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Copyright Law: Digital Rights Management Legislation in the 107th and 108th Congresses

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Copyright Law: Digital Rights Management Legislation in the 107th and 108th Congresses

Summary

Digital Rights Management (DRM) refers to the technology that copyright owners use to protect digital media. This report surveys several of the DRM bills that were introduced in the 107th and 108th Congresses. Generally, the bills are directed at two separate goals. One goal is to increase access to digitally-protected media for lawful purposes. The other attempts to thwart digital piracy and would do so by enhancing civil and criminal sanctions for digital (and traditional) copyright infringement and educating the public about the rights of copyright holders.

Two of the bills introduced during the 107th Congress focusing on access were reintroduced in the 108th Congress. Representatives Boucher and Lofgren reintroduced their bills from the 107th Congress. They are H.R. 107, the "Digital Media Consumers' Rights Act of 2003" and H.R. 1066, respectively. H.R. 1066 is renamed the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003." And Senator Wyden introduced S. 692, a labeling disclosure bill entitled the "Digital Consumers Right to Know Act."

S. 1621, the "Consumers, Schools, and Libraries Digital Management Awareness Act of 2003," addresses several DRM issues. It would prohibit the Federal Communication Commission from establishing mandatory technology standards and require disclosure requirements for access controlled digital media and consumer electronics. It also addresses the subpoena process by which copyright owners acquire personal information about suspected infringers. And the "Family Movie Act of 2004," originally introduced as H.R. 4586 and subsequently incorporated into H.R. 4077, would amend the law to expressly authorize the in-home use of filtering technology designed to edit out sexual, violent, or profane content in movies available for consumers' home viewing.

Bills addressing piracy include H.R. 4077, the "Piracy Deterrence and Education Act of 2004" which passed the House on September 28, 2004; S. 1932, the "Artists Rights and Theft Prevention Act of 2004"; and, S. 2237, the "Protecting Intellectual Rights Against Theft and Expropriation Act of 2004." S. 1932 and S. 2237 passed the Senate. Because digital transmission poses the greatest distribution risk to entertainment content owners, these bills attempt to thwart the initial unauthorized copying and/or uploading to the Internet. Hence, sanctions for illegal distribution of pre-release commercial works and surreptitious recording of movies in theaters are emphasized. Many of these provisions, including the Family Movie Act of 2004, were reintroduced in S. 3021, which passed the Senate on November 20, 2004. On June 22, 2004, S. 2560, the "Inducing Infringement of Copyrights Act of 2004" was introduced in the Senate. This bill would add a new section to the Copyright Act defining intentional inducement of copyright infringement as an express form of statutory infringement.

Although this report will not be updated, many of these issues are likely to be revisited during the 109th Congress and will be tracked as warranted.

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Copyright Law: Digital Rights Management Legislation in the 107th and 108th Congresses

Background. Digital technology has radically altered the landscape of copyright law. The potential for unauthorized but near perfect replication of digital media poses new challenges to copyright owners. Copyright law gives a copyright holder the exclusive right to reproduce, adapt, distribute, perform publicly and display protected material for a limited term.[1] Historically, technology (or lack thereof) presented an obstacle to wide-spread piracy. For example, repeated copying of analog video or audio tapes could result in a degradation of the quality of the reproduction; packaging and transportation for distribution could be cumbersome. There are no comparable impediments to copying and distributing media in a digital format.

The legal basis for protecting copyright has traditionally been through the initiation of a civil proceeding by the copyright holder against the infringer for injunctive relief and/or money damages, although there are criminal sanctions for willful infringement as well.[2] The efficacy of this remedy is diminished in a digital environment where distribution may be decentralized, instantaneous, and global. Unauthorized peer-to-peer (P2P) file sharing of music illustrates this problem. Instituting a civil suit against thousands of individuals for *each* unauthorized download has traditionally been presumed to be infeasible. Recently, however, the Recording Industry Association of American (RIAA) has embarked on an aggressive litigation enforcement effort against college students and others who upload or download copyrighted sound recordings on P2P file-sharing sites.[3] The efficacy of this effort remains to be seen. Nevertheless, copyright owners believe that *prevention* of piracy is preferable. The technology-based approaches and mechanisms that copyright owners utilize to protect digital media are referred to as digital rights management (DRM).

Congress has enacted two laws to date which facilitate DRM to enhance copyright protection. The Audio Home Recording Act (AHRA) of 1992 effects a technology-based regulatory program for consumer goods designed to copy analog

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[1] 17 U.S.C. § 106.

[2] *Id.* at §§ 501- 505.

