



Senate Fiscal Agency  
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BILL ANALYSIS

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Senate Bills 1386 & 1387 (as enrolled)  
House Bills 5336 & 5347 (as enrolled)  
Sponsor: Senator Alan Sanborn (S.B. 1386 & 1387)  
Representative John Stakoe (H.B. 5336)  
Representative Mike Nofs (H.B. 5347)  
Senate Committee: Judiciary  
House Committee: Judiciary (S.B. 1386 & 1387)  
Criminal Justice (H.B. 5336 & 5347)

**PUBLIC ACTS 451 & 450 of 2004**  
**PUBLIC ACTS 424 & 423 of 2004**

Date Completed: 1-19-05

### **RATIONALE**

Evidently, it is increasingly common for pirated or bootleg copies of films to appear within days of, or even before, major theatrical releases of movies. According to the Motion Picture Association of America (MPAA), 90% of the pirated movies originate from a camcorder copy. "Camcorder piracy" is the practice of using hand-held video cameras to record a film shown in a motion picture theater. Some people who record movies in this fashion sell the recordings to labs where the videos are illegally duplicated, packaged, and distributed for sale. The recordings can be made into video tapes or DVDs or stored digitally and shared on-line. Distribution can be through the black market, such as street vendors, or over the internet through file transfers; the recordings also may be sold on auction websites like eBay. While recording a film with a video recording device may violate Federal copyright laws, most states do not explicitly ban the practice. Consequently, their local and state law enforcement officials and prosecutors do not have jurisdiction over this activity.

To combat the growth of film piracy, several states recently enacted legislation prohibiting the use of a recording device to capture the images and sounds displayed in a motion picture theater. It was suggested that Michigan also enact such a ban, along with criminal penalties and civil remedies. In addition, some contended that excusing theater operators and their employees from

liability for detaining suspects would help to enforce the ban.

### **CONTENT**

**The bills amend various statutes to do all of the following:**

- **Prohibit and provide criminal penalties for operating an audiovisual recording device in a theatrical facility.**
- **Include in the sentencing guidelines felony violations of operating an audiovisual recording device in a theatrical facility.**
- **Grant civil immunity to certain people who detain an individual believed to have committed a motion picture recording violation.**
- **Specify damages for which a person who commits a motion picture recording violation is liable.**
- **Allow a person injured by a motion picture recording violation to bring an action to enjoin the violator from certain activities.**

Senate Bills 1386 and 1387 amend the Revised Judicature Act, House Bill 5336 amended the Code of Criminal Procedure, and House Bill 5347 amends the Michigan Penal Code.

Senate Bills 1386 and 1387 and House Bill 5336 were tie-barred to House Bill 5347.

House Bill 5336 took effect on December 15, 2004; House Bill 5347 will take effect on March 15, 2005; and Senate Bills 1386 and 1387 will take effect on March 28, 2005.

### **Senate Bill 1386**

Under the bill, if the owner or lessee of a theatrical facility in which a motion picture is being shown, or the owner's or lessee's authorized agent or employee, alerts a law enforcement agency of an alleged motion picture recording violation and takes measures, while awaiting the arrival of law enforcement authorities, to detain an individual whom the owner, lessee, agent, or employee has probable cause to believe committed the violation, the owner, lessee, agent, or employee is not liable in a civil action arising out of the measures taken. This immunity does not apply, however, if the plaintiff shows that the measures taken were unreasonable and/or the period of detention was unreasonably long.

### **Senate Bill 1387**

The bill specifies that a person who commits a motion picture recording violation is 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 acted for direct or indirect commercial advantage or financial gain.
- Reasonable attorney fees and costs.

If the violator is an unemancipated minor who lives with his or her parent or parents, the parent or parents also are liable for these damages to a person injured by the violation.

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

A person injured by a motion picture recording violation may 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 may bring an action regardless of whether the person has suffered or will suffer actual damages.

An action under the bill is in addition to any other criminal or civil penalties or remedies provided by law.

Under the bill, "motion picture recording violation" means a violation of Section 465a of the Michigan Penal Code (enacted by House Bill 5347). "Person injured by a motion picture recording violation" includes, but is not limited to, the owner or lessee of the theatrical facility in which the motion picture was being shown.

### **House Bill 5336**

The bill includes felony offenses enacted by House Bill 5347 in the sentencing guidelines, as shown in Table 1.

Table 1

Violation	Felony Level	Statutory Maximum
Operating audiovisual recording device in a theatrical facility – 2 <sup>nd</sup> offense.	G-Property	2 years
Operating audiovisual recording device in a theatrical facility – 3 <sup>rd</sup> or subsequent offense.	F-Property	4 years

### **House Bill 5347**

The bill prohibits and prescribes criminal penalties for knowingly operating an "audiovisual recording function" of a device in a facility where a motion picture is being exhibited, without the consent of the facility's owner or lessee and of the motion picture's licensor. (The bill defines "audiovisual recording function" as the capability of a device to record or transmit a motion picture or any part of a motion picture by technological means. "Theatrical facility" means a facility being used to exhibit a motion picture to the public, but does not include an individual's residence or a retail establishment.)

