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**REGISTER OF COPYRIGHTS**

**before the**

**SUBCOMMITTEE ON COURTS,**

**THE INTERNET AND INTELLECTION PROPERTY**

**OF THE HOUSE COMMITTEE ON THE JUDICIARY**

**“The Family Movie Act”**

**Washington, DC**

**June 17, 2004**

Mr. Chairman, Representative Berman and Members of the Subcommittee, thank you for inviting me to appear before the Subcommittee to discuss H.R. \_\_\_\_\_, “The Family Movie Act.”

The Family Movie Act would make it lawful for a person who is watching a motion picture on a DVD in the privacy of his or her own home to use software that filters out certain types of content that the person would prefer not to see or hear. As you pointed out at a hearing last month, Mr. Chairman, such software can be used by parents to assist them in preventing their children from seeing or hearing objectionable content by muting the sound or fast forwarding past objectionable material. What material is to be filtered out is determined by the provider of the software, but such software can include options that give the user the ability to select categories of material that the user prefers not to see or hear.

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. At the moment, providers of such software are free to sell it and consumers are free to use it. If the court ultimately rules that the making or distribution of the software is unlawful – a ruling that I believe is unlikely – the time may then be opportune to consider legislation. But meanwhile, there is every reason to believe that the proposed Family Movie Act is a solution to a problem that does not exist.

It is difficult to address the merits of this legislation without addressing the merits of the litigation in Colorado – something that I would prefer not to do, in part because the litigation remains at a very early stage. The Copyright Office generally expresses its views on individual copyright cases only in those cases that involve important questions of copyright law and policy and in which an erroneous ruling would create precedent harmful to the appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. For example, I have spoken out on issues relating to copyright infringement on peer-to-peer networks while litigation involving those issues has been pending because I believe that mass infringement on such networks poses an unprecedented threat to creators and copyright owners. In contrast, I do not believe that the litigation relating to the subject matter of this legislation implicates such issues, and I have no desire to be drawn into the Colorado litigation.

Nevertheless, I cannot avoid offering some views on the current state of the law, because my recommendation against the enactment of the Family Movie Act is based in part on my conclusion that the conduct that it is intended to permit is already lawful under existing law.

### **Policy Considerations**

Let me start with a proposition that I believe everybody can agree on. I do not believe anybody would seriously argue that an individual who is watching a movie in his or her living room should be forbidden to press the mute button on a remote control in order to block out language that he or she believes is offensive. Nor should someone be forbidden to fast-

forward past a scene that he or she does not wish to see. And certainly parents have the right to press the mute and fast-forward buttons to avoid exposing their children to material that they believe is inappropriate.

Does that mean that parents should be able to purchase a product that makes those decisions for them – that automatically mutes certain sounds and skips past certain images that the provider of that product believes parents would not want their children to hear or see? What if the parent is able to determine what categories of material (e.g., profanity, nudity, violence) should be blocked, and is willing to trust the provider of the filtering product to make the ultimate judgments about what material in a particular movie falls into the selected categories?

It is very tempting to say that consumers should be able to purchase such products, and that providers of such products should be permitted to develop and market them. But I have to say that I am hesitant to endorse that proposition.

First of all, 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. Parents who have not prescreened a movie and made their own judgments can take guidance from the ratings that appear on almost all commercially released DVDs. Not only do those ratings label movies by particular classes denoting the age groups for which a particular movie is appropriate (e.g., G, PG, PG-13, R), but those ratings now also give parents additional advice about the content of a particular motion picture (e.g., "PG-13 ... Sexual Content, Thematic Material & Language" (from "The Stepford Wives") or "PG-13 ... Non-stop Creature Action Violence and Frightening Images, and for Sensuality" (from "Van Helsing")). It is appropriate that parents and other consumers should be given sufficient information to make a judgment whether a particular motion picture is suitable for their children or themselves to view. And there are many third-party services that supplement

the information provided by the movie studios. For example, the "Weekend" section of the *Washington Post* contains a "Family Filmgoer" column that briefly summarizes current motion pictures and offers more detailed commentary on the suitability of each movie for children of various age groups. For example, last week's column made the following observations as part of its commentary on the current motion picture, *Saved!:*

[H]igh schoolers may find it both humorous and intriguing. A little too adult for middle-schoolers, the movie contains a strongly implied sexual situation and rather romanticizes the idea of being an 18-year-old unwed mother. Other elements include profanity, sexual slang, homophobic talk, drunkenness, smoking and a jokey reference to bombing abortion clinics.

