENSENBRENNER. I am happy to make sure that that will be in the Committee's report and instruct the staff on both sides of the aisle to make sure that the observations of the gentleman from California are contained in the Committee report before it is filed.

Mr. BERMAN. I thank you very much, and I yield back my time.

Chairman SENSENBRENNER. The gentleman yields back the balance of his time. Are there further amendments to Senate 167?

[No response.]

Chairman SENSENBRENNER. If there are no further amendments, without objection, the previous question is ordered favorably reporting Senate 167.

We are still one short of a reporting quorum. I would ask the Members present to be patient, and as soon as we round up—here we go. They have been rounded up. [Laughter.]

The previous question has been ordered on reporting favorably the following bills: Senate 167, H.R. 683, H.R. 1036, H.R. 1037 and H.R. 1038. So many as are in favor of reporting these bills favorably will say aye.

Opposed, no?

The ayes appear to have it. The ayes have it, and the bills are reported favorably.

Without objection, those bills which were amended here, meaning H.R. 683, will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted here today. That unanimous consent request also includes Senate 167 as amended.

Is there any objection?

Mr. SCOTT. Mr. Chairman, reserving the right to object.

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. SCOTT. Mr. Chairman, I want the record to reflect that on S. 167 I do not approve of the Family Movie Act of 2005, and I withdraw my reservation.

Chairman SENSENBRENNER. The Chair would observe that people who disagree with the Family Movie Act provisions have got the authority to file additional views as a part of the Committee report. Without——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman——

Mr. WATT. Reserving the right to object.

Chairman SENSENBRENNER. Does the gentleman from Virginia withdraw his reservation?

Mr. SCOTT. I did, Mr. Chairman.

Chairman SENSENBRENNER. Okay. The gentleman from North Carolina.

Mr. WATT. Simply—and I will not object, Mr. Chairman. I simply wanted to note that I was the only dissenting voice in a favorable report and wanted the record to show that that was because of my opposition to H.R. 1038, and I just wanted that in the record.

Chairman SENSENBRENNER. With the next unanimous consent request, the gentleman will be given the right to file dissenting views on that bill. There will be separate Committee reports that will be filed on each of the bills considered en bloc. Does the gentleman withdraw his reservation?

Mr. WATT. Yes.

Chairman SENSENBRENNER. Okay. Without objection, all Members will be given 2 days as provided by House rules, in which to submit additional dissenting, supplemental or minority views, and without objection the staff is directed to make any technical and conforming changes.

[Intervening business.]

Chairman SENSENBRENNER. There being no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 10:17 a.m., the Committee was adjourned.]

MINORITY VIEWS

While we support the anti-piracy provisions of S. 167, we oppose title II of the bill. Title II consists of the "Family Movie Act of 2004."[1] With the purported goal of sanitizing undesired content in motion pictures, the Family Movie Act immunizes from copyright and trademark liability any for-profit companies that develop movie-editing software to make content imperceptible without permission from the movies' creators. Title II takes sides in a private lawsuit, interferes with marketplace negotiations, fails to achieve its goal, is unnecessary and overbroad, may increase the level of undesired content, and impinges on artistic freedom and rights.

The bill's proponents would have us believe that this bill is about whether children should be forced to watch undesired content, but it is not. The issue in this debate is who should make editorial decisions about what movie content children see: parents or a for-profit company. Supporters of the Family Movie Act believe companies should be allowed to do the editing for profit, and without permission of film creators, while opponents believe parents are the best qualified to know what their children should not see. The legislation would accomplish little beyond inflaming the debate over indecent content in popular media and interfering with marketplace solutions to parental concerns.

That is why the Family Movie Act is opposed by: (1) entities concerned with the intellectual property and artistic rights of creators, including the Directors Guild of America,[2] the Motion Picture Association of America,[3] and the Dean of the UCLA Film School;[4] and (2) experts on copyright law, such as the Register of Copyrights.[5]

A. THE FAMILY MOVIE ACT WOULD IMPROPERLY INTERFERE WITH PENDING LITIGATION AND PREMATURELY TERMINATE MARKETPLACE NEGOTIATIONS TO SETTLE THE DISPUTE

As a preliminary matter, the legislation is inappropriate because it not only addresses the primary issues in a pending lawsuit but also takes sides with one of the parties to that suit. The U.S. District Court for the District of Colorado currently has before it a

[1] The Family Movie Act was introduced as H.R. 4586 in the 108th Congress and was added to H.R. 4077 at full Committee markup in the 108th Congress. A hearing on H.R. 4586 was held at the Subcommittee level.

