The Family Entertainment and Copyright Act and Its Consequences and Implications for the Movie-Editing Industry

Sara Gansheimer*

I. INTRODUCTION

It all began rather innocently back in 1998, following the release on home video of the Academy Award winning blockbuster motion picture

* Sara Gansheimer graduated from Colgate University in Hamilton, New York, with a B.A. in Psychology. She worked in advertising in Boston for four years before entering law school, and she will begin practicing law in the Fall of 2006 in Washington, D.C. after her graduation from Tulane University School of Law. She would like to thank Editor in Chief Brooke Shultz for her endless efforts in the timely publication of this issue of the *Tulane Journal of Technology and Intellectual Property* after Hurricane Katrina closed Tulane and scattered the journal staff across the country; her mother for a lifetime of editing her work; and Tracy Hoskinson for helping her to retain her sanity during a tumultuous and unplanned fall semester in Cambridge, Massachusetts.

Titanic.[1] Don and Carol Biesinger, owners of Sunrise Family Video in American Fork, Utah, decided to offer a service to their conservative clientele. For five dollars, they would remove two objectionable scenes from the movie, one where Kate Winslet's character poses nude for a portrait and one portraying a steamy encounter between her and Leonardo DiCaprio's character in the backseat of a car.[2] For an extra three dollars, the Biesingers would edit out additional objectionable content at the customer's request.[3] Although Sunrise did not rent or sell R-rated movies, the Biesingers advertised the *Titanic* editing service for anyone who brought in a copy of the R-rated movie purchased elsewhere.[4] The unexpected demand for Sunrise's editing services gave birth to a new and ever-expanding market for "sanitized" movies.

The growing popularity for these sanitized or "E-rated" movies has led to the emergence of a number of movie-editing businesses and countless legal issues. The Family Entertainment and Copyright Act of 2005 (FECA) addresses this issue, as well as other notable copyright issues in the entertainment domain.[5] FECA was signed into law by President George W. Bush on April 27, 2005.[6]

FECA is the culmination of four previously proposed bills: the Family Movie Act, the Artists' Rights and Theft Prevention Act, the National Film Preservation Act, and the Preservation of Orphan Works Act.[7] While FECA sets forth various changes to current law, such as those pertaining to film preservation, three sections have garnered the most attention. These provisions address the practice of editing copyrighted movies to remove offensive content, increased penalties for infringement when an infringer distributes copyrighted works before the

---

1. *Titanic* (Paramount Pictures & Twentieth Century Fox 1997). *Titanic* received eleven Oscars at the 70th Academy Awards ceremony, including Best Director (James Cameron) and Best Picture. *See* Film Festival 1998, 1998 Academy Awards, http://www.filmfestivals.com/academy/oscars.htm (last visited Apr. 15, 2006).

2. *For $5, a Family Video Store Will Cut 2 'Titanic' Scenes*, N.Y. TIMES, Sept. 10, 1998, at G3.

3. *Director Urges Boycott over Store's Editing of 'Titanic'*, TIMES-HERALD REC., Oct. 28, 1998.

4. Rachel A. Roemhildt, *Family Fare Backers Take Knife to Films' Sex Scenes Cut from Videos; Studios Cry Foul*, WASH. TIMES, Dec. 10, 1998, at A2.

5. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202, 119 Stat. 218, 223-24 (2005).

6. *Id.*

7. *See* Artists' Rights and Theft Prevention Act, S. 1932, 108th Cong. (2004); Family Movie Act, H.R. 4586, 108th Cong. (2004); Preservation of Orphan Works Act, H.R. 5136, 108th Cong. (2004); National Film Preservation Act, H.R. 3569, 108th Cong. (2003); Press Release from U.S. Senator Diane Feinstein, Coryn-Feinstein Legislation to Curb Copyright Piracy, Protect Artists' Rights, Unanimously Clears Senate (Feb. 1, 2005), http://www.senate.gov/~feinstein/05releases/r-piracy-artact0201.htm.

copyright holder has released them to the public, and federal criminal sanctions for recording a motion picture in a movie theater.[8]

This Comment will address the first of those provisions: the editing of copyrighted movies. Part II will focus on the technology behind the editing. Part III will address FECA's provisions for movie-editing, and Part IV will consider the legal background of the movie-editing issue. Part V will then consider the movie editors' possible defenses, and Part VI will conclude with the likely outcome for the current legal controversy and the implications of FECA.

