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THE E-RATED INDUSTRY: Fair Use *Sheep* Or Infringing *Goat?*¹

- By Christina Mitakis*

Removing swear words or violent scenes from DVDs may soon become much harder - not because the technology is not available, but because editing a movie without the permission of its makers may violate copyright laws. This Note explores the copyright issues presented by the litigation between companies that sanitize movies for viewing by the general public and the studios and directors involved in the creation of the edited movies. Collectively, these companies comprise what is generally referred to as the e-rated industry.² Certain companies within the e-rated industry use digital editing software to edit profanity, sex and violence from popular movies, while other companies provide software allowing viewers to edit their own DVDs. In all cases, this editing is done without the consent of the moviemakers. CleanFilms, which rents out e-rated movies, defines e-rated movies as edited to remove nudity and sexual situations, offensive language, and graphic violence, effectively reducing the movies to a PG rating.³ The implications of such movie editing extend beyond the movie industry because private consumers also have access to the digital editing software the e-rated industry uses. If the e-rated industry is engaged in illegal activity, then private consumers who use the same software to edit their own movies may also be in trouble.

Viewers of PG-13 or R-rated movies are exposed to profanity, sex, and gory and disturbing violence. Arguably, certain movies would not be

memorable without disturbing or offensive scenes. Until a few years ago, viewers who would not patronize certain movies because of certain content had to wait for an airplane flight or network television to offer cleaned-up versions. Scenes of sex, violence and profanity offended some viewers' religious values. Other viewers who opt not to view such movies include parents who do not allow their children to hear swear words or to see sexual scenes. Both groups of viewers are limited in what they themselves can watch, or what they allow their children to watch.

The e-rated industry developed specifically to meet the needs of these viewers. The availability of inexpensive movie editing software and the existence of companies willing to offer edited movies for a fee enable this group to watch previously taboo movies. The editing itself is accomplished by relatively inexpensive digital software. This software allows the editor to remove language or entire scenes, and to even add elements such as clothing on nude forms.⁴ Companies that offer edited movies for rent online or in video stores include CleanFlicks and their affiliates, MyCleanFlicks.com and CleanFilms.com. The movie editors of these companies are members of the same religious faith⁵ as their viewers and claim to make their editing choices with the implied endorsement of these viewers.

Endorsements are lacking, however, from filmmakers and directors of the digitally edited movies. When movies are edited for network television or airplanes, movie studios cooperate and even contribute creative input to the final edited product. The movie studios may even receive compensation when such movies are edited for airplanes or network television. In contrast, movies independently edited by companies such as Cleanflicks involve no input from either the movie

ordinary non-commercial viewers to edit movies using their own software.

The Origins of the E-rated Industry

Controversy began in 1998 with a family-owned video store catering to members of the Mormon faith in American Fork, Utah. The store, called Sunrise Videos, digitally "snipped" the partially nude scene between Leonardo DiCaprio and Kate Winslet in its copies of the movie *Titanic*.⁹ Ray Lines, a Sunrise Videos employee, used the technology enabling such movie editing when he opened the first CleanFlicks in 1999.¹⁰ CleanFlicks experienced

EVEN if the e-rated industry is engaged in copyright violation, it may still raise a fair use defense. Fair use is a doctrine of equity and reasonable use, and no clear standards have emerged in applying this defense.

studios or the movie directors. This lack of endorsement by the creators and makers of the edited movies has led to the current legal battle between Hollywood and the e-rated industry.

The legal battle centers on whether these digitally edited movies violate copyright law because of their status as derivative works. The Directors Guild of America and the movie studios argue that e-rated movies violate copyright law, and the e-rated industry argues that the films do not implicate copyright law at all. Alternatively, the e-rated industry asserts that even if copyright law is implicated, their activities are shielded by the fair use doctrine. The main Supreme Court cases this Note analyzes are *Sony Corporation of America v. Universal City Studios, Inc.*⁶; *Harper & Row, Publishers, Inc. v. Nation Enterprises*⁷; and *Campbell v. Acuff-Rose Music, Inc.*⁸ Even if the e-rated industry is engaged in copyright violation, it may still raise a fair use defense. Fair use is a doctrine of equity and reasonable use, and no clear standards have emerged in applying this defense. In applying fair use, a court must weigh the relevant statutory factors on a case by case basis in a way that meets the ends of copyright law. The result of the litigation will substantially impact not only the future of the e-rated movie industry, but also the freedom of

fast growth to approximately seventy outlets in eighteen states in the Midwest and West including California, Utah, Arizona, Colorado, Idaho, Michigan, Montana, Ohio and Oregon.¹¹ Since then, the availability of digital editing equipment and the increasing demand for sanitized movies has spawned an industry of companies committed to producing "e-rated" movies.

These companies are being sued by movie studios, however, because the offensive words and pictures are removed without their permission.¹² The film studios argue that the e-rated industry violates federal copyright laws because changes to a movie should be within the exclusive control of the copyright holder. The e-rated industry, however, points to several characteristics of its business practices when defending the legality of its conduct. The CleanFilms website contends that, as owner of the original DVD, it has the right to edit material that is objectionable to its members, and will only perform this editing on behalf of its members.¹³ According to Scott Mikulecky, an attorney representing the e-rated industry,¹⁴ misrepresentation does not exist because each movie is clearly labeled as edited.¹⁵

The e-rated industry has fashioned a number of perceived safeguards against copyright violations.

Whenever CleanFilms edits a movie, for example, it buys an original copy of the movie.¹⁶ Many of the video store franchises operate as co-operative rental clubs, which allows the franchises to act with the implied endorsement of the club members.¹⁷ Those who join the co-operative rental club own the inventory of movies.¹⁸ The franchises purchase DVDs and VHS videos on behalf of their members in a one-to-one ratio and then digitally edit out profanity, sexual activity, and violence from the movies.¹⁹ These members are then able to rent a certain number of videos at a time for a flat monthly fee. Club members may obtain the sanitized movies from video stores or, more recently, over the internet.²⁰ The e-rated industry argues that this co-operative rental club characterization does not implicate copyright law because co-op members constructively consent to the editing of the films by paying a membership fee. Therefore, if there is copyright infringement, it is the consumers of the edited movies who are the infringers and not the e-rated industry.

