108TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
108–670

FAMILY MOVIE ACT OF 2004

SEPTEMBER 8, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4586]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4586) to provide that making limited portions of audio or video content of motion pictures imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefor, is not an infringement of copyright or of any right under the Trademark Act of 1946, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

29–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family Movie Act of 2004".

SEC. 2. EXEMPTION FROM COPYRIGHT INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.

Section 110 of title 17, United States Code, is amended—

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

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

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

"(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use in a household, by means of consumer equipment or services that—

"(i) are operated by an individual in that household;

"(ii) serve only such household; and

"(iii) do not create a fixed copy of the altered version; and

"(B) the use of technology to make such audio or video content imperceptible, that does not create a fixed copy of the altered version.".

SEC. 3. EXEMPTION FROM TRADEMARK INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.

Section 32 of the Trademark Act of 1946 (15 U.S.C. 1114) is amended by adding at the end the following:

"(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act.

"(B) A manufacturer, licensee, or licensor of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible that is authorized under subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this Act. Such manufacturer, licensee, or licensor shall ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

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

"(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2004.".

SEC. 4. DEFINITION.

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

PURPOSE AND SUMMARY

The purpose of H.R. 4586 is to clarify that existing law allows companies to offer technologies and services that filter out inappropriate or adult content in movies, usually digital video discs (DVDs).

BACKGROUND AND NEED FOR THE LEGISLATION

Motion picture fans have become increasingly concerned about picture content that they do not want to watch or hear, including that related to sex, profanity, and violence. For years, parents have manually turned down the volume of the audio or simply turned off playback of the offensive content. In recent years, people have begun using remote controls bundled with playback devices to accomplish the same thing. However, the ability of parents to manually filter out all of the content that they view as inappropriate has become more difficult as the number of sources of entertainment continues to increase.

The Committee notes that airline and broadcast versions of numerous motion pictures exist that have been edited for offensive content. In the Committee's view, these works manifest a valuable family friendly market that directors and copyright holders are willing to serve by editing their movies. The ongoing policy dispute involving H.R. 4586 may have been avoided if these airline and broadcast versions had been made available for sale to the public in the first place.

Because these versions are not being made available by copyright owners, a growing number of companies are now offering services to assist families in their efforts to shield their children from inappropriate content. These services range from selling derivative works to the public that have been edited by a third party other than the director or copyright holder to technology that skips and mutes content that parents may not want their children to watch or hear. Such services have spawned recent litigation between the companies that offer these services and the affected copyright holders.

The Committee believes these services are an important tool for parents and other citizens concerned about audiovisual content to filter out inappropriate content. There is ongoing litigation in Colorado that is placing the viability of such services into question. The Committee believes that legislation is necessary to clarify which services and technology do not conflict with those rights protected under existing copyright and trademark law. The Committee is not endorsing any particular technology or service as either legal or more suitable for consumers than others. The decision regarding preference is left to consumers; the decision regarding legality is left to the courts.

The Committee is nonetheless concerned that one service that has adopted a model that is already legal under existing law is embroiled in litigation. In fact, the Register of Copyrights testified on June 17, 2004, that this model is legal under existing law.[1] The Committee believes that ongoing litigation threatens the viability of services that operate under this legal model and that legislation to clarify the legality of this model is therefore necessary.

The model of services that the Committee believes is legal only skips and mutes content without adding any new audio or video content while making it clear to the end user that the modified version may not be supported by the director.

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[1] *Family Movie Act: Hearings on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House of Representatives Comm. on the Judiciary,* 108th Cong. 94 (2004).

Under existing law, moral (reputational) rights do not supersede parental rights to raise children as they see fit. The Committee believes that directors should be assured that their works are properly identified as such; but these same directors may not control every detail of how their works are displayed, particularly for a legal copy aired in the privacy of a consumer's home. Several directors and a trade association representing them have argued that for-profit services that offer families a means to control what they watch in the privacy of their own home were illegal under existing copyright law. The Committee strongly disagrees with this interpretation of copyright law.

HEARINGS

The Committee's Subcommittee on Courts, the Internet, and Intellectual Property held an oversight hearing on this issue on May 20, 2004, with testimony received from five witnesses representing five organizations. The Subcommittee subsequently held a hearing on H.R. 4586 on June 17, 2004. Testimony was received from four witnesses representing four organizations.

COMMITTEE CONSIDERATION

On July 8, 2004, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 4586, as amended, by a vote of 11 to 5, a quorum being present. On July 21, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 4586 with an amendment by a vote of 18 to 9, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following recorded vote occurred during the Committee's consideration of H.R. 4586. The Committee adopted the motion to report the bill favorably with an amendment by a vote of 18 yeas to 9 noes.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren	X		
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	18	9	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4586, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 17, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4586, the Family Movie Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for Federal costs), who can be reached at 226–2860, and

Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2960.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4586—Family Movie Act of 2004.

H.R. 4586 would specify that technology used to filter certain material out of movies for private viewing would not constitute a violation of copyright or trademark law. CBO estimates that implementing H.R. 4586 would have no effect on Federal spending.

H.R. 4586 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

H.R. 4586 would impose private-sector mandates as defined in UMRA. CBO estimates that the direct cost of the mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation).

First, the bill would impose a private-sector mandate on copyright owners. The bill would limit the right of copyright owners to collect compensation under copyright law from persons using or manufacturing a technology that enables making limited changes to a motion picture for a private home viewing. According to testimony from the Patent and Trademark Office and other sources, no such compensation is currently received by copyright owners. Therefore, CBO estimates that the direct cost of the mandate, measured as net income forgone, would be small or zero.

Second, the bill also would impose a private-sector mandate on manufacturers, licensees, and licensors of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible. Such manufacturers, licensees, or licensors would be required to ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. Complying with the mandate would exempt such manufacturers, licensees, or licensors from liability under section 32 of the Trademark Act of 1946. The direct cost of the mandate on those private-sector entities would be the total cost of providing the notice less the direct savings achieved by limiting their liability. CBO has no basis for determining the direct savings for the exemption from trademark liability. However, according to Government and other sources, the technology to provide the required notice is readily available and is currently used by some manufacturers. Thus, CBO expects the direct cost to comply with the mandate, if any, would be minimal.

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4586 is designed to clarify the legality of existing and future services and technology that enable the skipping or muting of content in audio-visual works.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, § 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

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

Section 1 provides that this Act may be cited as the "Family Movie Act of 2004."

Section 2 of the legislation creates a new subsection § 110 (11) of Title 17. This new subsection ensures that U.S. copyright law sanctions the use of any filtering service or technology that mutes or skips content, provided the service or technology—

1. is confined to private, in-home use, for the household of the purchasing consumer only; and
2. does not create a fixed copy of the alternate version.

The Committee is aware of services and companies that create fixed derivative copies of motion pictures and believes that such practices are illegal under the Copyright Act.

Section 3 of the legislation clarifies existing U.S. trademark law to ensure that it cannot be interpreted to proscribe the operation of services identified in § 2 so long as they display a clear and conspicuous notice that the altered version is not the performance intended by the director or copyright holder of the motion picture. The Committee believes that an on-screen disclaimer in large font at the beginning of a performance of a particular work that is displayed for a length of time suitable for the average viewer to read the notice is sufficient. Such notice would be similar to the FBI anti-piracy warnings shown at the beginning of most major motion pictures. This requirement begins 180 days after the legislation becomes law. Since the manufacturer of a physical device complying with the requirements maintains control over the device before the retail purchase point, these requirements should not burden consumer electronics manufacturers.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 110 OF TITLE 17, UNITED STATES CODE

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) * * *

* * * * * * *

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization; **[**and**]**

(10) notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose**[**.**]***; and*

(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use in a household, by means of consumer equipment or services that—

(i) are operated by an individual in that household;

(ii) serve only such household; and

(iii) do not create a fixed copy of the altered version; and

(B) the use of technology to make such audio or video content imperceptible, that does not create a fixed copy of the altered version.

* * * * * * *

SECTION 32 OF THE TRADEMARK ACT OF 1946

SEC. 32. (1) * * *

* * * * * * *

(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act.

(B) A manufacturer, licensee, or licensor of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible that is authorized under subparagraph (A) is not liable on account of such manufacture or license for a violation of any right under this Act. Such manufacturer, licensee, or licensor shall ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

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

(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2004.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 21, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will come to order. A quorum is present.

[Intervening business.]

[11:00 a.m.]

Chairman SENSENBRENNER. Next item on the agenda is H.R. 4586, the "Family Movie Act of 2004." The Chair recognizes the gentleman from Texas Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, for a motion.

Mr. SMITH. The Subcommittee on Courts, Internet, and Intellectual Property reports favorably the bill H.R. 4586 with the single amendment in the nature of a substitute and moves its favorable recommendation to the full House.

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

[The bill, H.R. 4586, follows:]

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108TH CONGRESS
2D SESSION

H. R. 4586

To provide that making limited portions of audio or video content of motion pictures imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefor, is not an infringement of copyright or of any right under the Trademark Act of 1946.

IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 2004

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

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A BILL

To provide that making limited portions of audio or video content of motion pictures imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefor, is not an infringement of copyright or of any right under the Trademark Act of 1946.

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 Movie Act of 2004".

SEC. 2. EXEMPTION FROM COPYRIGHT INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.