[2] *See Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 108th Cong., 2d Sess. 86 (May 20, 2004) (written statement of Taylor Hackford, Directors Guild of America) [hereinafter *May 20, 2004 Hearing*].

[3] *Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 108th Cong., 2d Sess. 67–70 (June 17, 2004) (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Ass'n of America) [hereinafter *H.R. 4586 Hearing*]

[4] Declaration of Dean Robert Rosen In Support of the Director Parties' Opposition to ClearPlay, Inc.'s, Trilogy Studios, Inc.'s, and Family Shield Technologies, LLC's Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo.) (02–M–1662) [hereinafter Rosen Decl.].

[5] *H.R. 4586 Hearing* at 6 (statement of Marybeth Peters, Register of Copyrights).

case that began as an action brought by a company called Clean Flicks against directors of movies.[6] Clean Flicks sought a declaratory judgment against several directors that its business practice of providing edited versions of movies to consumers does not violate the rights of those who own the copyrights and trademarks for the original movies.[7]

In the course of litigation, the number of parties expanded. Because Clean Flicks claimed that its conduct was lawful under the Copyright Act, the directors sought to join the movie studios in the dispute. In addition, a Utah-based company known as ClearPlay joined on the side of Clean Flicks. ClearPlay employees view motion pictures and create software filters that tag scenes they find offensive in each movie; this editing is done without notice to or permission from the copyright owners (the movie studios) or movie directors.[8] When downloaded to a specially-adapted DVD player, the ClearPlay software filter instructs the player to "skip and mute" the tagged content when the affiliated DVD movie is played. Consumers who play a DVD they have rented or purchased would thus not see or hear the scenes that ClearPlay has tagged for filtering.

The bill directly addresses copyright and trademark issues raised in the case and inappropriately takes the side of one party. First, the content creators allege in the lawsuit that ClearPlay makes derivative works in violation of the Copyright Act; in particular, they argue ClearPlay's editing software violates their exclusive rights as movie copyright owners to make modifications or other derivations of the original movies.[9]

Though no court has ruled on this issue, the bill would assist ClearPlay by preemptively vitiating this legal claim. It would amend the law to state that certain technology that makes portions of motion picture content imperceptible during playback does not violate copyright law. While not benefitting Clean Flicks and certain other defendants, the bill is specifically designed to legalize ClearPlay technology.

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[6] *Huntsman v. Soderbergh,* No. 02–M–1662 (D. Colo. filed Aug. 29, 2002). The parties are awaiting a ruling on a motion for summary judgment.

[7] Complaint and Jury Demand, *Huntsman v. Soderbergh* (D. Colo.) (No. 02–M–1662).

[8] ClearPlay has fourteen filter settings: (1) strong action violence, (2) gory/brutal violence, (3) disturbing images (i.e., macabre and bloody images), (4) sensual content, (5) crude sexual content, (6) nudity (including art), (7) explicit sexual situations, (8) vain references to deity, (9) crude language and humor, (10) ethnic and racial slurs, (11) cursing, (12) strong profanity, (13) graphic vulgarity, and (14) explicit drug use.

[9] *See* The Player Control Parties' Opening Brief in Support of Their Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo.) (No. 02–M–1662). Section 106(2) of title 17, United States Code, gives to authors the exclusive right to "prepare derivative works based on the copyrighted work." The Copyright Act further defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

The Register of Copyrights has testified as to her opinion about the copyright issues involved in the case. The Register believes that infringement of the exclusive right under 17 U.S.C. § 106(2) to make derivative works requires creation of a fixed copy of a derivative work. *H.R. 4586 Hearing* at 7. While the Register's opinion clearly bears much authority, it is neither binding on a court nor dispositive of the pending lawsuit. Due to the novelty of both the legal and technological issues involved, the court may very well reach a different conclusion from that drawn by the Register.

