S. 165

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

SECTION 1. PERMANENT RESIDENT STATUS FOR TCHISOU THO.

(a) IN GENERAL.—Notwithstanding subsections (a) and (b) of section 201 of the Immigration and Nationality Act (8 U.S.C. 1151), Tchisou Tho shall be eligible for the issuance of an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence upon filing an application for issuance of an immigrant visa under section 204 of that Act (8 U.S.C. 1154) or for adjustment of status to lawful permanent resident.

(b) ADJUSTMENT OF STATUS.—If Tchisou Tho enters the United States before the filing deadline specified in subsection (c), Tchisou Tho shall be considered to have entered and remained lawfully and shall be eligible for adjustment of status under section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) as of the date of enactment of this Act.

(c) DEADLINE FOR APPLICATION AND PAYMENT OF FEES.—Subsections (a) and (b) shall apply only if the application for issuance of an immigrant visa or the application for adjustment of status are filed with appropriate fees within 2 years after the date of enactment of this Act.

(d) REDUCTION OF IMMIGRANT VISA NUMBERS.—Upon the granting of an immigrant visa or permanent residence to Tchisou Tho, the Secretary of State shall instruct the proper officer to reduce by 1, during the current or next following fiscal year, the total number of immigrant visas that are made available to natives of the country of the aliens' birth under section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)) or, if applicable, the total number of immigrant visas that are made available to natives of the country of the aliens' birth under section 202(e) of that Act (8 U.S.C. 1152(e)).

By Mr. SMITH (for himself and Mr. WYDEN):

S. 166. A bill to amend the Oregon Resource Conservation Act of 1996 to reauthorize the participation of the Bureau of Reclamation in the Deschutes River Conservancy, and for other purposes; to the Committee on Energy and Natural Resources.

Mr. SMITH. Mr. President, today I am introducing legislation, cosponsored by my colleague from Oregon, to reauthorize participation by the Bureau of Reclamation in the Deschutes River Conservancy for an additional 10 years.

The Deschutes River Conservancy, formerly know as the Deschutes Resources Conservancy, was originally authorized in 1996 as a pilot project. It was so successful it was reauthorized in the 106th Congress. The Conservancy is designed to achieve local consensus for on-the-ground projects to improve ecosystem health in the Deschutes River Basin.

The Deschutes River is truly one of Oregon's greatest resources. It drains Oregon's high desert along the eastern front of the Cascades, eventually flowing into the Columbia River. It is the State's most intensively used recreational river. It provides water to both irrigation projects and to the city of Bend, which is one of Oregon's fastest growing cities. The Deschutes Basin also contains hundreds of thousands of acres of productive forest and rangelands, serves the treaty fishing and water rights of the Confederated Tribes of Warm Springs, and has Oregon's largest non-Federal hydroelectric project.

By all accounts, the Deschutes River Conservancy has been a huge success. It has brought together diverse interests within the Basin, including irrigators, tribes, ranchers, environmentalists, an investor-owned utility, local businesses, as well as local elected officials and representatives of State and Federal agencies. Together, the Conservancy board members have been able to develop project criteria and identify a number of water quality, water quantity, fish passage and habitat improvement projects that could be funded. Over the years, projects have been selected by consensus, and there must be a fifty-fifty cost share from non-Federal sources.

Over the past 8 years, they have been very successful at finding cooperative, market-based solutions to enhance the ecosystem in the basin. The Conservancy has used this approach to restore over ninety cubic-feet-per-second of streamflow in the Deschutes Basin. In addition, by planting over 100,000 trees, installing miles of riparian fencing, removing berms and reconstructing stream beds, the Conservancy has helped improve fish habitat and water quality along one hundred miles of the Deschutes River and its tributaries.

The existing authorization provides for up to two million dollars each year for projects. This bill would continue that annual authorization ceiling for 10 years. Funds are provided through the Bureau of Reclamation, the group's lead Federal agency.

The Deschutes River Conservancy enjoys widespread support in Oregon. It has very committed board members who represent diverse interests in the Basin. The high caliber of their work, and their pragmatic approach to ecosystem restoration have been recognized by others outside the region.

