FIGHTING FOR CONTROL: MOVIE STUDIOS AND THE BATTLE OVER THIRD-PARTY REVISIONS

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In this note, the author addresses the copyright implications of commercially editing copyrighted movies to delete "objectionable" material in an attempt to reduce exposure to sex, violence, profanity, or other objectionable material. Companies such as CleanFlicks, the best-known provider of edited movies, supply customers with "clean" versions of movies using cut and splice editing and digital filtering to remove "objectionable" material. These third-party editors, as the author calls them, argue that the movie studios, which own the copyrights to these movies, should not dictate what people watch in their own homes. The studios, on the other hand, claim that third-party editors violate their copyrights by copying or altering the content of their movies. Following a brief discussion of copyright law, the author analyzes the validity of the movie studios' copyright infringement claims against third-party editors and whether the fair use defense applies to this dispute. The author concludes that third-party editing likely constitutes copyright infringement.

I. INTRODUCTION

Imagine walking into a video store to rent a movie and discovering that you can choose between ten different versions of *Saving Private Ryan*. In addition to authorized versions such as the original theatrical release and the director's cut, this imaginary video store also has a whole shelf of different unauthorized edited versions. You can choose to watch a version that does not contain any foul language. Or you can pick the version where no one bleeds after being shot. Perhaps you could instead rent a version where viewers never see anyone die. And, maybe, the video store also carries a version that completely skips the opening D-Day beach-landing scene. This may sound incredible, but if a number of companies have their way, these movies may all be coming soon to a video store near you.

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Parents have been laboring to combat the ill effects resulting from their children's exposure to outside influences since the nineteenth century.[1] In recent years, people have increasingly focused their attention on the media and the amount of sex, violence, and language contained within movies and television programs. Teaching morals and beliefs can be especially difficult if the media portrays them as unnecessary or glorifies individuals of questionable character. For example, for a parent to successfully teach a child that a violent response to provocation is wrong, that parent must overcome the influence of popular television shows and movies that portray violence as acceptable, normal, and perhaps even "cool."

The confrontation between Hollywood and parents continues today in a courtroom in Colorado.[2] In this Colorado courtroom, a number of companies that edit commercial movies are embroiled in a lawsuit with directors and studios from Hollywood.[3] The editing companies argue that the directors and studios purposely try to harm all children—and adults too—by taking away the right to choose what to watch.[4] On the other hand, the directors and studios argue that, while they support a consumer's right to avoid "objectionable" content, editing the movies without authorization is illegal.[5]

Media content that qualifies as "objectionable" varies from person to person. Some people wish to avoid observing violence. Others would prefer not to view any intimate acts or hear sexual innuendos. Still others find foul language objectionable. Of course, within each of these categories, a wide range exists between what some find acceptable and others do not. In essence, each person has a different comfort level with respect to the amount of violence, sex, or swearing that is acceptable in the media.

In an attempt to enable consumers to view movies without having to expose themselves to any "objectionable" content, a number of companies now produce edited versions of select movies.[6] A video rental chain called CleanFlicks[7] is probably the best-known provider of edited mov-

1. *See* JUDITH LEVINE, MEDIA COALITION, SHOOTING THE MESSENGER: WHY CENSORSHIP WON'T STOP VIOLENCE 11–12 (Aug. 24, 2000), *available at* http://www.mediacoalition.org/reports/stm_full.pdf

2. *See* Huntsman v. Soderbergh (D. Colo. 2002) (No. 02-M-1662), *available at* http://news.findlaw.com/hdocs/docs/copyright/cflixstud102802cmp.pdf.

3. *See id*.

4. *See infra* note 12 and accompanying text.

5. *See infra* note 13 and accompanying text**.**

6. *See* Kieth Merrill, *Cleaning Up the Movies, Part I,* MERIDIAN, *at* http://www.meridianmagazine.com/arts/020604clean.html (last visited July 6, 2004). Merrill points out that all of the editing companies have two things in common: (1) "[t]hey were started by people who enjoy films but don't want to be exposed to 'the garbage'"; and (2) "[i]n one way or another they edit out nudity, sex, violence and mute or cut profanity, then make these 'edited versions' of the movies available to their customers." *Id.*

7. CleanFlicks is a family-oriented company based in Utah that makes edited VHS tapes and DVDs available to consumers. CleanFlicks, *at* http://www.cleanflicks.com (last visited Mar. 30, 2003).

ies.[8] Legal struggles, however, bring CleanFlicks more notoriety than its edited movies ever have.[9] Specifically, CleanFlicks fired the first shot in the Colorado courtroom battle by filing an action seeking a declaratory judgment that unauthorized editing of copyrighted movies was perfectly legal.[10] This confrontation between CleanFlicks and the defendant film directors soon grew into a full-fledged war involving many commercial editors, directors, and movie studios,[11] with some expecting that it may take the Supreme Court to resolve their differences.

Essentially, the main conflict between these parties centers on control. The editors argue that the directors and studios cannot dictate what either general consumers or the editors themselves watch in their homes.[12] The directors and studios argue that, although consumers have the ability to choose what to watch, they do not have the right to make unauthorized changes to copyrighted films because copyright owners have exclusive rights in their works.[13] However, the editors, despite their rhetoric, are not actually arguing about what they can watch in their own homes or whether they can edit a movie for personal use. The editors are really arguing that they have a right to operate businesses that provide edited versions of movies to third parties.[14] Although the directors and studios may pursue additional causes of action in the course of their legal battle, this note focuses solely on the copyright implications of commercial movie editing. Thus, the issue at hand is whether commercial editing businesses, such as the third-party editors involved in this case, violate the studios' copyrights by using various methods to control what viewers experience when they watch movies.

8. *See* Merrill, *supra* note 6.

9. *See* Plaintiff's Second Amended Complaint and Jury Demand at 2, 6, Huntsman v. Soderbergh (D. Colo. 2002) (No. 02-M-1662), *available at* http://news.findlaw.com/hdocs/docs/copyright/cflixstud102802cmp.pdf.

10. *See id.* Among the sixteen original defendants are famed directors Steven Soderbergh, Robert Altman, Martin Scorsese, Steven Spielberg, Robert Redford, and Sydney Pollack. *Id.* at 1–2.

11. The Directors Guild of America (DGA) intervened on behalf of the directors and countersued CleanFlicks and a number of other commercial editors under the Lanham Act. *Id*. at 2, 6. Additionally, the studios have joined forces with the DGA to protect their copyright interests. *Id*. at 2.

12. For example, Breck Rice, a software developer affiliated with Trilogy Studio's MovieMask program, argues that "[i]n the privacy of [their] own home[s], consumers have whatever liberties they want to take with property they own or have paid for the rights to use. . . . No studio or no director should be allowed to tell parents how to protect their kids." Associated Press, *Film-Censoring Software Angers Entertainment Industry*, USA TODAY, Feb. 3, 2003, *available at* http://www.usatoday.com/tech/news/techpolicy/2003-02-03-film-censors_x.htm (last visited Mar. 30, 2003) [hereinafter *Film-Censoring Software Angers Entertainment Industry*]. Bill Aho, the chief executive of ClearPlay, believes that the disagreement between third-party editors and the studios and directors "is a matter of economics and control" and questions the studios' right "to dictate what [his] choices are." *Id.*

13. *See id.* According to Warren Adler, the associate national director of the Directors Guild of America, the lawsuit is about "the fact that the filmmaker and the copyright owner have the right to send their product out into the world and decide what they're saying and what they're presenting." *Id.*

14. Because the editors are neither the copyright owners nor the individuals actually using the edited movies, they are referred to as "third-party editors" in this note.

Part II of this note will first examine the types of media content that some find "objectionable."[15] The discussion then turns to the ways that people can avoid exposure to such "objectionable" content.[16] In addition, this part briefly introduces and explains applicable U.S. copyright law.[17] Part III of this note discusses the pervasiveness of edited works and distinguishes these edited movies from other types of edited materials.[18] Next, two basic types of editing[19] are explored: cut and splice editing and digital filtering. This part then applies principles of copyright law to the editing methods,[20] including whether infringement occurs and whether the doctrine of fair use excuses any infringement.[21] Finally, Part IV of this note argues that third-party editing of copyrighted movies likely constitutes copyright infringement.[22] Alternative solutions to the conflict between copyright holders and those desiring "clean" media are discussed and the author proposes that the studios' release of authorized edited versions of movies can resolve the dispute.[23]

II. BACKGROUND

A. "Objectionable" Content in Movies and Other Media

1. The Existence and Effects of "Objectionable" Content

Research has shown that movies "average one scene of serious violence every four minutes,"[24] and a recent study found that a high number of young teenagers have been exposed to extremely violent movies.[25]

15. *See infra* text accompanying notes 24–49.
16. *See infra* text accompanying notes 50–80.
17. *See infra* text accompanying notes 81–166.
18. *See infra* Part III.A–B, notes 167–80 and accompanying text.
19. While some of the techniques used perhaps do not literally edit the physical film, they do control what the viewer sees and hears when watching the film. For simplicity, all techniques for changing what the viewer experiences are considered editing in this note.
20. *See infra* Part III.C–D.
21. *See infra* Part III.C–D.
22. *See infra* text accompanying note 296.
23. *See infra* Part IV.
24. Press Release, Senator Joe Lieberman, Movie, TV Violence Still Going Great Guns, New Study Shows (Sept. 22, 1999), *available at* http://lieberman.senate.gov/press/99/09/r092399b.html [hereinafter Lieberman]. Researchers have defined "serious violence" to include murder, rape, kidnapping, or assault with a weapon. *Id.*; *see also Newshour with Jim Lehrer: Violence and the Media* (PBS television broadcast, Sept. 24, 1999) [hereinafter *Violence and the Media*] (transcript available online at http://www.pbs.org/newshour/bb/media/july-dec99/violence_9-24.html).
25. Press Release, Dartmouth College, Study Finds That Young Teens Are Exposed to Too Many Violent Movies (Dec. 23, 2002), *available at* http://www.dartmouth.edu/~news/releases/2002/dec/122302.html [hereinafter Dartmouth College]. In conducting a study examining the reach of extremely violent movies, researchers interviewed more than 5000 children between the ages of ten and fourteen to determine which movies they had seen in a random group of movies selected from among the 600 top-grossing box office movies released between 1988 and 1999. *Id*. Researchers found that an average of twenty-eight percent of the children had seen each of fifty of the most violent films. *Id.*

Surprisingly, even G-rated movies contain a fair amount of violence.[26] "Offensive" content pervades the television networks,[27] as illustrated by the fact that the amount of rough language used on network television shows has dramatically increased in the last ten years.[28] The amount of sexual interaction contained in television programs has also significantly increased.[29] Further, increasing access to videos, DVDs, and cable and satellite television enables more children to watch R-rated movies.[30]

Some of the concern with "objectionable" content in movies originated with studies that show it harms children. A number of studies specifically address whether violence in the media has an adverse affect on children.[31] During the past thirty years, researchers have conducted hundreds of studies on the subject of media violence.[32] Some of the reports suggest that there is a clear link between media violence and aggressive behavior, particularly among young people.[33] Other studies, however,

26. David Germain, *Deceptively Innocent*, ABCNEWS.com, *at* http://web.archive.org/web/20000816192806/http://www.abcnews.go.com/sections/living/DailyNews/violence0523.html (July 6, 2004). A study published in the *Journal of the American Medical Association* "examined 74 G-rated theatrical films available on video and found that each contained at least one act of violence" and averaged almost ten minutes of violence per film. *Id.; see also* Press Release, Harvard School of Public Health, Violence in G-rated Animated Feature Films (May 23, 2000), *available at* http://www.hsph.harvard.edu/press/releases/press05232000.html.