II. THE TECHNOLOGY BEHIND EDITING MOVIES

Only a few years ago, it was inconceivable that a viewer could choose an alternative version of a movie to watch, one that had been "cleansed" of any objectionable content. However, due to the efforts of several pioneers in this new market for edited movies, consumers today have the choice of watching "E-rated" versions of movies that they otherwise might choose not to see because of the movies' original content. Such editing can, for example, replace Jack Nicholson's foul language in *A Few Good Men* with "you funny people."[9]

Although the movie-editing companies focus their efforts on the same types of content to remove or silence, typically sexual content, obscene language, and violence, they do not all use the same means to do so. These differences in methodologies may prove determinative of the movie-editing companies' legal fates. The means employed to create E-rated versions of movies may be categorized in one of two ways: those that cut and splice the movies—either physically or digitally—to remove content or those that digitally filter movies to allow the viewer to see a cleansed version of the film while leaving the original movie intact.

A. Cut-and-Splice Editing

The most straightforward way to remove content from a movie involves physically cutting out the objectionable portion of the film and reattaching the remaining film. However, this method is not very practical due to its inherent time inefficiency and the prevalence of the DVD market.[10] Physical cut-and-splice editing, however, was used at the

---

8. Family Entertainment and Copyright Act of 2005, § 202.

9. Sam LaGrone, *Hollywood Howls a Forced Bath*, NEWS & OBSERVER, Feb. 4, 2005, at N4; Gary Gentile, *Movie Sanitizing Turning into Battle Royal*, DESERT NEWS, Feb. 10, 2003, at B2.

10. Katharine Biele, *Videos: Who Makes Final Cut?*, CHRISTIAN SCI. MONITOR, Oct. 5, 1998, at 1.

beginning of the commercial practice of movie-editing.[11] When the Biesingers of Sunrise Family Video offered their services to edit customers' copies of *Titanic*, they received over 200 copies of the movie to edit one day after its release.[12] The physical cutting and splicing of a movie can be quite time-consuming; it took Sunrise about thirty minutes to edit *Titanic*.[13] Moreover, this process must be repeated for each copy of a movie.[14]

Digitally cutting and splicing, however, provides one advantage over the traditional practice. It allows an editor to remove offensive content from a movie efficiently. Using this method, a DVD is loaded onto a computer and the edits are made digitally using editing software.[15] Once all offensive material is removed or muted, the cleansed movie is copied onto VHS cassettes or burned onto DVDs.[16] Although digital editing merely uses new technology to accomplish the same goal as physically cutting and splicing, it raises additional copyright issues that will be addressed later in this Comment.

Two of the major purveyors of edited movies are CleanFlicks and CleanFilms. Both online companies rent and sell movies that have been edited to remove profanity, graphic violence, nudity, and sexual content.[17] CleanFilms attempts to edit movies down to a PG-13 rating, similar to the television versions of movies that have been edited to comply with the FCC and network guidelines.[18]

---

11. *See, e.g.*, David M. Bresnahan, *Utah Video Business vs. Hollywood*, WORLD NET DAILY, Sept. 3, 1998, http://www.wnd.com/news/article.asp?ARTICLE_ID=16700.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Sharon Weinberg Nokes, Note, *E-Rated Movies: Coming Soon to a Home Theater Near You?*, 92 GEO. L.J. 611, 618-19 (2004) (citing Keith Merrill, *Cleaning Up the Movies, Part I*, MERIDIAN MAG., June 2002, http://www.meridianmazagine.com/arts/020604 clean.html).