Second, film directors claim that ClearPlay violates their trademark rights under section 43(a) of the Lanham Act.[10] The directors allege that ClearPlay uses their trademarked names in a way that is likely to cause confusion as to the affiliation, connection, or association of ClearPlay with the director, or as to the origin, sponsorship, or approval of ClearPlay by the director.[11] Their allegation is based on the fact that a ClearPlay-sanitized film still indicates the name of the director, making it incorrectly appear as if the director has approved the sanitized version.

As with the copyright claims against ClearPlay, the bill would usurp judicial consideration of the trademark claims against ClearPlay by legalizing the very conduct at issue in the pending litigation. The bill would make it legal under trademark law to sell a product that alters a work so long as clear and conspicuous notice is provided at the beginning of each performance indicating it has been altered from the performance intended by the director or copyright owner. The effect would again be to specifically benefit one party, ClearPlay, to the detriment of all others involved in pending litigation.

In summary, the directors and movie studios have non-frivolous legal claims against ClearPlay. Because the case has not proceeded past the most preliminary stages at the trial level, there has not been any statutory interpretation, let alone a problematic one, that would justify a legislative solution. In other words, the law has yet to be interpreted in this area, so there is no rational basis for Congress to pass legislation that eliminates certain copyright and trademark rights that are at issue between specific parties.

Passage of this legislation is even more problematic considering that the movie creators have negotiated in good faith to settle their dispute with ClearPlay. The movie creators had offered ClearPlay terms that would allow it to deploy its technology without fear of copyright or trademark liability.[12] Unfortunately, due to the two hearings on this issue and the movement of this legislation, those negotiations have stalled; ClearPlay has been emboldened to present several new demands that represent a significant step back from its previous positions. The growing prospects for a legislative fix have caused ClearPlay to abandon good-faith negotiation and have made it less likely that consumers will have the choices the bill's proponents allegedly desire.

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[10] *See* The Player Control Parties' Opening Brief in Support of Their Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo.) (No. 02–M–1662).

[11] *See* 15 U.S.C. § 1125(a)(1).

[12] Despite the extremely complicated nature of these negotiations, they had proceeded quite far. In December 2003, the DGA agreed not to object under its collective bargaining agreement if the studios offered ClearPlay a license to utilize the edits contained in television and airplane versions of movies. The DGA believed this compromise was tolerable because a film's director usually makes the necessary edits for television and airplane versions and is able to control the integrity of such edited versions. Over the course of the next several months, the studios conveyed an offer along these lines to ClearPlay.

More recently, ClearPlay presented the studios with a counteroffer. The studios forwarded this counteroffer to the DGA for its response. In a May 29, 2004 response, the DGA relaxed certain limitations on a previous agreement to allow ClearPlay to license the television and airplane versions of movies. Rather than accept this offer, or present a good-faith counteroffer, ClearPlay apparently has enlarged its demands: (1) for movies where, no airplane or television version is available, it has sought the ability to edit them; and (2) with regard to films for which television or airplane versions have been made available, it is asking that it be able to make its own edits, rather than use the pre-existing edited versions.

In short, fundamental fairness prohibits Congress from passing legislation to influence a pending case and private business negotiations. As a matter of equity, it is unfair to change the rules in the middle of the game, particularly to help one specific entity; if passed, title II would be an unfortunate example of such unfairness. For these reasons, title II should not be considered while litigation is pending.[13]

B. THE FAMILY MOVIE ACT IS UNNECESSARY

Regardless of the outcome of the pending litigation, this legislation should not be brought before the House because it is unnecessary. Its supposed rationale is to make it easier for parents and children to avoid watching motion pictures with undesired content, but parents and children already have such options.

At the outset, there is an obvious marketplace solution to undesired content in that consumers can merely elect not to view it. As the Register of Copyrights testified at a hearing on the issue of whether a legislative fix was necessary:

> I cannot accept the proposition that not to permit parents to use such products means that they are somehow forced to expose their children (or themselves) to unwanted depictions of violence, sex and profanity. *There is an obvious choice—one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie.*[14]

The motion picture industry has even enhanced the ability of consumers to exercise this choice. For decades and on a voluntary basis, it has implemented a rating system for its products that indicates the level of sexual or violent content and the target audience age.[15] Each and every major motion picture released in theaters or on DVD or VHS bears such a rating. Such ratings effectively enable parents to steer their children away from movies they consider inappropriate.

