Raiders, Psychos, Butchers, and Hypocrites: Steven Soderbergh and the Question of Fair Use and Visual Works on the Internet

Stephen Richard Belden*

I. INTRODUCTION

On February 24, 2014, Academy Award-winning filmmaker Steven Soderbergh posted a reedit of Alfred Hitchcock's horror classic *Psycho*[1] to his website, Extension765.[2] The reedit featured Hitchcock's film intercut with scenes from the 1998 Gus Van Sant-directed remake,[3] which mimicked the 1960 original almost shot-for-shot.[4] The news that the filmmaker had made his own "unofficial" edit of the films was quickly picked up by media outlets and analyzed by fans and film critics

* © 2015 Stephen Richard Belden. J.D. candidate 2016, Tulane Law School; M.A. 2008, Journalism, University of Mississippi; B.A. 2006, English, Millsaps College. The author would like to thank his wife and daughter for their encouragement during the writing of this Comment. The author would also like to thank the past and present members of the *Tulane Journal of Technology and Intellectual Property* for their hard work on this volume.

1. PSYCHO (Universal Pictures 1960).
2. EXTENSION 765, http://www.extension765.com (last visited Mar. 22, 2015).
3. PSYCHO (Universal Pictures 1998).
4. Steven Soderbergh, *Psychos*, EXTENSION 765 (Feb. 24, 2014), http://extension765.com/sdr/15-psychos.

alike.[5] Soderbergh later posted two other similar "unofficial" edits in 2014—one of a drastic reedit of Michael Cimone's *Heaven's Gate*[6] and a black-and-white edit of Steven Spielberg's *Raiders of the Lost Ark*[7] with the sound removed entirely and replaced with different music.[8] Only the posting of the *Raiders* edit contained a legal disclaimer of any kind, reading "Note: This posting is for educational purposes only."[9] On January 14, 2015, Soderbergh posted yet another video—an edit of Stanley Kubrick's *2001: A Space Odyssey*[10]—without a disclaimer.[11]

Following news of this posting, technology critics and intellectual property scholars posted blog entries questioning the legality of Soderbergh's actions and pointed out that the filmmaker had previously testified before Congress on behalf of the Directors Guild of America, where he asked for harsher penalties for online copyright infringers.[12] David Post, a leading Internet law scholar and *Washington Post* blogger, described Soderbergh's appropriation of the copyrighted material as being at odds with his history as a plaintiff in a suit against the company Clean Flicks, that edited and distributed versions of Hollywood movies designed to be "family friendly."[13] The suit was successful under § 106(2) of the Copyright Act, effectively shutting down Clean Flicks.[14]

While no studio or filmmaker has filed suit against Soderbergh, the works posted to Extension765 present a fascinating fact pattern. As the United States Court of Appeals for the Ninth Circuit recently said, "The fair use doctrine has been called the most troublesome in the whole law

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5. Kevin Jagernauth, *Watch: Steven Soderbergh's 'Psychos,' His Feature Length Mashup 1960 and 1998 Versions of 'Psycho,'* PLAYLIST (Feb. 25, 2014, 12:43 AM), http://blogs.indiewire.com/theplaylist/watch-steven-soderberghs-psychos-his-feature-length-mashup-of-the-1960-and-1998-versions-of-psycho-20140225.

6. HEAVEN'S GATE (Metro-Goldwyn-Mayer 1980).

7. RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

8. HEAVEN'S GATE, *supra* note 6; Steven Soderbergh, *Heaven's Gate: The Butcher's Cut*, EXTENSION 765 (Apr. 21, 2014), http://extension765.com/sdr/16-heavens-gate-the-butchers-cut [hereinafter Soderbergh, *Heaven's Gate*]; Steven Soderbergh, *Raiders*, EXTENSION 765 (Sept. 22, 2014), http://extension765.com/sdr/18-raiders [hereinafter Soderbergh, *Raiders*].

9. Soderbergh, *Raiders*, *supra* note 8.

10. 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968).

11. Steven Soderbergh, *The Return of W. De Rijk*, EXTENSION 765 (Jan. 14, 2015), http://extension765.com/sdr/23-the-return-of-w-de-rijk. This video was removed from Extension 765 per a request by Warner Brothers and Stanley Kubrick's estate. *Id.*

12. *See* Mike Masnick, *Steven Soderbergh Fought To Make Re-Editing Films Illegal; Now He's Re-Editing Famous Films*, TECHDIRT (Jan. 15, 2015, 9:27 AM), https://www.techdirt.com/articles/20150114/17225129702/steven-soderbergh-got-judge-to-say-that-reediting-films-is-not-fair-use-now-hes-reediting-films-posting-them-online.shtml/; David Post, *Steven Soderbergh, Copyright Infringer?*, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/stephen-soderbergh-copyright-infringer.

