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The Family Entertainment and Copyright Act of 2005

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Summary

Intellectual property legislation that came close to enactment during the 108th Congress passed the Senate by unanimous consent early in the 109th Congress. Among the issues addressed are unauthorized distribution of pre-release commercial works, the marketing of devices for home use to edit objectionable content from DVDs, the preservation of the nation's film heritage, and use by libraries and archives of "orphan works." A companion bill has been introduced in the House. This report discusses the provisions of S. 167, 109th Cong., 1st Sess. (2005).

S. 167, 109th Congress, 1st Sess. (2005), the "Family Entertainment and Copyright Act of 2005" passed the Senate on February 1, 2005.[1] The bill, comprised of legislative proposals considered in the 108th Congress, is divided into four titles.[2] They are discussed below.

Title I – "Artists' Rights and Theft Prevention" (ART Act). The ART Act would add new criminal penalties for unauthorized recording or filming of motion pictures in a theater. It is intended to stem bootlegging and unauthorized distribution of "*pre-release* commercial works."

Movie studios complain that all too frequently an unauthorized version of a film is available online even before or shortly after it is commercially released. The bill would add a new law, 18 U.S.C. § 2319B, expressly prohibiting unauthorized recording of motion pictures in a motion picture exhibition facility.

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[1] 151 CONG. REC. S827 (daily ed. Feb. 1, 2005). *See* companion bill, H.R. 357, 109th Cong., 1st Sess. (2005).

[2] The bill contains provisions similar to or identical to language in bills that passed their respective chambers in the 108th Congress, namely, H.R. 4077, 108th Cong., 2d Sess. (2004), the "Piracy Deterrence and Education Act of 2004," and S. 3021, 108th Cong., 2d Sess. (2004), the "Family Entertainment and Copyright Act of 2004."

The provision is conceptually related to current 18 U.S.C. § 2319A, which establishes criminal sanctions for unauthorized filming or recording of live musical concerts.[3] It would subject offenders to imprisonment for three to six years and forfeiture or destruction of the bootlegged copies. Movie theaters and exhibitors receive civil and criminal immunity from liability for a reasonable detention for questioning or arrest of any person suspected of violating the law. It would permit a victim of the crime to submit a victim impact statement identifying the extent and scope of loss suffered, including the estimated economic impact of the offense, to a probation officer.

The ART Act would establish another category of criminal infringement: unauthorized distribution of a pre-release commercial copyrighted work.[4] Section 103 of the bill adds a new class of prohibited activity to 17 U.S.C. § 506 governing criminal copyright infringement. § 506(a) currently defines criminal infringement as willfully infringing for (1) commercial advantage or private financial gain or (2) by reproducing or distributing within any 180-day period one or more copyrighted works having a retail value of $1000. A new category – knowingly making a work being prepared for commercial distribution available on a computer network accessible to the public – would be added. Works covered include computer programs, motion pictures, and sound recordings. Punishment includes fines and/or imprisonment for 3 to 10 years.

Section 104 of the bill directs the Copyright Office to establish procedures to allow preregistration of a work that is being prepared for commercial distribution and has not been published.[5] The work must be of a class that the Register determines suffers a history of pre-commercial distribution infringement. Copyright registration facilitates an action for infringement.

Section 105 directs the U.S. Sentencing Commission to review, and if appropriate, amend the federal sentencing guidelines and policy statements applicable to persons convicted of IP crimes.

Title II – The "Family Movie Act of 2005" (FMA). The FMA would amend 17 U.S.C. § 110 which establishes limitations on the exclusive rights of copyright holders to permit the marketing and home use of devices intended to edit out sexual, violent and/or profane scenes and language from motion picture DVDs.

The bill is intended to create a "safe harbor" from copyright and trademark infringement liability for movie filtering technology, such as that currently sold by ClearPlay, that skips over dialog and scenes deemed offensive but does not create a fixed

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[3] *See* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999), *cert. den.* 529 U.S. 1036 (2000) upholding 18 U.S.C. § 2319A under congressional authority to legislate pursuant to the Commerce Clause. *Contra,* United States v. Martignon, 346 F.Supp.2d 413 (S.D.N.Y. 2004). Any question concerning Congress' constitutional authority to regulate commercial matters involving live performances should not, however, be implicated in protection of clearly copyrightable motion pictures.