Most importantly, the film rating system enable parents to identify movies that they consider appropriate for their children, and the industry has acted to make this choice meaningful. The industry annually releases dozens of films geared toward audiences who do not wish to see sexual, violent, or profane content.[16] As a result, it is clear that the movie industry provides parents with abundant opportunity to find films they will consider appropriate for their children. The movie industry has, therefore, already met the re-

[13] *See H.R. 4586 Hearing* at 8 (statement of Marybeth Peters, Register of Copyrights) ("I do not believe that such legislation should be enacted—and certainly not at this time. As you know, litigation addressing whether the manufacture and distribution of such software violates the copyright law and the Lanham Act is currently pending in the United States District Court for the District of Colorado. A summary judgment motion is pending. The court has not yet ruled on the merits. Nor has a preliminary injunction been issued—or even sought.").

[14] *H.R. 4586 Hearing* at 9 (written statement of Marybeth Peters) (emphasis added).

[15] Motion Picture Ass'n of America, Movie Rating System Celebrates 34th Anniversary with Overwhelming Parental Support (Oct. 31, 2002) (press release). The industry has five rating categories: G for General Audiences, PG for Parental Guidance Suggested, PG–13 for Parental Caution Suggested for children under 13, R for Restricted (parent or guardian required for children under 17), and NC–17 for No Children 17 and under admitted.

[16] In 1999, filmmakers released 14 G-rated and 24 PG-rated major motion pictures. In 2000, there were 16 G-rated and 27 PG-rated films. In 2001, 8 G-rated and 27 PG-rated movies were released. In 2002, 12 G-rated and 50 PG-rated pictures were distributed. Finally, in 2003, 11 G-rated and 34 PG-rated motion pictures were released.

quest of a Family Movie Act supporter who looked forward to a day when "the industry will get around to issue us age-appropriate products." [17]

While some of the bill's supporters say these choices are meaningless on the grounds that the entertainment industry markets violent and sexual content to youth,[18] that claim is false according to the most recent and objective report. The Federal Trade Commission conducted the most recent study on this issue and concluded the following:

> On the whole, the motion picture industry has continued to comply with its pledge not to specifically target children under 17 when advertising films rated R for violence. In addition, the studios generally are providing clear and conspicuous ratings and rating information in advertisements for their R- and PG-13 rated films.[19]

The industry is, therefore, doing its part to keep undesired content away from children.

The facts demonstrate that parents have the information and tools necessary to make and enforce informed choices about the media their children experience and have plenty of wholesome media alternatives to offer their children.

C. THE FAMILY MOVIE ACT WOULD LEGALIZE EDITING THAT IS INCOMPREHENSIBLE AND OVERBROAD AND WOULD LEAD TO AN INCREASE IN UNDESIRED CONTENT

The Family Movie Act would lead to editing that is inconsistent, overbroad, and counterproductive. First, ClearPlay does not screen out the content it purportedly is designed to filter. The *New York Times* found that ClearPlay's editing does not conform to its own standards:

> For starters, its editors are wildly inconsistent. They duly mute every "Oh my God," "You bastard," and "We're gonna have a helluva time" (meaning sex). But they leave intact various examples of crude teen slang and a term for the male anatomy.
>
> In "Pirates of the Caribbean," "God-forsaken island" is bleeped, but "heathen gods" slips through.[20]

In this regard, ClearPlay is seemingly ineffective, and the legislation would be, as well.

Second, the legislation is overbroad and would go beyond its allegedly intended effects of legalizing tools for sanitizing movies of sex, violence, and profanity. In fact, title II would legalize a far wider and less desirable universe of filters for profit than its sponsors have disclosed. Filters could be based on social, political, and professional prejudices and could edit more than just movies.

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[17] *H.R. 4586 Hearing* at 15 (statement of Amitai Etzioni, Founder and Director, The Institute for Communitarian Policy Studies, George Washington University).