[3] See Frank Ahrens, *4 Students Sued Over Music Sites; Industry Group Targets File Sharing at Colleges,* THE WASHINGTON POST, April 4, 2003 at E1; Ted Bridis, *RIAA's Subpoena Onslaught Aimed at Illegal File Sharing,* THE WASHINGTON POST, July 19, 2003 at E1.

and digital musical recordings.[4] It requires manufacturers and distributors of audio recording devices to employ copy control technology. However, a "digital musical recording" is defined as a "material object" that does *not* include "one or more computer programs."[5] Hence, the AHRA does not cover songs fixed on computer hard drives and extends only to recordings from the material objects in which songs are otherwise normally fixed, such as recorded compact discs (CDs), digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.[6]

The act requires consumer goods manufacturers to incorporate the Serial Copyright Management System (SCMS) into digital audio recording devices. SCMS is technology that sends, receives, and acts upon information about the generation and copyright status of the files that it plays. It allows copies to be made from an authorized recording, but prevents the SCMS-equipped machine from making copies of copies. The AHRA prohibits circumvention of the SCMS system as well. In consideration for permission to facilitate consumer copying of music recordings, manufacturers are required to pay music royalties based on sales of the devices. And, as a consequence of and in consideration for the technology-limited copying and royalty payments program, manufacturers, importers, and distributors of audio recording devices, and consumers who use them for noncommercial use, are protected from suit for copyright infringement.

A more controversial DRM law is the Digital Millennium Copyright Act (DMCA) of 1998. This law added a new chapter 12 to the Copyright Act entitled "Copyright Protection and Management Systems."[7] Subject to relatively narrow exceptions, this law makes it illegal to circumvent a technological copyright-control measure. This includes activity to descramble a scrambled work, to decrypt an encrypted work, or to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.[8] In contrast to copyright infringement, which prohibits unauthorized or unexcused *use* of copyrighted material, the anticircumvention provisions of the DMCA prohibit the design, manufacture, import, offer to the public, or trafficking in technology produced to circumvent copyright encryption programs, regardless of the actual existence or absence of copyright infringement. Even though the anticircumvention provisions of the DMCA have, to date, been upheld by the courts, critics argue that they have a chilling effect on rights of free speech and that their implementation will thwart the public's ability to access copyrighted works, which is ultimately necessary in order to exercise "fair use."[9]

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[4] 17 U.S.C. §§ 1001 - 1010.

[5] 17 U.S.C. § 1001(5).

[6] See Recording Industry Ass'n of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1073 (9th Cir. 1999).

[7] 17 U.S.C. § 1201 *et seq.*

[8] *Id.* at § 1201(a)(3)(A).

[9] For more detail, see CRS Report RL31827, *"Digital Rights" and Fair Use in Copyright*
(continued...)

Fair Use. The doctrine of "fair use" is a limitation upon a copyright holder's exclusive rights. It permits the public to use a copyrighted work for limited purposes, such as criticism, comment, news reporting, teaching, scholarship or research.[10] And, although the concept of "personal use" (i.e., copying lawfully acquired copyrighted materials for one's personal use) is not expressly protected by statute, it is widely-accepted and judicially sanctioned.[11] Fair use protects the public interest in a free exchange of ideas and discourse.

The ever-changing state of technology and DRM laws raise many issues, several of which paradoxically confound one another. To the extent that copyrighted digital material is not encrypted, it may be subject to piracy on a massive scale. But, as digital material is increasingly encrypted to protect against piracy, the public is in jeopardy of restricted access, which may impede the exercise of fair use. And, some observers assert that protection controls give copyright holders more exclusive control over their creations than the copyright law intends.[12] Content owners, however, argue that allowing *limited* circumvention only to facilitate fair use, including personal use, is impracticable; once the circumvention technology becomes publicly available, its protective value is compromised.

Members of 107th Congress responded by introducing bills which address two sides of the issue – piracy prevention and fair use access. Legislative proposals would have mandated government-sponsored encryption technology and enhanced content owners' abilities to fight P2P piracy over the Internet. Other bills were intended to clarify and expand content users' fair use, including personal use, access to digital media. While none of these bills were enacted during the 107th Congress, the underlying policy issues have not been resolved, and the matter continues to be the subject of interest in the 108th Congress. This report surveys several of the DRM bills introduced in the 107th and 108th Congresses. Many of these issues are likely to be reconsidered in the 109th Congress.

Legislation in the 107th Congress.

Bills Promoting Enhanced DRM Anti-piracy Protection in the 107th Congress. *S. 2048, 107th Cong., 2d Sess. (2002), the "Consumer Broadband and Digital Television Promotion Act".* This bill, introduced on March 21, 2002 by Senator Hollings, would have directed digital media device manufacturers, consumer groups, and copyright owners to attempt to reach an agreement on security system standards for use in digital media devices and encoding rules within a year after enactment. If parties were unable to agree on acceptable standards, the Federal Communications Commission (FCC), in consultation with the

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[9] (...continued)
Law by Robin Jeweler (March 24, 2003).

[10] 17 U.S.C. § 107.

[11] See Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984)(authorizing consumer use of home videocassette recorders to "time-shift" television broadcasts) .

