

Legislative Analysis



PROHIBIT BOOTLEG MOVIES

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**House Bill 5336 as enrolled
Public Act 424 of 2004**

Sponsor: Rep. John Stakoe

**House Bill 5347 as enrolled
Public Act 423 of 2004**

Sponsor: Rep. Mike Nofs

**Senate Bills 1386 and 1387 as enrolled
Public Acts 451 and 450 of 2004**

Sponsor: Sen. Alan Sanborn

**House Committee: Criminal Justice
Senate Committee: Judiciary**

Second Analysis (1-12-05)

BRIEF SUMMARY: The bills would prohibit the practice of using recording devices to record movies in theaters and other venues, provide criminal penalties, establish civil remedies, and provide immunity from liability to theater owners when detaining violators.

FISCAL IMPACT: The House bills would have an indeterminate fiscal impact on the state and local units of government. The impact would depend on how the bills affected prosecutorial charging practices, numbers and types of convictions, and sentences imposed. Offenders convicted of felony offenses may present costs to the state for prison incarceration or felony probation supervision, or to local units of government for incarceration in a jail. Misdemeanor offenders are a local responsibility. Senate Bills 1386 and 1387 would have no significant fiscal impact on the judiciary.

THE APPARENT PROBLEM:

According to the Motion Picture Association of America, "camcorder piracy" is on the increase. Basically, it begins with a person sneaking a camcorder or other recording device into a movie theater and making a bootleg copy of a new movie. From that one copy, several dozen master copies may be created and then sold to a lab operator (for approximately \$100 each). The lab operator then makes thousands of copies. From ten master copies, 100,000 pirated discs can be made. Lab operators then sell the copies to individual distributors, who in turn sell to street vendors, Internet sales sites, gas stations, discount stores, and even vendors at flea markets. These vendors in turn sell the pirated discs to the general public, both in this country and abroad.

Reportedly, 125 laboratories making copies from master discs were investigated in the first nine months of 2003 with almost half a million pirated discs being seized, as compared to only 62 labs being investigated during the same time period the previous year and a seizure of 137,000 discs. Sometimes pirated copies of movies are released over the Internet or for sale before the movie has its official release. Over 50 major movie titles were stolen in the US prior to their general release between May of 2002 and May of 2003.

Obviously, this poses a significant financial problem for those in the movie industry. Films are expensive to make and distribute. Revenue from ticket sales and VCR tape and DVD rentals and sales are needed to cover production and distribution costs, salaries of actors, and provide a profit for investors. Pirated copies of movies reduce the revenue that a movie can generate, and even more so when made at a prescreening and released at the same time, if not before, a movie's general release. This has a far reaching effect beyond earnings for those in the movie industry, as it also affects earnings for all employees, local theaters and their employees, and the communities in which these employees live and spend their salaries.

Other than a federal law regarding copyright infringements, however, most states do not have a criminal law prohibiting the making of bootleg movies. Therefore, if an employee or manager of a movie theater observes someone recording the movie, local law enforcement officers have no legal authority to remove or ticket the person. Recently, four states (California, New York, Pennsylvania, and Wisconsin) and the District of Columbia have enacted anti-camcorder laws.

In addition, in light of the significant financial impact that "camcorder piracy" has on the movie industry, some feel that the injured parties should be able to sue the person caught videotaping a movie to help recover some of those losses. Legislation has been introduced to allow Michigan to join with other jurisdictions to make it a criminal offense to record a movie in a movie theater and to provide both civil immunity and civil remedies to theater owners in regards to individuals recording movies in their theaters.

THE CONTENT OF THE BILLS:

House Bills 5336 and 5347 would prohibit the practice of using a camcorder or other recording device inside a theatrical facility to record the movie and/or trailers being shown. Senate Bill 1386 would provide civil immunity to a theater owner who detained a person illegally recording a movie and Senate Bill 1387 would provide civil remedies to a theater owner to recover damages from a person who illegally recorded movies in his or her establishment. House Bill 5336, Senate Bill 1386, and Senate Bill 1387 are tie-barred to House Bill 5347. Specifically, the bills would do the following:

House Bill 5347 would add a new section to the Michigan Penal Code (MCL 750.465a) to make it a crime to knowingly operate an audiovisual recording function of a device in a theatrical facility where a motion picture was being exhibited without the consent of the owner or lessee of the theatrical facility and of the licensor of the motion picture. A "theatrical facility" would be defined as a facility being used to exhibit a motion picture to the public. It would not include an individual's residence or a retail establishment. An "audiovisual recording function" would mean the capability of a device to record or transmit a motion picture or any part of a motion picture by technological means.

