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108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 108–700

PIRACY DETERRENCE AND EDUCATION ACT OF 2004

SEPTEMBER 24, 2004.—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 H.R. 4077]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4077) to enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Piracy Deterrence and Education Act of 2004".

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) The Internet, while changing the way our society communicates, has also changed the nature of many crimes, including the theft of intellectual property.

(2) Trafficking in infringing copyrighted works through increasingly sophisticated electronic means, including peer-to-peer file trading networks, Internet chat rooms, and news groups, threatens lost jobs, lost income for creators, lower tax revenue, and higher prices for honest purchasers.

(3) The most popular peer-to-peer file trading software programs have been downloaded by computer users over 200,000,000 times. At any one time there are over 3,000,000 users simultaneously using just one of these services. Each month, on average, over 2,300,000,000 digital-media files are transferred among users of peer-to-peer systems.

(4) Many computer users simply believe that they will not be caught or prosecuted for their conduct.

(5) The security and privacy threats posed by certain peer-to-peer networks extend beyond users inadvertently enabling a hacker to access files. Millions of copies of one of the most popular peer-to-peer networks contain software that could allow an independent company to take over portions of users' computers and Internet connections and has the capacity to keep track of users' online habits.

(6) In light of these considerations, Federal law enforcement agencies should actively pursue criminals who steal the copyrighted works of others, and prevent such activity through enforcement and awareness. The public should be educated about the security and privacy risks associated with being connected to certain peer-to-peer networks.

SEC. 3. VOLUNTARY PROGRAM OF DEPARTMENT OF JUSTICE.

(a) VOLUNTARY PROGRAM.—The Attorney General is authorized to establish a program under which the Department of Justice, in cases where persons who are subscribers of Internet service providers appear to be engaging in copyright infringing conduct in the course of using that Internet service, would send to the Internet Service providers notices that warn such persons of the penalties for such copyright infringement. The Internet service providers may forward the notices to such persons.

(b) LIMITATIONS ON PROGRAM.—

(1) EXTENT AND LENGTH OF PROGRAM.—The program under subsection (a) shall terminate at the end of the 18-month period beginning on the date of the enactment of this Act and shall be limited to not more than 10,000 notices.

(2) PRIVACY PROTECTIONS.—No Internet service provider that receives a notice from the Department of Justice under subsection (a) may disclose to the Department any identifying information about the subscriber that is the subject of the notice except pursuant to court order or other applicable legal process that requires such disclosure.

(c) REIMBURSEMENT OF INTERNET SERVICE PROVIDERS.—The Department of Justice shall reimburse Internet Service providers for all reasonable costs incurred by such service providers in forwarding notices under subsection (a).

(d) REPORTS TO CONGRESS.—The Attorney General shall submit to the Congress a report on the program established under subsection (a) both at the time the program is initiated and at the conclusion of the program.

SEC. 4. DESIGNATION AND TRAINING OF AGENTS IN COMPUTER HACKING AND INTELLECTUAL PROPERTY UNITS.

(a) DESIGNATION OF AGENTS IN CHIPS UNITS.—The Attorney General shall ensure that any unit in the Department of Justice responsible for investigating computer hacking or responsible for investigating intellectual property crimes is assigned at least one agent to support such unit for the purpose of investigating crimes relating to the theft of intellectual property.

(b) TRAINING.—The Attorney General shall ensure that each agent assigned under subsection (a) has received training in the investigation and enforcement of intellectual property crimes.

SEC. 5. EDUCATION PROGRAM.

(a) ESTABLISHMENT.—There shall be established within the Office of the Associate Attorney General of the United States an Internet Use Education Program.

(b) PURPOSE.—The purpose of the Internet Use Education Program shall be to—

(1) educate the general public concerning the value of copyrighted works and the effects of the theft of such works on those who create them; and

(2) educate the general public concerning the privacy, security, and other risks of using the Internet to obtain illegal copies of copyrighted works.

(c) SECTOR SPECIFIC MATERIALS.—The Internet Use Educational Program shall, to the extent appropriate, develop materials appropriate to Internet users in different sectors of the general public where criminal copyright infringement is a concern. The Attorney General shall consult with appropriate interested parties in developing such sector-specific materials.

(d) CONSULTATIONS.—The Attorney General shall consult with the Register of Copyrights and the Secretary of Commerce in developing the Internet Use Education Program under this section.

(e) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under this section shall not use funds or resources of the Department of Justice allocated for criminal investigation or prosecution.

(f) ADDITIONAL PROHIBITION ON THE USE OF FUNDS.—The program created under this section shall not use any funds or resources of the Department of Justice allocated for the Civil Rights Division of the Department, including any funds allocated for the enforcement of civil rights or the Voting Rights Act of 1965.

SEC. 6. ACTIONS BY THE GOVERNMENT OF THE UNITED STATES.

Section 411(a) of title 17, United States Code, is amended in the first sentence by striking "Except for" and inserting "Except for an action brought by the Government of the United States or by any agency or instrumentality thereof, or" .

SEC. 7. AUTHORIZED APPROPRIATIONS.

There are authorized to be appropriated to the Department of Justice for fiscal year 2005 not less than $15,000,000 for the investigation and prosecution of violations of title 17, United States Code.

SEC. 8. 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 an offense under 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 AND AUTHORIZED PERSONS.—With reasonable cause, the owner or lessee of a motion picture facility where a motion picture is being exhibited, the authorized agent or employee of such owner or lessee, the licensor of the motion picture 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 committing an offense under this section for the purpose of questioning that person or summoning a law enforcement officer; and

"(2) shall not be held liable in any civil or criminal action by reason 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) DEFINITIONS.—In this section:

"(1) AUDIOVISUAL WORK, COPY, ETC.—The terms 'audiovisual work', 'copy', 'copyright owner', 'motion picture', 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.

"(3) MOTION PICTURE EXHIBITION FACILITY.—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.

"(g) 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.".

(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.".

SEC. 9. SENSE OF THE CONGRESS ON NEED TO TAKE STEPS TO PREVENT ILLEGAL ACTIVITY ON PEER-TO-PEER SERVICES.

(a) FINDINGS.—The Congress finds as follows:

(1) The most popular publicly accessible peer-to-peer file sharing software programs combined have been downloaded worldwide over 600,000,000 times.

(2) The vast majority of software products, including peer-to-peer technology, do not pose an inherent risk. Responsible persons making software products should be encouraged and commended for the due diligence and reasonable care they take including by providing instructions, relevant information in the documentation, disseminating patches, updates, and other appropriate modifications to the software.

(3) Massive volumes of illegal activity, including the distribution of child pornography, viruses, and confidential personal information, and copyright infringement occur on publicly accessible peer-to-peer file sharing services every day. Some publicly accessible peer-to-peer file sharing services expose consumers, particularly children, to serious risks, including legal liability, loss of privacy, threats to computer security, and exposure to illegal and inappropriate material.

(4) Several studies and reports demonstrate that pornography, including child pornography, is prevalent on publicly available peer-to-peer file sharing services, and children are regularly exposed to pornography when using such peer-to-peer file sharing services.

(5) The full potential of peer-to-peer technology to benefit consumers has yet to be realized and will not be achieved until these problems are adequately addressed.

(6) To date, the businesses that run publicly accessible file-sharing services have refused or failed to voluntarily and sufficiently address these problems.

(7) Many users of publicly available peer-to-peer file-sharing services are drawn to these systems by the lure of obtaining "free" music and movies.

(8) While some users use parental controls to protect children from pornography available on the Internet and search engines, not all such controls work on publicly accessible peer-to-peer networks.

(9) Businesses that run publicly accessible peer-to-peer file sharing services have openly acknowledged, and numerous studies and reports have established, that these services facilitate and profit from massive amounts of copyright infringement, causing enormous damage to the economic well-being of the copyright industries whose works are being illegally "shared" and downloaded.

(10) The legitimate digital music marketplace offers consumers a wide and growing array of choices for obtaining music legally, without exposure to the risks posed by publicly accessible peer-to-peer file sharing services.

(11) The Federal Trade Commission issued a Consumer Alert in July of 2003 warning consumers that some file-sharing services contain damaging viruses and worms and, without the computer user's knowledge or consent, install spyware to monitor a user's browsing habits and send data to third parties or automatically open network connections.

(12) Publicly available peer-to-peer file-sharing services can and should adopt reasonable business practices and use technology in the marketplace to address the existing risks posed to consumers by their services and facilitate the legitimate use of peer-to-peer file sharing technology and software.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that—

(1) responsible software developers should be commended, recognized, and encouraged for their efforts to protect consumers;

(2) currently the level of ongoing and persistent illegal and dangerous activity on publicly accessible peer-to-peer file sharing services is harmful to consumers, minors, and the economy; and

(3) therefore, the Congress and the executive branch should consider all appropriate measures to protect consumers and children, and prevent such illegal activity.

SEC. 10. ENHANCEMENT OF CRIMINAL COPYRIGHT INFRINGEMENT.

(a) CRIMINAL INFRINGEMENT.—Section 506 of title 17, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a) CRIMINAL INFRINGEMENT.—Any person who—

"(1) infringes a copyright willfully and for purposes of commercial advantage or private financial gain,

"(2) infringes a copyright willfully by the reproduction or distribution, including by the offering for distribution to the public 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

"(3) infringes a copyright by the knowing distribution, including by the offering for distribution to the public by electronic means, with reckless disregard of the risk of further infringement, during any 180-day period, of—

"(A) 1,000 or more copies or phonorecords of 1 or more copyrighted works,

"(B) 1 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of more than $10,000, or

"(C) 1 or more copies or phonorecords of 1 or more copyrighted pre-release works,

shall be punished as provided under section 2319 of title 18. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish the necessary level of intent under this subsection."; and

(2) by adding at the end the following:

"(g) LIMITATION ON LIABILITY OF SERVICE PROVIDERS.—No legal entity shall be liable for a violation of subsection (a)(3) by reason of performing any function described in subsection (a), (b), (c), or (d) of section 512 if such legal entity would not be liable for monetary relief under section 512 by reason of performing such function. Except for purposes of determining whether an entity qualifies for the limitation on liability under subsection (a)(3) of this section, the legal conclusion of whether an entity qualifies for a limitation on liability under section 512 shall not be considered in a judicial determination of whether the entity violates subsection (a) of this section.

"(h) DEFINITIONS.—In this section:

"(1) PRE-RELEASE WORK.—The term 'pre-release work' refers to a work protected under this title which has a commercial and economic value and which,

at the time of the act of infringement that is the basis for the offense under subsection (a)(3), the defendant knew or should have known had not yet been made available by the copyright owner to individual members of the general public in copies or phonorecords for sale, license, or rental.

"(2) RETAIL VALUE.— The 'retail value' of a copyrighted work is the retail price of that work in the market in which it is sold. In the case of an infringement of a copyright by distribution, if the retail price does not adequately reflect the economic value of the infringement, then the retail value may be determined using other factors, including but not limited to suggested retail price, wholesale price, replacement cost of the item, licensing, or distribution-related fees.".

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

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

(2) by inserting after subsection (c) the following:

"(d) Any person who commits an offense under section 506(a)(3) of title 17—

"(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 5 years, or fined in the amount set forth in this title, or both; and

"(2) shall, if the offense is a second or subsequent offense under paragraph (1), be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 10 years, or fined in the amount set forth in this title, or both."; and

(3) in subsection (f), as so redesignated—

(A) in paragraph (1), by striking "and" after the semicolon;

(B) in paragraph (2), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(3) the term 'financial gain' has the meaning given that term in section 101 (relating to definitions) of title 17.".

(c) CIVIL REMEDIES FOR INFRINGEMENT OF A COMMERCIAL PRE-RELEASE COPYRIGHTED WORK.—Section 504(b) of title 17, United States Code, is amended—

(1) by striking "The copyright owner" and inserting the following:

"(1) IN GENERAL.—The copyright owner"; and

(2) by adding at the end the following:

"(2) DAMAGES FOR PRE-RELEASE INFRINGEMENT.—

"(A) IN GENERAL.—In the case of any pre-release work, actual damages shall be presumed conclusively to be no less than $10,000 per infringement, if a person—

"(i) distributes such work by making it available on a computer network accessible to members of the public; and

"(ii) knew or should have known that the work was intended for commercial distribution.

"(B) DEFINITION.—For purposes of this subsection, the term 'pre-release work' has the meaning given that term in section 506(h). ".

SEC. 11. AMENDMENT OF FEDERAL SENTENCING GUIDELINES REGARDING THE INFRINGEMENT OF COPYRIGHTED WORKS AND RELATED CRIMES.

(a) AMENDMENT TO THE SENTENCING GUIDELINES.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including sections 2318, 2319, 2319A, 2319B, 2320 of title 18, United States Code, and sections 506, 1201, and 1202 of title 17, United States Code.

(b) FACTORS.—In carrying out this section, the Sentencing Commission shall—

(1) take all appropriate measures to ensure that the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) are sufficiently stringent to deter and adequately reflect the nature of such offenses;

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

(3) consider whether the definition of "uploading" contained in Application Note 3 to Guideline 2B5.3 is adequate to address the loss attributable to people

broadly distributing copyrighted works over the Internet without authorization; and

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

(c) PROMULGATION.—The Commission may promulgate the guidelines or amendments under this section in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

SEC. 12. EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO CONTENT IN MOTION PICTURES.

(a) SHORT TITLE.—This section may be cited as the "Family Movie Act of 2004".

(b) EXEMPTION FROM COPYRIGHT AND TRADEMARK INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.—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"; and

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

"(11)(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 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.".

(c) 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.

"(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 that is authorized under 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 that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

"(C) Any manufacturer, licensee, or licensor of technology described in subparagraph (B) who fails to comply with the requirement under subparagraph (B) to provide notice with respect to a motion picture shall be liable in a civil action brought by the copyright owner of the motion picture that is modified by the technology in an amount not to exceed $1,000 for each such motion picture.

"(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), 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 2004.".

(d) 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.).

PURPOSE AND SUMMARY

H.R. 4077 will educate the public about intellectual property law, create an alternative to litigation through a voluntary warning program, increase cooperation among Federal agencies and intellectual property owners concerning piracy, assist the Department of Justice in its efforts to prosecute intellectual property theft, and 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.

BACKGROUND AND NEED FOR THE LEGISLATION

Both Congressional testimony and recently issued Federal court rulings have noted that piracy continues to increase, particularly on certain, newly developed, peer-to-peer networks. The Copyright Act already provides civil and criminal remedies for traditional online intellectual property infringement. Federal law enforcement agencies have begun to pursue more cases of traditional online infringement, but they have been slower to bring cases involving peer-to-peer networks. Insufficient funding, ambiguity in the law, and untrained staff are the primary explanations offered for the lack of greater investigative and prosecutorial activity. H.R. 4077 will address these problems in an effort to increase the ability of agencies to investigate and prosecute intellectual property crimes.