27. Press Release, The Dove Found., FCC Sets the Standard for Offensive Content on TV and Radio (Apr. 6, 2001) ("The public is outraged by the increasingly coarse content aired on radio and television at all hours of the day."), *available at* http://www.dove.org/research/fcc_sets_standard.htm [hereinafter FCC Sets the Standard for Offensive Content on TV and Radio]. While it may seem that the content of television programs has nothing to do with third-party editing of movies, a number of television series are now being released on DVD and are therefore potentially open to similar editing. While Congress has rejected proposals for movie content regulation by the Federal Communications Commission (FCC), *see* Melissa Morrison, *Bang! A Look at Violence and Sex Onscreen, and at Who—If Anyone—Should Be in Control*, BOXOFFICE ONLINE (Nov. 1, 1999), *at* http://www.boxoff.com/issues/nov99/nov99story4.html (last visited Feb. 27, 2003), network television programs are already subject to FCC-imposed content guidelines, *see* FCC Sets the Standard for Offensive Content on TV and Radio, *supra.* In determining whether broadcast content is indecent, the FCC applies guidelines that take into consideration the intent and context of potentially offensive material, as well as the extent to which it is used. *See id.* Even the FCC does not consider full frontal nudity indecent in movies like *Schindler's List*, where nudity is shown in the context of concentration camps. *Id.*

28. Byron Rivers, *%$@#&!*, EAGLE-TRIBUNE (Lawrence, Mass.), Apr. 4, 2002 (noting that each hour of network television during 1989–1990 contained an average of less than one use of rough language, whereas there were more than five per hour during the 1999–2000 season), *available at* http://www.eagletribune.com/news/stories/20020404/LI_001.htm.

29. *See* CHILDREN NOW & THE KAISER FOUND., SEX, KIDS, AND THE FAMILY HOUR, *at* http://www.childrennow.org/media/familyhour/FAMHOUR.html (last visited Mar. 23, 2003).

30. Dartmouth College, *supra* note 25.

31. *Violence and the Media*, *supra* note 24 ("Everybody from the Surgeon General to the American Academy of Pediatrics has concluded after looking at all the research that violence in the media does contribute to violent behavior among kids, almost makes people become desensitized to violence—in the case of some kids, scares kids.").

32. Michael Massing, *Movie Violence, Still Playing*, WASH. POST, July 4, 1999, at B1.

33. *Id.* Studies conducted by the U.S. Surgeon General's office in 1972 and 1982 found that "televised violence contributed to antisocial behavior." *Id.* Other groups whose studies have agreed that TV violence contributes to real world violence include the American Medical Association, the American Psychological Association, the National Institute of Mental Health, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry. *Id.* In particular, the American Psychological Association reached "'the irrefutable conclusion that viewing violence in-

have found that media violence is not a significant factor in the occurrence of actual violence.[34] Interestingly, while the amount of accessible media has increased in recent years, "violent crime has fallen to its lowest level in nearly 30 years."[35]

The "objectionable" content in media seems to have varied effects. For example, although much of the violence in G-rated movies is intended for comedic effect, the films may send the message to children that it is acceptable to resolve differences through force.[36] For instance, some researchers believe that "'[c]artoon violence is one of the most likely forms to promote imitation . . .' [because] '[i]t normalizes violence and also trivializes violence . . . . by focusing not on negative consequences of violence but making it funny.'"[37] In addition, researchers have also found that teenagers permitted to watch R-rated movies are nearly three times more likely to smoke than those who do not watch R-rated movies.[38] Lastly, research shows that sexual content in the media influences teenagers' views on sexuality and decisions about sex.[39] This influence may have some positive effects, however. For example, an episode of the television show *Friends* may have educated teenagers about the dangers of relying on condoms as a sole method of birth control.[40]

Politicians have continuously attempted to protect children from violent media content. For example, Bill Bennett, a former Secretary of Education, "petitioned the movie industry to police itself" and former President Bill Clinton joined the members of the National Association of Theatre Owners (NATO) when they announced their plans to strictly enforce the MPAA ratings system to protect young adults from media vio-

creases violence.'" Daphne White, *PG-13 Movies in the Late-Bond Era*, WASH. POST, Jan. 18, 2000, at C4.

34. *See, e.g.*, LEVINE, *supra* note 1, at 14–16 (discussing the multitude of causes which contribute to violence and the lack of a direct link between actual violence and media violence); Francesca Cappucci Fordyce, *Movies, Music, TV, and Peer Pressure*, INNERSELF, *available at* http://www.innerself.com/Parenting/movies.htm (last visited Nov. 4, 2003) (stating that "[m]edia violence does not cause children to be violent"); Kathryn Wright, *Does Media Cause Violent Behavior? A Look at the Research*, Oct. 6, 2000, *at* http://www.womengamers.com/articles/gameviolence1.html (noting that exposure to media violence "can be one of several risk factors for violence" but acknowledging that "viewing violent entertainment ALONE does not cause a child to commit violent acts").

35. Press Release, Media Coalition, *Shooting the Messenger Debunks Link Between Media Violence and Real Violence: Report Finds Censorship Will Not Stop Violence* (Aug. 24, 2000), *available at* http://www.mediacoalition.org/stm/press_release.htm.

36. Germain, *supra* note 26.

37. *Id.* (quoting Joanne Cantor, a communications professor emeritus at the University of Wisconsin-Madison).

38. Dartmouth College, *supra* note 25; *see also* Press Release, Dartmouth College, Dartmouth Researchers Link Movies to Teen Smoking (Dec. 14, 2001), *at* http://www.dartmouth.edu/~news/releases/2001/dec01/teensmoking.shtml.

39. MEDIASCOPE, TEENS, SEX, & THE MEDIA, 2001, *at* http://www.mediascope.org/pubs/ibriefs/tsm.htm (last visited July 6, 2004).

40. *See* News Release, RAND Corp., RAND Study Finds Entertainment TV Can Help Teach Teens Responsible Sex Messages (Nov. 3, 2003), *available at* http://www.rand.org/hot/press.03/11.03.html.

lence.[41] While Congress has considered regulating the media's violent content, it has rejected all proposed bills to date.[42] In doing so, Congress has placed a higher value on free speech than on regulating violent content.[43] Specifically, Congress rejected a bill that would have required Hollywood to either create its own labeling system or accept one created by the Federal Trade Commission.[44] Congress also declined to pass a bill that would have defined some violent content as "obscene" and therefore subject to banning.[45]

According to Senator Joe Lieberman, "Hollywood is still going great guns to mass market mass murder" despite evidence presented to it that violent films threaten children.[46] Rupert Wainwright offers one reason for Hollywood's apparent indifference to complaints about violence in the media: an international audience that reacts differently to media content.[47] He notes that, while American movies are distributed around the world, violence rates in foreign countries differ radically from those found within the United States.[48]

In addition to dealing with an international audience, moviemakers face another problem in cleaning up their films: not everybody has the same standards as to what is too violent or too sexy. Notably, some parents "don't view sexual content and violence [sic] content as equally corrosive."[49] Thus, a moviemaker who desires to "clean up" his or her films then faces the problem of where to draw the line. How much and what types of violence and foul language are acceptable? What scenes containing sexual themes are okay? To which audience standard must he or she cater?

2. Avoiding "Objectionable" Content

Because Hollywood has not eliminated "objectionable" content from its movies, consumers are left to their own devices to avoid exposure to "objectionable" content in their homes. Senator Lieberman has suggested that parents should take a more active role in preventing their

41. Morrison, *supra* note 27. The theatre owners, however, do insist that they have consistently enforced the MPAA ratings system since its establishment in 1968. *Id.*

42. *Id*.

43. *Id*.

44. *Id*.

45. *Id*.

46. Lieberman, *supra* note 24.

47. *Violence and the Media*, *supra* note 24.

48. *Id.* Wainwright appears to suggest that because the United States and other Western nations have virtually the same amount of violence in the media, factors other than media content account for the unusually high rates of violence in the United States. *Id.*

49. Morrison, *supra* note 27. Barrie Lawson Loeks, the NATO chairwoman in 1999, notes that "parents have very different views on sex and on violence, and not necessarily consistent ones." *Id*. For example, Ms. Loeks says that parents have yelled at her for "not letting their eight-year-old in to see 'Friday the 13th' but won't let their kids see anything with nudity," while other parents feel just the opposite. *Id.*

children's consumption of violent media.[50] A large number of parents appear to be taking his advice.[51]

Consumers use a variety of tactics to avoid contact with "objectionable" content. First, the consumer may simply choose not to watch the movie.[52] Directors and studios argue that not every piece of art is intended for every individual[53] and that consumers should simply avoid movies they deem inappropriate. Third-party editors, however, argue that everyone should see some films and that people should have the option of seeing films such as *Saving Private Ryan* "without so much violence and language."[54] Perhaps, however, the viewer who watches an edited version of *Saving Private Ryan* completely misses the point of the movie.[55] War can be gruesome and gory—not glorious—and *Saving Private Ryan* illustrates this reality. Editing out the violence in the film may conceal the reality of war—which some would argue is exactly what Stephen Spielberg tried to convey in the film that the studios copyrighted and released.

Movie reviews on the internet can be very helpful in determining whether a movie contains "objectionable" content.[56] In addition, the MPAA rating system exists to aid parents in determining whether a movie is appropriate for children to view.[57] This ratings system is intended to assist consumers in deciding whether a particular film is right for them. For example, those attempting to avoid all sexual content should avoid movies that are rated NC-17, R, and probably even PG-13. The MPAA ratings system provides only a general guideline; therefore,

50. Lieberman, *supra* note 24 ("[W]e have to ask ourselves if we are feeding the degradation of our culture by silently tolerating our children's consumption of this mix of media garbage and poison.").

51. *See, e.g.*, Marnie Ko, *Hollywood Fights to Protect Its Filth*, *at* http://web.archive.org/web/20030123082000/http://www.marnieko.com/editmovies.htm (last visited Feb. 22, 2003) (noting that in a recent year more than a million parents purchased TV Guardian, a device that mutes foul language in television shows and movies); *see also* VIEWER FREEDOM, THE VIEWER CHOICE LAWSUIT FAQ, *at* http://viewerfreedom.org/legal/faq.html (last visited Mar. 30, 2003) (noting that the "viewer choice" companies have a growing number of customers).

52. *Film-Censoring Software Angers Entertainment Industry*, *supra* note 12 (noting that Brad Silberling, the director of *City of Angels*, believes viewers "have ultimate control over what they see because they can choose to avoid movies they find objectionable").

53. *See* Jason O'Brien, *Clean Flicks Sues for Their Right to Edit Movies* (Sept. 18, 2002), *at* http://www.suite101.com/article.cfm/academy_awards/94983 ("Martin Scorsese said it brilliantly . . . 'Not every picture is meant to be seen by everyone—especially children.'"); *see also Film-Censoring Software Angers Entertainment Industry*, *supra* note 12 (noting that director Brad Silberling finds danger in assuming that every film can be made family appropriate and believes that *Saving Private Ryan* is a powerful message, but only for those old enough to view it).

54. O'Brien, *supra* note 53.

55. *Id.* (noting that editing *Saving Private Ryan* "would mute the whole intended effect of experiencing that film").

56. *See, e.g.,* The Movie Mom, *at* http://www.moviemom.com (last visited Mar. 30, 2003); Kids-in-Mind, *at* http://www.kids-in-mind.com (last visited Mar. 30, 2003).

