

Legislative Analysis



CIVIL REMEDIES FOR VIOLATIONS INVOLVING BOOTLEG MOVIES

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Senate Bills 1386 and 1387 as passed by the Senate

Sponsor: Sen. Alan Sanborn

House Committee: Judiciary

Senate Committee: Judiciary

First Analysis (11-29-04)

BRIEF SUMMARY: 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.

FISCAL IMPACT: The bills 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. It begins with a person sneaking a camcorder or other recording device into a movie theater or facility where a movie is being shown and making a bootleg copy of a newly released or about-to-be-released movie. From that one copy, dozens of master copies can be created and then sold to a lab operator who then can make thousands of copies. From just ten master copies, 100,000 pirated discs can be made. These are then sold to distributors, who in turn sell to street vendors, Internet sales sites, gas stations, discount stores, and vendors at flea markets who then sell the pirated discs to the general public here and abroad.

For those in the movie industry, such acts of piracy have a significant financial impact.

House Bills 5336 and 5347 were recently passed by both chambers (but not yet ordered enrolled) in an attempt to address the problem of "camcorder piracy", where a person sneaks a video recording device into a theater to record the movie and then use that recording to make bootleg copies for profit. The bills would establish criminal penalties for the act of operating an audiovisual recording device in a theatrical facility without consent of the facility's owner or the licensor of the motion picture.

As passed by the House, House Bill 5347, which amended the Michigan Penal Code, included a provision to give immunity from civil actions to the owner or lessee of a theatrical facility. In general, under that provision, an owner or lessee could not be sued for injuries that happened in detaining a person caught in the act of illegally videotaping a movie while awaiting the arrival of the police. However, it has since been decided that the provision would be more appropriately placed within the Revised Judicature Act.

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. Additional legislation is being offered to address these concerns.

THE CONTENT OF THE BILLS:

House Bill 5347, which has passed both chambers but has not yet been ordered enrolled, would amend the Michigan Penal Code to make it a crime to use various recording devices to record movies being shown in theaters and other establishments (e.g., libraries or community centers). 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. The bills are tie-barred to House Bill 5347 and would take effect 90 days after their enactment.

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.

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.

ARGUMENTS:

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 his or her 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 usually 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.

POSITIONS:

A representative of the National Association of Theater Owners of Michigan indicated support for the bills. (11-9-04)

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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.