

in the actual motion picture will be skipped or muted at the direction of the viewer based on that viewer's desire to avoid seeing or hearing the action or sound in the motion picture. Skipping or muting done for the purpose of or having the effect of avoiding copy protection technologies would be an abuse of the safe harbor outlined in this legislation and may violate section 1201 of title 17.

Violating the Digital Millennium Copyright Act, and particularly its anti-circumvention provisions, is not necessary to enable technology of the kind contemplated under the Family Movie Act. Although the amendment to section 110 provides that it is not an infringement of copyright to engage in the conduct that is the subject of the Family Movie Act, the Act does not provide any exemption from the anti-circumvention provisions of section 1201 of title 17, or from any other provision of chapter 12 of title 17. It would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new exemption in section 110(11), just as it is not a defense under section 1201 that the circumvention is for the purpose of engaging in any other non-infringing conduct.

There are a number of companies currently providing the type of products and services covered by this Act. The Family Movie Act is intended to facilitate the offering of such products and services, and it certainly creates no impediment to the technology employed by those companies. Indeed, it is important to underscore the fact that the support for such technology and consumer offerings that is reflected in this legislation is driven in some measure by the desire for copyright law to be respected and to ensure that technology is deployed in a way that supports the continued creation and protection of entertainment and information products that rely on copyright protection. This legislation reflects the firm expectation that those rights and the interests of viewers in their homes can work together in the context defined in this bill. Any suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the copy protection schemes that provide protection for such work should be rejected as counter to legislative intent or technological necessity.

The House-passed bill included an explicit exclusion to the new section 110(11) exemption in cases involving the making imperceptible of commercial advertisements or network or station promotional announcements. This provision was added on the House floor to respond to concerns expressed by Members during the House Judiciary Committee markup that the bill might be read somehow to exempt from copyright infringement liability devices that allow for skipping of advertisements in the playback of recorded television (so called "ad-skipping" devices). Such a reading is not consistent with the language of the bill or its intent.

The phrase "limited portions of audio or video content of a motion picture" applies only to the skipping and muting of scenes or dialog that are part of the motion picture itself, and not to the skipping of commercial advertisements, which are themselves considered motions pictures under the Copyright Act. It also should be noted that the phrase "limited portions" is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work (including a commercial advertisement) is made imperceptible, the section 110(11) exemption would not apply.

The House-passed bill adopted a "belt and suspenders" approach to this question by adding exclusionary language in the statute itself. Ultimately that provision raised concerns in the Senate that such exclusionary language would result in an inference that the bill somehow expresses an opinion, or even decides, the unresolved legal questions underlying recent litigation related to these so-called "ad-skipping" devices. In the meantime, the Copyright Office also made clear that such exclusionary language is not necessary. In other words, the exclusionary language created unnecessary controversy without adding any needed clarity to the statute.

Thus, the Senate amendment omits the exclusionary language while leaving the scope and application of the bill exactly as it was when it passed the House. The legislation does not provide a defense in cases involving so-called "ad-skipping" devices, and it also does not affect the legal issues underlying such litigation, one way or another. Consistent with the intent of the legislation to fix a narrow and specific copyright issue, this bill seeks very clearly to avoid unnecessarily interfering with current business models, especially with respect to advertising, promotional announcements, and the like. Simply put, the bill as amended in the Senate is narrowly targeted to the use of technologies and services that filter out content in movies that a viewer finds objectionable, and it in no way relates to or affects the legality of so-called "ad-skipping" technologies.

There are a variety of services currently in litigation that distribute actual copies of altered movies. This type of activity is not covered by the section 110(11) exemption created by the Family Movie Act. There is a basic distinction between a viewer choosing to alter what is visible or audible when viewing a film, the focus of this legislation, and a separate entity choosing to create and distribute a single, altered version to members of the public. The section 110(11) exemption only applies to viewer directed changes to the viewing experience, and not the making or distribution of actual altered copies of the motion picture.

Related to this point, during consideration of this legislation in the House there were conflicting expert opinions on whether fixation is required to infringe the derivative work right under the Copyright Act, as well as whether evidence of Congressional intent in enacting the 1976 Copyright Act supports the notion that fixation should not be a prerequisite for the preparation of an infringing derivative work. This legislation should not be construed to be predicated on or to take a position on whether fixation is necessary to violate the derivative work right, or whether the conduct that is immunized by this legislation would be infringing in the absence of this legislation. Subsection (b) also provides a savings clause to make clear that the newly-created copyright exemption is not to be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption.

