



2005

Sanitizing the Obscene: Fighting for the Right to Edit Objectionable Film Content

Darcy Williams

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Darcy Williams, *Sanitizing the Obscene: Fighting for the Right to Edit Objectionable Film Content*, 12 Jeffrey S. Moorad Sports L.J. 161 (2005).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol12/iss1/6>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

SANITIZING THE OBSCENE: FIGHTING FOR THE RIGHT TO EDIT OBJECTIONABLE FILM CONTENT

I. INTRODUCTION

A major film industry battle is emerging in a federal courthouse in Colorado.¹ The result of this battle will affect small businesses across the country that are making a business of renting out videos and Digital Video Discs (“DVDs”) that were altered without authorization from the studios.² Some examples of such altered films are “Evil Dead II” and “Saving Private Ryan,” which offer scenes of horrific violence.³ While the first film represents surrealism, the second, “Saving Private Ryan,” represents actual historical events.⁴

Beyond violence, there exists a market that is flooded with films that contain objectionable content.⁵ In fact, films seem to be rampant with not only violence, but also foul language and scenes of sexuality.⁶ In the past, a person who found this material offensive could either endure the movie or not watch it at all.⁷

Recently, some conservative firms have started taking measures that will give film watchers another option.⁸ These family-friendly

1. See Jason Schossler, *Plot Thickens in Hollywood Battle with Video Sanitizers*, ENT. INDUSTRY LITIG. REP., Jan. 31, 2003, at 5 (giving background for legal battle between Directors Guild of America, major film studios, and CleanFlicks). Major studios such as Warner Brothers, MGM, and Sony Pictures are joining the Directors Guild of America in an attempt to prevent copyright and trademark infringement by CleanFlicks and twelve other film rental businesses. See *id.*

2. See *id.* (stating some video rental businesses have based their operations solely on renting unauthorized edited materials).

3. See James Ball, *THE FINAL CUT: Who Controls the Right to Create “Clean” Versions of Films?*, 8 MULTIMEDIA & ENT. L. ONLINE NEWS 3 (May 2003) (exploring legal consequences for unauthorized film editing), at http://208.253.207.51/melon/ARCHIVE/802_final1.html.

4. See *id.* (questioning whether fantastical violence is any more or less objectionable than violence presented in historical setting).

5. See *id.* (emphasizing prevalence of objectionable content in contemporary film market). Other examples of movies with content that can be perceived as objectionable are films such as “Blow,” “Jerry Maguire,” “Mullholland Drive,” “Traffic,” and “We Were Soldiers.” See Schossler, *supra* note 1, at 5. Due to their potentially offensive content, these movies are R-rated. See *id.*

6. See Ball, *supra* note 3 (stating prevalence of offensive material in contemporary films). “Today’s market is flooded with films that contain content which many people find objectionable, such as violence, sex and foul language.” *Id.*

7. See *id.* (stating there are few choices for film viewers).

8. See *id.* (stating marketplace demand for cleaned up movies prompted companies to remove objectionable content from films).

firms are editing films for language, violence, and sexuality by removing the offensive scenes.⁹

There are two basic ways in which these numerous companies are editing films.¹⁰ CleanFlicks, a Utah-based rental chain, is representative of one of the two controversial editing techniques.¹¹ CleanFlicks chain stores are seemingly normal video rental stores open to the public.¹² Before CleanFlicks offers the movies that it purchased from the studios for public rental, however, it makes alterations to the films' content.¹³ Through the use of digital technology, scenes containing potentially offensive material are edited out of the film.¹⁴ Once this editing process is complete, CleanFlicks puts the videos on the shelves for public rental.¹⁵ It is unclear, however, whether or not the packaging used for the videotapes and DVDs has been altered in order to show that the film was edited.¹⁶

In a strategic move to obtain court permission to continue its editing practices in the face of opposition from the film industry, CleanFlicks filed a preemptive suit against the Directors Guild of America ("DGA") in *Huntsman v. Soderbergh*.¹⁷ As expected, many major film studios and the DGA have launched a countersuit in this Colorado court against CleanFlicks and joined a dozen other video rental companies who are similarly altering copyrighted material without studio permission.¹⁸

9. See *id.* (stating ClearPlay and CleanFlicks are two firms editing films for offensive content); see also Peter Rojas, *The Blessed Version*, THE VILLAGE VOICE, Oct. 15, 2002 (stating there are some Utah-based firms offering films for rental that have been edited for sexuality, violence, and foul language), available at <http://www.villagevoice.com/issues/0241/rojas.php>.