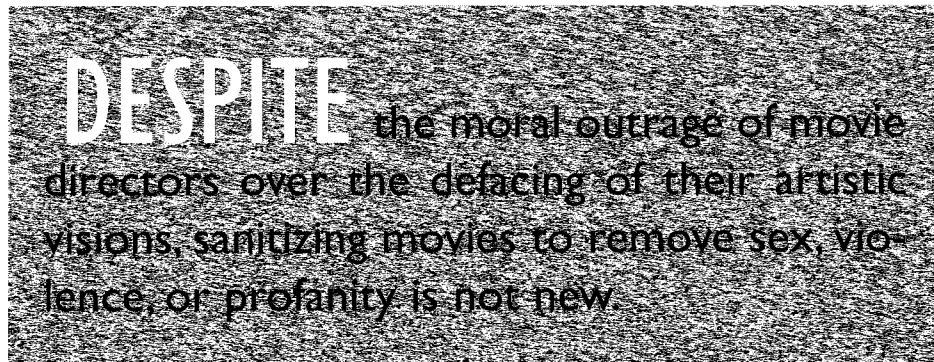
Since CleanFlicks began operation, other companies in numerous states as well as over the Internet offer services that vary on this same theme. Companies now sell software that sanitizes movies per the viewer's instructions. Other available software provides information about exactly what sex, violence, and profanity a particular movie includes. Family Safe Media is an example of a company that sells edited VHS tapes; they also offer to edit a customer's copy.²¹ ClearPlay sells software that edits sounds and scenes from DVDs played on a computer for a monthly fee as long as the movie is on ClearPlay's list.²² Family Shield Technologies sold a product called "MovieShield" for \$239.99 that connects a customer's television to his VCR or DVD player and removes words and pictures according to instructions downloaded from the Internet.²³ Screen It, Inc. offers a less expensive alternative to MovieShield by providing viewers with detailed information about the profanity, sex, and violence in movies for free.²⁴

Despite the moral outrage of movie directors over the defacing of their artistic visions,

sanitizing movies to remove sex, violence, or profanity is not new. In fact, far from categorically rejecting the editing of any of its creations, Hollywood has long worked with television networks and airline companies to provide sanitized versions of movies.²⁵ Additionally, Warner Brothers Studios' New Line Cinema has an agreement with Dove, a Michigan foundation, whereby New Line Cinema endorses Dove's sanitized video versions of the studio's films.²⁶ These Dove label versions of Hollywood movies are sold at Target and Wal-Mart stores with a "Family Edited" label.²⁷

The Impact of the E-rated Industry on the Marketplace²⁸

Sanitized versions of *Heat*, *Close Encounters of the Third Kind*, *Saving Private Ryan*, *Patriot Games*, and *Erin Brockovich* are offered by CleanFlicks.²⁹ While Julia Roberts yells "Oh!" in the e-rated version of the movie *Erin Brockovich* and not "Oh, shit!"³⁰ "hell" and "damn" are not removed from any of the movies because these words permeate movies so thoroughly that editors feared they would not be able to catch



all of them.³¹ The current president of CleanFlicks, John Dixon,³² said in *The Denver Post* that "a lot of these movies are good movies; there are just some scenes that are offensive. I don't want to see gory violence or adultery all over the screen."³³ Some movies, however, have been deemed to be beyond saving. For example, the storylines of *Pretty Woman*, *Hannibal*, *Analyze This*, and *The Story of Us* were thought so controversial as to be beyond the digital editing wizardry of even CleanFilms.³⁴

In the markets where e-rated movie businesses operate, the response seems to be high

praise and increasing demand. While Mormons and their religious beliefs may have inspired the e-rated industry, sanitized movies also appeal to a less religious market that will only watch movies it deems "safe" for a general audience.³⁵ Both groups can now watch and enjoy movies they would otherwise consider inappropriate because of perceived excesses in violence, use of profane language, or sexual content.

The Litigation between the E-rated Industry and Hollywood

The movie industry did not pursue any legal remedies to stop the e-rating industry for several years after CleanFlicks started business. That changed, however, after a CleanFlicks in Pleasant Grove, Utah, began renting edited movies over the internet through its affiliate, MyCleanFlicks.com.³⁶ The website charges a staggered monthly fee depending on the number of movies rented.³⁷ After MyCleanFlicks.com appeared online, documents surfaced on the Directors Guild of America (DGA) website in mid-August of 2002 threatening a lawsuit.³⁸ Robert Huntsman,³⁹ an Idaho lawyer who owns several CleanFlicks franchises in Colorado and Utah, learned of the possible lawsuit and joined CleanFlicks in asking a Colorado District Court to declare their movie editing activities legal.⁴⁰ CleanFlicks named sixteen directors as defendants when it filed suit in late August of 2002, including well-known directors Robert Altman, Michael Mann, Robert Redford, Martin Scorsese and Steven Spielberg.⁴¹ The DGA countersued on September 20, 2002, alleging, in part, federal copyright and Lanham Act violations. DGA President, Martha Coolidge, stated that "what these companies are doing is wrong, plain and simple," analogizing the practice to ripping pages of a book and then reselling the book with the original title and author's name.⁴²

Certain members of the e-rated industry are attempting to self-differentiate in the hope of legally separating themselves from the legal attack against the industry. One of the named counter-defendants in the DGA countersuit, Trilogy Studios, is attempting this endeavor.⁴³ Trilogy Studios, which is based in Utah, makes a software product called MovieMask. This product allows the consumer to

filter out offensive scenes or language from movies. A co-founder of Trilogy Studios states that they "certainly are much different from CleanFlicks."⁴⁴ Users of MovieMask rent ordinary, unedited DVDs and play them on computer or TV sets that are hooked to computers with the software installed.⁴⁵ The software is pre-programmed to handle specific movies and will delete scenes and sounds according to the user's selections.

Trilogy relies on the direct participation of the movie watcher to differentiate itself from CleanFlicks. Whereas companies like CleanFlicks do the actual editing, Trilogy enables consumers to edit their movies at home. Although the alterations are made by the viewer instead of a third party, the result is still a movie that is missing elements found in the original, unedited version. This difference may still help Trilogy in its goal of differentiation, however, because Trilogy can more easily argue that the consumers themselves are the copyright-violators. Trilogy merely enables consumers to do their own editing more easily and seamlessly than manually deleting certain scenes and language.

While reluctant to involve themselves in a battle involving film decency, eight major movie studios⁴⁶ joined the legal battle against CleanFlicks on December 13, 2002.⁴⁷ The Federation of European Film Makers also offered their support of the DGA, as has the Board of the Film Foundation.⁴⁸ The lawsuits are not without their threat, however, of alienating a public already wary of perceived Hollywood indecency. *The Los Angeles Times*, for example, quotes a movie studio executive as saying that the studios "were dragged in kicking and screaming."⁴⁹

The studios' wariness partially stems from past Senate hearings on youth-directed movie violence.⁵⁰ Additionally, Senator Orrin G. Hatch (UT) once organized a failed informational session between two of the warring parties, Trilogy and the DGA.⁵¹ The meeting apparently did not lead to the hoped-for effect, judging by a statement from Jack Valenti on the DGA website that "the altering of a film by anyone not involved in the creation of that film is to enter a dangerous arena, and is a legitimate concern to all Americans who value private property."⁵²

Meanwhile, the e-rating industry has experienced dissent within its ranks. Far from presenting a uniform front against the DGA and the movie studios, the e-rated movie companies have

AMERICA, however, has also enacted federal copyright laws that may well mean that editing movies is “something to cry about” in a way that painting golf clubs yellow is not.

the availability and the relative cheapness of digital video editing software, anyone who cares to learn the skills and make a DVD purchase can modify movies in their home. If the DGA succeeds in stopping CleanFlicks from editing movies for

splintered both legally and practically. John Dixon, the president of CleanFlicks, terminated a CleanFlicks franchise agreement with Korey Smitheran, the filer of the initial lawsuit against the DGA.⁵³ Dixon has also expressed unhappiness and disagreement with Robert Huntsman, a plaintiff in the suit against the DGA. Dixon stated that “we don’t want affiliation with someone who would go behind our backs, filing a lawsuit.”⁵⁴ Huntsman, in turn, is considering suing CleanFlicks over franchise rights and may close one of the two CleanFlicks stores he owns in Colorado due to disappointing sales.⁵⁵