The Committee is increasingly concerned with the development of new digital business models that promote online infringement. This Committee has long recognized the illegality of distributing stolen property to others, whether it occurs in the real or digital world. The Committee has previously updated the laws addressing online infringement when new methods of piracy appeared. The passage of the No Electronic Theft Act [1] in 1997 was a response to the then developing practice of individuals giving away stolen intellectual property without remuneration. In this bill, the Committee is acting once again to address a new form of intellectual property theft. Portions of this legislation are targeted directly and indirectly at the online infringement occurring on certain peer-to-peer networks. The Committee has seen significant evidence that the amount of infringement occurring on such networks has grown significantly in the past few years as these networks continue to expand. The Committee is not concerned with the spread or use of peer-to-peer technology in general since this technology appears to represent the future of computing. Nevertheless, the legal uses of peer-to-peer technology are being ignored as it is used to spread infringing material.

Section 3 of the legislation creates a voluntary warning program administered by the Department of Justice. The Committee hopes that this provision represents a litigation alternative that will reduce online piracy levels by making online users aware of the penalties for copyright infringement. This program is designed to enable the Department to warn Internet users who appear to be engaging in illegal activity. Although the program may be used to combat other forms of piracy, the Committee anticipates that the majority of such warnings will be sent to those who apparently engage in infringing activity via peer-to-peer networks.

Recent news stories indicate that minor children are indulging in illegal activity (e.g., copyright infringement) without the knowledge of their parents by using a account paid for by a parent. Inevitably, illegal activity ceases once discovered by a parent. A warning letter from the Department of Justice should get the attention of the parent who pays for an online account used for potentially illegal activity as well as that of the few adults that may not be aware of the illegal nature of their activity. For corporate accounts, businesses may also be unaware of the activities of an individual employee who is using employer resources to engage in potentially il-

[1] Pub. L. No. 105–147.

legal activity. A similar warning letter from the Department of Justice should serve to educate the company and its employees about the penalties for copyright infringement.

The Committee therefore endorses a pilot warning system administered by the Department of Justice that would issue up to 10,000 warning letters in an 18-month period to those who appear to be engaging in online infringement. Following a public comment period in which interested parties can comment on the process by which the program will operate, the Department should distribute warning letters to participating Internet Service Providers ("ISPs") that would then forward them to those subscribers who appear to be engaging in illegal activity. These letters would contain some identification of the potentially illegal activity, such as the file name available at specific Internet Protocol ("IP") addresses. Such letters would not issue in the absence of independent investigation conducted by the Department. Simply forwarding allegations made by private parties would not suffice. Warning letters would also contain more information about the potential civil and criminal penalties related to online infringement. The Department should include contact information for recipients of such warning letters to call in case the recipients wish to verify the authenticity of the warning along with a clear statement that the information that led to a letter being mailed was gathered without the assistance of their ISP.

This program is designed to be voluntary; ISPs may opt out before or during the duration of the pilot program. ISPs can also opt back in at any point if they initially opted out. The Committee has noted the repeated expressions of interest by the ISP community in working with content owners to develop an alternative to litigation against those who appear to be undertaking online infringement. The willingness of ISPs to participate in this program would be an indication of their sincerity.

In addition, the Committee does not believe that the receipt and forwarding of such warning letters by an ISP impacts the repeat infringer provisions of § 512(i)(1)(A) since the warning letters only reflect what appears to the Department to be potential infringement.

To receive the reimbursement of costs authorized under § 3(c), the Department shall establish a system to receive from each participating ISP listings of the number of, and actual costs associated with, letters that the ISP spent in forwarding warning letters. The Department must reimburse the ISPs promptly. The costs of forwarding such warning letters is anticipated to include the direct costs of matching IP addresses to subscriber addresses as well as to the actual mailing costs. Unless the Department feels otherwise, the Committee does not anticipate that the Department should pay for indirect costs such as the pro-rata costs of electricity for running a computer to look up an IP address or the pro-rata costs of rent for the building in which the employee who conducts the search is employed. The Department shall maintain records for review by Congress of these costs and include summaries in the reports required under § 3(d). A request for reimbursement by an ISP shall only be made after it has made a good faith effort to identify the subscriber in question and forward the warning letter to him or her. The ISP is not responsible for ensuring that the warning

letter is received by their subscriber, is read, or ameliorates the problem. If the forwarded warning letter is returned to the ISP due to a bad address and the ISP is unable to contact the subscriber to update the address, the ISP may consider this in deciding whether the customer is using its networks for illegal activity in general, and not just for potential infringement.

Responding to potential objections to the program, the Committee stipulates that its operation will not result in the transmission of personal subscriber information back to the Department of Justice. If the Department wishes to learn the identity of an online user, it can use existing legal authority to do so. Section 3 does not expand or restrict such authority. To ensure that the ISP does not learn of any new customer information that it is not already aware of from the routine operation of its networks, the Department shall ensure that the warning letters are sealed and marked in such a way that anyone other than the ISP subscriber is on notice that only the subscriber should open it. The Department shall provide a cover letter for the ISP to read that contains a description of this program and the IP address and date and time when the potentially infringing activity occurred that led to the decision of the Department to send a warning letter. This will allow the ISP to match the IP address on that date and time with a subscriber. Other information that the Department feels is necessary for this program to be successfully operated may also be included for the ISP to review.

The ISP would then voluntarily forward the unopened warning letter without reviewing its contents, to the subscriber whose IP address matched. If there are general situations in which the ISP knows in advance that it cannot match a subscriber's identity to an IP address, such as IP logs that are maintained for only 30 days, the Committee hopes that ISPs are forthcoming about this information to ensure that the Department does not waste its resources sending warning letters to ISPs that cannot or will not be forwarded to subscribers.

The legislation authorizes a specific number of warning letters—10,000. To count towards this limit, a warning letter must actually be forwarded to an ISP subscriber. Warning letters that cannot or will not be sent by an ISP to one of its subscribers do not count against the total number limit. To keep track of the overall number of warning letters meeting this limitation, the Department shall count the number of reimbursement requests that it has received from ISPs.

Section 4 recognizes the benefits of having a dedicated agent in each of the computer hacking and intellectual property sections ("CHIPs") and other similar units to support intellectual property theft investigations. CHIPs units have succeeded in increasing the number of intellectual property investigations. Recent announcements by the Department of the creation of new units will lead to even further prosecutions. The agents authorized by this program will be capable of assisting with the notice program authorized in § 3.

Section 5 creates an education program that the Committee feels is overdue. Consumer education is an important part of combating illegal activity. The government has long used public education campaigns to modify consumer behavior, such as boosting the use

of seat belts and reducing the underpayment of Federal income taxes. A similar campaign to educate the public about the value of copyrighted works and the risks of using the Internet to obtain illegal copies of them will have similar positive impacts on reducing illegal activity on the Internet. Recipients of § 3 notices who also see the education campaigns authorized by § 5 will be even less likely to engage in illegal activity. To ensure that funding from other priority programs within the Department is not used to subsidize this activity, a prohibition on criminal investigation and civil rights funding earmarked for § 5 programs is included. Instead, the Committee expects funding for this program will primarily, if not entirely, come from resources used to fund other educational campaigns run by the Department. The Department is directed to consult with the Register of Copyrights in developing this program.

Section 6 expressly authorizes the undertaking of actions by the United States government for infringements of copyright before registration has been made. The Committee has learned of situations in which intellectual property infringement occurs so quickly after a new work is released that pursuing those responsible for the infringement is prevented by existing law. The Committee is also aware of situations in the motion picture, music, publishing, games, and software industries, among others, in which stolen pre-release versions of works are made available for distribution. The pursuit of those responsible for the illegal activity is similarly hindered since pre-release versions of works are not typically registered with the Copyright Office at any point.

Section 8 creates a new § 2319B in Title 18 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, 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. Typically, an offender attends a pre-opening "screenings" or a first-weekend theatrical release, and uses sophisticated digital equipment to record the movie. This 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 per year of losses the movie industry suffers because of hard goods piracy.

Even worse, 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. One goal of H.R. 4077 is to provide a potent weapon in the arsenal of prosecutors 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. It would reach 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."[2]

This does not, of course, suggest that taking photographs in a movie theater is in any way sanctioned by this bill. Engaging in such conduct could still subject a person to civil or criminal liability under the Copyright Act. But the provision is drafted narrowly to address the specific and pernicious problem of "camcording" of 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 into a movie theater a high-quality miniature camera and recording equipment may be highly probative of the intent to camcord. The Committee is concerned, however, that the "attempt" language is not 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 occurring.

Further, the bill is not intended to permit a prosecution of, for instance, a salesperson at a store who uses a camcorder to record some part 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, H.R. 4077 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

[2] 17 U.S.C. § 101.

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." 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 trusts the Department to exercise appropriate prosecutorial discretion when using H.R. 4077. 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 criminal law. The Committee fully expects that NATO and the MPAA will abide by that commitment. Prosecutors should consider whether the theater from which the camcording took place had posted such a sign as an important factor in determining 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 suspect of camcordering. 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 9 reflects the view of Congress concerning the imperative to prevent illegal activity on peer-to-peer networks. The growth in peer-to-peer piracy continues and is a function of the activities of certain peer-to-peer network operators to design their systems in a way to shift all liability for infringement that occurs on their networks to their users.

Section 10 reflects the need by the Department of Justice to have clearer authority to criminally pursue those who make available significant numbers of files for others to download. This section sets this threshold at either:

1) 1,000 or more works, or
2) 1 or more works having a total retail value of $10,000 or more, or
3) 1 or more pre-release works.

The Committee believes that these thresholds will allow the Department to pursue criminal charges against those who knowingly distribute, with reckless disregard of the risk of further infringement, works in number equal to or higher than one of the three thresholds. In a real world comparison, the Committee views the activity made criminal under this provision as equivalent to someone who knowingly, without permission of the those who have a right of access to a house, distributes 1,000 keys or more to the front door with reckless disregard that at least one of the key holders will enter the house without permission. Such activity is wrong in both the physical and digital worlds. The Committee notes the sentiment of those who feel that no economic harm has occurred as a result of such file sharing. Although the Committee has been pro-

vided with significant testimony and evidence to refute such statements from songwriters, record labels, and online music stores that are being forced to compete with sites and networks offering piratical versions for free, the point is not relevant. Someone who enters a house without the owner's permission using a key gained from a third party is criminally liable whether or not they chose to steal a physical compact disc containing music or a digital video disc containing a motion picture. The same is true for someone who uses a car without the permission of the owner and then replaces the gas and oil used during the unauthorized trip.

Some have argued that § 10 criminalizes wireless networks operated by individuals in their home or business that they use to access files or the Internet for their own benefit. In such cases, a typical user does not knowingly offer files for distribution to others except for himself and in a business setting, for employees. Those who access the network without permission to download files do not trigger the knowing test of § 506(a)(3). Someone who deliberately makes known to others by advertising or other overt acts the presence of files available for download could fall under this Act if they meet one of the three threshold citeria.

The Committee has set a lower threshold for pre-release works since the economic harm of pirated works is higher when the work has not been made available to the public for sale. The harm is even higher when the work has never been publicly performed. This issue is the same for all forms of copyrighted works—why pay for something that you can get for free? Although some Americans pay for bottled water, many more do not and get their water for near-free prices from their local water company. Some consumers may still pay to see or hear the public performance of a work that is available elsewhere for little or no cost; the majority will not.

Since the Department of Justice is unlikely to have the resources to pursue every instance of pre-release works, the Committee has included a provision to allow for civil suits to recover damages. It is expected that more civil suits will be brought than criminal suits.

In developing this provision, the Committee heard from several Internet companies and providers that they should not face liability under the new § 506(a)(3) when they did not participate in the illegal conduct in the first place. The newly created § 506(g) preempts any liability under the new § 506(a)(3) for entities that would qualify for a limitation on monetary damages for civil copyright infringement with respect to a claimed infringement under 17 U.S.C. § 512.

The Committee believes that a service provider that performs the functions described in §§ 512(a) through (d) in a manner that complies with the conditions set out in § 512 should not be subject to criminal liability under § 506(a)(3). Therefore, if an entity would not be liable for damages for civil copyright infringement when it undertakes one or more of the functions described in §§ 512(a) through 512(d), § 506(g) ensures that it would not be subject to criminal sanctions under § 506(a)(3). The obverse is not necessarily true, as the government is always required to prove beyond a reasonable doubt each of the elements of a criminal statute against any defendant, irrespective of the defendant's liability for civil damages for copyright infringement under the Copyright Act.

There are several key points to this provision. First, the limitation on liability affects only potential criminal liability under subsection (a)(3). It is not meant to limit or expand in any way the ability of law enforcement to bring an action under subsection (a)(1) against a service provider that acts willfully and for purposes of commercial advantage or private financial gain, or to bring an action under subsection (a)(2) against a service provider that acts willfully and meets the corresponding numerical and retail value thresholds set forth in (a)(2).

This does not mean that the facts and circumstances of a service provider's conduct and whether it was in accordance with the strictures of § 512 are irrelevant to an action brought under § 506(a)(1) or (a)(2). Rather, it means only that the legal conclusion that a service provider's conduct was exempt from prosecution under (a)(3) should not be considered in determining "willfulness" for purposes of subsections (a)(1) or (a)(2). Similarly, the fact that a service provider might fail to qualify for a limitation of liability under this subsection should not bear adversely upon a defense that the service provider's conduct is not infringing under this title, that it has not acted with reckless disregard for the risk of further infringement, or any other defense.

In addition, the limitation applies only to a "legal entity"—a firm, corporation, union or other organization which is organized under the laws of the United States; the laws of a State, district, commonwealth, territory, or possession of the United States; or the laws of a foreign country and which is capable of suing and being sued in a Federal District court of law. This provision is not intended to allow a natural person who might otherwise be subject to prosecution to claim that he or she performs the functions described in § 512, and therefore cannot be prosecuted. Efforts by individuals to establish a "legal entity" simply to take advantage of this carve-out should be ignored by prosecutors and the courts.

Finally, this provision is intended to address a narrow issue raised by the intersection of the limitation on liability contained in § 512, the creation of a new and more objective intent standard from that which currently exists in § 506, and the stated concern by service providers that, without this protection, their businesses could be subjected to prosecution in circumstances that would be unjust. Although the Committee is unaware of any criminal prosecutions of service providers under existing law and anticipates few, if any, such ISP prosecutions under § 506(a)(3), this provision clarifies that engaging in behavior that meets the requirements set out in the Digital Millennium Copyright Act[3] to avoid damages for monetary relief for civil copyright infringement is also sufficient to avoid criminal liability under § 506(a)(3).

Section 11 of the legislation is a companion to § 10 which directs the United States Sentencing Commission to review and, if appropriate, amend several sentencing guidelines applicable to persons convicted of several sections of Titles 17 and 18 of the U.S. Code. The Committee has given the Commission flexibility in making the determination for these sections. However, in the Committee's view, all of these sections need to be updated for the factors identified in this Section.