It seems that if a parent doesn't want a child to see offensive portions of a particular movie that's available on DVD, or if a person doesn't want to watch such portions himself, there is a simple choice: don't buy or rent the movie. In fact, those of us who are truly offended by some of the content found in many movies might ask ourselves whether we are doing ourselves or society any favors by buying or renting those movies. I have always had great faith in the marketplace, and I believe that if enough people simply refuse to spend their money on movies that contain offensive material, the incentives for motion picture studios to produce them will diminish.

I also have to wonder how effective such filtering products are. A review of one such product in the New York Times observed:

The funny thing is, you have to wonder if ClearPlay's opponents have ever even tried it. If they did, they would discover ClearPlay is not objectionable just because it butchers the moviemakers' vision. The much bigger problem is that it does not fulfill its mission: to make otherwise offensive movies appropriate for the whole family.

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. (So much for the promise to remove references to "God or a deity.")

Similarly, in "Terminator 3," the software skips over the

Terminator -- a cyborg, mind you -- bloodlessly opening his abdomen to make a repair. Yet you're still shown a hook carving bloody gouges into the palms of a "Matrix Reloaded" character.<sup>1</sup>

Again, perhaps it's just better to avoid getting the offending movie in the first place.

Moreover, 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 dialog 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.

That brings me to an objection that is more firmly rooted in fundamental principles of copyright, which recognize that authors have moral rights. To be sure, the state of the law with respect to moral rights is relatively undeveloped in the United States, and a recent ill-considered decision by our Supreme Court has weakened the protection for moral rights that our laws offer.<sup>2</sup> Moreover, I am not suggesting that enactment of the proposed legislation would violate our obligations under the Berne Convention to protect moral rights.<sup>3</sup> In fact, I do not believe that the Berne Convention's provision on moral rights forbids permitting the making and marketing of products that permit individual consumers to block certain undesired audio or video content from their private home viewing of motion pictures. But beyond our treaty obligations, the principles

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<sup>1</sup> David Pogue, "STATE OF THE ART; Add 'Cut' and 'Bleep' To a DVD's Options," New York Times, May 27, 2004, page G1.

<sup>2</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. \_\_\_, 123 S.Ct. 2041 (2003). While the *Dastar* decision is not the subject of this hearing, I believe that the subcommittee should examine whether section 43(a) of the Lanham Act should be amended to reflect what was the longstanding understanding prior to *Dastar* – that section 43(a) is an important means for protecting the moral rights of attribution and integrity. Although I will comment no further on *Dastar* at this hearing, and although I will not comment on the portion of the proposed legislation that would provide an exemption from liability under the Lanham Act, it is worth noting that in the wake of *Dastar* (and, for that matter, even under pre-*Dastar* law), there may be little reason to be concerned that the conduct proposed to be covered by the proposed Family Movie Act would violate the Lanham Act in any event.

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works, Art. 6bis.

underlying moral rights are important. The right of integrity – the author’s right to prevent, in the words of Article 6bis of the Berne Convention – the “distortion, mutilation, or any other modification of, or other derogatory action in relation to [his or her] work, which would be prejudicial to his honor or reputation” – is a reflection of an important principle. As one leading commentator has put it:

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.<sup>4</sup>

I can well understand how motion picture directors may be offended when a product with which they have no connection and over which they have no control creates an altered presentation of their artistic creations by removing some of the directors’ creative expression. This is more than a matter of personal preference or offense; it finds its roots in the principle underlying moral rights: that a creative work is the offspring of its author, who has every right to object to what he or she perceives as a mutilation of his or her work.