Disappointing sales may not be limited to Huntsman’s stores, as CleanFlicks plans on selling all ten of its corporately owned stores.⁵⁶ Six of CleanFlicks’ franchised stores are no longer in operation, and Family Shield Technologies, the makers of MovieShield, appears to be out of business.⁵⁷ Albertson’s grocery stores, which previously carried e-rated videos in its Utah grocery stores and planned to offer the videos in its grocery stores outside of Utah, dropped the edited videos in all of its stores.⁵⁸

Yet some people praise the service offered by the e-rated industry. Companies like CleanFlicks and CleanFilms remain in business because of market demand for movies stripped of certain content. Certain religious viewers reject many movies as initially offered by the film studios. Even for viewers not constrained by religious values, parenting choices may still restrict movie choices. The advent of the e-rated industry expands the viewing choices of these particular groups. Ultimately, the availability of sanitized movies broadens Hollywood’s audience. Yet the movie industry has assumed an adversarial position against the e-rated industry that goes against their self-interest vis-à-vis the public’s perception of Hollywood.

The litigation between CleanFlicks and the e-rated industry against the DGA and movie studios raises a number of unconsidered questions. Due to

content and then renting out these movies, private DVD owners by extension may also come under attack for using editing software. The impact of this litigation may, therefore, reach beyond the confines of the e-rated industry.

There may be no legal difference, as some have argued, between a user fast-forwarding scenes while watching a movie in his house, and a user paying someone to delete those same scenes.⁵⁹ Alternatively, as DGA president Martha Coolidge argues, editing movies may be more akin to ripping pages out of a book and then reselling it.⁶⁰ The founder of CleanFlicks contends that “I can go into Wal-Mart, buy a set of golf clubs and paint ‘em a different color, and nobody cries about that ...this is America.”⁶¹ America, however, has also enacted federal copyright laws that may well mean that editing movies is “something to cry about” in a way that painting golf clubs yellow is not.

General Legal Arguments to Stop the E-rated Industry

The DGA argues that movies are intellectual property of the DGA, and consequently the DGA claims a so-called artistic right to all of their movies.⁶² The DGA grounds this claim in *Gilliam v. American Board Company*,⁶³ which states that the Lanham Act, or the Trademark Act of 1946,⁶⁴ “properly vindicate[s] the author’s personal right to prevent the presentation of his work to the public in a distorted form.”⁶⁵ The DGA in its Proposed Amended Counterclaim⁶⁶ first states that the counter-defendants⁶⁷ violate Section 1125(a) and Section 1125(c) of the Lanham Act.⁶⁸ The Lanham Act governs trademark violations against “goods or service” sold in commerce. Sections 1125(a) and 1125(c) govern false designation of origin and trademark dilution, respectively. Simultaneously, the

movie studios claim copyright violation under Title 17 of the United States Code ("Copyright Act").⁶⁹ While the DGA asserts artistic rights based on the Lanham Act as well as general intellectual property rights, the movie studios are the actual copyright holders and can assert a property right in the movies under United States copyright law.

The Claim of Copyright Violation

The Supreme Court has visited the issue of copyright infringement many times. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court considered whether home videotape recorder manufacturers violated copyrights of television programs; the Court held that they did not.⁷⁰ In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, fair use did not protect a magazine's infringing use of the unpublished memoirs of Gerald R. Ford in an article.⁷¹ In *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew's parody of the song "Pretty Woman" did constitute a fair use.⁷² These touchstone cases will be used to analyze the doctrine of fair use as applied to the litigation between the e-rated industry and the copyright holders of the e-rated movies.

Sony involved the use of home videotape recorders ("VTR"), or Betamax, to record television broadcasts for viewing at a later time before erasing the broadcast recording.⁷³ This practice was known as "time-shifting" and constituted the primary use of the Betamax machines.⁷⁴ The machines were manufactured by Sony for consumer sale.⁷⁵ Universal Studios and Walt Disney Productions sued Sony Corporation for selling the VTRs because it enabled individual consumers to infringe on their copyright.⁷⁶ The Court held that Sony's sales of VTRs did not constitute contributory infringement.⁷⁷ Sony demonstrated with sufficient likelihood that a substantial number of copyright holders would not object to the time-shifting use of their broadcasts.⁷⁸

Additionally, the VTR was capable of substantial non-infringing uses because the copyright owners failed to demonstrate that time-shifting would cause non-minimal harm to the value of their copyrighted works.⁷⁹

The Supreme Court in *Harper & Row* considered whether the fair use doctrine sanctioned the publication of excerpts from an unpublished memoir by former President Gerald R. Ford.⁸⁰ The Court held that fair use did not defend the use of the material.⁸¹ In 1977, Mr. Ford had contracted with Harper & Row and *Reader's Digest* to publish his memoirs, which were to contain unpublished material involving the Watergate crisis and Mr. Ford's dealings with former President Nixon.⁸² Before the memoirs were completed, Harper & Row negotiated a prepublication licensing agreement with *Time* magazine.⁸³ *Time* was to pay \$25,000 in two equal installments for the right to publish a 7,500 word excerpt from Mr. Ford's memoirs one week before the book version was to be shipped to bookstores.⁸⁴

Several weeks before *Time* was to release its article, *The Nation* magazine had received the Ford manuscript from an unidentified person.⁸⁵ The editor of *The Nation* cobbled together an article from the

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memoirs, piecing together facts, quotes and paraphrases, but, as the Court determined, added no independent commentary, research, or criticism.⁸⁶ After *The Nation* published its article, *Time* withdrew its piece and did not pay the remaining amount due to Harper & Row under the prepublication licensing agreement.⁸⁷

In *Campbell*, the Supreme Court considered whether 2 Live Crew's rap song was a parody of "Oh, Pretty Woman" such that it fell within the fair use doctrine and did not violate Acuff-Rose Music

Inc.'s rights in the song.⁸⁸ The rap group had applied for permission to use the song in their parody, but Acuff-Rose's agent refused permission.⁸⁹ The rap group used the song anyway, identifying Roy Orbison and William Dees as the authors of "Oh, Pretty Woman" on its records and compact discs.⁹⁰ The Court determined whether the parody was "transformative" enough that is, whether the new work added something new, "with a further purpose or different character, altering the first."⁹¹ The Court remanded the case because insufficient consideration was given to the song's parodic nature in weighing fair use.⁹²

The copyright holders⁹³ argue that the e-rated industry violates federal copyright law. Congressional enactment of federal copyright law is authorized by the Constitution, which allows Congress to make laws protecting the rights of copyright holders.⁹⁴ The Supreme Court articulates the following purpose of the Copyright Clause in *Harper & Row*: "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."⁹⁵ To affect this balance, copyright law is

limited to the aspect of the copyrighted work involving the author's originality.⁹⁶ In *Sony*, Justice Stevens offered the following guidance when confronted with ambiguities in copyright law: "creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."⁹⁷

Copyright extends to derivative works as well as a work derived from the original. A derivative work is statutorily defined as follows:

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, abridgment,

condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'⁹⁸

An owner of a copyrighted work has the exclusive rights to do and to authorize the preparation of derivative works based upon that copyrighted work.⁹⁹ The above statute prohibits the making of derivative works except by the copyright holders or those authorized by the copyright holders. The House Report on the Copyright Act describes a derivative work as requiring a process of "recasting, transforming or adapting" a pre-existing work that comes within the general subject matter of copyright.¹⁰⁰

THE movies' status as derivative works does not automatically make the edited movies unlawful. The movies may fit within the fair use exception of the Copyright Act, embodied in Section 107 of the Copyright Act.