I am convinced that Federal participation in this project needs to continue. This organization has helped to avoid the conflicts over water that we have seen in too many watersheds in the western United States. I urge my colleagues to continue support for this project. Not only is it important to central Oregon, but the Deschutes River Conservancy can serve as a national model for cooperative watershed restoration at the local level.

By Mr. HATCH (for himself, Mr. LEAHY, Mr. CORNYN, and Mrs. FEINSTEIN):

S. 167. A bill to provide for the protection of intellectual property rights, and for other purposes; to the Committee on the Judiciary.

Mr. HATCH. Mr. President, I rise today to introduce the Family Entertainment and Copyright Act of 2005. This important legislation consists of a package of smaller intellectual property bills that the House and Senate have been working to enact since last Congress. This legislation passed the Senate not once, but twice, during the waning days of the last Congress. Unfortunately, though, it was doomed by a non-germane amendment unrelated to intellectual property law. My hope is that we can work together this Congress to avoid this type of pitfall, and I commit to work with other members to do so.

Before beginning my substantive discussion of the bill, I would like to thank my colleagues Senators LEAHY, CORNYN, and FEINSTEIN for their ongoing efforts on this legislation. Just as it was last year, this legislation is a group effort, and I want to take care to recognize the contributions and their excellent work along with that of Representatives SENSENBRENNER, SMITH, BERMAN, and CONYERS in the House.

Before going into a title-by-title discussion of the bill, I would like to express my particular support for the Family Movie Act, which has been included in this legislation. Chairman LAMAR SMITH and I worked on this bill last Congress. It's important legislation both to parents who want the ability to use new technologies to help shield their families from inappropriate content as well as the technology companies, such as ClearPlay in my home State of Utah, that are working to develop these technologies. The Family Movie Act will give parents more say over what their children see, without limiting the creative control of directors and movie studios.

Title I of this Act, the Artists' Rights and Theft Prevention Act of 2005, (the ART Act), contains a slightly modified version of S. 1932, authored by Senators CORNYN and FEINSTEIN in the 108th Congress. This bill will close two significant gaps in our copyright laws that are feeding some of the piracy now rampant on the Internet.

First, it criminalizes attempts to record movies off of theater screens. These camcorded copies of new movies now appear on filesharing networks almost contemporaneously with the theatrical release of a film. Several States have already taken steps to criminalize this activity, but providing a uniform Federal law—instead of a patchwork of State criminal statutes—will assist law enforcement officials in combating the theft and redistribution of valuable intellectual property embodied in newly-released motion pictures.

Second, the bill will create a pre-registration system that will permit criminal penalties and statutory-damage awards. This will also provide a tool for law enforcement officials combating the growing problem of music and movies being distributed on filesharing networks and circulating on the Internet before they are even released. Obviously, the increasingly frequent situation of copyrighted works

being distributed illegally via the Internet before they are even made available for sale to the public severely undercuts the ability of copyright holders to receive fair and adequate compensation for their works.

Title II of this Act, the Family Movie Act of 2005 (the FMA), resolves some ongoing disputes about the legality of so-called ''jump-and-skip'' technologies that companies like Clearplay in my home State of Utah have developed to permit family-friendly viewing of films that may contain objectionable content. The FMA creates a narrowly defined safe-harbor clarifying that distributors of such technologies will not face liability for copyright or trademark infringement, provided that they comply with the requirements of the Act. I have been working with my colleagues in the Senate and several leaders in the House—including, most importantly Chairmen SMITH and SENSENBRENNER—for the past couple of years to resolve this issue. The FMA will help to end aggressive litigation threatening the viability of small companies like Clearplay which are busy creating innovative technologies for consumers that allow them to tailor their home viewing experience to their own individual or family preferences.

The Family Movie Act creates a new exemption in section 110(11) of the Copyright Act for skipping and muting audio and video content in motion pictures during performances of an authorized copy of the motion picture taking place in the course of a private viewing in a household. The version passed last year by the House explicitly excluded from the scope of the new copyright exemption so-called ''ad-skipping'' 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. This provision was included on the House floor to address the concerns of some Members who were concerned that a court might misread the new section 110(11) exemption to apply to ''ad-skipping''' cases, such as in the recent litigation involving ReplayTV.