Section 110 of title 17, United States Code, is amended—

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

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

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

''(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use in a household, by means of consumer equipment or services that are operated by an individual in that household and serve only such household; and

''(B) the use of technology to make such audio or video content imperceptible, that does not create a fixed copy of the altered version.''.

SEC. 3. EXEMPTION FROM TRADEMARK INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.

Section 31 of the Trademark Act of 1946 (15 U.S.C. 1114) is amended by adding at the end the following:

"(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act.

"(B) A manufacturer of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible that is authorized under subparagraph (A) is not liable on account of such manufacture for a violation of any right under this Act. Such manufacturer shall ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

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

SEC. 4. DEFINITION.

In this Act, 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, 1945 (15 U.S.C. 1051 et seq.).

○

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

[The amendment in the nature of a substitute follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4586 AS REPORTED BY THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family Movie Act of 2004".

SEC. 2. EXEMPTION FROM COPYRIGHT INFRINGEMENT FOR SKIPPING OF AUDIO OR VIDEO CONTENT OF MOTION PICTURES.

Section 110 of title 17, United States Code, is amended—

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

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

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

"(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the

course of viewing of that work for private use in a household, by means of consumer equipment or services that—

"(i) are operated by an individual in that household;

"(ii) serve only such household; and

"(iii) do not create a fixed copy of the altered version; and

"(B) the use of technology to make such audio or video content imperceptible, that does not create a fixed copy of the altered version.".

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"(3)(A) Any person who engages in the conduct described in paragraph (11) of section 110 of title 17, United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act.

"(B) A manufacturer of technology that enables the making of limited portions of audio or video content of a motion picture imperceptible that is authorized under subparagraph (A) is not liable on account of such manu-

facture for a violation of any right under this Act. Such manufacturer shall ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.

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

"(D) The requirement under subparagraph (B) to provide notice, and the provisions of subparagraph (C), shall apply only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2004.".

SEC. 4. DEFINITION.

In this Act, 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, 1945 (15 U.S.C. 1051 et seq.).

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

Mr. SMITH. I do move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, we are here today to determine whether parents have the right to decide what their children watch on the screen in the privacy of their own home. Specifically, do parents have a right to protect their children from sex, violence, and profanity in the movies?

These days I don't think anyone would even consider buying a DVD player that doesn't come with a remote control, yet there are some who would defy the parents the right to use the equivalent electronic device that would protect their children from offensive material on television. Yes, parents might mute dialogue that others deem crucial or might fast-forward over scenes that others consider essential, but that is irrelevant. Parents should be able to mute or skip over anything they want if they feel it is in the best interest of their children. And as a practical matter, parents cannot monitor their children's viewing habits all the time.

If you look at a DVD and VCR before and after technology has been used to mute or fast-forward over offensive material, there would be absolutely no difference in the product. It has not been sliced, diced, mutilated, or altered. The director's work is still intact. No unauthorized copies have been distributed, no copyright violated.

Some have said that the recent decision by RCA to stop selling one brand of family-friendly technology is a sign that this legislation should not proceed. This issue has never been about simply one company or one technology. It has always been about the ultimate right of parents to limit the profanity, sex, and violence that their children are exposed to in the privacy of their own home.

In fact, the Register of Copyrights has testified that skipping of content is legal under the law. Most recently the Supreme Court itself has issued a decision in *Ashcroft* v. *ALCU* concerning the Children's On-Line Protection Act. The majority opinion noted at length their preference for private sector filters to protect children from objectionable content on the Internet. Two quotes from the majority opinion are noteworthy. Quote, "Filters are less restrictive than the Children's On-Line Protection Act. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source." the majority then added, quote, "by enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties," end quote.

Just as the author of a book should not be able to force me or anyone else to read that book in any particular manner, a studio or director should not be able to force me or my children to watch a movie in a particular way. No one would argue that it would be or it should be against the law to skip over a few pages or even entire chapters of a book. So too it should not be illegal to skip over a few words or scenes in a movie.

One criticism is that no one forces parents to make sure children watch objectionable movies. However, popular movies are used as homework assignments in many middle and high schools today.

The parents are in fact forced to allow their children to watch a movie in the privacy of their own home, even though the movies contain objectionable content.

However, Mr. Chairman, even that criticism itself is a distraction. Parents should have the right to show any movie they want and to skip or mute over any content they find objectionable. The Family Movie Act ensures that parents have those rights.

Mr. Chairman, I will yield back the balance of my time.

Chairman SENSENBRENNER. Mr. Berman, the gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. Mr. Chairman, I ask my colleagues to oppose this bill. Notwithstanding the comments of my friend, the Chairman of the Subcommittee, and I think this is probably the first bill in the year and a half that he has been Chair and I have been Ranking Member where I disagree with him on an item that came out of Subcommittee as opposed to some other issues which don't come out of our Subcommittee.

This is not a bill about empowering parents or protecting children. Notwithstanding the rhetoric in the opening statement, notwithstanding the Republican memo, I ask the Committee to remember two things. In the subCommittee I offered an amendment to ensure this bill only legalizes movie editing done on behalf of minor children. That amendment was rejected. I also offered an amendment, and Mr. Schiff is going to be offering an amendment on this bill, that limited the filtering to profanity, violence, and explicit sexual conduct. That amendment was rejected by the majority.

So in defeating those amendments, essentially, and in the rhetoric to defeat those amendments, the supporters of the bill as presented to us stated that it is intended to facilitate movie editing by anyone, for anyone, for any purpose, not just for children. So even the bill's sponsors have acknowledged that this bill is not focused on empowering parents or protecting children.

Let's be clear about something else too. H.R. 4586 does not give parents the ability to do anything they cannot legally do today. No parent has ever been sued or threatened with suit for editing or censoring the movies their children see. In fact, the Register of Copyrights have testified that H.R. 4586 is, quote, "not needed because it seems reasonably clear that such conduct is not prohibited under existing law." copyright owners themselves clearly admit that parents have the legal authority to do such editing in the privacy of their own home.

The bill is also not needed to give parents the technological ability to edit or censor the movies their children watch. To a large extent, parents already have this ability. They can use their remote control to fast forward, mute, or turn off a movie. They can engage their V-chips that are built into all televisions sold these days. And this bill does nothing to legalize technologies that enable parents to make editorial decisions about which movie scenes their children cannot see or hear.

So what does this bill do? It gives for-profit companies the right to commercially exploit the copyrights and trademarks of movie makers without fear of liability. It allows those for-profit companies to make editorial decisions about movies without the input of their creators and to market products containing those editorial decisions to anyone, parents or otherwise. This is the key point. H.R. 4586 does not empower parents to make editorial decisions about which scenes their children will or won't see; rather, it empowers for-profit companies like ClearPlay to make editorial decisions about which movie scenes other people's children will or won't see.

When a parent uses a remote control to fast-forward through a scene, it is the parent who views the scene and assesses whether it is inappropriate for the child. Again, it is absolutely clear that such editing is entirely legal today. However, when a parent engages a ClearPlay filter, the parent relies on a nameless, faceless ClearPlay employee to decide which scenes are inappropriate for her child.

The question at the heart of this bill and the copyright litigation to which it reacts is whether ClearPlay should be able to engage in such commercial editing without the permission of copyright and trademark owners. I don't believe Congress should be in the business of giving ClearPlay such a right.

Even if you believe ClearPlay should have the legal ability to do such commercial editing, this bill won't get you there. H.R. 4586 only protects movie filtering technologies like ClearPlay from liability for copyright and trademark infringement, but it doesn't protect them, at least at this point, from suits for patent infringement.

At least one company, Nissan Corporation, claims to have a patent over ClearPlay-type technology and has sued ClearPlay for patent infringement. Since Thompson Electronics recently pulled its ClearPlay-enabled DVD players from the market, it appears that Nissan's patent claims are well founded. Thus, if H.R. 4586 were to become law, ClearPlay very likely will not be able to distribute its technology. In fact, if it is——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. BERMAN. I ask unanimous consent for 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. If the patent claims are valid, Nissan Corporation would be the only company that H.R. 4586 benefits. Nissan would be the only company that could distribute its technology without fear of liability. Knowing the professed intent of the bill's sponsors, I find it highly ironic that H.R. 4586 may exclusively benefit Nissan. Nissan, unlike ClearPlay, distributes a technology called Custom Play—well, actually ClearPlay distributes the same technology, but Nissan advertises that it allows movie viewers to either reduce or enhance the level of violence, sex, and profanity in a movie. The Nissan Web site states that using Custom Play technology, an adult can play a version of an adult video that seamlessly excludes content inconsistent with the viewer's adult content preferences. And that is presented at a level of explicitness preferred by the adult. Adult content categories are standardized and are organized into five groups: who, what, camera, position, and fetish. In other words, H.R. 4586 exclusively protects from liability a technology that, among other things, enables viewers of

pornographic movies to filter out the nonpornographic scenes. I am sure its sponsors don't intend H.R. 4586 to solely benefit a company that makes pornography more pornographic; however, that may very will be its effect.

Now they are aware of the risk, I think they should think twice before asking Committee Members to vote in favor of this bill. Upon reflection, I think the bill's sponsors may agree with the Register of Copyrights who testified, quote——

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

Without objection, all Members' opening statements will appear in the record at this point.