57. Morrison, *supra* note 27.

some argue that it does not provide enough guidance.[58] Further, while the MPAA says that "parents just like you" rate the films, many people find that their judgment greatly differs from that of the film raters.[59]

A viewer can also choose not to watch a segment of the movie. For example, when using a VCR or DVD player to watch movies, parents have the ability to manually fast-forward through portions of movies that contain "objectionable" content.[60] As an aid to individuals who desire to skip portions of films, some organizations hope to create websites that provide minute-by-minute descriptions of movie content.[61] These websites are intended to provide detailed information regarding the types of violence, language, or sexual acts that are contained in the movie and the part of the film that contains such content.

In many cases, a consumer may also wait and watch the film on network television. Because network television content is required to meet FCC guidelines, objectionable content has already been excised from movies shown on network television.[62] Thus, network television viewers do not see the most violent or racy parts of a film.[63]

Currently, some consumers have begun to use technology, in addition to these traditional methods, to protect themselves from "objectionable" content. Instead of making individual choices regarding the content, these viewers use third-party commercial editing services to insulate themselves from "objectionable" content in films.[64] Those who support such movie editing argue that "[m]ovie editing allows films that might otherwise be passed over for objectionable content to be enjoyed by the whole family."[65]

58. *See Violence and the Media, supra* note 24; s*ee also* Merrill, *supra* note 6 ("Relying on ratings from MPAA may not always protect you from exposure to inappropriate language, images and ideas.").

59. *See* Merrill, *supra* note 6 ("You only have to watch a couple of PG-13 movies to know that whoever decided it was appropriate for young teenagers is NOT a parent who shares our values and concerns.").

60. *See* Lionel S. Sobel, *Understanding the CleanFlicks Lawsuit*, DGA MAG., Nov. 2002, *available at* http://www.dga.org/news/v27_4/feat_digitalpiracy1.php3 (last visited Mar. 30, 2003) (noting that parents can fast-forward through scenes and mute dialogue). As an example, a parent watching actor Tom Cruise's movie *Top Gun* with his or her children might fast-forward through the one sex scene in the movie and explain it to children by exclaiming, "Yuck! Mushy stuff. . . . We don't want to watch this . . . ."

61. *See, e. g.,* VIEWER FREEDOM, SOLUTIONS: FACES, CUSTOM PLAYBACK, AND AIRLINE EDITIONS, *at* http://web.archive.org/web/20030206054306/http://www.viewerfreedom.org/obj2.php (last visited July 6, 2004) (describing its plan to develop Film Architecture and Content Evaluations, or FACES, that "contain detailed information on the exact nature of the content as well as the overall message of the film").

62. *See* FCC Sets the Standard for Offensive Content on TV and Radio, *supra* note 27.

63. Some third-party editors, however, may argue that the TV versions still contain "objectionable" content. The edited versions of films often are stripped of content that is allowable on television. For example, Edit-My-Movies edits movies to a PG-rating level. *See* http://www.editmymovies.com (last visited Mar. 30, 2003) (discussing edits for language and images pertaining to profanity, sex, and violence).

64. *See* Merrill, *supra* note 6.

65. Ko, *supra* note 51.

Movies are artistic works just like paintings, books, photos, music, and sculptures. Not all artistic works are intended for all audiences. For example, some people may be embarrassed by the subject matter of the play *The Vagina Monologues*; someone easily offended by human anatomy perhaps would not appreciate Michelangelo's *David*. However, an individual who finds these artistic works offensive usually would not manipulate them into something he or she personally finds less offensive.[66] The individual would just choose not to attend a performance of *The Vagina Monologues* or, instead of buying a replica of *David* and then removing his lower body or sewing him clothing, the offended consumer probably would just avoid the statue. For some reason, people treat films as lesser works of art.[67] Instead of simply choosing not to view a movie that contains offensive material, individuals choose to reshape the work until it meets their standards.

A number of third-party editors now provide viewers with new ways of reshaping movies. These companies create edited versions of movies by deleting the "objectionable" material and, in some cases, adding or substituting other material into the scene.[68] Customers of these businesses either receive a special edited copy of the movie[69] or a video playback system that controls the audio-video output from a DVD.[70]

Deletion and insertion of material are common forms of film alteration.[71] Deletion is often used when TV versions of movies are created. Deletion involves the removal of material from films in order to allow them to fit into a television timeslot or meet censorship requirements.[72] People and objects can also be inserted into existing films.[73] While most of the third-party movie editors use deletion techniques, some also insert material into films.

The most basic way to delete or insert video content is to use cut and splice techniques.[74] One type of cut and splice editing involves physically removing a portion of the film from a videocassette on which the "objectionable" content exists and then fastening the film back to-

66. *See* O'Brien, *supra* note 53 ("No one ever thinks to cover up or paste over something that might be offensive in a painting, they simply can choose not to look at it. No one would think to use a black marker and mask out offensive words from a book.").

67. *See id*.

68. *See Film-Censoring Software Angers Entertainment Industry*, *supra* note 12.

69. *See* Defendants' Answer and Counterclaims at 13, Huntsman v. Soderbergh, (D. Colo. 2002) (No. 02-M-1662) (alleging that CleanFlicks, Clean Cut, Family Safe, and Family Flix provide customers with edited movies on DVD or videotape).

70. *See id.* at 18–23 (alleging that ClearPlay, Trilogy Studios, and Family Shield provide video editing software/hardware systems that cause edited movies to be displayed).

71. David A. Honicky, *Film Labelling [sic] as a Cure for Colorization and Other Alterations: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409, 410 (1994).

72. *Id.* at 411–12. As noted by Honicky, a two-hour film cannot fit into a two-hour television timeslot, with commercials, without some material being deleted. *Id.* Typically a two-hour film must be reduced to about ninety minutes to fit into a two-hour television time slot. *Id.* at 412 n.18.

73. *Id.* at 412.

74. Merrill, *supra* note 6.

gether without it.[75] Editors prefer not to use this physical cut and splice technique, however, because it is inefficient and will not work on DVDs.[76] A preferred cut and splice method involves using a video capture device to transfer the movie onto a computer, removing the "objectionable" material with video editing software, and then transferring the edited movie onto a videocassette or recordable DVD (DVD-R).[77]

Alternatively, editors can use filtering techniques to modify what viewers see. For example, software programs can simply mask any "objectionable" audio or video content.[78] A more advanced version of filtering allows editors to completely alter scenes that do not comport with their moral standards. For example, editors may add clothing into nude scenes[79] or manipulate images of actors' mouths to make it appear that they are actually saying whatever new non-"objectionable" content has been inserted in place of foul language.[80]

B. Introduction to Copyright Law

1. General Overview

The authority of Congress to grant protection to intellectual property stems from the U.S. Constitution.[81] Congress can "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."[82] Pursuant to its constitutional authority to protect authors' writings, Congress has passed federal copyright laws.[83] The 1976 Copyright Act provides a federal statutory copyright protection "automatically as soon as a work of authorship is fixed in a tangible form . . . and preempts state copyright protection for works of authorship fixed in

75. *See id.*

76. *Id.*

77. *Id.*

78. ClearPlay created a software program that performs this type of editing. Drew Clark, *Bowdlerizing for Columbine? Why American Directors Have No Moral Rights to Their Movies*, *at* http://slate.msn.com/id/2077192 (Jan. 20, 2003). When ClearPlay is used, "[o]nce a consumer pops an unaltered *Erin Brockovich* DVD in the player, the software simply instructs the player to mute Julia Roberts' foul language." *Id*.

79. Trilogy Studios created software that performs such substitutions. *Id*. Trilogy Studios's software has the ability to instruct certain DVD players to replace "objectionable" scenes in movies with those of its own creation. *Id.* For example, in the movie *Titanic*, while movie-theatre viewers saw a scene where actress Kate Winslet posed for a nude drawing, a consumer using Trilogy Studios's software sees her posing in a corset. *Id.*

80. *Film-Censoring Software Angers Entertainment Industry*, *supra* note 12. In an edited version of *A Few Good Men*, the image of Jack Nicholson's mouth was altered so that it appeared that he was saying something less obscene than the words he actually uttered. *Id.*

81. *See* U.S. CONST. art. I, § 8, cl. 8.

82. *Id.*

83. *See* 17 U.S.C.A. §§ 101–1332 (2003).

a tangible form."[84] Motion pictures, among many other types of works, are eligible for copyright protection.[85]

Copyright protection of a work confers a set of exclusive rights upon the owner of the copyright.[86] When another person encroaches upon the copyright owner's exclusive rights, copyright infringement has occurred. Copyright infringement can be direct, contributory, or vicarious.[87] Direct infringement occurs when any of the copyright owner's exclusive rights are violated.[88] A contributory infringer is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."[89] The liability of those who manufacture and sell equipment that is used to directly infringe copyrights is somewhat limited, however, if the device is capable of substantial noninfringing uses.[90] Finally, vicarious liability for copyright infringement exists if one has "control or supervision over the direct infringer and a direct financial interest in the infringement," even if one neither participated in nor had actual knowledge of the infringing activity.[91]

2. The Exclusive Rights of Copyright Owners

Copyrights provide the copyright owner with a set of exclusive economic rights.[92] The copyright owner has the exclusive right to take or authorize the following actions: reproduction of the copyrighted work,

84. MARGRETH BARRETT, INTELLECTUAL PROPERTY—PATENTS, TRADEMARKS & COPYRIGHTS 182 (2000). Section 102(a) of the Copyright Act of 1976 provides that a copyright exists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C.A. § 102(a).

85. 17 U.S.C.A. § 102(a) (2000). Section 102(a) includes a nonexhaustive list of categories of "works of authorship" that can be protected under the Copyright Act of 1976. *Id*. Examples from the list include literary works, musical works, dramatic works, sound recordings, and motion pictures and other audiovisual works. *Id*. Additionally, "obscene or immoral works" are not excepted from qualification for copyright protection. BARRETT, *supra* note 84, at 205.

86. 17 U.S.C.A. § 106 (2003); *see infra* notes 92–137 and accompanying text.

87. Direct infringement is provided for by § 501 of the Copyright Act. Vicarious and contributory copyright infringement are both nonstatutory and judicially constructed.

88. 17 U.S.C.A. § 501.

89. Gershwin Publ'g Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

90. For example, in *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417 (1984), the U.S. Supreme Court held that manufacturing and selling VCRs did not constitute contributory infringement even though Sony had constructive knowledge that some of the people buying its VCRs would use them to make unauthorized copies of movies and television programs. The existence of substantial noninfringing uses for the VCR convinced the Court Sony should not be held liable for contributory infringement for selling VCRs with the knowledge some users might use it to infringe copyrights. *Id.* at 417.

91. BARRETT, *supra* note 84, at 246. See *Shapiro, Bernstein & Co. v. H.L. Green Co*., 316 F.2d 304 (2d Cir. 1963), for an example of a case dealing with vicarious liability for copyright infringement. In *Shapiro*, the defendant had the right to control the activities of a company operating record departments in its store and the defendant received a commission upon the record department's gross sales as part of its license fee. *Id*.

92. BARRETT, *supra* note 84, at 210; s*ee* 17 U.S.C.A. § 106 (2003).

preparation of derivative works based upon the copyrighted work, distribution of copies of the copyrighted work to the public, public display of the work, and public performance of the work.[93] The editing of copyrighted motion pictures on DVDs or videocassettes implicates the exclusive rights to reproduction, preparation of derivative works, and distribution.

