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Legislative Bulletin……..……...…April 19, 2005

Contents:

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: $2.65 million over 5 years

Effect on Revenue: $0

Total Change in Mandatory Spending: $0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 2

Number of *Bills* Without Committee Reports: 0

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.Con.Res. 53 — Expressing the sense of the Congress regarding the issuance of the 500,000th design patent by the United States Patent and Trademark Office (*Conyers*)

Order of Business: The resolution is scheduled to be considered on Tuesday, April 19th, under a motion to suspend the rules and pass the bill.

Summary: H.Con.Res. 53 resolves that it is the sense of the Congress that—

> "(1) the United States Patent and Trademark Office has contributed significantly to the Nation's economy; and
>
> "(2) DaimlerChrysler Corporation and its employees should be commended for their achievement in receiving the 500,000th design patent."

Additional Information: On December 21, 2004, the United States Patent and Trademark Office awarded the 500,000th design patent to DaimlerChrysler Corporation for the design of the Chrysler Crossfire.

Committee Action: On February 10, 2005, the bill was referred to the Judiciary Committee, which considered it and reported it by voice vote to the full House on March 9, 2005.

Cost to Taxpayers: The resolution authorizes no expenditure.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Committee, in Report 108-022, finds authority for this legislation in Article I, Section 8, Clause 8 of the Constitution ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.")

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S. 167 — Family Entertainment and Copyright Act of 2005 (Senator Hatch)

Order of Business: The bill is scheduled to be considered on Tuesday, April 19th, under a motion to suspend the rules and pass the bill.

Summary: The bill creates new federal crimes dealing with recording and distributing movies shown in movie theaters, creates an exemption to federal copyright lays for devices that skip content in motion pictures for home viewing, and reauthorizes at $2.65 million over five years the National Film Preservation Foundation and its board, which both were set to expire.

Bootlegging Movies:

- Title I of S. 167 adds a new section to the federal criminal code (18 U.S.C. 2319) making it a federal crime for a person to knowingly use or attempt to use an audiovisual recording device to transmit or make a copy of a motion picture in a

motion picture exhibition facility. The crime is punishable by a fine and/or an imprisonment for up to three years for first offenses and not more than six years imprisonment for second offenses. The bill includes an immunity clause for theaters and their employees who detain, for limited times, persons suspected of illegally recording a movie. S. 167 states that this new provision does not annul or limit any rights or remedies under state law.

- Current law regarding criminal infringement also is modified under S. 167 to make illegal the "willful distribution of works being prepared for commercial distribution" (such as a person distributing bootleg copies of a movie about to be released). The crime is punishable by a fine and/or an imprisonment for up to three years (six years for second or subsequent offense) or a fine and/or no more than five years imprisonment if the offense was for commercial advantage or private financial gain (10 years for second or subsequent offenses). The bill authorizes the Register of Copyrights to create a new process for "preregistration of a work" for works being prepared for commercial distribution (because something, such as a movie, is not copyrighted until it is in its final form) and creates a civil remedy for infringements of preregistered works. The U.S. Sentencing Commission is directed to review and update sentencing guidelines regarding several intellectual property rights crimes.

Skipping Technology:

- Title II of S. 167 amends current copyright laws to add an addition exemption to Title 17 copyright laws for technology that skips or makes "imperceptible" portions of motion pictures for private home viewing. The exemption does not pertain to technology that makes a fixed copy of the altered version of the movie. The provision creates an exemption from trademark infringements for manufacturers, licensees, or licensors of this enabling technology as long as they provide a clear and conspicuous notice at the beginning of the movie (like the FBI warning) that indicates the performance is altered. This notice requirement starts with technology manufactured 180 days after enactment.

S. 167 also reauthorizes the 1995 National Film Preservation Foundation at $2.65 million over five years to match private contributions and reauthorizes through 2009 the 1996 National Film Preservation Foundation Board, which was originally authorized for seven years.

Additional Information: The bootlegging provisions are in part a response to movie industry reports that 90 percent of illegally distributed movies on the Internet come from camcorder copies of movies made in movie theaters. It is currently a federal crime to bootleg, or make unauthorized recordings and trafficking in sound recordings and music videos from live musical performances and these provisions are modeled on that law. One company affected by the new skipping exemption would be Clear Play, a company that embeds its technology in certain DVD players and allows families to watch certain movies and screen out language, content, etc. (See http://www.clearplay.com/). There has been a question of law as to whether or not this technology infringes on copyright laws and this provision will clarify that this technology is allowed.

Committee Action: The bill was introduced in the Senate on January 25, 2005, and passed by unanimous consent on February 1, 2005. It was referred in the House to both the Judiciary Committee, which considered it and reported it by voice vote on March 9, 2005, and to the Committee on House Administration, which discharged it without consideration.