10. For a further discussion of film editing techniques used by various companies, see *infra* notes 28-43 and accompanying text.

11. See Ball, *supra* note 3 (stating both litigants in current lawsuit with Director's Guild of America, CleanFlicks and ClearPlay, are Utah companies).

12. See *id.* (explaining editing techniques of CleanFlicks).

13. See *id.* (explaining purpose of CleanFlicks). Unlike NetFlix, which directly offers the movies for rental in the form the studio sold them, CleanFlicks alters the films for violence, sexuality and foul language. See *id.*

14. See *id.* (explaining CleanFlicks' business model for video editing).

15. See *id.* (explaining CleanFlicks' rental process).

16. See Ball, *supra* note 3 (raising possible problem in CleanFlicks' defense against copyright infringement allegations).

17. See Complaint of Huntsman, *Huntsman v. Soderbergh*, 2002 WL 32153735 (D. Colo. Oct. 28, 2002) (No. 02-M-1662) [hereinafter *Huntsman Complaint*]; see also *DGA v. CleanFlicks, ET AL.*, DGA AGENCY UPDATE, Fall 2002, at 2 [hereinafter *Agency Update*] (describing progression of DGA's suit against CleanFlicks and joined defendants).

18. See *id.* (stating ClearPlay and CleanFlicks are two firms editing films for offensive content); see also Rojas, *supra* note 9 (explaining that in response to preemptive suit by CleanFlicks against DGA, DGA and several major studios and sixteen movie directors launched countersuit against CleanFlicks).

Even if CleanFlicks' approach to editing is legally unsound, there is another, more legally tenable way of editing films for offensive content without infringing on copyrights.¹⁹ Another editing firm, ClearPlay, has written software that reads the DVD as it plays and alters the film before it displays the picture on the television screen. This method of editing does not alter the DVD or videotape itself.²⁰ This form of editing does not necessarily need the use of software; it can also be achieved by specially designed hardware, which attaches to the DVD player and reads the movie as it plays, altering the film only on the screen.²¹

Editing is by no means restricted to only family-oriented conservatives and companies based in Utah.²² In this computer age, many average people are now able to edit films in ways that were not available in the past.²³ Some famous examples of such edits done on personal computers are "Star Wars Episode I: The Phantom Edit," and "A.I.: The Kubrick Edit."²⁴

This Comment examines the various techniques utilized by a multitude of film editors and analyzes the legal footing of two representative firms, CleanFlicks and ClearPlay, by looking at the strength of their arguments and the trend of judicial history regarding the permissibility of each of their respective techniques. Section II explores the various legal issues at the heart of this editing controversy and introduces pertinent legal history affecting this is-

19. See Ball, *supra* note 3 (explaining in contrast to CleanFlicks, ClearPlay "has put forth a business model that appears to be legally tenable"); see also Rojas, *supra* note 9 (stating Family Shield is firm that edits its films in similar manner to ClearPlay). Family Shield "sells MovieShield, a device that connects to a DVD player and the television, using closed-captioning cues to automatically block offensive content." *Id.*

20. See Ball, *supra* note 3 (explaining ClearPlay's editing software).

21. See Rojas, *supra* note 9 (explaining functioning of Family Shield's MovieShield hardware). MovieShield is a device that connects the DVD player to the television set. See *id.* The signal from the DVD player sends closed-captioning cues to the MovieShield device, which then blocks offensive content. See *id.* Like CleanFlicks, Family Shield is one of the thirteen firms being counter-sued by the Directors Guild of America, the major studios, and the sixteen directors. See *id.*

