
**Morals, Movies, and the Law: Can Today's Copyright Protect a
Director's Masterpiece from Bowdlerization?**

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I. INTRODUCTION

Imagine popping in the DVD of *Gone with the Wind*, and to your dismay or pleasure, Rhett tells Scarlett, "Frankly my dear, I don't give a [mute]." ¹ Movies are increasingly littered with profanity, sensuality, gore and violence. ² Due to innovations of the digital revolution, such offensive content can be edited out, muted, or simply filtered out, in order to provide a more family friendly film. ³ Several commercial entities, without permission of the copyright owners, provide either the technology to bypass the offensive content, or supply their own edited version of the films, despite the fact that the

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1. GONE WITH THE WIND (Selznick International Pictures 1939).

2. After the Columbine shooting spree, the Clinton administration launched an investigation into the entertainment industry's marketing practices and general content in an effort to determine what effects movie violence have on America's youth. See *Fair Inquiry on Media Violence*, L.A. TIMES, June 3, 1999, at B8; see also Jacqueline Trescott, *Senators Seek Probe of Culture & Violence: Congress Would Explore the Role of Hollywood, Society*, WASH. POST, Sept. 3, 1999, at C01; John M. Broder, *Clinton Urges Film Industry to Limit Violence on Screen*, N.Y. TIMES, May 16, 1999, § 1, at 30. In June of 2002, the Court of Appeal of Louisiana held that the production company and director of the film *Natural Born Killers* were not liable for the actions of two individuals who imitated characters from the movie, killing one man and shooting another during the course of an armed robbery. *Byers v. Edmonson*, 826 So. 2d 551 (La. Ct. App. 2002).

3. See discussion *infra* Parts III-IV.

original movies are copyrighted.⁴ These practices have the movie industry in an uproar, and present copyright law with new challenges in the digital millennium.

This note explores the content-editing case *Huntsman v. Soderbergh*,⁵ which presents a fundamental question concerning the degree of control copyright owners have over how consumers may enjoy their protected works. The case also highlights the need to balance the interests and rights of creators on the one hand, and the rights of society to use technology to enhance their viewing experience of copyrighted films on the other hand. While companies that physically and permanently edit out content are most likely copyright infringers, others that provide software to merely filter out the content while leaving the film in its original form present a more difficult issue.

II. HISTORY

A. Origins and Purpose of American Copyright Law, Derivative Works, and the Application of the Fair Use Doctrine.

The origins of American copyright law are found in the United States Constitution, which provides that Congress shall have the 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.”⁶ Copyright law, however, originated several centuries prior to the drafting of the Constitution, with the invention of the printing press.⁷ As new innovations arise, Congress creates new laws necessitated by the technology, resulting in an evolving body of law.⁸ Due to the

4. See discussion *infra* Part III.

5. No. 02-M-1662 (D. Colo. filed Sept. 9, 2002). See *infra* Parts III-IV.

6. U.S. CONST. art. I, § 8. The “limited times” provision ensures that copyrights will expire, allowing the public to eventually receive the right to use all works created by authors. See *infra* note 10 and accompanying text (discussing the purpose of copyright).

7. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984). The printing press, invented in 1450, made written works easier and cheaper to produce. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 31 (rev. ed., Stanford University Press 2003). Copyright laws soon developed. *Id.* at 31. The aim of copyright then, as it is now, was to subject the production of literary and artistic works to the control of market forces. *Id.* at 188.

8. *Sony Corp. of Am.*, 464 U.S. at 430. The laws are amended repeatedly in order to balance the interests of authors and society’s interest in the free flow of information, ideas, and commerce. *Id.* at 429. For example, the invention of the player piano, radio, television, photocopier, VCR, DVD player, and the Internet

conversion from analog to digital technology and the speed at which such technology changes, more pages of copyright law have been added to the United States Code in the past decade than in the years since the Copyright Act was adopted in 1790.⁹

Copyright's purpose is to stimulate creative activity of authors and inventors by rewarding them with a limited monopoly and allowing society to access the products of their genius.¹⁰ Copyright protection "subsists... in original works of authorship fixed in any tangible medium of expression."¹¹ While the copyright holder does not have absolute control over his work, he does have six exclusive rights, including the right to reproduce copyrighted works, perform the copyrighted work publicly, and prepare derivative works.¹²

resulted in Congress' enactment of the Copyright Act of 1909, the revision of 1976, and the passage of the Digital Millennium Copyright Act (DMCA) in 1998. GOLDSTEIN, *supra* note 7. The goal underlying the DMCA is to bring copyright law "squarely into the digital age" and attempt to keep up with constantly evolving technology. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680-81 (2000). See Peter S. Menell, *Can our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 133-41 (2002 / 2003) (discussing the Audio Home Recording Act of 1992, No Electronic Theft Act of 1997, DMCA of 1998, and other digital copyright legislation).

9. Menell, *supra* note 8 at 65. One major reason why copyright law is expanding and changing is due to the inclusion of computer software as a protectable work. Menell, *supra* note 8 at 65. This inclusion is problematic because copyright protects expression and computer software serves a more functional purpose, an area reserved for patent law. Menell, *supra* note 8 at 65. Therefore, computer software does not fit well within the copyright scheme. Menell, *supra* note 8 at 65. Another reason for the deluge of new provisions results from the threat of unauthorized reproduction and distribution of copyrighted works using computers and networks. Menell, *supra* note 8 at 65.

10. *Sony Corp. of Am.*, 464 U.S. at 429. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). "Copyright is intended to increase and not to impede the harvest of knowledge." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545 (1985). See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-95 (1968).

11. 17 U.S.C. § 102(a) (2000). An original work of authorship requires that the work be independently created by the author and possess a minimal spark of creativity. *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340, 345 (1991). For example, almost any photograph may claim the necessary originality in order to support a copyright. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

12. 17 U.S.C. § 106 (2000). Section 106 provides, in part: [s]ubject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted

Currently, American copyright law only extends to these rights, reserving all remaining uses to the public.¹³ In addition, it does not give authors moral rights in their original works.¹⁴ Therefore, an unlicensed use of a copyright is not an infringement unless it violates one of the exclusive rights.¹⁵

A potential source of infringement involves a derivative work, or one “based upon one or more preexisting works, such as a... motion picture version, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁶ A

work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of . . . individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. *Id.* There are limitations on the exclusive rights. *Id.* § 109. For example, “[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” *Id.* § 109(a). This provision is known as the first sale doctrine. *United States v. Cohen*, 946 F.2d 430, 434 (6th Cir. 1991) (recognizing that copyright law does not forbid an individual from renting or selling a copy of a copyrighted work which was lawfully obtained or lawfully manufactured by that individual). Because the rights granted by section 106 are separate and distinct, the waiver of a copyright owner’s exclusive right to distribute those copies sold does not waive his right to the other exclusive rights. *Columbia Pictures Industries, Inc. v. Redd Home, Inc.*, 568 F. Supp. 494, 498 (W.D. Pa. 1983) (studios’ sale of video cassette copies of their copyrighted motion pictures waived their exclusive rights to distribute those copies sold, but video retail renter was still liable for infringement because it publicly performed the movies).

13. *Twentieth Century Music*, 422 U.S. at 155.

14. GOLDSTEIN, *supra* note 7, at 136-40. French copyright law embodies the doctrine of moral right – *droit moral* – which entitles authors to maintain complete control over what they create. GOLDSTEIN, *supra* note 7, at 136. The doctrine implies that the author’s integrity is on the line in the way his works are viewed. Drew Clark, *Bowdlerizing for Columbine?*, at <http://slate.msn.com/id/2077192/> (Jan. 20, 2003). Therefore, an author can require his publisher to stop selling the book if he no longer believes in it, and an artist can stop the owner of his painting from destroying it. *Id.* This doctrine is in contrast to the American system of copyright in which a bargain between the author and the public is struck. *Id.* See GOLDSTEIN, *supra* note 7, at 136-40 for a discussion on the two different cultures of copyright.