In the Senate, however, some expressed concern that the inclusion of such explicit language could create unwanted inferences with respect to the merits of the legal positions at the heart of recent ''ad-skipping'' litigation. Those issues remain unsettled in the courts, and it was never the intent of this legislation to resolve or affect those issues in any way. Indeed, the Copyright Act contains literally scores of similar exemptions, and none of those exemptions have been or should be construed to imply anything about the legality of conduct falling outside their scope. As a result, the Copyright Office has now confirmed that such an explicit exclusion is unnecessary to achieve the desired outcome, which is to avoid application of this new exemption in potential future cases involving ad-skipping devices. In order to avoid unnecessary controversy, the Senate bill omits the exclusionary language with the understanding that doing so does not in any way change the scope of the bill.

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.

This bill also differs from the version passed by the House last year in that it adds two ''savings clauses.'' 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 trademark savings clause 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.

Title III of this Act, the National Film Preservation Act of 2004, will reauthorize the National Film Preservation Board and the National Film Preservation Foundation. These entities have worked successfully to recognize and preserve historically or culturally significant films—often by providing the grants and expertise that enable local historical societies to protect and preserve historically significant films for the local communities for which they are most important. This fine work will ensure that the history of the 20th century will be preserved and available to future generations.

As a conservative Senator from a socially conservative state, I occasionally take a few swings at the movie industry for the quality and content of the motion pictures they are currently creating, but I will note for the record that I commend efforts to ensure that important artistic, cultural, and historically significant films are preserved for future generations. I commend my friend from Vermont for his perseverance in reauthorizing Federal funds to continue this important effort.

Title IV of this act, the ''Preservation of Orphan Works Act,'' also ensures the preservation of valuable historic records by correcting a technical error that unnecessarily narrows a limitation on the copyright law applicable to librarians and archivists. This will strengthen the ability of librarians and archivists to better meet the needs of both researchers and ordinary individuals and will result in greater accessibility of important works. I applaud my colleague in the House—Representative HOWARD BERMAN of California—for his efforts on this bill and am pleased to see it included in this Senate package.

Just to conclude, I will again thank Ranking Democratic Member LEAHY, Senator CORNYN, Chairmen SENSENBRENNER and SMITH, as well as Mr. CONYERS and Mr. BERMAN for their bicameral, bipartisan approach to these bills and to intellectual property issues generally.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 167

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

SECTION 1. SHORT TITLE.

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

TITLE I—ARTISTS' RIGHTS AND THEFT PREVENTION

SEC. 101. SHORT TITLE.

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

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

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

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

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

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

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

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

to support a conviction of that person for such offense.

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

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

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

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

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

''(e) VICTIM IMPACT STATEMENT.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

''(a) CRIMINAL INFRINGEMENT.—

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) in subsection (a)—

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

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

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

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

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

(5) by adding after subsection (c) the following:

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

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

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

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

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

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

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

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

(C) by adding at the end the following:

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

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

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

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

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

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

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

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

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

''(B) a deposit; and

''(C) the applicable fee.

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

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

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

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

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

SEC. 105. FEDERAL SENTENCING GUIDELINES.

(a) REVIEW AND AMENDMENT.—Not later than 180 days after the date of enactment of this Act, the United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and

in accordance with this section, shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes, including any offense under—

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

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

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

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

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

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

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

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

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

SEC. 201. SHORT TITLE.

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

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

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

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

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

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

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

(4) by adding at the end the following:

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

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

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

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

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

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

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

(c) DEFINITION.—In this section, the term ''Trademark Act of 1946'' means the Act entitled ''An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes'', approved July 5, 1946 (15 U.S.C. 1051 et seq.).

TITLE III—NATIONAL FILM PRESERVATION

Subtitle A—Reauthorization of the National Film Preservation Board

SEC. 301. SHORT TITLE.

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

SEC. 302. REAUTHORIZATION AND AMENDMENT.

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

(1) in subsection (b)—

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

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

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

(2) by adding at the end the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) EFFECTIVE DATE.—Section 113 of the National Film Preservation Act of 1996 (2 U.S.C. 179w) is amended by striking ''7'' and inserting ''12''.

Subtitle B—Reauthorization of the National Film Preservation Foundation

SEC. 311. SHORT TITLE.

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

SEC. 312. REAUTHORIZATION AND AMENDMENT.