Subsection (c): Exemption from Trademark Infringement

Subsection (c) provides for a limited exemption from trademark infringement for those engaged in the conduct described in the new section 110(11) of the Copyright Act. In short, this subsection makes clear that a person engaging in the conduct described in section 110(11)—the "making imperceptible" of portions of audio or video content of a motion picture or the creation or provision of technology to enable such making avail-

able—is not subject to trademark infringement liability based on that conduct, provided that person's conduct complies with the requirements of section 110(11). This section provides a similar exemption for a manufacturer, licensee or licensor of technology that enables such making imperceptible, but such manufacturer, licensee or licensor is subject to the additional requirement that it ensure that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or the copyright holder.

Of course, nothing in this section would immunize someone whose conduct, apart from the narrow conduct described by 110(11), rises to the level of a Lanham Act violation. For example, someone who provides technology to enable the making imperceptible limited portions of a motion picture consistent with section 110(11) could not be held liable on account of such conduct under the Trademark Act, but if in providing such . . .

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 10—HONORING THE LIFE OF JOHNNY CARSON

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

S. RES. 10

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

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

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

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

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

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

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

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

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

Resolved, That the Senate—

- (1) mourns the loss of Johnny Carson;
- (2) recognizes the contributions of Johnny Carson to his home State of Nebraska;
- (3) admires the sense of humor and late night presence of Johnny Carson in homes in the United States for over 30 years;
- (4) expresses gratitude for the lifetime of memories Johnny Carson provided; and
- (5) directs the Secretary of the Senate to transmit an enrolled copy of this resolution to the family of Johnny Carson.

SENATE RESOLUTION 11—HONORING THE SERVICE OF REV-EREND LLOYD OGILVIE

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

and Mr. SANTORUM) submitted the following resolution; which was considered and agreed to:

S. RES. 11

Whereas a decade ago, on January 24, 1995, the Reverend Lloyd Ogilvie was elected by the Senate as its 61st Chaplain;

Whereas Reverend Lloyd Ogilvie is a friend and confidant to Senators, and to many staff members and Senate employees;

Whereas Reverend Lloyd Ogilvie was always a soothing presence in a body whose Members are sometimes at loggerheads;

Whereas Reverend Lloyd Ogilvie is someone upon whom Democrats and Republicans, men and women of different religious faiths, can count as a sympathetic and trusted advisor; and

Whereas after the tragedy of September 11, 2001, and until his retirement in 2003, we depended on him even more to strengthen our spirit and help us find consolation in Scripture: Now, therefore, be it

Resolved, That the Senate honors the significance of this 10-year anniversary by declaring to the Reverend Lloyd Ogilvie that we remember his loving service to the Senate and this Country, and use this anniversary to express our gratitude to him for his ministry to the Senate family.

SENATE RESOLUTION 12—COMMENDING THE UNIVERSITY OF SOUTHERN CALIFORNIA TROJANS FOOTBALL TEAM FOR WINNING THE 2004 BOWL CHAMPIONSHIP SERIES NATIONAL CHAMPIONSHIP GAME

Mrs. FEINSTEIN (for herself and Mrs. BOXER) submitted the following resolution; which was considered and agreed to:

S. RES. 12

Whereas the University of Southern California Trojans football team won the 2004 Bowl Championship Series national championship game, defeating Oklahoma University by a score of 55 to 19 in the FedEx Orange Bowl at Pro Player Stadium in Miami, Florida, on January 4, 2004;

Whereas the University of Southern California Trojans football team has won 11 national championships;

Whereas the University of Southern California Trojans football team has won 34 Pacific 10 conference championships;

Whereas the University of Southern California Trojans football team has won 27 bowl games, only 2 games fewer than the University of Alabama;

Whereas the University of Southern California Trojans football team won 13 games during the 2004 season for the first time in the history of the school and became the first team since the University of Nebraska in 1994-1995 to repeat as Associated Press national champions and the second team to start and finish the season at number 1 in the Associated Press poll;

Whereas the University of Southern California Trojans football team has won 22 consecutive games;

Whereas the University of Southern California Trojans football team is ranked in the top 10 in every defensive category;