13. Post, *supra* note 12.

14. *Id.*

of copyright."[15] Courts have long struggled to use the fair use doctrine to consistently define a rule that makes it clear what constitutes art and what is simple copyright infringement. Moreover, the element of "transformativeness," largely defined by the United States Supreme Court in the *Campbell v. Acuff-Rose Music, Inc.*, case, was developed in order to allow more leeway for possibly infringing artists, but also adds to the complexity and confusion of the fair use doctrine.[16] The advent of new technology that simplifies the sharing of possibly infringing media also complicates matters. The prevalence of YouTube and the accessibility of software like iMovie have enabled amateurs and professionals alike to reedit their favorite copyrighted material, add music, and repost it for all to see.

The purpose of this Comment is first to state the history of fair use and transformativeness with respect to artists as well as visual images and film works on the Internet; second, to analyze the facts of Soderbergh's actions using the four-factor test; and third, to discuss Soderbergh's alleged hypocrisy and policy changes to more clearly define what constitutes fair use in art necessary to help promote "the Progress of Science and useful Arts" as is the United States Constitution's stated goal of copyright law.[17]

II. HISTORY OF FAIR USE

A. Purpose of American Copyright Law and Fair Use

The United States Constitution gives Congress 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."[18] The author's right to ownership of her creation is not "inevitable, divine or natural right[,] . . . [i]t is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public."[19]

The copyright holder is granted six exclusive rights over her work, including the right to reproduce copyrighted works, perform the copyrighted work publicly, and prepare derivative works.[20] The

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15. Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012) (internal quotation marks omitted).
16. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
17. U.S. CONST. art. I, § 8, cl. 8.
18. *Id.*
19. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).
20. 17 U.S.C. § 106 (2012).

remaining uses are reserved for the public.[21] A "derivative work" as defined by the 17 U.S.C. § 101 "is a work based upon one or more preexisting works, [including] any other form in which a work may be recast, transformed, or adapted."[22] However, this right to prepare derivative works is limited in one respect: in order to be considered infringing, the derivative work must be substantially similar to the copyrighted work.[23]

Fair use developed shortly after the creation of copyright in the 18th century in recognition of instances where the unauthorized use of copyrighted material did not infringe on an author's rights.[24] Like copyright, fair use is intended to benefit society as well as the author. Society confers to the author "monopoly-exploitation benefits for a limited duration . . . in order to obtain for itself the . . . enrichment that results from creative endeavors."[25] But society also benefits from "referential analysis and the development of new ideas out of old."[26] Without the leeway of fair use, advances in creativity and intellectual invention would be stymied. As with patent protection, "[e]ach advance stands on building blocks fashioned by prior thinkers."[27] According to Judge Pierre Leval, "There is no such thing as a wholly original thought or invention."[28]

B. The Four-Factor Test

The 1976 Copyright Act codified prior fair use law and created four statutory factors to be used in determining whether the fair use defense can be rightly applied.[29] The four factors are:

> the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; [and] the effect of the use upon the potential market for or value of the copyrighted work.[30]

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21. *Id.*
22. *Id.* § 101.
23. Christine McCarroll, *Morals, Movies, and the Law: Can Today's Copyright Protect a Director's Masterpiece from Bowdlerization?*, 5 J. HIGH TECH. L. 331, 334-35 (2005).
24. Leval, *supra* note 19, at 1105.
25. *Id.* at 1109.
26. *Id.*
27. *Id.*
28. *Id.*
29. Katherine M. Lieb, *Can the Television and Movie Industries Avoid the Copyright Battles of the Recording Industry? Fair Use and Visual Works on the Internet*, 17 WASH. U. J.L. & POL'Y 233, 236 (2005).
30. 17 U.S.C. § 107 (2012).

The first factor tries to determine what "lies at the heart of the fair user's case."[31] A transformative-use prong was added through case law in 1994 and has since become a critical part of the fair use analysis.[32] In *Campbell*, the Supreme Court defined the concept in order to more clearly explain why a hip-hop group's parody of the Roy Orbison song "Pretty Woman" was protected under fair use.[33] The primary purpose of this element is to determine whether the secondary use "merely 'supersede[s] the objects' of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[34] Echoing Leval, the Supreme Court stated that the purpose of copyright is to promote science and the arts, and this goal is furthered by transformative works.[35] Moreover, if a work is determined to be largely "transformative," the significance of other factors, such as commercial purpose, is diminished.[36]

The second factor examines the nature of the copyrighted work.[37] This factor concerns whether the original work is of the type that is "closer to the core of intended copyright protection than others."[38]

The third factor examines "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[39] While the test is both quantitative and qualitative, courts are typically more concerned with the importance of the materials copied—"the heart of the work" as the Supreme Court has termed it.[40]

The fourth factor examines "the effect of the use upon the potential market for or value of the copyrighted work."[41] This factor is concerned with the potential economic harm that the secondary use may have on the copyrighted work, as well as the copyright holder's ability to market derivative works.[42] When determining whether the use can be permitted, the court must take into account not only what harm may come to the copyright holder, but also the benefit the public will derive from the