Movies are within the explicit purview of the Copyright Act; consequently, any edited versions of movies are derivative works from the original if they recast, transform, or adapt the movie.¹⁰¹ Editing profanity and violence of movies adapts the work for an audience that objects to the inclusion of this material in Hollywood movies. The e-rated industry argues, however, that no copyright is implicated by its practices. The industry bases this conclusion on the fact that it purchases a DVD for every edited version it rents out. Presumably, this practice is meant to ensure that the movie studios are compensated for every edited movie version. This situation differs from one where a DVD is purchased and then numerous edited copies are rented out, a situation that would violate copyright. However, payment to the copyright holder for the work is but one factor to weigh when analyzing the copyright

issue. Therefore, the co-op arrangement the e-rated industry has fashioned does not alone shield it from implicating copyright law.

The Fair Use Doctrine Defense

The movies' status as derivative works does not automatically make the edited movies unlawful. The movies may fit within the fair use exception of the Copyright Act, embodied in Section 107 of the Copyright Act.¹⁰² The fair use doctrine statutorily limits exclusive use by the copyright holder.¹⁰³ This doctrine is one of equity that gives rise to a factual determination, as the House Report on the Copyright Act states:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.¹⁰⁴

HOWEVER, the e-rated industry is engaged in editing the movie, and there is a price that other companies have paid to do this.

The four statutory factors set forth in Section 107 of the Copyright Act are considered as a set of criteria that is not determinative or definitive, but rather a "gauge for determining the equities" when applying the doctrine.¹⁰⁵ These four factors are: (1) the purpose and character of the use, including whether the use is commercial; (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 on the potential market for the copyrighted

work.¹⁰⁶ According to the Supreme Court, fair use analysis must "always be tailored to the individual case" and consider the nature of the interest at stake.¹⁰⁷

The Court in *Sony* stated that a fair use is usually a productive use, that is, it creates some added benefit for the public.¹⁰⁸ However, not every productive use constitutes fair use.¹⁰⁹ While fact-dependent, the *Sony* dissent stated that fair use turns on whether it is "reasonable to expect the user to bargain with the copyright owner for use of the work."¹¹⁰ When considering the fair use factors, the ultimate purpose of copyright should be constantly kept in mind: balancing the free expression of ideas with the need to reward authors for original works.

Commercial Use: Purpose and Nature

A fair use defense must first consider the commercial nature of CleanFlicks' enterprise. While no single factor of the fair use exception is dispositive, the *Sony* court stated that "every commercial use of a copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."¹¹¹ Noncommercial uses, however, are "a different matter" according to

the Court, and likelihood of harm must be demonstrated.¹¹² The Court backed away from calling commercial use presumptively unfair in *Campbell*, however, as will be discussed below.¹¹³ In *Harper & Row*, the Court did not define commercial use to mean whether monetary gain

is the motive of the use, but rather, "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹¹⁴ Thus, whether monetary gain is the motive or even the result of CleanFlicks's editing enterprise is irrelevant according to the analysis in *Harper & Row*.

The *Harper & Row* commercial use test also asks whether the e-rated industry exploits the copyrighted material by not paying the customary price. As discussed, the movie studios have

contracted with companies like Dove Foundation to offer family-friendly versions of their movies. There is a precedent, therefore, for cooperation between movie studios and companies offering edited movie versions. However, this does not mean that the e-rated industry is necessarily engaged in a commercial use. The e-rated industry does purchase DVDs and VHS tapes for every edited copy that they make; consequently, they are arguably paying the customary price to the copyright holder, at least, the customary price for purchasing a DVD or VHS tape. However, the e-rated industry is engaged in editing the movie, and there is a price that other companies have paid to do this.

Assuming that commercial use is involved, the next question is how to weigh this factor. The *Sony* court found that the practice of "time-shifting" served a legitimate, unobjectionable purpose of public benefit: to allow viewers to make copies of freely broadcast televised sports events, religious broadcasts and educational programs they would have otherwise missed.¹¹⁵ While *Sony* concerned a non-commercial use, the Court considered all commercial uses to be presumptively unfair.

In *Campbell*, however, the Court concluded that a commercial use is not presumptively unfair.¹¹⁶ In weighing the first factor, the Court considered whether the new work merely supercedes the copyrighted material, or instead alters the copyrighted material with a new purpose or character.¹¹⁷ The 2 Live Crew parody was transformative enough so as to promote the goals of copyright law and was given the fair use doctrine's protection. As for the commercial aspect of the use, the Court determined that a derivative work's commercial use should have no presumptive significance and that a commercial use is instead a factor that tends to weigh against fair use depending on the context.¹¹⁸

According to *Campbell*, therefore, a commercial use is not presumptively unfair, but rather weighs against a fair use finding. The e-rated industry likely employs a commercial use according to the

Harper commercial use test. However, this does not mean that editing movies without the copyright holder's authorization is presumptively unfair. Rather, the commercial nature of the use simply weighs against a fair use finding.

The Nature of the Copyrighted Work

Section 102 of the Copyright Act lists "motion pictures and other audiovisual works" as works of authorship protected under the general subject matter of copyright.¹¹⁹ The nature of the work is the entire movie itself, already released to the public in easily modifiable, DVD format. There is no issue of using an unpublished work as in *Harper & Row*, which would limit a finding of fair use. The movies, however, are not news or facts, but works of fiction. Editing these works of fiction could be analogized as tearing pages out of a book were it not for the easily modifiable DVD and VHS format.¹²⁰

An alternative way to tip the scales toward the e-rated industry is to call the edited movies parodies. A parody's transformative use of the material allows parodies to rest within the "breathing space" the fair use doctrine guarantees.¹²¹ Parody is like any other use, however, and must still wind through the fair use factors. Whether a work is a parody or not depends on whether the work could be perceived as commenting on or criticizing the copyrighted work.¹²²

HOWEVER, this does not mean that editing movies without the copyright holder's authorization is presumptively unfair. Rather, the commercial nature of the use simply weighs against a fair use finding.

E-rated movies are difficult to analyze under normal copyright doctrine because they are not just using some of the copyrighted material and offering it as a new work. CleanFlicks and its counterparts instead offer the entire movie for rent just with

particular language and scenes removed. They are not offering it as their own work. Other companies such as Trilogy do not even do this; they instead offer software that allows consumers to filter out scenes by themselves. While the e-rated movies are not traditional parodies, or parodic twins of the original movies, their existence does signal criticism of and commentary on Hollywood's sometimes lascivious choices when making movies. However, this is unlikely to be transformative enough, or new enough to call these edited movies parodic.