[The prepared statement of Ms. Waters follows:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

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

Mr. Chairman, I have significant concerns about this bill. Mr. Berman has expressed many of them. Yet these concerns are somewhat lessened because the technology that we are addressing does not create an altered copy that can be redistributed to other users or to the public generally.

As I understand the technology, it employs software that will filter what appears on a dvd player when a movie is inserted, but it does not alter the movie itself. I see some persuasiveness to the view that Representative Lofgren expressed in our Subcommittee markup that the technology simply assists authorized users in doing what they already have a right to do: namely, to view only those portions of a movie or a TV show that they wish to watch.

Nonetheless, I question whether H.R. 4586 is necessary. I also believe that we must acknowledge that the bill contains no meaningful limits on the scope of permissible filtering. As a result, I believe that it will impinge on the artistic freedom of motion picture creators, weaken the rights of motion picture copyright owners, and raise First Amendment concerns.

As I noted at the Subcommittee markup, if our goal is to protect young people from content that their parents deem objectionable, I believe that there are far less drastic means available to accomplish this.

We know that there are versions of movies that appear on airlines and on television that are edited from the original work. While sometimes these movie versions are edited to shorten the time of the film or to delete the credits, they also sometimes are edited to ensure that content not deemed suitable for children is deleted.

It seems clear to me that where the public, or a company like ClearPlay, has access to the so-called "airplane" or "TV" versions of movies that these versions will properly protect young people from potentially objectionable content.

Thus, I continue to believe that if we are going to legislate in this area, where "airplane" or "TV" versions of a movie are licensed to a company like ClearPlay or where such versions are available for sale to the public, the airplane or TV version should represent the outer limit of permissible content editing.

We should prevent the use of filtering software to create edited versions of movies that contain edits other than those included in the "airline" or "TV" version where such a version is available to the public, and not permit additional filtering of the work without the consent of the motion picture owners and creators.

Mr. Chairman, I am not seeking to require any movie owner to create an "airline" or "TV" version of any movie, nor should we require a movie owner to make an airline or TV version available to the public or to license such versions to companies like ClearPlay where such versions do exist.

Mr. Chairman, I know that there is considerable controversy as to whether the software employed by ClearPlay violates the copyright or trademark laws, and my comments are not intended to express a view on that dispute. Yet, as I noted at our hearing on this bill, I think that the public would be well-served if the parties to the ClearPlay litigation can reach a commercial settlement of this dispute.

I have no interest in allowing the possibility of legislation like this bill to be used as a club to influence settlement negotiations between the movie studios and ClearPlay in the federal court litigation pending in Colorado, or to influence any other efforts to arrive at a commercial resolution of this dispute. I fear that the prospect of this legislation is derailing meaningful settlement discussions.

It seems as if the prospect of this legislation may have caused ClearPlay to raise its demands and to take certain terms off the table that it previously had offered. I am advised that ClearPlay is now asking that it be allowed to edit movies made by "final cut" directors for which no airplane or TV version is available. With regard to films for which TV or airplane versions are available, ClearPlay is now asking that it be able to make its own edits, rather than use the TV or airplane edits.

Mr. Chairman, I am very concerned about preserving the rights of the movie studios and creative artists to protect their exclusive right to create derivative works based upon their copyrighted motion pictures. If the movie owners and the movie creators and directors can agree to give ClearPlay a license to exhibit "airplane" or "TV" versions of movies or if such versions are available to the public directly, the public will be very well-served. In these circumstances, I see no compelling reason whatsoever to create further exemptions from copyright and trademark law.

I yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? Gentleman from Texas, Mr. Smith, has a perfecting amendment. And the clerk will report the amendment.

The CLERK. Mr. Chairman, I have two amendments.

Chairman SENSENBRENNER. This is Smith Texas 074 XML. Is that the right one? The clerk will report that amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 4586 offered by Mr. Smith of Texas.

[The amendment to the amendment in the nature of a substitute, offered by Mr. Smith of Texas, follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4586 OFFERED BY MR. SMITH OF TEXAS

Page 2, line 22, insert ", licensee, or licensor" after "manufacturer".

Page 3, line 1, strike "for" and insert "or license for".

Page 3, lines 2 and 6, insert ", licensee, or licensor" after "manufacturer".

Chairman SENSENBRENNER. Without objection, the amendment will be considered as read. The gentleman from Texas will be recognized for 5 minutes.

Mr. SMITH. I will be brief. The perfecting amendment makes one simple change to the Subcommittee reported bill. The existing bill refers in section 3 to manufacturers. The amendment would change such references to manufacturers, licensees, and licensors. This

amendment would ensure that those who were involved in licensing the technology identified in this act do not also face trademark claims.

So I urge my colleagues to support the perfecting amendment. And also, Mr. Chairman, I want to point out to my colleagues who are here today that the bill did receive bipartisan support as it was marked up in the Subcommittee.

Ms. LOFGREN. Would the gentleman yield? I just wanted to briefly comment about the bill and certainly this is a technical amendment. I think, and Mr. Berman's last comment about the use of technology to go the other direction in terms of content, emphasizes that really, although there has been a lot of discussion about the use of technology to protect parents, it is really about consumer rights in my judgment.

And it seems to me that if an individual has a right not to watch parts of a DVD, which we all agree consumers have that right—you can go to the bathroom, you can go to the refrigerator—then it seems to me you have the right to use whatever technology you wish to as a tool to advance that right. So I think it is important to note that this technology does not permanently alter the underlying DVD, it has never changed, but it is merely a tool to allow people to watch what they want to watch, either enhanced so that they don't have to watch the nondirty parts, or to take out all the violence and dirty parts or whatever.

So looking at it in that way this is just a consumer rights bill. And I feel very comfortable in supporting it.

I thank the gentleman for yielding to me to say so.

Mr. SMITH. I thank the gentlelady from California for her comments. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. Mr. Berman.

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

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I have no objection to this amendment of a technical nature. I am not asking people to oppose this amendment. I just want to respond that were there a company to develop a software that enabled parents or consumers to develop filters to exclude items they wanted to, we would be talking about something very different. But this is not what this legislation authorizes and purports to legalize.

And again I simply go back to the fact that things which empower consumers are very different than things which substitute for consumers' judgment with a product owned by somebody else so that their trademark and their copyright is changed. And the fact that this doesn't touch—if ever I heard of a distinction without a difference, the fact that this is a filter that makes imperceptible that which comes off of the DVD as opposed to altering the DVD to me is a distinction without a difference. They are changing what the creator of that work intended. I think that they should be working with that creator and that copyright owner to provide a licensed version of those things when they are in the business of making a profit by producing and distributing and selling these filters.

I yield back.

Chairman SENSENBRENNER. The question is on the amendment to the amendment in the nature of a substitute offered by the gentleman from Texas, Mr. Smith.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. Ayes have it. The amendment is agreed to.

Further amendments? The gentleman from California Mr. Schiff.

Mr. SCHIFF. I have two amendments at the desk. If I could take up the first, 110.

Chairman SENSENBRENNER. The clerk will report Schiff 110.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 4586 offered by Mr. Schiff. Page 1, line 15, strike "limited" and insert "profane, sexual or violent." page 2, line 22, strike "limited" and insert "profane, sexual, or violent."

[The amendment to the amendment in the nature of a substitute, offered by Mr. Schiff, follows:]

H.L.C.

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4586 OFFERED BY MR. SCHIFF

Page 1, line 15, strike "limited" and insert "profane, sexual, or violent".

Page 2, line 22, strike "limited" and insert "profane, sexual, or violent".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I thank the Chairman. Before I go to the merits, I wanted to join my colleague from California, Mr. Berman, in his remarks. This bill is really not about parents having editorial discretion over the films that their children see, but rather whether one private company or a series of private technology makers should have the unrestricted ability to edit someone else's work product and put it into the market, edit it in any way they like without

having, as they are required under current law, to negotiate those rights with the developer of the content.

This is, in just a different forum, one of the many disputes between the technology makers and the makers of content about who want to control that content. That is really what is at the heart of the bill. I think this amendment lays bare what this bill is really about. Because in sum what this amendment does is ensure that the protections provided by the legislation would only be extended to technology that is aimed at protecting viewers from profane, sexual, or violent content.

This amendment was offered by Mr. Berman in Subcommittee. And as has been pointed out, while the proponents of the underlying bill have indicated that their goal is to provide filters that would sanitize movies of sex, violence, and profanity, the current bill is not drafted to limit its provisions to such edits; rather, the bill would legalize a far wider and unbridled universe of filtering to either increase profane, violent, and sexual content or decrease it.

This legislation would provide a safe harbor to a company that proactively markets this product as a means of isolating sexual content for the viewer, as has been indicated by my colleague from California. And I sincerely doubt the proponents of this legislation intend to do that, but that is the effect.

So this amendment would ensure that Congress is not promoting unintended consequences providing licenses to those that make filters that are less desirable. And since the amendment really goes precisely at what the proponents say they want to accomplish, I can only assume if they oppose the amendment that their goal is something different, that their goal is not really to limit the violence, the sexual, the profane, but rather to give a competitive economic advantage to some technology makers over other technology makers, to all technology makers over content makers, because what the technology makers seek to do they are capable of doing through negotiation. And currently those negotiations are going on.