[18] *May 20, 2004 Hearing* at 20 (statement of Jeff J. McIntyre, Senior Legislative and Federal Affairs Officer, American Psychological Ass'n).

[19] FEDERAL TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 10 (July 2004).

[20] David Pogue, *Add "Cut" and "Bleep" to a DVD's Options, N.Y. Times,* May 27, 2004, at G1.

For instance, because the bill is not explicitly limited to the deletion of sex, violence, and profanity, it would legalize socially-undesirable editing, such as:

- A filter that edits out racial conflict between law enforcement and minorities in *The Hurricane,* conflict that sets the context for how the minorities later react to the police;[21]
- A filter that skips over the nude scenes from *Schindler's List,* scenes that are critical to conveying the debasement and dehumanization suffered by concentration camp prisoners;
- A filter that strips *Jungle Fever* of scenes showing interracial romance and leaves only those scenes depicting interracial conflict; and
- A filter marketed by Holocaust revisionists that removes from World War II documentaries any footage of concentration camps.

The legislation also would immunize products that filter political or business content based on the opinions of the creator, including:

- A filter that skips over political advertisements contrary to the positions of the developer's beliefs;
- A filter that cleanses news stories, such as by editing out comments in support of or in opposition to government policies; and
- A filter that deletes television stories either helpful to the filter developer's competitor or critical of the developer's corporate parent.

We would hope that none of the bill's proponents would condone such malicious editing. Unfortunately, at last year's full Committee markup of similar legislation, the sponsors rejected an effort to limit the proposal to its purported scope of profane, sexual, and violent content.[22] If enacted, title II could lead to the editing of artistic works based upon racial, religious, social, political, and business biases.

Finally, the legislation could lead to increased violence and sexual content in entertainment. Just as title II allows nudity to be edited out, it allows everything except nudity to be deleted. This concern is not merely hypothetical. Nissim Corporation has patented a technology called CustomPlay that, among other things, enables viewers of pornographic movies to filter out the non-pornographic scenes and "enhance" the adult-viewing experience.[23]

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[21] ClearPlay actually has made such edits. "In its alterations of the film, ClearPlay chooses to omit the racist language [used by white police officers against a young Rubin Carter] that is integral to our understanding of the story. . . . ClearPlay skips these lines in full, choosing to fast-forward its version of the movie to a later part of the interrogation scene. However, it is via this racist and threatening language that the audience connects with the intimidation that the young Carter must feel and the racism he is encountering at the very center of law enforcement." Rosen Decl., *supra* note 4, at 6–7.

[22] *See Markup of H.R. 4586 Before the House Comm. on the Judiciary,* 108th Cong., 2d Sess. (July 21, 2004) (amendment offered by Rep. Adam Schiff (D-CA) to limit editing to profane, sexual, and violent content) [hereinafter *H.R. 4586 Markup*]. The amendment was defeated by voice vote. *Id.*

[23] Using CustomPlay, "[a]n adult can play a version of an adult video that seamlessly excludes content inconsistent with the viewer's adult content preferences, and that is presented at a level of explicitness preferred by the adult. Adult content categories are standardized and are orga-

Because title II only protects technology developers like ClearPlay from liability for copyright and trademark infringement, Nissim may cause the bill to backfire on its sponsors. Nissim has sued ClearPlay for patent infringement, claiming to have a patent on ClearPlay-type film-editing technology.[24] If Nissim's claims are valid, then only Nissim could distribute such film-editing software.[25] Thus, contrary to its stated purpose, the Family Movie Act could succeed in legalizing only Nissim's technology, which enables users to increase the proportion of sex or violence in a movie.[26]

D. THE FAMILY MOVIE ACT WOULD IMPAIR ARTISTIC FREEDOM AND INTEGRITY

The problems with this legislation are compounded by the fact that it violates principles of artistic freedom and expression. The concept of protecting artistic freedom is well recognized.[27] The National Endowment for the Arts states "[a]rtistic work and freedom of expression are a vital part of any democratic society."[28] For this reason, the NEA seeks to preserve works of art,[29] and an important part of preservation is to ensure artists are involved in how their creations are portrayed.