16. *See id.*

17. CleanFlicks, http://www.cleanflicks.com (last visited Apr. 8, 2006). CleanFlicks' Web site describes its editing standards:

> We edit out:
>
> Profanity
>
> > This includes the B-words, H-word when not referring to the place, D-word, S-word, F-word, etc. It also includes references to deity (G-word and JC-words etc.), only when these words are used in a non-religious context.
>
> Graphic Violence
>
> > This does not mean all violence, only the graphic depictions of decapitation, impalements, dismemberment, excessive blood, gore etc.

CleanFlicks, http://www.cleanflicks.com/lovDetail.php?detailID=6 (last visited Apr. 8, 2006).

18. *See* CleanFilms, http://www.cleanfilms.com/about_edited.phtml (last visited Apr. 8, 2006).

B. Filtering: Altered Playback Only

Filtering achieves the same end result from the viewer's perspective as cutting and splicing, but is accomplished using a different method. Movie-filtering is on much safer legal ground than editing movies. Although the viewer may see the same "cleansed" version with either method, there are different implications under copyright law because of one crucial distinction between the two means. Cutting and splicing creates a permanent altered copy of the copyrighted work.[19] Filtering, on the other hand, merely allows the viewer to see an edited version; the actual VHS tape or DVD remains unchanged.[20] The movie remains unaltered because the technology uses a filter to instruct the DVD player to cut out or mute a section during playback.[21]

One of the most well-known filtering companies, ClearPlay, sells a DVD player with built-in ClearPlay technology. Customers download individual movie-specific "ClearPlay Filters" online through ClearPlay's subscription service.[22] They are then able to watch hundreds of titles with the filter either skipping over or muting material based on the viewer's input.[23] The filter contains multiple settings that may be adjusted to edit objectionable content, such as graphic violence, sexual content, or offensive language.[24]

C. "Filtering Plus"

In addition to removing offensive material, the filtering technology is capable of adding in new material to cover up what one finds offensive ("filtering plus"). For example, Trilogy Studios' MovieMask product has the ability to insert a digital corset to cover Kate Winslet's naked body in the *Titanic* scene where she poses for Leonardo DiCaprio.[25] Similarly, in *The Princess Bride*, swords used in a fight scene are swapped with laser light sabers.[26] While these variations on digital filtering may at first

---

19. *See* Michael Kurzer, *Who Has the Right To Edit a Movie? An Analysis of Hollywood's Efforts To Stop Companies from Cleaning Up Their Works of Art*, 11 UCLA ENT. L.J. 41, 46 (2004).

20. *See id.*

21. *See* Matthew S. Bethards, *Can Moral Rights Be Used To Protect Immortality? Editing Motion Pictures To Remove Objectionable Content*, 3 VA. SPORTS & ENT. L.J. 1, 4 (2003).

22. ClearPlay, http://clearplay.com/About.aspx (last visited Apr. 8, 2006.).

23. *Id.*

24. *Id.*

25. Rick Lyman, *Hollywood Balks at High-Tech Sanitizers; Some Video Customers Want Tamer Films, and Entrepreneurs Rush To Comply*, N.Y. TIMES, Sept. 19, 2002, at E1. According to a message on its Web site, Trilogy Studios is not currently offering MovieMask. Trilogy Studios, http://moviemask.com/index.php (last visited Apr. 8, 2006).

26. Lyman, *supra* note 25, at E1.

blush seem insignificant, the implications and consequences for "filtering plus" under copyright law are markedly different than for subtractive filtering.