But if Congress steps in and changes the playing field, it obviously advantages some of the technology makers vis-a-vis others. But if our goal really is to limit this to protecting minors, to empower parents, this amendment goes right to the heart of what the proponents seek to do. And I think it will be apparent based on the support for this amendment or its opposition what is really at stake here.

And I would urge all my colleagues to support this limiting language. I would yield back the balance of my time.

Chairman SENSENBRENNER. Mr. Smith.

Mr. SMITH. Mr. Chairman, we dealt with this amendment in Subcommittee, but I am happy to register my objection to it again. The Family Movie Act is not about just profane, sexual, or violent content, it is about the right of parents to decide what their children see. Parents may choose to skip over or mute anything they want to, quite frankly. It might be profane, sexual or violent content, but they might also choose to mute or skip over other content that they find objectionable. This content, for example, could include drug use that a parent does not want their teenager to watch, or it could simply be a scary part of a movie that an 8-year-old will get nightmares from. In other words, it is not just limited

to the profane or the sex or the violence. Whatever the content depicted on the screen, parents should have a right to use a remote control to mute or skip over it or use technology to accomplish the very same thing.

I urge my colleagues to oppose the amendment.

Mr. CANNON. Would the gentleman yield?

Mr. SMITH. I would be happy to.

Mr. CANNON. This, of course, has been a very interesting issue to me, since I represented all of the defendants in litigation between the studios and directors on the one hand, and the producers of innovation and technology that allows people a great deal more freedom as they look at Hollywood's otherwise admirable products. But I have a concern that is very important to me. We have in that lawsuit a number of technologies and theories of law. I am wondering if the gentleman from Texas could comment on the implications of this bill for other theories of law that are represented in that lawsuit. In other words, when the lawyers for the studios and the directors stand up and argue what we do here today, will that have an effect on that lawsuit, or do you see it as independent, maybe establishing some principles but not jeopardizing other arguments or issues?

Mr. SMITH. Would the gentleman yield? I envision this legislation as being independent both from lawsuits and from any specific technology, if that reassures the gentleman. And one reason for this legislation is that, quite frankly, we don't know what a specific court in a specific State is going to do. What we want to do here is make sure that parents, in whatever State they live, have the right to mute or skip over certain material that they consider to be offensive and not in the best interest of their children.

Does that help the gentleman?

Mr. CANNON. I thank the gentleman.

Mr. BERMAN. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Mr. Chairman, I obviously support the gentleman's amendment. Only two comments I want to make. One, in presenting the bill, this is about presenting—allowing parents, empowering parents to prevent children from seeing inappropriate violence, hearing inappropriate profanity, viewing inappropriate sexual content.

Mr. Schiff offers an amendment and now it is about empowering parents to filter any item, including items that don't fit into those categories for children. When we offer an amendment that says all right, let's just allow this for when the parents are using filters to show it to the children, this is not about just parents showing it to the children.

Why with all the rhetoric, why don't we just go right to the gentleman from California's point; they think it is a consumer right to have a commercial company create its own filters which are then sold to change, fundamentally in many cases, either in a pornographic enhancing or a pornographic reducing way or in any other way, the product of an artistic creation owned by somebody else.

The second point I want to make is the comment that this is technology neutral. Just read the bill. This only purports to authorize one type of technology, a technology by means—it is a tech-

nology, if you look at the bill, the making—which allows the making of limited portions of audio or video content imperceptible by or for the owner or other lawful possessor, for private use in a household, although that may be changed by a subsequent amendment that the gentleman may offer, which are operated by an individual in that household, serve only such household, do not create a fixed copy of the altered version.

If you create a fixed copy of the altered version, then this technology—that technology is not permitted. This bill is not technology neutral. This favors the ClearPlay-type technology, not technologies which alter, mutilate, splice, or whatever dice means, in the context of this. It is not a technology neutral proposal.

Mr. SCHIFF. Would the gentleman yield? I wonder if I might pose a question to the gentleman from Texas that how far he thinks this legislation or other ought to go. Should purchasers of the technology be able to use it to edit a film to change the ending of a film?

Mr. SMITH. Would the gentleman yield? Let me repeat a couple of things that I thought I had made clear but apparently did not. First of all, I feel that parents should be able to use the technology to skip over anything that they deem offensive. If they want to skip the ending of a movie, even though someone else might consider it to be crucial, I think that is the right of the parents.

So to follow upon what Mr. Berman just said, we have given examples of sex, violence, and profanity, but I made clear from the very beginning those are just the most egregious examples. I gave an example of a parent not wanting to see drug dealing, for example.

So all the examples that you all might come up with are really red herrings or straw men or distractions to get us away from the real issue to me, which is the right of parents, the right of consumers, even in Ms. Lofgren's words, to use technology that we might have done—it might have been manual a generation ago, it might be by remote control in other year or two—but to use technology to skip over anything they deem offensive in the privacy of their own home.

We are not talking about changing permanently the film or the DVD or the VCR. We are not talking about selling it for profit. We are not talking about commercializing it. We are talking about the right of parents to do what they want to do with the VCR in their own home.

Mr. BERMAN. I yield to the gentleman from Massachusetts.

Mr. DELAHUNT. I was just simply going to ask the Ranking Member Mr. Berman here, aren't there other technologies that are in existence at this moment in time that do exactly what the gentleman from Texas wishes to do?

Mr. BERMAN. V-chips, remote controls, mute buttons, fast-forward buttons.

Mr. DELAHUNT. Is that why the——

Mr. BERMAN. And other—and technologies which empower the parent—although I know it is not just the parent—but the parent to create their own filters to show movies.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. DELAHUNT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Massachusetts.

Mr. DELAHUNT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I yield whatever time Mr. Berman needs to complete the point that he was making.

Mr. BERMAN. On the theory that it is a point that I have already made, I will not make it again.

Chairman SENSENBRENNER. That is appreciated.

Mr. BERMAN. At this moment.

Mr. DELAHUNT. Again, I would just make the observation that I think it is rather clear that in the exchange between Mr. Smith and Mr. Berman and Mr. Schiff, and I applaud the gentleman for his amendment, I think it really does clarify for us this is really not—and I think we should be clear—this is not about violence, this is not about profanity, this is not about inappropriate sexual scenes, this is about a technology that will be provided a particular commercial advantage. That is what I see this to be. And I think it is absolutely inappropriate.

And for those that have concerns about children viewing sex, violence, et cetera, any kind of unacceptable behavior, there are technologies that are in existence right now. We as a Committee are intruding ourselves into litigation. Yes, I understand the gentleman's point regarding that it would not be used in the sense of a particular discrete lawsuit; however, let's not kid ourselves. The parties to that particular litigation are waiting for action and it does create a certain leverage for Clear Channel in terms of the negotiations, because I presume that at some point in time reasonable people will work out an agreement and a settlement will be affected.

Mr. CANNON. Would the gentleman yield?

Thank you. We actually agree on a point here. I believe this bill gives a technological advantage; at least it makes clear that one technology is appropriate. I would like to make clear for the record that doing so doesn't—I think the gentleman from California was suggesting that there may be some rationale here for application of this theory as limiting the theories of law that the other, in this case plaintiffs, those people who are being sued by the directors and the studios have; that is, as I review this, I believe that this bill only adds protection to a particular technology and does nothing to undermine the theories of the case of the other plaintiffs with other technologies. And I would like to know if the gentleman from California, or Mr. Delahunt, you believe anything other than that.

Mr. DELAHUNT. Reclaiming my time, I agree with the gentleman from Utah. This is all about, in my opinion, providing leverage for negotiations to secure a settlement. It has nothing to do with the outcome of legislation.

Mr. BERMAN. Would the gentleman yield?

Mr. DELAHUNT. Yield to the Ranking Member.

Mr. BERMAN. Taking up a theme that the gentleman said earlier and the gentleman from California implied, I guess when you say it is about sex, violence, and profanity, it is really about the money. It does create an implication, I suggest, because the Register of Copyrights says for the copyright purposes you really don't need

this bill, because a fixed copy isn't created through this filter and therefore it doesn't violate copyright now.

Now, that is not a comment on the facts of the particular litigation and the Register acknowledges she hasn't seen the evidence that is being presented in that case. But when you have a bill that says do not create a fixed copy of the altered version, it certainly leaves an implication that if you do create a fixed copy, you are in bad shape. And so I would argue that by clear implication from the language of this bill, people with other kinds of technologies that don't meet the test of this bill, are in high risk.

Mr. SMITH. Would the gentleman yield?

I certainly agree with Mr. Berman if we were to tamper with or alter permanently with the disc, that would be a copyright violation. But just for your sake, I think the record ought to be accurate. A while ago you mentioned Clear Channel instead of ClearPlay. That happens to be a constituent firm, and I wouldn't want to involve them in the this debate.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the adoption of the amendment by the gentleman from California, Mr. Schiff.

Those in favor will say aye.

Opposed, no.

The noes appear to have. The noes have it. The amendment is not agreed to.

Are there further amendments?

Mr. SCHIFF. I have a further amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

[The amendment to the amendment in the nature of a substitute, offered by Mr. Schiff, follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4586

OFFERED BY MR. SCHIFF

Add at the end the following:

SEC. 5. EFFECTIVE DATE.