Amount and Substantiality of the Portion Used

The third factor that a court may consider when applying the fair use doctrine is the amount and substantiality of the portion of the original work used.¹²³ The Supreme Court in *Harper & Row* found that while *The Nation* only lifted 13% of the Ford memoir verbatim for publication, this insubstantial portion regardless was the "heart of the book," or the section that "qualitatively embodied Ford's distinctive impression."¹²⁴ The determinative question, then, does not appear to be the numeric amount of the portion used, but rather whether that portion goes to the "heart" of the copyrighted work. The e-rated movies use the entire movie for the most part, minus some minutes in deleted language and scenes. When considering this factor, however, the amount of the movie used is more or less 100%. Therefore, this factor weighs on the side of the copyright holders.

Effect on the Market of the Copyrighted Work

The Supreme Court calls the effect on the market of the copyrighted work the "single most important element of fair use."¹²⁵ This factor requires consideration of the extent of market harm actually caused by the infringer as well as any adverse impact on the potential market for the copyrighted work.¹²⁶ If a use is for a noncommercial purpose, the likelihood of future harm to the potential market for the copyrighted work must be demonstrated.¹²⁷ In *Sony*, the Supreme Court found that the petitioners did not demonstrate a likelihood of non-minimal harm to the market of copyrighted works broadcast on

television.¹²⁸ In *Campbell*, the Court determined that a commercial use did not create a presumption of market harm.¹²⁹ Such a presumption would apply to a case that did not involve anything other than "mere duplication" for commercial purposes.¹³⁰ A presumption of market harm, therefore, applies when a commercial use amounts to a market replacement.¹³¹

The effect on the market was also considered by the Supreme Court in *Harper & Row*.¹³² The district court in *Harper* granted the claim of copyright violation against *The Nation*, finding that their article contained no new facts and that the publication of the "heart" of the memoir for profit diminished the value of the copyright because it caused *Time* to abort its agreement with Harper & Row.¹³³ The Second Circuit, however, reversed the district court decision, finding no copyright violation because the purpose of the article was news reporting, the number of words appropriated was insubstantial, and the impact on the market for the original was minimal.¹³⁴ The Supreme Court in turn reversed the Second Circuit decision, finding that the Second Circuit did not weigh the fair use factors in a way consistent to the "scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest."¹³⁵ This scheme includes assuring copyright holders of a "fair return for their labors."¹³⁶

If the e-rated industry is engaged in duplication for commercial purposes, then according to *Harper & Row* and *Campbell* the use is presumptively unfair. However, the context may tip this factor in the favor of the e-rated industry. The threshold issue arises as to whether the e-rated industry's practice is a commercial use of the movies. If so, then a secondary issue arises: is CleanFlicks engaged in simple duplication in a way that is presumptively unfair? If not, then commercial use simply weighs against a fair use finding but is not presumptively unfair.

The movie studios would argue that such a practice is very objectionable because the practice modifies the movie without the consent of its initial creators and therefore constitutes mere duplication. The e-rated industry, however, would claim that editing out certain scenes does provide a public benefit because of certain viewers' religious values or parenting choices. Additionally, Hollywood has yet to provide this public benefit on a large enough scale. The e-rated industry creates a new market by

filling a niche. Therefore, editing the movies is not simply duplicative and does not create a presumption against fair use. However, while not presumptively unfair, the commercial use factor likely weighs more in favor of the movie studios because the only ones profiting from the editing are the e-rated companies.

Another way to analyze this factor is to ask whether there is market substitution.¹³⁷ The key to market substitution is whether the work is transformative, or whether the commercial use is duplicative enough to supercede the original, and serve as a market replacement.¹³⁸ If the work is transformative, market harm should not be inferred; when it is merely duplicative, it is likely that market harm will occur. The markets for derivative uses include those that the copyright holders would generally develop, or license others to develop.¹³⁹ Effects are gauged not only by loss of revenue, but also in the adverse effect on the potential market for either the original or the derivative work.¹⁴⁰

The effect on the market is the most important factor to consider in the fair use analysis

this market of agreed-to movie modification between studios and editing companies. Yet the question fair use analysis asks is whether the market for the unedited movies is harmed.

Many viewers who opt for CleanFlicks' versions presumably would not have purchased or viewed the copyrighted movies in their unedited form. CleanFlicks may argue, then, that their conduct in no way impacts the market for the unedited movies. Those who would have watched movies replete with sex, violence, and profanity are likely to continue doing so, despite the existence of a version with the sex, violence, and profanity clipped out. Those who regularly avoid such movies have a new opportunity to watch Hollywood's offerings. Impliedly, those who prefer the e-rated version of those same movies stay away from movies they believe contain sex, violence, or profanity.

On the other hand, the market for Hollywood's films may be harmed by a public perception that the studios are censoring their own movies. Since the edited movies are not offered

with the representation that the movie studios agreed or disagreed with the modifications, some viewers may consider the changes to be censorship and thus refuse to purchase Hollywood's product.

Justice Blackmun in the *Sony* dissent stated that a reproduction of an entire work for its

HOWEVER, while not presumptively unfair, the commercial use factor likely weighs more in favor of the movie studios because the only ones profiting from the editing of the movies are the e-rated companies.

for the e-rated industry. The market to consider is the one for the copyrighted work, or the market for the original movie. There is proof of actual market harm in the CleanFlicks situation because movie studios have actually contracted with companies like Dove Foundation to produce family-friendly movies for public consumption. If customers of sanitized movie versions would never otherwise watch offensive movies, then the e-rated industry is expanding, not harming, the market. The market for edited movies may well be considered "harmed" when looking at the realities of the market. Additionally, movie studios regularly participate in the editing of movies for television or airplane viewing. Arguably, CleanFlicks's editing interferes with

original purpose, with no added benefit to the public, is a copyright infringement and does not implicate the fair use exception.¹⁴¹ In the case of CleanFlicks, they use the entire movie, and this complicates the analysis because there is no new work. The e-rated industry does not just use certain segments of a movie and incorporate them into a new movie or work of art or criticism. The same exact movie is offered to the public but with certain edits.

The controversial issue is whether the e-rated industry adds any benefit to the public by editing the movies. The DGA would argue that the movie should be seen as an indivisible whole that represents the creator's artistic vision. Modifying the movies provides no benefit when the movie

studios are not agreeing to the edits. This appears to be a specious argument because the studios are offering movies on easily modifiable DVDs. The movie studios do not argue that consumers are the infringers; however, the same argument could easily extend to the consumers. This is particularly true if the e-rated industry is acting more as an agent of consumers.

To expect that studios should retain control over movies in all forms after release is unreasonable when all that is being removed are profanities and certain scenes. The e-rated industry is doing more than this, however. By putting in clothes over nude forms, or inserting new language, the movie is modified in a way that tampers with the creative vision of the movies' authors. This type of modification is unreasonable and presents a situation where the authors' originality is not adequately protected. While fair use may shield companies and consumers from editing out certain words and deleting certain scenes of sex and violence, there should be a limit as to how far these companies can go before the use is no longer fair.

