

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1928

SPONSOR: Commerce, Economic Opportunities, and Consumer Services Committee and
Senator Atwater

SUBJECT: Unlawful Use of a Recording Device in a Motion Picture Theater

DATE: April 9, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	Maclure	CM	Favorable/CS
2.	Clodfelter	Cannon	CJ	Favorable
3.	Brown	Lang	JU	Fav/1 amendment
4.				
5.				
6.				

I. Summary:

This Committee Substitute prohibits a person from knowingly operating the audiovisual recording function of any device in a motion picture theater, while a motion picture is being exhibited, without the express written consent of the theater owner. The committee substitute specifies that violations constitute a third degree felony, punishable by up to 5 years in prison or by a fine of up to \$25,000, or both. The committee substitute also provides an exemption from these criminal offenses for certain law enforcement officials under specified conditions.

The committee substitute authorizes the theater owner to detain a person who the theater owner believes in good faith has committed a violation. The committee substitute grants the theater owner immunity from civil actions arising out of measures taken to detain offenders while awaiting the arrival of a law enforcement officer, if offenders are detained in a reasonable manner for a reasonable time.

This committee substitute creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Unauthorized Recording of Motion Pictures

The Motion Picture Association of America (MPAA) estimates that the motion picture industry in the United States loses more than \$3 billion annually in potential worldwide revenue due to the unauthorized recording of motion pictures.¹

¹ Motion Picture Association of America, *Anti-Piracy*, at <http://www.mpa.org/anti-piracy> (last visited Mar. 10, 2004).

One of the methods used to create unauthorized recordings is commonly cited as “camcording.” Camcording entails the use of a hand-held video camera to record a motion picture film off the theater screen and then copy the film onto blank videocassettes or optical discs for distribution.

The MPAA reports the following:

- From May 2002-2003, over 50 major movie titles were stolen by camcording prior to their theatrical release in the U.S.;
- Seizures in the U.S. have uncovered 457,000 pirated optical discs in the first nine months of 2003, compared to 137,000 in the same period in 2002; and,
- 125 major pirate camcorder product source labs have been investigated in the U.S. in the first three quarters of 2003, more than twice the 62 investigations in the same period in 2002.²

Federal Offenses for Copyright Infringement

Under federal law, a person infringes a copyright if the person violates any of the exclusive rights of the copyright owner (17 U.S.C. s. 501(a)). These exclusive rights of a copyrighted work include, for example, the right to reproduce and distribute copies of the work, the right to prepare derivative works, and the right to display or perform the work publicly (17 U.S.C. s. 106).

Federal law imposes criminal penalties upon a person who willfully infringes a copyright by the reproduction or distribution of copyrighted works (17 U.S.C. s. 506(a)(2)). A violation involving the reproduction or distribution of at least 10 copies of one or more copyrighted works during any 180-day period, which have a total retail value of \$2,500 or more, is punishable by up to 3 years in federal prison and up to a \$250,000 fine (18 U.S.C. s. 2319(c) and s. 3571(b)). A second or subsequent offense is punishable by up to 6 years in federal prison. Lesser violations involving the reproduction or distribution of at least one copy of one or more copyrighted works during any 180-day period, which have a total retail value of more than \$1,000, are punishable by up to 1 year in federal prison and up to a \$100,000 fine.

In addition, federal law imposes enhanced criminal penalties upon a person who willfully infringes a copyright for purposes of commercial advantage or private financial gain (17 U.S.C. s. 506(a)(1)). A violation involving the reproduction or distribution of at least 10 copies of one or more copyrighted works during any 180-day period, which have a total retail value of more than \$2,500, is punishable by up to 5 years in federal prison and up to a \$250,000 fine (18 U.S.C. s. 2319(b) and s. 3571(b)). A second or subsequent offense is punishable by up to 10 years in federal prison. Lesser violations are punishable by up to 1 year in federal prison and up to a \$100,000 fine.

Federal Preemption of State Laws on Copyright Infringement

In 1978, the United States Congress preempted state laws governing “all legal or equitable rights” that are equivalent to the exclusive rights within the general scope of copyright (e.g., rights to reproduce and distribute work, prepare derivative works, and display or perform the work publicly) and that come within the subject matter of copyright (17 U.S.C. s. 301). Accordingly, federal law essentially precludes states from enforcing penalties for copyright

² *Theatrical Camcorder Piracy*, MPAA Camcorder Sheet (December 2003).

violations and requires, in most instances, criminal prosecution for copyright infringement under federal law.³

Taking Offenders into Custody

Under Florida law, a law enforcement officer, a merchant, a farmer, or a transit agency's employee or agent may take an offender into custody and detain the offender in a reasonable manner for a reasonable length of time, if:

- There is probable cause that a retail theft, farm theft, transit fare evasion, trespass, or unlawful use or attempted use of any antishoplifting or inventory control device countermeasure has been committed by the offender;
- In the case of retail or farm theft, the property can be recovered by taking the offender into custody;
- In the case of a farmer, the taking of the offender into custody is effectuated only on property owned or leased by the farmer; and
- The offender is detained for the purpose of attempting to recover the property or for prosecution (s. 812.015(3)(a), F.S.).