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31. Leval, *supra* note 19, at 1111.
32. Caroline L. McEneaney, *Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art*, 78 BROOK. L. REV. 1521, 1531 (2013).
33. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994).
34. *Id.* at 579 (citation omitted).
35. *Id.*
36. *Id.*
37. 17 U.S.C. § 107(2) (2012).
38. *Campbell*, 510 U.S. at 586.
39. 17 U.S.C. § 107(3).
40. *Campbell*, 510 U.S. at 587.
41. 17 U.S.C. § 107(4).
42. McCarroll, *supra* note 23, at 338.

secondary use.[43] The potential loss of revenue must be substantial in order for this factor to turn in favor of the copyright holder.[44] This factor "disfavors a finding of fair use" when the secondary use of the copyrighted material has impaired the market by serving as a substitute for the original work.[45]

C. Fair Use and Artwork

Fair use and, in particular, the transformative-use prong as laid out by the Supreme Court in *Campbell* has had an effect on the finding of fair use in artwork.[46] Prior to *Campbell*, "the purpose and character of the use" had largely been considered the determining factor when analyzing fair use in the visual arts.[47] Post-*Campbell*, courts were hung up on the parody aspect of that case, finding it difficult to create a coherent test for transformativeness that did not rely on whether the secondary work was a direct parody of the original work.[48] Thus, it became important for courts to determine whether the secondary use commented on the original.[49]

Collage artist Jeff Koons had been successfully sued for copyright infringement several times before finally prevailing under the fair use doctrine in 2006.[50] In *Blanch v. Koons*, the United States Court of Appeals for the Second Circuit ruled that Koons's work "Niagara," which used part of a photograph Koons found in a magazine, passed the transformative test "almost perfectly."[51] The court took into account that the adaptation of the fashion photograph to Koons's piece changed colors, mediums, size, details and gave an "entirely different purpose and meaning" to the original work.[52]

The court considered additional prongs for the first factor: "commercial use, . . . parody, satire, . . . justification for copying[,] and bad faith."[53] In short sequence, the court determined that because Koons's work was transformative, "the significance of other factors,

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43. *Id.*
44. Leval, *supra* note 19, at 1125.
45. *Id.*
46. McEneaney, *supra* note 32, at 1530.
47. *Id.*
48. *Id.* at 1532.
49. *See id.* at 1536.
50. *See* Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006); *see also* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); United Feature Syndicate v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993).
51. *Blanch*, 467 F.3d at 253.
52. *Id.*
53. *Id.* at 253-56.

[including] commercialism, are of [less significance]."[54] As to the "Parody, Satire, and Justification for the Copying," the court opined that it was not the job of the court to attempt to critique or understand the merits of the artwork or Koons's approach: "[I]t seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography."[55] And to the question of bad faith, the court found that "failure to seek permission for copying" is insufficient to allow for a finding of bad faith.[56]

The court then said that the second factor, the nature of the copyrighted work, has only limited use when a secondary use is found to be a transformative commentary and not an exploitation of the original work's "creative virtues."[57]

For the third factor, the court found that Koons's copying of the photograph was "reasonable in relation to the purpose of the copying," in this case, in order to "evoke 'a certain style of mass communication.'"[58]

The fourth and final factor, the effect the secondary use may have on the potential market of the copyrighted work, was found to favor Koons, as his use of the photograph did nothing to harm the photographer's career, ruin any current or future plans for licensing, nor devalue the photograph.[59]

The court in *Blanch* determined that Koons was not liable for copyright infringement, and allowing him to use the photograph would better serve the goal of copyright law than would preventing it.[60] This decision was indicative of the shift that had taken place in fair use analysis following the addition of the "transformative" prong. In stark contrast to the decision in *Blanch*, *Koons* had previously lost under the fair use defense in *Rogers v. Koons* under similar circumstances. Koons used a photographer's picture without permission arguing that his work was a "parody of modern society."[61] However, the court found not only that Koons had copied the original work in bad faith, but that the work did not constitute parody, and, moreover, was primarily profit motivated.[62]

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54. *Id.* at 254 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
55. *Id.* at 254-55.
56. *Id.* at 256.
57. *Id.* at 257.
58. *Id.* at 258.
59. *Id.*
60. *Id.* at 259.
61. Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).
62. *Id.*

However, the *Blanch* decision, while indicative of a greater shift in sensitivity to artists who appropriate original, copyrighted works as part of their own work, still left artists open to liability.[63] This case was interpreted narrowly by at least one district court as requiring the artist to comment directly on the original work, thus limiting the freedom promised in *Blanch*.[64] In *Cariou v. Prince*, an artist, Richard Prince, who used copyrighted photographs from a coffee table book for his collage without permission, did not prevail under fair use as the court determined that he did not comment on the original photographs, but used the photographs for the same purpose as the original photographer.[65]

D. Fair Use and Visual Images on the Internet

In *Kelly v. Arriba Soft Corp.*, a software company, Arriba Soft, developed a search engine that allowed browsers to view displayed thumbnail images for each search.[66] A photographer, Leslie Kelly, brought action against Arriba Soft for using his photographs in the image database without his consent.[67] The court held that fair use covered Arriba Soft's actions.[68]