Whereas the University of Southern California Trojans football team has set a school record by scoring at least 20 points in its last 38 games;

Whereas Head Coach Pete Carroll has a record of 42 wins, 9 losses at the University of Southern California and is the second University of Southern California coach to win back-to-back national championships;

Whereas Heisman Trophy winner and Associated Press Player of the Year, quarterback Matt Leinart, completed 18 of 35 passes for a total of 332 yards and set an Orange Bowl record with 5 touchdown passes;

Whereas tailback Reggie Bush was a Heisman Trophy finalist and the winner of the Chic Harley award, presented annually to the College Football Player of the Year by the Touchdown Club of Columbus; and

Whereas quarterback Matt Leinert, tailback Reggie Bush, defensive tackle Shaun Cody, and linebacker Matt Grootegoed were named to the Associated Press All-American first team: Now, therefore, be it

Resolved, That the Senate—

(1) commends the University of Southern California Trojans football team for winning the 2004 Bowl Championship Series national championship game; and

(2) directs the Secretary of the Senate to make available to the University of Southern California an enrolled copy of this resolution for appropriate display.

SENATE CONCURRENT RESOLUTION 4—EXPRESSING THE SENSE OF THE CONGRESS THAT THE DEPARTMENT OF DEFENSE SHOULD CONTINUE TO EXERCISE ITS STATUTORY AUTHORITY TO SUPPORT THE ACTIVITIES OF THE BOY SCOUTS OF AMERICA, IN PARTICULAR THE PERIODIC NATIONAL AND WORLD BOY SCOUT JAMBOREES

Mr. NELSON of Florida (for himself, Mr. ALLARD, Mr. ALLEN, Mr. NELSON of Nebraska, Mr. SESSIONS, and Mr. ENZI) submitted the following concurrent resolution; which was referred to the Committee on Armed Services:

S. CON. RES. 4

Whereas the Boy Scouts of America was incorporated on February 8, 1910, and received a Federal charter on June 15, 1916, which is codified as chapter 309 of title 36, United States Code;

Whereas section 30902 of title 36, United States Code, states that it is the purpose of the Boy Scouts of America to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues;

Whereas, since its inception, millions of Americans of every race, creed, and religion have participated in the Boy Scouts of America, and the Boy Scouts of America, as of October 1, 2004, utilizes more than 1,200,000 adult volunteers to serve 2,863,000 youth members organized in 121,051 units;

Whereas the Department of Defense and members of the Armed Forces have a long history of supporting the activities of the Boy Scouts of America and individual Boy Scout troops inside the United States, and section 2606 of title 10, United States Code, enacted in 1988, specifically authorizes the Department of Defense to cooperate with and assist the Boy Scouts of America in establishing and providing facilities and services for members of the Armed Forces and their dependents, and civilian employees of the Department of Defense and their dependents, at locations outside the United States;

Whereas sections 4682, 7541, and 9682 of title 10, United States Code, authorize the Department of Defense to sell and, in certain cases, donate obsolete or excess material to the Boy Scouts of America to support its activities; and

Whereas Public Law 92-249, enacted on March 10, 1972, and codified as section 2554 of title 10, United States Code, recognizes that Boy Scout Jamborees may be held on military installations and authorizes the Department of Defense, in support of Boy Scout Jamborees, to lend certain equipment and to provide transportation from the United States or military commands overseas, and return, at no expense to the United States Government, and to provide other personnel services and logistical support to the Boy Scouts of America to support national and world gatherings of Boy Scouts at events known as Boy Scout Jamborees: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress that the Department of Defense should continue to exercise its long-standing statutory authority to support the activities of the Boy Scouts of America, in particular the periodic national and world Boy Scout Jamborees.

Mr. NELSON of Florida. Mr. President, today I rise to submit a concurrent resolution on behalf of myself, Senators ALLARD, ALLEN, BEN NELSON of Nebraska, SESSIONS and ENZI expressing the sense of the Congress that the Department of Defense should continue to exercise its statutory authority to support the activities of the Boy Scouts of America, in particular the periodic national and world Boy Scout Jamborees.

I ask unanimous consent that, the attached letter from Secretary of Defense Rumsfeld be printed in the RECORD.

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

THE SECRETARY OF DEFENSE,
Washington, DC, December 2, 2004.