Immediately after the offender has been taken into custody, a law enforcement officer must be called to the scene.

If the offender is taken into custody and detained in accordance with the law, current law grants a law enforcement officer, merchant, merchant's employee, farmer, or transit agency's employee or agent with immunity from criminal or civil liability for false arrest, false imprisonment, or unlawful detention (s. 812.015(3)(c), F.S.).

III. Effect of Proposed Changes:

Criminal Penalty for Unauthorized Recording in Motion Picture Theater

The committee substitute prohibits a person from knowingly operating the audiovisual recording function⁴ of any device in a motion picture theater,⁵ while a motion picture is being exhibited, without the express written consent of the theater owner or the owner's employee or agent. The committee substitute specifies that violations constitute a third degree felony, punishable by up to 5 years in prison or by a fine of up to \$25,000, or both.

The definition of "motion picture theater" includes any venue when used primarily for the exhibition of a motion picture, but the term "motion picture" is not defined. Broadly interpreted, the definition of a motion picture theater might be applied to the living room of a private

³ U.S. Dept. of Justice, *Federal Prosecution of Violations of Intellectual Property Rights* 50, available at http://www.usdoj.gov/criminal/cybercrime/intell_prop_rts/SectIII.htm#III (last visited Mar. 10, 2004); see, e.g., *People v. Borriello*, 155 Misc. 2d 261, 588 N.Y.S.2d 991 (N.Y. Sup. Ct. 1992); *Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289 (E.D. Tex. 1988).

⁴ The bill defines an "audiovisual recording function" as the capability of a camera, an audio or video recorder, or any other device to record, transfer sounds or images, or transmit a motion picture or any part thereof by means of any technology now known or later developed.

⁵ The bill defines a "motion picture theater" as a movie theater, screening room, or other venue when used primarily for the exhibition of a motion picture.

residence when the room is being used primarily to watch a movie. It is not uncommon for a person to watch a televised movie, a videotape, or a DVD while recording a television show with a videocassette recorder or personal video recorder. In such a case, arguably all of the elements of the new offense of unlawful use of a recording device in a motion picture theater would have been met unless the homeowner had given written permission to operate the recording equipment.

Exemption for Law Enforcement Officials

The committee substitute exempts from being subject to the criminal penalties the employees or agents of an investigative agency, law enforcement agency, protective services agency, or intelligence-gathering agency operating an audiovisual recording device in a motion picture theater as part of a lawfully authorized investigation.

Immunity for Taking Offenders into Custody

The committee substitute authorizes the theater owner to detain a person who the theater owner believes in good faith has knowingly operated an audiovisual recording device in the theater, while a motion picture was being exhibited, without the theater owner's express written consent. The theater owner may only detain the offender in a reasonable manner for a reasonable time.

The committee substitute grants the theater owner immunity from civil actions arising out of measures taken to detain offenders while awaiting the arrival of a law enforcement officer. The committee substitute permits a civil claim against the theater owner if the plaintiff demonstrates by clear and convincing evidence that the measures taken were manifestly unreasonable or the period of detention was unreasonably long.

Limitation

The committee substitute specifies that it does not prevent the prosecution of an offense under any other law.

Effective Date

The committee substitute provides an effective date of July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The committee substitute authorizes, but does not require, theater owners in this state to detain and seek the criminal prosecution of persons who operate an audiovisual recording device in a motion picture theater without the owner's express written consent. To the extent that the committee substitute reduces the occurrence of "camcording," the committee substitute may reduce the revenue losses observed by the motion picture industry.⁶

C. Government Sector Impact:

The committee substitute does not designate a state agency as responsible for enforcement or prosecution of violations. State attorneys and local law enforcement agencies may experience a moderate workload increase associated with the enforcement and prosecution of violations.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:

Changes the basis for authorization for a theater owner to detain from good faith to probable cause, and grants criminal immunity to a theater owner in addition to civil immunity.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

⁶ See the discussion of unauthorized recording of motion pictures on pages 1 and 2 of this staff analysis.