Although I acknowledge that there is some tension between principles of moral rights and the products we are discussing today, I believe that this narrowly-defined activity does not violate moral rights, for several reasons: (1) it takes place in the context of a private performance of a motion picture in which the alteration of the original motion picture is not fixed in a tangible medium of expression; (2) it consists only of omissions of limited portions of the sounds and/or images in the motion picture, rather than the addition of material or alteration of material in the motion picture; and (3) it is desired and implemented by the individual who is viewing the private performance, who is perfectly aware that there are omissions of material and that the director and studio did not consent to those omissions. But that is not to say that the creator of the motion picture does not have a legitimate artistic reason to complain – and I am very sympathetic to such

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<sup>4</sup> Sam Ricketson, *The Berne Convention: 1886-1986* 456 (1987).

complaints.

Nevertheless, despite my misgivings, I believe that on balance parents and other consumers should be able to purchase products that allow them to mute and skip past audio and visual content of motion pictures that they believe is objectionable. While the artistic integrity as well as the continuity of the motion picture may suffer, the person viewing the edited performance is fully aware that he or she is viewing a performance of less than the entire motion picture because that was his or her preference. Because only a private performance is involved, the only changes consist of deletions, and no copies of an edited version of the motion picture are made or further communicated, I do not believe the director or copyright owner should have the power to stop the marketing and use of software that renders such a performance.

One reason why I am reasonably comfortable with this conclusion is that, although the producer and marketer of the software is presumably making a profit from its sale, it is difficult to imagine any economic harm to the copyright owner. The software is designed to be used in conjunction with an authentic DVD of the motion picture. In fact, arguably some people who would not have purchased or rented a particular movie if they did not have the ability to skip past portions that they believe are objectionable will purchase or rent it if they can obtain the software for that particular movie.

### **Analysis of Current Law**

Despite my conclusion that on balance, the conduct that is addressed by the Family Movie Act should not be prohibited, I do not believe that legislation is needed because it seems reasonably clear that such conduct is not prohibited under existing law. The exclusive rights of the copyright owner that might arguably be implicated are the reproduction, distribution, public performance and derivative work rights, but on examination, it seems clear that there is no infringement of any of those rights.<sup>5</sup>

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<sup>5</sup> This brief legal analysis is based on my admittedly sketchy understanding of how the products that are the subject of the proposed legislation work. If, for example, these products

There is no infringement of the reproduction right because no unauthorized copies of the motion pictures are made. Rather, an authorized copy of the motion picture, distributed on a DVD, is played in the same manner as it would be played on any conventional DVD player, but with some of the audio and video content of the motion picture in effect deleted from that private performance because it is muted or bypassed. The distribution right is not infringed because no copies of the motion picture are distributed, apart from the authorized, unedited DVD that the consumer has purchased or rented. The public performance right is not infringed because the motion picture is played in the privacy of the viewer's home, a quintessential private performance.<sup>6</sup>

Not surprisingly, the motion picture studios have not asserted claims of infringement of the reproduction, distribution and public performance rights. Rather, they have alleged infringement of the right to prepare derivative works. The analysis of that claim is a little more complex, but ultimately the result is the same: I believe that the arguments that such products infringe the derivative work right are weak.

The fundamental flaw in the claim of infringement of the derivative work right is that the only possible manifestation of a derivative work is in the private performance itself. It is true that the home viewer who uses one of these products to remove some of the movie's audio and/or visual content is seeing an altered version of the film. Such a version might appear to be an adaptation, or, in copyright parlance, a "derivative work." But that is not my reading of the law. Section 106(2) of the Copyright Act gives the copyright owner the exclusive right to "prepare derivative works based upon the copyrighted work." The question is, can you have a derivative work when no *copy* (or "fixation") of the derivative work exists? Is an altered private

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actually caused copies to be made of any or all of a motion picture, my analysis might well be different.