III. THE FECA PROVISIONS

A. FECA and Allowable Editing: Filtering

FECA expressly permits digital filtering, while physical or digital cut-and-splice editing of movies is noticeably absent from the legislation.[27] The crucial distinction, as mentioned in Part II.B, *supra*, is that the filtering does not physically alter the actual DVD.[28] Such an altered movie seems to fall under the definition of a "derivative work." A "derivative work" is one "based upon one or more preexisting works . . . in which [the preexisting] work may be recast, transformed, or adapted."[29] In fact, the editing done by all of the various methods could be considered to create a derivative work; all edited works are clearly based upon preexisting works (the original copyrighted movies) and are "adapted" by the editor. Thus, the movies are adapted to appeal to a less tolerant audience, one that would prefer offensive language and other content to be excised. However, some form of fixation of the infringing work is also required, such that only movies that are physically altered, and not merely filtered, are caught in the web of derivative works.[30]

B. FECA and Unpermitted Editing: Cut and Splice and "Filtering Plus"

FECA does not include any provisions for movie-editing accomplished through cutting and splicing, nor does it allow for filtering that adds new material to a copyrighted work. Both of these methods are, in fact, expressly excluded from the legislation.[31] Therefore,

---

27. *See* Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(a), 119 Stat. 218, 223 (codified as amended in scattered sections of 17 and 18 U.S.C.). The law permits editing "by or at the direction of a member of a private household, of limited portions of audio or video content" of a movie and the creation of "technology that enables . . . making imperceptible [limited portions of audio or video content] and that is designed and marketed to be used, at the direction of a member of a private household," provided that "no fixed copy of the altered version of the motion picture is created." *Id.*

28. Bethards, *supra* note 21, at 4.

29. 17 U.S.C. § 101 (2000) ("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.'").

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

31. Family Entertainment and Copyright Act, § 202. The removal of audio or video content is allowed, provided "no fixed copy of the altered version of the motion picture is created

resolution of copyright issues pertaining to these technologies will likely be relegated to the courts.

IV. LEGAL BACKGROUND

A. The Current Legal Conflict: Huntsman v. Soderbergh

The battle being waged in the courtroom today stems from a declaratory judgment action filed by CleanFlicks in 2002 against sixteen directors of copyrighted movies (Directors), all members of the Directors Guild of America (DGA).[32] CleanFlicks sells and rents E-rated versions of copyrighted movies. The suit was initiated by CleanFlicks in anticipation of litigation by the Directors. The Directors filed their answer along with motions for leave to intervene the entire DGA and to compel joinder of several movie studios (Studios).[33] The Studios were a necessary party to the action because they, not the Directors, hold the copyrights to the motion pictures and thus had the requisite standing to assert claims of copyright infringement.[34] The DGA counterclaimed violations of copyright law and sought to join with CleanFlicks other companies that also provided movie-editing services and software (Counterdefendants), including ClearPlay, Inc., Family Shield Technologies, LLC, and Trilogy Studios, Inc.[35]

In *Huntsman*, the claims against filtering companies ClearPlay and Family Shield were dismissed following the passage of FECA in 2005.[36] The court held that the causes of action at issue were rendered nonjusticiable and therefore moot against these parties.[37] This was due to FECA's modification of the Copyright Act, which makes technology that

---

by such computer program or other technology." *Id.* § 202(a)(3). "The term 'making imperceptible' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture." *Id.* § 202(a)(4).

32. Second Amended Complaint and Jury Demand, Huntsman v. Soderbergh, No. 02-M-1622, 2005 WL 1993421 (D. Colo. Aug. 17, 2005). The defendant directors include Steven Soderbergh, Martin Scorsese, Steven Spielberg, and Robert Redford. *Id.*

33. Defendant Directors' Answer to Amended Complaint, *Huntsman*, No. 02-M-1662, 2005 WL 1993421; Defendant Directors Guild of America's Motion for Leave To Intervene at 3, *Huntsman*, No. 02-M-1662, 2005 WL 1993421; Defendant Directors' Motion To Compel Joinder of Third-Party Copyright Holders as Necessary Parties Pursuant to *Federal Rules of Civil Procedure* 19 and 17 U.S.C. § 501(b) at 2, *Huntsman*, No. 02-M-1662, 2005 WL 1993421.

