



Analysis of the Family Entertainment and Copyright Act of 2005 (S. 167) April 2005

Overview

Congress has passed S. 167, the Family Entertainment and Copyright Act of 2005, and it is expected to be signed into law shortly. The legislation consists of several provisions that were debated and refined in 2004, but that failed to win final passage before the close of the 108th Congress. The bill does not include many of the most controversial provisions considered last year and CDT believes that in current form, the bill is overall a balanced and appropriate measure that provides strong new copyright enforcement tools.

The legislation would:

- Create new criminal penalties for using “camcorders” or similar devices to copy movies in movie theaters;
- Create new criminal and civil penalties for copyright infringement involving works that have not yet been released for commercial distribution;
- Specify that devices or services that a consumer can use at home to skip over objectionable portions of a movie are lawful under U.S. copyright and trademark law (this portion of the legislation is titled the “Family Movie Act”);
- Require the U.S. Sentencing Commission to review sentencing guidelines for intellectual property crimes, and in particular whether higher sentences may be warranted for infringements involving pre-release works;
- Reauthorize the National Film Preservation Board and National Film Preservation Foundation; and
- Correct an error from previously enacted legislation that had inadvertently limited access by libraries and archives to certain orphan works.

Analysis

CDT believes it is crucial to find ways to protect and reward those who place valuable content online, in a manner consistent with democratic values and the open architecture of the Internet. In CDT’s view, this means that a successful strategy to combat copyright infringement in the digital world must include strong enforcement against infringers, the development of lawful online content distribution options, and greater consumer education. S. 167 makes a contribution to the enforcement side of this equation by providing additional tools that may prove useful in strengthening enforcement against some types of infringers.

- Camcorder Felony. The legislation's camcorder provision creates powerful new tools to punish those who record movies in a theater. It prohibits, in relatively broad fashion, any use of a camcorder or similar device in a theater to record a movie. The provision applies to attempted as well as actual use of recording devices, and to the recording (or attempted recording) of even just a portion of a movie. Penalties are potentially steep, with imprisonment of up to three years for a first offense. However, the legislation expressly states that mere possession of a camcorder in a movie theater will not be sufficient to support a conviction – so people who innocently carry a camcorder (or a cell phone with built-in video camera capability) into a theater in a pocket or bag shouldn't face prosecution.

CDT believes that, with sufficient publicity of the recording ban by movie theater operators, the impact of this provision on ordinary moviegoers should be relatively low. Meanwhile, it may help address the problem of an attendee at a preview or early screening of a movie making a recording using a camcorder and then allowing it to be posted on the Internet or converted into pirated DVDs.

Two caveats are worth mentioning. First, the legislation provides theater owners with legal immunity for questioning suspected violators or detaining them while police are summoned – a provision that will bear watching for signs of abuse or overzealousness. Second, there is no exception for a person recording an excerpt for purposes that would constitute legal “fair use,” such as for criticism or scholarship.

- Distribution of Pre-Release Works. S. 167 creates new felony and civil remedies for works that are being prepared for commercial distribution but have not yet been released. These provisions reflect the judgment that the commercial harm to a copyright holder is likely to be especially large when the work is made available online before it has been released to the public.

On the criminal side, the legislation prohibits making a pre-release work publicly available online. It applies to movies (before release on DVDs) and other video programming, music and sound recordings, and computer software. Again, penalties are steep – up to three years imprisonment with longer terms possible for repeat offenders and offenses committed for commercial gain. Given these penalties, consumers will need to take great care to ensure that any currently non-commercial works they post online are not intended for future commercial distribution. However, the risk of innocent infringement is mitigated somewhat by language providing that criminal penalties apply only if the infringement was willful and the infringer knew or should have known that the work was intended for commercial distribution.

S. 167 also makes civil remedies available for pre-release works that have been preregistered with the Copyright Office, and the legislation requires the establishment of a special, streamlined preregistration system for that purpose.

This preregistration option will be available for any class of works determined by the Copyright Office to have a history of pre-release infringement.

CDT believes that the provisions relating to pre-release works should offer powerful tools in the copyright enforcement arsenal.

- Family Movie Act. The portion of S. 167 known as the Family Movie Act will permit companies to offer, without fear of violating copyright or trademark law, products or services that enable parents to skip over objectionable content during home viewing of movies. The express exemption from liability is narrow – it applies only so long as no fixed version of the altered movie is created, and no audio or video content is added to replace the objectionable content.

CDT has long argued that the best way to protect children from inappropriate content is to empower parents with the right tools. In addition, in CDT's view it is entirely appropriate to permit consumers to exercise this type of voluntary control over their personal use of lawfully obtained copyrighted material. CDT was deeply concerned about language in prior versions of the legislation that could have been read to prejudge the question of whether other devices that facilitate consumer control – such as personal video recorders that provide the ability to skip over commercials – violate copyright law. The final version of the legislation succeeds in narrowly confirming the legality of one specific type of device or service, without addressing in any way the legality of other types.

- Film Preservation and Orphan Works. Enhancing free expression is one of CDT's bedrock principles, so we welcome provisions in the legislation to promote preservation of and access to older films. In addition, the legislation appropriately removes an inadvertent limitation on access by libraries and archives to certain works that are in the last 20 years of their copyright terms and that are not being commercially exploited.

In sum, CDT is pleased that the final version of S. 167 avoids many problems raised by prior versions of the legislation. In particular, the legislation is consistent with the principle that anti-infringement measures should target bad behavior rather than specific technologies. While there is room for legitimate discussion about appropriate penalty levels in the camcording and pre-release works provisions, there is little doubt that the behavior being addressed contributes to the piracy problem and merits punishment. CDT is hopeful that S. 167 may offer needed aid to strong enforcement against certain instances of copyright infringement.