<sup>6</sup> Of course, it is possible to use the filtering products to alter a performance of the motion picture in a public setting, resulting in an infringing public performance. But as I understand it, that is not the typical use, nor are the products that are the subject of this legislation marketed for such use. Moreover, if there were a public performance, it would be an act of infringement not because the performance was altered, but simply because the motion picture was performed in public without the authorization of the copyright owner.

performance of a motion picture a derivative work when it leaves the copy of the motion picture intact and does not create a copy of the altered version?

A review of the legislative history of the 1976 Copyright Act might lead one to the conclusion that the derivative work right can be infringed simply by causing an altered performance of a work. The reports of both the House and Senate Judiciary Committees on the 1976 Act state:

Preparation of derivative works. – The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

H.R. Rep. No. 94-1476, at 64 (1976); S. Rep. No. 94-473, at 58 (1976). I believe that when the House and Senate Reports spoke of derivative works, such as ballets, pantomimes, and improvisations, that are not fixed in tangible form, they were referring to public performances of works in altered form. There are strong policy reasons for recognizing a derivative work right when a work is performed publicly in an altered form, even if the alteration never exists apart from the performance. Certain types of works, such as the works mentioned in the legislative history, are exploited primarily by means of public performance rather than by sale of copies, and to require fixation of the derivative work in order to have infringement of the derivative work right could defeat the very purpose of recognizing a derivative work right.

However, while it may have been the intent of Congress not to make infringement of the derivative work right turn on whether the derivative work has been fixed, I do not find that intent expressed in the language of the statute. The exclusive right is a right to “prepare derivative works based upon the copyrighted work.” The question then becomes, what is a derivative work? Must a derivative work be fixed in a tangible medium of expression? Certainly in order to qualify for copyright protection, a derivative work – like any work – must be fixed in a tangible medium of expression. 17 U.S.C. §102(a). But is there a fixation

requirement for infringement of the derivative work right?

Although one might expect the extensive list of definitions in §101 of the Copyright Act to include a definition of as fundamental a term as “work,” no such definition exists.

However, §101 does tell us when a work is “created”:

A work is “created” when it is fixed in a copy or phonorecord for the first time where; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

If a work is created when it is fixed in a copy or phonorecord for the first time, it is difficult to imagine that the work exists prior to that time. Thus, the Copyright Act seems to have the functional equivalent of a partial definition of a work; while it may not tell us everything that we need to know in order to recognize a “work,” it does tell us that a work must be fixed in a copy or phonorecord. And if it is a work in progress, then at any point in time, the “work” consists of that which has already been fixed.

Because a plain reading of the statute leads to the conclusion that in order to have an infringement of the derivative work right, the derivative work must be fixed, I find it difficult to conclude that there is an infringement of the derivative work right when software instructs a DVD player to mute certain sounds or skip past certain images in a motion picture being played on the DVD. The putative derivative work is never fixed. Moreover, if, as I understand to be the case, the software itself consists of instructions to mute the soundtrack at a point a certain number of minutes and seconds into the performance of the movie, or to skip past the part of the movie that begins at a point a certain number of minutes and seconds into the performance of the movie and ends certain number of seconds later, I find it difficult to characterize that software as a derivative work, since none of the underlying work is actually incorporated into the software.

There are other products in the marketplace that serve a similar function, but which are infringing and should not be permitted. For example, I understand that some products on the market consist of videotapes of motion pictures that have had allegedly offensive scenes physically removed from the videotape. In such cases, there is – and ought to be -- a violation of the derivative work

right: permanent copies of edited versions of the copyrighted motion pictures are made and distributed. They can also be redistributed, competing in the marketplace with legitimate copies and perhaps ending up in the hands of recipients who aren't even aware that they are edited versions. But it is not the intent of the proposed Family Movie Act to make those products lawful.

### **Is There a Need for Legislation?**

Because I believe that under existing law, the conduct that is addressed by this legislation is already lawful, and because I believe it is likely that the district court in Colorado will come to the same conclusion, I do not believe there is any reason to enact legislation that would make lawful that which already is lawful.