[12] See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001).

Copyright Office, would do so. With respect to prospective encoding rules, the bill stipulated that the rules "shall take into account the limitations on the exclusive rights of copyright owners, including the fair use doctrine." It further provided that "[n]o person may apply a security measure that uses a standard security technology to prevent a lawful recipient from making a personal copy for lawful use... ."[13]

The bill would have implemented the standards by requiring interactive computer services to incorporate security measures associated with standard security technologies and by requiring manufacturers, importers and sellers of digital media devices to include the security technologies. It would have prohibited removal or alteration of the technology from the devices. How fair use access and the security technology would interface was not expressly addressed.

H.R. 5211, 107th Cong., 2d Sess. (2002), a bill "to limit the liability of copyright owners for protecting their works on peer-to-peer networks". Sponsored by Representative Berman, this bill was designed to create "a safe harbor from liability so that copyright owners could use technological means to prevent the unauthorized distribution of that owner's copyrighted works via a P2P network."[14] It would have added a new section to the Copyright Act, 17 U.S.C. § 514, which would exempt copyright owners from liability under state and federal law for

> disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.[15]

The bill included exceptions to the safe harbor for copyright owners, and required them to notify the Department of Justice before employing specific blocking technologies. It created a new cause of action, in addition to existing ones, for file traders to deter harassment or abuse of P2P networks by copyright owners.

Because the bill aimed to allow the prevention of unauthorized file trading over decentralized P2P networks, its sponsors suggested that it would not adversely impact consumers' fair use of digital media.[16]

Bills Addressing Digital Access. In addition to the bills noted below, Senator Wyden and Representative Cox introduced, respectively, Senate and House

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[13] S. 2048, § 3(e).

[14] Introductory statement of Rep. Berman, 148 CONG. REC. E1395 (daily ed. July 25, 2002).

[15] H.R. 5211 at § 514(a).

[16] Note 14, *supra.* ("Because its scope is limited to unauthorized distribution, display, performance or reproduction of copyrighted works on publicly accessible P2P systems, the legislation only authorizes self-help measures taken to deal with clear copyright infringements. Thus, the legislation does not authorize any interdiction actions to stop fair or authorized uses of copyrighted works ... or any interdiction of public domain works.")

joint resolutions entitled the "Consumer Technology Bill of Rights."[17] They were reportedly based upon a proposal of the same name by the advocacy group, DigitalConsumer.org.[18] Their premise was that copyright law should not curtail consumers' fair use rights with respect to digital and electronic entertainment media. The resolutions' enumeration of consumer rights included the right to use technology for

- "time-shifting" (i.e., recording legally acquired audio or video for later listening or viewing);
- "space-shifting" (i.e., using legally acquired content in different places);
- making backup or archival copies;
- using legally acquired content on the electronic platform or device of choice; and,
- translating legally acquired content into comparable formats.

Discussed below are two bills addressing digital fair use which were introduced in the latter part of the 107th Congress.

H.R. 5522, 107th Cong.,2d Sess. (2002), the "Digital Choice and Freedom Act". On October 2, 2002, Representative Zoe Lofgren introduced this bill. Among its findings is the observation that "[D]igital technology threatens the rights of copyright holders. Perfect digital copies of songs and movies can be publicly transmitted without authorization to thousands of people at little or no cost. On the other hand, technological control measures give copyright holders the capacity to limit non-public performances and threaten society's interest in the free flow of ideas, information and commerce."[19]

In order to recalibrate the balance between the copyright interests of authors and society, H.R. 5522 would have amended the Copyright Act to effect three goals:

- To expressly provide that it is not a copyright infringement for a person who lawfully possesses or receives a transmission of a digital work to reproduce, store, adapt or access it for archival purposes or to transfer it to a preferred digital media device in order to effect a non-public performance or display;
- To amend 17 U.S.C. § 109,[20] to allow one who lawfully possesses a digital work to sell or otherwise dispose of it by means of a transmission to a single recipient, provided that the owner does not retain his or her copy; and

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[17] S.J.Res. 51, 107th Cong., 2d Sess. (2002) and H.J.Res. 116, 107th Cong. 2d Sess. (2002).

[18] *Wyden Offers Digital Fair Use Resolution*, 64 BNA Patent, Trademark & Copyright J. 585 (Oct. 25, 2002).

[19] H.R. 5522 at § 2(5).

[20] 17 U.S.C. § 109. This provision, known as the "first sale" doctrine, permits the owner of a copyrighted book or record to sell or otherwise dispose of it without violating copyright holder's right to control distribution.

- To amend the DMCA, 17 U.S.C. § 1201, to permit circumvention of copyright encryption technology, including the manufacture and import of, and trafficking in technology, if it is necessary to enable a non-infringing use and the copyright owner fails to make available the necessary means for circumvention.