Contributory Infringement of the E-rated Industry

Sony raises another correlation with the e-rated industry litigation. Universal Studios and Walt Disney argued that Sony was a contributory infringer and vicariously liable for the copyright infringement of the VTR customers.¹⁴² The Court uses both concepts in *Sony*, seemingly interchangeably. For example, the Court determined that there is vicarious liability when the contributory infringer is able to control the use of the copyrighted works by others when the use was not authorized by the copyright holder.¹⁴³ Ultimately the *Sony* court determined that vicarious liability rests on Sony's constructive knowledge that purchasers of Sony's equipment would use that equipment to make unauthorized copies of copyrighted material.¹⁴⁴

However, Sony did not control the use of the machines once they were sold and vicarious liability was not imposed.¹⁴⁵

The Court looked to patent law when discussing contributory infringement, finding it the

WHILE fair use may shield companies and consumers from editing out certain words and deleting certain scenes of sex and violence, there should be a limit as to how far these companies go before the use is no longer fair.

equivalent of holding that "the disputed article is within the monopoly granted to the patentee."¹⁴⁶ Contributory infringement, the Court also found, would not exist if the product is capable of "substantial, noninfringing uses."¹⁴⁷ After applying the four "fair use" factors laid out in the statute, the Court in *Sony* found that the VTRs were capable of substantial non-infringing use because Sony demonstrated the likelihood that a significant number of copyright holders would not object to having their broadcasts "time-shifted."¹⁴⁸ Additionally, private time-shifting would not cause any likelihood of non-minimal harm to the potential market of their copyrighted works.¹⁴⁹ Sony was not a contributory infringer by selling the machines to the public because the Betamax machine is capable of substantial, noninfringing uses.¹⁵⁰

Trilogy's MovieShield product, which allows consumers to filter out scenes, may be the most analogous to the VTRs, and provides the same "legitimate, unobjectionable" purpose as the VTR by allowing viewers to filter out scenes. MovieShield relies upon the customers to independently and proactively filter out any objectionable scenes. This may well be a more sophisticated means of simply fast-forwarding through sex scenes or muting profane language. The movie itself is not being modified by the software, though the viewer's experience of the movie is being modified. This change in the viewer's experience of the movie is

legitimate and unobjectionable, just as fast forwarding or muting is legitimate and unobjectionable.

The constitutionality of CleanFlicks's conduct may be salvaged within the structure of their arrangement with their customers. Since CleanFlicks purchases DVDs on behalf of its members and edits them for a fee, perhaps the true copyright infringers are the customers of CleanFlicks. Under *Sony*, vicarious liability is imposed when there is control over the direct infringer.¹⁵¹ CleanFlicks presents an interesting twist to this analysis by flipping the analysis so that the customers are the vicarious infringers. By renting the edited movies via co-ops the members own the movie inventory and arguably consent to the modifications. CleanFlicks just provides the technology and the skill that allows individuals to infringe on studio's copyrighted works. However, while this argument is appealing, implied consent is not the same legally as direct control.

The DGA argues that their artistic vision is somehow depreciated by the removal of exclamatory language, or the snipping of certain scenes of violence and sex. While the removal of such words and pictures may lessen the intensity of certain moments, it does not impact the quality of the acting, the flow of the plot, or the other various production values that go into the creation of a movie. Yet the DGA will assert that every element contributes to the overall effect of a movie upon a subjective viewer, and that any one scene or line of dialogue is as important as any other scene or line of dialogue. The Film Foundation, a non-profit organization committed to protecting and preserving motion picture history, has stated in its website that CleanFlicks "not only exploit[s] copyrighted works, but also challenge[s] the fundamental issue of artistic integrity."¹⁵²

While courts have not addressed the exact issue the litigation at issue presents, drawing certain analogies may be helpful. For example, the copyright holders' argument resembles cases where artists claim copyright to derivative works when

seeking to prevent modification or alteration of their works after purchase. A number of these cases are grounded in the Visual Artists Rights Act of 1990,¹⁵³ which prevents modifications of a work that would prejudice an artist's honor or reputation.¹⁵⁴ The pending CleanFlicks litigation likely cannot be grounded in this Act, however, as a work of visual art is defined as including paintings, drawings, prints or sculptures, but not motion pictures.¹⁵⁵ While the language in the Visual Artists Rights Act mimics the moral arguments the Directors Guild has set forth about maintaining the integrity of their artistic vision and efforts while making movies,¹⁵⁶ the United States has not accepted a "moral right" of authors.¹⁵⁷

Conclusion

The ongoing dispute between movie studios and the e-rated industry raises a number of implications for copyright law. The main dilemma is whether movie studios retain control over all aspects of a movie after its release on DVD form. The four factors listed in Section 107 are to serve as guidance only and are not determinative, and the court must make a factual determination as to what is "fair" use of the movies. While certain factors weigh in the e-rated industry's favor, such as the effect of the movies on the marketplace for the copyrighted work, other factors may count against the industry. The

WHEN only certain words and certain types of scenes are consistently removed through all of the movies, then the use should be fair. When scenes are added in, or nude forms covered up, then the situation is more akin to tampering, and should be considered an unreasonable use.

"balancing" that the fair use doctrine entails to determine the constitutionality of the use must be determined by the court. There is no hard and fast way to weigh the factors, however. Instead, the court

must consider the entire context of the scenario. Fair use ultimately is a doctrine of equity, and so the courts must consider whether it is reasonable for the e-rated industry to offer movies that they themselves have edited with no help from the movie studios.

This current situation is complicated by the use of the entire movie by the e-rated industry, instead of the use of certain portions in a new work. Additionally, a turning point is whether the editing adds a public benefit to the work in a way that tips the fair use doctrine in the favor of the e-rated industry. Judging from the response to the e-rated industry in the markets which it is present, there is some, or perhaps much, benefit to a public wary of sex, profanity, and violence in their movies. Yet one must also consider the purpose behind copyright law: promoting free expression while rewarding the fruits of an author's originality. The fair use doctrine asks whether it is reasonable to edit movies without bargaining with the movie studios first. When only certain words and certain types of scenes are consistently removed through all of the movies, then the use should be fair. When scenes are added in, or nude forms covered up, then the situation is more akin to tampering, and should be considered an unreasonable use.

The e-rated industry is not a monolithic group and dissensions arise within the industry as to which particular action is actually unconstitutional. The makers of MovieMask, for example, argue that since they offer software that allows a consumer to directly take out scenes they are different from a company that takes out scenes at the direction of customers. MovieMask may be more analogous to the use of the VTR in Sony. This may well serve to distinguish companies like Trilogy from companies like CleanFlicks because they do not offer the movie itself. Rather, companies such as Trilogy offer the tools for consumers to do the editing. Consumers in their own homes who modify movies for their own private use should be excepted from copyright infringement by fair use, although different factors come into play when consumers edit movies directly.