The amendments made by sections 2 and 3 shall take effect on the date of the enactment of this Act and shall remain in effect until the end of the 3-year period beginning on such date of enactment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 4586 offered by Mr. Schiff. Add at the end the following: Section 5——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentleman from California will be recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, this is a simple but important amendment that would provide a 3-year sunset for the legislation. As has already been pointed out the Register of Copyrights testified at the Subcommittee that the issues touched upon in this legislation are currently in the middle of litigation and negotiation, litigation addressing whether the manufacture and distribution of such technology violates the copyright law. And the Lanham Act is in Federal court with a summary judgment motion still pending.

The parties to the pending litigation include the commercial providers of various movie filters available, the movie studies that own the copyrights, and the directors who are legitimately concerned about their rights as creators. But more importantly and perhaps more promising, are the serious ongoing negotiations that have been occurring between the individual studios and technology providers aimed at resolving this dispute through mutually acceptable licensing agreements. Indications are that those negotiations have progressed substantially well. However, this legislation will surely bring these negotiations to a complete halt.

By supporting a 3-year sunset, Congress will be sending a clear message that negotiations should still be taken seriously. My colleagues on the other side of the aisle have often urged us to permit the marketplace to resolve a host of issues. This amendment would do just that. If we provide a small incentive to the studios and technology providers to work something out over the next 3 years, a permanent exemption is not needed.

This amendment would also ensure that Congress can revisit this issue to make sure there are no unintended consequences. As we have already heard, the legislation would currently potentially provide a safe harbor to a company which markets its product as a means of isolating and enhancing sexual content for the viewer. And I doubt the proponents of legislation intended to promote that. It will ensure that Congress can come back and determine whether this legislation has indeed had such unintended consequences.

I would urge my colleagues' support.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. I oppose the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. The issue before us today is still what right do parents have to control what their families see in the privacy of their own home. If we think that parents should have such right, there is no justification for limiting those rights. Are we saying that parents can only protect their children for 3 years? Parents have a moral right and in fact a legal responsibility to protect their children from offensive material. Most parents remain heavily involved in the lives of their children. Why should we limit parental rights to only the next 3 years?

The Register of Copyrights has already testified that what one of these companies is doing is legal, not that they are only legal for a certain number of years. This amendment seems to ignore the Register's testimony. Also, Mr. Chairman, I don't know of a single precedent by this full Committee where we have limited or attempted to limit any right. And I don't think we should start to by limiting the right of parents to only 3 years.

So I would encourage my colleagues to oppose this amendment. I yield back.

Chairman SENSENBRENNER. The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman. I would like to strike the requisite number of worlds.

Chairman SENSENBRENNER. The gentlelady is recognized for 5 minutes.

Ms. JACKSON LEE. I will add my comments to incorporate Mr. Schiff previous amendment which was defeated—I thought that was certainly an effort of reasonable compromise—and then, of course, to add my comments on the present amendment that speaks to this question of a limitation, and combine it with my concern for the broadness of this legislation and to indicate that in the past I have been frankly welcoming a legislation that deals with the prohibition of obscenity and other untoward activities that might impact children. But in this instance, I think there are several points that would undermine this legislation at this point.

One, there is ongoing litigation that may have an alternate viewpoint. Of course, here we go again. We are trying to thwart the third branch of government. That will be occurring in the next 48 hours as we debate legislation on the Marriage Protection Act. We now want to close the door prematurely and interfere with ongoing litigation.

Secondarily, I think it is noted that we voted in this Committee, some of us, on the V-chip which has been working for a number of years.

And then I want to take my good friend up on his question of morality, my good friend from Texas. He is absolutely right. It is a question of morality. What we have heard so often is that it is a question of parents being parents. Some of us who are parents realize that those are very challenging responsibilities. But parents have the opportunity to sit down with their children and be selective of what is on and what is not.

The interesting point about this, of course, is that this is an economically biased legislative initiative. The poor parents who can't afford this technology will have their household, I assume, filled up with these bad movies, if you will, leave them to, I guess, their religious views and their morality. But the rich folks can go off to the Hamptons and leave the kids in front of sophisticated technology.

Well, I believe in equal opportunity. Let all parents be parents, poor people, middle-class people, and rich people. Leave the technology alone and sit down and tell your kids what to look at, or turn the TV off, or sit down with them and discuss the issue.

My concern was there was nudity in "Schindler's List," nude bodies. Are you suggesting there is nothing wrong with that? There was interracial relationships in Spike Lee's "Jungle Fever." it is all a matter of taste and it is all a matter of having a family member

sit down and deal with their children. Some of us have been perfect and imperfect. But it is our responsibility. We can be aided by certain tools, and I think the V-chip is reasonable. But I would argue at this point, with ongoing litigation, the fact that this is a purchased item and therefore some will get it and some won't, I just think at this point we need further facts and further study before we support this particular legislation.

But I would support both amendments, one that has been defeated, but I rise in support of Mr. Schiff's amendment. I yield back my time.

Chairman SENSENBRENNER. Question is on the second Schiff amendment.

Those in favor will say aye.

Opposed, no.

Noes appear to have it. Noes have it. And the amendment is not agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. SCOTT. I would like to ask the gentleman from California a couple of questions to make sure I understand this. This machine that we are allowing to be used is not content neutral like a VCR or cassette tape, it is movie-specific, where would you have to buy a subscription to a specific movie for this thing to work; that is to say, you can't view the altered version without paying somebody some money for that specific movie. Is that right?

Mr. BERMAN. Close to right. Here, what you are doing is buying a filter, one of a number of filters in the case of ClearPlay, that are offered for a specific film that will be used when you show that film, it will be used on your machine, on your DVD player, and which will then filter out what some employees at ClearPlay decided should be filtered out. So it is you buy filters for a specific movie. It is not film neutral. It does not edit out certain words or certain scenes from all movies. It is movie specific.

Mr. SCOTT. To get this movie after this altered version software, I buy the movie, and then have to pay someone a subscription fee or money to get this altered software, movie specific.

Mr. BERMAN. That is right. A subscription I think that is actually—that is maybe their business model, subscriptions to choose which filters for which movies that we have decided we should create filters for and what—the kinds of things that our employees are filtering.

Mr. SCOTT. Obviously you have trademark implications if you are selling a product which will show a version of a movie and the people that produce the movie don't get a cut of the action.

Mr. BERMAN. That is exactly right.

Mr. SCOTT. Now, does the pending litigation—would the outcome of the pending litigation solve this question?

Mr. BERMAN. Yes. The pending litigation would solve—it would either say this kind of filtering system does not violate copyright law, does not violate the Lanham Act trademark law, or it does. And if it was concluded that it does, than perhaps we would want to consider—then debate the merits of whether they should be allowed and we should exempt and under what conditions we should

exempt this kind of technology from copyright law and trademark law.

Ms. LOFGREN. Would the gentleman yield? I think it is important to clarify that the person who makes the movie, the DVD, is compensated; because in order to play the movie using the technology, you either have to buy the DVD or rent the DVD. So that doesn't change. It is just how you watch it that changes. I thank the gentleman.

Mr. SCOTT. I would ask—but to view the different version, you would have to buy the DVD; but if for some reason you wouldn't buy it unless you could have the enhancement, movie-specific enhancement so it would be "Training Day" without cuss words, the without-cuss-words edition, you would have to pay extra for, and the people who made "Training Day" would not have the editorial decision as to what gets cut out and what doesn't and they would get no cut of additional money.

Ms. LOFGREN. That is correct. If you used your remote to skip over the parts, or if you went to the refrigerator to get a beer while they were doing the dirty words, no one would get a cut of the beer for the altered version.

Mr. SCOTT. But you didn't have to pay for the use of the remote control in the VCR.

Mr. BERMAN. You have to pay for the beer but you don't have to otherwise pay to go to the refrigerator. The fact is that altered forms of films are a revenue stream for copyright owners. And that is why there is a market for films for airplanes, films for television, and in some cases, by the way, original cuts for DVDs that aren't shown in the theater. Each one of those produce revenue streams for the copyright owners and the creators.

And under the collective bargaining agreements, the copyright owners must consult with the creators before they make those, so both as to how it is edited and the revenue stream, copyright owners traditionally recover additional monies for that altered version.

Chairman SENSENBRENNER. The time of the gentleman has expired. Are there further amendments?

For what purpose does the gentleman from California seek recognition?

Mr. BERMAN. I have an amendment at the desk, amendment number 2.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 4586 offered by Mr. Berman.

Page 1, line 15, after——

[The amendment to the amendment in the nature of a substitute, offered by Mr. Berman, follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4586

OFFERED BY M R. Berman

Page 1, line 15, after "(11)(A)" insert "Subject to subparagraph (C),"

Page 2, line 8, after "(B)" insert "Subject to subparagraph (C),"

Page 2, line 10, strike the quotation mark and succeeding period

Page 2, line 10, insert the following at the end:

"(C) Despite subparagraphs (A) and (B), the manufacturer of technology that makes audio or video content imperceptible as described in subparagraph (A) may still be subject to liability for direct or contributory infringement of the rights under Section 106 if that manufacturer fails to offer all competitors a license, without charge, to manufacture that technology."