I could understand the possible need for legislation if there were substantial doubt as to the outcome of the litigation, or if there was a pressing need to settle the issue once and for all by Congressional action due to an urgent need to permit conduct which people could not engage in unless the legislation were enacted. But no injunction has been entered. The defendants are still producing their products. Indeed, I understand that recently a major consumer electronics equipment manufacturer has begun to distribute a DVD player that has such software preloaded – compelling evidence that the pending litigation has not had a chilling effect. And, given my ambivalence about the desirability of permitting the conduct at issue here, I cannot endorse the notion that there is a pressing need to resolve the issue here and now.

In fact, the issues raised at this hearing persuade me that we need to reexamine the derivative work right in order to determine whether the approach taken in 1976 still works in the 21<sup>st</sup> Century, when technological changes may well be making fixation an obsolete concept for purposes of determining when the derivative work right has been violated. While the technology that we have been discussing today is fairly benign, it is not difficult to imagine technologies that, without creating a fixation of a new derivative work, result in performances that do not simply edit out limited portions of the work that many viewers would find offensive, but either add new material or result in a rendition of the copyrighted work that so changes the character or

message of that work that it constitutes an assault on the integrity of the work. The marketing and use of such technologies should not be tolerated, and I strongly believe that any legislation that affirmatively permits the use and marketing of the technologies we are discussing today should also expressly prohibit the use and marketing of technologies that result in performances of those more harmful alterations of a work.

Rather than enact narrow legislation that would create a safe harbor for the technologies that simply mute and skip content, a safe harbor that – as I have already explained – we do not urgently need, I believe we should take a little more time and give a little more thought to the extent to which the derivative work right should require fixation as a prerequisite for infringement. As I have already noted, Congress's original, but apparently unrealized, intent was that there need not be a fixation of the work in order to infringe the derivative work right. We should take a fresh look at that judgment and ask under what circumstances, if any, fixation should be a requirement. For example, I believe that fixation should not be required in order to infringe the derivative work right in cases where there is a derivative public performance – e.g., of a play, or a ballet, the types of performances that were addressed in that part of the legislative history that stated that there “may be an infringement even though nothing is ever fixed in tangible form.” Whether fixation should be a requirement in order to infringe the derivative work right where there is a only private performance may require a more nuanced approach, looking at the nature of the alteration from the original work. The result of such a study might be an amendment could be in the form of a new definition of “to prepare derivative works based upon the copyrighted work” to be added to section 101.

Assuming that you do decide to enact legislation now, I will now turn to the specific legislative text that has been proposed.

### **The Family Movie Act**

The Family Movie Act would amend section 110 of the Copyright Act to provide that it is not an infringement of copyright for the owner or lawful possessor of an authorized copy of a

motion picture to make limited portions of audio or video content of the motion picture imperceptible in the course of private home viewing of the motion picture. It further provides that the use of technology to make such audio or video content imperceptible is not an infringement. In order to qualify for the exemption, no fixed copy of the altered (i.e., edited) version of the motion picture may be made.

“Private home viewing” would be defined as viewing for private use in a household, by means of consumer equipment or services that are operated by an individual in that household and that serves only that household. This definition is adapted from the definition of “private home viewing” found in section 119 of the copyright law, the statutory license for secondary transmissions of television broadcast signals by satellite carriers.

The legislation would codify what I believe is existing law: A consumer would be permitted to use technology, such as the software that we have been discussing, that automatically mutes parts of the soundtrack of a motion picture or fast-forwards past a part of the audiovisual content of the motion picture when the consumer is playing a lawfully acquired copy of the motion picture in the privacy of his or her own home. Not only would the consumer’s use of that technology be noninfringing, but the manufacture and sale of that technology would also be noninfringing, to the extent that it enables the muting or fast-forwarding.

The legislation would also provide that it is not a violation of the Lanham Act to engage in such conduct, but that to qualify for this immunity the manufacturer of the technology must provide a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder.

Mr. Chairman, as I have already stated, I do not believe that this legislation is necessary or desirable at this time. But if the subcommittee disagrees, then I believe that the language that you have drafted is a reasonable means of accomplishing your goals.