[3] Pub. L. No. 105–304.

The Committee has included the text of H.R. 4586, the "Family Movie Act of 2004," as a new § 12 of the legislation. During the markup of H.R. 4077, Committee Members commented on the need to invigorate copyright enforcement while clarifying that copyright law cannot be used to limit a parent's right to control what their children watch in the privacy of their own home. H.R. 4586 was reported by the Committee on the Judiciary prior to the markup of H.R. 4077.[4] The legislative language earlier reported by the Committee is included in § 12, and a full description of that language may be found in the Committee's report on H.R. 4586.

H.R. 4077, as reported, omitted several provisions that had been included in earlier versions due to commitments the Committee received from several Federal departments and agencies. As originally drafted in H.R. 2517, the predecessor to H.R. 4077, this bill would have amended §§ 411, 602 and 603 of Title 17 to provide that neither registration with the Copyright Office, nor recordation with, the Bureau of Customs and Border Protection of the Department of Homeland Security (hereinafter referred to as "CBP") was a prerequisite for the exclusion of piratical goods by CBP. Since then, representatives from this Committee have met with the Copyright Office and with CBP to discuss how such changes might impact their operations. Specifically, the Copyright Office expressed concern that the amendments could have the unintended consequences of reducing incentives to register copyrights and of imposing on CBP the duplicative burden of determining issues of copyrightability—without having the expertise of the Copyright Office to rely upon.

Upon further consideration, and based on certain commitments made by CBP, the Committee has deleted the provisions of this bill that would have amended §§ 411, 602 and 603 relating to border enforcement because we are persuaded that these provisions are not necessary. In particular, we cite the CBP's draft amendments to its regulations that would provide a more flexible approach for certain categories of works where copyrightability is rarely at issue (e.g. sound recordings and audio-visual works), as well as for non-United States works. In those cases, pursuant to the draft amendments, CBP would permit the recordation with it of applications for registration, pending issuance of the certificate of copyright registration, or, in the case of non-United States works, the recordation of an affidavit of ownership. The Memorandum of Understanding reached between CBP and the Recording Industry Association of America reflects this flexibility inherent in present laws to fashion modifications to certain procedures in order to effect better protection at the US border against the importation of piratical articles. We are satisfied that CBP has reached general agreement with industry on a regulatory framework that addresses the industry's, as well as this Committee's, concerns about preventing the importation of infringing materials into this country, and does so in an operationally sound manner. The Committee understands that issues relating to the *Capitol Records* v. *Naxos* decision in the Southern District of New York may remain unresolved for some interested parties. CBP is directed to consult with the Copyright Office on the merits of such concerns.

[4] See H.R. Rept. No. 108–670.

Among law enforcement agencies, CBP is in a unique position to provide meaningful border protection for our copyright-based industries. Unless we increase the probability (and reality) of exclusion, our industries will lose the U.S. market so critical to their continued existence. Moreover, as established in hearings in our Committee and other Committees, copyright piracy's high profits and low risk have made it an appealing complement to narcotics and arms trafficking. Confirmed links between intellectual property crime, especially with respect to global trade in pirated CDs, and organized crime make the case that CBP must continue to take intellectual property violations seriously.[5]

The Committee has withdrawn the border enforcement related sections of this bill based on its understanding that CBP will promptly issue new interim regulations that will direct officers to detain articles embodying sound recordings suspected of infringement under Title 17, or that violate 18 U.S.C. § 2319A, regardless of whether such articles are recorded with CBP or registered with the Copyright Office at the time of detention, and will work with copyright owners to secure the recordation of information that will subject such infringing goods to seizure and forfeiture. The Committee is particularly concerned about the need to improve and streamline procedures in certain areas—namely with respect to foreign works, and with respect to sound recordings and audio-visual works in which the absolute number of works (in the case of the recording industry) or the need to enter information in the CBP database quickly (in the case of both record and film industries) necessitated flexibility in how CBP would accept recordations.

Some parties have raised concerns with the Committee that because the detention and/or seizure of pre-1972 sound recordings takes place in the absence of a copyright registration, that CBP might take actions which could result in the improper detention and/or seizure of materials that are not subject to protection. It is the opinion of the Committee that CBP should ensure that it adopt and implement practices that will fully address such concerns.

We are pleased that under this new framework, CBP has established procedures that will allow it to pursue an aggressive enforcement campaign against the importation of piratical sound recordings, audio-visual works and bootlegs. Central to this are the following elements:

1. Making the detention, seizure and forfeiture of infringing articles, including sound recordings, audio-visual works, and fixations of live performances a priority.
2. Providing a streamlined and more efficient process for the recordation of certain categories of works where "copyrightability" is rarely an issue—namely sound recordings and audio visual works—so that CBP recordation can be effected by the submission by the copyright owner of a copy of the application for copyright registration filed with the Copyright Office.
3. Directing field officers to detain articles suspected of infringing sound recording copyrights, or suspected of being unauthorized fixations of live musical performances.

[5] Committee on the Judiciary Serial No. 9, March 13, 2003.

4. Requiring sound recording copyright owners to furnish sufficient proof of ownership and proof of infringement within 30 days of the detention of such articles.
5. Providing for the seizure and destruction of all phonorecords or other copies of sound recordings or live musical performances included in shipments containing copies of sound recordings or live musical performances that CPB has determined to be infringing—unless the importer can demonstrate the non-infringing nature of such other articles.
6. Ensuring that copyright owners are provided with specific information related to the importation of infringing articles, including the identity of the parties and other relevant information.

In addition to the discussions summarized above, representatives from this Committee, the CBP, the Copyright Office and the affected industries also met to discuss the amount and kind of information that Port Directors disclose to owners of intellectual property and their representatives when they seize infringing goods. The information currently disclosed is set forth in 19 C.F.R., § 133.42(d). The Committee considered legislation to increase the amount and kind of information that Port Directors would disclose, but determined that such legislation was unnecessary upon the CBP's commitment to expand their disclosure authority through the issuance of interim regulations amending § 133.42(d).

Specifically, the CBP has agreed that it will promptly promulgate a proposed amendment to 19 C.F.R. § 133.42 (Infringing Copies or phonorecords) that:

1. Extends the list of information, if available, to be disclosed by the port director to the owner of the copyright under § 133.42(d), to the extent legally permissible, to include the following:
    (a) Information from available shipping documents (such as manifests, airbills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.
    (b) The name and address of the broker involved in the transaction.
    (c) Information relating to previous completed seizures of imported infringing copies or phonorecords involving the same importer, manufacturer, exporter or broker, provided that obtaining such information is not unduly burdensome.
2. Directs the port directors, when providing disclosure to the owner of the copyright under 19 C.F.R. § 133.42(d), to provide such information as expeditiously as possible in order to allow the owner of the copyright to pursue avenues for relief and deterrence beyond the seizure and forfeiture of infringing materials, such as by seeking criminal investigations at the local, state, Federal or international level.

In light of this commitment, the Committee has determined that no additional legislation in this area is necessary at this time.

Finally, the Committee is aware of cooperative efforts between intellectual property owners and CBP to enable CBP to release information on seized devices which violate the anti-circumvention provisions of the Digital Millennium Copyright Act. The information would be comparable to that released under 19 C.F.R. § 133.42(d). While the devices themselves may not contain infringing copyrighted material, they provide the capability for a user to remove technological protection measures from copyrighted works such as entertainment software. Since they allow a user to circumvent technological protection measures, they represent a critical step in enabling a user to make unauthorized copies of software titles which can then be uploaded to the Internet for free downloading across the globe.

CBP has not released such information to copyright owners who may be harmed by such devices because the devices themselves do not contain infringing copyrighted material. The copyright owner thus has no means to learn important information solely within CBP's knowledge, such as the identity of the importer, even though CBP itself has determined that the devices violate the Digital Millennium Copyright Act. The copyright owner is then restricted from pursuing private or criminal enforcement actions in this country or work with foreign authorities to identify and shut down the manufacturing source of the devices.

The Committee believes this gap in disclosure serves only to protect those who import illegal devices. The Committee recommends CBP close this loophole and provide information about illegal circumvention devices to copyright owners.

HEARINGS

The Subcommittee on Courts, the Internet, and Intellectual Property conducted a hearing on related legislation, H.R. 2517, on July 17, 2003, with testimony received from four witnesses representing three organizations and one government agency.

The Committee's Subcommittee on Courts, the Internet, and Intellectual Property held an oversight hearing on the issue involved in § 12 of the legislation on May 20, 2004, with testimony received from five witnesses representing five organizations. The Subcommittee subsequently held a hearing on H.R. 4586 which is incorporated as Section 12 on June 17, 2004. Testimony was received from four witnesses representing four organizations.

COMMITTEE CONSIDERATION

On March 31, 2004, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably the bill H.R. 4077 as amended by a voice vote, a quorum being present. On September 8, 2004, the full Committee met in open session and ordered favorably reported the bill H.R. 4077 with an amendment by a voice vote.

As noted above, the Committee adopted an amendment to H.R. 4077 that consisted of the text of H.R. 4586 as reported by the Committee. On July 8, 2004, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 4586, as amended, by a vote of 11 to 5, a quorum being present. On July 21, 2004, the Committee met

in open session and ordered favorably reported the bill H.R. 4586 with an amendment by a vote of 18 to 9, 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 H.R. 4077.

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, H.R. 4077, 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, September 24, 2004.

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 H.R. 4077, the "Piracy Deterrence and Education Act of 2004."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4077—Piracy Deterrence and Education Act of 2004.

SUMMARY

H.R. 4077 would authorize the appropriation of $15 million for fiscal year 2005 for the Attorney General to enforce copyright laws. The bill would direct the Attorney General to establish the Internet Use Education Program to increase awareness of copyright in-

fringement issues. H.R. 4077 also 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. Finally, the bill 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.

Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 4077 would cost $15 million over the 2005–2009 period. This legislation could affect direct spending and receipts, but we estimate that any such effects would be less than $500,000 annually.

H.R. 4077 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.

H.R. 4077 would impose private-sector mandates as defined in UMRA. CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 4077 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Authorization Level	15	0	0	0	0
Estimated Outlays	13	2	0	0	0

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2005. CBO assumes that the amount authorized for enforcement of copyright laws will be appropriated near the beginning of fiscal year 2005 and that outlays will follow the historical rate of spending for this activity. Based on information from the Department of Justice, CBO estimates that it would cost less than $500,000 annually to establish and operate the Internet Use Education Program.

Section 12 of the bill would provide 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 section 12 would have no effect on federal spending.

Because those prosecuted and convicted under H.R. 4077 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

H.R. 4077 contains no intergovernmental mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 4077 would impose two private-sector mandates as defined in UMRA. CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation).

First, the bill would impose a private-sector mandate on copyright owners. Section 12 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 12 also would impose a private-sector mandate on manufacturers, licensees, and licensors of technology 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.

PREVIOUS CBO ESTIMATES

On May 18, 2004, CBO transmitted a cost estimate for S. 1932, the Artists' Rights and Theft Prevention Act of 2004, as reported by the Senate Committee on the Judiciary on April 29, 2004. In addition, on May 28, 2004, we transmitted a cost estimate for S. 1933, the Enhancing Federal Obscenity Reporting and Copyright Enforcement Act of 2004, as reported by the Senate Committee on the Judiciary on May 20, 2004. Both those bills would authorize the appropriation of $5 million for each of fiscal years 2005 through 2009 for the investigation and prosecution of intellectual property offenses, and we estimated that implementing each bill would cost $23 million over the 2005–2009 period, assuming appropriation of the necessary amounts.

On August 17, 2004, CBO transmitted a cost estimate for H.R. 4586, the Family Movie Act of 2004, as ordered reported by the

House Committee on the Judiciary on July 21, 2004. Section 12 of H.R. 4077 and H.R. 4586 are identical, as are the cost estimates. The private-sector mandates contained in section 12 of H.R. 4077 are identical to the mandates in H.R. 4586 with direct costs well below UMRA's annual threshold for private-sector mandates.

ESTIMATE PREPARED BY:

Federal Costs: Mark Grabowicz (226–2860)
Impact on State, Local, and Tribal Governments: Melissa Merrell (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, H.R. 4077 will educate the public about intellectual property law, create an alternative to litigation through a voluntary warning program, increase cooperation among Federal agencies and intellectual property owners concerning piracy, assist the Department of Justice in its efforts to prosecute intellectual property theft, and 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. In general, this will lead to an increased number of criminal prosecutions brought by the Department of Justice and diminished of digital copyright theft.

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, § 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. This section states that the Act may be cited as the "Piracy Deterrence and Education Act of 2004."

Section 2. Findings. This section makes several findings regarding the nature of the Internet and online piracy.

Section 3. Voluntary Program of the Department of Justice. This section creates a voluntary program in which the Department of Justice would be authorized to send up to 10,000 warning letters in an 18-month period to those suspected of engaging in infringement. ISPs would voluntarily help to forward these notices to their subscribers while protecting the privacy of their customers and having their costs reimbursed.

Section 4. Designation and Training of Agents in Computer Hacking and Intellectual Property Units. This section requires each

Computer Hacking and Intellectual Property Unit established by the Department of Justice to include not less than one agent per unit dedicated to investigating crimes related to intellectual property theft.

Section 5. Education Program. This section establishes within the Office of the Associate Attorney General of the United States an Internet Use Education Program. Funds from criminal investigations and prosecutions and from the Civil Rights Division may not be used to fund such programs. Authorization for such funding has already become law in other legislation. The Department is directed to consult with the Register of Copyrights in developing this program.

Section 6. Actions by the Government of the United States. This section authorizes the filing of actions by the United States against persons for their infringement of works before the work is registered with the Copyright Office. Currently, only the author of the work has the authority to do so. This section ensures that criminal charges can be brought by the United States Government against those who steal a pre-release version of a work and then distribute it to others.

Section 7. Authorization of Appropriations. This section authorizes $15 million in annual appropriations for investigations and prosecutions of violations of Title 17.

Section 8. Prevention of Surreptitious Recording in Motion Picture Theaters. This section creates a new felony penalty for the camcording of movies in a movie theater subject to several conditions.

Subsection (a) of the new § 2319B created by § 8 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 § 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 in their theater(s). This provision is modeled upon numerous shopkeeper privilege statutes that exist in state and local laws.

Subsection (g) 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.[6]

[6] *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).

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

Section 9. Sense of Congress. Section 9 contains sense-of-the-Congress language that details the harms caused by peer-to-peer piracy and the difficulty in prosecuting crimes that occur on such networks.