Page 2, line 21, after "(B)" insert "(i) Subject to the limitations of clause (ii),"

Page 3, line 4, strike the period and insert a semicolon

Page 3, line 4, insert at the end the following:

"(ii) Clause (i) is only applicable to a manufacturer of technology described in clause (i) if that manufacturer offers all competitors a license, without charge, to manufacture that technology."

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentleman from California will be recognized for 5 minutes.

Mr. BERMAN. Thank you, Mr. Chairman.

H.R. 4586 limits the copyright and trademark rights of movie producers and directors, provides them no compensation or royalties for those statutory limitations of their rights. It was just pointed out in the dialogue that the gentleman from Virginia undertook with Ms. Lofgren and myself.

The stated justification for these limitations on copyright and trademark rights is to ensure parental access to technological tools that filter objectionable content in motion pictures. My amendment will advance these goals in much the same way. It requires the manufacturers of these filtering technologies to offer competitors royalty-free licenses to their technology in order to get the protection from liability provided by H.R. 4586.

This amendment will ensure the most widespread dissemination of filtering technologies to parents. It will ensure the best technologies available from a wide variety of vendors. If will ensure that parents will not have to pay monopoly prices for access to that technology. I think my amendment is fair. And if it is fair to limit the intellectual property rights associated with movies in order to benefit parents, then it is fair to the intellectual property rights of the filtering companies who are filtering without the consent of the copyright owners and without compensating them in order to ben-

efit parents. If it is fair to provide movie copyright and trademark holders with no royalties in exchange for the loss of their rights, then filtering companies should likewise expect no royalties for a similar loss. That is my amendment.

Mr. SCHIFF. I would like to say to my colleague from California, this is a brilliant amendment. It is very much a consumer——

Mr. BERMAN. I didn't think of it.

Mr. SCHIFF. It is very much a consumer rights amendment. It expands the benefits for the consumers that the proponents of the underlying bill purport to be concerned about.

And I do have one question about both the amendment and the underlying bill, and that is, does the underlying bill permit, for example, one of the makers of this filter technology to advertise, buy a filter for "The Terminator" and you can change "The Terminator" in this way, or buy a filter for this movie and basically use the names, use the likenesses, use the subscription of the films without ever having to compensate the film makers?

Mr. BERMAN. It certainly would, unless this bill is amended to strip that right from these people. And in addition, it contains a provision prohibiting Federal courts from hearing first amendment cases. No, it would certainly allow that.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. BERMAN. Yes.

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas, Mr. Terminator.

Mr. SMITH. Thank you, Mr. Chairman. I oppose the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. I really do have some difficulty understanding the reasoning behind the amendment. It seems to say——

Mr. BERMAN. Would the gentleman yield? I would like to repeat the reasoning.

Mr. SMITH. It seems to say that American intellectual property laws that allow directors and studios to profit from their work for 95 years do not apply to those who create other forms of intellectual property. I recognize that some in Hollywood disagree with what companies like ClearPlay and others are doing, and that is certainly their right. But should we then stop such companies from offering their technology to interested parents by legislating a taking of a company's intellectual property?

I have not seen any justification as to why this Committee should legislate the taking of someone else's intellectual property simply because someone in Hollywood doesn't like them. What is good for the goose is good for the gander. Perhaps we should require movie studios to offer free licenses to all who want to watch their movies because some people this country don't like the movies made in Hollywood. I urge my colleagues to oppose the amendment.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I would like to observe that on a Committee of 37 men and women, all but four of whom are lawyers, how we could be taking a matter that has been filed in a Federal court since August 2002—and we know that negotiations are ongoing—and passed a law dealing with the specific issues that are in the litiga-

tion is beyond me. Can any Member in this case explain to me why we are doing this? This is so exceptional that I would seek an explanation if there is one. And I would yield to anyone.

Mr. BERMAN. Thank you, John.

My friend, the Chairman of the Subcommittee's point, you made my point. I view this bill as a taking. This is not simply about what is cut, what is obliterated from the creator's work, it is about whether the creator is entitled to any stream of revenue for the altered version of his work. And you will—I am saying if it is good for the goose, it is good for the gander. If you are going to have a taking of the creator's artistic rights and the copyright owner's rights, then let's have a compulsory royalty-free license for the creators of this technology, because our goal is to protect the children.

Chairman SENSENBRENNER. The question is on the Berman amendment to the amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

Noes appear to have it. Noes have it. The amendment amount is not agreed to.

Mr. BERMAN. Move to strike the last word.

Chairman SENSENBRENNER. We are running out of time.

Mr. BERMAN. I am going to have raise one issue. Then we will go to a vote.

The CHAIRMAN. The gentleman is recognized for 5 minutes.

Mr. BERMAN. Thank you, Mr. Chairman. There is a concern that hasn't been raised by any amendment, that I will not offer as an amendment, that while this is entitled the Family Movie Act, it covers more than movies, could cover live over-the-air television programming, and that it immunizes from liability companies that manufacture technology to edit TV programs, including commercial stripping.

In other words, this might, this bill might well legalize the elimination of a fairly common business model, which is over-the-air commercial television. And without trying to debate that issue now, I am just wondering if the Chairman might be willing to consider working through this issue to see if—what his intent would be with respect to that possibility.

Chairman SENSENBRENNER. Would the gentleman yield?

The answer is yes, we will in work to consider this, with no promises being made as to a result.

Mr. BERMAN. Well, that is quite an offer. Maybe I can keep you engaged.

Chairman SENSENBRENNER. The Chair is always happy to be engaged with the gentleman from California.

If there are no further amendments, without objection, the Subcommittee amendment in the nature of the substitute laid down as the base text is amended as adopted. A reporting quorum is present.

The question occurs on the motion to report the bill, H.R. 4586, favorably, as amended.

All in favor will say aye.

Opposed, no.

Ayes appear to have it.

Mr. BERMAN. rollcall.

Chairman SENSENBRENNER. A rollcall is ordered. Those in favor of reporting the bill favorably, as amended, will answer aye. Those opposed will answer no.
The CLERK. Mr. Hyde.
[No response.]
The CLERK. Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye.
Mr. Gallegly.
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly, aye.
Mr. Goodlatte.
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte, aye.
Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye.
Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye.
Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye.
Mr. Bachus.
[No response.]
The CLERK. Mr. Hostettler.
[No response.]
The CLERK. Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller.
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye.
Ms. Hart.
Ms. HART. Aye.
The CLERK. Ms. Hart, aye.
Mr. Flake.
[No response.]
The CLERK. Mr. Pence.
[No response.]
The CLERK. Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.

Mrs. Blackburn.
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
[No response.]
The CLERK. Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt.
Mr. WATT. Pass.
The CLERK. Mr. Watt, pass.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters, no.
Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no.
Mr. Weiner.
[No response.]
The CLERK. Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sanchez.
Ms. SANCHEZ. No.
The CLERK. Ms. Sanchez, no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote? If not, the clerk will report.
The gentleman from North Carolina, Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

The CLERK. There are 18 ayes, and 9 noes.

Chairman SENSENBRENNER. The motion to report favorably, as amended, is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes.

All Members will be given 2 days as provided by House rules in which to submit additional dissenting, supplemental, or minority views.

The purpose for which this meeting has been called having been accomplished, the Committee stands adjourned.

[Whereupon, at 12:00 p.m., the Committee was adjourned.]

DISSENTING VIEWS

We strongly oppose H.R. 4586, the "Family Movie Act of 2004." With the purported goal of sanitizing undesired content in motion pictures, H.R. 4586 immunizes from copyright and trademark liability any for-profit companies that develop movie-editing software to make content imperceptible without permission from the movies' creators.[1] H.R. 4586 takes sides in a private lawsuit, interferes with marketplace negotiations, fails to achieve its goal, is unnecessary and overbroad, may increase the level of undesired content, and impinges on artistic freedom and rights.

The bill's proponents would have us believe that this bill is about whether children should be forced to watch undesired content, but it is not. The issue in this debate is who should make editorial decisions about what movie content children see: parents or a for-profit company. Supporters of H.R. 4586 believe companies should be allowed to do the editing for profit, and without permission of film creators, while opponents believe parents are the best qualified to know what their children should not see. The legislation would accomplish little beyond inflaming the debate over indecent content in popular media and interfering with marketplace solutions to parental concerns.

That is why H.R. 4586 is opposed by: (1) entities concerned with the intellectual property and artistic rights of creators, including the Directors Guild of America,[2] the Motion Picture Association of America,[3] and the Dean of the UCLA Film School; [4] and (2) experts on copyright law, such as the Register of Copyrights.[5]

A. H.R. 4586 WOULD IMPROPERLY INTERFERE WITH PENDING LITIGATION AND PREMATURELY TERMINATE MARKETPLACE NEGOTIATIONS TO SETTLE THE DISPUTE

As a preliminary matter, the legislation is inappropriate because it not only addresses the primary issues in a pending lawsuit but also takes sides with one of the parties to that suit. The U.S. District Court for the District of Colorado currently has before it a case that began as an action brought by a company called Clean

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

[2] *See Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 108th Cong., 2d Sess. 86 (May 20, 2004) (written statement of Taylor Hackford, Directors Guild of America) [hereinafter *May 20, 2004 Hearing*].