34. *See* 17 U.S.C. § 501(b).

35. Defendant Directors' Motion for Leave To Join Third Parties as Counterdefendants at 2, *Huntsman*, No. 02-M-1662, 2005 WL 1993421.

36. *Huntsman*, 2005 WL 1993421, at *2.

37. *Id.*

allows movie viewers to skip audio and video content during playback permissible.[38]

B. Copyright Act

The Copyright Act of 1976 is authorized by the Constitution.[39] It grants copyright holders the exclusive rights to: (1) make copies, (2) prepare derivative works, (3) distribute copies, (4) perform publicly, and (5) display publicly.[40] These rights are limited by the provisions of 17 U.S.C. §§ 107-122.[41] Although the rights to make copies and to prepare derivative works often overlap, they are independent rights under the statute.[42] Fixation is required for copyright protection and has also been considered a requirement for finding copyright infringement.[43] Fixation occurs when a work is more than evanescent or transient.[44] Even when a violation has been found, a defendant will not be held liable if he succeeds in a fair use defense.[45] The statutory provision instructs courts to weigh a number of factors to determine whether the action should be deemed a fair use of the copyrighted work.[46]

C. Relevant Case Law

The issue of editing copyrighted material is novel; no case law exists which is exactly on point. However, it is helpful to examine several relevant developments in copyright law over the last two decades. Cases involving video games and music may be considered for guidance in the realm of motion picture editing.

The United States Supreme Court addressed movie playback technology in *Sony Corp. of America v. Universal City Studios, Inc.*,

---

38. *Id.*
39. U.S. CONST. art. 1, § 8, cl. 8.
40. 17 U.S.C. § 106 (2000).
41. *Id.*
42. *See id.* §§ 106(1)-(2).
43. *See id.* § 101. *See generally* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d, 965, 967 (9th Cir. 1992).
44. 17 U.S.C. § 101. Section 101 provides in pertinent part:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.
45. *See id.* § 107.
46. *See id.*

limiting the control copyright holders had over their works once they had been sold.[47] *Sony* involved an action brought by a group of television program copyright holders concerned about consumers' use of Betamax home video tape recorders to record programs that were broadcast on television.[48] The Court went through a fair use analysis and determined that the purpose of the machine was to allow consumers to tape programs in order to watch them at a later time, which was a noncommercial use.[49] By finding commercial use to be presumptively unfair, the Court inferred that noncommercial use was presumptively fair use.[50]

The Court addressed the issue of a presumption a decade later in *Campbell v. Acuff-Rose Music, Inc.* in the context of a music parody.[51] There the Court weakened its stance on the bright line presumption set out in *Sony* and instead found that a noncommercial use constituted an inclination towards, rather than a presumption of, fair use.[52]

In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, the United States Court of Appeals for the Ninth Circuit considered whether copyright law was violated when the defendant's technology allowed game play to be altered but did not create a permanent change to the actual game cartridge.[53] The defendant's product, the Game Genie, attached to a Nintendo game cartridge and allowed gamers to modify their playing experience by increasing the player's speed, number of lives, or other capabilities.[54] Each time the game was played, the codes for the specific changes had to be reentered, as the changes were not permanent.[55] Once the game was over, the Game Genie could be removed from the unaltered game cartridge.[56] The crucial consideration in *Galoob* was that the Game Genie was merely an enhancement of the original game cartridge and was useless without the cartridge.[57] Therefore, the court held that the audiovisual displays Galoob's product created did not constitute an infringing derivative work.[58]

---

47. *See* 464 U.S. 417, 438 (1984).
48. *Id.* at 420.
49. *Id.* at 449.
50. *See id.*
51. 510 U.S. 569, 591 (1994).
52. *Id.* at 577. The Court stated that "the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Id.*
53. 964 F.2d 965, 968 (9th Cir. 1992).
54. *Id.* at 967.
55. *See id.*
56. *See id.*
57. *See id.* at 968.
58. *Id.* at 969.