The decision turned heavily on the first factor in the fair use analysis.[69] The court found that while the purpose and use of the website was decidedly commercial, the use of the plaintiff's photograph was not exploitative because Arriba Soft did not use images to promote or make a profit through the image's sale.[70]

The court also determined that the use was transformative because the image was of low-resolution quality and served an entirely separate purpose from the original work.[71] Judge Nelson wrote that Arriba Soft's use was "more than merely a retransmission of Kelly's images in a different medium," and that, due to the picture's low resolution, it would be unlikely for anyone to repurpose the image for any other purpose.[72]

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63. McEneaney, *supra* note 32, at 1533.
64. *Id.*
65. 714 F.3d 694, 698-99 (2d Cir. 2013). This decision was largely based on Prince's testimony wherein he stated that he did not intend to comment on the original artist's photographs. *Id.* at 707-08.
66. 336 F.3d 811, 815 (9th Cir. 2003).
67. *Id.*
68. *Id.* at 822.
69. *See id.* at 818.
70. *Id.*
71. *Id.*
72. *Id.* at 819.

The fact that the site's use did not supersede Kelly's use, but created "an entirely different function," made Arriba Soft's use transformative.[73]

Upon finding the use to be transformative, the court gave short shrift to the other four factors, but found that the first and fourth factors weighed heavily in favor of Arriba, and only the second factor weighed "slightly in favor of Kelly," due to the fact that Kelly had previously published the works.[74] The third factor, nature of the copyrighted work, was deemed "neutral" because, while Arriba used the entirety of Kelly's images, the court determined this amount was reasonable in order to allow users to recognize the image.[75] The fourth factor weighed in favor of Arriba, and the court opined that works that are judged to be transformative are "less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work."[76] This case is consistent with the Copyright Act because the thumbnails did not "stifle artistic creativity" or "supplant the need for the originals."[77]

E. Fair Use and Film Works on the Internet

The court in *Video Pipeline v. Buena Vista Home Entertainment* leaned heavily on the holding in *Kelly* in reaching its decision.[78] Video Pipeline, a company specializing in distributing trailers for motion pictures, had a distribution agreement with Disney.[79] However, when the company posted Disney-owned trailers to its website, Disney asked the trailers be removed.[80] Video Pipeline complied, but filed for a declaratory judgment, arguing that their use of the trailers did not violate Disney's copyright.[81] Video Pipeline also replaced the trailers with two-minute video clip previews of the Disney movies and "amended its complaint to seek a declaratory judgment allowing it to use the clip previews."[82] Disney then counterclaimed for copyright infringement.[83] Video Pipeline argued that their use of the clips was protected under fair use, claiming that their collection of clips were not derivative works, but

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73. *Id.* at 818.
74. *Id.* at 820-22.
75. *Id.* at 821-22.
76. *Id.* at 821.
77. *Id.* at 820.
78. Lieb, *supra* note 29, at 243-44.
79. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 195 (3d Cir. 2003).
80. *Id.*
81. *Id.*
82. *Id.* at 196.
83. *Id.*

constituted a catalog, and the use of the copyrighted material was necessary.[84]

For the first factor, the purpose and character of the use, the court held in favor of Disney. The clip previews that replaced Disney's trailers were highly similar to the original trailers, to the point where they could serve as substitutes to the trailers.[85] Moreover, in producing the clips, Video Pipeline did not add creative aspects to Disney's original expression, beyond the job of deciding which scene to include in the clip previews, which is only creative in the narrowest sense.[86] Moreover, the court found that the clips could not be considered informational as might a movie review.[87]

The second factor also weighed in favor of Disney. The court found that the expressive and creative nature of the original full-length movies and trailers—as opposed to factual material—outweighed the finding of fair use.[88]

The third factor, the amount and substantiality of the work copied was the only factor in the court's fair use analysis to turn in favor of Video Pipeline.[89] Video Pipeline only reproduced clips from the first half of each movie and preserved the "heart" of each film, meaning the amount taken was qualitatively and quantitatively reasonable relative to the original full-length films.[90]

The fourth factor, the effect of the secondary use on the potential market or value of the original work, weighed in favor of Disney.[91] The court found that because there is a market for trailers, Video Pipeline's clips could serve as a market replacement for the trailers, making it likely that "cognizable market harm to the [derivatives would] occur."[92] Furthermore, if Video Pipeline were allowed to post these clips to their site, Disney could be "depriv[ed] . . . of the opportunity to advertise and sell other products to those users."[93]

Based on the comparison of the original movie trailers and Video Pipeline's clip previews, the court held that three of the four factors of the

84. *Id.* at 197.
85. *Id.* at 199-200.
86. *Id.* at 200.
87. *Id.*
88. *Id.* at 200-01.
89. *Id.* at 201.
90. *Id.*
91. *Id.* at 201-03.
92. *Id.* at 201-02.
93. *Id.* at 203.