Reproduction of the Copyrighted Work

A copyright owner has the "right to reproduce the work in material copies."[94] In order to produce "a 'copy' of a work, a defendant must duplicate, transcribe, imitate or simulate some substantial part of the work in a 'fixed' form in a material object."[95] A person who reads a book out loud has not made a material copy of the work and therefore has not infringed the right of reproduction.[96] Section 101 of the Copyright Act of 1976 requires that the fixation of the work in the material object be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[97] The "owner of the exclusive right to reproduce a work may make [his or] her own copies . . . and prevent others from [making reproductions] without [his or] her permission."[98]

Derivative Works

The copyright owner also has the exclusive right to prepare derivative works.[99] Although all works are arguably derivative,[100] for copyright purposes "derivative work" refers to those works that make changes to an existing work without completely changing its identity.[101] The Copyright Act of 1976 defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."[102] In general, a work is

93. 17 U.S.C.A. § 106.
94. BARRETT, *supra* note 84, at 217.
95. *Id.*
96. *Id.* at 211.
97. 17 U.S.C.A. § 101.
98. BARRETT, *supra* note 84, at 211.
99. 17 U.S.C.A. § 106. This right is also sometimes referred to as the exclusive right to adapt the copyrighted work. BARRETT, *supra* note 84, at 223. An author of a derivative work can get original material copyrighted, but cannot copyright any preexisting material that the author has adapted. MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 3.01, 3.06 (2003). Further, copyright protection does not extend to the portions of derivative works in which preexisting material "has been used unlawfully." *Id.*
100. *See* Julie Van Camp, *Creating Works of Art from Works of Art: The Problem of Derivative Works*, 1994–95 ENT. PUB. & ARTS HANDBOOK 3, 3 ("[A]rtistic creation is rarely if ever de novo.").
101. *Id.*
102. 17 U.S.C.A. § 101.

not considered derivative "unless it has *substantially* copied from a prior work."[103] In other words, "a work will be considered a derivative work only if it would be considered an infringing work if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work."[104]

The circuit courts of appeals disagree regarding the amount of alteration necessary in order to create a derivative work from an original work.[105] In *Lee v. A.R.T. Co.*,[106] the Seventh Circuit held that mounting copyrighted artwork onto tiles for resale did not create a derivative work. Specifically, the court found that mounting artwork was not one of the enumerated derivative works and also that mounting the artwork did not transform, recast, or adapt it.[107] Thus, the Seventh Circuit found persuasive A.R.T.'s argument that turning note cards into trivets was more similar to framing a work than to revising it.[108] This kind of argument was not as successful in the Ninth Circuit. In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, the Ninth Circuit ruled that a defendant who tile-mounted pages torn from books had created derivative works because it had "clearly [made] another version of [the protected] art works."[109]

In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,[110] the Ninth Circuit considered whether a device called the "Game Genie" infringed Nintendo's copyrights in its game cartridges.[111] The "Game Genie" functioned as an interface to the Nintendo game programs and allowed players to alter features of the games by entering temporary alternate values for characteristics such as speed and strength.[112] The court held that derivative works were not created; hence, copyright in-

103. NIMMER, *supra* note 99, § 3.01.

104. *Id.*

105. *Compare* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (holding that mounting note card artwork onto tiles does not create a derivative work), *with* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343 (9th Cir. 1988) (holding that mounting pages of artwork torn from a book onto tiles creates a derivative work).

106. *Lee*, 125 F.3d at 580.

107. *Id*. at 582.

108. Before the district court, A.R.T argued that affixing note cards to ceramic tiles was analogous to framing them. Lee v. Deck the Walls, Inc., 925 F. Supp. 576, 579 (N.D. Ill. 1996), *aff'd sub nom.* II Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997). *Lee* argued that while framing was understood to be a "method of display" the ceramic tiles produced by A.R.T. transformed the note cards for other uses such as floor tiles or trivets. *Id.* (citing Munoz v. Albuquerque A.R.T. Co., 829 F. Supp. 309, 314 (D. Alaska 1993)).

109. *Mirage Editions*, 856 F.2d at 1343. As a sidenote, after determining that the tiles were a derivative work, the Ninth Circuit then found that the plaintiff's suit was not barred by the first-sale doctrine. *Id*. at 1344 ("The mere sale of the book to the appellant without a specific transfer by the copyright holder of its exclusive right to prepare derivative works, does not transfer that right to appellant. The derivative works right, remains unimpaired and with the copyright proprietors . . . . As we have previously concluded that appellant's tile-preparing process results in derivative works and as the exclusive right to prepare derivative works belongs to the copyright holder, the 'first sale' doctrine does not bar the appellees' copyright infringement claims.").

110. 964 F.2d 965 (9th Cir. 1992).

111. *Id.* at 967.

112. *Id*.

fringement did not occur, because the "Game Genie" only enhanced the audiovisual display that was already contained within the Nintendo game cartridges.[113]

In *Micro Star v. Formgen, Inc*., FormGen alleged that Micro Star infringed its copyright in the "Duke Nukem 3D" computer game by manufacturing and distributing a CD that contained new Duke Nukem game levels written by players.[114] The Ninth Circuit found that FormGen would likely prevail on a copyright infringement cause of action and therefore reversed a decision denying a preliminary injunction against Micro Star.[115] FormGen argued that the audiovisual displays created when players used Micro Star's CD in conjunction with the game constituted derivative works of Duke Nukem 3D.[116] The Micro Star CD contained files referred to as "MAP files," which, in essence, consisted of instruction sets for new ways to arrange images from the copyrighted game's own library.[117] In the Ninth Circuit, a work is derivative if it exists in a "concrete or permanent form"[118] and "substantially incorporate[s] protected material from the preexisting work."[119] While Micro Star argued that the CD it created was merely an advanced version of the noninfringing "Game Genie,"[120] the court found that the new game level displays generated by the Micro Star CD existed in a permanent form.[121] The court then held that the new levels, as sequels to the stories told in the original Duke Nukem game, infringed the copyright owner's rights.[122]

In *Gilliam v. American Broadcasting Cos*.,[123] arguably the most famous case regarding editing of audiovisual materials, the Second Circuit granted an injunction prohibiting a television station from airing edited versions of Monty Python's *Flying Circus*.[124] The BBC licensed the plaintiffs' scripts[125] to produce the Monty Python television programs, but the BBC received only very limited rights with respect to editing the mate-

113. *Id*. at 969. The key to this appears to be that the "Game Genie" was unable to produce an audiovisual display of its own and only worked to enhance the output of the Nintendo game cartridge. *Id.* The court found that the enhancement was not a transformation of the Nintendo audiovisual. *Id.*

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

115. *Id.* at 1114.

116. *Id.* at 1110.

117. *Id.*

118. *Id.* (quoting *Lewis Galoob Toys*, 964 F.2d at 967) (internal citation omitted).

119. *Id.* at 1110 (citing Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984)).

120. *Id*. at 1111. In Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967, the Ninth Circuit found that the "Game Genie" did not create derivative works because it only allowed players to temporarily modify individual aspects of the game.

121. The court first found that the MAP files existed in a permanent form because they were burned onto a CD. *Micro Star*, 154 F.3d at 1111. The court then found that the MAP files described every detail of the generated audiovisual displays, and thus, the audiovisual displays were also in a concrete form. *Id*. at 1111–12.

122. *Id.* at 1112.

123. Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

124. *See id.* at 17.

125. The writers retained all their rights in the scripts, subject to the licensing agreement. *Id*.

rial.[126] The ABC network later licensed the BBC television programs, editing out about twenty-five percent of the programs to remove obscene and "objectionable" material and to make time for commercials.[127] The scriptwriters sued ABC for airing an altered version of their work.[128] While authors do not have a moral right of integrity in the United States, the *Monty Python* authors had retained the copyrights in their scripts and thus still held the exclusive right to prepare derivative works.[129] Because the BBC did not have authority to alter the recorded programs, ABC exceeded the scope of the BBC's license and created unauthorized derivative works when it edited the programs for viewing on American television.[130]

Distribution

The copyright owner also has the exclusive right of distribution or publication.[131] This exclusive right of distribution includes the "exclusive right to distribute copies . . . of the work to the public by sale or other transfer of ownership, or by rental, lease or lending."[132] The doctrine of first sale,[133] however, limits this exclusive right of distribution. Under the doctrine of first sale, once the copyright owner transfers title "to a copy . . . of the copyrighted work to a third party, the third party is entitled to sell or otherwise dispose of it without obtaining the copyright owner's consent."[134] Therefore, the copyright owner cannot limit subsequent resale or transfers of title to the physical embodiment of the copyrighted work. The copyright owner also cannot "prohibit the new owner from renting or lending the copy . . . to others, or . . . from physically destroying it."[135] It is important to note that ownership of a material object in which the copyrighted work is affixed, such as ownership of a videotape or DVD that contains a copyrighted film, is not the same thing as ownership of the copyright.[136] Therefore, ownership of a copy of a film does not include ownership of the right to reproduce it, publicly display or perform it, or to create derivative works based upon it. Additionally, the doctrine of first sale only applies to legal copies.[137] Thus, distribution of illegal copies infringes upon the exclusive right of distribution as well as the exclusive right of reproduction.

126. *See id.*
127. *See id.* at 18.
128. *See id.* at 17.
129. *See id*. at 24.
130. *See id.* at 21–22.
131. 17 U.S.C.A. § 106 (2003); *see also* BARRETT, *supra* note 84, at 226.
132. BARRETT, *supra* note 84, at 226.
133. 17 U.S.C.A. § 109.
134. BARRETT, *supra* note 84, at 227.
135. *Id.*
136. 18 AM. JUR. 2D *Copyright and Literary Property* § 69 (2000).
137. 17 U.S.C. § 109 (2003).

3. The Fair Use Defense

The fair use defense is essentially an argument that a technical infringement should be excused.[138] As an affirmative defense, fair use only applies following "a prima facie showing of infringement, i.e., copying and substantial similarity."[139] In some situations, the doctrine of fair use allows courts to avoid a rigid application of copyright laws when doing so would unfairly inhibit the production and dissemination of useful works to the public.[140] Congress codified the judicial doctrine of fair use in Section 107 of the Copyright Law of 1976.[141] Section 107 includes examples of situations where fair use applies: uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[142] Section 107 also lists four factors that courts must consider when deciding whether a particular infringement should be excused as fair.[143] These four factors 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.[144]

The first fair use factor involves an examination of "the purpose and character of the use."[145] With respect to analyzing the "purpose" of the use, the investigation is intended to discover "whether the new work merely 'supersede[s] the objects' of the original creation"[146] or whether it transforms the work by changing its character or purpose.[147] The commercial nature analysis attempts to ascertain whether the user is exploiting the work for profit-making purposes without paying normal usage fees to the copyright holder.[148] Although "[c]ommercial uses have traditionally been denied fair use privileges," courts have wavered in the

138. BARRETT, *supra* note 84, at 251.

139. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 361 (1985).

140. BARRETT, *supra* note 84, at 251.

141. 17 U.S.C.A. § 107 (2003).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* § 107(1).

146. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (quoting Justice Story in Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

147. *Id.* at 579.

148. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the [protected] material without paying the customary price.").

strength with which they state their disapproval of such uses.[149] In some early cases, courts denied the fair use defense solely because of the commercial nature or purpose of the defendant's infringement.[150] More recently, the court has considered whether the usage of the protected work was commercial in nature as relevant to, but not determinative of, whether the analysis of the fair use defense applied.[151]

The second fair use factor necessitates an examination of the "nature of the copyrighted work."[152] In general, "works of an entertainment nature have traditionally been held to be less subject to fair use."[153] While there is little discussion of fair use as applied to pictorial works in the Copyright Act of 1976 or in the legislative reports,[154] one occasion on which a court addressed fair use and pictorial works was in *Time Inc. v. Bernard Geis Associates*.[155] Time Inc. owned the copyright to the Zapruder film, the famous film that captured the assassination of President Kennedy, and the defendant published a book that contained sketched reproductions of a number of frames of the film.[156] In a much-criticized opinion, the court determined that the fair use defense applied; however, the decision was based in part on the public interest in having available as much information about the assassination as possible.[157]

The third fair use factor relates to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."[158] Both qualitative and quantitative aspects are examined,[159] and "the extent of

149. PATRY, *supra* note 139**,** at 365.

150. *See, e.g.,* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 303–04 (E.D. Pa. 1938) (denying fair use defense when defendant used portions of three sentences from a scientific work in a pamphlet advertising its cigarettes because the defendant had a commercial motive in the infringement).

151. *See, e.g.,* Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980). In *Iowa State*, ABC used portions of a copyrighted film about an Olympic wrestler during its coverage of the 1972 Olympics. The court stated that "[w]hile the fact that ABC sought to profit financially from its telecasts of the Olympics 'does not, standing alone, deprive [ABC] of the fair use defense . . . it is relevant' that the film was used, at least, in part, for 'commercial exploitation.'" *Id*. at 61 (internal citations omitted).

152. 17 U.S.C.A. § 107(2) (2003).

153. PATRY, *supra* note 139, at 417 n.310; *see, e.g.,* Brewer v. Hustler Magazine, Inc., 749 F.2d 527, 529 (9th Cir. 1984) ("The scope of the fair use defense is broader when informational works of general interest to the public are involved than when the works are creative products."); Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963, 972 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984) ("If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.").

154. PATRY, *supra* note 139, at 433–34 ("The case law has centered primarily around parody of cartoon or like characters in which the entire representation was appropriated, a typical problem with the use of pictorial, graphic, and sculptural works which, owing to their very nature, are hard to use in any manner other than in their entirety.").

155. 293 F. Supp. 130, 144–46 (S.D.N.Y. 1968).

156. *Id.* at 131–32.

157. *Id*. at 146.

158. PATRY, *supra* note 139, at 449.

159. Video-Cinema Films, Inc. v. Cable News Network, Inc., No. 98 CIV.7128, 2001 WL 1518264, at *7 (S.D.N.Y. Nov. 28, 2001).

permissible copying varies with the purpose and character of the use."[160] Therefore, in applying this factor to third-party editing of movies, this investigation focuses on whether the copied material formed a "significant part of the original film" and whether that material "[was] essentially the heart of the film."[161] In general, fair use is not an available defense "for the copying of entire works or substantial portions thereof."[162] *Sony Corp. v. Universal City Studios* is a noteworthy exception to this general rule.[163] In *Sony*, the Supreme Court found that time shifting was fair use even though it involved the copying of an entire work.[164]

The fourth fair use factor relates to "the effect of the use upon the potential market for or value of the copyrighted work."[165] When examining the effect of infringement, "[i]t is not only the market for the original that must be looked at, however, because copyright owners are given the exclusive right in Section 106(2) of the Act to 'prepare derivate works based upon the copyrighted work.'"[166]

III. DISCUSSION

A. The Prevalence of Edited Material

Consumers are accustomed to the existence of edited materials. Condensed books,[167] for example, leave the major storyline intact, but remove words or descriptions that an editor deems superfluous. Abridged versions of books are often released as audio books on compact disc or audiotape.[168] People who enjoy music with explicit lyrics generally know that artists also usually release radio-edit versions of explicit songs. They also know not to buy their music from Wal-Mart if they want the "real" version of the album. Wal-Mart, as a family-oriented store, refuses to sell any music that requires the attachment of a parental advisory sticker.[169] Artists producing explicit music, therefore, must choose between creating a "clean" version for Wal-Mart to sell and simply not selling the music through that particular retailer.[170]

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

161. *Video-Cinema Films*, 2001 WL 1518264, at *7.

162. PATRY, *supra* note 139, at 449.

163. Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

164. *Id.* at 449–50 (holding that time shifting "merely enables a viewer to see . . . a work which he had been invited to witness in its entirety" and, therefore, "the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use").

165. 17 U.S.C.A. § 107(4) (2000).

166. PATRY, *supra* note 139, at 457 (quoting 17 U.S.C. § 106(2) (2000)).

167. Reader's Digest, for example, publishes volumes containing multiple books, each in a condensed format.

168. It seems that much of this editing is done simply to decrease the length of the audio book because even the abridged ones commonly surpass the seven-hour mark.

169. Steve Morse, *Up Against the Wal-Mart: Rockers and Rappers Claim Censorship*, BOSTON GLOBE, Dec. 6, 1996, at C13.

170. *Id.*

Network television viewers are also accustomed to the editing that occurs to make movies television-friendly. Networks edit programs for both length[171] and content.[172] Any portions of the film that the network deems "objectionable" for network television or in violation of FCC standards are removed.[173] The FCC has promulgated guidelines to assist networks in determining what is suitable content for daytime and prime-time television.[174] For example, excessive violence, obscenities, and nude scenes are usually edited out of the television version.[175] Airlines similarly show edited versions of movies so that all passengers flying the "Friendly Skies" can enjoy the movie.[176]

B. Lack of Authorization to Edit Home Videos

While all of this editing seems very similar to that being performed on home videos, there is one major difference: copyright ownership. All of the editing discussed in the directly preceding section is done with permission and the copyright owner or his agent actually makes the decisions regarding the editing process.[177] The manner in which captured film is edited to obtain the final version of a motion picture has "an enormous impact on how the film is received and how the audience will perceive it."[178] When authorized alternative versions are created, "the copyright holder does it by choice" and, in the case of movies, "each scene, each moment has been carefully worked on."[179] In the instant case, third-party editors make editing decisions based upon what they feel their customers will find most acceptable.[180] The copyright-owning studios have no input in the editing process or the resulting film.

171. Portions of the movie are usually removed to make it fit into the time span the network has allotted for the movie (usually two hours) and to allow for the addition of advertisements. *See* Honicky, *supra* note 71.

172. See *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), for a discussion of the editing that occurred when episodes of *Monty Python's Flying Circus* were prepared for exhibition on the ABC network.

173. FCC Sets the Standard for Offensive Content on TV and Radio, *supra* note 27.

174. *Id.*

175. *Id.*

176. United Airlines, for example, shows edited movies and notifies its customers of this practice through a disclaimer that "all movies shown are edited for airline use." *See, e.g.,* UNITED AIRLINES, NOVEMBER MOVIES, *at* http://www.united.com/page/specialpage/0,14151,37,00.htm (last visited Nov. 6, 2003).

177. *Film-Censoring Software Angers Entertainment Industry, supra* note 12 ("Writers and directors admit they do edit their work for wider viewing [i.e., create airline and television versions] but say directors often are consulted on those edits or actually shoot alternative footage for those versions."); *see also* Ko, *supra* note 51; O'Brien, *supra* note 53 (noting that producers or directors almost always approve edits).

178. John J. Dellaverson, *The Director's Right of Final Cut—How Final Is Final*?, *in* 1989 ENT. PUB. & ARTS HANDBOOK 279 (Robert Thorne et al. eds.) (discussing a director's negotiated right to make the final film editing decisions and the extent of that right).

179. *Film-Censoring Software Angers Entertainment Industry, supra* note 12 (quoting Victoria Riskin, President of the Writers Guild of America West).

180. Each of the editing companies produces its own version of the copyrighted film. Thus, the number of versions of the same film that are created could be endless.

C. Are the Editors "Copying" the Studios' Works?

Third-party editors use a variety of techniques to control what their customers see when they view one of the studios' copyrighted films; the methods used range from the crude cut and splice method to a sophisticated masking technique that replaces original scenes with new material.[181] The arguments both for and against copyright infringement vary slightly depending upon the exact methodology used to control what the viewers see. This note examines the arguments applicable to three of the editing methods: (1) the cut and splice technique; (2) the digital filtering technique where software instructs the DVD player to mute the sound or skip a number of frames; and (3) the digital filtering technique in which the viewer sees alternate versions of scenes or conversations.[182]

As an initial matter, the Digital Millennium Copyright Act (DMCA)[183] prohibits the circumvention of technological measures that protect copyrighted works.[184] The DMCA also prohibits trafficking products for circumvention purposes.[185] Thus, if any of the third-party editors or their products somehow circumvent the encryption that protects movies on VHS or DVD, that third-party editor is potentially subject to both civil remedies and criminal penalties.[186] However, the feasibility of a DMCA claim cannot be fully analyzed without access to detailed information regarding the practices of the third-party editors and the operation of any software or hardware that they employ. Thus, further analysis under the DMCA is beyond the scope of this note.

1. Cut and Splice Editing

Cut and splice editing results in the production of an altered copy of the original movie. There are two types of cut and splice editing: physical and electronic.[187] Physical cut and splice editing involves the physical removal of the portion of videotape that contains the offensive material.[188] Electronic cut and splice editing involves loading the movie into editing software on a computer, deleting the offensive portions, and then saving the remainder of the movie onto a videotape or DVD-R.[189]

Editors performing electronic cut and splice operations on copyrighted movies may directly infringe the studios' copyrights by reproduc-

181. *See generally* Merrill, *supra* note 6 (discussing various editing techniques including the sophisticated masking technique, which replaces original scenes from the copyrighted material with new material).

182. *See infra* text accompanying notes 183–289.

183. The Digital Millennium Copyright Act is codified at 17 U.S.C.A. §§ 1201–1205 (2003).

184. *See id.* § 1201(a)(1)(A).

185. *See id.* § 1201(b).

186. *See id.* §§ 1203–1204.

187. *See, e.g.,* Merrill, *supra* note 6.

188. *See id.*

189. *Id*.

ing the original work, preparing derivative works, and distributing copies of the works. Although third-party editors usually do not use the physical cut and splice technique[190] because of the inherent inefficiency in doing so,[191] the physical technique may directly infringe the copyright owner's exclusive right to prepare derivative works. Because third-party editors primarily use the electronic technique, this note does not focus on the physical cut and splice technique. However, the analysis of derivative works found below applies to the physical cut and splice technique, as well as to its electronic counterpart.

Infringement of the Right of Reproduction

For a copyright owner to win a claim of copyright infringement based upon reproduction of a copyrighted work, the copyright owner must show that the "defendant took copyrightable expression, and that the audience for whom his work was intended would perceive substantial similarities between the defendant's work and the plaintiff's protected expression."[192] In general, a two-part test is applied to determine whether infringement of the right of reproduction has occurred.[193]

The first component of the infringement analysis requires the defendant's work to have actually been copied from the copyrighted work.[194] Copying may be demonstrated by direct evidence or through the use of indirect evidence, such as the defendant's access to the copyrighted work, expert testimony, and similarities that are "probative of copying between the works."[195]

After establishing actual copying, the plaintiff must then demonstrate that the copied work is "substantially similar" to the copyrighted work.[196] Substantial similarity indicates that the "copying was improper or unlawful"[197] and thus "amount[ed] to an improper or unlawful appropriation."[198] Either literal similarity[199] or nonliteral similarity[200] will suffice in the case of works such as books or audiovisual works.[201]

190. *See id*. ("None of the companies actually edit the physical original video tape or DVD purchased by the consumer.").