H.R. 5544, 107th Cong., 2d Sess. (2002), the "Digital Media Consumers' Rights Act of 2002". Introduced on October 4, 2002 by Representatives Boucher and Doolittle, the Digital Media Consumers' Rights Act addresses copy-protected (*i.e*, non-standard) audio CDs through consumer disclosure via labeling requirements. Specifically, the bill would have amended the Federal Trade Commission Act by adding a new section entitled "Inadequately Labeled Copy-Protected Compact Discs." The new labeling requirements were intended to notify consumers when a non-standard CD has copy-protection measures which could preclude playing on and/or copying to a computer hard drive or other consumer electronic devices. The Federal Trade Commission would be empowered to engage in rulemaking regarding audio CD labeling to prevent consumer confusion about playability and recordability.

The bill, in a vein similar to H.R. 5522, would have amended the DMCA to broaden the exemption for scientific research from the anti-circumvention rule; to permit circumvention for non-infringing uses; and, to permit the manufacture and sale of circumvention software capable of a significant non-infringing use.

Bills introduced in the 108th Congress.

Bills Addressing Digital Access and Disclosure. Representatives Boucher and Lofgren reintroduced their bills from the 107th Congress. In the 108th Congress, Representative Boucher's bill is H.R. 107, the "Digital Medial Consumers Rights Act of 2003." The House Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on H.R. 107 on May 12, 2004. Representative Lofgren's bill, H.R. 1066, is renamed the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003."

S. 692, 108th Cong., 1st Sess. (2003), the "Digital Consumer Right to Know Act." Introduced by Senator Wyden, this bill emphasizes and would require disclosure of DRM anti-piracy protections that would restrict consumers' use of digital content. Specifically, the Federal Trade Commission (FTC) is directed to issue rules governing disclosures of technological features that limit the practical ability of a purchaser "to play, copy, transmit, or transfer such content on, to, or between devices or classes of devices that consumers commonly use ... prior to sale."[21] Examples of limitations subject to the disclosure requirement include:

- limitations on "time shifting" (recording for later viewing or listening) of free over-the-air and certain subscription packaged audio or video programming;

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[21] S. 692, § 3(b).

- limitations on reasonable and noncommercial use of legally acquired video or audio programing to facilitate "space shifting" (recording for use in different physical locations), including the transfer of the content to different electronic platforms or devices;
- limitations on making backup copies of legally acquired content;
- limitations on using limited excerpts of legally acquired content for criticism, comment, news reporting, teaching, scholarship, or research; and
- limitations on engaging in the transfer or sale of legally acquired content.

The goal of the legislation is to address legitimate consumer expectations regarding how they may use and manipulate content in concert with developing technology, and to promote development of an acceptable balance between protecting against piracy and preserving utility and flexibility for consumers.[22]

S. 1621, 108th Cong., 1st Sess. (2003), the "Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003". Introduced by Senator Brownback on September 16, 2003, the DRM Awareness Act addresses several issues, including mandatory technology standards, disclosure requirements for access controlled digital media and consumer electronics, the subpoena process by which copyright owners acquire personal information about suspected infringers, and the secondary market for digital consumer goods. Among the bill's findings are:

- it is not in public interest for the federal government to mandate the inclusion of access or redistribution control technologies used with digital media into consumer electronics;
- access controlled compact discs have created confusion and inconvenience for consumers, educational institutions, and libraries;
- it is not in the public interest for Internet service providers to disclose personal information about subscribers for whom they transport electronic communications; and
- it is not in the public interest to allow access or redistribution control technologies to limit the secondary market for digital media products.

To this end, S. 1621 would *prohibit* the Federal Communications Commission from establishing mandatory access control technology (including redistribution control technology) standards for consumer digital media machines and devices. The FCC could not require manufacturers and importers of digital media devices to incorporate access or redistribution control technology. It would, however, grandfather in two pending FCC rulemaking proceedings, namely, "cable plug and play" and digital broadcast copy protection, subject to the requirement that objective standards, not specific technologies, be adopted.

In addition, the bill would:

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[22] 149 CONG. REC. S4327 (daily ed. March 24, 2003)(Statement of Sen. Wyden).

- direct the Federal Trade Commission to establish an advisory committee to study and report on the ways in which access and redistribution control technology affect consumers, educational institutions, and libraries and how to better inform them of the impact of such technologies;
- direct the FTC to establish labeling requirements to inform consumers of the existence of access or redistribution control technology-protected digital products;
- address litigation over the DMCA's requirement that Internet service providers (ISPs) respond to subpoenas obtained by copyright holders who suspect copyright infringement. The bill provides that ISPs *not* make information about its subscribers available unless a subpoena is issued pursuant to state law or the Federal Rules of Civil Procedure, or unless the information requested relates to allegedly infringing digital products residing on the system or network of the ISP;
- create a consumer "first sale" doctrine for digital media by providing that an owner may transmit a digital product to a single recipient as long as the transmission technology contemporaneously deletes the transmitter's copy; and
- prohibit manufacturers and vendors of digital media from imposing any access or redistribution control technology that prevents a consumer from donating the item to an educational institution or library, or that limits consumer resale or donations to specific venues or distribution channels.