fair use claim fell against Video Pipeline.[94] The holding was seen as a victory for the movie industry in their attempt to combat Internet piracy.[95]

The case was critiqued as strict copyright enforcement as "consistent with the purposes of the Copyright Act and the fair use doctrine."[96] Video Pipeline's use of the original work was commercial and not transformative in that the company did not add expressive or transformative aspects to the clips.[97] Nonetheless, the decision did pique the interest of critics who feared this type of protection might be expanded to provide strict protection for any secondary use of visual images taken from copyrighted films.[98]

Another case decided by a federal district court adds to the interest in this fact pattern. In *Clean Flicks of Colorado, LLC v. Soderbergh*, a group of motion picture studios along with the Directors Guild of America (DGA) alleged that various companies were infringing their copyright by creating, marketing and distributing edited-for-content copies of the studios' films.[99] This was achieved by copying the DVD to a computer, using software to delete the offending scenes and dialogue, and creating a new DVD of the edited version, which was then sold or rented to consumers.[100] The companies asserted that their actions were protected under fair use.[101] The court analyzed the facts of the case using the four statutory factors.[102]

For the first factor, the purpose and character of the use, the court considered whether the defendant companies' use could be considered "transformative" and answered in the negative, noting that the deletions involved only small portions of the movies.[103] The court also noted that the challenged use was for commercial gain.[104] This factor weighed in favor of the studios and DGA.

For the second factor, the nature of the copyrighted work, the court found that because the secondary use was nontransformative, that fact weighed against a finding of fair use.[105]

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94. *Id.* at 207.
95. Lieb, *supra* note 29, at 247.
96. *Id.* at 255.
97. *Id.* at 254-55.
98. *Id.* at 255-56.
99. Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006).
100. *Id.*
101. *Id.* at 1239.
102. *Id.* at 1240.
103. *Id.* at 1241.
104. *Id.*
105. *Id.*

The third factor, the amount and substantiality of the work copied, weighed in favor of the studios once again, as the court determined that the defendant's new versions copied the original films in almost their entirety and for nontransformative purposes.[106]

For the fourth factor, the defendants argued that their edited versions helped the market for the studios as the services' customers had to purchase the original DVD before it could be edited.[107] Thus, the customers may never have purchased the DVD in the first place were it not for the service.[108] The court said this argument "ignore[d] . . . the right [of the copyright holder] to control the content of the copyrighted work."[109]

All four factors weighed against a finding of fair use.[110] The court granted an injunction permanently restraining the defendant companies from continuing selling and marketing their services.[111]

III. SODERBERGH—HYPOCRITE, ARTIST, OR BOTH?

In the months following Steven Soderbergh's posting of his reedited versions of *Psycho*, *Heaven's Gate*, and *Raiders of the Lost Ark*, he received heavy criticism from some critics who viewed Soderbergh, in light of the *Clean Flicks* decision and testimony he gave before Congress in 2009 pushing for harsher punishments for people guilty of digital piracy, as a "copyright maximalist" who was now behaving hypocritically.[112]

> I think it's great that Soderbergh is making these edits and posting them for everyone to see. . . . I think he should be allowed to do so. I just find it strange (and somewhat hypocritical) that this is coming from the very same Steven Soderbergh who has fought for greater punishment for copyright infringers and whose name sits atop a court ruling that directly says re-editing films the way you'd like to see them is infringing.[113]

The bloggers suggest that the district court's holding in *Clean Flicks* is "clearly saying" that Soderbergh reediting and posting his new versions of these films "is very much copyright infringement."[114] Moreover, in suggesting that because Soderbergh is in favor of harsher

106. *Id.*
107. *Id.* at 1241-42.
108. *Id.*
109. *Id.* at 1242.
110. *Id.*
111. *Id.* at 1243-44.
112. Masnick, *supra* note 12.
113. *Id.*
114. *Id.*; *see* Post, *supra* note 12.

penalties for those guilty of piracy, the bloggers inadvertently conflate digital pirates with anyone who dare infringe on copyright for the purpose of art or education. This is a false equivalency on its face and speaks to a bigger problem within the general public's perception of copyright law: all copyright infringement is per se illegal.

While it is true that Soderbergh is using copyrighted material, these accusations either choose to ignore that Soderbergh may have a defense under fair use or they are conflating the facts of *Clean Flicks* with the facts of Soderbergh's actions and assume that the outcome—were Soderbergh to be sued—would be identical, and the fair use defense would surely fail.

This then begs the question, how would the facts of Soderbergh's case, or what we know of his case, fare under the fair use defense?

