and a fine judge who has committed the better part of his life to promoting and improving the administration of justice. Montana is proud to call him one of their own, and I am proud to call him my friend.

Judge Browning was born in Great Falls, MT, just like another famous Montana son—former Senate Majority Leader and Ambassador to Japan, Mike Mansfield. Judge Browning grew up in the small town of Belt, MT, and married his high-school sweetheart Marie Rose from Belfry, MT. Judge Browning received his law degree from the University of Montana in 1941, graduating at the top of his class. He worked for the Antitrust Division of the Department of Justice before joining the U.S. Army where he served in Military Intelligence for 3 years, attaining the rank of first lieutenant and winning the Bronze Star.

After the war, he returned to the Justice Department, eventually rising through the ranks to become Executive Assistant to the Attorney General. In 1953, he entered private practice, leaving after 5 years to serve as the Clerk of the U.S. Supreme Court at the request of Chief Justice Earl Warren. In that position, he held the Bible during President John F. Kennedy's inauguration.

In 1961, President Kennedy named James Browning to be a Circuit Judge of the U.S. Court of Appeals for the Ninth Circuit. Judge Browning has served on that court with distinction and honor for more than 40 years, longer than any other judge in Ninth Circuit history. He was still working 6 days a week as an active federal judge when he turned 80 in 1998, and he did not take senior status until November of 2000. He has participated in nearly 1000 published appellate decisions.

Judge Browning was named chief judge of the Ninth Circuit in 1976. During his 12-year tenure as the chief judge, the Ninth Circuit expanded from 23 to 28 judges, eliminated its case backlog entirely, and reduced by half the time needed to decide appeals. He worked tirelessly to improve the administration of the courts, dramatically increasing the efficiency and productivity of the Ninth Circuit, all the while emphasizing collegiality and civility among his colleagues on the Ninth Circuit. Judge Browning's leadership and innovation sparked similar administrative reforms throughout the country.

Judge Browning is held in the highest regard by both bench and bar across California, in Montana, and within the Ninth Circuit legal community. His rich and distinguished career spans more than six decades—most of it spent in public service. We have finally recognized his long service to his country and the Ninth Circuit by renaming the U.S. Courthouse in San Francisco in his honor. It is a long way from Belt, MT, but Judge Browning never forgot his roots, and now neither will the Ninth Circuit that he helped to build.●

FAMILY ENTERTAINMENT AND COPYRIGHT ACT OF 2004

● Mr. CORNYN. Mr. President, would the chairman yield for a question?

Mr. HATCH. I would be happy to yield for a question from the distinguished Senator from Texas.

Mr. CORNYN. As the chairman knows, he and I and our other co-sponsors have worked throughout this Congress on the provisions of the Family Entertainment and Copyright Act of 2004 that we have introduced today. I just want to confirm what I believe to be our mutual understanding about the effect of certain provisions of the Family Movie Act. Title II of the Family Entertainment and Copyright Act of 2004 that we introduced today modifies slightly the Family Movie Act provisions of H.R. 4077 as passed by the House of Representatives. That bill created a new exemption in section 110(11) of the Copyright Act for skipping and muting audio and video content in motion pictures during performances that take place in the course of a private viewing in a household from an authorized copy of the motion picture. The House-passed version specifically excluded from the scope of the new copyright exemption computer programs or technologies that make changes, deletions, or additions to commercial advertisements or to network or station promotional announcements that would otherwise be displayed before, during, or after the performance of the motion picture.

My understanding is that this provision reflected a ''belt and suspenders'' approach that was adopted to quiet the concerns of some Members in the House who were concerned that a court might misread the statute to apply to ''ad-skipping'' cases. Some Senators, however, expressed concern that the inclusion of such explicit language could create unwanted inferences as to the ''ad-skipping'' issues at the heart of the recent litigation. Those issues remain unsettled, and it was never the intent of this legislation to resolve or affect those issues. In the meantime, the Copyright Office has confirmed that such a provision is unnecessary to achieve the intent of the bill, which is to avoid application of this new exemption in potential future cases involving ''ad-skipping'' devices; therefore, the Senate amendment we offer removes the unnecessary exclusionary language.

Would the chairman confirm for the Senators present his understanding of the intent and effect, or perhaps stated more appropriately, the lack of any effect, of the Senate amendment on the scope of this bill?

Mr. HATCH. My cosponsor, Senator CORNYN, raises an important point. While we removed the ''ad-skipping'' language from the statute to avoid this unnecessary controversy, you are absolutely correct that this does not in any way change the scope of the bill. The bill 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 a product would be infringing. This legislation does not in any way deal with that issue. It means simply that such a product is not immunized from liability by this exemption.

Mr. CORNYN. I thank the chairman. I am pleased that we share a common understanding. If the chairman would yield for one more question about the Family Movie Act?

Mr. HATCH. Certainly.