Cost to Taxpayers: The bill authorizes the appropriation of $2.65 million from FY05-09 ($530,000 a year) to the Library of Congress for preserving films in the Library's collection. CBO estimates that implementing the bill would have no significant cost in 2005 and would cost nearly $3 million over the 2005-2009 period.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill creates new federal crimes and reauthorizes a board and a foundation that were set to expire.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, S. 167 would impose private-sector mandates as defined in UMRA, though CBO estimates that the direct cost of those mandates would fall well below the annual threshold established by UMRA for private-sector mandates ($123 million in 2005).

The bill would impose a private-sector mandate on copyright owners by limiting their right owners to collect compensation under copyright law from persons using or manufacturing a technology that enables making limited changes to a motion picture for a private home viewing. According to testimony from the Patent and Trademark Office and other sources, no such compensation is currently received by copyright owners and therefore CBO estimates that the direct cost of the mandate would be small or zero.

The bill also imposes a private-sector mandate on certain manufacturers, licensees, and licensors of technology, requiring them to ensure their technology provides a clear and conspicuous notice that the performance of the motion picture is altered. According to government and other sources, the technology to provide the required notice is readily available and is currently used by some manufacturers and thus CBO expects that the direct cost to comply with the mandate, if any, would be minimal.

Constitutional Authority: The Committee, in Report 109-033, finds authority for this legislation in Article I, Section 8, Clause 8 of the Constitution ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

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H.R. 1038—Multidistrict Litigation Restoration Act (Sensenbrenner)

Order of Business: The bill is scheduled to be considered on Tuesday, April 19th, under a motion to suspend the rules and pass the bill. The identical bill (H.R. 1768 in the 108th Congress) passed the House on March 24, 2004, by a vote of 418-0: http://clerk.house.gov/evs/2004/roll079.xml

Background: Under current law, a Multidistrict Litigation Panel (MDLP)—a select group of seven federal judges picked by the Chief Justice of the Supreme Court—helps to consolidate lawsuits which share common questions of fact filed in more than one judicial district nationwide. Typically, these multidistrict suits involve mass torts—a cross-country train accident, for example—in which the plaintiffs are from many different states. The MDLP attempts to identify the one U.S. district court nationwide that is best suited to adjudicate pretrial matters. The MDLP then remands individual cases back to the districts where they were originally filed for trial, unless the cases have been previously terminated.

Over the last three decades, it has been common practice for "transferee" courts (the courts at which such pretrial matters were consolidated) to invoke a different provision in current law to retain jurisdiction for trial over all of the suits (by essentially remanding cases back to themselves). The Judiciary Committee reports that the Administrative Office of the U.S. Courts and the MDLP believe that this practice has worked well, since the transferee court is versed in the facts and law of the consolidated litigation.

However, a recent Supreme Court decision (*Lexecon v. Milberg Weiss Bershad Hynes & Lerach, et. al.*) ruled that a transferee court **had** to remand all cases for trial back to the respective jurisdictions from which they were originally referred and that only Congress could determine whether a transferee court could retain jurisdiction for multidistrict litigation trials.

Summary: H.R. 1038 would give a transferee court the option under current multidistrict litigation law (28 U.S.C. 1407; Public Law 107-273) of retaining jurisdiction over a referred civil case or remanding such jurisdiction back to the court(s) from which it was transferred. Retaining jurisdiction should be done "for the convenience of the parties and witnesses and in the interests of justice." That is, H.R. 1038 would return the multidistrict litigation situation back to pre-*Lexecon* practice—except this time such practice would be codified.

H.R. 1038 would also serve as a technical fix to activate a provision in current law (Public Law 107-273) that confers original jurisdiction on U.S. district courts for any civil action arising out of a single accident in which at least 75 persons are either killed or injured and in which damages for each person exceed $150,000 (amongst other criteria). Since this original jurisdiction provision is dependent on courts being able to retain jurisdiction for trial in multidistrict litigation, H.R. 1038 therefore activates this portion of current law.

Committee Action: On March 3, 2005, the Subcommittee on Courts, the Internet, and Intellectual Property marked up and ordered the bill favorably reported to the full Judiciary Committee by voice vote. On March 9, 2005, the full Committee marked up and ordered the bill favorably reported to the full House by voice vote. Similar committee actions were taken on H.R. 1768 during the 108th Congress.

Administration Position: Although a Statement of Administration Policy (SAP) is unavailable for H.R. 1038, the SAP for H.R. 1768 last Congress indicated Administration support for the legislation:
http://www.whitehouse.gov/omb/legislative/sap/108-2/hr1768sap-h.pdf

Cost to Taxpayers: CBO confirms that H.R. 1038 would have no significant impact on the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Judiciary Committee, in House Report 109-24, cites constitutional authority in Article III, Section 1 (the congressional power to "ordain and establish" federal courts).