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

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

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

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

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

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

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

''(b) LIMITATION RELATED TO ADMINISTRATIVE EXPENSES.—Amounts authorized under this section may not be used by the corporation for management and general or fundraising expenses as reported to the Internal Revenue Service as part of an annual information return required under the Internal Revenue Code of 1986.''.

TITLE IV—PRESERVATION OF ORPHAN WORKS

SEC. 401. SHORT TITLE.

This title may be cited as the ''Preservation of Orphan Works Act''.

SEC. 402. REPRODUCTION OF COPYRIGHTED WORKS BY LIBRARIES AND ARCHIVES.

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

Mr. LEAHY. Mr. President, today I join my colleagues, Senators HATCH, FEINSTEIN, and CORNYN, introducing an important piece of bipartisan intellectual property legislation. The provisions of the ''Family Entertainment and Copyright Act of 2005'' are virtually identical to those in the bill we passed in the waning days of the 108th Congress. Unfortunately, that package of intellectual property bills was hijacked in an effort to use it as a vehicle to pass unrelated legislation. The effort failed, and in the end so did Congress: we were not able to send to the President the most important package of intellectual property legislation on last year's agenda. The legislation passed in the Senate—several times in fact—but there was simply not enough time for the House of Representatives to act.

I am pleased that we were able to salvage two components of last year's bill. As Congress came to a close, the House passed the Senate version of the CREATE Act, legislation I cosponsored with Senator HATCH. The new law will continue to encourage collaborative research partnerships between private industry and not-for-profits, such as universities. We were also able to send to the President the Anti-counterfeiting Amendments Act, a version of Senator Biden's legislation that my friend from Delaware has championed for several years. Both laws are important, but our task remains incomplete.

It is time to enact the remaining components of the Family Entertainment and Copyright Act, to finish off the work of the 108th Congress as we begin the 109th.

Title I of the bill contains the ''Artists'' Rights and Theft Prevention Act,'' better known as the ART Act. This provision passed the Senate as a standalone bill in June of 2004, and again as part of the FECA bill at the end of the last Congress. The bill will make important inroads in the fight against movie piracy by criminalizing the use of camcorders to pilfer movies from the big screen. It will also direct the Register of Copyrights to create a registry of pre-release works in order to better address the problem of movie-theft before these works are offered for legal distribution.

The next title of the bill is the Family Movie Act, which will preserve the rights of families to watch motion pictures in the manner they see fit. At the same time, the Act protects the rights of directors and copyright holders to maintain the artistic vision and integrity of their works. A version of this legislation passed the other chamber in September of 2004, and it passed the Senate as part of the FECA bill at the end of the 108th Congress.

Title III of the bill is the Film Preservation Act, legislation that I sponsored in the last Congress. A version of this bill, too, was part of the FECA bill that passed the Senate last Congress. The Film Preservation Act will allow the Library of Congress to continue its important work in preserving America's fading film treasures. The works preserved by this important program include silent-era films, avant-garde works, ethnic films, newsreels, and home movies that are in many ways more illuminating on the question of who we are as a society than the Hollywood sound features kept and preserved by major studios. What's more, the bill will assist libraries, museums, and archives in preserving films, and in making those works available to researchers and the public.

Finally, the bill contains the Preservation of Orphan Works Act. This provision corrects for a drafting error in the Sonny Bono Copyright Term Extension Act. Correction of this error will allow libraries to create copies of certain copyrighted works, such as films and musical compositions that are in the last 20 years of their copyright term, are no longer commercially exploited, and are not available at a reasonable price. Again, this provision ensures that copies of culturally-illuminating works are not lost to history.

Anytime we enact a package of legislation as large as the ''Family Entertainment and Copyright Act,'' building consensus is difficult. However, this is a chamber built on collegiality and compromise, and while I may have crafted specific components of this package differently, I believe that the final result we have achieved is one worthy of enactment. The components of this package have already passed the Senate at least once, and I have received assurances from the other chamber that the bill will receive swift consideration once it is approved in this body.

The legislative process is functioning well when we work with our colleagues across the aisle, and it is at its best when we work on a bipartisan basis with our friends in the other chamber. This bill has benefited from both. The agenda of the 109th Congress promises many issues that divide us, but this is not such a bill: It has garnered broad consensus, and I hope that we can finally move to swiftly enact it.