The Ninth Circuit later reached a different result when it considered the legality of a collection of 300 player-created game levels sold by Micro Star and based on plaintiff Formgen's computer game, *Duke Nukem 3D*.[59] Formgen encouraged players to create their own unique "levels" of play through use of the "Build Editor" utility and to post them online.[60] The court held that Micro Star infringed Formgen's copyrighted work when it sold the collection of player-created levels because the collection constituted a derivative work.[61] Micro Star's product contained MAP files that instructed the computer to draw files from the game's art library, which created the derivative work, the audiovisual display the player sees.[62] Unlike the Game Genie in *Galoob*, someone playing *Duke Nukem 3D* would not be required to enter codes or other data each time he played to recreate the audiovisual display because the information was stored in a permanent form on the CD.[63] The court applied the *Galoob* standard that a derivative work be "in a 'concrete or permanent form' and must substantially incorporate protected material from the preexisting work" and found that Micro Star's product met these requirements.[64] The court then found that Micro Star could not defend itself on fair use grounds because it infringed Duke Nukem solely for financial gain—a commercial purpose—and impinged on Formgen's ability to sell future versions of the Duke Nukem story.[65]

---

59. Micro Star v. Formgen, Inc., 154 F.3d 1107, 1109 (9th Cir. 1998).

60. *Id.* at 1109.

61. *Id.* at 1112.

62. *Id.* at 1111-12.

63. *Id.* at 1111. In the opinion, Judge Kozinski used an example of a hypothetical Pink Screener:

> Imagine a product called the Pink Screener, which consists of a big piece of pink cellophane stretched over a frame. When put in front of a television, it makes everything on the screen look pinker. Someone who manages to record the programs with this pink cast (maybe by filming the screen) would have created an infringing derivative work. But the audiovisual display observed by a person watching television through the Pink Screener is not a derivative work because it does not incorporate the modified image in any permanent or concrete form. The Game Genie might be described as a fancy Pink Screener for video games, changing a value of the game as perceived by the current player, but never incorporating the new audiovisual display into a permanent or concrete form.

Id. at 1111 n.4.

64. *Id.* at 1110 (quoting Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992)).

65. *Id.* at 1112-13.

V. DEFENSES

A. Defenses Available for Filtering

Under FECA, ClearPlay and its filtering competitors are free to continue selling their products. They are lawfully allowed to provide filters and similar technology to allow movie viewers to skip over or mute offensive content, while keeping the original DVD or VHS cassette intact, and without making any permanent edited version of the movies. The changes made will only appear on the screen, while the movie is playing, with the filter engaged.

Protection for the filtering technology is a logical extension of copyright law and may be compared to Galoob's Game Genie or Judge Kozinski's hypothetical Pink Screener.[66] Although the viewer sees an edited version of the movie, no changes are made to the actual movie. The DVD player or VCR is merely programmed to skip over or mute portions during playback so that the offensive content is not seen or heard. As such, the filter technology does not appear to create a derivative work as there is no fixation. Digital filtering companies have persistently likened their services to that of a remote: According to ClearPlay's Web site, watching a movie through a ClearPlay filter is "as if you had super-fast fingers and were able to punch remote control buttons fast and accurately enough to skip and mute certain content, but still maintain the movie's continuity and entertainment value!"[67] While the remote and filter technology have a number of similarities, one important difference between the two is that in the case of the filter someone else is making the decisions about what content to edit out of the movie. However, although the viewer does not ultimately make decisions about what content to edit or how to do it, he does have the ability to make choices as to what level of editing he wants to see. Using the ClearPlay system, for example, he can turn the system on or off and may choose to adjust fourteen different filter settings for each movie, amounting to 12,384 potential user configurations.[68] Although digital filtering has been blessed by FECA, the other types of editing have not received such protection, and they will likely be found to violate copyright law.