H.R. 4586, 108th Cong., 2d Sess. (2004), the "Family Movie Act of 2004". Introduced on June 16, 2004, this bill was reported favorably by a vote of 18 to 9 by the House Judiciary Committee on July 21, 2004.[23] The bill would amend 17 U.S.C. § 110 which establishes limitations on the exclusive rights of copyright holders to permit the marketing and home use of devices intended to edit out sexual, violent and/or profane scenes and language from motion picture DVDs. The language of this bill was incorporated into H.R. 4077, the Piracy Deterrence and Education Act of 2004, discussed *infra*, which passed the House on September 28, 2004.

The bill is intended to create a "safe harbor" from copyright and trademark infringement liability for movie filtering technology such as that currently sold by ClearPlay that skips over dialog and scenes deemed offensive but does not create a fixed copy of the altered version.[24] It emphasizes that the filtering technology must be used for private household use.

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[23] See H.Rept. 108-670, 108th Cong., 2d Sess. (2004).

[24] The requirement that filtering not result in a fixed copy of the edited version should distinguish ClearPlay's skipping technology from practices of other businesses, such as that of CleanFlicks, which does its own editing without authorization from copyright holders to offer family-friendly versions of movies for rental to the public.

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

With respect to copyright law, the bill's sponsors wish to preclude a manufacturer's liability for the unauthorized preparation of a derivative work.[25] However, it is not clear that manufacture, sale, or use of the skipping technology does in fact violate a copyright holder's exclusive right to prepare a derivative work based upon the copyrighted work.[26] Litigation is currently pending with respect to both filtering technology and the offering for rental of movies edited without permission of copyright holders.

Bills Addressing Copyright Piracy.

H.R. 2517, 108th Cong., 1st Sess. (2003), the "Piracy Deterrence and Education Act of 2003". Introduced on June 19, 2003 by Representative Lamar Smith, this bill takes a two-pronged approach to copyright piracy. It would enhance criminal copyright infringement enforcement and public education about use of copyrighted material. Section 1 of the bill sets forth a lengthy recitation of congressional findings of problems that warrant corrective legislation.[27]

The bill directs the Federal Bureau of Investigations (FBI) to develop programs to deter copyright infringement over the Internet, including the issuance of appropriate warnings and facilitating information sharing about infringing activities among law enforcement agencies, ISPs and copyright owners. The Attorney General is directed to designate at least one agent to investigate IP theft in any unit of the Department of Justice (DOJ) responsible for investigating computer hacking and IP crimes.

The DOJ is directed to establish an "Internet Use Education Program" to educate the general public about the damage resulting from IP theft; the privacy and security risks of P2P file-sharing to obtain unauthorized copies of copyrighted work; and, to coordinate and consult with the Departments of Education and Commerce regarding copyright law and Internet use. The Attorney General will also establish criteria for use by specified copyright owners of the seal of the FBI for deterrent purposes in connection with digital works of authorship.

The bill also waives certain copyright registration requirements, considered to be formalities, which hinder or delay enforcement actions by the government,

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[25] 17 U.S.C. § 106(2).

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

[27] See also *The Piracy Deterrence and Education Act of 2003: Hearing on H.R. 2517 before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 108th Cong., 1st Sess. (2003).

including actions to prevent importation of infringing materials by the Bureau of Customs and Border Protection of the Dept. of Homeland Security.

H.R. 2752, 108th Cong., 1st Sess. (2003), the "Author, Consumer, and Computer Owner Protection and Security Act (ACCOPS) Act of 2003." Introduced by Representative Conyers as a companion bill to H.R. 2517, ACCOPS would increase international and domestic anti-piracy IP law enforcement efforts. In addition to increasing appropriations for criminal law enforcement and procedures directing U.S. cooperation with foreign authorities in international investigations, the bill increases criminal sanctions for domestic copyright infringement. Title III of the bill would, among other things:

- amend 17 U.S.C. § 506 to provide that willful, unauthorized uploading of a single copyrighted work on the Internet satisfies the standards for a felony as opposed to a misdemeanor offense.
- require P2P file-swapping software distributors to give notice of potential security risks posed by the software and to receive consent from the downloader of such software;
- make it a federal crime to surreptitiously record a movie being performed in a movie theater; and
- direct the courts to consider that providing misleading or false contact information to a domain registry by a domain name registrant is evidence of "willfulness" with respect to any copyright infringement committed through the use of the domain name.