Section 10. Enhancement of Criminal Copyright Infringement. DOJ has stated that existing law makes it difficult, if not impossible, to bring actions against peer-to-peer file sharers for sharing pirated materials. Section 10 creates a new 17 U.S.C. § 506(a)(3) to criminalize conduct in which a person "infringes a copyright by the knowing distribution, including by the offering for distribution by the public by electronic means, with reckless disregard of the risk of further infringement, during any 180-day period 1,000 or more works, or works that have a retail value of $10,000, or 1 or more pre-release works. "Pre-release works" and "retail value" are defined. A limitation on liability is created for legal entities that meet face no civil liability under § 512 as listed civil and criminal penalties are created for the violation of the newly created 17 U.S.C. § 506(a)(3).

Section 11. Amendment of Federal Sentencing Guidelines Regarding the Infringement of Copyrighted Works and Related Crimes. Section 11 amends the authority of the United States Sentencing Commission to review and update the sentencing guidelines and policy statements surrounding several intellectual property rights crimes.

Section 12. Exemption from Infringement for Skipping Audio or Video Content in Motion Pictures. Subsection 12(b) of the legislation creates a new subsection § 110 (11) of Title 17. This new subsection ensures that U.S. copyright law 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.

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.

Subsection 12(c) of the legislation clarifies existing U.S. trademark law to ensure that it cannot be interpreted to proscribe the operation of services identified in § 12(b) 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, these requirements should not burden consumer electronics manufacturers.

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 17, UNITED STATES CODE

* * * * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * * * *

§ 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 lit-

erary 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)(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 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.

* * * * * * *

CHAPTER 4—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

* * * * * * *

§ 411. Registration and infringement actions

(a) **[**Except for**]** *Except for an action brought by the Government of the United States or by any agency or instrumentality thereof, or* 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 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.

* * * * * * *

CHAPTER 5—COPYRIGHT INFRINGEMENT AND REMEDIES

* * * * * * *

§ 504. Remedies for infringement: Damages and profits

(a) * * *

(b) ACTUAL DAMAGES AND PROFITS.—[The copyright owner]

(1) IN GENERAL.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(2) DAMAGES FOR PRE-RELEASE INFRINGEMENT.—

(A) IN GENERAL.—In the case of any pre-release work, actual damages shall be presumed conclusively to be no less than $10,000 per infringement, if a person—

(i) distributes such work by making it available on a computer network accessible to members of the public; and

(ii) knew or should have known that the work was intended for commercial distribution.

(B) DEFINITION.—For purposes of this subsection, the term "pre-release work" has the meaning given that term in section 506(h).

* * * * * * *

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

(a) CRIMINAL INFRINGEMENT.—Any person who—

(1) infringes a copyright willfully and for purposes of commercial advantage or private financial gain,

(2) infringes a copyright willfully by the reproduction or distribution, including by the offering for distribution to the public 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

(3) infringes a copyright by the knowing distribution, including by the offering for distribution to the public by electronic means, with reckless disregard of the risk of further infringement, during any 180-day period, of—

(A) 1,000 or more copies or phonorecords of 1 or more copyrighted works,

(B) 1 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of more than $10,000, or

(C) 1 or more copies or phonorecords of 1 or more copyrighted pre-release works,

shall be punished as provided under section 2319 of title 18. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish the necessary level of intent under this subsection.

* * * * * * *

(g) LIMITATION ON LIABILITY OF SERVICE PROVIDERS.—No legal entity shall be liable for a violation of subsection (a)(3) by reason of performing any function described in subsection (a), (b), (c), or (d) of section 512 if such legal entity would not be liable for monetary relief under section 512 by reason of performing such function. Except for purposes of determining whether an entity qualifies for the limitation on liability under subsection (a)(3) of this section, the legal conclusion of whether an entity qualifies for a limitation on liability under section 512 shall not be considered in a judicial determination of whether the entity violates subsection (a) of this section.

(h) DEFINITIONS.—In this section:

(1) PRE-RELEASE WORK.—The term "pre-release work" refers to a work protected under this title which has a commercial and economic value and which, at the time of the act of infringement that is the basis for the offense under subsection (a)(3), the defendant knew or should have known had not yet been made available by the copyright owner to individual members of the general public in copies or phonorecords for sale, license, or rental.

(2) RETAIL VALUE.— The "retail value" of a copyrighted work is the retail price of that work in the market in which it is sold. In the case of an infringement of a copyright by distribution, if the retail price does not adequately reflect the economic value of the infringement, then the retail value may be determined using other factors, including but not limited to suggested retail price, wholesale price, replacement cost of the item, licensing, or distribution-related fees.

* * * * * * *

CHAPTER 113 OF TITLE 18, UNITED STATES CODE

CHAPTER 113—STOLEN PROPERTY

Sec.
2311. Definitions.

* * * * * * *

2319A. Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances.

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

* * * * * * *

§ 2319. Criminal infringement of a copyright

(a) * * *

* * * * * * *

(d) Any person who commits an offense under section 506(a)(3) of title 17—

(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 5 years, or fined in the amount set forth in this title, or both; and

(2) shall, if the offense is a second or subsequent offense under paragraph (1), be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 10 years, or fined in the amount set forth in this title, or both.

[(d)**]** *(e)*(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, 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.

* * * * * * *

[(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**[**.**]***; and*

(3) the term "financial gain" has the meaning given that term in section 101 (relating to definitions) 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 of-

fense 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 an offense under 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 AND AUTHORIZED PERSONS.—With reasonable cause, the owner or lessee of a motion picture facility where a motion picture is being exhibited, the authorized agent or employee of such owner or lessee, the licensor of the motion picture 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 committing an offense under this section for the purpose of questioning that person or summoning a law enforcement officer; and

(2) shall not be held liable in any civil or criminal action by reason 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) DEFINITIONS.—In this section:

(1) AUDIOVISUAL WORK, COPY, ETC.—The terms "audiovisual work", "copy", "copyright owner", "motion picture", 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.

(3) MOTION PICTURE EXHIBITION FACILITY.—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.

(g) 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.

* * * * * * *

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.

(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 that is authorized under 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 that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

(C) Any manufacturer, licensee, or licensor of technology described in subparagraph (B) who fails to comply with the requirement under subparagraph (B) to provide notice with respect to a motion picture shall be liable in a civil action brought by the copyright owner of the motion picture that is modified by the technology in an amount not to exceed $1,000 for each such motion picture.

(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), 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 2004.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 8, 2004

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.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is H.R. 4077, the "Piracy Deterrence and Education Act of 2004."

The Chair recognizes the gentleman from Texas, Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, for a motion.

Mr. SMITH. Mr. Chairman, the Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill H.R. 4077 with a single amendment in the nature of a substitute and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 4077, follows:]

I

108TH CONGRESS
2D SESSION

H. R. 4077

To enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 2004

Mr. SMITH of Texas (for himself, Mr. BERMAN, and Mr. CONYERS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, 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 ''Piracy Deterrence and Education Act of 2004''.

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) The Internet, while changing the way our society communicates, has also changed the nature

of many crimes, including the theft of intellectual property.

(2) Trafficking in infringing copyrighted works through increasingly sophisticated electronic means, including peer-to-peer file trading networks, Internet chat rooms, and news groups, threatens lost jobs, lost income for creators, lower tax revenue, and higher prices for honest purchasers.

(3) The most popular peer-to-peer file trading software programs have been downloaded by computer users over 200,000,000 times. At any one time there are over 3,000,000 users simultaneously using just one of these services. Each month, on average, over 2,300,000,000 digital-media files are transferred among users of peer-to-peer systems.

(4) Many computer users simply believe that they will not be caught or prosecuted for their conduct.

(5) The security and privacy threats posed by certain peer-to-peer networks extend beyond users inadvertently enabling a hacker to access files. Millions of copies of one of the most popular peer-to-peer networks contain software that could allow an independent company to take over portions of users'

computers and Internet connections and has the capacity to keep track of users' online habits.

(6) In light of these considerations, Federal law enforcement agencies should actively pursue criminals who steal the copyrighted works of others, and prevent such activity through enforcement and awareness. The public should be educated about the security and privacy risks associated with being connected to certain peer-to-peer networks.

SEC. 3. DETERRENCE AND COORDINATION.

(a) PROGRAM; SHARING OF INFORMATION.—The Director of the Federal Bureau of Investigation, in consultation with the Register of Copyrights, shall—

(1) develop a program based on providing of information and notice to deter members of the public from committing acts of copyright infringement through the Internet; and

(2) facilitate the sharing among law enforcement agencies, Internet service providers, and copyright owners of information concerning acts of copyright infringement described in paragraph (1).

The program under paragraph (1) shall include issuing appropriate warnings to individuals engaged in acts of copyright infringement described in paragraph (1) that they may be subject to criminal prosecution.

(b) CONSTRUCTION.—Nothing in this section shall be construed to expand the investigative or enforcement powers of the Federal Bureau of Investigation nor to affect the duty, if any, of Internet service providers to monitor their service, affirmatively seek facts indicating infringing activity, or share private information about the users of their systems.

(c) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under subsection (a)(1) shall not use funds or resources of the Department of Justice allocated for criminal investigation or prosecution.

SEC. 4. DESIGNATION AND TRAINING OF AGENTS IN COMPUTER HACKING AND INTELLECTUAL PROPERTY UNITS.

(a) DESIGNATION OF AGENTS IN CHIPS UNITS.—The Attorney General shall ensure that any unit in the Department of Justice responsible for investigating computer hacking or responsible for investigating intellectual property crimes is assigned at least one agent to support such unit for the purpose of investigating crimes relating to the theft of intellectual property.

(b) TRAINING.—The Attorney General shall ensure that each agent assigned under subsection (a) has received training in the investigation and enforcement of intellectual property crimes.

SEC. 5. EDUCATION PROGRAM.

(a) ESTABLISHMENT.—There shall be established within the Office of the Associate Attorney General of the United States an Internet Use Education Program.

(b) PURPOSE.—The purpose of the Internet Use Education Program shall be to—

(1) educate the general public concerning the value of copyrighted works and the effects of the theft of such works on those who create them; and

(2) educate the general public concerning the privacy, security, and other risks of using the Internet to obtain illegal copies of copyrighted works.

(c) SECTOR SPECIFIC MATERIALS.—The Internet Use Educational Program shall, to the extent appropriate, develop materials appropriate to Internet users in different sectors of the general public where criminal copyright infringement is a concern. The Attorney General shall consult with appropriate interested parties in developing such sector-specific materials.

(d) CONSULTATIONS.—The Attorney General shall consult with the Register of Copyrights and the Secretary of Commerce in developing the Internet Use Education Program under this section.

(e) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under this section shall not use funds or

resources of the Department of Justice allocated for criminal investigation or prosecution.

SEC. 6. ACTIONS BY THE GOVERNMENT OF THE UNITED STATES.

Section 411(a) of title 17, United States Code, is amended in the first sentence by striking ''Except for'' and inserting ''Except for an action brought by the Government of the United States or by any agency or instrumentality thereof, or''.

SEC. 7. AUTHORIZED APPROPRIATIONS.

There are authorized to be appropriated to the Department of Justice for fiscal year 2005 not less than $15,000,000 for the investigation and prosecution of violations of title 17, United States Code.

SEC. 8. PREVENTION OF SURREPTITIOUS RECORDING IN MOTION PICTURE THEATERS.

(a) SHORT TITLE.—This section may be cited as the ''Artists' Rights and Theft Prevention Act of 2004'' or the ''ART Act''.

(b) CRIMINAL PENALTIES FOR UNAUTHORIZED RECORDING OF MOTION PICTURES IN A MOTION PICTURE THEATER.—

(1) 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 theater

"(a) OFFENSE.—Whoever, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device in a motion picture theater to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof, in a motion picture theater 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.

"(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 violation.

"(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 pursuant to a con-

tract with the United States, a State, or a political subdivision of a State.

"(d) VICTIM IMPACT STATEMENT.—

"(1) IN GENERAL.—During the preparation of the presentence report pursuant to 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.

"(e) DEFINITIONS.—In this section:

"(1) AUDIOVISUAL WORK, COPY, ETC.—The terms 'audiovisual work', 'copy', 'copyright owner',

'motion picture', 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.

"(3) MOTION PICTURE THEATER.—The term 'motion picture theater' means a movie theater, screening room, or other venue that is being used primarily for public performance of a motion picture.".

(2) CONFORMING AMENDMENT.—The table of sections for 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 theater.".

SEC. 9. SENSE OF THE CONGRESS ON NEED TO TAKE STEPS TO PREVENT ILLEGAL ACTIVITY ON PEER-TO-PEER SERVICES.

(a) FINDINGS.—The Congress finds as follows:

(1) The most popular publicly accessible peer-to-peer file sharing software programs combined have been downloaded worldwide over 600,000,000 times.

(2) The vast majority of software products, including peer-to-peer technology, do not pose an inherent risk. Responsible persons making software products should be encouraged and commended for the due diligence and reasonable care they take including by providing instructions, relevant information in the documentation, disseminating patches, updates, and other appropriate modifications to the software.

(3) Massive volumes of illegal activity, including the distribution of child pornography, viruses, and confidential personal information, and copyright infringement occur on publicly accessible peer-to-peer file sharing services every day. Some publicly accessible peer-to-peer file sharing services expose consumers, particularly children, to serious risks, including legal liability, loss of privacy, threats to computer security, and exposure to illegal and inappropriate material.

(4) The following studies and reports demonstrate that pornography, including child pornog-

raphy, is prevalent on publicly available peer-to-peer file sharing services, and children are regularly exposed to pornography when using publicly available peer-to-peer file-sharing services:

(A) A February 2004 report by the General Accounting Office (GAO) states that children using peer-to-peer file-sharing technology can be exposed inadvertently to pornographic content. When searching for popular terms like ''Britney'', ''Pokemon'', and ''Olsen twins'', more than half the files retrieved were pornographic, including 8 percent containing child pornography or child erotica.

(B) The GAO also found that when searching the most popular peer-to-peer service for keywords known to be associated with child pornography, 42 percent of the returns (543 out of 1,286 files) were associated with images of child pornography.

(C) From 2001, when the National Center for Missing and Exploited Children began to track peer-to-peer child pornography, until 2002, the number of reported incidents increased over 400 percent—compared to an increase of less than 100 percent for chat rooms,

less than 32 percent for websites, and no increase for news groups and bulletin boards.

(5) The full potential of peer-to-peer technology to benefit consumers has yet to be realized and will not be achieved until these problems are adequately addressed.

(6) To date, the businesses that run publicly accessible file-sharing services have refused or failed to voluntarily and sufficiently address these problems.

(7) Many users of publicly available peer-to-peer file-sharing services are drawn to these systems by the lure of obtaining ''free'' music and movies.

(8) While some users use parental controls to protect children from pornography available on the Internet and search engines, not all such controls work on publicly accessible peer-to-peer networks.

(9) Businesses that run publicly accessible peer-to-peer file sharing services have openly acknowledged, and numerous studies and reports have established, that these services facilitate and profit from massive amounts of copyright infringement, causing enormous damage to the economic well-being of the copyright industries whose works are being illegally ''shared'' and downloaded.