---

66. *Id.* at 1111.

67. Ian Bell, *Hollywood Sues ClearPlay over DVD Player*, Designtechnica.com, June 10, 2004, http://news.designtechnica.com/article4202.html.

68. *Id.*

B. Defenses Available for the Cut and Splice

Companies editing movies and selling or renting the revised versions, such as CleanFlicks and CleanFilms, defend their practice on several grounds. CleanFilms maintains that it provides a lawful service because it maintains a one-to-one ratio of legitimately purchased movies and edited movies and thus is protected by the doctrine of first sale.[69] CleanFlicks has two possible defenses, both falling under the fair use doctrine. CleanFlicks can argue that it is protected by the doctrine of first sale and by the noncommercial lending library nature of the cooperative. Despite CleanFilms' statement proclaiming its operations are legal, its assertion will likely prove false once the matter has been litigated, due in part to FECA's explicit exclusion of permanently altered works.[70]

A fair use defense is typically evaluated on four criteria, although the list is not necessarily exhaustive.[71] The criteria enumerated in the Copyright Act are:

> (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.[72]

The cut-and-splice editors appear to be making derivative works, as discussed in Part III.A, *supra*. Therefore, it is appropriate to subject the works to a fair use analysis to determine if they nevertheless will be considered noninfringing works. The edited movies are not made for

---

69. *See* 17 U.S.C. § 109 (2000); CleanFilms, *supra* note 18. According to CleanFilms' Web site:

> CleanFilms is a Co-operative rental club. All subscribers to our service become members of the Co-op. The Co-op collectively purchases original, unedited DVD movies then has them edited—always maintaining a 1 to 1 ratio of edited and non-edited originals. As owners of the original, unedited movies, the Co-op has the right to edit out content that is objectionable to its members—similar to how you might press mute to avoid hearing objectionable language today. Accordingly, you must subscribe as a member of the rental club before you can rent edited movies.

Id.

70. *See* Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(a)(3), 119 Stat. 218, 223 (2005); CleanFilms, *supra* note 18.

71. *See* 17 U.S.C. § 107; *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.").

72. 17 U.S.C. § 107.

nonprofit educational purposes, but are instead made for commercial purposes. Therefore, the first factor of the fair use defense, purpose or character of use, weighs against companies like CleanFlicks.

Consideration of the second factor, the nature of the copyrighted work, may weigh in favor of the companies employing a cut-and-splice method. For the most part, the movies at issue are fictional: Even when they are factually based, there is substantial creativity involved in making the movie, and all could arguably be characterized as entertainment. Fictional or entertainment works generally receive greater protection than factual works; factual works receive "thinner" protection because copyright law seeks to protect an author's expression and not facts.[73] Therefore, the nature of the works may fortify the editors' argument.

Factor three, the amount and substantiality of the portion used, will likely weaken the cut-and-splice editors' case. The editors are creating a work that is very similar to the underlying work and are only removing what is necessary to appeal to a more conservative audience. Due to the nature of the product, it is essential that it remain as close as possible to the copyrighted work; if not, it would not be a reasonable substitute for the original product—the unedited movie—and there would be virtually no market for it. The more creative license that the editors take, the less likely they are to make a product that will sell to a population that is looking for the original movies, but without the offensive content.

The cut-and-splice editors may have an argument in favor of the final factor: the effect of the use upon the potential market. They may claim that because they maintain a one-to-one ratio of legitimately purchased copies of the copyrighted movies to edited versions, they are not depriving the studios of any income. By utilizing the doctrine of first sale, the editors could show that since the studios have already made a profit on each copy of the movie when it was purchased by the editors, they have not lost anything when the editors resell the (edited) movie to their customers.[74] However, the correct inquiry, under the fourth factor of fair use, concerns the *potential* market. That would be the market for edited movies in this case. The editors may be depriving the studios of their potential market for edited movies. The studios could lose out on profits for selling the more expensive (as demonstrated by the editors' success selling the edited movies at a price that would necessarily include the cost of the movie and the editing service) edited versions of their movies.