[3] *Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 108th Cong., 2d Sess. 67–70 (June 17, 2004) (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Ass'n of America) [hereinafter *H.R. 4586 Hearing*]

[4] Declaration of Dean Robert Rosen In Support of the Director Parties' Opposition to ClearPlay, Inc.'s, Trilogy Studios, Inc.'s, and Family Shield Technologies, LLC's Motion for Summary Judgment, *Huntsman* v. *Soderbergh* (D. Colo.) (02–M–1662) [hereinafter Rosen Decl.].

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

Flicks against directors of movies.[6] Clean Flicks sought a declaratory judgment against several directors that its business practice of providing edited versions of movies to consumers does not violate the rights of those who own the copyrights and trademarks for the original movies.[7]

In the course of litigation, the number of parties expanded. Because Clean Flicks claimed that its conduct was lawful under the Copyright Act, the directors sought to join the movie studios in the dispute. In addition, a Utah-based company known as ClearPlay joined on the side of Clean Flicks. ClearPlay employees view motion pictures and create software filters that tag scenes they find offensive in each movie; this editing is done without notice to or permission from the copyright owners (the movie studios) or movie directors.[8] When downloaded to a specially-adapted DVD player, the ClearPlay software filter instructs the player to "skip and mute" the tagged content when the affiliated DVD movie is played. Consumers who play a DVD they have rented or purchased would thus not see or hear the scenes that ClearPlay has tagged for filtering.

The bill directly addresses copyright and trademark issues raised in the case and inappropriately takes the side of one party. First, the content creators allege in the lawsuit that ClearPlay makes derivative works in violation of the Copyright Act; in particular, they argue ClearPlay's editing software violates their exclusive rights as movie copyright owners to make modifications or other derivations of the original movies.[9]

Though no court has ruled on this issue, the bill would assist ClearPlay by preemptively vitiating this legal claim. It would amend the law to state that certain technology which makes portions of motion picture content imperceptible during playback does not violate copyright law. While not benefitting Clean Flicks and certain other defendants, the bill is specifically designed to legalize ClearPlay technology.

Second, film directors claim that ClearPlay violates their trademark rights under section 43(a) of the Lanham Act.[10] The directors

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[6] *Huntsman* v. *Soderbergh,* No. 02–M–1662 (D. Colo. filed Aug. 29, 2002). The parties are awaiting a ruling on a motion for summary judgment.

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

[8] ClearPlay has fourteen filter settings: (1) strong action violence, (2) gory/brutal violence, (3) disturbing images (i.e., macabre and bloody images), (4) sensual content, (5) crude sexual content, (6) nudity (including art), (7) explicit sexual situations, (8) vain references to deity, (9) crude language and humor, (10) ethnic and racial slurs, (11) cursing, (12) strong profanity, (13) graphic vulgarity, and (14) explicit drug use.

[9] *See* The Player Control Parties' Opening Brief in Support of Their Motion for Summary Judgment, *Huntsman* v. *Soderbergh* (D. Colo.) (No. 02–M–1662). Section 106(2) of title 17, United States Code, gives to authors the exclusive right to "prepare derivative works based on the copyrighted work." The Copyright Act further defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

The Register of Copyrights has testified as to her opinion about the copyright issues involved in the case. The Register believes that infringement of the exclusive right under 17 U.S.C. § 106(2) to make derivative works requires creation of a fixed copy of a derivative work. *H.R. 4586 Hearing* at 7. While the Register's opinion clearly bears much authority, it is neither binding on a court nor dispositive of the pending lawsuit. Due to the novelty of both the legal and technological issues involved, the court may very well reach a different conclusion from that drawn by the Register.

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

allege that ClearPlay uses their trademarked names in a way that is likely to cause confusion as to the affiliation, connection, or association of ClearPlay with the director, or as to the origin, sponsorship, or approval of ClearPlay by the director.[11] Their allegation is based on the fact that a ClearPlay-sanitized film still indicates the name of the director, making it incorrectly appear as if the director has approved the sanitized version.

As with the copyright claims against ClearPlay, the bill would usurp judicial consideration of the trademark claims against ClearPlay by legalizing the very conduct at issue in the pending litigation. The bill would make it legal under trademark law to sell a product that alters a work and then still attribute that work to the original's creator. The effect would again be to specifically benefit one party, ClearPlay, to the detriment of all others involved in pending litigation.

In summary, the directors and movie studios have non-frivolous legal claims against ClearPlay. Because the case has not proceeded past the most preliminary stages at the trial level, there has not been any statutory interpretation, let alone a problematic one, that would justify a legislative solution. In other words, the law has yet to be interpreted in this area, so there is no rational basis for Congress to pass legislation that eliminates certain copyright and trademark rights that are at issue between specific parties.

Passage of this legislation is even more problematic considering that, over the past year, movie creators have negotiated in good faith to settle their dispute with ClearPlay. The movie creators had offered ClearPlay terms that would allow it to deploy its technology without fear of copyright or trademark liability.[12] Unfortunately, due to the two hearings on this issue and the movement of H.R. 4586, those negotiations have stalled; ClearPlay has been emboldened to present several new demands that represent a significant step back from its previous positions. The growing prospects for a legislative fix have caused ClearPlay to abandon good-faith negotiation and have made it less likely that consumers will have the choices the bill's proponents allegedly desire.

In short, fundamental fairness prohibits Congress from passing legislation to influence a pending case and private business negotiations. As a matter of equity, it is unfair to change the rules in the middle of the game, particularly to help one specific entity; if passed, H.R. 4586 would be an unfortunate example of such unfair-

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[11] *See* 15 U.S.C. § 1125(a)(1).

[12] Despite the extremely complicated nature of these negotiations, they had proceeded quite far. In December 2003, the DGA agreed not to object under its collective bargaining agreement if the studios offered ClearPlay a license to utilize the edits contained in television and airplane versions of movies. The DGA believed this compromise was tolerable because a film's director usually makes the necessary edits for television and airplane versions and is able to control the integrity of such edited versions. Over the course of the next several months, the studios conveyed an offer along these lines to ClearPlay.

More recently, ClearPlay presented the studios with a counteroffer. The studios forwarded this counteroffer to the DGA for its response. In a May 29, 2004 response, the DGA relaxed certain limitations on a previous agreement to allow ClearPlay to license the television and airplane versions of movies. Rather than accept this offer, or present a good-faith counteroffer, ClearPlay apparently has enlarged its demands: (1) for movies where, no airplane or television version is available, it has sought the ability to edit them; and (2) with regard to films for which television or airplane versions have been made available, it is asking that it be able to make its own edits, rather than use the pre-existing edited versions.

ness. For these reasons, H.R. 4586 should not be considered while litigation is pending.[13]

B. H.R. 4586 IS UNNECESSARY

Regardless of the outcome of the pending litigation, this legislation should not be brought before the House because it is unnecessary. Its supposed rationale is to make it easier for parents and children to avoid watching motion pictures with undesired content, but parents and children already have such options.

At the outset, there is an obvious marketplace solution to undesired content in that consumers can merely elect not to view it. As the Register of Copyrights testified:

> I cannot accept the proposition that not to permit parents to use such products means that they are somehow forced to expose their children (or themselves) to unwanted depictions of violence, sex and profanity. *There is an obvious choice—one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie.*[14]

The motion picture industry has even enhanced the ability of consumers to exercise this choice. For decades and on a voluntary basis, it has implemented a rating system for its products that indicates the level of sexual or violent content and the target audience age.[15] Each and every major motion picture released in theaters or on DVD or VHS bears such a rating. Such ratings effectively enable parents to steer their children away from movies they consider inappropriate.

Most importantly, the film rating system enable parents to identify movies that they consider appropriate for their children, and the industry has acted to make this choice meaningful. The industry annually releases dozens of films geared toward audiences who do not wish to see sexual, violent, or profane content.[16] As a result, it is clear that the movie industry provides parents with abundant opportunity to find films they will consider appropriate for their children. The movie industry has, therefore, already met the request of an H.R. 4586 supporter who looked forward to a day when "the industry will get around to issue us age-appropriate products."[17]

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[13] *See H.R. 4586 Hearing* at 8 (statement of Marybeth Peters, Register of Copyrights) ("I do not believe that such legislation should be enacted—and certainly not at this time. As you know, litigation addressing whether the manufacture and distribution of such software violates the copyright law and the Lanham Act is currently pending in the United States District Court for the District of Colorado. A summary judgment motion is pending. The court has not yet ruled on the merits. Nor has a preliminary injunction been issued—or even sought.")

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

[15] Motion Picture Ass'n of America, Movie Rating System Celebrates 34th Anniversary with Overwhelming Parental Support (Oct. 31, 2002) (press release). The industry has five rating categories: G for General Audiences, PG for Parental Guidance Suggested, PG-13 for Parental Caution Suggested for children under 13, R for Restricted (parent or guardian required for children under 17), and NC-17 for No Children 17 and under admitted.

[16] In 1999, filmmakers released 14 G-rated and 24 PG-rated major motion pictures. In 2000, there were 16 G-rated and 27 PG-rated films. In 2001, 8 G-rated and 27 PG-rated movies were released. In 2002, 12 G-rated and 50 PG-rated pictures were distributed. Finally, in 2003, 11 G-rated and 34 PG-rated motion pictures were released.