A. Fair Use Analysis

For the purpose and character of the use, courts consider whether the work was transformative and added "something new, with a further purpose or different character, altering the first with new expression, meaning or message."[115] In other words, for each reedit Soderbergh created, if he is found to have altered the original film with new expression to the extent that it can be considered transformative, the other statutory factors will be given less weight.[116]

In the case of *Raiders*, Soderbergh strips the film of both its color and its sound—including dialogue and its highly recognizable John Williams score.[117] Soderbergh's stated purpose is to allow the viewer to concentrate on the cinematography and shot composition.[118] Soderbergh is altering the first expression by stripping it of some of its essence in order to focus on one important aspect for the purpose of education. Here, Soderbergh has altered the original work in order to "comment" on it—an important requirement in a finding of fair use under *Campbell*. If we look to the more relaxed standard in *Koons*, Soderbergh clearly has a "different objective" than did Steven Spielberg with the original film *Raiders of the Lost Ark*.

Likewise, in his *Psychos* reedit, Soderbergh juxtaposes shots from Alfred Hitchcock's original with Gus Van Sant's shot-for-shot remake.[119] Though Soderbergh does not state a purpose here or include any text that

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115. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
116. *See id.* at 580.
117. Soderbergh, *Raiders*, *supra* note 8.
118. *Id.*
119. Soderbergh, *supra* note 4.

might put the reedit into context, it would appear that he is examining the similarities and differences of the two films, again, as a type of study. By editing the two films into one, his secondary work is an attempt to comment on the original films, which fulfills at least one of the requirements of transformativeness under *Campbell*.[120]

For his *Heaven's Gate* reedit, subtitled *The Butcher's Cut*, Soderbergh's purpose is again vague. In his preamble, he only says that the film has been an "obsess[sion]" and "unfortunately history has shown that on occasion a fan can become so obsessed they turn violent toward the object of their obsession. . . . This is the result."[121] The result is a pared down version of a notoriously long film, which was poorly received upon release.[122] In essence, it's Soderbergh's version of the movie; the original film's running time has been cut by more than half, and *Rolling Stone* remarked that Soderbergh's reedit "makes a case for parts of *Heaven's Gate* being a forgotten gem."[123] The magazine also notes major changes Soderbergh made in the film's structure: "[T]his version truncates the ending (removing the final ambush on Ella and the epilogue on the yacht) and moves the prologue (at Harvard's 1870 graduation) to the end, rendering it more poignant when we know of all the bloodshed that will follow it."[124]

At the beginning of the reedit, Soderbergh includes a title card that reads, "I acknowledge that what I have done with this film is both immoral and illegal."[125] It is more difficult to argue that *The Butcher's Cut* is transformative in the sense that the other reedits may be considered. Here, Soderbergh's work may be closer to the preview clips in *Video Pipeline* than one of Koons's art collages.[126] While Soderbergh's job of reediting Cimino's original work seems to have required a great deal more creativity than Video Pipeline's preview clips, it is ultimately just a different version of the original work and is being used for the same purpose, likely putting it out of reach for a finding of transformativeness.[127]

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120. *See Campbell*, 510 U.S. at 579.

121. Soderbergh, *Heaven's Gate*, *supra* note 8.

122. *See* Joe Queenan, *From Hell*, GUARDIAN (Mar. 20, 2008, 08:15 PM), http://www.theguardian.com/film/2008/mar/21/1.

123. Gavin Edwards, *South of 'Heaven': Steven Soderbergh Cuts an Epic Bomb in Half*, ROLLING STONE (Apr. 28, 2014), http://www.rollingstone.com/movies/news/south-of-heaven-steven-soderbergh-cuts-an-epic-bomb-in-half-20140428.

124. *Id.*

125. Soderbergh, *Heaven's Gate*, *supra* note 8

126. *See* Video Pipeline v. Buena Vista Home Entm't, 342 F.3d 191 (3d Cir. 2003); Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

127. *See Blanch*, 467 F.3d at 252.

A court may also consider additional prongs under the first factor such as commercial use, although if the secondary use is found to be transformative, the commercialism prong will be considered to be of less significance.[128] Here, however, it is important to note that in one instance, Soderbergh explicitly says that he is posting his reedit for "educational purposes."[129] The site and reedit videos are not behind a paywall of any kind, although Soderbergh does sell merchandise on the site, which is explicitly dubbed "A One-of-a-Kind Marketplace."[130] However, because the reedit videos themselves are not being sold for profit, it is unlikely that Soderbergh is enjoying any revenues off of unauthorized use of copyrighted material.

Therefore, it is likely that *Raiders* and *Psychos* would be considered transformative works under the first factor, while it is unlikely that *Heaven's Gate: The Butcher's Cut* would be.

The second factor for the court to consider is the nature of the copyrighted work. For the second factor, courts analyze whether the original work is of the type "'intended [for] copyright protection.' . . . Fictional, creative works come closer to this core than do primarily factual works."[131] In *Campbell*, the Court stated that when the second work inherently requires the inclusion of "publicly known, expressive works" in order to be effective, then this factor is useless.[132] In that case, Roy Orbison's song "Pretty Woman" was integral to the 2 Live Crew parody.[133] Here, Soderbergh's videos, while unequivocally not parodial, are entirely dependent on the original copyrighted works. However, in *Video Pipeline*, the United States Court of Appeals for the Third Circuit rejected the defendant's argument that because the studio's movies had been released to the public, that this factor should therefore weigh in the defendant's favor, and held instead that the "use is not fair regardless of the published or unpublished status of the original."[134] Therefore, it is unlikely that the second factor would weigh in favor of Soderbergh.