191. *See id.* ("It would be impossible for any of these companies to survive if in fact they disassembled the VHS tape, [and then] threaded it up on an editing system to cut and splice the videotape.").

192. BARRETT, *supra* note 84, at 213.

193. *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998).

194. *See id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. BARRETT, *supra* note 84, at 213.

199. *See id.* at 214–15 (defining "literal similarity" as that which occurs when the defendant's work contains either a duplication or close paraphrase of language used in the plaintiff's protected work).

200. *See id.* at 215 (defining "non-literal similarity" as that which occurs when the defendant "copies the fundamental essence or structure of the plaintiff's work").

201. *See id.* at 214–15.

Applying the "actually copying" prong of the standard infringement test to cut and splice editing yields mixed results. As in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*,[202] some of the defendants admitted that they directly copied from the copyrighted films to create their products. Direct copying occurs when a master edited copy of a film is made and the edited film is recorded onto either the original or a new VHS tape or a DVD-R. Third-party editors CleanFlicks, Clean Cut, Family Safe, and Family Flix apparently make such master copies.[203]

In cases where actual copying cannot be established, such as when physical cut and splice editing occurs, the right of reproduction is not infringed.[204] However, where actual copying is established, the successful plaintiff then must demonstrate substantial similarity between the accused work and the copyrighted work.[205] In *Castle Rock Entertainment*,[206] the court stated that substantial similarity exists only when the copying is "quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement (*actionable* copying) has occurred."[207]

While the quantitative component generally involves the amount of the copyrighted work that is copied, the qualitative component relates to the "'copying of expression, rather than ideas [, facts, works in the public domain, or any other non-protectable elements].'"[208] With edited films, a substantial quantity of copying occurs. For example, an edited version of the nearly three-hour World War II movie *Saving Private Ryan* contains the whole movie sans about five minutes of original scenes.[209] This exceeds any applicable quantitative copying threshold.[210]

Because the copied portions of the film are exact copies of the original film, meaning that the nonedited portions of the film are what viewers of an edited version of the film see and not recreations with differing elements, such as new settings and actors, the copying is also qualitatively substantial. The edited version is "based directly upon original, protectable expression in [the copyrighted films]."[211] For example, the edited versions of *Saving Private Ryan* do not merely copy the idea of a

202. *Castle Rock Entm't, Inc.*, 150 F.3d at 137–38.

203. *See* Motion Picture Studio Defendants' Answer and Counterclaims at 13–14, Huntsman v. Soderbergh (D. Colo. 2002) (No. 02-M-1662).

204. *See Castle Rock Entm't, Inc.*, 150 F.3d at 137.

205. *See supra* note 192 and accompanying text.

206. *Castle Rock Entm't, Inc.*, 150 F.3d at 138.

207. *Id.*

208. *Id.* (quoting Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997)).

209. *See* Catherine Donaldson-Evans, *Grinding an Axe with Hollywood*, FOX NEWS, Oct. 8, 2002, *at* http://www.foxnews.com/story/0,2933,65043,00.html. While CleanFlicks cleaned up the movie *Good Will Hunting* by muting "130 F-words and 75 other curse words," it decided against editing "the estimated 400 F-words from the 1990 Martin Scorsese movie *Goodfellas* [because] '[i]t would have been a silent movie.'" *Film-Censoring Software Angers Entertainment Industry*, *supra* note 12 (quoting Ray Lines, the Chief Executive Officer of CleanFlicks).

210. *See Castle Rock Entm't*, 150 F.3d at 138 (finding that copying 643 fragments from the *Seinfeld* television series into trivia questions in a single book plainly crossed the quantitative copying threshold).

211. *See id.* at 138.

World War II movie; they use the same form of expression. The edited versions take the same form of expression because the same character played by actor Tom Hanks appears in both films and the character still does and says the same things, except for the actions or dialogue which is edited out.

The third-party editors who practice unauthorized electronic cut and splice movie editing directly infringe upon the copyright owner's exclusive right of reproduction. The edited versions of the films are admittedly copied from the original copyrighted version, and the copied portions are both quantitatively and qualitatively substantial.

Infringement of the Right of Distribution

As discussed above,[212] copyright holders have the exclusive right to distribute copies of their works subject to the doctrine of first sale.[213] While the editors may argue that the studios cannot prohibit them from reselling legally purchased copies, the editors using electronic cut and splice techniques do not actually resell legally purchased copies. They instead sell edited copies they made on their computers.[214] As discussed in the previous section, electronic cut and splice editing infringes the right of reproduction.[215] As a result, the copies the third-party editors distribute are not legal copies. Therefore, distributing these electronically edited movies infringes upon the studios' exclusive right to distribution.

Infringement of the Right to Create Derivative Works

As discussed above, the copyright holder has the exclusive right to make derivative works.[216] A derivative work is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."[217]

While some people believe that the owner of a DVD or videotape has the right to do whatever he or she wants with it, the copyright owner has a right to control what the owner does with that copy. Although the studios have relinquished the right to control distribution of any legally

212. S*ee supra* notes 131–37 and accompanying text.
213. 17 U.S.C.A. § 109 (2003).
214. *See* Merrill, *supra* note 6.
215. *See supra* notes 192–211 and accompanying text.
216. *See supra* notes 99–130 and accompanying text.
217. 17 U.S.C.A. § 101.

sold copies of the movies,[218] the studio retains all of the other exclusive rights inherent in copyright ownership.[219]

Given that the studio retains the right to prepare derivative works, third-party editors involved in copyright litigation have two options. First, they could admit that the edited movies are derivative works and then rely completely on the doctrine of fair use in an attempt to avoid liability for infringement. Alternatively, the editors could argue that the edited movies are not derivative works.

Assuming that the editors choose to argue that the edited movies are not derivative works, they might analogize the sale of a cut and spliced movie to the sale of a used textbook that has markings or missing pages. In *Lee v. A.R.T. Co.*,[220] the Seventh Circuit rejected a definition of derivative works that would include writing on a note card as creating a derivative work.[221] The Seventh Circuit strictly interpreted the meaning of a "derivative work" in order to prevent the back-door introduction of an "extraordinarily broad version of authors' moral rights."[222]

Unlike the tiles created in *Lee v. A.R.T. Co.*, the edited movies seem to fall squarely within even the Seventh Circuit's strict interpretation of the statute. Section 101 of the Copyright Act explicitly includes "motion picture version[s]" within the definition of a derivative work.[223] Given that definition of derivative works, the disagreement over infringement boils down to a quarrel over the definition of "version." While the studios would define a version as a variation upon an original,[224] the editors likely would argue that a version is an adaptation into another medium.[225] Because editorial revisions made to show movies on television result in products commonly referred to as the "TV version" or "airline version," it seems likely that these edited movies qualify as motion picture versions and are thereby derivative works. Alternatively, section 101 includes abridgements and condensations within its definition of "derivative work."[226] Because editors delete "objectionable" portions of the movie, the edited movie must be at least slightly shorter than the

218. *See supra* notes 131–37 and accompanying text.

219. While the studio may have transferred title to a particular copy of the movie, ownership of a DVD containing a copyrighted film is not the same thing as ownership of the film's copyright. *Copyright and Literary Property, supra* note 136. Because the studio has not transferred its copyright to the DVD owner, the studios retain the exclusive rights to reproduce the work and to prepare derivative works. *Id.* § 98 ("One who owns a particular copy of a book may sell or transfer it to another, or destroy it, but he cannot reproduce the book, adapt it for a motion picture, or perform it without the copyright owner's consent.").

220. 125 F.3d 580 (7th Cir. 1997).

221. *See id.* at 582.

222. *Id.* Moral rights, which are personal rights that an author has in his works, are generally not included in U.S. copyright law. Moral rights include the right of integrity and the right of attribution. Altering a work infringes upon the right of integrity. *See* Clark, *supra* note 78.

223. 17 U.S.C.A. § 101 (2003).

224. AMERICAN HERITAGE DICTIONARY 1344 (2d ed. 1985).

225. *Id.*

226. 17 U.S.C.A. § 101.

original copyrighted movie.[227] It follows that the edited movies constitute abridgements or condensations of the original movie. Thus, the edited movies are derivative works.

2. Digital Filtering

This section discusses two versions of digital filtering, referred to as "simple masking" and "insertion masking."[228] From the vantage point of the copyright holder, the second type of filtering is more ominous than the first. In addition to concerns about the director's vision for the movie, some are concerned that "insertion masking" could also be used to spice up family movies.[229]

Where editors use digital filtering techniques and "masks" to control what the viewer sees, reproduction does not appear to occur. In the case of digital filtering, however, the third-party editors may be liable for direct, contributory, or vicarious copyright infringement for the unauthorized creation of derivative works.

Simple Masking

Third-party editors, such as ClearPlay, Trilogy, and FamilyShield, apparently use masking techniques to control what viewers see and hear during movie playback.[230] Instead of physically editing the movies, these third-party editors developed filters that direct the viewing systems to mute sounds and skip frames so that portions of the copyrighted work are not exhibited.[231] Proponents of this type of filtering claim that copyright infringement does not occur because the filtering does not reproduce the movie like the electronic cut and splice technique does.[232] Assuming that no reproduction occurs, the editors may still be liable for either direct or contributory copyright infringement due to a creation of derivative works.

227. *See* Twin Peaks Prods. v. Publ'ns Int'l, 996 F.2d 1366 (2d Cir. 1993) (holding that a book containing detailed episode plot summaries was an abridgement, and therefore an unlawful derivative, of the television program).

228. *See Film-Censoring Software Angers Entertainment Industry, supra* note 12.

229. *Id.* As Jack Valenti, the president of the MPAA said, "It's a double-edged sword . . . . If there are people who want to do it [edit] for benign reasons, that's one thing. But they can take *Spider-Man* and make it into a pornographic movie, and that's a problem." *Id.*

230. *See* Motion Picture Studio Defendants' Answer and Counterclaims at 18–23, Huntsman v. Soderbergh (D. Colo. 2002) (No. 02-M-1662).

231. For example, the creators of the "masks" used by the MovieMask software "scan films frame by frame" and then create the masks that allow consumers to skip offensive frames of the movies. *Film-Censoring Software Angers Entertainment Industry, supra* note 12.

232. Note that reproduction may actually be occurring but this cannot be ascertained without access to technical details of the digital filtering systems. If the software saves any images in a memory buffer, then a reproduction is occurring. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994) (holding that the loading of information into a computer's random access memory, or "RAM," creates a copy, and therefore infringes the right of reproduction).

The editors using digital filtering currently filter the content in a number of proprietary manners and continue to design new and different systems.[233] As an alternative to addressing the specific methods and technical implementations of each system, this note addresses the infringement analysis more generally.

The statutory analysis that resulted in a determination that cut and splice edited movies are derivative works also applies in the case of digital filtering.[234] Additionally, the reasoning found in cases such as *Lewis Galoob Toys, Inc. v. Nintendo*[235] and *Micro Star v. Formgen, Inc*.[236] seem to fit the digital filtering situation just as easily as it did the video game environment. Both of these cases address the use of external devices or programs to change the audiovisual display from what the copyright holder originally intended.[237]

The simple mask filters at first glance seems similar to the "Game Genie" at issue in *Galoob*. First, an original DVD is used with the digital filtering systems.[238] The "mask" is applied only when the movie is played back and it cannot be saved onto the original DVD.[239] Thus, the filters have only temporary effects and do not permanently alter the movies with which they are used.[240]

Second, with respect to the muting function of the filters, it would arguably not be infringement to change the value of the sound factor for certain words prior to each movie playback, just as it was not infringement to change the value of the speed factor in the Nintendo games. Whereas the *Micro Star* MAP file contained a fixed detailed textual description of the placement of all images, the "Game Genie" and the simple mask filter files do not contain the exact description of an audiovisual display.[241] However, unlike the "Game Genie" user, a simple mask program user does not simply enter a random new value to temporarily replace an existing one.[242] The filter files contain information as to the timing of "objectionable" material within the movie.[243] As with the *Micro Star* MAP file, the alteration instructions in the filters are permanently

233. Merrill, *supra* note 6.

234. *See supra* notes 216–27 and accompanying text.