15. *Twentieth Century Music*, 422 U.S. at 155. An important distinction, however, needs to be made concerning ownership of the copyright and any of its exclusive rights, and ownership of the material object in which the work is embodied. *Columbia Pictures Indus.*, 568 F. Supp. at 498. “Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.” 17 U.S.C. § 202 (2000).

16. 17 U.S.C. § 101 (2000). In addition, “a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” *Id.* For example,

derivative work must, depending on the analysis used, incorporate a protected work in some concrete or permanent “form” or be fixed in any tangible medium of expression.¹⁷ The right of the copyright holder to prepare derivative works, however, is limited by the rule that no infringement occurs unless the alleged derivative work is substantially similar to the copyrighted work.¹⁸

Another potential source of infringement involves a public performance, which entails performing a work (1) at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹⁹ The right of the copyright holder to perform a work is limited by the word “publicly,” and therefore, while watching a TV show at home with family and friends, or singing in the shower

a trailer is a derivative of the full length copyrighted movie. *Lamb v. Starks*, 949 F. Supp. 753, 756 (N.D. Cal. 1996). See discussion *infra* pp. 18-20 (discussing Video Pipeline and derivative work). The Act defines copies as “material objects, other than phonorecords, in which a work is fixed by any method” 17 U.S.C. § 101. However, the Act’s definition of “derivative work” contains no reference to fixation. *Id.* A derivative work must be fixed to be protected, but not to infringe. *Id.* § 102(a). See *Lewis Galoob Toys, Inc., v. Nintendo of America, Inc.*, 964 F.2d 965, 968 (9th Cir. 1992) (noting that a work is “created” when it is fixed in a copy for the first time – in essence, the definition clarifies the time at which a work is created and therefore when it is protected, as opposed to providing a definition of “work.”). *But see* *Woods v. Bourne Co.*, 60 F.3d 978, 990 (2d Cir. 1995) (in order for a work to qualify as a derivative work it must be independently copyrightable and therefore fixed).

17. *Lewis Galoob Toys*, 964 F.2d at 967; 17 U.S.C. § 102. See *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1121 (D. Nev. 1999) (in order to establish the existence of an infringing derivative work, a plaintiff must show that the defendant’s work substantially incorporated protected materials from the plaintiff’s preexisting work); see also *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342-44 (9th Cir. 1998) (holding that when a non-copyright holder takes a legal copy of a copyrighted work of art and glues it to a ceramic tile and sells the tile for profit, an infringing derivative work is created). *But see* *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (holding that the tile art creator did not create an infringing derivative work and was entitled to make and sell the tile art without incurring liability). See Amy B. Cohen, *When Does a Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 *CARDOZO ARTS & ENT. L.J.*, 623 (1999) (discussing derivative work infringement and the current split of courts concerning tile art).

18. See *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984) (holding that a movie not substantially similar to a screenplay does not infringe, despite fact that the movie was made with the screenplay in mind).

19. 17 U.S.C. § 101 (2000).

constitute performances, they are not public, and no infringement occurs.²⁰

The copyright owner's exclusive rights are also limited by the fair use doctrine, which allows the legal use of copyrighted works under certain circumstances, including criticism, comment, news reporting, teaching, scholarship, or research.²¹ In analyzing whether a use constitutes a fair use, four factors come into play: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²² These factors should be weighed together, in light of the purpose of copyright, and not judged by which party has a majority of the factors in their favor.²³

Under the first factor, the more commercial the use, the less likely there is to be a finding of fair use.²⁴ The purpose and character of the use also focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character.²⁵ Essentially, whether and to what extent is the new work "transformative."²⁶ If a work is transformative, it alters the original

20. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 468-69 (1984) (Blackmun, J., dissenting).

21. 17 U.S.C. § 107 (2000). These uses are merely favored, and therefore are not fair uses per se. *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003). The text utilizes the terms "including" and "such as" to indicate that the examples given are "illustrative and not limitative." *Lamb v. Starks*, 949 F. Supp. 753, 757 (N.D. Cal. 1996). In order to achieve the constitutional purpose set out in Article I, courts must occasionally subordinate the copyright holder's interest in order to fulfill a greater public interest. *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 89 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). A classic fair use example is a movie review. A movie review can sample the work and comment on it selectively by quoting dialogue and describing particular scenes. Julie Hilden, *The "Clean Flicks" Case: Is it Illegal to Rent Out a Copyrighted Video After Editing it to Omit "Objectionable" Content?*, at <http://writ.findlaw.com/hilden/20020903.html> (Sept. 3, 2002). The reviewer can even misconstrue the work and unfairly criticize it. *Id.* All of these acts are considered fair use in part because they are transformative. *Id.*

22. 17 U.S.C. § 107.

23. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 198 (3rd Cir. 2003).

24. *L.A. News Serv. v. Tullo*, 973 F.2d 791, 797-98 (9th Cir. 1992) (video news clipping service sold segments to interested buyers, motivated primarily by making a profit, and therefore the first fair use factor weighed against them).

25. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

26. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001). See *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 446-447 (S.D.N.Y. 2001) (holding that twenty seconds of a movie shown in the A&E

work and gives it new expression, meaning, or message.²⁷

The second fair use factor recognizes that the law generally acknowledges a greater need to disseminate factual works than works of fiction or fantasy, and that works of a creative nature are closer to the core of intended copyright protection.²⁸ An author may not copyright his ideas or the facts he narrates.²⁹ This second factor, however, is not too significant in the overall fair use balancing analysis.³⁰

Under the third fair use factor, wholesale copying does not preclude fair use per se, but copying an entire work weighs against a finding of fair use.³¹ Even copying an insubstantial portion of a work can, in effect, be substantial if the heart of the work is taken.³² Therefore, quantitative and qualitative tests must be applied in order to determine the amount and substantiality of the material used in relation to the copyrighted work.³³ The extent of permissible copying

biography of Peter Graves was not shown to recreate the creative expression in the original movie, but rather for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business).

27. *Dr. Seuss Enters., L.P., v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400-01 (9th Cir. 1997) (holding that under the first fair use factor, a poetic account of the O.J. Simpson murder entitled "The Cat NOT in the Hat! A Parody by Dr. Juice," was not a transformative work with new expression, meaning, or message because the authors used the Cat's stove-pipe hat, the narrator, and the title to get attention or avoid the drudgery in working up something fresh). *See infra* note 54 and accompanying text.

28. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985). Copyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression. *Id.* at 556. *See A&M Records*, 239 F.3d at 1016.

29. 17 U.S.C. § 102(b) (2000).

30. *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1189 (C.D. Cal. 1998).

31. *Hustler Magazine, Inc. v. Moral Majority, Inc.* 796 F.2d 1148, 1155 (9th Cir. 1986). *See also A&M Records, Inc.*, 239 F.3d at 1016.

32. *Harper & Row Publishers*, 471 U.S. at 564-65. In *Harper & Row*, The Nation Magazine published a 2250 word article, at least 300 to 400 words of which consisted of verbatim quotes from President Ford's unpublished memoirs. *Id.* at 543, 548. The copying was unauthorized and the purpose of the article was to "scoop" the Time Magazine article which did have authorization to publish a select portion of the memoirs. *Id.* at 542. The Supreme Court, in overruling the Second Circuit, held that in view of the expressive value of the excerpts and their key role in the infringing work, Nation Magazine did not take a "meager," "infinitesimal amount" of Ford's original language, but rather took the heart of the book – a qualitatively substantial amount. *Id.* at 564-66. *See Roy Export Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (taking of fifty five seconds of one hour and twenty nine minute film deemed qualitatively substantial).

