

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1331 Movie Theaters/Recording Devices
SPONSOR(S): Bogdanoff
TIED BILLS: **IDEN./SIM. BILLS:** SB 1928

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice	5 Y, 0 N	Kramer	De La Paz
2) Public Safety & Crime Prevention			
3) Commerce			
4)			
5)			

SUMMARY ANALYSIS

HB 1331 makes it a third degree felony to knowingly operate the audiovisual recording function of any device in a motion picture theater without the express written consent of the theater owner and the licensor of the motion picture that is being exhibited. The offense is punishable by up to five years in prison and a by a fine of up to \$25,000.

The bill also authorizes a theater owner or licensor to detain , in a reasonable manner and for a reasonable period, any person who the owner or licensor believes in good faith has committed or is committing the criminal offense created by the bill. The bill provides that the owner or licensor may not be held liable in any civil action arising out of the measures taken in the course of detaining the person while awaiting the arrival of a law enforcement officer, unless the plaintiff can show by clear and convincing evidence that the methods were manifestly unreasonable or the period of detention was unreasonably long.

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. To the extent that this bill deters people from recording motion pictures in a theater and subsequently duplicating the recording for sale, it may have a positive fiscal impact on the motion picture industry.

The Subcommittee on Criminal Justice recommended the adoption of an amendment that alters the original bill in several ways. See AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES section of bill analysis for details.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Federal copyright law: Federal law provides copyright protection for “original works of authorship fixed in any tangible medium of expression” including motion pictures.¹ Subject to specified exceptions, a copyright owner has the exclusive right to reproduce or authorize the reproduction of the work.² Federal law provides for civil remedies for infringement of a copyright including either actual damages or damages specified in statute.³ Further, any person who willfully infringes a copyright either for commercial advantage or private gain or reproduces or distributes copies worth a certain value, commits a criminal offense.⁴

Congress has preempted “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright....in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.....”.⁵ Accordingly, federal law essentially precludes states from enforcing penalties for copyright violations and requires, in most instances, criminal prosecution for copyright infringement under federal law

Florida law does not specifically criminalize the act of using a recording device in a movie theater. In New York, it is unlawful to operate a recording device in a motion picture theater without permission of the operator of the theater.⁶

¹ 17 U.S.C. 102(a)(6)

² 17 U.S.C. 106.

³ See generally, 17 U.S.C. 504

⁴ 17 U.S.C. 506. 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.

⁵ 17 U.S.C. 301(a)

⁶ New York Penal Law, section 275.32.

Effect of HB 1331: HB 1331 makes it a third degree felony for a person to knowingly operate the audiovisual recording function⁷ of any device in a motion picture theater⁸ without the express written consent of the theater owner⁹ and the licensor¹⁰ of the motion picture that is being exhibited. The offense is punishable by up to five years in prison and a fine of up to \$25,000.

The bill also authorizes a theater owner or licensor to detain¹¹, in a reasonable manner and for a reasonable period, any person who the owner or licensor believes in good faith has committed or is committing the criminal offense created by the bill. The bill provides that the owner or licensor may not be held liable in any civil action arising out of the measures taken in the course of detaining the person while awaiting the arrival of a law enforcement officer, unless the plaintiff can show by clear and convincing evidence that the methods were manifestly unreasonable or the period of detention was unreasonably long.

The bill provides that the section does not prevent an employee or agent of an investigative agency, law enforcement agency, protective services agency, or intelligence gathering agency from operating an audiovisual recording device in a motion picture theater where a motion picture is being exhibited as part of a lawfully authorized investigative, protective, law enforcement, or intelligence gathering activity. The section also does not apply to a person who operates the audiovisual recording function of a device in a retail establishment solely to demonstrate the use of that device for sales purposes.

C. SECTION DIRECTORY:

Section 1. Creates undesignated section of statute which relates to use of a recording device in a motion picture theater.

Section 2. Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. Traditionally, the conference has determined that a third degree felony that is not ranked in the offense severity ranking chart of the Criminal Punishment Code, and therefore would result in a lowest permissible sentence of any non-state prison sanction, will have an insignificant prison bed impact.

⁷ The bill defines the term "audiovisual recording function" to mean "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".

⁸ The bill defines the term "motion picture theater" to mean "any site or facility used for the exhibition of a motion picture to the public" and provides that the term does not include a personal residence.

⁹ The bill defines the term "theater owner" to mean the "owner, operator, or lessee of a motion picture theater and includes an employee or agent of the theater owner".

¹⁰ The bill defines the term "licensor" to mean "the person who owns the intellectual property rights of the motion picture and includes an employee or agent of the licensor."

¹¹ Section 812.015, F.S. authorizes a merchant or a law enforcement officer to detain an offender in a reasonable manner and for a reasonable length of time when the merchant or officer has probable cause to believe that a retail theft has been committed and that the property can be recovered. If a merchant or a merchant's employee takes an offender into custody, a law enforcement officer must be immediately called to the scene.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that this bill deters people from recording motion pictures in a theater and subsequently duplicating the recording for sale, it may have a positive fiscal impact on the motion picture industry.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Scope of bill: The bill makes it a felony for a person to knowingly operate the audiovisual recording function of a device in a motion picture theater without the written consent of the theater owner and licensor of the movie that is being exhibited. Although the bill does refer to the "licensor of the motion picture that is being exhibited", the bill does not specifically require that the offense only applies to recording that is done during the actual exhibition of that motion picture. It also does not appear to require that the motion picture itself be recorded. For instance, it could be interpreted to apply to a photograph or a video recording which is taken of people inside a motion picture theater, regardless of whether the motion picture is playing and regardless of whether the photograph or recording is taken of the motion picture screen. Further, as written, the definition of "audiovisual recording function", which refers to the transfer of sounds, appears to be broad enough to apply to a cellular phone conversation which occurs within a motion picture theater.

Federal preemption: Because federal preemption of state law essentially precludes states from enforcing penalties for copyright violations and requires, in most instances, criminal prosecution for copyright infringement under federal law, the bill may be void to the extent that the bill provides criminal penalties for the unauthorized recording of intellectual property (i.e., motion pictures). For example, the bill prohibits a person from operating an audiovisual recording device in a motion picture theater unless the licensor of the motion picture provides express written consent. The bill's connection between the licensor of the motion picture, as the owner of intellectual property rights, and the prohibition against

operating the audiovisual recording device appears to implicate the general scope and subject matter of copyright, which is preempted to the Federal Government. The Legislature may wish to amend the bill to delete those aspects of the legislation which are within the general scope and subject matter of copyright

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Subcommittee on Criminal Justice recommended the adoption of an amendment that made several changes. The amendment removes any reference to the "licensor" of the motion picture. The amendment also provides that the offense can only be committed if the recording is done *while a motion picture is being exhibited*. The amendment modifies the language relating to the authority of a theater owner to detain an offender by requiring that the owner have probable cause to believe that the offense is being or has been committed and by requiring that a law enforcement officer be called to the scene immediately after a person has been detained. The amendment also clarifies the liability of the theater owner who detains an offender.