

*Presented to the
Subcommittee on Courts, the Internet and Intellectual
Property
House Committee on the Judiciary*

*Hearing on:
H.R. 3632 – The Anticounterfeiting Amendments of
2003*

On behalf of the member companies of
THE MOTION PICTURE ASSOCIATION OF
AMERICA

by
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Washington D. C.

**LEGISLATIVE HEARING ON:
H.R. 3632, THE ANTICOUNTERFEITING AMENDMENTS OF 2003**

**Prepared Testimony of David E. Green
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Motion Picture Association of America**

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Introduction

On behalf of Jack Valenti and the seven companies that comprise the Motion Picture Association of America, * I very much appreciate this opportunity to testify today on H.R. 3632, the Anti-counterfeiting Amendments of 2003. The movie industry contributes significantly to America's culture and its economy. The livelihoods of nearly one million men and women in America are impacted by the film industry, which entertains millions of consumers every day.

Our ability to continue making these types of contributions, however, is being undermined by wide-scale piracy. World-wide, piracy costs the film industry \$3.5 billion annually in hard goods piracy alone. The losses associated with the intensifying problem of Internet piracy are difficult to quantify, but it has been estimated that 400,000 to 600,000 movies are uploaded or downloaded every day on "file-stealing" networks like KaZaA and Gnutella.

* Buena Vista Pictures Distribution, Inc. (The Walt Disney Company); Metro-Goldwyn-Mayer Studios Inc.; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; and Warner Bros., a division of Time Warner Entertainment Company, L.P.

We commend the Chairman and this Subcommittee for this hearing and legislation aimed at the piracy problem, and the many other hearings held and bills introduced on this issue over the last twelve months. Movie piracy's victims include not only the movie studios, but also all the actors and behind-the-scenes employees associated with the making of the film. The consumer, whose entertainment choices are narrowed as the legitimate return on investments is stolen, is an additional victim, as is the citizen, whose governments cannot collect the tax revenues associated with the sale of legitimate goods.

H.R. 3632

MPAA supports H.R. 3632. The bill will help protect consumers and producers of intellectual property, the victims of piracy, in two respects.

First, the bill properly expands the definition of "counterfeit label" from merely "an identifying label or container that appears to be genuine, but is not," to genuine labeling components that are illicitly distributed. This expansion is an appropriate response to the growth of trade in and theft of genuine "authentication devices" used to make the counterfeited goods appear legitimate. The new definition will make it easier for federal prosecutors to charge people who may not themselves be distributing the final counterfeit product, but are assisting in the illicit production of those products.

Second, the bill adds a civil remedy for a violation of 18 U.S.C. § 2318. We recognize the reality that federal investigators and prosecutors are pressed with a wide range of important responsibilities, and sometimes will be unable to respond in a timely manner to even serious instances of trafficking in counterfeit labels. In these

circumstances, it is important for rightsholders to be able to protect themselves by seeking injunctive relief and damages.

The Importance of the Digital Future

H.R. 3632 is a good bill, and we hope to work with the Subcommittee and the stakeholders to make it even better. We are concerned, however, that this bill does not explicitly state that an authentication device can be digital, as well as physical. While we do not read the current language as covering just the physical, we are concerned that the courts could interpret the coverage of section 2318 in such a limited fashion. The Supreme Court's ruling in *Dowling v. United States*, 473 U.S. 207 (1985) (holding that the interstate transportation of stolen property statute did not cover intangible goods such as intellectual property), stands as a reminder that a failure of Congress to be clear as to the scope of coverage may lead the courts, employing the rule of lenity, to interpret a statute too narrowly.

Section 2318 should not be limited to the physical labels; rather, it should be broad enough to encompass the authentication devices of the digital age. Digital distribution, and digital piracy, are upon us, and will loom much larger in the near future. It has become a cliché to note how much the advent of digital communications has revolutionized how we work, how we gather information, and how we are entertained. Yet we at MPAA firmly believe that we are still in the opening moments of the digital age, and that the wonders still to come will make the novel technologies of today seem pale in significance.