The best question for the movie industry to consider is why they rail against the editing of their movies in this way. Removing questionable elements makes these movies available to a greater audience, which will ultimately mean increased sales for the movie industries. Working with the e-rated industry, however, would present a more family-

friendly and less profit-driven image to the public. And indeed there is precedent for the movie studios cooperating with private companies in order to offer edited versions of movies. If the DGA wins against the e-rated industry, the movies will likely be offered with the same languages and scenes removed. Perhaps the same companies would even contract with the movie studios to do the editing. The only difference would be that the movies will have the studio's stamp of approval, and the studios will receive the subsequent benefits. For an industry that relies on a favorable public perception of its products and is already attacked for its allegedly depraved values, this lawsuit would seem to entail nothing but negative publicity.

ENDNOTES

* The author received a J.D. degree from Vanderbilt University Law School in 2004. She received a B.A. degree from Northwestern University in English Literature in 1998. The author wishes to thank Professor Thomas McCoy and this Journal's editorial staff for their assistance. The author also wishes to thank those who helped her see the topic opportunity within a stray news article.

¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

² The "e" has stood for "everyone" as well as "edited without the filmmaker's permission."

³ CleanFilms, About Edited Movies, at http://www.cleanfilms.com/about_edited.phtml (last visited Mar. 15, 2004).

⁴ An example of such an addition is the covering up of a nude Kate Winslet when she poses for DiCaprio's drawing of her portrait in *The Titanic*.

⁵ Most often the religious faith is Mormonism, or the Church of Latter Day Saints. Larry Williams, *Cleaning up Hollywood: Sanitized tapes, DVDs have directors crying foul*, CHI. TRIB., Oct. 1, 2002, at 3.

⁶ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

⁷ Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985).

⁸ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

⁹ Williams, *supra* note 5, at 3.

¹⁰ Dan Luzadder, *CleanFlicks offers videos free of sex, swearing*, DENVER POST, Dec. 28, 2001, at A-01 (quoting President of CleanFlicks John Dixon).

¹¹ *Id.*

¹² *Id.*

¹³ CleanFilms, About Edited Movies, at http://www.cleanfilms.com/about_edited.phtml (last visited Mar. 15, 2004).

¹⁴ Mikulecky represents Robert Huntsman, a plaintiff in the suit against the Directors Guild, asking the Colorado District Court to declare the activities of CleanFlicks legal.

¹⁵ Louis Aguilar, *Family-friendly or defaced? Colo. Stores' cleaned-up movies spur 1st Amendment fight*, DENVER POST, Sept. 24, 2002, at A-01 (quoting Scott Mikulecky of Colorado Springs that the film being edited is clearly labeled as such on the box, and that "we are not trying to fool anyone.").

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Shannon Starr, *New business offers 'sanitized' movies*, PRESS-ENTERPRISE (Riverside, California), Aug. 30, 2003, at A-01.

¹⁹ Aguilar, *supra* note 15, at A-01.

²⁰ See, e.g., CleanFilms, at <http://www.cleanfilms.com> (last visited Mar. 15, 2004); CleanFlicks, at <http://www.cleanflicks.com> (last visited Mar. 15, 2004).

²¹ See Williams, *supra* note 5, at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Aguilar, *supra* note 15, at A-01.

²⁶ Luzadder, *supra* note 10, at A-01.

²⁷ *Id.*

²⁸ Though I frequently name CleanFlicks as representative of the whole group, the counter-defendants named in the suit include Robert Huntsman, Video II, Glen Dickman, J.W.D. Management Corp., Albertson's Inc., Trilogy Studios, CleanFlicks, MyCleanFlicks, Family Shield Technologies, LLC, Clean Cut Cinemas, Edit My Movies, Family Flix, and ClearPlay, Inc., among others.

²⁹ Motion to Compel Joinder of Third Party Copyright Holders as Necessary Parties Pursuant to Federal Rule of Civil Procedure 19 and 17 U.S.C. § 501(b) at 10-11, Huntsman v. Soderbergh, No. 02-M-1662 (D. Colo. Sept. 2002), available at <http://www.dga.org/NewFiles/pdfs/Motion%20to%20Join%20Studios.pdf> (last visited Mar. 15, 2004).

³⁰ Andrew Gumbel, *Cut! Hollywood is being taken to the cleaners; cinema directors are locked in battle with video chain producing hugely popular versions of hit movies – without sex and*

violence, INDEPENDENT ON SUNDAY (London), Sept. 22, 2002, at 20.

³¹ Luzadder, *supra* note 10, at A-01 (quoting the current President of CleanFlicks John Dixon).

³² John Dixon purchased CleanFlicks from Ray Lines, who is currently the CEO of CleanFlicks.

³³ Luzadder, *supra* note 10, at A-01.

³⁴ CleanFilms, Movies We Won't Edit, at <http://www.cleanfilms.com/index.phtml> (last visited Mar. 15, 2004).

³⁵ Williams, *supra* note 5, at 3.

³⁶ *Id.* The website name has since changed to www.cleanflicks.com.

³⁷ CleanFilms, Frequently Asked Questions, at <http://www.cleanfilms.com/faq.phtml> (last visited Mar. 15, 2004).

³⁸ Williams, *supra* note 5, at 3.

³⁹ Robert Huntsman, a plaintiff in the lawsuit, is in the business of licensing the digital software that allows the editing possible and developing the digital editing technology. Mr. Huntsman also practices law in Idaho.

⁴⁰ Williams, *supra* note 5, at 3.

⁴¹ *Id.*; Press Release, Directors Guild of America, DGA responds and counterclaims against Robert Huntsman and CleanFlicks; adds motion picture studios to suit (Sept. 20, 2002), at http://www.dga.org/news/pr_expand.php3?281 (last visited Mar. 15, 2004).

⁴² *Id.*

⁴³ *Filter companies in Hollywood legal drama cry 'Objection!'*, TV MEETS WEB, June 4, 2003, available at 2003 WL 7587541.

⁴⁴ Louis Aguilar, *Legal battles divide film 'sanitizers'*, DENVER POST, Nov. 20, 2002, at C-01.

⁴⁵ *Id.*

⁴⁶ Including Metro-Goldwyn-Mayer Studios, Inc., Warner Bros., Columbia Pictures, Disney, Universal Studios, Paramount Pictures, and 20th Century Fox Film.

⁴⁷ Michael Cieply, *Studios Go on Offensive Against Film Sanitizers Companies*, L.A. TIMES, Dec. 13, 2002, at C-1.

⁴⁸ The Film Foundation, The Film Foundation Supports DGA Countersuit, at <http://www.film-foundation.org/news/detail.cfm?QID=1255> (last visited Mar. 15, 2004).

⁴⁹ Cieply, *supra* note 47, at C-1.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Press Release, Directors Guild of America, Statement by Jack Valenti, available at http://www.dga.org/news/pr_mpaasupportsdgastance.php3 (last visited Mar. 15, 2004).

⁵³ Vince Horiuchi, *Cleanflicks Boss Wants No Part of Suit*, SALT LAKE TRIB., Aug. 31, 2002, at B1.

⁵⁴ Louis Aguilar, *Legal battles divide film 'sanitizers'*, DENVER POST, Nov. 20, 2002, at C-01.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* Disconnected phone numbers and no forwarding information strongly indicate ceased operation.

⁵⁸ *Id.*

⁵⁹ Nell Minow, *Directors Guild yells cut ... to stop edited versions*, CHI. TRIB., Dec. 31, 2002, at C-2.