Mr. CORNYN. Mr. President, in the fall of 2003, I introduced S. 1932, the Artists' Rights and Theft Prevention Act of 2003, along with my friend from California, Senator FEINSTEIN. As introduced, the ART Act was a modest but necessary first step to combat the rampant piracy plaguing the motion picture, recording and general content industries. The Bill focuses on the most egregious form of copyright piracy plaguing the entertainment industry today—the piracy of film, movies, and other copyrighted materials before copyright owners have had the opportunity to market fully their products.

Now, as part of a comprehensive package, ''the Family Entertainment and Copyright Act of 2005,'' it is even more significant. This package contains a number of targeted, important reforms that help strengthen our intellectual property laws. I rise to express my strong support for the bill and ask my colleagues to move it expeditiously.

Intellectual property laws and the American businesses that rely on them deserve our strongest support. Our Nation was founded on a number of important ideas. One central one was that the value created by the work and sweat of a person should be recognized as that person's property and should be protected. Protecting the creativity and capital that American innovators invest to make our lives richer is the right thing to do. Failure to do so not only would diminish the quality of our individual lives, but our country would suffer too. Intellectual property-related industries are a central driver of our Nation's economy and a staple of our international trade.

The copyright-based industries alone accounted for more than 5 percent of the U.S. GDP or $535,100,000,000 in 2001 and almost 6 percent of U.S. employment, and led all major industry sectors in foreign sales and exports in 2001, the last year for which we have figures.

As the Justice Department recently has pointed out:

Ideas and the people who generate them serve as critical resources both in our daily lives and in the stability and growth of America's economy. The creation of intellectual property—from designs for new products to artistic creations—unleashes our Nation's potential, brings ideas from concept to commerce, and drives future economic and productivity gains. In the increasingly knowledge-driven, information age economy, intellectual property is the new coin of the realm. . . . [Report of the DOJ Task Force on Intellectual Property, p. 7.]

As the DOJ IP Task Force Report notes, America's economy relies more and more on ideas we create, not things we make. We need to protect our Nation's innovative and creative works with strong laws and enforcement of those laws because doing so is vital to our national economic security.

Having noted and quoted the DOJ Report, I want to pause to thank the Justice Department and outgoing Attorney General John Ashcroft for taking these issues seriously and for taking significant steps to address them. The formation of the Intellectual Property Task Force spotlighted these issues at the Justice Department and the work of the Task Force, headed by David Israelite did a superb job in developing comprehensive and serious steps better protecting our intellectual property interests. The DOJ engaged in serious domestic and international investigations and prosecutions against digital thieves who have misused promising digital technology like the Internet to further their attacks on American businesses. General Ashcroft and the Justice Department, who deserve our gratitude for so many reasons, certainly deserve it for their efforts on this area.

Having provided that foundation, let me discuss briefly some of the important provisions contained in this legislative package.

We have purposefully compiled a package of legislation that strikes a balance between innovation and copyright protection. One needn't be sacrificed to encourage the other—rather they go hand-in-hand.

First, I would mention the Cornyn-Feinstein ''Artist's Rights and Theft Prevention Act'' or the ART Act. Notably, it contains a provision making it a felony to record a movie in a theater. One of the principal ways that movie piracy happens is by thieves sitting in a movie theater, or bribing a projectionist to help them, and recording movies with small camcorders. These camcorded copies can then make their way around the world on the internet and usually land on the streets of cities around the world in pirated copies sold on the street, often the day the movie opens in the U.S. or even before the movie opens in many countries.

All it takes is a single or a small handful of camcorded copies distributed worldwide to have a devastating effect on a movie's profitability. Movies are generally an investment of tens or hundreds of millions of dollars that rely on box office and home video and other subsequent sales to recoup this investment. A camcorded copy released early in any of these cycles can undermine the economics of this business, and especially if they hit the streets or the internet while the movie is still in theaters. This is theft, and it is theft that supports organized crime groups, and perhaps, even terrorism. It deserves to be stopped by the specter of a federal felony.