[4] 18 U.S.C. § 2319 sets forth conditions and penalties for criminal copyright infringement.

[5] Section 104 of the bill would amend 17 U.S.C. § 408.

copy of the altered version.[6] It emphasizes that the filtering technology must be used for private household use.

In order to avoid liability for trademark infringement, the manufacturer must ensure that the technology provides notice that the edited motion picture will be altered from the performance intended by the movie's director or copyright holder.

With respect to copyright law, the bill's sponsors wish to preclude a manufacturer's liability for the unauthorized preparation of a derivative work.[7] However, it is not clear that manufacture, sale, or use of the skipping technology does in fact violate a copyright holder's exclusive right to prepare a derivative work based upon the copyrighted work.[8] Litigation is currently pending with respect to both filtering technology and the offering for rental of movies edited without permission of copyright holders.

As in the 108th Congress, the Senate bill is silent on the issue of "ad skipping". The House-passed version in the 108th Congress specified that the exemption from copyright infringement for filtering technology did *not* apply to ad skipping. The Senate version omits this express exclusion from the exemption because the permissibility of ad-skipping devices and technology is generally unsettled and it is not the intention of the bill's sponsors to resolve the question:

> That this change in no way affects the scope of the exemption is clear when considering that the new section 110(11) exemption protects the "making imperceptible ..... limited portions of audio or video content of a motion picture....." An advertisement, under the Copyright Act, is itself a "motion picture," and thus a product or service that enables the skipping of an entire advertisement, in any media, would be beyond the scope of the exemption. Moreover, the phrase "limited portions" is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work, such as a commercial advertisement, is made imperceptible, the new section 110(11) exemption would not apply. The limited scope of this exemption does not, however, imply or show that such conduct or a technology that enables such conduct would be infringing. This legislation does not in any way deal with that issue. It means simply that such conduct and products enabling such conduct are not immunized from liability by this exemption.[9]

Title III – The "National Film Preservation Act of 2005". This Title reauthorizes the National Film Preservation Board and the National Film Preservation Foundation. These organizations work to recognize and preserve historically or culturally

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[6] The requirement that filtering not result in a fixed copy of the edited version should distinguish ClearPlay's skipping technology from practices of other businesses which edit films without authorization from copyright holders to offer family-friendly versions of movies for rental to the public.

[7] 17 U.S.C. § 106(2).

[8] *See, e.g.*, *H.R. 4586, The Family Movie Act of 2004: Hearing before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 108th Cong., 2d Sess. (2004)(Statement of Marybeth Peters, Register of Copyrights, that the legislation is not needed because it seems reasonably clear that such conduct is not prohibited under existing law).

[9] 151 CONG. REC. S495 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

significant films. It directs the Library of Congress to work with the Preservation Board to make films included in the National Film registry more broadly accessible for research and educational purposes; to ensure that the national film preservation plan addresses technological advances in preservation and storage; and, to expand initiatives to ensure the preservation of the Nation's image heritage.

Title IV – The "Preservation of Orphan Works Act". Under the predecessor to the current Copyright Act, a copyright owner was obliged to undertake certain procedural formalities to establish and extend the term of a protectible copyright. Many of those formalities are done away with under current law. A copyright subsists from the moment an original work of authorship is fixed in a tangible form and endures for a single term without the need for renewal. An "orphan work," that is, a work for which the copyright owner cannot be located, imposes a burden on users. According to the U.S. Copyright Office, which is studying the issue, the question is whether orphan works are being needlessly removed from public access and their dissemination inhibited to the public's detriment.[10] The bill, however, makes a very minor amendment to the Copyright Act, 17 U.S.C. § 108(i), to permit limited reproduction by libraries and archives of specified copyrighted works that are not subject to normal commercial exploitation within the last 20 years of their copyright term.

[10] *See* Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005)(U.S. Copyright Office seeks to solicit comments on and to examine the issues raised by orphan works).