The third factor examined by the court is the amount and substantiality of the work used. While typically "copying an entire work militates against a finding of fair use," in *Kelly*, the court clarified the rule laid out by the Supreme Court in *Campbell* that said that the amount

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

129. Soderbergh, *Heaven's Gate*, *supra* note 8.

130. Steven Soderbergh, *Threads*, EXTENSION 765, http://extension765.com/categories/threads (last visited Mar. 26, 2015).

131. *Video Pipeline*, 342 F.3d at 200 (citation omitted).

132. *Campbell*, 510 U.S. at 586.

133. *Id.* at 579.

134. 342 F.3d at 200-01.

of permissibly copying is dependent on the purpose and character of its use: "If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her."[135]

In *Kelly*, the Ninth Circuit determined that, because it was reasonable for Arriba to use the entirety of Kelly's image, the third factor weighed neither for nor against either party.[136] Here, because the "intended use" for each reedit is to give a full-length study of the entire film, it could easily be argued that Soderbergh's use of the entirety of each film is reasonable, and thus weighs neither for nor against either party.[137]

The fourth factor analyzes "the effect of the use upon the potential market for or value of the copyrighted work."[138] As stated by the Ninth Circuit in *Kelly*, "A transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work."[139] Following this line of thinking, Soderbergh might have an easier time showing that the reedits *Raiders* and *Psychos* would have an adverse impact than *Heaven's Gate: The Butcher's Cut*.

Raiders is unlikely to be a substitute due to its experimental nature. Its purpose is different than that of the original work.[140] If it could be said that the Soderbergh reedit has an "audience," it is likely a niche—students or scholars of film who would gain a greater understanding of shot composition and lighting through viewing the film under these modifications. In this respect, it does not supersede the original, copyrighted work.

Psychos is also an experiment, but again, unlikely to be a substitute for the original work. However, it would not be unusual for a court to find a sufficient commercial market for fans and students of film to see a version of *Psycho* with both films' iconic shots juxtaposed. If that were the case, Soderbergh's continued streaming of the clips on the Internet may cause the court to hold that it is "likely that cognizable market harm to the [copyright holder's derivative works] will occur."[141]

Because *Heaven's Gate: The Butcher's Cut* would likely not be found to be transformative, it would be more difficult to show that it does

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135. Kelly v. Arriba Soft Corp., 336 F.3d 811, 820-21 (9th Cir. 2002).

136. *Id.* at 821.

137. *See id.*

138. 17 U.S.C. § 107(4) (2012).

139. 336 F.3d at 821.

140. *See* Soderbergh, *Raiders*, *supra* note 8 (stating that the posting is for educational purposes).

141. Video Pipeline v. Buena Vista Home Entm't, 342 F.3d 196, 202-03 (3d Cir. 2003) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994)).

not have an adverse effect on the potential market for the original work. A court is likely to determine that it is not a transformative work, and thus, it may be substituted for the derivative works.[142] Soderbergh, by sharing his reedit, may have diluted the value of the original film and future opportunities for the copyright owners to market derivative works such as "director's cut" versions of the original work.[143]

Therefore, it seems likely that his reedits *Psychos* and *Raiders* would be protected under the fair use doctrine, while it is less likely that *Heaven's Gate: The Butcher's Cut* would prevail using this defense.

B. Piracy in Art and Changes in Policy

Soderbergh might be seen as a hypocrite by the previously cited critics and legal scholars—particularly by those who campaign for more liberal copyright laws—but perhaps his works challenging the fair use doctrine and his feelings toward piracy are not mutually exclusive. In fact, where some might see two diametrically opposed sides of one man, others might argue his actions demonstrate when a more relaxed stance on copyright infringement is important (regarding art) and when a stricter stance toward copyright infringement is important (regarding piracy). Perhaps the best way to make one's point about the dangers of piracy is to demonstrate ways in which utilizing copyrighted materials for artistic purposes can be not only be considered acceptable, but could be encouraged. Some may find it ridiculous to suggest there is a right way and a wrong way to infringe on copyrighted works, but Soderbergh's actions suggest just that.

Perhaps the larger point here is how this argument indicates a lack of understanding about the fair use doctrine among the public. This is especially problematic in 2015, because editing software and social media have made reediting videos and posting them as streaming videos online relatively easy. As pointed out in a *Loyola of Los Angeles Entertainment Law Review* comment, users often have their videos pulled from the video sharing site YouTube due to their use of copyrighted content.[144] Not only are the users likely unaware of the existence of the copyright laws, they are likewise unaware of the fair use doctrine that might protect their use of the copyrighted material.[145]

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142. *See id.* at 202.