33. *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 448 (S.D.N.Y. 2001) (holding that twenty seconds of footage excerpted from a seventy minute

varies with the purpose and character of the use.³⁴

The fourth fair use factor - the effect of the use upon the potential market for or value of the copyrighted work - is the most important element in a fair use analysis.³⁵ Both the extent of market harm caused by the infringing work and whether unrestricted and widespread dissemination would hurt the potential market for the original and its derivatives must be considered.³⁶ Courts strive for a balance between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.³⁷ The less adverse effect that the alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.³⁸ An essential question is whether the infringing work is a substitute for the original.³⁹

Two cases illustrate how the Supreme Court has applied the fair use analysis, which allows insight into the relevant inquiries. In *Sony Corp of America v. Universal City Studios, Inc.*, Sony, manufacturer of the Betamax, successfully argued that their consumers' private home recordings of copyrighted TV shows and movies were fair use and therefore it was not liable for contributory infringement of Universal's copyrights.⁴⁰ Consumers used the Betamax to record movies and TV shows so that they could watch it at a later time, and

movie and used in an A&E biography was fair use).

34. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994).

35. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985).

36. *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1189 (C.D. Cal. 1998). See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.* 109 F.3d 1394, 1403 (9th Cir. 1997) (holding "because . . . the use of *The Cat in the Hat* original was nontransformative, and admittedly commercial . . . , market substitution was at least more certain, and market harm may be more readily inferred").

37. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2nd Cir. 1981). See *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975).

38. *MCA*, 677 F.2d at 183.

39. See *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 449 (S.D.N.Y. 2001).

40. *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 456 (1984). In order for the Court to hold Sony liable for vicarious liability, it would have to rest on the fact that Sony sold the Betamax with the constructive knowledge that its customers may use the VTR to make unauthorized copies of copyrighted material. *Id.* at 439. There is no precedent in copyright law for such a theory. *Id.* Also, the difference between vicarious liability and direct liability is important. *L.A. News Serv. v. Tullo*, 973 F.2d 791, 797 (9th Cir. 1992) (nothing that under *Sony*, a VTR owner who tapes a copyrighted movie to watch at home at a later time is protected by the fair use doctrine, but a VTR owner who tapes the movies to sell copies to others without the copyright holder's permission is subject to civil and criminal penalties).

presumably, to erase the show after viewing (“time-shifting”).⁴¹ In determining the purpose and character of the use, the Court found that time-shifting was not a commercial use because it was a private activity that took place in the consumers’ homes.⁴² As the dissent notes, the second statutory factor was basically ignored by the Court.⁴³ Even though viewers copied entire programs, the third fair use factor weighed in Sony’s favor because consumers were invited to view the programs in their entirety free of charge.⁴⁴ In addressing the effect of the use upon the potential market for or value of the copyrighted work, a noncommercial use requires proof that either the use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.⁴⁵ Actual present harm does not have to be shown and future harm does not have to be shown with certainty.⁴⁶ The copyright owners failed to show actual or potential harm because there was no factual basis for their assumptions that live TV, movie, and/or rerun audiences would decrease.⁴⁷ Weighing all of the factors, the Court concluded that time shifting was a fair use.⁴⁸

In *Campbell v. Acuff-Rose Music, Inc.*, the Court considered whether the rap group 2 Live Crew’s parody of Roy Orbison’s song, “Oh, Pretty Woman,” constituted copyright infringement.⁴⁹ The second work must comment upon or criticize the original copyrighted work to qualify as a parody.⁵⁰ If the commentary has no critical bearing on the substance or style of the original work, but rather is used to get the attention or to avoid the drudgery in creating something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly.⁵¹ The Court of Appeals for the Sixth Circuit held that the parody was not fair use because of its commercial nature and the fact that the parody had taken too much from the original.⁵² The Supreme Court reversed the ruling.⁵³

41. *Sony Corp. of Am.*, 464 U.S. at 423.

42. *Id.* at 449.

43. *Id.* at 496-97. The Dissent maintained that the second factor strongly weighed in favor of Universal because entertainment shows, rather than informational works, accounted for more than 80% of the programs recorded by Betamax owners. *Id.*

44. *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 449 (1984).

45. *Id.* at 451.

46. *Id.*

47. *Id.* at 452-53.

48. *Id.* at 454-55.

49. 510 U.S. 569, 572 (1994).

50. *Id.* at 580-81.

51. *Id.* at 580.

52. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (1992).

In analyzing the first fair use factor, the Court stated that the commercial or nonprofit purpose of a work is only one element in the enquiry and found that 2 Live Crew's song was commenting on the original and did not merely supersede the objects of the original.⁵⁴ The second factor was not much help in this case because parodies almost invariably copy a publicly known, expressive work.⁵⁵ In analyzing the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the Court took into account the quantity of the materials used, their quality and importance.⁵⁶ Even though 2 Live Crew took the heart of the original song, it was necessary to do so in order to parody it, and it was important that the rest of the lyrics differed markedly from the Orbison lyrics.⁵⁷ The parody took no more than was necessary and therefore the copying was not excessive in relation to its parodic purpose, even though the portion taken was the original's heart.⁵⁸ Under the fourth factor, the Court considered the extent of the market harm caused by the actions of the alleged infringer as well as whether the unrestricted and widespread conduct of the alleged infringer would result in a substantially adverse impact on the potential market for the original.⁵⁹ Harm to the market for derivative works was also considered, in addition to harm to the original.⁶⁰ The Court found that there was no evidence that a potential rap market was harmed by 2 Live Crew's parody, and therefore the fourth factor weighed in favor of the

53. *Campbell*, 510 U.S. at 572.

54. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-84 (1994). In determining the commercial nature of the use, the purpose of the investigation is to see whether the new work merely "supersedes the objects" of the original work, or instead adds something new, altering the original with new expression, meaning or message – in essence, creating a "transformative" work. *Id.* at 578-79. The more transformative the work is, the less significant commercialism and other factors become in the fair use analysis. *Id.* at 579.

55. *Id.* at 586. See *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D.N.Y. 1996) (noting that an ad for the film *Naked Gun: 33 1/3* depended on the unique qualities of a Demi Moore photo and its instant recognizability in order to parody it).

56. *Campbell*, 510 U.S. at 586-87. A relevant question is whether or not a substantial portion of the infringing work was copied verbatim because it could reveal a lack of transformative character or increase the likelihood of market harm due to it fulfilling demand for the original. *Id.* at 587-88.

57. *Id.* at 588-90.

58. *Id.* at 589. *Cf. supra* note 32.

59. *Id.* at 590. When the copy is transformative, market harm may not be so readily inferred as in the case of an exact duplication. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994). The market for potential derivative works includes only those that the creators of the original works would in general develop. *Id.* at 592.

60. *Id.* at 590.

parodists.⁶¹ The Court, therefore, eschewing a bright line rule, looked at all four factors and determined that the parody did not infringe the original.⁶² It stated that parody has an obvious claim to transformative value and it can provide social benefit by shedding light on an earlier work, and in the process, create a new one.⁶³ Therefore, parody, like other comment or criticism, can claim fair use.⁶⁴

B. Copyright Infringement in the Digital Age

In the digital age, copyright infringement analysis continues to apply the factors outlined above. The task, however, is increasingly formidable due to the novel and complex issues that the internet and other technology present.⁶⁵ Two cases highlight these issues and are helpful to the resolution of the CleanFlicks case discussed below.⁶⁶

In *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, Video Pipeline created “clip previews” from Disney’s copyrighted movies and sold these previews to retail web sites, which would display the previews to site visitors.⁶⁷ Analyzing the affirmative defense of fair use, the court noted that the commercial nature of the use did not by itself determine whether the purpose and character of the use weighed for or against a finding of fair use.⁶⁸ Therefore, while the character and purpose of the clip previews and the full-length films differ, the clips have the same character and purpose of

61. *Id.* at 593-94.