The offense is punishable as shown in Table 2.

Table 2

Violation	Level	Maximum Imprisonment	Maximum Fine
1 <sup>st</sup> Offense	Misdemeanor	1 year	\$10,000
2 <sup>nd</sup> Offense	Felony	2 years	\$20,000
3 <sup>rd</sup> or Subsequent Offense	Felony	4 years	\$40,000

The bill states that it does not prevent any lawfully authorized investigative, law enforcement, protective, or intelligence-gathering State or Federal agent or employee from operating a device's audiovisual recording function in a theatrical facility where a motion picture is being exhibited, as part of an investigative, protective, law enforcement, or intelligence-gathering activity.

The bill also states that it does not prohibit a person from being charged with, convicted of, or punished for any other violation of law that proscribes conduct described in the bill and provides a greater penalty.

MCL 600.2917a (S.B. 1386)  
600.2953a (S.B. 1387)  
777.16w (H.B. 5336)  
750.465a (H.B. 5347)

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Camcorder piracy apparently has increased greatly in recent years and is a major threat to the film industry and those who are legitimately involved in it. Countless films are stolen through the use of this technique. According to the MPAA's website, between May 2002 and May 2003, hand-held recording devices were used to steal more than 50 major motion pictures even before their theatrical release in the United States. When movies are pirated and sold outside of the film industry's established distribution system, none of those involved with actually making, marketing, and distributing the movies are rewarded for their labors. This affects a vast array of individuals and businesses, including producers, directors,

writers, actors, costume designers, technical crews, set construction workers, and all the support personnel involved with film production, as well as advertising firms, film distribution companies, theater owners and employees, and even local video rental stores.

Although Federal copyright law enforcement can snare some of those who illegally record, duplicate, and distribute films, state laws banning the practice may be more effective in fighting this crime. Indeed, according to testimony before the Senate Judiciary Committee, at least 13 states had adopted statutory prohibitions as of May 2004, with new laws imminent in various other states at that time. By prohibiting and prescribing criminal penalties for operating an audiovisual recording function of a recording device in a motion picture facility, House Bills 5347 and 5336 will help to fight the growing incidence of camcorder piracy.

### **Supporting Argument**

When someone illegally records a motion picture from a movie theater's screen, he or she can easily elude arrest and prosecution, even if caught by theater operators or their employees. If a theater employee confronts a patron who is suspected of recording a movie, the suspect may just leave the theater. Apparently, the threat of legal action has deterred theater management from trying to detain suspects while waiting for police to arrive at the theater. By granting theater employees immunity from liability for detaining suspected camcorder pirates while awaiting the arrival of law enforcement authorities, Senate Bill 1386 will increase the likelihood that the suspects will face arrest and prosecution for their actions.

**Response:** By excusing theater owners, operators, and employees from liability for detaining those suspected of camcorder piracy, the bill essentially deputizes them to enforce the law. This is unwise, as those employees have no law enforcement training or jurisdiction. In addition, attempts by theater employees to detain a person might result in the suspect's taking actions that would endanger others.

### **Supporting Argument**

In addition to criminal sanctions for recording a film in a movie theater, civil remedies should help to deter camcorder piracy. Under Senate Bill 1387, a person

who commits a motion picture recording violation will be liable to someone injured by that violation for actual and exemplary damages and reasonable attorney fees. The bill also specifically allows someone injured by a violation to bring an action to enjoin a person from the unauthorized recording, receipt, or transmission of a recording of a motion picture and to recover damages, regardless of the outcome of a criminal prosecution.

Legislative Analyst: Patrick Affholter

## **FISCAL IMPACT**

### **Senate Bills 1386 & 1387**

To the extent that Senate Bills 1386 and 1387 limit and expand, respectively, the circumstances under which someone can pursue civil litigation, they will have an indeterminate fiscal impact on the judiciary.

### **House Bills 5336 & 5347**

The bills will have an indeterminate fiscal impact on State and local government.

There are no data to indicate how many offenders will be convicted of the misdemeanor and felony offenses. The Class G felony has a sentencing guidelines recommended minimum sentence range of 0-3 months to 7-16 months, while the Class F felony has a sentencing guidelines recommended minimum sentence range of 0-3 months to 17-30 months. It is probable that most offenders will receive local sanctions for either felony unless they have extensive prior records. Local units incur the costs of misdemeanor probation, intermediate sanctions, and incarceration in a local facility, which vary by county. The State incurs the cost of felony probation at an average annual cost of \$1,800, as well as the cost of incarceration in a State facility at an average annual cost of \$28,000. Public libraries will benefit from any additional revenue available due to new penal fines.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.