Mr. CORNYN. This bill also differs from the House-passed version because it adds two ''savings clauses.'' As I understand it, the ''copyright'' savings clause makes clear that there should be no ''spillover effect'' from the passage of this law: that is, nothing shall be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption. The second, relating to trademark, clarifies that no inference can be drawn that a person or company who fails to qualify for the exemption from trademark infringement found in this provision is therefore liable for trademark infringement. Is that the chairman's understanding as well?

Mr. HATCH. Yes it is. Let me ask that a copy of the section-by-section analysis of the Family Movie Act as amended by the Senate be included in the RECORD. This section-by-section analysis contains a more complete analysis of the bill as proposed today in the Senate, including the limited changes made by the bill Senators LEAHY, CORNYN, BIDEN, and I offer today.

The analysis follows.

SECTION-BY-SECTION ANALYSIS OF THE FAMILY MOVIE ACT OF 2004, AMENDED AND PASSED BY THE SENATE

OVERVIEW

Title II of the Family Entertainment and Copyright Act of 2004 incorporates the House-passed provision of the Family Movie Act of 2004, with limited changes as reflected in this section-by-section analysis. As discussed herein, these changes are not intended to and do not affect the scope, effect or application of the bill.

The purpose of the Family Movie Act is to empower private individuals to use technology to skip and mute material that they find objectionable in movies, without impacting established doctrines of copyright or

trademark law or those whose business models depend upon advertising. This amendment to the law should be narrowly construed to effect its intended purpose only. The sponsors of the legislation have been careful to tailor narrowly the legislation to clearly allow specific, consumer-directed activity and not to open or decide collateral issues or to affect any other potential or actual disputes in the law.

The bill as proposed in the Senate makes clear that, under certain conditions, ''making imperceptible'' of limited portions of audio or video content of a motion picture—that is, skipping and muting limited portions of movies without adding any content—as well as the creation or provision of a computer program or other technology that enables such making imperceptible, does not violate existing copyright or trademark laws. That is true whether the movie is on prerecorded media, like a DVD, or is transmitted to the home, as through pay-per-view and ''video-on-demand'' services.

Subsection (a): Short Title

Subsection (a) sets forth the short title of the bill as the Family Movie Act of 2004.

Subsection (b): Exemption From Copyright and Trademark Infringement for Skipping of Audio or Video Content of Motion Pictures

Subsection (b) is the Family Movie Act's core provision and creates a new exemption at section 110(11) of the Copyright Act for the ''making imperceptible'' of limited portions of audio or video content of a motion picture during a performance in a private household. This new exemption sets forth a number of conditions to ensure that it achieves its intended effect while remaining carefully circumscribed and avoiding any unintended consequences. The conditions that allow an exemption, which are discussed in more detail below, consist of the following:

The making imperceptible must be ''by or at the direction of a member of a private household.'' This legislation contemplates that any altered performances of the motion picture would be made either directly by the viewer or at the direction of a viewer where the viewer is exercising substantial choice over the types of content they choose to skip or mute.

The making imperceptible must occur ''during a performance in or transmitted to the household for private home viewing.'' Thus, this provision does not exempt an unauthorized ''public performance'' of an altered version.

The making imperceptible must be ''from an authorized copy of a motion picture.'' Thus, skipping and muting from an unauthorized or ''bootleg'' copy of a motion picture would not be exempt.

No ''fixed copy'' of the altered version of the motion picture may be created by the computer program or other technology that makes imperceptible portions of the audio or video content of the motion picture. This provision makes clear that services or technologies that make a fixed copy of the altered version are not afforded the benefit of this exemption.

The ''making imperceptible'' of limited portions of a motion picture does not include the addition of audio or video content over or in place of other content, such as placing a modified image of a person, a product, or an advertisement in place of another, or adding content of any kind.

These limitations, and other operative provisions of this new section 110(11) exemption, merit further elaboration as to their purposes and effects.

The bill makes clear that the ''making imperceptible'' of limited portions of audio or video content of a motion picture must be done by or at the direction of a member of a private household. While this limitation does not require that the individual member of the private household exercise ultimate decision-making over each and every scene or element of dialog in the motion picture that is to be made imperceptible, it does require that the making imperceptible be made at the direction of that individual in response to the individualized preferences expressed by that individual. The test of ''at the direction of an individual'' would be satisfied when an individual selects preferences from among options that are offered by the technology.

An example is the C1earPlay model. C1earPlay provides so-called ''filter files'' that allow a viewer to express his or her preferences in a number of different categories, including language, violence, drug content, sexual content, and several others. The version of the movie that the viewer sees depends upon the preferences expressed by that viewer. Such a model would fall under the liability limitation of the Family Movie Act.