(10) The legitimate digital music marketplace offers consumers a wide and growing array of choices for obtaining music legally, without exposure to the risks posed by publicly accessible peer-to-peer file sharing services.

(11) The Federal Trade Commission issued a Consumer Alert in July of 2003 warning consumers that some file-sharing services contain damaging viruses and worms and, without the computer user's knowledge or consent, install spyware to monitor a user's browsing habits and send data to third parties or automatically open network connections.

(12) Publicly available peer-to-peer file-sharing services can and should adopt reasonable business practices and use technology in the marketplace to address the existing risks posed to consumers by their services and facilitate the legitimate use of peer-to-peer file sharing technology and software.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that—

(1) responsible software developers should be commended, recognized, and encouraged for their efforts to protect consumers;

(2) currently the level of ongoing and persistent illegal and dangerous activity on publicly accessible

peer-to-peer file sharing services is harmful to consumers, minors, and the economy; and

(3) therefore, the Congress and the executive branch should consider all appropriate measures to protect consumers and children, and prevent such illegal activity.

SEC. 10. ENHANCEMENT OF CRIMINAL COPYRIGHT INFRINGEMENT.

(a) CRIMINAL INFRINGEMENT.—Section 506 of title 17, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a) CRIMINAL INFRINGEMENT.—Any person who—

"(1) infringes a copyright willfully and for purposes of commercial advantage or private financial gain,

"(2) infringes a copyright willfully by the reproduction or distribution, including by the offering for distribution to the public 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

"(3) infringes a copyright by the knowing distribution, including by the offering for distribution to the public by electronic means, with reckless dis-

regard of the risk of further infringement, during any 180-day period, of—

"(A) 1,000 or more copies or phonorecords of 1 or more copyrighted works,

"(B) 1 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of more than $10,000, or

"(C) 1 or more copies or phonorecords of 1 or more copyrighted pre-release works,

shall be punished as provided under section 2319 of title 18. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish the necessary level of intent under this subsection."; and

(2) by adding at the end the following:

"(g) DEFINITIONS.—In this section:

"(1) PRE-RELEASE WORK.—The term 'pre-release work' refers to a work protected under this title which has a commercial and economic value and which, at the time of the infringement, the defendant knew or should have known that the work had not yet been made available by the copyright owner to individual members of the general public in copies or phonorecords for sale, license, or rental.

"(2) RETAIL VALUE.—The 'retail value' of a copyrighted work is the retail price of that work in the market in which it is sold. In the case of an infringement of a copyright by distribution, if the retail price does not adequately reflect the economic value of the infringement, then the retail value may be determined using other factors, including but not limited to suggested retail price, wholesale price, replacement cost of the item, licensing, or distribution-related fees.".

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

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

(2) by inserting after subsection (c) the following:

"(d) Any person who commits an offense under section 506(a)(3) of title 17—

"(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 5 years, or fined in the amount set forth in this title, or both; and

"(2) shall, if the offense is a second or subsequent offense under paragraph (1), be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 10 years, or fined in the amount set forth in this title, or both."; and

(3) in subsection (f), as so redesignated—

(A) in paragraph (1), by striking "and" after the semicolon;

(B) in paragraph (2), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(3) the term 'financial gain' has the meaning given that term in section 101 (relating to definitions) of title 17.".

(c) CIVIL REMEDIES FOR INFRINGEMENT OF A COMMERCIAL PRE-RELEASE COPYRIGHTED WORK.—Section 504(b) of title 17, United States Code, is amended—

(1) by striking "The copyright owner" and inserting the following:

"(1) IN GENERAL.—The copyright owner"; and

(2) by adding at the end the following:

"(2) DAMAGES FOR PRE-RELEASE INFRINGEMENT.—

"(A) IN GENERAL.—In the case of any pre-release work, actual damages shall be presumed conclusively to be no less than $10,000 per infringement, if a person—

"(i) distributes such work by making it available on a computer network accessible to members of the public; and

"(ii) knew or should have known that the work was intended for commercial distribution.

"(B) DEFINITION.—For purposes of this subsection, the term 'pre-release work' has the meaning given that term in section 506(g).".

SEC. 11. AMENDMENT OF FEDERAL SENTENCING GUIDELINES REGARDING THE INFRINGEMENT OF COPYRIGHTED WORKS AND RELATED CRIMES.

(a) AMENDMENT TO THE SENTENCING GUIDELINES.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted

of intellectual property rights crimes, including sections 2318, 2319, 2319A, 2319B, 2320 of title 18, United States Code, and sections 506, 1201, and 1202 of title 17, United States Code.

(b) FACTORS.—In carrying out this section, the Sentencing Commission shall—

(1) take all appropriate measures to ensure that the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) are sufficiently stringent to deter and adequately reflect the nature of such offenses;

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

(3) consider whether the definition of ''uploading'' contained in Application Note 3 to Guideline 2B5.3 is adequate to address the loss at-

tributable to people broadly distributing copyrighted works over the Internet without authorization; and

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

(c) PROMULGATION.—The Commission may promulgate the guidelines or amendments under this section in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

○

Chairman SENSENBRENNER. And the Subcommittee amendment in the nature of a substitute which the Members have before them will be considered as read, considered as the original text for purposes of amendment and open for amendment at any point.

[The amendment follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4077, AS REPORTED BY THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Piracy Deterrence and Education Act of 2004''.

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) The Internet, while changing the way our society communicates, has also changed the nature of many crimes, including the theft of intellectual property.

(2) Trafficking in infringing copyrighted works through increasingly sophisticated electronic means, including peer-to-peer file trading networks, Internet chat rooms, and news groups, threatens lost jobs, lost income for creators, lower tax revenue, and higher prices for honest purchasers.

(3) The most popular peer-to-peer file trading software programs have been downloaded by com-

puter users over 200,000,000 times. At any one time there are over 3,000,000 users simultaneously using just one of these services. Each month, on average, over 2,300,000,000 digital-media files are transferred among users of peer-to-peer systems.

(4) Many computer users simply believe that they will not be caught or prosecuted for their conduct.

(5) The security and privacy threats posed by certain peer-to-peer networks extend beyond users inadvertently enabling a hacker to access files. Millions of copies of one of the most popular peer-to-peer networks contain software that could allow an independent company to take over portions of users' computers and Internet connections and has the capacity to keep track of users' online habits.

(6) In light of these considerations, Federal law enforcement agencies should actively pursue criminals who steal the copyrighted works of others, and prevent such activity through enforcement and awareness. The public should be educated about the security and privacy risks associated with being connected to certain peer-to-peer networks.

SEC. 3. DETERRENCE AND COORDINATION.

(a) PROGRAM; SHARING OF INFORMATION.—The Director of the Federal Bureau of Investigation, in consultation with the Register of Copyrights, shall—

(1) develop a program based on providing of information and notice to deter members of the public from committing acts of copyright infringement through the Internet; and

(2) facilitate the sharing among law enforcement agencies, Internet service providers, and copyright owners of information concerning acts of copyright infringement described in paragraph (1).

The program under paragraph (1) shall include issuing appropriate warnings to individuals engaged in acts of copyright infringement described in paragraph (1) that they may be subject to criminal prosecution.

(b) CONSTRUCTION.—Nothing in this section shall be construed to expand the investigative or enforcement powers of the Federal Bureau of Investigation nor to affect the duty, if any, of Internet service providers to monitor their service, affirmatively seek facts indicating infringing activity, or share private information about the users of their systems.

(c) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under subsection (a)(1) shall not use

funds or resources of the Department of Justice allocated for criminal investigation or prosecution.

SEC. 4. DESIGNATION AND TRAINING OF AGENTS IN COMPUTER HACKING AND INTELLECTUAL PROPERTY UNITS.

(a) DESIGNATION OF AGENTS IN CHIPS UNITS.—The Attorney General shall ensure that any unit in the Department of Justice responsible for investigating computer hacking or responsible for investigating intellectual property crimes is assigned at least one agent to support such unit for the purpose of investigating crimes relating to the theft of intellectual property.

(b) TRAINING.—The Attorney General shall ensure that each agent assigned under subsection (a) has received training in the investigation and enforcement of intellectual property crimes.

SEC. 5. EDUCATION PROGRAM.

(a) ESTABLISHMENT.—There shall be established within the Office of the Associate Attorney General of the United States an Internet Use Education Program.

(b) PURPOSE.—The purpose of the Internet Use Education Program shall be to—

(1) educate the general public concerning the value of copyrighted works and the effects of the theft of such works on those who create them; and

(2) educate the general public concerning the privacy, security, and other risks of using the Internet to obtain illegal copies of copyrighted works.

(c) SECTOR SPECIFIC MATERIALS.—The Internet Use Educational Program shall, to the extent appropriate, develop materials appropriate to Internet users in different sectors of the general public where criminal copyright infringement is a concern. The Attorney General shall consult with appropriate interested parties in developing such sector-specific materials.

(d) CONSULTATIONS.—The Attorney General shall consult with the Register of Copyrights and the Secretary of Commerce in developing the Internet Use Education Program under this section.

(e) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under this section shall not use funds or resources of the Department of Justice allocated for criminal investigation or prosecution.

(f) ADDITIONAL PROHIBITION ON THE USE OF FUNDS.—The program created under this section shall not use any funds or resources of the Department of Justice allocated for the Civil Rights Division of the Department, including any funds allocated for the enforcement of civil rights or the Voting Rights Act of 1965.

SEC. 6. ACTIONS BY THE GOVERNMENT OF THE UNITED STATES.

Section 411(a) of title 17, United States Code, is amended in the first sentence by striking ''Except for'' and inserting ''Except for an action brought by the Government of the United States or by any agency or instrumentality thereof, or'' .

SEC. 7. AUTHORIZED APPROPRIATIONS.

There are authorized to be appropriated to the Department of Justice for fiscal year 2005 not less than $15,000,000 for the investigation and prosecution of violations of title 17, United States Code.

SEC. 8. PREVENTION OF SURREPTITIOUS RECORDING IN MOTION PICTURE THEATERS.

(a) SHORT TITLE.—This section may be cited as the ''Artists' Rights and Theft Prevention Act of 2004'' or the ''ART Act''.

(b) CRIMINAL PENALTIES FOR UNAUTHORIZED RECORDING OF MOTION PICTURES IN A MOTION PICTURE THEATER.—

(1) 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 theater

"(a) OFFENSE.—Whoever, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device in a motion picture theater to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof, in a motion picture theater 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.

"(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 violation.

"(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 pursuant to a con-

tract with the United States, a State, or a political subdivision of a State.

"(d) VICTIM IMPACT STATEMENT.—

"(1) IN GENERAL.—During the preparation of the presentence report pursuant to 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.

"(e) DEFINITIONS.—In this section:

"(1) AUDIOVISUAL WORK, COPY, ETC.—The terms 'audiovisual work', 'copy', 'copyright owner',

'motion picture', 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.

"(3) MOTION PICTURE THEATER.—The term 'motion picture theater' means a movie theater, screening room, or other venue that is being used primarily for public performance of a motion picture.".

(2) CONFORMING AMENDMENT.—The table of sections for 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 theater.".

SEC. 9. SENSE OF THE CONGRESS ON NEED TO TAKE STEPS TO PREVENT ILLEGAL ACTIVITY ON PEER-TO-PEER SERVICES.

(a) FINDINGS.—The Congress finds as follows:

(1) The most popular publicly accessible peer-to-peer file sharing software programs combined have been downloaded worldwide over 600,000,000 times.

(2) The vast majority of software products, including peer-to-peer technology, do not pose an inherent risk. Responsible persons making software products should be encouraged and commended for the due diligence and reasonable care they take including by providing instructions, relevant information in the documentation, disseminating patches, updates, and other appropriate modifications to the software.

(3) Massive volumes of illegal activity, including the distribution of child pornography, viruses, and confidential personal information, and copyright infringement occur on publicly accessible peer-to-peer file sharing services every day. Some publicly accessible peer-to-peer file sharing services expose consumers, particularly children, to serious risks, including legal liability, loss of privacy, threats to computer security, and exposure to illegal and inappropriate material.

(4) The following studies and reports demonstrate that pornography, including child pornog-

raphy, is prevalent on publicly available peer-to-peer file sharing services, and children are regularly exposed to pornography when using publicly available peer-to-peer file-sharing services:

(A) A February 2004 report by the General Accounting Office (GAO) states that children using peer-to-peer file-sharing technology can be exposed inadvertently to pornographic content. When searching for popular terms like ''Britney'', ''Pokemon'', and ''Olsen twins'', more than half the files retrieved were pornographic, including 8 percent containing child pornography or child erotica.

(B) The GAO also found that when searching the most popular peer-to-peer service for keywords known to be associated with child pornography, 42 percent of the returns (543 out of 1,286 files) were associated with images of child pornography.

(C) From 2001, when the National Center for Missing and Exploited Children began to track peer-to-peer child pornography, until 2002, the number of reported incidents increased over 400 percent—compared to an increase of less than 100 percent for chat rooms,

less than 32 percent for websites, and no increase for news groups and bulletin boards.

(5) The full potential of peer-to-peer technology to benefit consumers has yet to be realized and will not be achieved until these problems are adequately addressed.

(6) To date, the businesses that run publicly accessible file-sharing services have refused or failed to voluntarily and sufficiently address these problems.

(7) Many users of publicly available peer-to-peer file-sharing services are drawn to these systems by the lure of obtaining ''free'' music and movies.

(8) While some users use parental controls to protect children from pornography available on the Internet and search engines, not all such controls work on publicly accessible peer-to-peer networks.

(9) Businesses that run publicly accessible peer-to-peer file sharing services have openly acknowledged, and numerous studies and reports have established, that these services facilitate and profit from massive amounts of copyright infringement, causing enormous damage to the economic well-being of the copyright industries whose works are being illegally ''shared'' and downloaded.

(10) The legitimate digital music marketplace offers consumers a wide and growing array of choices for obtaining music legally, without exposure to the risks posed by publicly accessible peer-to-peer file sharing services.

(11) The Federal Trade Commission issued a Consumer Alert in July of 2003 warning consumers that some file-sharing services contain damaging viruses and worms and, without the computer user's knowledge or consent, install spyware to monitor a user's browsing habits and send data to third parties or automatically open network connections.

(12) Publicly available peer-to-peer file-sharing services can and should adopt reasonable business practices and use technology in the marketplace to address the existing risks posed to consumers by their services and facilitate the legitimate use of peer-to-peer file sharing technology and software.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that—

(1) responsible software developers should be commended, recognized, and encouraged for their efforts to protect consumers;

(2) currently the level of ongoing and persistent illegal and dangerous activity on publicly accessible

peer-to-peer file sharing services is harmful to consumers, minors, and the economy; and

(3) therefore, the Congress and the executive branch should consider all appropriate measures to protect consumers and children, and prevent such illegal activity.