H.R. 4077, 108th Cong., 2d Sess. (2004), the "Piracy Deterrence and Education Act of 2004." Introduced by Representative Smith, this bill combines aspects of H.R. 2517, H.R. 2752, and H.R. 4586, discussed *supra*. The bill was reported favorably by the House Judiciary Committee on September 8, 2004,[28] and passed by the House on September 28, 2004.[29]

Section 102 of the bill makes findings of fact similar to those set forth in H.R. 2517. Among the findings are:

- IP theft through electronic means causes great economic damage;
- Many computer users do not know that copyright laws apply to the Internet or believe that they will not be caught or prosecuted for their conduct;
- Use of P2P systems may pose serious security and privacy threats to computer users;
- It is important that federal law enforcement agencies prosecute theft of copyright and that the public be educated about the security and privacy risks associated with being connected to unauthorized P2P networks; and

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[28] See H.Rept. 108-700, 108th Cong., 2d Sess. (2004).

[29] 150 CONG. REC. H7654 (daily ed. Sept. 28, 2004).

- Formal copyright registration requirements unnecessarily burden criminal and civil litigation efforts to enforce the laws protecting copyright.

Section 103 directs Department of Justice (DOJ) to establish a voluntary 18-month program to deter the public from copyright infringement over the Internet by issuing warning letters advising of suspected infringement and penalties therefor to Internet Service Providers (ISPs). The ISP would forward the warning letter to the suspected infringer but would not be permitted to disclose any identifying information about the subscriber to the DOJ. The DOJ is limited to issuance of not more than 10,000 warning letters and would reimburse the ISPs for costs incurred in identifying the proper recipients of the warning letters.

The Attorney General, in section 104, is directed to designate at least one agent to investigate IP theft in any unit of the DOJ responsible for investigating computer hacking and IP crimes.

The DOJ is directed to establish an "Internet Use Education Program" to educate the general public about the damage resulting from IP theft; the privacy and security risks of P2P file-sharing to obtain unauthorized copies of copyrighted work; and, to coordinate and consult with the Copyright Office and the Department of Commerce regarding copyright law and Internet use. The Program will develop sector-specific materials for Internet users where criminal copyright infringement is a concern. Section 105.

Section 106 would amend 17 U.S.C. § 411 to permit the government to file copyright infringement actions prior to copyright registration. Registration is ordinarily a prerequisite to filing an action for infringement. Section 107 sets forth authorized appropriations.

Section 108 creates criminal penalties for unauthorized recording of motion pictures in a movie theater. The statute's provisions are similar to those of the "Artists Rights and Theft Prevention Act of 2004 or the ART Act." (S. 1932 *infra*). It would add a new law, 18 U.S.C. § 2319B, expressly prohibiting unauthorized recording of motion pictures in a motion picture exhibition facility. Offenders would be subject to imprisonment for three to six years and forfeiture or destruction of the bootlegged copies. Owners and lessees of exhibition facilities receive immunity for reasonable detention, for a reasonable time, for the purpose of questioning or summoning law enforcement, of any person suspected of committing an offense. It would permit a victim of the crime to submit a victim impact statement to a probation officer.

Section 109 sets forth a Sense of the Congress on the need to take steps to prevent illegal activity on P2P services. It lists many findings regarding the widespread use of P2P file-sharing technology, including massive volumes of illegal activity such as distribution of child pornography, viruses, and confidential personal information. It identifies studies documenting the ways in which children are exposed to pornography through P2P technology. It concludes with a Sense of Congress that while responsible software developers should be recognized and

commended, Congress and the executive branch should consider all appropriate measure to protect consumers and children and prevent illegal activity.

Section 110, entitled "Enhancement of Criminal Copyright Infringement," would amend 17 U.S.C. § 506 dealing with criminal offenses. Activity constituting criminal infringement would be expanded. Current § 506(a) makes criminal willful infringement for purposes of commercial advantage or private gain, or willful reproduction or distribution within 180 days of 1 or more copyrighted works with a retail value of more than $1000. New categories are: within any 180-day period, knowingly, with reckless disregard of the risk of further infringement, distributing by electronic means or otherwise (1) 1000 or more copies of 1 or more copyrighted works; (2) 1 or more copies of 1 work with a total retail value of more than $1000; or, (3) 1 or more copies of 1 or more copyrighted pre-release works. Evidence of reproduction alone will not be sufficient to establish criminal intent. Punishment may include fines and/or imprisonment for between 3 and 10 years as required by 18 U.S.C. § 2319, as amended by the bill. Under current § 2319, imprisonment for not more than five years is authorized only for the distribution "of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than $2500[.]"

ISPs are immune from liability for transmitting, routing, providing connections of infringing material when they are engaging in the types of "passive conduit" activity described in 17 U.S.C. § 512.