A first offense would be a misdemeanor punishable by imprisonment for not more than one year, a fine of not more than \$10,000, or both. A second offense would be a felony punishable by up to two years imprisonment, a fine of not more than \$20,000, or both. A

third or subsequent offense would be punishable by imprisonment for not more than four years, a fine up to \$40,000, or both.

The bill would specify that it would not prevent any lawfully authorized state or federal investigative, law enforcement, protective, or intelligence-gathering employee or agent from operating the audiovisual recording function of a device in a theatrical facility where a motion picture was being shown as part of an investigative, protective, law enforcement, or intelligence-gathering activity. Further, a person could be charged with, convicted of, or punished for any other violation of law that proscribed conduct described in the bill and that carried a greater penalty.

The bill would effect March 15, 2005 (90 days after enactment).

House Bill 5336 would place the corresponding sentencing guidelines within the Code of Criminal Procedure (MCL 777.16w). Under the bill, a second offense of operating an audio visual recording device in a theatrical facility would be a Class G felony against property with a maximum term of imprisonment of two years and a third or subsequent offense would be a Class F felony against property with a maximum term of imprisonment of four years. The bill's effective date is June 1, 2004.

Senate Bill 1386 would add a new section to the Revised Judicature Act (MCL 600.2917a) to provide civil immunity to certain people who detained an individual believed to have committed a motion picture recording violation (proposed by House Bill 5347). Specifically, if the owner or lessee of a theatrical facility in which a motion picture was being shown, or the owner's or lessee's authorized agent or employee, alerted a law enforcement agency of an alleged motion picture recording violation and took measures, while awaiting the arrival of law enforcement authorities, to detain an individual whom he or she had probable cause to believe committed the violation, the owner, lessee, agent, or employee would not be liable in a civil action arising out of the measures taken. This immunity would not apply, however, if the plaintiff showed that the measures taken were unreasonable and/or the period of detention was unreasonably long. The bill takes effect December 28, 2004.

Senate Bill 1387 would also add a new section to the Revised Judicature Act (MCL 600.2953a) and would specify that a person who committed a motion picture recording violation would be liable to a person injured by the violation for one or more of the following:

- Actual damages.
- Exemplary damages of not more than \$1,000 -- Exemplary damages of not more than \$50,000, if violator were acting for direct or indirect commercial advantage or financial gain.
- Reasonable attorney fees and costs.

If the violator were an unemancipated minor who lived with his or her parent or parents, the parent or parents also would be liable to a person injured by the violation.

A person could recover damages only if a formal incident report, containing factual allegations that the defendant committed a violation, was filed with a local law enforcement agency with jurisdiction over the location where the violation took place. Recovery of damages, however, would not depend on the outcome of a criminal prosecution.

A person injured by a motion picture recording violation could bring an action to enjoin someone from the unauthorized recording, receipt, or transmission of a recording or transmission of a motion picture or part of a motion picture obtained or made by a violation, or from committing a violation. A person could bring an action regardless of whether the person had suffered or would suffer actual damages. An action under the bill would be in addition to any other criminal or civil penalties or remedies provided by law.

"Motion picture recording violation" would mean a violation of Section 465a of the Michigan Penal Code (proposed by House Bill 5347). "Person injured by a motion picture recording violation" would include, but not be limited to, the owner or lessee of the theatrical facility in which the motion picture was being shown.

The bill takes effect December 28, 2004.