---

73. *See generally* Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340 (1991); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

74. *See* 17 U.S.C. § 109.

The physical cut-and-splice editors may be on safer ground than their digital counterparts because of one crucial difference: The digital editor must necessarily reproduce the work. First, the original movie will be loaded onto a computer (arguably creating a reproduction of the work) assuming it meets the fixation requirement. Then, the editor will use a software program to manipulate the movie in order to remove the objectionable content before copying the revised movie onto DVDs or VHS cassettes.[75]

This final step quite clearly appears to create a copy of the work, which is prohibited by § 106(1) of the Copyright Act.[76] This copy is fixed on the tape or DVD and would necessarily be substantially similar to the underlying copyrighted work. As such, it is expressly prohibited by FECA.[77] The physical cut-and-splice method, as previously discussed, does not involve making either of these two infringing reproductions of the work.

C. Defenses for "Filtering Plus"

The filter technology that allows for content to be added, as well as removed, from movies likely will not fare as well as the straight removal filter technology will in copyright challenges. While copyright holders have authorized some types of movie-editing—such as the director's cut and editing for broadcast television or airplane viewing—the addition of new material has not traditionally been allowed, with the exception of dubbing over profanities in the authorized edited versions. To permit a party to add content to a copyrighted movie, such as MovieMask's corset for Kate Winslet, seems to come squarely within the definition of a derivative work: It is an original work of authorship that is based on a preexisting work.[78] It is "a work consisting of editorial revisions . . . which . . . represent[s] an original work of authorship."[79] Under *Micro Star*, the work must also be in a "concrete or permanent form" and substantially incorporate copyrighted material from the preexisting work.[80] There is a strong argument that MovieMask's technology creates an infringing work that is substantially similar to a preexisting work; the

---

75. *See generally* Nokes, *supra* note 15.

76. 17 U.S.C. § 105.

77. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(a)(3), 119 Stat. 218, 223 (2005).

78. *See* 17 U.S.C. § 101.

79. *See id.*; *see also* Micro Star v. Formgen, Inc., 154 F.3d 1107 (9th Cir. 1998); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992); Anderson v. Stallone, 11 U.S.P.Q.2D 1161 (1989).

80. *Micro Star*, 154 F.3d at 1110.

end product is the same movie, only with changes inserted to cover up offensive material. There is little doubt that a court would find an edited movie to be substantially similar to the underlying motion picture. The only viable ground for challenging the claim that MovieMask creates a derivative work is that it may not be sufficiently permanent.[81] This can likely be overcome as the permanence of the edited movie is similar to the *Duke Nukem 3D* product at issue in *Micro Star v. Formgen*,[82] that is, the data for the new content is stored and may be replayed in conjunction with the underlying work (either the "Duke Nukem 3D" CD or the movie DVD). Additionally, FECA expressly prohibits the addition of new material into copyrighted works.[83] Given this, a product like MovieMask may be found to infringe the movie studios' copyrighted works by creating derivative works, at least insofar as it adds new material to the movies.

VI. CONCLUSION

The developments over the last several years demonstrate a market for E-rated movies. If the motion picture studios, as copyright holders of the movies, fail to create such a product themselves, others will likely continue to work around copyright law to produce it. While it appears that many of the technologies may be shown to infringe the studios' copyrights, the movie-filtering technology has been declared permissible through the passage of FECA and will probably survive additional copyright challenges. If the market for edited movies continues to grow, this demand may drive development so that new technologies are developed that circumvent copyright law. As long as the market is available, there will be companies willing to figure out how to break into it.

---

81. *See Galoob*, 964 F.2d at 967.

82. *See Micro Star*, 154 F.3d at 1111.

83. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(a)(4), 119 Stat. 218, 223 (2005).