The SPEAKER,
House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: The Department of Defense (DOD) has a long tradition of providing worldwide support for Boy Scout activities, which have been mutually beneficial to the Department and the Boy Scouts of America. I am especially appreciative of the efforts undertaken by numerous Scouting organizations to assist Service members deployed in the war on terrorism.

As you are aware, the American Civil Liberties Union sued the Department of Defense, the Department of Housing and Urban Development, and others, challenging the various statutory authorizations of support for the Boy Scouts on the grounds that they violate the Establishment Clause of the First Amendment. The Department of Justice is fighting the lawsuit, and the Department of Defense is assisting in all respects.

The Department of Defense entered a "partial settlement" in the litigation, which apparently resolved a small component of the overall lawsuit. I was unaware of this settlement, but I have since been advised that this agreement does not fundamentally change the long-standing relationship between America's Boy Scouts and U.S. military installations. I have been assured that Scouts will continue to have access to our facilities for camping, hiking, fishing, etc.

I am concerned with the impression left by the ACLU in recent reporting of this matter that suggests the Department of Defense is changing its relationship with the Boy Scouts. Recently, I supported Sense of Congress resolutions introduced in the House and Senate that the Department should continue to exercise its statutory authority to

support the activities of the Boy Scouts, in particular the periodic national and world Boy Scout Jamborees.

I also have reviewed legislation recently introduced that affirms Congressional support for Scouting organizations. I believe this legislation is important and welcome the opportunity to work with you as it moves forward.

Sincerely,

DONALD RUMSFELD.

SENATE CONCURRENT RESOLUTION 5—CONGRATULATING THE PEOPLE OF UKRAINE FOR CONDUCTING A DEMOCRATIC, TRANSPARENT, AND FAIR RUNOFF PRESIDENTIAL ELECTION ON DECEMBER 26, 2004, AND CONGRATULATING VIKTOR YUSHCHENKO ON HIS ELECTION AS PRESIDENT OF UKRAINE AND HIS COMMITMENT TO DEMOCRACY AND REFORM

Mr. LUGAR (for himself and Mr. BIDEN) submitted the following concurrent resolution; which was referred to the Committee on Foreign Relations:

S. CON. RES. 5

Whereas the establishment of a democratic, transparent, and fair election process for the 2004 presidential election in Ukraine and of a genuinely democratic political system have been prerequisites for that country's full integration into the international community of democracies;

Whereas the Government of Ukraine has accepted numerous specific commitments governing the conduct of elections as a participating State of the Organization for Security and Cooperation in Europe (OSCE);

Whereas the election of Ukraine's next president was seen as an unambiguous test of the extent of the Ukrainian authorities' commitment to implement these standards and build a democratic society based on free elections and the rule of law;

Whereas a genuinely free and fair election requires government and public authorities to ensure that candidates and political parties enjoy equal treatment before the law and that government resources are not employed to the advantage of individual candidates or political parties;

Whereas a genuinely free and fair election requires the full transparency of laws and regulations governing elections, multiparty representation on election commissions, and unobstructed access by candidates, political parties, and domestic and international observers to all election procedures, including voting and vote-counting in all areas of the country;

Whereas efforts by national and local officials and others acting at the behest of such officials to impose obstacles to free assembly, free speech, and a free and fair political campaign took place throughout Ukraine during the entire 2004 presidential election campaign without condemnation or remedial action by the Government of Ukraine;

Whereas on October 31, 2004, Ukraine held the first round of its presidential election and on November 21, 2004, Ukraine held a runoff presidential election between the two leading candidates, Prime Minister Viktor Yanukovich and opposition leader Viktor Yushchenko;

Whereas a consensus of Ukrainian and international election observers determined that the runoff election did not meet a considerable number of international standards for democratic elections, and these observers specifically declared that state resources

were abused in support of Viktor Yanukovich, and that illegal voting by absentee ballot, multiple voting, assaults on electoral observers and journalists, and the use of counterfeit ballots were widespread;

Whereas following the runoff presidential election on November 21, 2004, tens of thousands of Ukrainian citizens engaged in peaceful demonstrations in Kiev and elsewhere to protest the unfair election and the declaration by the Ukrainian Central Election Commission that Viktor Yanukovich had won a majority of the votes;

Whereas, on November 25, 2004, the Ukrainian Supreme Court blocked the publication of the official runoff election results thus preventing the inauguration of the next president of Ukraine until the Supreme Court examined the reports of voter fraud;