⁶⁰ Directors Guild of America, Press Release, DGA responds and counterclaims against Robert Huntsman and CleanFlicks; adds motion picture studios to suit, (Sept. 20, 2002), available at http://www.dga.org/news/pr_expand.php3?281 (last visited Mar. 15, 2004).

⁶¹ Rebecca Buckman, *A Cottage Industry in Utah Cleans up Hollywood's Act*, WALL ST. J., Sept. 19, 2002, at A1.

⁶² Proposed Amended Counterclaim at 16, Huntsman v. Soderbergh, No. 02-M-1662 (D. Colo. Sept. 2002), available at <http://www.dga.org/index2.php3?chg> (last visited Mar. 15, 2004).

⁶³ *Gilliam v. American Bd. Co.*, 538 F.2d 14, 24 (2d Cir. 1976).

⁶⁴ 15 U.S.C. § 1125 (1982).

⁶⁵ *Gilliam v. American Broad. Co., Inc.*, 538 F.2d 14, 24 (2d Cir. 1976).

⁶⁶ Proposed Amended Counterclaim at 16, Huntsman v. Soderbergh, No. 02-M-1662 (D. Colo. Sept. 2002), available at <http://www.dga.org/index2.php3?chg> (last visited Mar. 15, 2004).

⁶⁷ Video II, Dickman, J.W.D. Management, Trilogy Studios, CleanFlicks, MyCleanFlicks, Family Shield, ClearPlay, CleanCut, Family Safe, EditMyMovies, Family Flix, Play It Clean.

⁶⁸ 15 U.S.C. § 1125 (1982).

⁶⁹ 17 U.S.C. § 101 et. seq. (2000).

⁷⁰ 464 U.S. 417 (1984).

⁷¹ 471 U.S. 539 (1985).

⁷² 510 U.S. 569 (1994).

⁷³ See generally *Sony*, 464 U.S. at 417.

⁷⁴ *Id.* at 423.

⁷⁵ *Id.* at 422.

⁷⁶ *Id.* at 421.

⁷⁷ *Id.* at 456.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 542 (1985).

⁸¹ *Id.* at 569.

⁸² *Id.*

⁸³ *Id.* at 542.

⁸⁴ *Id.* at 542-43.

⁸⁵ *Id.* at 543.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸⁹ *Id.* at 572-73.

⁹⁰ *Id.* at 573.

⁹¹ *Id.* at 579.

⁹² *Id.* at 572.

⁹³ Before initiating their own suit in December of 2002, the studio copyright holders were joined to the litigation by the Directors Guild via the Motion to Compel Joinder of Third Party Copyright Holders as Necessary Parties Pursuant to Federal Rule of Civil Procedure 19 and 17 U.S.C. § 501(b), *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Sept. 2002), available at <http://www.dga.org/NewFiles/pdfs/Motion%20to%20Join%20Studios.pdf> (last visited Mar. 15, 2004). The Motion includes Metro-Goldwyn-Mayer Studios Inc., Time Warner Entertainment Co., L.P., Sony Pictures Entertainment, Disney Enterprises, Inc., DreamWorks L.L.C., Universal City Studios, Inc., Twentieth Century Fox Film Corp. and Paramount Pictures Corporation.

⁹⁴ U.S. CONST. art. I, § 8, "The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

⁹⁵ *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (quoting *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984)).

- ⁹⁶ *Id.* at 547.
- ⁹⁷ Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 432 (1984).
- ⁹⁸ 17 U.S.C. § 101 (2000).
- ⁹⁹ 17 U.S.C. § 106 (2000).
- ¹⁰⁰ H.R. Rep. 94-1476, reprinted in 1976 U.S.C.C.A.N. 5659.
- ¹⁰¹ 17 U.S.C. § 102 states that “[c]opyright protection subsists, in accordance with this title, 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.”
- ¹⁰² 17 U.S.C. § 107 (2000).
- ¹⁰³ *Id.*
- ¹⁰⁴ H.R. Rep. 94-1476, reprinted in 1976 U.S.C.C.A.N. 5659.
- ¹⁰⁵ *Id.*
- ¹⁰⁶ 17 U.S.C. § 107 (1)-(4).
- ¹⁰⁷ Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 552 (1985).
- ¹⁰⁸ Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 428, 478-79 (1984).
- ¹⁰⁹ *Id.* at 479.
- ¹¹⁰ *Id.* (Blackmun, J., dissenting).
- ¹¹¹ *Id.* at 451.
- ¹¹² *Id.*
- ¹¹³ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994), discussed *infra*.
- ¹¹⁴ Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 562 (1985).
- ¹¹⁵ Sony, 464 U.S. at 446.
- ¹¹⁶ Campbell, 510 U.S. at 584-85.
- ¹¹⁷ *Id.* at 579.
- ¹¹⁸ *Id.* at 585.
- ¹¹⁹ 17 U.S.C. § 102 (a)(6) (2000).
- ¹²⁰ Press Release, Directors Guild of America, DGA responds and counterclaims against Robert Huntsman and CleanFlicks; adds motion picture studios to suit (Sept. 20, 2002), at http://www.dga.org/news/pr_expand.php3?281 (last visited Mar. 15, 2004).
- ¹²¹ Campbell, 510 U.S. at 569.
- ¹²² *Id.* at 583.
- ¹²³ 17 U.S.C. § 107 (3) (2000).
- ¹²⁴ Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 565 (1985).
- ¹²⁵ *Id.* at 566.
- ¹²⁶ Campbell, 510 U.S. at 589.
- ¹²⁷ Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 456 (1984).
- ¹²⁸ *Id.* at 456.
- ¹²⁹ Campbell, 510 U.S. at 591.
- ¹³⁰ *Id.*
- ¹³¹ *Id.*
- ¹³² Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).
- ¹³³ *Id.* at 544.
- ¹³⁴ *Id.* at 545.
- ¹³⁵ *Id.* at 545-46.
- ¹³⁶ *Id.* at 546.
- ¹³⁷ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).
- ¹³⁸ *Id.*
- ¹³⁹ *Id.* at 592.
- ¹⁴⁰ Harper & Row, 471 U.S. at 568.
- ¹⁴¹ Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 480 (1984).
- ¹⁴² *Id.* at 434.
- ¹⁴³ *Id.* at 437.
- ¹⁴⁴ *Id.* at 439.
- ¹⁴⁵ *Id.*
- ¹⁴⁶ *Id.* at 441.
- ¹⁴⁷ *Id.* at 442.
- ¹⁴⁸ *Id.* at 456.
- ¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 456.

¹⁵¹ *Id.* at 439.

¹⁵² Press Release, Directors Guild of America, The Film Foundation Supports DGA Countersuit Against Unauthorized Editing of Films, (Sept. 20, 2002), available at <http://www.film-foundation.org/news/detail.cfm?QID=1255> (last visited Mar. 15, 2004).

¹⁵³ See, e.g., *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994).

¹⁵⁴ See generally 17 U.S.C. § 101 et seq. (2002); § 106(A)(3).

¹⁵⁵ 17 U.S.C. § 101.

¹⁵⁶ See also Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. VI, 25 U.S.T. 1341, 828 U.N.T.S. 221.

¹⁵⁷ See *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (1949).

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