62. *Id.* at 577-78, 594. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (finding that the book, “The Wind Done Gone” was a parody of the novel, “Gone With the Wind,” and was entitled to a fair use defense).

63. *Campbell*, 510 U.S. at 579-80.

64. *Campbell*, 510 U.S. at 579-80. See *Elsmere Music, Inc. v. National Broad. Co.*, 482 F. Supp. 741 (holding that the Saturday Night Live comedy sketch “I Love Sodom,” a parody of the “I Love New York” advertising campaign and jingle, constituted fair use).

65. See discussion *infra* Parts III-IV.

66. See discussion *infra* Parts III-IV.

67. 342 F.3d 191, 195 (3rd Cir. 2003). A “clip preview” is a two minute segment of a movie, copied without the authorization of the film’s copyright holder, and used in the same way as a movie “trailer,” which is authorized by the copyright holder. *Id.* at 194. Video Pipeline was authorized to compile movie trailers onto videotape for home video retailers to display in their stores. *Id.* at 194-95. When Buena Vista terminated the licensing agreement, Video Pipeline replaced some of the trailers with its clip previews. *Id.* at 195.

68. *Id.* at 198. The court must consider whether the copy is transformative because it altered the original with new expression, meaning, or message, or instead, whether the copy merely supersedes the objects of the original creation. *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 198 (3rd Cir. 2003).

Disney's derivative trailers, and as a result substitute for those derivatives.⁶⁹ The second factor weighed in Disney's favor because the movies and trailers contained mainly creative expression, not factual material.⁷⁰ The third factor requires not only an analysis of the quantity taken from the copyrighted work, but the quality and importance of the material as well.⁷¹ In this case, the quantity taken from the movies was small and the clip previews did not reveal, or intend to reveal, the heart of the movies.⁷² As a result, this factor weighed in Video Pipeline's favor.⁷³ Addressing the fourth factor, the court took into account not only the harm to the original, but also the harm to the market for derivative works.⁷⁴ The court held that the clips streamed over the internet served as a market replacement for the trailers, making it likely that market harm to the derivatives would result.⁷⁵ In weighing all of the factors, the court concluded that the clip previews did not qualify as fair use.⁷⁶

In *Lewis Galoob Toys, Inc. v. Nintendo of America* the Court of Appeals for the Ninth Circuit considered whether or not the Game Genie, a device manufactured by Lewis Galoob Toys, violated Nintendo's exclusive right to prepare derivative works based on their copyrighted works.⁷⁷ A derivative work must incorporate a protected work in some concrete or permanent form.⁷⁸ The Game Genie altered up to three features of a Nintendo game by blocking the value of a data byte sent by the game cartridge to the central processing

69. *Id.* at 198-99. The clip previews superseded the objects of Disney's derivatives. *Id.* at 199. The clips did not add significantly to the original's expression, involving no new creative ingenuity. *Id.* at 199-200.

70. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 201 (3rd Cir. 2003).

71. *Id.* at 201.

72. *Id.*

73. *Id.*

74. *Id.* at 202. The fourth factor requires consideration of the effect of the use upon the value of the copyrighted work, not just the effect upon the market. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 202 (3rd Cir. 2003). "Value" entails more than monetary rewards. *Id.*

75. *Id.* at 202-03. Disney used the trailers on its own website to advertise, cross-market and cross-sell their products, and to obtain marketing information about registered visitors. *Id.* at 202. Internet users interested in trailers of Disney films could be drawn to websites and Disney would be deprived of the opportunity to advertise and sell its products to those users. *Id.* at 203. Therefore, there was a sufficient market for, or value in, the previews, and an infringing work could be harmful. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 203 (3rd Cir. 2003).

76. *Id.*

77. *Lewis Galoob Toys, Inc. v. Nintendo of America*, 964 F.2d 965, 967 (9th Cir. 1992).

78. *Id.*

unit in the Nintendo Entertainment System (NES) and replacing it with a new value.⁷⁹ For example, the Game Genie increased the speed at which the character moved, increased the number of lives of the player's character, and allowed the character to float above obstacles.⁸⁰ When the Game Genie is inserted between a game cartridge and the NES, it never alters the data that is stored in the game cartridge.⁸¹ Rather, its effects are only temporary.⁸² Therefore, the altered displays did not incorporate a portion of the copyrighted work in some concrete or permanent form, as the statutory definition implies.⁸³ The Game Genie also did not supplant demand for Nintendo game cartridges.⁸⁴ The result was that the Game Genie did not constitute a derivative work.⁸⁵ In addition, the court stated that copyright infringement can occur despite the fact that the derivative work is not "fixed" in a tangible medium of expression.⁸⁶

III. THE CLEANFLICKS CASE

The controversial nature of motion pictures has been an issue virtually since their inception in American life in 1894.⁸⁷ The Motion Picture Association of America (MPAA) was founded in 1922 in order to regulate the industry.⁸⁸ It soon developed the Hays Code,

79. *Id.*

80. *Id.* The value that controlled the character's strength, for example, is blocked and replaced with a new value that allowed the character to become invincible. *Id.*

81. *Lewis Galoob Toys, Inc. v. Nintendo of America*, 964 F.2d 965, 967 (9th Cir. 1992).

82. *Id.*

83. *Id.* at 968. The Game Genie, by itself, cannot produce an audiovisual display – it is useless by itself. *Id.* at 968-69. It requires the NES and a game cartridge in order to do so. *Id.*

84. *Lewis Galoob Toys, Inc. v. Nintendo of America*, 964 F.2d 965, 969 (9th Cir. 1992).

85. *Id.* at 968. *Cf. Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983) (Circuit board which speeds up video game's rate of play when inserted into video game machine in place of original circuit board created a derivative work). *See supra* note 16 and accompanying text.

86. *Lewis Galoob Toys, Inc.*, 964 F.2d at 967-68. The court drew a distinction between the Copyright Act's definition of "copies" and "derivative work," stating that the latter did not reference fixation as the former did. *Id.* at 968. In order to be protected, a derivative work must be fixed, but it may infringe despite its lack of fixation. *Id.*

87. *See generally* Tim Dirks, *Film History Before 1920*, at <http://www.filmsite.org> (last visited Mar. 6, 2005).

88. *See* <http://www.mpa.org/about/> (last visited Mar. 6, 2005). The initial goal was to stem the criticism of the then silent American films, which were occasionally rambunctious and rowdy, and to restore a more favorable image of the film industry. *Id.* Television programming, on the other hand, has been subject to

which contained specific regulations so that “no picture shall be produced that will lower the moral standards of those who see it.”⁸⁹ The Code was abandoned in 1968 due to a depression in movie attendance and the desire to include adult issues in films.⁹⁰ The MPAA, however, did not abandon regulation entirely, and instead adopted a rating system, which is still in use today.⁹¹ This rating system is much more flexible than the Hays Code and allows moviemakers to portray virtually anything.⁹²

Due to increasing violence, sex, and profanity in films, various companies throughout the United States are taking advantage of the digital revolution and editing out such “objectionable” content, offering their edited versions for rent and sale to consumers.⁹³ Many consumers are frustrated with the amount of offensive material depicted in films and are turning to clean versions edited by CleanFlicks, ClearPlay and others.⁹⁴ These companies employ

FCC regulation since its inception. *See* 47 U.S.C. § 151 (2000) (creation of the Federal Communications Commission in 1934 for the purpose of regulating interstate and foreign commerce in communication by wire and radio). Therefore, studios edit their films for TV, deleting footage and replacing offensive language, in order to come into compliance with the FCC regulations. *See* *Obscene and Indecent Broadcasts*, available at <http://www.fcc.gov/parents/content.html> (last visited Mar. 6, 2005); 18 U.S.C. § 1464 (2000) (punishment for broadcasting obscene language).