Its second key provision focuses on so-called ''pre-released'' works. Because serious harm can be done to both the reputation of and market for creative products if they are pirated before they actually come to market, we have included reforms in the ART Act and this package that make it easier for the Justice Department to prosecute those who steal and distribute copies of copyrighted works on the internet before they are released to the public by their owners or authorized distributors. We make the prosecutor's job easier by allowing certain presumptions with regard to the harm caused, including the dollar amount and number of copies, necessary to allow the prosecutor to bring a felony action where the works in question are being prepared for commercial release but have not been released to the public legitimately. This is fair because no one can legitimately believe that they are within their rights copying and distributing works that are not yet available in the marketplace. Again this is a common sense concept, which deserves the support of the Congress.

Also, I would mention the Family Movie Act—another important component of this package. This provision allows the use of certain, specified technology to skip or mute content that may be objectionable to certain viewers when watching a movie at home, so long as no fixed copy of the edited work is made.

Very few would argue that many of the movies produced today contain significant amounts of gratuitous sex, violence, foul language or other potentially objectionable content. A number of innovative companies have stepped forward to solve this problem by providing filters that tag such scenes and allows consumers to tailor their viewing experience.

This legislation is designed to solve an on-going controversy surrounding the use of such technology. Specifically, there is litigation pending over the issue of whether providing edited versions of movies to consumers creates a ''derivative work'' that violates the rights of those who created or own the copyrights and trademarks for the original movies. The existence of this controversy arguably is hampering the development of the technology that families may find helpful in protecting children from potentially objectionable content.

Let me make clear that this bill is not designed to deal with ad-skipping by consumers in the home. I know that there has been some misinformation about this by groups who apparently oppose copyright protections generally, but this bill has nothing to do with anything other than using a certain kind of technology to modify the viewing experience of a movie to skip over objectionable content.

Finally, the two remaining provisions—though relatively small—are not insignificant. The Film Preservation Act, legislation that I recognize is particularly important to Senator LEAHY, and I thank him for his efforts in promoting it, will reauthorize a Library of Congress Program dedicated to saving rare and significant films. Additionally, we make a small but necessary change to the Sonny Bono Copyright Term Extension Act. Correction of this error will allow libraries to create copies of certain copyrighted works, such as films and musical compositions that are in the last 20 years of their copyright term, are no longer commercially exploited, and are not available at a reasonable price.

Before I relinquish my time, I do want to thank a number of people who have worked tirelessly on behalf of this bill. Allow me to thank David Jones and Tom Sydnor of the staff of Chairman ORRIN HATCH, who is not only our previous Judiciary Committee Chairman, but a leader on copyright and intellectual property issues; Susan Davies and Dan Fine of Senator LEAHY's staff, who also has long been a leader on intellectual property issues; and finally, David Hantman of Senator FEINSTEIN's staff, a Senator with whom I am happy to have teamed to introduce the ART Act in the last Congress.

Having begun with the staff, who rarely get mentioned as much as they deserve for the great work they do, let me also thank the Senators they work for: Senators HATCH, LEAHY, and FEINSTEIN for their co-sponsorship, as well as the Majority Leader, who has taken a personal interest in this legislation and worked to make it happen.

Mr. CORNYN. Mr. President, would the Senator yield for a quick 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 cosponsors have worked throughout last Congress on the provisions of the Family Entertainment and Copyright Act of 2005 that we have introduced today. With respect to the Family Movie Act portion of the bill, I just wanted to raise the point that there had been some concern over the potential effect of the FMA on future cases involving ''ad skipping'' technologies and ask if you would have any objection to including in the record the relevant portion of the floor discussion on that issue from last Congress?

Mr. HATCH. I thank my friend, the Senator from Texas, for that reminder. I would certainly have no objection to entering our previous colloquy into the RECORD again and ask unanimous consent that it appear after our remarks.

Mr. HATCH. Mr. President, Section 102 of the ART Act establishes a new provision of Title 18 entitled, ''Unauthorized Recording of Motion Pictures in a Motion Picture Exhibition Facility.'' I ask Senator CORNYN, what is the purpose of this provision?

Mr. CORNYN. Section 102 addresses a serious piracy issue facing the movie business: the use of camcorders in a motion picture theater. Sad to say, there are people who go to the movie theater, generally during pre-opening ''screenings'' or during the first weekend of theatrical release, and using sophisticated digital equipment, record the movie. They're not trying to save $8.00 so they can see the movie again. Instead, they sell the camcorded version 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 ''P2P'' networks such as KaZaA, Grokster and Morpheus—and made available for millions to download. The goal of our bill is to provide a potent weapon in the arsenal of prosecutors to stem the piracy of commercially valuable motion pictures at its source.