SEC. 10. ENHANCEMENT OF CRIMINAL COPYRIGHT INFRINGEMENT.

(a) CRIMINAL INFRINGEMENT.—Section 506 of title 17, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a) CRIMINAL INFRINGEMENT.—Any person who—

"(1) infringes a copyright willfully and for purposes of commercial advantage or private financial gain,

"(2) infringes a copyright willfully by the reproduction or distribution, including by the offering for distribution to the public 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

"(3) infringes a copyright by the knowing distribution, including by the offering for distribution to the public by electronic means, with reckless dis-

regard of the risk of further infringement, during any 180-day period, of—

"(A) 1,000 or more copies or phonorecords of 1 or more copyrighted works,

"(B) 1 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of more than $10,000, or

"(C) 1 or more copies or phonorecords of 1 or more copyrighted pre-release works, "; and shall be punished as provided under section 2319 of title 18. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish the necessary level of intent under this subsection.

(2) by adding at the end the following:

"(g) DEFINITIONS.—In this section:

"(1) PRE-RELEASE WORK.—The term 'pre-release work' refers to a work protected under this title which has a commercial and economic value and which, at the time of the infringement, the defendant knew or should have known that that the work had not yet been made available by the copyright owner to individual members of the general public in copies or phonorecords for sale, license, or rental.

"(2) RETAIL VALUE.— The 'retail value' of a copyrighted work is the retail price of that work in the market in which it is sold. In the case of an infringement of a copyright by distribution, if the retail price does not adequately reflect the economic value of the infringement, then the retail value may be determined using other factors, including but not limited to suggested retail price, wholesale price, replacement cost of the item, licensing, or distribution-related fees.".

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

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

(2) by inserting after subsection (c) the following:

"(d) Any person who commits an offense under section 506(a)(3) of title 17—

"(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 5 years, or fined in the amount set forth in this title, or both; and

"(2) shall, if the offense is a second or subsequent offense under paragraph (1), be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 10 years, or fined in the amount set forth in this title, or both."; and

(3) in subsection (f), as so redesignated—

(A) in paragraph (1), by striking "and" after the semicolon;

(B) in paragraph (2), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(3) the term 'financial gain' has the meaning given that term in section 101 (relating to definitions) of title 17.".

(c) CIVIL REMEDIES FOR INFRINGEMENT OF A COMMERCIAL PRE-RELEASE COPYRIGHTED WORK.—Section 504(b) of title 17, United States Code, is amended—

(1) by striking "The copyright owner" and inserting the following:

"(1) IN GENERAL.—The copyright owner"; and

(2) by adding at the end the following:

"(2) DAMAGES FOR PRE-RELEASE INFRINGEMENT.—

"(A) IN GENERAL.—In the case of any pre-release work, actual damages shall be presumed conclusively to be no less than $10,000 per infringement, if a person—

"(i) distributes such work by making it available on a computer network accessible to members of the public; and

"(ii) knew or should have known that the work was intended for commercial distribution.

"(B) DEFINITION.—For purposes of this subsection, the term 'pre-release work' has the meaning given that term in section 506(g). ".

SEC. 11. AMENDMENT OF FEDERAL SENTENCING GUIDELINES REGARDING THE INFRINGEMENT OF COPYRIGHTED WORKS AND RELATED CRIMES.

(a) AMENDMENT TO THE SENTENCING GUIDELINES.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted

of intellectual property rights crimes, including sections 2318, 2319, 2319A, 2319B, 2320 of title 18, United States Code, and sections 506, 1201, and 1202 of title 17, United States Code.

(b) FACTORS.—In carrying out this section, the Sentencing Commission shall—

(1) take all appropriate measures to ensure that the sentencing guidelines and policy statements applicable to the offenses described in subsection (a) are sufficiently stringent to deter and adequately reflect the nature of such offenses;

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

(3) consider whether the definition of ''uploading'' contained in Application Note 3 to Guideline 2B5.3 is adequate to address the loss at-

tributable to people broadly distributing copyrighted works over the Internet without authorization; and

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

(c) PROMULGATION.—The Commission may promulgate the guidelines or amendments under this section in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. Gentleman's recognized for 5 minutes.

Mr. SMITH. Thank you, Mr. Chairman.

First of all, I would like to thank the gentleman from California, Mr. Berman, for his contributions to this piece of legislation. This has been genuinely a cooperative effort, and I appreciate his support of this bill and perhaps his grudging support of the combination of this bill with the Family Movie Act.

I would also like to thank Representative Forbes, who was here a minute ago, for working with MPAA in helping to narrow the focus of the bill which I think also improved it.

Mr. Chairman, piracy of intellectual property over the Internet, especially on peer-to-peer networks, has reached alarming levels. Millions of pirated movies, music, software, game and other copyrighted files are now available for free download via certain peer-to-peer networks. This piracy harms everyone, from those looking for legitimate sources of content to those who create it.

I have heard from songwriters, video store owners, software publishers and games developers who feel the impact of such piracy every day. They have urged Congress to better educate the public about the harms of piracy while also warning and penalizing those who continue to steal from others. P-to-P technology is an essential development of our Nation's high-tech economy. However, like all new technologies, it has been abused by those who want to commit crimes.

This legislation addresses P-to-P piracy by better educating the public about copyright law, authorizing creation of a system to warn on-line users of potential infringement, increasing cooperation among Federal agencies and intellectual property owners, penalizing those who bring camcorders into movie theaters for the purpose of making pirated DVD, and assisting Federal law enforcement authorities in their efforts to investigate and prosecute intellectual property crimes.

The Subcommittee on Courts, the Internet, and Intellectual Property reported this bill in March to the full Committee; and I will shortly offer a manager's amendment to H.R. 4077 to make changes that have resulted from an ongoing series of discussions with interested parties.

The key components of legislation include the development of a voluntary system for DOJ to warn Internet users of potentially illegal activity while protecting their privacy and addressing ISP cost concerns; a designation of dedicated intellectual property crime agents within DOJ, computer hacking and intellectual property sections who prosecute cybercrimes; and the creation of criminal penalties for those who go into movie theaters with camcorders to record new movies in order to create pirated DVDs. Finally, it has the creation of a new criminal penalties for those who wrongly make available over 1,000 copyrighted works for others to download.

Mr. Chairman, the Internet has revolutionized how Americans locate information, shop, and communicate. We must not let new Internet technologies become a haven for criminals. H.R. 4077 will

accomplish this, and I would urge the Members of the Committee to support it, and I yield back the balance of my time.

Chairman SENSENBRENNER. Does the gentleman from California, Mr. Berman, wish to add to this discussion?

Mr. BERMAN. I do, Mr. Chairman.

Chairman SENSENBRENNER. He is recognized for 5 minutes.

Mr. BERMAN. Mr. Chairman, while I was proud to work with my friend, the Chairman of the Subcommittee, on H.R. 4077 as originally introduced and as passed by our Subcommittee, I have some reservations about the substitute which will be offered later in this markup. I will defer an explanation of these reservations until the substitute is offered, but I will ask my colleagues to reject the substitute and vote to report the bill as reported by the Subcommittee.

Copyright piracy poses a grave threat to the livelihood of all copyright creators. On just one peer-to-peer file swapping network a relatively small number of people are at this very moment likely offering for distribution more than 850 million mostly infringing files to be downloaded by millions of strangers. Web sites, Internet relay chat channels, file transfer protocol sites remain havens for theft of pre-released movies music and software.

In the case of pre-released movies, copies often originate with surreptitious camcorders in public theaters. One Yahoo-run affinity group alone hosts almost 50,000 pages of copyright-infringing needlework designs.

I think an objective view understands that the solution to copyright piracy involves many elements, most of which don't require congressional involvement. Customer, consumers must have convenient access to legal content, copyright owners must utilize technology both to protect their creations and thwart piracy. Copyright owners must continue to educate consumers about the importance of copyright protection and use civil suits to protect their legal rights.

Criminal prosecutions also play an important role, particularly in deterring egregious infringements by otherwise judgment-proof infringers. While several piracy rings have recently been prosecuted, there has been no prosecutions against egregious uploaders on public P-to-P networks. In examining why, it has become clear that law enforcement authorities need additional resources, statutory authority and incentives to make them a productive participant in the anti-piracy battle. H.R. 4077 is designed to fulfill these needs and therefore is one part of the overall solution to copyright piracy.

I want to mention just a couple of its provisions.

Section 10 insures that criminal copyright prosecutions can be brought against copyright infringers who knowingly distribute massive amounts of copyrighted works or enormously valuable copyrighted works with reckless disregard of the risk of future infringement. As a result of this provision, it will be clear that criminal prosecutions can be brought against an infringer who knowingly uploads onto public P-to-P networks 1,000 or more copyrighted works, a copyrighted work worth more than $10,000, or a pre-released copyrighted work. The high threats are threshold and mens rea standards included in section 10 ensure that only the most egregious infringers are subject to criminal liability.

Section 8 clarifies it is a felony to surreptitiously record a movie in the theater. Organized piracy rings distribute copies of these

surreptitious recordings on-line or on the street as pirate DVDs, video disks or VHS tapes.

Section 6, which enables criminal prosecution of copyright infringement involving unregistered works, is important to photographers and other individual copyright owners who cannot practically register their copyrights in those images. Without the threat of statutory damages, which they can't get with unregistered works, there is no credible deterrent to infringement. Criminal prosecution would help remedy this situation.

And, finally, section 3 directs the FBI to develop a program to deter copyright infringement on-line and to facilitate sharing of information about on-line copyright infringements among law enforcement ISPs and copyright owners.

Mr. Chairman, taken together, the provisions of H.R. 4077 as reported by the Subcommittee advance important objectives and I encourage my colleagues to stick with this version and report it favorably. I yield back.

Chairman SENSENBRENNER. Without objection, all Members may put opening statements in the record at this point in time.

The Chair recognizes the gentleman from Texas, Mr. Smith, for purposes of offering an amendment in the nature of a substitute.

Mr. SMITH. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment in the nature of a substitute to H.R. 4077 offered by Mr. Smith of Texas.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and open for amendment at any point; and the gentleman from Texas, Mr. Smith, is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4077 OFFERED BY MR. SMITH OF TEXAS

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Piracy Deterrence and Education Act of 2004''.

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) The Internet, while changing the way our society communicates, has also changed the nature of many crimes, including the theft of intellectual property.

(2) Trafficking in infringing copyrighted works through increasingly sophisticated electronic means, including peer-to-peer file trading networks, Internet chat rooms, and news groups, threatens lost jobs, lost income for creators, lower tax revenue, and higher prices for honest purchasers.

(3) The most popular peer-to-peer file trading software programs have been downloaded by computer users over 600,000,000 times. At any one time

there are over 3,000,000 users simultaneously using just one of these services. Each month, on average, over 2,300,000,000 digital-media files are transferred among users of peer-to-peer systems.

(4) Many computer users simply believe that they will not be caught or prosecuted for their conduct.

(5) The security and privacy threats posed by certain peer-to-peer networks extend beyond users inadvertently enabling a hacker to access files. Millions of copies of one of the most popular peer-to-peer networks contain software that could allow an independent company to take over portions of users' computers and Internet connections and has the capacity to keep track of users' online habits.

(6) In light of these considerations, Federal law enforcement agencies should actively pursue criminals who steal the copyrighted works of others, and prevent such activity through enforcement and awareness. The public should be educated about the security and privacy risks associated with being connected to certain peer-to-peer networks.

SEC. 3. VOLUNTARY PROGRAM OF DEPARTMENT OF JUSTICE.

(a) VOLUNTARY PROGRAM.—The Attorney General is authorized to establish a program under which the Department of Justice, in cases where persons who are subscribers of Internet service providers appear to be engaging in copyright infringing conduct in the course of using that Internet service, would send to the Internet Service providers notices that warn such persons of the penalties for such copyright infringement. The Internet service providers may forward the notices to such persons.

(b) LIMITATIONS ON PROGRAM.—

(1) EXTENT AND LENGTH OF PROGRAM.—The program under subsection (a) shall terminate at the end of the 18-month period beginning on the date of the enactment of this Act and shall be limited to not more than 10,000 notices.

(2) PRIVACY PROTECTIONS.—No Internet service provider that receives a notice from the Department of Justice under subsection (a) may disclose to the Department any identifying information about the subscriber that is the subject of the notice except pursuant to court order or other applicable legal process that requires such disclosure.

(c) REIMBURSEMENT OF INTERNET SERVICE PROVIDERS.—The Department of Justice shall reimburse

Internet Service providers for all reasonable costs incurred by such service providers in forwarding notices under subsection (a).

(d) REPORTS TO CONGRESS.—The Attorney General shall submit to the Congress a report on the program established under subsection (a) both at the time the program is initiated and at the conclusion of the program.

SEC. 4. DESIGNATION AND TRAINING OF AGENTS IN COMPUTER HACKING AND INTELLECTUAL PROPERTY UNITS.

(a) DESIGNATION OF AGENTS IN CHIPS UNITS.—The Attorney General shall ensure that any unit in the Department of Justice responsible for investigating computer hacking or responsible for investigating intellectual property crimes is assigned at least one agent to support such unit for the purpose of investigating crimes relating to the theft of intellectual property.

(b) TRAINING.—The Attorney General shall ensure that each agent assigned under subsection (a) has received training in the investigation and enforcement of intellectual property crimes.

SEC. 5. EDUCATION PROGRAM.

(a) ESTABLISHMENT.—There shall be established within the Office of the Associate Attorney General of the United States an Internet Use Education Program.

(b) PURPOSE.—The purpose of the Internet Use Education Program shall be to—

(1) educate the general public concerning the value of copyrighted works and the effects of the theft of such works on those who create them; and

(2) educate the general public concerning the privacy, security, and other risks of using the Internet to obtain illegal copies of copyrighted works.

(c) SECTOR SPECIFIC MATERIALS.—The Internet Use Educational Program shall, to the extent appropriate, develop materials appropriate to Internet users in different sectors of the general public where criminal copyright infringement is a concern. The Attorney General shall consult with appropriate interested parties in developing such sector-specific materials.

(d) CONSULTATIONS.—The Attorney General shall consult with the Register of Copyrights and the Secretary of Commerce in developing the Internet Use Education Program under this section.

(e) PROHIBITION ON USE OF CERTAIN FUNDS.—The program created under this section shall not use funds or resources of the Department of Justice allocated for criminal investigation or prosecution.

(f) ADDITIONAL PROHIBITION ON THE USE OF FUNDS.—The program created under this section shall

not use any funds or resources of the Department of Justice allocated for the Civil Rights Division of the Department, including any funds allocated for the enforcement of civil rights or the Voting Rights Act of 1965.

SEC. 6. ACTIONS BY THE GOVERNMENT OF THE UNITED STATES.