MPAA and its member companies are devoting enormous amounts of time and money toward figuring out how to use modern communications tools to deliver movies –

in a consumer-friendly manner – right to people’s homes. Even today, despite the still-relatively modest numbers of homes that have broadband Internet connections, new services such as MovieLink and CinemaNow are enabling consumers to download movies to their hard drives to watch at a later time. Video-on-demand systems allow consumers to select from a range of modestly-price movies to watch in their living rooms. But this is only the beginning.

The Internet is speeding up. Cal Tech recently reported one experiment called “FAST,” which can download a quality DVD movie in *five seconds*. Another experiment, “Internet-2,” has dispatched 6.7 gigabytes – well more than a typical DVD movie – halfway around the world in *one minute*. As the experiments of today reach the marketplace of tomorrow, we envision a near-term future where digital delivery grows into a full-fledged partner to the sale of physical DVDs. Ours is a future when any consumer can obtain, with a few clicks of a mouse, any movie ever made, with choices offered as to whether to watch the movie once, or keep it forever as part of a video library.

Of course, legitimate and profound concerns about rampant Internet piracy form a dark cloud obscuring this bright digital future. We are hard at work with our counterparts in the information technology, sound recording and consumer electronics industries to devise ways to protect content from being illicitly distributed online, while providing flexible models for a range of consumer uses. We are confident that, working together, we can reach a solution that allows the legal electronic distribution of movies and other valuable content to flourish.

Even as we strive to bring about this bounty for consumers, we must be aware that the pirates and counterfeiters will try mightily to undo all the good we are trying to achieve. For the physical distribution of its products, some software companies developed hard-to-copy “certificates of authenticity” to stymie counterfeiters, then found their program hijacked by pirates who were buying or stealing these certificates to make their counterfeit goods appear authentic. For the digital distribution of products – such as software, games, music or movies – digital counterparts of these “certificates of authenticity” will be devised to discern whether a work is counterfeit or infringing of any copyright. As soon as we develop these tools, digital outlaws will find a way to traffic in them, facilitating the ability of counterfeiters to defraud consumers into believing that the illegally copied goods they are peddling are legitimate.

We must make sure that the prosecutors of tomorrow have adequate legal weapons at their disposal to attack piracy with the same zeal, whether it occurs in the physical world or online. It makes little sense to have a provision which allows someone to be sent to jail for up to five years for trafficking in counterfeit *physical* labels, while someone who does the same thing digitally gets off scot-free. Rather, the legislation should be technology-neutral, focusing on the function and effect of the counterfeit label being trafficked in, and applied equally whether the counterfeit label being trafficked in takes a digital or a physical form. We would be happy to work on language with the Subcommittee and with others concerned, to ensure the courts will interpret this provision appropriately.

The “Licensing” Document Clause Should Not be Limited to Computer Programs

In most aspects of this statute, all copyrighted works, whether they are movies, music, or computer programs, are treated the same. In one section, however, a “licensing document” comes within the definition of “counterfeit label” if it is used in connection with a computer program, but not a phonorecord, a copy of a motion picture, or other work. We think this disparate treatment is unwarranted, and ask the definition be extended to all types of works protected under the statute.

Specifically, Section 2 of H.R. 3632 defines counterfeit labels as, among other things, “a genuine . . . licensing document . . .

- (i) that is used by the copyright owner to verify that a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, or documentation or packaging is not counterfeit or infringing of any copyright; and
- (ii) that is, without the authorization of the copyright owner—

. . .

(II) in the case of a computer program, altered or removed to falsify the number of authorized copies or users, type of authorized user, or edition or version of the computer program.”

(Emphasis added.)

MPAA agrees with this definition, but not with its limitation to computer programs. Rather, as “Digital Rights Management” (or DRM) comes to the fore, movies, entertainment software and music, as well as computer programs, will increasingly use “licensing” documentation, both physical and digital, to establish the number of authorized copies or users, type of authorized user, or edition or version of the work.

Anyone who “traffics” in false licensing information should be covered by the statute, regardless of type of work, and regardless of whether it is physical or digital.

Conclusion

We support H.R. 3632 and commend the Chairman and Representatives Keller, Wexler, Goodlatte, Gallegly, and Carter for its introduction. We look forward to working with you on the changes and clarifications discussed above that would make section 2318 a more useful statute for the future. I look forward to answering any questions that you may have.