235. 964 F.2d 965 (9th Cir. 1992).

236. 154 F.3d 1107 (9th Cir. 1998).

237. *See, e.g.*, *Lewis Galoob Toys, Inc.*, 964 F.2d at 967 (describing how the "Game Genie," attached to a Nintendo system, could alter data signals).

238. *Cf. id.* (noting that the "Game Genie" operates by enhancing, rather than replacing, the audiovisual display).

239. *Cf. id*. (noting that the "Game Genie" only temporarily changes Nintendo game cartridges).

240. The Ninth Circuit held that the "Game Genie" did not create derivative works because the audiovisual displays it created were not in a permanent or concrete form. *Id.* at 967–68.

241. *Id.* at 969.

242. *See Film-Censoring Angers Entertainment Industry, supra* note 12.

243. *Id.* The MAP files at issue in *Micro Star v. Formgen Inc*., 154 F.3d 1107 (9th Cir. 1998), contained detailed instructions for displaying elements from the image library to create new game levels. Some of the third-party editors have created filters that use the timing information to instruct a DVD playback device as to which scenes it should skip or show next. *See Film-Censoring Angers Entertainment Industry, supra* note 12.

fixed in a computer file and external files alter the presentation of the copyrighted audiovisual display. Each time a movie filter is used with its associated movie, the same audiovisual display results. Thus, it appears that the audiovisual display is also fixed.

Third, like the "Game Genie," the individual masks alone do not create audiovisual displays.[244] However, although a filter file by itself would not produce a display, the filter files generally are not distributed alone. In some cases, the file is used in conjunction with a special DVD player/decoder that relies on the file to determine which images and sounds it should play from the DVD.[245] Another filtration system involves a software implementation of a remote control.[246] The controller accesses the filter file and then directs the actions of the standard DVD decoder on the user's computer.[247] Yet another method involves the combination of hardware and a software filter to interrupt the signal from the DVD player's output to the TV input.[248] As with the other systems, this device operates in conjunction with the DVD player to produce audiovisual displays.[249] Thus, these filter files are part of a software package that produces audiovisual displays from a DVD.[250] As a result, the filters appear to be more similar to the *Micro Star* MAP files than to the passive "Game Genie."

Finally, the filters resemble the *Micro Star* MAP file more than the "Game Genie" because they effectively work on only one particular film.[251] In contrast, the "Game Genie" operated in the same manner irrespective of the particular Nintendo game with which it was used.[252] Due to the use of permanent fixed filters, control over the production of images, and the fact that the movie filters each work with only one movie, the simple mask filters should constitute derivative works.

Insertion Masking

At least one third-party editor has developed software capable of both adding and removing audiovisual material in "objectionable" scenes.[253] While the "simple masking" derivative works analysis equally

244. *See Lewis Galoob Toys, Inc.*, 964 F.2d at 968 (discussing the fact that the "Game Genie" was incapable of producing its own audiovisual displays).

245. Trilogy Studios' MovieMask operates in this manner. MovieMask, *at* http://www.moviemask.com (last visited Mar. 28, 2003).

246. *See, e.g.,* ClearPlay, *at* http://www.clearplay.com.

247. ClearPlay's system appears to work in this manner. *See id.*

248. *See, e.g.,* MovieShield, *at* http://www.movieshield.com (last visited Nov. 11, 2003).

249. *Id.*

250. *See id.*

251. *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 n.5 (9th Cir. 1998) (noting that the MAP files can only be used with the Duke Nukem game and that the MAP files would not incorporate protected expression if they could be used to tell the story of a different character in a different game).

252. *See* Lewis Galoob Toys, Inc. v. Nintendo, 964 F.2d 965, 967 (9th Cir. 1992) (noting that the "Game Genie" was just an interface to the game programs and was not designed to edit any one game).

253. *See, e.g.*, MovieMask, *at* http://www.moviemask.com (last visited Nov. 11, 2003).

applies here, a few additional comments are warranted. An "insertion masking" system that allows for the insertion of alternate scenes[254] is further distinguishable from the "Game Genie." In determining that the "Game Genie" displays were not derivative works, the court seemed to place great emphasis upon the fact that the "Game Genie" did not add its own scenes to the Nintendo games but merely enhanced Nintendo's own display.[255] Masking software that inserts alternate images into movies, however, adds its own scenes to the motion picture.[256] Therefore, the case against insertion masking software is even stronger than that against simple masking. Insertion masking software, therefore, also creates derivative works.

D. The Fair Use Defense to Copyright Infringement

The fair use defense applies once a plaintiff establishes a prima facie case of copyright infringement.[257] The movie studios seem to have strong cases against third-party editors for infringements of their exclusive right to create derivative works and, in some cases, their exclusive rights of reproduction and distribution. Third-party editors, therefore, rely upon the doctrine of fair use to excuse their conduct. The same fair use analysis applies irrespective of the type of copyright infringement.

Before analyzing whether the editors' conduct constitutes fair use, it is important to remember that this note only focuses on editing by third-party editors, i.e., those editing as part of a business and not for personal use in their own homes. Thus, except for the cases of contributory or vicarious infringement,[258] whether an individual's personal infringement would be excused as fair use is irrelevant. A business cannot claim fair use simply because its customers could claim it as a defense had they been the infringers.[259]

Section 107 of the Copyright Act of 1976 contains an enumerated list of fair uses[260] and also lists four factors to consider in making a determination as to whether other uses are fair.[261] Because the third-party

254. *See supra* notes 79–80 and accompanying text.

255. *Lewis Galoob Toys, Inc.*, 964 F.2d at 965.

256. *See Film-Censoring Angers Entertainment Industry, supra* note 12.

257. *See supra* note 136 and accompanying text.

258. A party cannot be liable for contributory or vicarious copyright infringement unless an underlying direct copyright infringement exists. Thus, if the fair use defense applies to the direct infringer, there can be no liability for contributory or vicarious copyright infringement.

259. *See* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 333–34 (D.N.J. 2002) (noting that a commercial editor cannot "stand in the shoes of its customers in asserting a defense").

260. 17 U.S.C.A. § 107 (2003) (authorizing the availability of the fair use defense "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").

261. The four factors are: purpose and character of the use; nature of the copyrighted work; the amount and substantiality of the work used in relation to the whole work; and the effect upon the market for the copyrighted work. 17 U.S.C.A. § 107(1)–(4).

editors' actions are not explicitly delineated as "fair," the four fair use factors require analysis.

Purpose and Character of the Use

The first fair use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[262] When the character of the use is commercial, as opposed to nonprofit, the commercial character of the use "tends to weigh against a finding of fair use."[263] The studios will therefore argue that third-party editors profit from the business of providing edited movies and/or screening systems. Instead of making their own "clean" movies, individuals simply take the studios' copyrighted material and edit it. Thus, they unfairly exploit the copyrighted material. The third-party editors, on the other hand, will argue that the fees charged simply cover the costs of editing and that they do not exploit the copyrighted material or handsomely profit from it. Given that cut and splice editors charge between $10 and $20 extra for an edited copy, there are franchise stores opening in many locations,[264] and the digital filtering systems charge both for the system and the filters,[265] the third-party editors likely turn a modest profit at the very least.

The entertainment purpose of the edited videos appears to be roughly the same as the purpose of the original copyrighted movies. In general, home video versions of motion pictures are intended to entertain viewers in their homes. Edited versions of movies are also created to entertain people in their homes. In these situations the scope of fair use is more limited.[266]

A number of the editors, however, have stated that they edit movies to give consumers the ability to protect themselves from "objectionable" material in movies.[267] While this may seem like a noble cause, the overall purpose of the edited movies continues to be entertainment. A transformation of some type is required for this factor to weigh in favor of fair use. For example, parody is a type of transformation in that it uses humor to criticize or comment upon an earlier work.[268] Another type of transformation is the use of a film clip in the biography of an actor.[269] While the third-party editors may argue that they transform the movies

262. 17 U.S.C.A. § 107(1).

263. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994) (citation omitted).

264. *See, e.g.*, CleanFlicks, *at* http://www.cleanflicks.com (last visited July 6, 2004).

265. *See* MovieMask, *at* http://www.moviemask.com (last visited Nov. 11, 2003).

266. Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980) ("'[W]here the two works in issue fulfill the same function'. . . the 'scope of fair use is . . . constricted.'" (quoting 3 NIMMER ON COPYRIGHT § 13.05(B), at 13-58 (1979))) (alterations in original).

267. *See* CleanFlicks, *at* http://www.cleanflicks.com (last visited Mar. 28, 2003).

268. *See Campbell*, 510 U.S. at 579–80.

269. *See, e.g.,* Video-Cinema Films, Inc. v. Cable News Network, Inc., No. 98 CIV.7128, 2001 WL 1518264, at *6 (S.D.N.Y. Nov. 28, 2001) (finding that the use of a clip from a movie in an actor's obituary was a transformative use).

by making them more appealing to a larger audience, this simple bowdlerization of copyrighted works is not transformation of a type similar to parody or biographical use. The commercial character and common purpose of the works result in the first factor weighing against a finding of fair use.

Nature of the Copyrighted Work

The second statutory fair use factor is "the nature of the copyrighted work."[270] Expressive works generally receive a higher level of copyright protection than factual works.[271] Motion pictures and home videos, in particular, "enjoy generous protection under the copyright law."[272] Movies are expressive works, as opposed to factual works.[273] This factor, therefore, weighs against a finding of fair use.

Amount and Substantiality of the Copyrighted Material Used

A fair use examination also requires consideration of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[274] The analysis focuses first on whether a significant amount of the copyrighted work was used. If the amount of the work used is not substantial, then this portion of the third factor weighs in favor of a finding of fair use. Usage of clips constituting less than one percent of a movie have been found to be "far from substantial."[275] On the other end of the spectrum, the copying of an entire movie trailer favors a finding of substantiality.[276] Further, the copying of eight percent of a movie has also been found to be substantial.[277]

Edited movies typically appropriate extensive portions of the copyrighted motion pictures.[278] While the percentage of the work used varies

270. 17 U.S.C.A. § 107(2) (2003).

271. *Video-Cinema Films*, 2001 WL 1518264, at *7 ("Creative works are entitled to greater copyright protection than factual works.").

272. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 327 (D.N.J. 2002); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (contrasting fair use for news broadcasts and motion pictures).

273. *See Video Pipeline*, 192 F. Supp. 2d at 338 (finding movie trailer to be a fictional work and thus the nature of the work weighed against fair use).

274. 17 U.S.C.A. § 107(3).

275. *Video-Cinema Films*, 2001 WL 1518264, at *7. The film clips at issue in *Video-Cinema* "ranged from 6 to 22 seconds, or less than 1 percent, of the 108 minute long film." *Id.*

276. *See, e.g.,* Lamb v. Starks, 949 F. Supp. 753, 757 (N.D. Cal. 1996). *But see Sony Corp. of Am.*, 464 U.S. at 447–56 (finding, in an analysis limited to a discussion of time-shifting television programming, that copying an entire work did not preclude fair use).