ARGUMENTS:

For:

As technology advancements both decrease the size of recording devices and increase their quality, the problem of bootleg movies will also increase. In addition, copying and distributing the pirated movies is becoming increasingly sophisticated and organized. In short, it no longer is just a teenager sneaking in Dad's camcorder and selling a few scratchy copies to acquaintances. Indeed, the first nine months of 2003 recorded an explosion in pirated movies from last year. These bootleg movies are sold or passed along at flea markets, discount stores, gas stations, by street vendors, and over the Internet at auction sites, peer-to-peer networks, file transfer protocol (FTP) sites, and chat rooms. Sometimes movies appear at these venues before their general release in the United States or overseas. The financial losses this poses to the movie industry (estimated to be in the tens or hundreds of millions) affect more than just those at the top of the production and distribution houses. All of the investors and employees of these companies and movie theaters are affected as well, along with the communities where they live and pay taxes.

It would seem that the prudent approach would be to enact laws that go to the source of the problem (and the first link in the chain) – the person who, with a camcorder or other recording device, films a movie in a movie theater or other facility. However, most states, including Michigan, do not specifically criminalize this activity. Though federal copyright laws can provide some relief (if the person can be caught), the most effective measure would be to stop the person who is doing the actual filming.

House Bill 5336 would give state and local law enforcement officers the authority to arrest a person found filming a movie, and prosecutors would have an effective tool in stiff fines and possible jail or prison time. These penalties should act as a strong deterrent to discourage someone from this activity in the first place and provide an appropriate punishment for those who succumb to the lure of “easy money”. A high fine also mitigates the tendency of criminals to view such fines as merely a “cost of business”.

Further, the bill would protect the right of law enforcement agencies to conduct surveillance operations.

Though it is probably impossible to completely eliminate the pirating of movies, the bills should be successful in shutting down more of these operations.

For:

Films are expensive to make and market. Revenue from ticket sales and VCR tape and DVD rentals and sales are needed to cover production and distribution costs, salaries of actors, and provide a profit for investors. Pirated copies of movies reduce the revenue that a movie can generate, and impact earnings even for local theater owners and their employees.

Senate Bill 1387 would allow theater owners and others who suffer injury from a person illegally recording a movie to seek civil remedies. Under the bill, a person who suffered harm from the illegal recording of a movie could seek actual and exemplary damages from the individual who recorded the movie. The civil penalties under the bill, coupled with the prospect of jail and substantial criminal fines under House Bill 5347, will create a powerful disincentive for those contemplating sneaking a camcorder into a movie theater or other facility where movies are shown.

In addition, Senate Bill 1386 would provide protection to the theater owner from being sued by the person who was illegally recording a movie for injuries incurred when detained by the theater owner or theater employees while waiting for the police to arrive. However, the alleged perpetrator could still sue the theater owner or employee if the injuries occurred due to unreasonable measures being taken to subdue him or her or if the period of detention was unreasonably long.

Against:

Senate Bill 1387 seems to focus on the small fish (the person actually doing the video recording of a movie) and not the bigger fish (the lab operators who make multiple copies of the pirated movies and the people who distribute them to vendors). These people and the vendors who actually sell the bootleg copies could be enjoined from further circulating the bootleg copies, but would not be subject to the monetary penalties listed in the bill, as the underlying crime of committing a motion picture recording violation applies only to the person who recorded the movie. Of all the people involved in movie piracy, the person who sneaks a camcorder into a theater probably makes the least amount of money, yet stands to be the only one to suffer criminal and civil monetary penalties.

In addition, if the illicit recording was made by a minor, the parents could be sued by a theater owner or movie distributor even if they were unaware of their child's actions. This is unfair to parents given the gullibility of young teens who may succumb to temptation if handed a camcorder by an acquaintance and promised a token payment for videotaping the movie. If evidence showed that the parents had knowledge of their child's actions and did nothing to prevent or discourage it, then making them liable would be justified.

Furthermore, some feel that the inclusion of exemplary damages, in addition to actual damages, is excessive. Michigan currently does not allow punitive damages in civil cases, and the question must be raised whether this provision is an attempt to circumvent the prohibition. Again, since exemplary damages would be tied to the action of recording, it is more likely that the small fish in the chain of movie piracy would be unduly punished while those who gained the most financially would remain untouched.

Response:

Exemplary damages are typically used in cases when actual damages are hard to prove though it may be clear that some damage has been caused. Reportedly, it is not used very often. Also, unlike punitive damages, exemplary damages usually have a statutory cap and the focus is on providing a lesson to the general public to discourage similar actions in the future rather than on punishing a particular perpetrator.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.