143. Edwards, *supra* note 123.

144. Ian Chuang, *Be Wary of Adding Your Own Soundtrack:* Lenz v. Universal *and How the Fair Use Policy Should Be Applied to User Generated Content*, 29 LOY. L.A. ENT. L. REV. 163, 164 (2009).

145. *Id.* at 165-66.

Conversely, copyright holders may be equally ignorant of the burden placed upon them before alleging infringement. In *Lenz v. Universal*, the defendant, Lenz, was banned from YouTube for posting a short home video that featured a copyrighted song in the background.[146] Stephanie Lenz argued that the fair use doctrine should be considered before copyright holders can issue a takedown notice to YouTube under the Digital Millennium Copyright Act of 1998 (DMCA).[147] In a decision seen as a small victory for copyright minimalists, the court agreed, holding that a copyright owner must make a good faith evaluation as to whether the material in question makes fair use of the copyright before proceeding with a takedown notice under the DMCA.[148] As the appeal for this case is still pending before the Ninth Circuit, it remains to be seen whether this new rule, putting the burden on the owner alleging infringement, will set a precedent.[149]

This is a step in a direction that will hopefully lead not only to a greater understanding of the fair use doctrine and less litigation, but may also help to spur artists to pursue works that utilize copyrighted works—which is at least in part the reason for the Copyright Act.[150]

C. Expansion of Fair Use

The next question is whether we wish for the fair use doctrine to be expanded so that it more easily allows for art to be exempted from allegations of copyright infringement. Should Soderbergh be able to reedit and produce any video he wishes to on his website as long as he is an artist and it is considered art? This would be exceedingly difficult under the current copyright laws; however, some have suggested adding additional factors to the transformative use standard specifically asking whether the work "serves a different artistic purpose."[151] These new factors would codify the Second Circuit's holding in *Blanch* and abandon the idea that the secondary work must comment on the original in order to be transformative.[152] The new standards would ask "(i) the objective difference between the two works, (ii) expert testimony from art historians and critics, and (iii) the artist's intent."[153]

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146. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008).
147. *Id.* at 1153-54.
148. *Id.* at 1154 (citing 17 U.S.C. § 512(c)(3)(A)(v)).
149. *Lenz*, 572 F. Supp. 2d 1150, *appeal docketed*, No. 13-16106 & 13-16107 (9th Cir. Dec. 13, 2013).
150. *See* U.S. CONST. art. I, § 8 ("To promote the Progress of Science and Useful Arts.").
151. McEneaney, *supra* note 32, at 1545-46.
152. Blanch v. Koons, 467 F.3d 244, 259 (2d. Cir. 2006).
153. McEneaney, *supra* note 32, at 1547.

It is worth noting that these proposed standards may not change anything for Soderbergh. It isn't likely that such a widening would allow *Heaven's Gate: The Butcher's Cut* to be protected, though it would make it more likely that *Raiders* and *Psychos* would be. However, these standards may protect artists like Soderbergh from litigation or, more importantly, the fear that comes with the threat of litigation, which may have a chilling effect on creativity. This is, of course, a good thing for artists, particularly those who cannot afford to fight the kinds of lawsuits Jeff Koons has found himself embroiled in. Arguably, it also helps promote the arts without going too far and legalizing useless copying or piracy. A move away from requiring secondary work to comment on the original work, and a move toward allowing secondary works that present a separate and unique artistic purpose from the original are steps in the right direction; however, this decision cannot be made casually. These proposed standards are easier to swallow when one pictures the sympathetic starving artist being told by a court to destroy his work because it includes a cartoon mouse owned by a large corporation. But if we instead picture a famous artist being paid millions of dollars for a piece that incorporates a journeyman photographer's work, it becomes somewhat more difficult. Ultimately, the decision must be borne in the original intentions of goal and copyright, and the courts must decide how and when the law should yield to art.

IV. CONCLUSION

At the beginning of Steven Soderbergh's reedit, *Heaven's Gate: The Butcher's Cut*, a title card on the screen reads "I acknowledge that what I have done with this film is both immoral and illegal."[154] Whether this was a self-effacing joke, an acknowledgement of liability, or a half-hearted tactic to divert blame, the truth is far more complicated than that. Soderbergh's reedited videos present an interesting potential fact pattern in the realm of fair use, mixing copyright infringement, streaming video, and visual art. The question of whether or not Soderbergh is protected under the fair use defense is a complicated one, though perhaps his actions will push courts to consider whether it should be less complicated and more predictable. As Judge Leval said, "Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law."[155] Moving forward, with the advent of new and increasingly ubiquitous social technologies, copyright

154. Soderbergh, *Heaven's Gate*, *supra* note 8.

155. Leval, *supra* note 19, at 1135.

laws will no doubt constantly be challenged, and the fair use doctrine will be invoked repeatedly, but the courts and the public must work toward finding a balance that is both consistent and reflects the objectives of copyright while promoting the advancement of art and technology.