This principle, commonly referred to as a "moral right," is so important that it is required by international agreements and is codified in U.S. law. For instance, the Berne Convention for the Protection of Literary and Artistic Works grants creators the right to object to "any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[30] The United States, recog-

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nized into five groups Who, What, Camera, Position, and Fetish." CustomPlay, Content Preferences (visited Aug. 24, 2004) <*http://www.customplay.com/mccontent.htm*>.

[24] *Nissim Corp. v. ClearPlay,* No. 04–21140 (S.D. Fla. filed May 13, 2004).

[25] In response to a cease-and-desist letter from Nissim, a manufacturer of DVD players, Thomson, pulled ClearPlay-enabled players from the retail market.

[26] In analyzing the overbreadth of the legislation, we also note that it does not legalize technology that would skip over advertisements in broadcast television. The Copyright Office has stated that the bill would not permit commercial ad skipping on the grounds that each ad, in and of itself, would be a separate "motion picture;" skipping the entirety of an ad would go beyond the extent of the bill's authority of making "limited portions imperceptible." *See* Letter from Marybeth Peters, Register of Copyrights, to the Honorable F. James Sensenbrenner, Jr., and the Honorable Lamar Smith (Nov. 15, 2004).

Moreover, the legislation's original sponsor, Sen. Orrin Hatch (R-UT), further noted in his statement introducing the bill:

> An advertisement, under the Copyright Act, is itself a "motion picture," and thus a product or service that enables the skipping of an entire advertisement, in any media, would be beyond the scope of the exemption. Moreover, the phrase "limited portions" is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work, such as a commercial advertisement, is made imperceptible, the new section 110(11) exemption would not apply. 151 CONG. REC. S495 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

[27] SAM RICKETSON, THE BERNE CONVENTION: 1886–1986 456 (1997) ("Any author, whether he writes, paints, or composes, embodies some part of himself—his thoughts, ideas, sentiments and feelings—in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law, such as reputation, bodily integrity, and confidences. The interest in question here relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.").

[28] NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY2003–2008 3 (Feb. 2003).

[29] *Id.* at 8.

[30] Berne Convention for the Protection of Literary and Artistic Works, art. *6bis,* 1971.

nizing the importance of this right, subsequently enacted it into both copyright law[31] and trademark law.[32]

While moral rights protection for U.S. creators is far weaker than the protection afforded European creators, a certain level of protection for the moral rights of U.S. creators does exist. The ability of creators to bring claims under the Lanham Act, just as directors have done against ClearPlay, does provide creators with an important ability to protect their moral rights. In fact, the availability of section 43(a) was one of the specific reasons Congress decided, during adoption of the Berne Convention Implementation Act, that U.S. law met the moral rights obligations contained in the Berne Convention.[33] By limiting the availability of Lanham Act suits, title II would limit the moral rights of directors in a way that conflicts with U.S. obligations under the Berne Convention.

Contrary to our laws and international obligations, title II does not require that filtering be done with the permission of the content creator or owner, but rather creates an exemption from copyright and trademark liability for filtering. As the Register of Copyrights stated before the Subcommittee:

> I have serious reservations about enacting legislation that permits persons other than the creators or authorized distributors of a motion picture to make a profit by selling adaptations of somebody else's motion picture. It's one thing to say that an individual, in the privacy of his or her home, should be able to filter out undesired scenes or [dialogue] from his or her private home viewing of a movie. It's another matter to say that a for-profit company should be able to commercially market a product that alters a director's artistic vision.[34]

It is clear, therefore, that the legislation represents a threat to an artist's right to his or her artistic integrity. To permit editing of a creation without the permission of the creator is to encourage censorship and to vitiate freedom of expression.

In conclusion, the Family Movie Act is ill-conceived, poorly-drafted legislation. Beyond its patent assault on intellectual property rights, the bill inappropriately involves Congress in a private business dispute and would lead to socially undesirable editing and actually permit the distribution of technology that makes pornography even more pornographic. Finally, it encourages unwarranted intrusions into artistic freedom.

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[31] 17 U.S.C. § 106A.
[32] 15 U.S.C. § 1125.
[33] 133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (statement of Rep. Robert Kastenmeier).
[34] *H.R. 4586 Hearing* at 10 (written statement of Marybeth Peters).