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

While some of the bill's supporters say these choices are meaningless on the grounds that the entertainment industry markets violent and sexual content to youth,[18] that claim is false according to the most recent and objective report. The Federal Trade Commission conducted the most recent study on this issue and concluded the following:

> On the whole, the motion picture industry has continued to comply with its pledge not to specifically target children under 17 when advertising films rated R for violence. In addition, the studios generally are providing clear and conspicuous ratings and rating information in advertisements for their R- and PG-13 rated films.[19]

The industry is, therefore, doing its part to keep undesired content away from children.

The facts demonstrate that parents have the information and tools necessary to make and enforce informed choices about the media their children experience and have plenty of wholesome media alternatives to offer their children.

C. H.R. 4586 WOULD LEGALIZE EDITING THAT IS INCOMPREHENSIBLE AND OVERBROAD AND WOULD LEAD TO AN INCREASE IN UNDESIRED CONTENT

H.R. 4586 would lead to editing that is inconsistent, overbroad, and counterproductive. First, ClearPlay does not screen out the content it purportedly is designed to filter. The New York Times found that ClearPlay's editing does not conform to its own standards:

> For starters, its editors are wildly inconsistent. They duly mute every "Oh my God," "You bastard," and "We're gonna have a helluva time" (meaning sex). But they leave intact various examples of crude teen slang and a term for the male anatomy.
>
> In "Pirates of the Caribbean," "God-forsaken island" is bleeped, but "heathen gods" slips through.[20]

In this regard, ClearPlay is seemingly ineffective, and the legislation would be, as well.

Second, the legislation is overbroad and would go beyond its allegedly intended effects of legalizing tools for sanitizing movies of sex, violence, and profanity. In fact, H.R. 4586 would legalize a far wider and less desirable universe of filters for profit than its sponsors have disclosed. Filters could be based on social, political, and professional prejudices and could edit more than just movies.

For instance, because the bill is not explicitly limited to the deletion of sex, violence, and profanity, it would legalize socially-undesirable editing, such as:

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

[19] FEDERAL TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 10 (July 2004).

[20] David Pogue, *Add "Cut" and "Bleep" to a DVD's Options*, N.Y. TIMES, May 27, 2004, at G1.

- A filter that edits out racial conflict between law enforcement and minorities in *The Hurricane*, conflict that sets the context for how the minorities later react to the police; [21]
- A filter that skips over the nude scenes from *Schindler's List*, scenes that are critical to conveying the debasement and dehumanization suffered by concentration camp prisoners;
- A filter that strips *Jungle Fever* of scenes showing interracial romance and leaves only those scenes depicting interracial conflict; and
- A filter marketed by Holocaust revisionists that removes from World War II documentaries any footage of concentration camp.

The legislation also would immunize products that filter political or business content based on the opinions of the creator, including:

- A filter that skips over political advertisements contrary to the positions of the developer's beliefs;
- A filter that cleanses news stories, such as by editing out comments in support of or in opposition to government policies; and
- A filter that deletes television stories either helpful to the filter developer's competitor or critical of the developer's corporate parent.

We would hope that none of the bill's proponents would condone such malicious editing. Unfortunately, at the full Committee markup of the legislation, the sponsors rejected an effort to limit the proposal to its purported scope of profane, sexual, and violent content.[22] If enacted, H.R. 4586 could lead to the editing of artistic works based upon racial, religious, social, political, and business biases.

Moreover, the bill would permit the editing of works other than movies. While the bill's author argues that its purpose is to sanitize movies,[23] a close reading of the legislation shows that it would permit the editing of broadcast television programming, as well. More specifically, H.R. 4586 permits the "making of limited portions of audio or video content of a motion picture imperceptible." [24] The copyright law defines "motion pictures" as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." [25] Because this definition includes television pro-

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[21] ClearPlay actually has made such edits. "In its alterations of the film, ClearPlay chooses to omit the racist language [used by white police officers against a young Rubin Carter] that is integral to our understanding of the story. . . . ClearPlay skips these lines in full, choosing to fast-forward its version of the movie to a later part of the interrogation scene. However, it is via this racist and threatening language that the audience connects with the intimidation that the young Carter must feel and the racism he is encountering at the very center of law enforcement." Rosen Decl., *supra* note 4, at 6–7.

[22] *See Markup of H.R. 4586 Before the House Comm. on the Judiciary,* 108th Cong., 2d Sess. (July 21, 2004) (amendment offered by Rep. Adam Schiff (D-CA) to limit editing to profane, sexual, and violent content) [hereinafter *H.R. 4586 Markup*]. The amendment was defeated by voice vote. *Id.*

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

[24] H.R. 4586.

[25] 17 U.S.C. § 101.

grams,[26] the legislation would permit editing of broadcast television.

As a result, the bill would legalize a filter that skips, for instance, all commercial advertisements during playback of free, over-the-air broadcast television programming. The revenues that broadcast television companies generate from selling commercial advertisement time is the sole means by which television programming is financed.[27] Permitting television commercials to be deleted would reduce the ability of television programmers to sell ad time and thus make it financially difficult for television stations to remain in business. Consumers across the country would thus be deprived of a prime and free source of news, entertainment, and other information.

Finally, the legislation could lead to increased violence and sexual content in entertainment. Just as H.R. 4586 allows nudity to be edited out, it allows everything *except* nudity to be deleted. This concern is not merely hypothetical. Nissim Corporation has patented a technology called CustomPlay that, among other things, enables viewers of pornographic movies to filter out the non-pornographic scenes and "enhance" the adult-viewing experience.[28]

Additionally, because H.R. 4586 only protects technology developers like ClearPlay from liability for copyright and trademark infringement, Nissim may cause the bill to backfire on its sponsors. Nissim has sued ClearPlay for patent infringement, claiming to have a patent on ClearPlay-type film-editing technology.[29] If Nissim's claims are valid, then only Nissim could distribute such film-editing software.[30] Thus, contrary to its stated purpose, H.R. 4586 could succeed in legalizing only Nissam's technology, which enables users to *increase* the proportion of sex or violence in a movie.

D. H.R. 4586 WOULD IMPAIR ARTISTIC FREEDOM AND INTEGRITY

The problems with this legislation are compounded by the fact that it violates principles of artistic freedom and expression. The concept of protecting artistic freedom is well recognized.[31] The National Endowment for the Arts states "[a]rtistic work and freedom of expression are a vital part of any democratic society."[32] For this

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

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

[28] Using CustomPlay, "[a]n adult can play a version of an adult video that seamlessly excludes content inconsistent with the viewer's adult content preferences, and that is presented at a level of explicitness preferred by the adult. Adult content categories are standardized and are organized into five groups Who, What, Camera, Position, and Fetish." CustomPlay, Content Preferences (visited Aug. 24, 2004) <http://www.customplay.com/mccontent.htm>.

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

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

[31] SAM RICKETSON, THE BERNE CONVENTION: 1886–1986 456 (1997) ("Any author, whether he writes, paints, or composes, embodies some part of himself—his thoughts, ideas, sentiments and feelings—in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law, such as reputation, bodily integrity, and confidences. The interest in question here relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.").

[32] NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY2003–2008 3 (Feb. 2003).

reason, the NEA seeks to preserve works of art,[33] and an important part of preservation is to ensure artists are involved in how their creations are portrayed.

This principle, commonly referred to as a "moral right," is so important that it is required by international agreements and is codified in U.S. law. For instance, the Berne Convention for the Protection of Literary and Artistic Works grants creators the right to object to "any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[34] The United States, recognizing the importance of this right, subsequently enacted it into both copyright law[35] and trademark law.[36]

While moral rights protection for U.S. creators is far weaker than the protection afforded European creators, a certain level of protection for the moral rights of U.S. creators does exist. The ability of creators to bring claims under the Lanham Act, just as directors have done against ClearPlay, does provide creators with an important ability to protect their moral rights. In fact, the availability of section 43(a) was one of the specific reasons Congress decided, during adoption of the Berne Convention Implementation Act, that U.S. law met the moral rights obligations contained in the Berne Convention.[37] By limiting the availability of Lanham Act suits, H.R. 4586 is limiting the moral rights of directors in a way that conflicts with U.S. obligations under the Berne Convention.

Contrary to our laws and international obligations, H.R. 4586 does not require that filtering be done with the permission of the content creator or owner, but rather creates an exemption from copyright and trademark liability for filtering. As the Register of Copyrights stated before the Subcommittee:

> I have serious reservations about enacting legislation that permits persons other than the creators or authorized distributors of a motion picture to make a profit by selling adaptations of somebody else's motion picture. It's one thing to say that an individual, in the privacy of his or her home, should be able to filter out undesired scenes or [dialogue] from his or her private home viewing of a movie. It's another matter to say that a for-profit company should be able to commercially market a product that alters a director's artistic vision.[38]

It is clear, therefore, that the legislation violates an artist's right to his or her artistic integrity. To permit editing of a creation without the permission of the creator is to encourage censorship and to vitiate freedom of expression.

In conclusion, H.R. 4586 is ill-conceived, poorly-drafted legislation. Beyond its patent assault on intellectual property rights, the bill inappropriately involves Congress in a private business dispute and would lead to socially undesirable editing and actually permit the distribution of technology that makes pornography *even more*

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

pornographic. Finally, it encourages unwarranted intrusions into artistic freedom. For these reasons, we dissent.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
ROBERT C. SCOTT.
SHEILA JACKSON LEE.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.
TAMMY BALDWIN.

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