17 U.S.C. 504 would be amended to permit copyright owners to seek civil damages for infringement of pre-release works.

Section 111 directs the U.S. Sentencing Commission to review and, if appropriate, amend sentencing guidelines for persons convicted of IP crimes. Emphasis is on ensuring that guidelines are sufficiently stringent to deter and punish such offenses, especially those involving pre-release copyrighted work. The Commission must also determine wether the definition of "uploading" in its Guidelines is adequate to address losses attributable to unauthorized distribution of copyrighted work over the Internet. And, whether the guidelines adequately reflect harm to victims from infringement where law enforcement cannot determine how many times copyrighted material is reproduced and distributed.

Section 112 adds the "Family Movie Act of 2004."[30] The act would amend 17 U.S.C. § 110 which establishes limitations on the exclusive rights of copyright holders to permit the marketing and home use of devices and/or technology intended to edit out sexual, violent and/or profane scenes and language from motion picture DVDS.

It is intended to create a "safe harbor" from copyright and trademark infringement liability for movie filtering technology such as that currently sold by ClearPlay that skips over dialog and scenes deemed offensive. The bill emphasizes that the filtering technology must be used "at the direction of a member of a private

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[30] See discussion of H.R. 4586, *supra.*

household ... during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture[.]" The filtering cannot result in a fixed copy of the altered version, and no changes, deletions, or additions are to be made to commercial advertisements or promotional announcements that would otherwise be performed or displayed before, during, or after the performance.

In order to avoid liability for trademark infringement, the manufacturer must ensure that the technology provides notice that the edited motion picture will be altered from the performance intended by the movie's director or copyright holder. The notice requirement applies only with respect to technology manufactured six months after enactment of the Family Movie Act.

S. 1932, 108th Cong., 1st Sess. (2003), the "Artists Rights and Theft Prevention Act of 2004." Introduced on November 22, 2003 by Senator Cornyn, the bill was reported favorably with an amendment in the nature of a substitute by the Senate Judiciary Committee on April 29, 2004 and passed by the Senate on June 25, 2004. If enacted, S. 1932, the "ART Act," would add new criminal penalties for unauthorized recording or filming of motion pictures in a theater. It is intended to stem bootlegging and unauthorized distribution of "*pre-release* commercial works."

Movie studios have complained that all too frequently an unauthorized version of a film is available online even before or shortly after it is commercially released. Problems have been attributed to piracy by people in the film industry who have access to pre-release commercial works.[31] S. 1932 would add a new law, 18 U.S.C. § 2319B, expressly prohibiting unauthorized recording of motion pictures in a motion picture exhibition facility.

The provision is conceptually related to current 18 U.S.C. § 2319A which establishes criminal sanctions for unauthorized filming or recording of live musical concerts.[32] S. 1932 would subject offenders to imprisonment for three to six years and forfeiture or destruction of the bootlegged copies. Movie theaters and exhibitors receive civil and criminal immunity from liability for a reasonable detention for questioning or arrest of any person suspected of violating the law. It would permit a victim of the crime to submit a victim impact statement to a probation officer.

S. 1932 would establish another category of criminal infringement: unauthorized distribution of a pre-release commercial copyrighted work.[33] Section 4 of the bill adds a new class of prohibited activity to 17 U.S.C. § 506 governing criminal copyright infringement. § 506(a) currently defines criminal infringement as willfully infringing for (1) commercial advantage or private financial gain or (2) by reproducing or distributing within 180 days one or more copyrighted works having

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[31] See, e.g., Bernard Weinraub, *Advance Film Copies Halted for Oscar Voters*, N.Y. TIMES, Oct. 1, 2003.

[32] See United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999), *cert. den.* 529 U.S. 1036 (2000) upholding 18 U.S.C. § 2319A under congressional authority to legislate pursuant to the Commerce Clause. *Contra*, United States v. Martignon, 2004 WL 2149105, (S.D.N.Y., Sep 24, 2004).

[33] 18 U.S.C. § 2319 sets forth conditions and penalties for criminal copyright infringement.

a retail value of $1000. A new category – knowingly making a work being prepared for commercial distribution available on a computer network accessible to the public – would be added. Works covered include computer programs, motion pictures, and sound recordings. Punishment includes fines and/or imprisonment for 3 to 10 years.

Section 5 of the bill directs the Copyright Office to establish procedures to allow preregistration of a work that is being prepared for commercial distribution and has not been published.[34] The work must be of a class that the Register determines suffers a history of pre-commercial distribution infringement. Copyright registration facilitates an action for infringement.

Section 6 directs the U.S. Sentencing Commission to review, and if appropriate, amend the federal sentencing guidelines and policy statements applicable to persons convicted of IP crimes.