89. *See* The Motion Picture Production Code of 1930, available at <http://www.artsreformation.com/a001/hays-code.html> (last visited Mar. 6, 2005). For example, the “Sex” category of the Code stated that “[a]dultery, sometimes necessary plot material, must not be explicitly treated, or justified, or presented attractively,” and “miscegenation is forbidden.” *Id.*

90. *See* Jack Valenti, *How it All Began*, at <http://www.mpaa.org/movieratings/about/index.htm> (last visited Mar. 6, 2005). The desire to include adult themes stemmed from the overall social climate of the 1960s, including the rise in women’s liberation, protest of the young, doubts about the institution of marriage, and fading social traditions. *Id.* It would have been imprudent to stifle such a creative medium as film during this time. *Id.*

91. *See* <http://www.mpaa.org/movieratings/> (last visited Mar. 6, 2005). The rating system is designed to inform parents in advance about the content of films, thereby allowing them to decide what movies they want their children to see. *Id.*

92. *See* Jack Valenti, *How it All Began*, at <http://www.mpaa.org/movieratings/about/index.htm> (last visited Mar. 6, 2005) (discussing the criteria that go into deciding what rating a particular film receives).

93. *See generally* <http://www.cleanflicks.com>; <http://www.clearplay.com>; <http://moviemask.com>.

94. The editing practices were known to the studios, but they decided not to take action due to the perception that the public would react negatively. Brian McTavish, *Movie “Cleaning” Raises a Flicker of Protest*, KAN. CITY STAR, Sept. 25, 2002, available at <http://www.kansascity.com/mld/kansascity/entertainment/movies/4135403.htm>. *See also* Drew Clark, *Bowdlerizing for Columbine?*, at <http://slate.msn.com/id/2077192/> (last visited Mar. 6, 2005) (discussing Hollywood’s apprehension in filing suit because the companies’ operations were

different methodologies, all of which have come under fire from Hollywood.⁹⁵ To establish a claim for copyright infringement, the Studios, defendants in the CleanFlicks case, must show both ownership of a valid copyright and that the plaintiffs copied the protected work without authorization.⁹⁶

initially on a small scale). However, they misjudged the demand, as evident by the expansion of CleanFlicks, which has ten corporate stores and sixty seven independent dealers across the U.S. *CNN Newsnight with Aaron Brown, Should Violence and Sex be Edited Out of Movies Without Filmmakers' Consent?* (CNN television broadcast, Sept. 3, 2002), available at <http://www-cgi.cnn.com/TRANSCRIPTS/0209/03/asb.00.html>.

^{95.} See *Plot Thickens in Hollywood Battle with Video Sanitizers*, 9 INTELL. PROP. LITIG. REP., 5 (Jan. 21, 2003) (discussing the studios' reasons for joining the Directors Guild of America in the suit against the editing companies). The CleanFlicks case is also a tangential part of Hollywood's effort to curb piracy, which is not currently an epidemic, but higher bandwidth and other technological innovations could spawn such an epidemic, as the music industry has experienced first hand. Press Release from Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America (Sept. 30, 2003) (http://www.mpaa.org/Jack/2003/2003_09_30b.htm). The MPAA has launched an anti-piracy campaign, featuring movie theater trailers and TV public service announcements "starring" the ordinary craftsmen whose livelihoods depend on the success of films, as well as an intellectual property awareness curriculum via Junior Achievement. Press Release from Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America (Sept. 17, 2003) (http://www.mpaa.org/jack/2003/2003_09_17b.htm). See also A.O. Scott, *These are your Movies on Piracy*, N.Y. TIMES, Nov. 16, 2003, § 2, at 15 (discussing the MPAA's campaign against piracy); Associated Press, *MPAA Tries Goodfellas Approach*, (Jul. 22, 2003), available at <http://www.wired.com/news/business/0,1367,59723,00.html>. According to the MPAA, intellectual property is America's largest trade export and comprises over five percent of the gross domestic product. Press Release from Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America (Sept. 17, 2003) (http://www.mpaa.org/jack/2003/2003_09_17b.htm). However, the movie industry is suffering a loss of \$3.5 billion annually from hard goods piracy. *Id.* In addition, in May of 2003, it was estimated that 350,000 movies are illegally downloaded from the Internet every day. Reuters, *California Reviews DVD Code Case* (May 29, 2003), available at <http://www.wired.com/news/technology/0,1282,59040,00.html>. But see David Pogue, *The Difference Between Movies and Music*, N.Y. TIMES, Oct. 2, 2003, available at <http://www.nytimes.com/2003/10/02/technology/02POGUE-EMAIL.html> (hypothesizing that the downloading of movies will not become as rampant as the downloading of music because of the way people use the two different products – music is listened to repeatedly while movies are watched only several times at most, and therefore illegal movie collecting will not become as prevalent as illegal song collecting).

^{96.} See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2nd Cir. 1992). Copyright infringement may be proven by direct evidence or by showing that (1) the defendant had access to the plaintiff's copyrighted work and (2) that defendant's work is substantially similar to the plaintiff's copyrightable material. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2nd Cir. 1986). CleanFlicks of Colorado, L.L.C., a franchisee of CleanFlicks, originally sued sixteen directors, seeking a judgment declaring that its practice of providing edited movies did not

CleanFlicks employs one of the two most prevalent methodologies in editing out objectionable content.⁹⁷ Its edited movies are offered both for sale and rent in VHS and DVD formats.⁹⁸ However, not all DVD players are able to play the edited DVDs because of format complications.⁹⁹ According to CleanFlicks, movies are purchased in their original format and then it provides an edited version of the film to consumers in one of three ways: (1) the original and edited versions are distributed together; (2) the original is preserved but rendered inoperable and replaced with the edited version; or (3) movies are purchased by a consortium of viewers who cause an edited version to be made available for rent by members.¹⁰⁰ In all three instances, there is a one to one relationship to the number of original versions and edited versions.¹⁰¹ CleanFlicks does not edit

constitute copyright infringement. Pl.'s. 2nd Am. Compl. at 6, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. filed Sept. 9, 2002). The directors counterclaimed and motioned for the joinder of the Studios and other editing companies, including ClearPlay, as counterdefendants. Defs.' Mot. for Leave to Join Third Parties as Counterdefs. at 2, *Huntsman* (No. 02-M-1662); Defs.' Mot. To Compel Joinder of Third-Party Copyright Holders at 2, *Huntsman* (No. 02-M-1662).

97. Pl.'s. 2nd Am. Compl. at 4, *Huntsman* (No. 02-M-1662); Motion Picture Studio Defs'. Answer and Countercls. at 13, *Huntsman* (No. 02-M-1662). Others who allegedly use a similar methodology as CleanFlicks include Clean Cut, Family Safe, and Family Flix. Studios' Answer and Countercl. at 13, *Huntsman* (No. 02-M-1662). Another method not discussed in detail includes the Huntsman methodology, whereby unaltered movies and content filters are placed in a special viewing apparatus that applies the filters at viewing time, allowing the viewer to choose to apply or reject edits at viewing time through a remote control. Pl.'s. 2nd Am. Compl. At 4-5, *Huntsman* (No. 02-M-1662).