Section 411(a) of title 17, United States Code, is amended in the first sentence by striking ''Except for'' and inserting ''Except for an action brought by the Government of the United States or by any agency or instrumentality thereof, or'' .

SEC. 7. AUTHORIZED APPROPRIATIONS.

There are authorized to be appropriated to the Department of Justice for fiscal year 2005 not less than $15,000,000 for the investigation and prosecution of violations of title 17, United States Code.

SEC. 8. 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 an offense under 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 AND AUTHORIZED PERSONS.—With reasonable cause, the owner or lessee of a motion picture facility where a motion picture is being exhibited, the authorized agent or employee of such owner or lessee, the licensor of the motion picture 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 committing an offense under this section for the purpose of questioning that person or summoning a law enforcement officer; and

"(2) shall not be held liable in any civil or criminal action by reason 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) DEFINITIONS.—In this section:

"(1) AUDIOVISUAL WORK, COPY, ETC.—The terms 'audiovisual work', 'copy', 'copyright owner', 'motion picture', 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.

"(3) MOTION PICTURE EXHIBITION FACILITY.—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.

"(g) 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.".

(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.".

SEC. 9. SENSE OF THE CONGRESS ON NEED TO TAKE STEPS TO PREVENT ILLEGAL ACTIVITY ON PEER-TO-PEER SERVICES.

(a) FINDINGS.—The Congress finds as follows:

(1) The most popular publicly accessible peer-to-peer file sharing software programs combined have been downloaded worldwide over 600,000,000 times.

(2) The vast majority of software products, including peer-to-peer technology, do not pose an inherent risk. Responsible persons making software products should be encouraged and commended for the due diligence and reasonable care they take including by providing instructions, relevant information in the documentation, disseminating patches, updates, and other appropriate modifications to the software.

(3) Massive volumes of illegal activity, including the distribution of child pornography, viruses, and confidential personal information, and copyright infringement occur on publicly accessible peer-to-peer file sharing services every day. Some publicly accessible peer-to-peer file sharing services expose consumers, particularly children, to serious risks, including legal liability, loss of privacy, threats to com-

puter security, and exposure to illegal and inappropriate material.

(4) Several studies and reports demonstrate that pornography, including child pornography, is prevalent on publicly available peer-to-peer file sharing services, and children are regularly exposed to pornography when using such peer-to-peer file sharing services.

(5) The full potential of peer-to-peer technology to benefit consumers has yet to be realized and will not be achieved until these problems are adequately addressed.

(6) To date, the businesses that run publicly accessible file-sharing services have refused or failed to voluntarily and sufficiently address these problems.

(7) Many users of publicly available peer-to-peer file-sharing services are drawn to these systems by the lure of obtaining ''free'' music and movies.

(8) While some users use parental controls to protect children from pornography available on the Internet and search engines, not all such controls work on publicly accessible peer-to-peer networks.

(9) Businesses that run publicly accessible peer-to-peer file sharing services have openly acknowledged, and numerous studies and reports have estab-

lished, that these services facilitate and profit from massive amounts of copyright infringement, causing enormous damage to the economic well-being of the copyright industries whose works are being illegally "shared" and downloaded.

(10) The legitimate digital music marketplace offers consumers a wide and growing array of choices for obtaining music legally, without exposure to the risks posed by publicly accessible peer-to-peer file sharing services.

(11) The Federal Trade Commission issued a Consumer Alert in July of 2003 warning consumers that some file-sharing services contain damaging viruses and worms and, without the computer user's knowledge or consent, install spyware to monitor a user's browsing habits and send data to third parties or automatically open network connections.

(12) Publicly available peer-to-peer file-sharing services can and should adopt reasonable business practices and use technology in the marketplace to address the existing risks posed to consumers by their services and facilitate the legitimate use of peer-to-peer file sharing technology and software.

(b) SENSE OF CONGRESS.—It is the sense of the Congress that—

(1) responsible software developers should be commended, recognized, and encouraged for their efforts to protect consumers;

(2) currently the level of ongoing and persistent illegal and dangerous activity on publicly accessible peer-to-peer file sharing services is harmful to consumers, minors, and the economy; and

(3) therefore, the Congress and the executive branch should consider all appropriate measures to protect consumers and children, and prevent such illegal activity.

SEC. 10. ENHANCEMENT OF CRIMINAL COPYRIGHT INFRINGEMENT.

(a) CRIMINAL INFRINGEMENT.—Section 506 of title 17, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

"(a) CRIMINAL INFRINGEMENT.—Any person who—

"(1) infringes a copyright willfully and for purposes of commercial advantage or private financial gain,

"(2) infringes a copyright willfully by the reproduction or distribution, including by the offering for distribution to the public 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

"(3) infringes a copyright by the knowing distribution, including by the offering for distribution to the public by electronic means, with reckless disregard of the risk of further infringement, during any 180-day period, of—

"(A) 1,000 or more copies or phonorecords of 1 or more copyrighted works,

"(B) 1 or more copies or phonorecords of 1 or more copyrighted works with a total retail value of more than $10,000, or

"(C) 1 or more copies or phonorecords of 1 or more copyrighted pre-release works,"; and shall be punished as provided under section 2319 of title 18. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish the necessary level of intent under this subsection.

(2) by adding at the end the following:

"(g) LIMITATION ON LIABILITY OF SERVICE PROVIDERS.—No legal entity shall be liable for a violation of subsection (a)(3) by reason of performing any function described in subsection (a), (b), (c), or (d) of section 512 if such legal entity would not be liable for monetary relief

under section 512 by reason of performing such function. Except for purposes of determining whether an entity qualifies for the limitation on liability under subsection (a)(3) of this section, the legal conclusion of whether an entity qualifies for a limitation on liability under section 512 shall not be considered in a judicial determination of whether the entity violates subsection (a) of this section.

"(h) DEFINITIONS.—In this section:

"(1) PRE-RELEASE WORK.—The term 'pre-release work' refers to a work protected under this title which has a commercial and economic value and which, at the time of the act of infringement that is the basis for the offense under subsection (a)(3), the defendant knew or should have known had not yet been made available by the copyright owner to individual members of the general public in copies or phonorecords for sale, license, or rental.

"(2) RETAIL VALUE.— The 'retail value' of a copyrighted work is the retail price of that work in the market in which it is sold. In the case of an infringement of a copyright by distribution, if the retail price does not adequately reflect the economic value of the infringement, then the retail value may be determined using other factors, including but not limited to suggested retail price, wholesale price, re-

placement cost of the item, licensing, or distribution-related fees.''.

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

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

(2) by inserting after subsection (c) the following:

''(d) Any person who commits an offense under section 506(a)(3) of title 17—

''(1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 5 years, or fined in the amount set forth in this title, or both; and

''(2) shall, if the offense is a second or subsequent offense under paragraph (1), be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, or, if the offense was committed for purposes of commercial advantage or private financial gain, imprisoned for not more than 10 years, or fined in the amount set forth in this title, or both.''; and

(3) in subsection (f), as so redesignated—

(A) in paragraph (1), by striking ''and'' after the semicolon;

(B) in paragraph (2), by striking the period and inserting ''; and''; and

(C) by adding at the end the following:

''(3) the term 'financial gain' has the meaning given that term in section 101 (relating to definitions) of title 17.''.

(c) CIVIL REMEDIES FOR INFRINGEMENT OF A COMMERCIAL PRE-RELEASE COPYRIGHTED WORK.—Section 504(b) of title 17, United States Code, is amended—

(1) by striking ''The copyright owner'' and inserting the following:

''(1) IN GENERAL.—The copyright owner''; and

(2) by adding at the end the following:

''(2) DAMAGES FOR PRE-RELEASE INFRINGEMENT.—

''(A) IN GENERAL.—In the case of any pre-release work, actual damages shall be presumed conclusively to be no less than $10,000 per infringement, if a person—

''(i) distributes such work by making it available on a computer network accessible to members of the public; and

"(ii) knew or should have known that the work was intended for commercial distribution.

"(B) DEFINITION.—For purposes of this subsection, the term 'pre-release work' has the meaning given that term in section 506(h). ".

SEC. 11. AMENDMENT OF FEDERAL SENTENCING GUIDELINES REGARDING THE INFRINGEMENT OF COPYRIGHTED WORKS AND RELATED CRIMES.

(a) AMENDMENT TO THE SENTENCING GUIDELINES.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including sections 2318, 2319, 2319A, 2319B, 2320 of title 18, United States Code, and sections 506, 1201, and 1202 of title 17, United States Code.

(b) FACTORS.—In carrying out this section, the Sentencing Commission shall—

(1) take all appropriate measures to ensure that the sentencing guidelines and policy statements applicable to the offenses described in subsection (a)

are sufficiently stringent to deter and adequately reflect the nature of such offenses;

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

(3) consider whether the definition of ''uploading'' contained in Application Note 3 to Guideline 2B5.3 is adequate to address the loss attributable to people broadly distributing copyrighted works over the Internet without authorization; and

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

(c) PROMULGATION.—The Commission may promulgate the guidelines or amendments under this section in

accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

SEC. 12. EXEMPTION FROM INFRINGEMENT FOR SKIPPING AUDIO CONTENT IN MOTION PICTURES.

(a) SHORT TITLE.—This section may be cited as the ''Family Movie Act of 2004''.

(b) EXEMPTION FROM COPYRIGHT AND TRADEMARK INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.—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''; and

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

''(11)(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 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.".

(c) 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.

"(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 that is authorized under subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this Act. Such manufacturer, licensee, or licensor shall 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.

''(C) Any manufacturer, licensee, or licensor of technology described in subparagraph (B) who fails to comply with the requirement under subparagraph (B) to provide notice with respect to a motion picture shall be liable in a civil action brought by the copyright owner of the motion picture that is modified by the technology in an amount not to exceed $1,000 for each such motion picture.

''(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), 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 2004.''.

(d) 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.).

Mr. SMITH. Thank you, Mr. Chairman. This manager's amendment that I offer now incorporates changes developed over the past few months in consultation with a wide variety of individuals, groups and Government agencies. These changes reflect a balance between the right of users and owners of intellectual property while ensuring that the Federal Government is able to pursue those who steal intellectual property.

The changes incorporated in my manager amendment include ensuring that the section 3 provisions that authorize the Department of Justice to send warnings of potential piracy are voluntary for ISPs to communicate, ensuring that the same section 3 provisions protect consumer privacy, conforming the camcording provisions in section 8 to a Senate companion bill clarifying the references to Government studies in the sense of Congress resolution in section 9, and adding a provision to section 10 to protect ISPs from facing criminal sanctions for their routine day-to-day activities.

Mr. Chairman, I have also included in my manager's amendment H.R. 4586, the "Family Movie Act of 2004," which this Committee reported out last July on a bipartisan vote. Copyright enforcement is just as important as clarifying that copyright law cannot be used to limit a parent's right to control what their children watch in the privacy of their own homes.

I urge my colleagues to support this manager amendment, and I will yield back the balance of my time.

Chairman SENSENBRENNER. Are there second degree amendments to the amendment in the nature of a substitute offered by the gentleman from Texas?

Mr. BERMAN. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from California, Mr. Berman.

Mr. BERMAN. I move to strike the last word.

Chairman SENSENBRENNER. Gentleman is recognized for 5 minutes.

Mr. BERMAN. Mr. Chairman, I reluctantly oppose this amendment because it includes the text of H.R. 4586, sometimes referred to over here as the "ClearPlay" language. H.R. 4586 wrongfully takes sides in a private lawsuit, interferes with marketplace negotiations, impinges on artistic freedom and rights and is unnecessarily overbroad.

I am not going to go through all of the arguments because we—I made them in the last markup and I didn't prevail. But I do want to focus on one particular aspect—two particular aspects of the problem here. During the full Committee markup of the bill, H.R. 4586, the text of which is now included in this substitute amendment, the bill's sponsors argued that those reasons that I gave were not compelling. But I don't believe they ever responded to perhaps the most compelling argument; namely, the bill may accomplish the opposite of what they intend. H.R. 4586 only allows one movie filtering technology to go to market without fear of infringement liability. But it is not the technology that the bill's sponsors intend to protect.

Nissan Corporation, not ClearPlay, claims to have a patent over ClearPlay type technology. Nissan has sued ClearPlay for patent infringement, and there is some indication of the likelihood of their prevailing. Nissan recently convinced the huge company Thompson

Electronics to pull its ClearPlay enabled DVD players from the retail market. If H.R. 4586 were to become law, Nissan Corporation may be the only company ultimately benefited. So what is Nissan Corporation? Nissan distributes a technology, called CustomPlay, that allows movie viewers to either reduce or enhance the level of violence, sex and profanity in a movie. The Nissan Web sites state that using CustomPlay technology, and I will repeat myself here, an adult can play a version of an adult individual 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 organized into five groups, who, what, camera, position and fetish. In other words, H.R. 4586 exclusively protects from liability a technology, that among other things, enables viewers of pornographic movies to filter out the nonpornographic scenes.

Though titled the Family Movie Act, H.R. 4586 may end up being called the Pornography Enhancement Act. This outcome is the opposite of what I think the sponsors intend. Thus, I would urge they pull their support for H.R. 4586 or explain to the Committee why they believe their bill won't backfire on those they asked to vote for it.

There is another reason to oppose H.R. 4586, and it involves the fact that despite its title it covers television programs as well as movies. This bill uses the definition of motion picture found in section 101 of the Copyright Act, and this definition clearly includes television programming. Serious consequences result from the fact that this bill covers television as well. One consequence is that the bill would imperil the future of free over the air television by enabling ad skipping. This bill allows a digital video recorder service like TiVo to develop a filter that strips all commercials during playback of TV shows.

This is no far-fetched possibility. A DVR company called Replay TV was sued by owners of TV programming for providing an ad skipping feature in its DVR. Conversely, the bill protects from copyright liability a DVR service that replaces the original ads that came with the TV programming with its own advertisements. I understand that at least one DVR company may already be testing such technologies. What economic model will underwrite the creation of free broadcast programming if all commercials are stripped?

Unfortunately, the inclusion of TV programs within the ambit of this bill does not appear to be an unintended consequence. The bill sponsors have refused the entreaties of both broadcasters and owners of TV programming to limit the applicability of the bill to prerecorded movies. Apparently the bill sponsors want the bill to cover TV.

What is next? Recorded and broadcast music, video games, on line magazines, photographs? This is a slippery slope that the sponsors appear intent to slide down.

I ask my colleagues to vote against the substitute because it includes this unwise language.

Chairman SENSENBRENNER. Are there any second degree amendments to the amendment in the nature of a substitute offered by the gentleman from Texas? Gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. I move to strike the last word.

Chairman SENSENBRENNER. Gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. I will not consume the entire 5 minutes. I did want to address the voluntary program that is included in the manager's amendment. This was drafted late and I understand it was—the intent is to avoid the concern that was raised by the original draft and I appreciate that effort. However, in reaching out to the ISP world, there continues to be some concern about how this might in fact work. It is intended to be voluntary. If the ISP does not wish to forward the notices, they are under this act under no obligation to do so. But there is concern about this measure, and I am just hoping that between now and the floor that if we get additional comments or even suggestions that we might be open to considering them in the manager's amendment.