277. *See, e.g.,* Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980). ABC argued that its copying was insignificant because it used "only 2 1/2 minutes of a 28-minute film," but the court noted that the 2 1/2 minutes was equivalent to eight percent of the film. *Id*. The court noted that ABC must have found the footage "essential, or at least of some importance" because it broadcast some of the footage three times. *Id.* at 62; *see also* Roy Export Co. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (finding that excerpts of less than a two-minute duration could be deemed "quantitatively substantial").

278. *See supra* notes 58–80, 209 and accompanying text.

from movie to movie, the third-party edited versions of movies are generally only slightly shorter than the original copyrighted films. The amount taken from the copyrighted movies is much closer to one hundred percent than one percent, and it is certainly well above eight percent.[279] Therefore, it appears that the amount taken from the copyrighted material is substantial.

After analyzing the quantitative amount of the work used, the analysis turns toward exploring the qualitative amount used and whether the material taken constituted the "heart" of the copyrighted work. Even if the amount taken is not quantitatively substantial, the use itself can still constitute a substantial taking with a sufficient qualitative component.[280] Usage of short film clips that do not convey any information about the plot or pivotal moments in the film is not a qualitative taking. For example, a short movie clip that showed one character telling another to "dig a latrine" did not represent the "heart" of the movie *G.I. Joe*.[281] However, courts have considered the use of film clips in an advertising preview to be substantial use.[282]

The purpose of editing is to remove "objectionable" content so that sensitive viewers can enjoy the plot and lessons of the film without exposing themselves to any unwanted material.[283] The edited version of a copyrighted movie consists of the entire film, excepting the "objectionable" material that the editors consider superfluous. "Objectionable" material is ostensibly deleted with care so as to preserve the plot and continuity of the film. Thus, the "heart" of the movie remains intact.

This third factor initially appears to weigh against a finding of fair use due to the quantitative amount and the qualitative value of the copyrighted matter that appear in the edited films. With respect to edited movies, however, relying upon traditional notions regarding amount and substantiality may be inappropriate. The majority of courts considering misappropriation of movies generally dealt with the *taking* of small pieces of films for use elsewhere instead of the *deletion* of pieces of the films.[284] Therefore, particularly with respect to the digital filtering and

279. *See supra* text accompanying note 209.

280. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 339 (D.N.J. 2002) ("A taking may not be justified merely because the amount used is small in comparison to the work as a whole . . . .").

281. Video-Cinema Films, Inc. v. Cable News Network, Inc., No. 98 CIV.7128, 2001 WL 1518264, at *8 (S.D.N.Y. Nov. 28, 2001).

282. *Video Pipeline*, 192 F. Supp. 2d at 327 (finding that the usage of a few minutes of film was substantial when scenes from a copyrighted movie were used to create an advertisement for retail sales of that movie). While some of the film clips did not "reflect the 'heart' of the movies," the court found that the third fair use factor weighed against the defendants because the movie previews depicted "no other readily identifiable piece of work" and were intended to acquaint the customer with the "overall premise" of the movie. *Id*. at 339–40.

283. *See supra* note 6 and accompanying text.

284. *See, e.g., Video Pipeline*, 192 F. Supp. 2d at 327 (finding the use of a few minutes to be substantial when scenes from a copyrighted movie were used to create an advertisement for retail sales of

physical cut and splice techniques, it may be more proper to analyze the substantiality of infringement with respect to the amount of film removed.

Under this theory, the removal of an insubstantial amount of the film would constitute fair use and removal of a large portion of the film would not.[285] Again, whether a substantial amount of the copyrighted work or the "heart" of the work is taken varies from film to film. While the ClearPlay edit of *Proof of Life* "deletes the entire opening sequence involving rebel brutality, the first killings and subsequent kidnapping—leaving gaping plot holes in its wake," the CleanFlicks edit of *City of Angels* only deleted a total of about three minutes, including an off-camera sex scene.[286] As another example, the CleanFlicks edit of *Schindler's List* contained "43 audio and/or video cuts" for a total loss of ten minutes from the movie's running time.[287] Additionally, "[a] prisoner inspection scene in which SS guards manhandle nude prisoners and determine whether they will live or die is effectively eliminated from the film," thus muting the horrific impact of the film.[288] Thus, portions of the "heart" of the film can easily be removed by overzealous editors.

In the end, due to the difficulty in determining which analytical structure to apply, it is hard to determine whether this factor weighs for or against either side. When considering the editing from the "removal" vantage point as opposed to the "taken" viewpoint, however, it seems obvious that even small amounts of editing can have a substantial impact upon the plot and lessons of the films themselves. This factor, therefore, weighs at least slightly against the applicability of fair use.

Market Effects

Finally, "the effect of the use upon the potential market for or value of the copyrighted work" must also be considered.[289] This analysis must consider not only the harm caused by the actions of a particular infringer, but also whether the market would be substantially and adversely affected if the conduct was "unrestricted and widespread."[290]

that movie); *Video-Cinema Films*, 2001 WL 1518264 (finding the use of less than a minute of film footage "far from substantial").

285. *See generally* Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976) (examining the deletion of about twenty-seven percent of a television program and determining that such extensive editing was not within the traditional latitude afforded to licensees).

286. Ray Richmond, *CleanFlicks Update: The Battle Continues*, DGA MAG. (Mar. 2003), *at* http://www.dga.org/news/v27_6/news_digitalpiracy4.php3 (last visited Mar. 30, 2003).

287. *Id.*

288. *Id.*

289. 17 U.S.C.A. § 107(4) (2003).

290. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 340–41 (D.N.J. 2002) (noting that film clip previews may enhance the market for the copyrighted films because the films are being promoted "'to a broadened market of potential customers'") (internal citation omitted).

The market for copyrighted motion pictures appears to be enhanced by the practices of the third-party editors because the digital filtering systems use normal DVDs and the cut and splice editors require their customers to purchase an original DVD or videotape. Thus, the studios are selling copies of their films to people who, but for the availability of the editing services, would not have purchased the movie.[291]

However, the effect on the market for derivatives must also be considered.[292] The defendants creation of "clean" versions of films may reduce any profits the studios would make if they marketed their own "clean" and edited versions of the copyrighted motion pictures. Further, the existence of third-party edited films may reduce the market for a TV version.

Because the edited movies have both a potentially detrimental effect and a potentially beneficial effect on the market,[293] this factor weighs neither for nor against the applicability of the fair use doctrine.

Summary of Fair Use Findings

Both the purpose/character of the use and nature of the work factors weigh against a finding of fair use. Additionally, the amount/substantiality of infringement appears to weigh against the applicability of the fair use defense. Finally, the market effects factor seems somewhat neutral. While only two of the factors squarely support a denial of fair use, no factor directly supports a finding of fair use. Considering all of the factors together, the large-scale commercialization of third-party editing and the extremely expressive nature of movies outweigh the uncertainty as to the market effects and the substantiality of the infringement. Thus, the third-party editors likely are not protected by the doctrine of fair use.[294]

IV. RESOLUTION

While it appears that the editors cannot avail themselves of the fair use defense, the possibility that a court would rule otherwise should be considered. If this were to happen, then the studios could take a few actions to regain control. First, the studios could set the stage for a subse-

291. *See id.* at 340; *see also* Ann Oldenburg, *Clean Flicks Cuts Right to the Chase*, USA TODAY, (Sept. 3, 2002), http://www.usatoday.com/life/movies/2002-09-02-flicks_x.htm ("If anything, we're not only *not* taking a market from *them*, we're generating a market. There are people who might buy the edited version who might not have bought it otherwise." (quoting David Schachter, one of the attorneys who filed the CleanFlicks lawsuit)).

292. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.") (internal quotations omitted).

293. *See Video Pipeline*, 192 F. Supp. 2d at 340–41.

294. *See id.* at 343 (finding that the infringer was not entitled to the defense of fair use where two factors significantly weighed against fair use, a third factor was slightly against it, and the fourth was neutral).

quent lawsuit, assuming res judicata would not apply if circumstances were sufficiently changed. By directly competing in the edited movie market, the studios would change the balance in the market effects factor of the fair use analysis.

Alternatively, the studios may completely avoid copyright infringement litigation over future movies by changing how they sell DVDs and videotapes. The computer software industry uses shrink-wrap licensing to limit the rights of anyone who purchases software. In essence, when an individual purchases software, he or she is actually buying a license and not the software itself. Typical software licensing schemes restrict the user from altering the software in any way. If studios sold copies of movies under license agreements, then they could easily limit the license to viewing the movie in its original form, thereby preventing users from making changes to the films. While this solution would not sit well with those seeking to view "clean" movies, studios could sue third-party editors under contracts law. While some question the validity of shrink-wrap licensing, an increasing number of courts enforce the terms of shrink-wrap licenses.[295]

Returning to the copyright infringement discussion and an assumption that third-party editing is infringing, a judgment declaring third-party editing illegal likely would not be fully satisfactory at this point. Some consumers have gotten used to these edited movies, and it is difficult to put the cat back into the bag once it has escaped. Evidence of this includes the prevalence of Napster-type MP3 swapping services following the injunction issued against Napster.[296] For that reason, both the studios and proponents of "clean" movies should take steps to satisfy consumers by alternative means.

By releasing their own "clean" versions of the films, the studios would meet the demands of consumers while maintaining control over the copyrighted work. Studios could either produce an entirely separate DVD or include a "clean" version on the same DVD as the original movie.[297]

Additionally, the proponents of "clean" movies should use alternative methods to reduce "objectionable" content in movies. First, they should continue lobbying for the studios to release both edited versions of movies and an increased number of family-friendly films. Securing the release of studio-edited versions of the films would be beneficial to both sides. Another option is to raise money to either make their own "clean"

295. *See, e.g.*, Bowers v. Baystate Techs., Inc., 320 F.3d 1317 (Fed. Cir. 2003) (holding that a shrink-wrap license was valid and that it prohibited fair use in the form of reverse engineering).

296. *See, e.g.,* Gretchen Hyman, *File Swapping Sites Grow by 300 Percent*, INTERNET NEWS (Jan. 23, 2003), *available at* http://www.internetnews.com/ent-news/article.php/1573701 (last visited Nov. 6, 2003).

297. Jack Valenti, president of the Motion Picture Association of America, has stated that studios are considering this course of action. *Film-Censoring Software Angers Entertainment Industry, supra* note 12.

movies or support those artists that do. A third alternative is to license the films from the studios to make edited versions for a "clean" cable network or home videos. However, licensing costs could be prohibitive and the studios would likely refuse to license the films. Finally, the "clean" movie proponents could lobby Congress for a compulsory licensing scheme for creating edited movies.[298]

V. CONCLUSION

A technologically advancing society must continually deal with new inventions and technologies. Copyright laws are elastic, but each new technology tests the boundaries. The VCR problem that became the Napster problem has evolved again into the CleanFlicks problem. Now that consumers have experienced edited movies and the vast array of "clean" films that editing can offer them, limited options will no longer satisfy them.

The studios need to fill the void that the demise of unauthorized third-party editing will leave. The simplest solution to this dilemma is to create authorized edited versions of films whenever feasible. The release of such edited versions of movies resolves the situation to the satisfaction of both the consumers and the studios. The studios, having seized control back from third-party editors, can begin to supply consumers with higher quality and perhaps lower priced products. As it should be, everybody but the third-party editors wins in the end.

298. The problem with compulsory licensing, however, is that a complete loss of creative control may have a negative impact on creativity. Such an impact would not further the creation of arts, which is the primary reason copyright protection exists.