Whereas on November 27, 2004, the Parliament of Ukraine passed a resolution declaring that there were violations of law during the runoff presidential election on November 21, 2004, and that the results of the election did not reflect the will of the Ukrainian people;

Whereas on December 1, 2004, the Parliament of Ukraine passed a no confidence motion regarding the government of Prime Minister Viktor Yanukovich;

Whereas European mediators and current Ukrainian President Leonid Kuchma began discussions on December 1, 2004, to attempt to work out a resolution to the standoff between the supporters of both presidential candidates;

Whereas on December 3, 2004, the Ukrainian Supreme Court ruled that the runoff presidential election on November 21, 2004, was invalid and ordered a new presidential election to take place on December 26, 2004;

Whereas on December 8, 2004, the Parliament of Ukraine passed laws to reform the Ukrainian electoral process, including to reconstitute the Ukrainian Central Election Commission, and to close loopholes for fraud in preparation for a new presidential election;

Whereas on December 26, 2004, the people of Ukraine again went to the polls to elect the next president of Ukraine in what the consensus of domestic and international observers declared as a more democratic, transparent, and fair election process with fewer problems than the previous two rounds;

Whereas on January 10, 2005, the election victory of opposition leader Viktor Yushchenko was certified by the Ukrainian Central Election Commission; and

Whereas the runoff presidential election on December 26, 2004, signifies a turning point for Ukraine which offers new hope and opportunity to the people of Ukraine: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That Congress—

(1) commends the people and Government of Ukraine for their commitment to democracy and their determination to end the political crisis in that country in a peaceful and democratic manner;

(2) congratulates the people and Government of Ukraine for ensuring a free and fair runoff presidential election which represents the true choice of the Ukrainian people;

(3) congratulates Viktor Yushchenko on his election as President of Ukraine;

(4) applauds the Ukrainian presidential candidates, the European Union and other European representatives, and the United States Government for the role they played in helping to find a peaceful resolution of the crisis;

(5) acknowledges and welcomes the strong relationship formed between the United States and Ukraine and expresses its strong and continuing support for the efforts of the Ukrainian people and the new Government of

Ukraine to establish a full democracy, the rule of law, and respect for human rights; and

(6) pledges its assistance to the strengthening of a fully free and open democratic system in Ukraine, the creation of a prosperous free market economy in Ukraine, the reaffirmation of Ukraine's independence and territorial sovereignty, and Ukraine's full integration into the international community of democracies.

Mr. LUGAR. Mr. President, today I offer a resolution celebrating the December 26 election in Ukraine. I am pleased that Ukraine has dominated newspaper headlines and media broadcasts all over the world for the last sixty days. In that time, extraordinary events have occurred. A free press has revolted against government intimidation and reasserted itself. An emerging middle class has found its political footing. A new generation has found its hope for the future. A society has rebelled against the illegal activities of its government. It is in our interests to recognize and protect these advances.

I congratulate the people of Ukraine in their undeniable quest for freedom and democracy. Furthermore, I would also like to congratulate President Viktor Yushchenko, who was inaugurated last Sunday, for his victory.

The December 26 election in Ukraine was a tribute to Ukraine's maturing democracy and places Ukraine on a path to join the community of European democracies. A fraudulent and illegal election would have left Ukraine crippled. The new president would have lacked legitimacy with the Ukrainian people and the international community.

With the stakes so high, I commend President Bush, his Administration, and the international community for providing the people of Ukraine with the support they needed to withstand the threats to free and fair elections. Even in the face of repeated attempts to end any hope of a free and fair election, I was inspired by the willingness and courage of so many citizens of Ukraine to demonstrate their passion for free expression and the building of a truly democratic Ukraine.

I am hopeful that the momentum to foster democratic freedom around the world will continue. In his inaugural speech last week, President Bush stated his unequivocal support for democracy and put securing individual freedom at the forefront of America's foreign policy. I agree with the President. We must be prepared to play an active role in ensuring that democracy and basic freedoms are promoted and preserved around the world.

The future of Ukraine rests with its leaders and its people, but the United States and Europe must continue to support a foundation of democracy, rule of law, and a market economy, which will allow Ukraine to prosper and reach its full potential. I urge my colleagues to lend their support to U.S. policy in Ukraine and ask their support for this resolution.