S. 2237, 108th Cong., 2d Sess. (2004), the "Protecting Intellectual Rights Against Theft and Expropriation Act of 2004." Introduced on March 25, 2004 by Senators Leahy and Hatch, the PIRATE Act was reported by the Senate Judiciary Committee on April 29, 2004 and passed by the Senate on June 25, 2004. The bill would add a new 17 U.S.C. § 506a to the Copyright Act entitled "Civil penalties for violations of section 506" which authorizes the U.S. Attorney General to file civil copyright infringement actions in a U.S. district court against any one who meets the standards for criminal infringement under § 506. Upon proof of conduct by a preponderance of the evidence, a defendant would be subject to a civil penalty under § 504, which encompasses actual damages, profits, and statutory damages. Although imposition of a civil penalty would not preclude additional civil or criminal actions, any restitution received by a copyright owner as a result of a civil action brought by the Department of Justice would be offset against an award of damages in a subsequent suit brought by the copyright owner.

The bill authorizes funding for a civil copyright enforcement litigation training and pilot programs for personnel in the DOJ and U.S. Attorneys Offices. The DOJ is directed to report annually on litigation under a newly enacted § 506a.

S. 2560,108th Cong., 2d Sess. (2004), the "Inducing Infringement of Copyrights Act of 2004." Introduced on June 22, 2004, a hearing on the bill was held on July 22, 2004.[35] The bill would amend 17 U.S.C. § 501 which sets forth elements of and procedures to address copyright infringement. It specifies that whoever "intentionally induces" another to violate a copyright is liable for copyright infringement. The term means to intentionally aid, abet, induce or procure infringement by another; intent may be shown by acts from which a reasonable person would find such intent, including factors such as whether the inducing activity relies on infringement for commercial viability.

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

[35] *An Examination of S. 2560, The Inducing Infringement of Copyrights Act of 2004: Hearing Before the Senate Judiciary Committee*, 108th Cong., 2d Sess. (2004).

The provision would essentially codify common-law principles of secondary liability for copyright infringement, usually referred to as contributory and vicarious liability. It is intended to address illegal downloading facilitated by P2P file sharing software companies and to overcome legal impediments to imposing secondary liability on them presented by the Ninth Circuit Court of Appeals decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*[36] The bill's sponsors contend that it will protect children and college students, often the direct infringers, who use the software to download copyright-protected media, including pornography.[37] Critics fear that it will overrule the U.S. Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*,[38] which protects technology that may facilitate or arguably "induce" infringement but supports substantial noninfringing uses as well.[39]

S. 3021, 108th Cong., 2d Sess. (2004), the "Family Entertainment and Copyright Act of 2004." Introduced and passed by the Senate on November 20, 2004, this omnibus IP bill includes provisions from S. 1932, the "Artists Rights and Theft Prevention Act" in Title I and the "Family Movie Act of 2004"in Title II.[40] As explained in a colloquy between Senators Cornyn and Hatch, the Senate's version of the Family Movie Act differs slightly from the House version in H.R. 4077. The House-passed version specified that the exemption from copyright infringement for filtering technology does *not* apply to ad skipping. The Senate version omits this express exclusion from the exemption because the permissibility of ad-skipping devices and technology is generally unsettled and it is not the intention of the Senate to resolve the question.[41] A section-by-section analysis of the Family Movie Act explains:

> The House-passed bill included an explicit exclusion to the new section [17 U.S.C. §] 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.

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[36] 380 F.3d 1145 (9th Cir.) *cert. granted* ,___U.S.___, 2004 U.S. LEXIS 8173, 73 U.S.L.W. 3350 (U.S. Dec. 10, 2004).

[37] See 150 CONG. REC. S7189-93(daily ed. June 22, 2004)(Statements of Sens. Hatch and Leahy).

[38] 464 U.S. 417 (1984).

[39] *Critics Fear 'Induce Act' Will Undo Sony*, 68 BNA PATENT, TRADEMARK & COPYRIGHT J. 318 (July 16, 2004).

[40] Provisions in Title V of S. 3021, the "Anti-counterfeiting Provisions and Fraudulent Online Identity Sanctions Act" were enacted in a free-standing bill and is P.L. 108-482; Title VI, the "Cooperative Research and Technology Enhancement (CREATE) Act, was likewise enacted separately and is P.L. 108-453.

[41] 150 CONG. REC. S11852 (daily ed. Nov. 24, 2004).

> 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.
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> 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.
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> 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.[42]

The copyright status of ad-skipping technology and devices utilized for private, in-home use is unresolved. And, like all copyright matters, the question and any answer will be highly context specific. While the *Sony* decision does not address ad skipping at length, the ability of a tv viewer to do so is implicit in the Court's decision that use of a Betamax to "time shift" in-home viewing of broadcast tv is a fair use. Nevertheless, the permissibility of ad skipping is not resolved with regard to the wide variety of digital media, recording devices, technology, and services. In some cases, the anticircumvention provisions of the Digital Millennium Copyright Act may implicated. Given the presumed impracticability of monitoring personal viewing in any given household, it seems likely that copyright owners, as they did in *Sony*, would attempt to preclude consumer access to ad-skipping devices and/or services through suits against vendors thereof based on principles of secondary copyright infringement liability rather than direct suits against consumers.

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[42] *Id.* at S11853-4.