

read somehow to exempt from copyright infringement liability devices that allow for skipping of advertisements in the playback of recorded television (so called "ad-skipping" devices). Such a reading is not consistent with the language of the bill or its intent.

The phrase "limited portions of audio or video content of a motion picture" applies only to the skipping and muting of scenes or dialog that are part of the motion picture itself, and not to the skipping of commercial advertisements, which are themselves considered motions pictures under the Copyright Act. It also should be noted that 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 (including a commercial advertisement) is made imperceptible, the section 110(11) exemption would not apply.

The House-passed bill adopted a "belt and suspenders" approach to this question by adding exclusionary language in the statute itself. Ultimately that provision raised concerns in the Senate that such exclusionary language would result in an inference that the bill somehow expresses an opinion, or even decides, the unresolved legal questions underlying recent litigation related to these so-called "ad-skipping" devices. In the meantime, the Copyright Office also made clear that such exclusionary language is not necessary. In other words, the exclusionary language created unnecessary controversy without adding any needed clarity to the statute.

Thus, the Senate amendment omits the exclusionary language while leaving the scope and application of the bill exactly as it was when it passed the House. The legislation does not provide a defense in cases involving so-called "ad-skipping" devices, and it also does not affect the legal issues underlying such litigation, one way or another. Consistent with the intent of the legislation to fix a narrow and specific copyright issue, this bill seeks very clearly to avoid unnecessarily interfering with current business models, especially with respect to advertising, promotional announcements, and the like. Simply put, the bill as amended in the Senate is narrowly targeted to the use of technologies and services that filter out content in movies that a viewer finds objectionable, and it in no way relates to or affects the legality of so-called "ad-skipping" technologies.

There are a variety of services currently in litigation that distribute actual copies of altered movies. This type of activity is not covered by the section 110(11) exemption created by the Family Movie Act. There is a basic distinction between a viewer choosing to alter what is visible or audible when viewing a film, the focus of this legislation, and a separate entity choosing to create and distribute a single, altered version to members of the public. The section 110(11) exemption only applies to viewer directed changes to the viewing experience, and not the making or distribution of actual altered copies of the motion picture.

Related to this point, during consideration of this legislation in the House there were conflicting expert opinions on whether fixation is required to infringe the derivative work right under the Copyright Act, as well as whether evidence of Congressional intent in enacting the 1976 Copyright Act supports the notion that fixation should not be a prerequisite for the preparation of an infringing derivative work. This legislation should not be construed to be predicated on or to take a position on whether fixation is necessary to violate the derivative work right, or

whether the conduct that is immunized by this legislation would be infringing in the absence of this legislation.

Subsection (b) also provides a savings clause to make clear that the newly-created copyright exemption is not to be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption.

Subsection (c): Exemption From Trademark Infringement

Subsection (c) provides for a limited exemption from trademark infringement for those engaged in the conduct described in the new section 110(11) of the Copyright Act.

In short, this subsection makes clear that a person engaging in the conduct described in section 110(11)—the "making imperceptible" of portions of audio or video content of a motion picture or the creation or provision of technology to enable such making available—is not subject to trademark infringement liability based on that conduct, provided that person's conduct complies with the requirements of section 110(11). This section provides a similar exemption for a manufacturer, licensee or licensor of technology that enables such making imperceptible, but such manufacturer, licensee or licensor is subject to the additional requirement that it ensure 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 the copyright holder.

Of course, nothing in this section would immunize someone whose conduct, apart from the narrow conduct described by 110(11), rises to the level of a Lanham Act violation. For example, someone who provides technology to enable the making imperceptible limited portions of a motion picture consistent with section 110(11) could not be held liable on account of such conduct under the Trademark Act, but if in providing such technology the person also makes an infringing use of a protected mark or engages in other ancillary conduct that is infringing, such conduct would not be subject to the exemption provided here. As amended by the Senate, the bill also makes clear that failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption created by this subsection is not, by itself, enough to establish trademark infringement. Failure to qualify for the safe harbor from trademark liability merely means that the manufacturer, licensee, or other licensor of technology cannot assert an affirmative defense based on this exemption in a case where trademark infringement or some other violation of the Trademark Act is established.

Subsection (d): Definition

Subsection (d) provides definitional clarification regarding short-hand references throughout this section to the "Trademark Act of 1946." •

MESSAGE FROM THE HOUSE
DURING ADJOURNMENT

Under the authority of the order of January 7, 2003, the Secretary of the Senate, on November 24, 2004, during the adjournment of the Senate, received a message from the House of Representatives, announcing that the House has passed the following joint resolution, in which it requests the concurrence of the Senate:

H.J. Res. 115. Joint resolution making further continuing appropriations for the fiscal year 2005, and for other purposes.

The message also announced that the House has agreed to the amendment of the Senate to the resolution (H. Con. Res. 529) providing for a conditional adjournment of the House of Representatives and a conditional recess or adjournment of the Senate, with amendments.

ENROLLED BILLS SIGNED

Under authority of the order of the Senate of January 7, 2003, the Secretary of the Senate, on November 24, 2004, during the adjournment of the Senate, received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bills:

S. 434. An act to authorize the Secretary of Agriculture to sell or exchange all or part of certain parcels of National Forest System land in the State of Idaho and use the proceeds derived from the sale or exchange for National Forest System purposes.

S. 1146. An act to implement the recommendations of the Garrison Unit Joint Tribal Advisory Committee by providing authorization for the construction of a rural health care facility on the Fort Berthold Indian Reservation, North Dakota.

S. 1241. An act to establish the Kate Mullany National Historic Site in the State of New York, and for other purposes.

S. 1727. An act to authorize additional appropriations for the Reclamation Safety of Dams Act of 1978.

S. 2042. An act for the relief of Rocco A. Trecosta of Fort Lauderdale, Florida.

S. 2214. An act to designate the facility of the United States Postal Service located at 3150 Great Northern Avenue in Missoula, Montana, as the "Mike Mansfield Post Office".

S. 2302. An act to improve access to physicians in medically underserved areas.

S. 2484. An act to amend title 38, United States Code, to simplify and improve pay provisions for physicians and dentists and to authorize alternate work schedules and executive pay for nurses, and for other purposes.

S. 2640. An act to designate the facility of the United States Postal Service located at 1050 North Hills Boulevard in Reno, Nevada, as the "Guardians of Freedom Memorial Post Office Building" and to authorize the installation of a plaque at such site, and for other purposes.

S. 2693. An act to designate the facility of the United States Postal Service located at 1475 Western Avenue, Suite 45, in Albany, New York, as the "Lieutenant John F. Finn Post Office".

S. 2965. An act to amend the Livestock Mandatory Price Reporting Act of 1999 to modify the termination date for mandatory price reporting.

Under the authority of the order of January 7, 2003, the enrolled bills were signed by the President pro tempore (Mr. STEVENS) on November 24, 2004.

ENROLLED BILLS PRESENTED
DURING ADJOURNMENT

The Secretary of the Senate reported that on November 24, 2003, she had presented to the President of the United States the following enrolled bills:

S. 434. An act to authorize the Secretary of Agriculture to sell or exchange all or part of certain parcels of National Forest System land in the State of Idaho and use the proceeds derived from the sale or exchange for National Forest System purposes.