98. <http://www.cleanflicks.com/company/index.php?file=buy> (last visited Feb. 28, 2004). CleanFlicks will purchase, upon consumer request, a particular VHS or DVD, "edit it" for \$26.95/VHS or \$36.95/DVD, and ship the edited version and the master version to the consumer. *Id.* See also <http://www.cleanflicks.com/dvdrentals/index.php?file=faq#1d> (last visited Feb. 28, 2004). There are three different online rental plans, ranging from \$19.95 per month to \$39.95 per month. <http://www.cleanflicks.com/dvdrentals/index.php?file=faq#3a> (last visited Feb. 28, 2004). The Studios claim that the edited DVDs are created using the VHS master, resulting in a lack of enhanced features and overall low quality. Motion Picture Studio Answer and Countercl. at 15, *Huntsman* (No. 02-M-1662). In addition, the edited versions are offered for sale at a premium price. For example, *The Lord of the Rings: The Fellowship of the Rings* is offered for \$36.95 from CleanFlicks, and \$19.99 from Best Buy. See http://www.carttonic.com/catalog/index.php?file=catalog&action=catalog_productinfo&uid=581&pi_id=15921&clist= (last visited Mar. 21, 2003); <http://www.bestbuy.com/site/olspage.jsp?id=62779&skuId=4660325&type=product> (last visited Mar. 21, 2003).

99. <http://www.cleanflicks.com/dvdrentals/index.php?file=faq#2a> (last visited Feb. 28, 2004).

100. Pl.'s 2nd Am. Compl. at 3-4, *Huntsman* (No. 02-M-1662).

101. *Id.* at 4.

each tape individually, but rather an edited master tape is created from which the edited tapes are recorded.¹⁰² The company also edits movies that consumers already own.¹⁰³

ClearPlay employs the second most prevalent methodology in editing out objectionable content.¹⁰⁴ ClearPlay distributes software via the internet which, when downloaded and used in conjunction with a computer DVD drive and the DVD containing the relevant motion picture, edits the movie at particular points.¹⁰⁵ The software uses “ClearPlay Filters” that are associated with each different movie and filters out content that may have contributed to a movie’s PG-13 or R rating.¹⁰⁶ The software for each movie is unique for that movie and instructs the DVD to skip over certain scenes or mute specific dialogue.¹⁰⁷ Viewers will notice some of the skips and mutes during playback.¹⁰⁸ There is no need to get a special DVD because the software works with standard DVDs that can be purchased or rented at any video store.¹⁰⁹ The DVD itself is never physically or permanently altered by the software.¹¹⁰ By itself, the software is useless.¹¹¹

CleanFlicks, ClearPlay, and the other editing companies have rigid

102. Motion Picture Studio Answer and Countercl. at 13-14, *Huntsman* (No. 02-M-1662).

103. <http://www.cleanflicks.com/company/index.php?file=buy> (last visited Feb. 28, 2004). A consumer can send in a VHS or DVD of a film that is on CleanFlick’s edited movie list, and for \$14.00/VHS or \$18.50/DVD, the company will edit the movie and ship it back to the consumer. *Id.*

104. *See generally* <http://www.clearplay.com>. Trilogy Studios also uses a similar methodology. *See generally* <http://www.moviemask.com>.

105. Motion Picture Studio Defs.’ Answer and Countercl. at 18, *Huntsman* (No. 02-M-1662). ClearPlay is also partnered with ICE Systems which sells a DVD player with the ClearPlay feature already built in. *See* http://www.useice.com/clearplay_trans.htm (last visited Mar. 6, 2005).

106. *See* <http://www.clearplay.com/About.aspx> (last visited Mar. 6, 2005).

107. Motion Picture Studio Defs.’ Answer and Countercl. at 19, *Huntsman* (No. 02-M-1662). *See* <http://www.clearplay.com/About.aspx> (last visited Mar. 6, 2005). Trilogy Studios also has software that can superimpose computer-generated images over and in place of the objectionable content. *Id.* at 21.

108. According to the ClearPlay website, viewers will notice the edits due to the story nature of some movies and because ClearPlay only uses legal methods to control the DVD decoding. <http://www.clearplay.com/what.asp> (last visited Feb. 28, 2004).

109. <http://www.clearplay.com/About.aspx> (last visited Mar. 6, 2005). As of February 28, 2004, over 600 movies are available for “ClearPlaying.” <http://www.clearplay.com/index.asp> (last visited Feb. 28, 2004).

110. Edward C. Baig, *Skipping the Bad Stuff isn’t Always so Good*, USA TODAY, Jan. 22, 2003, at D5.

111. Motion Picture Studio Defs.’ Answer and Countercl. at 19, *Huntsman* (No. 02-M-1662).

standards for editing content.¹¹² The extent to which the edited versions differ from the original depends on the amount of nudity, violence, and profanity the original contains.¹¹³ Generally, offensive language is muted, violence passes muster provided it is not too gory, and any sexually explicit material is cut.¹¹⁴ The result can be gaps in the soundtrack and jumps in the film that can render portions of the movie incomprehensible.¹¹⁵ For example, in Robert Altman's *Gosford Park*, a valet describes his master, saying, "He thinks he's God almighty. They all do."¹¹⁶ In the ClearPlay edit, the valet simply says, "They all do," which makes no sense alone.¹¹⁷

The motion picture studios also create their own edited versions of feature films in order to meet guidelines for TV broadcasts and airline flights, but these versions are not currently available to the public in VHS or DVD format.¹¹⁸ Prior to the success of companies like CleanFlicks and ClearPlay, the Studios did not distribute family-friendly versions to video stores in part because the stores themselves did not have the shelf space to hold two versions of every movie.¹¹⁹ The Studios, however, are now considering including these versions on DVDs, giving viewers more choice.¹²⁰

112. See Stephen H. Wildstrom, *Warning: This DVD Contains no Sex*, BUS. WK., Apr. 7, 2003, at 25.

113. See generally Edward C. Baig, *Skipping the Bad Stuff isn't Always so Good*, USA TODAY, Jan. 22, 2003, at D5 (discussing different films and the amount of material removed).

114. See Stephen H. Wildstrom, *Warning: This DVD Contains no Sex*, BUS. WK., Apr. 7, 2003, at 25. For example, in *Analyze This*, bodies with clean bullet holes are not edited out, but five minutes of the gore laden opening scene in *Saving Private Ryan* are cut. *Id.* See Paula Moore, *Intel Supporting Retailer's Lawsuit Against Hollywood*, DENV. BUS. J., Aug. 4, 2003, available at <http://denver.bizjournals.com/denver/stories/2003/08/04/story2.html>. In the clean version of *Titanic*, Kate Winslet's topless scene is blanked, allowing only the dialogue to be heard. *Id.* Trilogy's MovieMask can take the same topless scene and display a nightgown on Kate Winslet, without editing the actual DVD. Roy Santos, *First Look: Trilogy Studios MovieMask*, at <http://www.techtv.com/products/software/story/0,23008,3371490,00.html> (Feb. 8, 2002).

115. Stephen H. Wildstrom, *Warning: This DVD Contains no Sex*, BUS. WK., Apr. 7, 2003, at 25.

116. GOSFORD PARK (USA Films 2001).

117. Stephen H. Wildstrom, *Warning: This DVD Contains no Sex*, BUS. WK., Apr. 7, 2003, at 25.

118. Associated Press, *Battle Intensifies Over Film-Sanitizing Software*, available at <http://www.firstamendmentcenter.org/news.aspx?id=3008&SearchString=cleanflicks> (Feb. 3, 2003).