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H.R. 683 — Trademark Dilution Revision Act (Smith of TX)

Order of Business: The bill is scheduled for consideration on April 19, 2005, under a motion to suspend the rules and pass the bill.

Summary: H.R. 683 would make changes to trademark law to strengthen a trademark owner's defense against the use of other similar marks in the market that could harm the reputation of the trademark or confuse consumers. Specifically, this bill amends the Trademark Act of 1946 to revise provisions relating to trademark dilution. The revision will entitle an owner of a "famous" mark that is distinctive to an injunction against another person who uses a similar mark or trade name in commerce to designate that person's goods or services and by doing so is likely to cause dilution of the owner's mark by blurring or tarnishment (defined below). The revisions in H.R. 683 would apply regardless of actual evidence or instances of confusion or competition between the two products or services.

The bill defines a mark as "famous" if it is widely recognized by the general consuming public of the United States to designate the source of the goods or services to the mark's owner. The bill defines "dilution by blurring" as an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. The bill defines "dilution by tarnishment" as an association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

The bill declares that certain acts are not actionable as dilution by blurring or dilution by tarnishment, including: (1) fair use of a famous mark by another person in *comparative* commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark; (2) noncommercial use of a designation of source; and (3) all forms of news reporting and news commentary.

Additional Information: Cases and injunctions involving "dilution" are commonplace in the United States today, since branding (distinguishing a product or service by a particular brand name or symbol) is so important in marketing. There have been numerous cases involving the Olympics and specifically the unauthorized use of the Olympic torch and the five interlocking rings in past years. Since the International Olympic Committee (IOC) produces revenue for the Olympic Games by granting (selling) entities the right and use of the official Olympic symbols, the IOC vigorously pursues those that use the symbols or similar ones without consent. For example, the 2010 Winter Olympics will be held in Vancouver, B.C., and a local pizza establishment called Olympic Pizza and Pasta has been targeted by the IOC for trademark infringement. The restaurant's signage carries similar symbols of the Olympic torch and rings. If this case were in the U.S., this may constitute examples of "diluting by tarnishment" (having the Olympics associated with a local pizza establishment) or an example of "dilution by blurring," since the symbols the restaurant is using is not exactly the same, but is arguably close enough to cause confusion.

Committee Action: H.R. 683 was introduced on February 9, 2005, and referred to the Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property. The bill was considered by both the Committee and Subcommittee and each held a mark-up. The bill was reported out by the full Committee on March 17, 2005 by voice vote (H. Rept. 109-23).

Cost to Taxpayers: CBO estimates that H.R. 683 would not have a "significant effect" on spending subject to appropriation, and would not affect direct spending or revenues.

Does the Bill Expand the Size and Scope of the Federal Government?: No, the bill modifies current trademark law.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Committee in Report 109-23 cites authority for this legislation under Article I, Section 8, and Clause 8 of the Constitution (regarding patents, trademarks, and copyrights: "The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

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H.J.Res. 19–Providing for the appointment of Shirley Ann Jackson as a citizen regent of the Board of Regents of the Smithsonian Institute (Johnson of TX)

Order of Business: The resolution is scheduled to be considered on Tuesday, April 19th, under a motion to suspend the rules and pass the resolution.

Summary: H.J.Res. 19 would provide for the appointment of Shirley Ann Jackson to serve as a citizen regent of the Board of Regents of the Smithsonian Institution for a term of six years.

Additional Background: Dr. Shirley Ann Jackson is a theoretical physicist and president of the Rensselaer Polytechnic Institute (one of the oldest science and engineering research universities in the nation). In 1973, she became the first women to receive a doctoral degree from MIT and went on to teach at Rutgers University. In 1995, President Clinton named her to chair the U.S. Nuclear Regulatory Commission.

Committee Action: On February 15, 2005, the resolution was referred to the Committee on House Administration, which took no official action on it.

Cost to Taxpayers: The resolution authorizes no expenditure.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

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H.J.Res. 20–Providing for the appointment of Robert P. Kogod as a citizen regent of the Board of Regents of the Smithsonian Institute (Johnson of TX)

Order of Business: The resolution is scheduled to be considered on Tuesday, April 19th, under a motion to suspend the rules and pass the resolution.

Summary: H.J.Res. 20 would provide for the appointment of Robert P. Kogod to serve as a citizen regent of the Board of Regents of the Smithsonian Institution for a term of six years.

Additional Information: Robert P. Kogod formerly served as co-chairman and co-chief executive officer of the Charles E. Smith Realty Companies. In 1979, the Robert P. and Arlene R. Kogod School of Business at American University was named in honor of him and his wife for their generosity and service to the university.

Committee Action: On February 15, 2005, the resolution was referred to the Committee on House Administration, which took no official action on it.

Cost to Taxpayers: The resolution would authorize no expenditure.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

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