Mr. HATCH. I have heard it said that this bill could be used against a salesperson or a customer at stores such as Best Buy or Circuit City if he or she were to point a video camera at a television screen showing a movie. Is this cause for concern?

Mr. CORNYN. Absolutely not. 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 Best Buy—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 movie theater.

Mr. HATCH. Does the Senator from California agree with your colleague from Texas?

Mrs. FEINSTEIN. Absolutely on all points.

Mr. HATCH. I have also heard some say that this statute could be used to prosecute someone for camcording a DVD at his home. Is this a fair concern?

Mrs. FEINSTEIN. No, it is not. The definition of a motion picture exhibition facility includes the concept that the exhibition has to be ''open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.'' This definition makes clear that someone recording from a television in his home does not meet that definition. It is important to emphasize that the clause ''open to the public'' applies specifically to the exhibition, not to the facility. An exhibition in a place open to the public that is itself not made to the public is not the subject of this bill.

Thus, for example, a university film lab may be ''open to the public.'' However, a student who is watching a film in that lab for his or her own study or research would not be engaging in an exhibition that is ''open to the public.'' Thus, if that student copied an excerpt from such an exhibition, he or she would not be subject to liability under the bill.

Mr. HATCH. Do the users of hearing aids, cell phones or similar devices have anything to fear from this statute?

Mrs. FEINSTEIN. Of course not. The statute covers only a person who ''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. . . .'' In other words, the defendant would have to be making, or attempting to make, a copy that is itself an audiovisual work, or make, or attempt to make, a transmission embodying an audiovisual work, as that term is defined in Section 101 of Title 17. As such, the Act would not reach the conduct of a person who uses a hearing aid, a still camera, or a picture phone to capture an image or mere sound from the movie.

Mr. HATCH. It appears that there is no fair use exception to this provision. Is that correct?

Mrs. FEINSTEIN. This is a criminal provision under Title 18, not a copyright provision under Title 17. Accordingly, there is no fair use exception included. However, 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. The object of this legislation is to prevent the copying and distribution of motion pictures in a manner that causes serious commercial harm. This legislation is not intended to chill legitimate free speech.

Mr. HATCH. Does the Senator from Texas agree?

Mr. CORNYN. Yes, on all points.

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 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 ClearPlay model. ClearPlay 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 . . .

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 10—HONORING THE LIFE OF JOHNNY CARSON

Mr. NELSON of Nebraska (for himself, Mr. HAGEL, Mr. KENNEDY, Mrs. FEINSTEIN, and Mr. INOUYE) submitted the following resolution; which was considered and agreed to:

S. RES. 10

Whereas Johnny Carson, a friend to the United States Senate, passed away January 23, 2005;

Whereas Johnny Carson was a philanthropist, friend, and favorite Nebraska native son;

Whereas Johnny Carson was born in Iowa, raised in Norfolk, Nebraska, and made famous in Hollywood as a late night friend to all of America;

Whereas Johnny Carson served in the United States Navy as an ensign during World War II;

Whereas Johnny Carson late hosted ''The Tonight Show'' for 30 years;

Whereas Johnny Carson was best known as America's late night king of comedy;

Whereas Johnny Carson was one of the biggest stars in Hollywood but never forgot his roots;

Whereas Johnny Carson was respected by his colleagues as a gentleman; and

Whereas Johnny Carson was bright and witty, and always set the highest of standards for his performances: Now, therefore, be it

Resolved, That the Senate—

(1) mourns the loss of Johnny Carson;

(2) recognizes the contributions of Johnny Carson to his home State of Nebraska;

(3) admires the sense of humor and late night presence of Johnny Carson in homes in the United States for over 30 years;

(4) expresses gratitude for the lifetime of memories Johnny Carson provided; and

(5) directs the Secretary of the Senate to transmit an enrolled copy of this resolution to the family of Johnny Carson.

SENATE RESOLUTION 11—HONORING THE SERVICE OF REVEREND LLOYD OGILVIE

Mr. KYL (for himself, Mr. BROWNBACK, Mr. LOTT, Mr. CHAMBLISS,