I am not going to vote against the provision as a consequence. I just wanted to raise the issue and it may be that the concerns are misplaced. I, you know, have not had enough time to really thoroughly explore that.

Mr. SMITH. If the gentlewoman would yield.

Ms. LOFGREN. I would.

Mr. SMITH. I could go into greater detail but I will be happy to talk to you about that between now and the full floor. I think we can address all your concerns and hope to do so shortly.

Ms. LOFGREN. I would welcome that opportunity, and as I say, the concerns may be misplaced, but I would like to explore them a little further, and I yield back.

Mr. COBLE. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman yield back? The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the Chairman and I won't use the entire 5 minutes, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE. But some people I think are concerned that the Family Movie Act, which is included as part of the substitute to Chairman Smith's anti-piracy bill, could allow the use of technology to fast forward through publicly aired broadcasts, including commercial advertisements. I am going to probably go along the same trail that Mr. Berman charted earlier. Advertisements or commercials pay for many of these publicly aired broadcasts, and without these commercials I fear the broadcast would be obsolete or maybe even substandard. And I am concerned and I am going to put this to you, Mr. Smith, or to Mr. Berman, that the language in the Family Movie Act, would that—strike that. The language in the Family Movie Act should be amended to clarify that the publicly aired broadcast should not be changed by ClearPlay policy. Now what do you say to that?

Mr. SMITH. If the gentleman from North Carolina would yield, I am happy that he brought that subject up. I too have heard some concerns expressed just in the last day or two, but quite frankly I think those concerns are unfounded and the fears are being raised by certain organizations who oppose the bill regardless of whether that would be the case or not. Let me say that the technology that we are talking about in this legislation does not in any shape or

form address, cover commercials or other kinds of broadcasting that you are concerned about. In this case we are talking about technology that is used by parents, as you well know, to filter out violence and sex and so forth in a certain predesignated way. This bill does represent a delicate balance, so I wouldn't want to see it amended. However, I would be happy to work with you as well as the gentleman from Florida, Mr. Feeney, on report language to reassure you all that that is not the intent of the Family Movie Act.

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH. It is not my time.

Mr. COBLE. Well, let me reclaim my time and then I will yield to Mr. Berman.

Mr. BERMAN. Thank you. The language of the bill clearly applies. The language exempts from any copyright liability technology which seeks to make imperceptible portions of a filmed program. As I explained under section 101 of the Copyright Act, television programming is included in this definition. "imperceptible" doesn't just apply to sex or violence. It applies to any frame, including commercials. You may want—you may name it a bill to do these things, but you rejected every amendment to limit it to those things, and as it stands this bill clearly applies to scenes having nothing to do with sex or nudity or violence and certainly includes commercials. So just on a factual basis I understand disagreeing with me and saying we wanted to include TV programming, but I think it is wrong to create an impression which is not the fact that this cannot apply to making imperceptible TV.

Mr. COBLE. Let me reclaim my time to say this. Then I will yield to the gentleman. But let me say this first. I have a little discomfort right now. But Mr. Smith has very generously offered to work with Mr. Feeney, with me, I assume with Mr. Berman, Ms. Lofgren and others, prior to going to the floor. Did I read you correctly, Mr. Chairman?

Mr. SMITH. Would the gentleman from North Carolina yield?

Mr. COBLE. I will indeed.

Mr. SMITH. I first of all thank him for his support, and I will reemphasize that we will work together on report language. I thought it was interesting what the gentleman from California just said. A few minutes ago he described this bill as on our side we call it the ClearPlay bill. Well, as the gentleman well knows, ClearPlay technology only addressed itself to approximately 1,600 movies and those 1,600 movies in different configurations are in fact skipped over, their violent and offensive sexual parts are skipped over by ClearPlay. The gentleman himself said that that is what the nature of the bill did and it addressed it self on ClearPlay, which has nothing to do with the commercials or nothing to do with any other entity other than these particular movies. So I think the gentleman by his own words a while ago admitted that this legislation did not get into commercial.

Mr. COBLE. Well, I promised the Chairman of the full Committee that I would not exhaust 5 minutes, so I am coming close to that right now.

Chairman SENSENBRENNER. The gentleman gets a "get out of jail free" card.

Mr. COBLE. Well, I have got a couple of seconds to go.

Mr. BERMAN. No one has suggested that ClearPlay is either trying to enhance pornographic scenes or obliterate commercials. But this bill is not a bill limited to ClearPlay. First of all, it is not even——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BERMAN. I would ask unanimous consent that the gentleman have one additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. If the gentleman would continue to yield to me, today is today. Who knows what ClearPlay or some other company will do tomorrow if this bill were to become law, and given that there is a patent infringement suit against ClearPlay it is not even clear if ClearPlay will be able to market this technology in the future. The company that claims to own the patent wants to market it in a very different way. You have got to deal with the language of the bill. It doesn't limit it to violence, to sexual—to the sexual explicitness, or to nudity, or profanity. It is open ended. It simply says a technology which makes imperceptible these—any scenes from a movie is not a copyright violation. That can include when applied to TV programming the commercials. That is—I mean there really isn't—can't be any serious legal dispute about that. And if report language could overcome a statute, statutory language, I would feel much more comfortable. But report language can't overcome the very explicit clear language of the text. You are going to have to change the language to——

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. GOODLATTE. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I will try to be brief. First of all, I want to thank Chairman Smith and Congressman Forbes for their work on this legislation, which is important and I support it. During the Subcommittee markup of the legislation I asked that the Subcommittee work to address the concerns that many Internet service providers had that they would be liable under the bill for their routine practices, and I am pleased to say the legislation today includes a provision that addresses these concerns. And I applaud the efforts of Chairman Sensenbrenner and Chairman Smith to address the concerns, while ensuring that strong protection of intellectual property rights continues. I know that it hasn't addressed the concerns of everybody, and I hope that Chairman Smith will remain open to continue to work on that. But I think a lot of progress has been made and I am very appreciative of that.

I do want to also thank Chairman Smith for his statement that he intends to make it clear that this bill will not allow for the addition of offensive content or other manipulation that would cause the films to be of that nature, and I hope that if there is a way to take care of it, either in report language or legislatively, we can continue to work on that subject, and I would be happy to yield to him if he wants to add anything more to this subject because I am supportive of his efforts to allow this type of work to be done.

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. I will yield to the gentlewoman from California.

Ms. LOFGREN. Just on that point, I don't think personally it is necessary to have such language because the—what we have talked about is not changing the fundamental copy protected work. What you are talking about, skipping, editing what is already there but not changing the fundamental copy protected work. And if you were to add material you would be altering the copy protected work. So I do think you can put it in, but I think it is superfluous. Really this is about—we have talked about pornography and the right of parents to protect. But I really see this as a much broader issue, the right of consumers to watch whatever they want and to use technology to assist you to watch whatever you want. And I don't want to repeat the hearings and markups that we had in Subcommittee, but I think that that is kind of the, you know, beer and sandwich rule. I mean, if you can leave the room to go to the refrigerator and skip the part that you are skipping through the technology, why couldn't you use technology to skip through it.

So I just wanted to add, I understand the concern, but you would be altering the work if you were to add material and therefore, I think it is precluded under that. And I thank the gentleman for yielding.

Mr. GOODLATTE. I thank the gentlewoman for her comments and yield to the gentleman from Texas.

Mr. SMITH. I would like to—thank you. First of all, I would like to thank the gentleman from Virginia for his support and his comments on this legislation. And let me reiterate what I mentioned a while ago, that we will be happy to work you and I will enlarge the group to say Representative Lofgren on appropriate report language to try to satisfy your concerns. I thank you again for your support.

Mr. GOODLATTE. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. Are there second degree amendments to the amendment in the nature of a substitute offered by the gentleman from Texas? If not, the question occurs on the Smith amendment in the nature of a substitute, as amended. All in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it and the amendment in the nature of a substitute is agreed to.

Without objection, the Subcommittee amendment in the nature of a substitute laid down as the base text, as amended by the Smith substitute, is adopted. Reporting quorum is present. The question occurs on the motion to report the bill H.R. 4——

Mr. BERMAN. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I congratulate the Chairman of the Subcommittee on the passage of his substitute amendment. He has truly found a way to put me between a rock and a hard place. I am going to vote for this bill because I think of the importance of the provisions that we have worked on together and some of the adjustments you have made along the lines that Ms. Lofgren talked about. I had hoped that your own reflected judgment on the issue of the impact of the ClearPlay language on television programming will cause you to make changes between now and the floor in that language, and that the Senate in its great wisdom will deal with the rest of the ClearPlay language.

Chairman SENSENBRENNER. The gentleman is given permission to revise and extend his remarks as it relates to the Senate. The gentleman yield back.

Mr. BERMAN. I do.

Chairman SENSENBRENNER. The reporting quorum is still present. The question occurs on the motion to report the bill H.R. 4077 favorably, as amended. All in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it and the motion to report favorably is agreed to.

Without objection, the bill 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.

Without objection, the Chair is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes and all Members will be given 2 days, as provided by House rules, in which to submit additional dissenting, supplemental or minority views.

MINORITY VIEWS

While we support the anti-piracy provisions of H.R. 4077, we oppose section 12 of the bill as reported. Section 12 adds to H.R. 4077 the text of H.R. 4586, the "Family Movie Act of 2004."[1] With the purported goal of sanitizing undesired content in motion pictures, section 12 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.[2] Section 12 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 section 12 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 section 12 is opposed by: (1) entities concerned with the intellectual property and artistic rights of creators, including the Directors Guild of America,[3] the Motion Picture Association of America,[4] and the Dean of the UCLA Film School;[5] and (2) experts on copyright law, such as the Register of Copyrights.[6]

A. SECTION 12 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

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[1] H.R. 4586 was reported by the Committee on the Judiciary on September 8, 2004. H.R. Rep. No. 670, 108th Cong., 2d Sess. (2004).

[2] H.R. 4586, the "Family Movie Act of 2004," 108th Cong., 2d Sess. (2004). The bill's proponents refer to movies that have been sanitized of what they consider to be offensive content as "family friendly."

[3] *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*].

[4] *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*].

[5] 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.].

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

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 case that began as an action brought by a company called Clean Flicks against directors of movies.[7] 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.[8]

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.[9] 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.[10]

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 which 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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[7] 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.

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

[9] 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.

[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). 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.[11] 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.[12] 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 and then still attribute that work to the original's creator. 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, over the past year, 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.[13] Unfortunately, due to the two hearings on this issue and the movement of this editing proposal, 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.

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

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

[12] *See* 15 U.S.C. § 1125(a)(1).

[13] 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.

the middle of the game, particularly to help one specific entity; if passed, section 12 would be an unfortunate example of such unfairness. For these reasons, section 12 should not be considered while litigation is pending.[14]

B. SECTION 12 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 bill underlying the amendment:

> 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.*[15]

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.[16] 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.[17] 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 request of an H.R. 4586 supporter who looked forward to a day when

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[14] *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.").

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

[16] 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.

[17] 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.

"the industry will get around to issue us age-appropriate products."[18]

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,[19] 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.[20]

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. SECTION 12 WOULD LEGALIZE EDITING THAT IS INCOMPREHENSIBLE AND OVERBROAD AND WOULD LEAD TO AN INCREASE IN UNDESIRED CONTENT

Section 12 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.[21]

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, section 12 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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[18] *H.R. 4586 Hearing* at 15 (statement of Amitai Etzioni, Founder and Director, The Institute for Communitarian Policy Studies, George Washington University).

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

[20] 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).

[21] 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;[22]
- 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 camp.

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 the full Committee markup of the legislation, the sponsors rejected an effort to limit the proposal to its purported scope of profane, sexual, and violent content.[23] If enacted, section 12 could lead to the editing of artistic works based upon racial, religious, social, political, and business biases.

Moreover, the bill would permit the editing of works other than movies. While the bill's author argues that its purpose is to sanitize movies,[24] a close reading of the legislation shows that it would permit the editing of broadcast television programming, as well. More specifically, section 12 permits the "making of limited portions of audio or video content of a motion picture imperceptible."[25] The copyright law defines "motion pictures" as "audiovisual works consisting of a series of related images which, when shown in succes-

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[22] 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.

[23] *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.*

[24] *H.R. 4586 Markup* (statement of Rep. Lamar Smith (R-TX)).

[25] H.R. 4586.

sion, impart an impression of motion, together with accompanying sounds, if any."[26] Because this definition includes television programs,[27] the legislation would permit editing of broadcast television.

As a result, the bill would legalize a filter that skips, for instance, all commercial advertisements during playback of free, over-the-air broadcast television programming. The revenues that broadcast television companies generate from selling commercial advertisement time is the sole means by which television programming is financed.[28] Permitting television commercials to be deleted would reduce the ability of television programmers to sell ad time and thus make it financially difficult for television stations to remain in business. Consumers across the country would thus be deprived of a prime and free source of news, entertainment, and other information.

Finally, the legislation could lead to increased violence and sexual content in entertainment. Just as section 12 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.[29]

Additionally, because section12 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.[30] If Nissim's claims are valid, then only Nissim could distribute such film-editing software.[31] Thus, contrary to its stated purpose, section12 could succeed in legalizing only Nissam's technology, which enables users to increase the proportion of sex or violence in a movie.

D. SECTION 12 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.[32] The National Endowment for the Arts states "[a]rtistic work and freedom

[26] 17 U.S.C. § 101.

[27] H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976) (House report on the 1976 Copyright Act).

[28] *In the Matter of Commission Seeks Public Comment on Spectrum Policy Task Force Report: Joint Reply Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters Before the Federal Communications Comm'n,* ET Docket No. 02–135 13 (Feb. 28, 2003).

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

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

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

[32] 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.").

of expression are a vital part of any democratic society."[33] For this reason, the NEA seeks to preserve works of art,[34] 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."[35] The United States, recognizing the importance of this right, subsequently enacted it into both copyright law[36] and trademark law.[37]

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.[38] By limiting the availability of Lanham Act suits, section12 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, section 12 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.[39]

It is clear, therefore, that the legislation violates 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, section 12 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

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[33] NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY2003–2008 3 (Feb. 2003).
[34] *Id.* at 8.
[35] Berne Convention for the Protection of Literary and Artistic Works, art. *6bis,* 1971.
[36] 17 U.S.C. § 106A.
[37] 15 U.S.C. § 1125.
[38] 133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (statement of Rep. Robert Kastenmeier).
[39] *H.R. 4586 Hearing* at 10 (written statement of Marybeth Peters).

the distribution of technology that makes pornography *even more* pornographic. Finally, it encourages unwarranted intrusions into artistic freedom.

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