This limitation, however, would not allow a program distributor, such as a provider of video-on-demand services, a cable or satellite channel, or a broadcaster, to make imperceptible limited portions of a movie in order to provide an altered version of that movie to all of its customers, which could violate a number of the copyright owner's exclusive rights, or to make a determination of scenes to be skipped or dialog to be muted and to offer to its viewers no more of a choice than to view an original or an altered version of that film. Some element of individualized preferences and control must be present such that the viewer exercises substantial choice over the types of content they choose to skip or mute.

It is also important to emphasize that the new section 110(11) exemption is targeted narrowly and specifically at the act of ''making imperceptible'' limited portions of audio or video content of a motion picture during a performance that occurs in, or that is transmitted to, a private household for private home viewing. This section would not exempt from liability an otherwise infringing performance, or a transmission of a performance, during which limited portions of audio or video content of the motion picture are made imperceptible. In other words, where a performance in a household or a transmission of a performance to a household is done lawfully, the making imperceptible limited portions of audio or video content of the motion picture during that performance, consistent with the requirements of this new section, will not result in infringement liability. Similarly, an infringing performance in a household, or an infringing transmission of a performance to a household, are not rendered non-infringing by section 110(11) by virtue of the fact that limited portions of audio or video content of the motion picture being performed are made imperceptible during such performance or transmission in a manner consistent with that section.

The bill also provides additional guidance, if not an exact definition, of what the term ''making imperceptible'' means. The bill provides specifically that the term ''making imperceptible'' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture. This is intended to make clear in the text of the statute what has been expressed throughout the consideration of this legislation, which is that the Family Movie Act does not enable the addition of content of any kind, including the making imperceptible of audio or video content by replacing it or by superimposing other content over it. In other words, for purposes of section 110(11), ''making imperceptible'' refers solely to skipping scenes and portions of scenes or muting audio content from the original, commercially available version of the motion picture. No other modifications of the content are addressed or immunized by this legislation.

The House sponsor of this legislation noted in his explanation of his bill, and the Senate is also aware, that some copy protection technologies rely on matter placed into the audio or video signal. The phrase ''limited portions of audio or video content of a motion picture'' means what it would naturally seem to mean (i.e., the actual content of the motion picture) and does not refer to any component of a copy protection scheme or technology. This provision does not allow the skipping of technologies or other copy-protection-related matter for the purpose of defeating copy protection. Rather, it is expected that skipping and muting of content in the actual motion picture will be skipped or muted at the direction of the viewer based on that viewer's desire to avoid seeing or hearing the action or sound in the motion picture. Skipping or muting done for the purpose of or having the effect of avoiding copy protection technologies would be an abuse of the safe harbor outlined in this legislation and may violate section 1201 of title 17.

Violating the Digital Millennium Copyright Act, and particularly its anti-circumvention provisions, is not necessary to enable technology of the kind contemplated under the Family Movie Act. Although the amendment to section 110 provides that it is not an infringement of copyright to engage in the conduct that is the subject of the Family Movie Act, the Act does not provide any exemption from the anti-circumvention provisions of section 1201 of title 17, or from any other provision of chapter 12 of title 17. It would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new exemption in section 110(11), just as it is not a defense under section 1201 that the circumvention is for the purpose of engaging in any other non-infringing conduct.

There are a number of companies currently providing the type of products and services covered by this Act. The Family Movie Act is intended to facilitate the offering of such products and services, and it certainly creates no impediment to the technology employed by those companies. Indeed, it is important to underscore the fact that the support for such technology and consumer offerings that is reflected in this legislation is driven in some measure by the desire for copyright law to be respected and to ensure that technology is deployed in a way that supports the continued creation and protection of entertainment and information products that rely on copyright protection. This legislation reflects the firm expectation that those rights and the interests of viewers in their homes can work together in the context defined in this bill. Any suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the copy protection schemes that provide protection for such work should be rejected as counter to legislative intent or technological necessity.

The House-passed bill included an explicit exclusion to the new section 110(11) exemption in cases involving the making imperceptible of commercial advertisements or network or station promotional announcements. This provision was added on the House floor to respond to concerns expressed by Members during the House Judiciary Committee markup that the bill might be

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

The phrase ''limited portions of audio or video content of a motion picture'' applies only to the skipping and muting of scenes or dialog that are part of the motion picture itself, and not to the skipping of commercial advertisements, which are themselves considered motions pictures under the Copyright Act. It also should be noted that the phrase ''limited portions'' is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work (including a commercial advertisement) is made imperceptible, the section 110(11) exemption would not apply.

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

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

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

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

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

Subsection (c): Exemption From Trademark Infringement

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

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

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

Subsection (d): Definition

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

MESSAGE FROM THE HOUSE DURING ADJOURNMENT

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

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

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

ENROLLED BILLS SIGNED

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

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

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

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

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

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

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

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

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

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

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

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

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

ENROLLED BILLS PRESENTED DURING ADJOURNMENT

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

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