119. Vince Horiuchi, *Edited Movie Videos Could Test Copyright Law Limits*, SALT LAKE TRIB., Aug. 26, 2002, at C1.

120. Associated Press, *Battle Intensifies Over Film-Sanitizing Software*, available

In September of 2002, CleanFlicks sought a declaratory judgment arguing that its editing practices did not infringe the copyrights of several movie studios, including Metro-Goldwyn-Mayer Studios, Inc., Universal City Studios, Inc., and Twentieth Century Fox Film Corp. (Studios).¹²¹ The Studios counterclaimed that CleanFlicks et al. infringed their copyrights in their motion pictures and sought temporary, preliminary, and permanent injunctive relief, restraining and enjoining all the editing parties from creating and selling edited versions and editing software of the Studios' copyrighted films.¹²²

IV. ANALYSIS

The CleanFlicks case is essentially two separate cases divided by differences in technology, illustrating both the Copyright Act's flexibility and inherent problems.¹²³ The Studios have a solid claim against the companies that physically and permanently edit their motion pictures (CleanFlicks), but face an uphill battle against the companies that digitally edit the films through software programs, leaving the original unaltered (ClearPlay).¹²⁴

at

<http://www.firstamendmentcenter.org/news.aspx?id=3008&SearchString=cleanflicks> (Feb. 3, 2003).

121. Other studios include: Time Warner Entertainment Co., L.P., Sony Pictures Entertainment, Disney Enterprises, Inc., and Paramount Pictures Corp. CleanFlicks initially sought a declaratory judgment arguing that its editing practices did not infringe several directors' trademark rights. The Director's Guild of America (DGA) soon intervened in the action and counterclaimed that CleanFlicks et al. infringed their trademark rights.

122. Motion Picture Studio Defs.' Answer and Countercl at 33-35, *Huntsman* (No. 02-M-1662). Specifically, the Studios claimed that the editing parties were infringing the Studios' exclusive right of reproduction, right to prepare derivative works, and the right to distribute copies, including copies of derivative works. *Id.* at 33-34. The Studios, in clarifying their claims against ClearPlay, argue that their copyrights are infringed by ClearPlay's creating, marketing, distributing, selling and/or offering for sale (1) unauthorized edited versions of the Studios' films, and (2) products (*e.g.* software) based upon and derived from the Studios' copyrighted films and containing film-specific codes for video display devices for the playback of unauthorized edited versions of the Studios' films. Motion Picture Studio Defs.' Statement Clarifying Claims at 3, *Huntsman* (No. 2-M-1662).

123. *See supra* notes 8-9.

124. *See discussion infra* Part IV.A-B. However, the Digital Editing Parties will also face problems if it is determined that their programs violate the DMCA, which provides that, "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title. 17 U.S.C. § 1201(a)(1)(A) (2000). In addition, the DMCA also states that, "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that (a) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (b) has

A. *CleanFlicks*

The Studios own the copyrights to many of the movies that CleanFlicks edits, and therefore, have five exclusive rights under the Copyright Act.¹²⁵ Among these rights is the right to reproduce copyrighted works, perform copyrighted works publicly, and to prepare derivative works.¹²⁶ CleanFlicks, despite maintaining a one to one ratio of copies purchased to copies edited, does not have the right to reproduce copyrighted works or create derivative works.¹²⁷ In addition, a derivative work is one based upon a preexisting work such as a motion picture version, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.¹²⁸ When CleanFlicks edits the copyrighted films, it is creating a different version, condensing, recasting, and transforming it.¹²⁹ This edited version is substantially similar to the copyrighted work and therefore is potentially infringing.¹³⁰

The Studios' ownership of their copyrights is limited by the fair use doctrine.¹³¹ CleanFlicks, however, should not have much success in using the doctrine as an affirmative defense because all of the

only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (c) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title. *Id.* § 1201(a)(2)(A)-(C). *See supra* note 108.

125. Motion Picture Studio Defs.' Answer and Countercls. at 7-10, *Huntsman* (02-M-1662). It is not disputed that the Studios own the copyrights to the films in question. *See* Pls.' 2nd Am. Compl. at 13, *Huntsman* (02-M-1662) (stating that the Studios object to third party edits of their copyrighted films). *See supra* note 12.

126. *See supra* note 12. John Dixon, President of CleanFlicks, stated that, "[o]nce you create a product and put it out there for sale, you are essentially giving up your rights. You don't own that copy anymore." Peter Rojas, *The Blessed Version*, available at <http://www.villagevoice.com/issues/0241/rojas.php> (Oct. 15, 2002). This assertion, however, is a gross misstatement. *See supra* notes 12, 15 (copyright owner's waiver of exclusive distribution right of copies sold does not waive his other exclusive rights; transfer of the material object in which the copyrighted work is fixed does not convey any rights in the copyrighted work).

127. CleanFlicks has the right to rent or sell the legally obtained copies under the first sale doctrine, but it does not have the right "to reproduce the copyrighted work in copies or phonorecords." *See supra* note 12. *See also* Paula Moore, *Intel Supporting Retailer's Lawsuit Against Hollywood*, DENV. BUS. J., Aug 4, 2003, available at <http://denver.bizjournals.com/denver/stories/2003/08/04/story2.html> (noting that if CleanFlicks produces their clean cuts by making duplicates of original resale copies of moves, that constitutes a violation of copyright law).

128. *See supra* note 16

129. *See supra* notes 114-15, and accompanying text.

130. *See supra* text accompanying note 18.

131. *See supra* notes 21-23, and accompanying text.

factors weigh in the Studios' favor.¹³² The purpose and character of the use is commercial in nature.¹³³ The edited videos are sold or rented for a profit.¹³⁴ It could be argued, however, that some new works are transformative, adding something new and altering the originals with new expression, meaning or message.¹³⁵ Films that are originally very sexy and violent are made unsexy and tame in order to appeal to a different sensibility than the director intended.¹³⁶ The more destructive the edits are, the more likely the new work is transformative.¹³⁷ The less destructive the edits are, the more likely the new work merely replaces the object of the original creation.¹³⁸ The nature of the copyrighted works is creative expression, rather than factual material, so more protection should be accorded works of that character.¹³⁹ In addressing the amount and substantiality of the portion used, the quantity, quality, and importance of the materials used should be factored in.¹⁴⁰ CleanFlicks retains most of the original footage in its edited versions, cutting out small portions.¹⁴¹ The edited versions are not intended to be parodies of the originals, therefore, taking the heart of the film is taking too much.¹⁴² Finally, there is an effect on the potential market for or value of the copyrighted works.¹⁴³ This factor includes the potential market for derivative works.¹⁴⁴ There is consumer demand for the clean versions of films, as evidenced by the expansion of businesses like CleanFlicks and the willingness of consumers to pay a premium for edited films.¹⁴⁵ The Studios, in addition, have the ability to and are considering putting clean versions of their films on the same DVDs that contain the original versions.¹⁴⁶ The Studios already provide

132. See discussion *infra* Part III.

133. See <http://www.cleanflicks.com>.

134. See *supra* note 100 and accompanying text.

135. See *supra* notes 26-27 and accompanying text.

136. Julie Hilden, *The "Clean Flicks" Case: Is it Illegal to Rent out a Copyrighted Video After Editing it to Omit "Objectionable" Content?*, at <http://writ.findlaw.com/hilden/20020903.html> (Sept. 3, 2002).

137. See *Id.*

138. See *supra* text accompanying note 25. See also source cited *supra* note 95 (discussing absence of a transformative work because CleanFlicks does not go through the effort or expense of financing, creating, producing, or distributing films, but rather avoids the drudgery in working up something fresh).

139. See *supra* text accompanying note 28; *supra* note 22 and accompanying text.

140. See *supra* note 22.

141. See *supra* notes 114-15 and accompanying text.

142. See *supra* note 57 and accompanying text.

143. See *supra* note 22.

144. See *supra* note 22.

145. See *supra* note 94, 98 and accompanying text.

146. See *supra* note 118.

edited versions to airlines and TV networks.¹⁴⁷ CleanFlicks, therefore, is diminishing the Studios' potential market for clean films.¹⁴⁸ In addition, finding for the Studios would serve the purpose of copyright by encouraging creativity.¹⁴⁹ If a party spent time, money and resources to create a work only to have another party edit out parts of it and sell it as their own, there would be little incentive to create such a work.¹⁵⁰ Due to all of the factors above, it is likely that CleanFlicks violates the Studios' copyrights when it physically and permanently edits out objectionable material.¹⁵¹

B. *ClearPlay*

On the other hand, ClearPlay has a valid argument that its digitally edited versions do not violate the Studios' copyrights.¹⁵² The Studios run into a roadblock because ClearPlay does not actually copy anything that is copyrighted by the Studios, the versions created by the software filters are arguably not derivative works, and the performances of the films are private, rather than public in nature.¹⁵³ Because ClearPlay does not copy anything from the copyrighted films, the Studios focus more on the derivative work claim, arguing that ClearPlay infringes their exclusive right to prepare and distribute copies of derivative works.¹⁵⁴

The first derivative work claim by the Studios alleges that a derivative work is created when a viewer uses ClearPlay to skip and mute objectionable portions of a film.¹⁵⁵ Essentially, it is an argument that the temporarily altered displays are derivative works.¹⁵⁶ In order for a work to be considered a derivative work, it must either, depending on the analysis used, incorporate the protected work in some concrete or permanent form, or be fixed in any tangible medium of expression.¹⁵⁷ Under both analyses, the altered versions

147. See *supra* note 118 and accompanying text.

148. See *supra* note 118. See also *supra* note 75 and accompanying text; 2 MEALEY'S LITIG. REPORT: COPYRIGHT 1 (2003) (discussing harm Disney would suffer in *Buena Vista* if the clip previews were found legal).

149. See *supra* note 10 and accompanying text.

150. See *supra* note 10.

151. See *supra* Parts II-III.

152. See discussion *infra* Part IVB.

153. See *supra* notes 105-11 and accompanying text.

154. See Motion Picture Studio Defs.' Statement Clarifying Claims at 3-6, *Huntsman* (02-M-1662).

155. See *supra* note 122.

156. See Motion Picture Studio Defs.' Statement Clarifying Claims at 5, *Huntsman* (02-M-1662) (arguing that ClearPlay is accomplishing the same ends as CleanFlicks, only using different means).

157. See *supra* notes 16-18 and accompanying text.

do not appear to be infringing derivative works.¹⁵⁸ The skipped and muted versions provided by ClearPlay are never fixed in any tangible medium of expression, nor do they incorporate the copyrighted films in some concrete or permanent form.¹⁵⁹ ClearPlay simply provides a software program that contains code which tells the DVD player when to omit or mute objectionable content.¹⁶⁰ The Studios acknowledge that the edited versions are perceived only if and when viewers choose to employ ClearPlay's technology.¹⁶¹ The argument made by the Studios is analogous to Nintendo's argument in *Lewis Galoob Toys*, where the court found that the altered displays created by the Game Genie were not derivative works of the original audiovisual displays.¹⁶²

The Studios, in making the above argument are, in essence, suggesting that the unauthorized versions of their films are unauthorized performances.¹⁶³ The Copyright Act, however, only provides copyright holders with the exclusive right to *publicly* perform the work.¹⁶⁴ A private performance of a copyrighted work is a right that belongs to everyone, copyright holder or not.¹⁶⁵ Copyright law, in extending this right of private performance, allows individuals to read a book in any particular order, fast forward through a scene in a movie, mute the commentators of a sporting event, or cover a child's eyes or ears during a TV show, whether or not such practices are authorized by the copyright owner.¹⁶⁶ If the Studios win this derivative works argument, all of these practices, despite being in private, will constitute infringing derivative works because unauthorized edited versions are created.¹⁶⁷ Because this outcome would undermine the purpose of copyright law and unnecessarily restrict the rights of non-copyright holders, the Studios

158. See *infra* text accompanying notes 160-62.

159. See <http://www.clearplay.com/what.asp> (last visited Feb. 27, 2004).

160. See *supra* note 105 and accompanying text.

161. See Brief Amicus Curiae of Electronic Frontier Foundation in Support of Player Control Parties' Motion for Summary Judgment, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. filed Sept. 9 2002).

162. See discussion *infra* Part IIB.

163. See Motion Picture Studio Defs.' Statement Clarifying Claims at 5, *Huntsman* (02-M-1662).

164. See *supra* notes 12, 19-20 and accompanying text. If a person, without authorization from the copyright holder, puts a copyrighted work . . . to a use not enumerated in [Section 106], he does not infringe. *Fornightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-395 (1968).

165. See *supra* note 20 and accompanying text.

166. See *supra* note 20 and accompanying text.

167. See *supra* text accompanying notes 164-66.

will most likely lose this derivative works argument.¹⁶⁸

The second derivative work claim by the Studios alleges that the software filters themselves are infringing derivative works of their films.¹⁶⁹ The software filters, however, do not incorporate the copyrighted works in either a fixed medium of tangible expression or a permanent or concrete form.¹⁷⁰ Rather, the software filters reference the time codes of the films, telling the DVD player when to mute or skip objectionable portions.¹⁷¹ Once again, *Lewis Galoob Toys* provides an appropriate reference.¹⁷² The Game Genie could only enhance a Nintendo game's output.¹⁷³ It could not duplicate or recast that output, rendering it useless by itself.¹⁷⁴ Similarly, ClearPlay's software filters are useless by themselves.¹⁷⁵ Therefore, in analogizing further, it is arguable that the ClearPlay filters themselves are not derivative works.¹⁷⁶ Due to the reasoning above, it is likely that ClearPlay does not infringe the Studios' copyrights when it digitally filters out objectionable content in motion pictures.¹⁷⁷

V. CONCLUSION

Since the adoption of the Constitution, copyright's goal has been to balance the interests of artists on one hand and society's interests on the other. The CleanFlicks case presents novel issues regarding this balance of interests and its resolution could have an impact on both how the public views films in the privacy of their own homes as well as the moral rights of the filmmakers. Creative expression requires incentive, and while technology has influenced such expression

168. See *supra* note 10 and accompanying text.

169. See Motion Picture Studio Defs.' Statement Clarifying Claims at 5, *Huntsman* (02-M-1662).

170. See *supra* text accompanying notes 106-11.

171. See *supra* note 107 and accompanying text. "Time code is a frame-by-frame address code time reference recorded on the spare track of a videotape or inserted in the vertical blanking interval for editing purposes." http://www.thscratchpost.com/resources/fx/vfx_dict_t.shtml (last visited Mar. 6, 2005). When decoded, the time code identifies every frame of a videotape using digits reading hours: minutes: seconds and frames (e.g., 02: 04: 48: 26). *Id.* Each individual video frame is assigned a unique address, a must for accurate editing. *Id.*

172. See *supra* text accompanying notes 77-86.

173. See *supra* notes 81-83 and accompanying text.

174. See *supra* note 83.

175. See <http://www.clearplay.com/About.aspx> (noting need for consumer to purchase regular DVDs in order for the filters to work).

176. See *supra* note 85 and accompanying text.

177. *Id.*

positively, it also threatens to destroy the incentive necessary to create. As technological advances are made, Congress will have to reassess the current copyright act in order to ensure that the goals set forth in the Constitution are achieved.¹⁷⁸

178. After the filing of *Hunstman v. Soderbergh*, Senators Orin Hatch (R-Utah), Pat Leahy (D-Vt.), John Cornyn (R-Tex.), and Dianne Feinstein (D-Calif.) introduced The Family Entertainment and Copyright Act of 2005 to the U.S. Senate, which would protect companies like ClearPlay. The Family Entertainment and Copyright Act of 2005, S. 167, 109th Cong. (2005). On February 1, 2005, the Senate passed the Act by unanimous consent. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00167:@@L&summ2=m&#titles>. As of March 2, 2005, the House Subcommittee on Courts, the Internet, and Intellectual Property was reviewing the Act. *Id.*