22. See *id.* (stating there are many motivations leading parties to edit films).

23. See *id.* (revealing computers are preferred tools for modern editors). "It's not just conservatives in Utah who are taking the knife to films: Enterprising fans are using their computers to alter films, too." *Id.*

24. See *id.* (giving examples of popular edited films done by computer). In "The Phantom Edit," the editors deleted the Jar Jar Binks character from every scene. See *id.* The edited version of "A.I." puts a dark spin on the film more in the style of Stanley Kubrick than its original form as directed by Steven Spielberg. See *id.* In this version of "A.I.," the final thirty minutes, which are considered to be the main sentimental scenes of the film, are cut. See *id.* Film edits such as "The Phantom Edit" and "A.I.: The Kubrick Edit" can be easily found on internet file sharing networks such as Kazaa or Gnutella. See *id.*

sue.²⁵ The various strengths and weaknesses of the arguments on both sides of the debate will be examined in Section III.²⁶ Additionally, Section III notes that although the topic is relatively new, past precedent indicates that editing schemes similar to ClearPlay's software or Family Shield's MovieShield hardware will most likely survive copyright infringement scrutiny.²⁷ Finally, Section IV explores the impact that the decision will have on both the film and editing industries.²⁸

II. BACKGROUND

There are fundamentally two different types of film editing techniques. Due to the differences in the styles of editing, two different ways of confronting copyright infringement allegations from the film industry arise. In the first type of editing, businesses like CleanFlicks permanently alter the videocassettes and DVDs that they are renting to customers.²⁹ In order to edit films, CleanFlicks' editors review the movie and dub in new inoffensive voices into films in lieu of the previously existing objectionable content, or they edit out the offending scene altogether.³⁰ Another editing option is to permanently mute the dialog when objectionable language is being used.³¹ On videocassettes, CleanFlicks achieves its editing goals by rerecording over the tape with new dubbed voices, or in the alternative, by splicing the tape to remove entire scenes.³² To edit DVDs, the same desired alterations can be made by playing the DVD on a computer and changing the desired portions of the film by using an editing program that digitally saves the alterations.³³ Then, the saved edited program can be burned onto a

25. For a further discussion of the legal issues and pertinent legal history affecting film editing, see *infra* notes 43-88 and accompanying text.

26. For a discussion of the strengths and weaknesses of ClearPlay and CleanFlicks' arguments, see *infra* notes 89-213 and accompanying text.

27. For a further discussion of the arguments on both sides of the issue, and the analysis of how editing firms can withstand scrutiny of copyright infringement allegations, see *infra* notes 43-213 and accompanying text.

28. For a further discussion of the impacts of possible court decisions on this issue, see *infra* notes 229-37 and accompanying text.

29. See Ball, *supra* note 3 (revealing CleanFlicks uses digital technology to permanently alter DVDs it rents to customers).

30. See *id.* (explaining CleanFlicks' method of film editing).

31. See Shannon Starr, *New business offers 'sanitized' movies*, THE PRESS ENTERPRISE, Aug. 30, 2003, at A8 (revealing these editors will erase dialog in order to block objectionable content).

32. See Ball, *supra* note 3 (explaining CleanFlicks' editing techniques).

33. See *id.* (describing CleanFlicks' editing techniques).

blank DVD through the use of burning hardware.³⁴ By doing this, CleanFlicks is permanently creating “derivative” works based on preexisting works, which may open it up to liability for copyright infringement, and accordingly, CleanFlicks must defend its editing techniques.³⁵

ClearPlay and Family Shield, on the other hand, do not create permanently edited films based on other films, and therefore, do not create derivative works.³⁶ ClearPlay has adopted a fundamentally different method of editing movies. Although its work results in an edited film that is substantially similar to that of CleanFlicks, ClearPlay’s choice of editing technique may prove to be its savior in litigation.³⁷ ClearPlay edits films through the use of a piece of software that is installed on a personal computer.³⁸ If a viewer wishes to watch a sanitized film, the program downloads a filter that has been specifically created for that movie.³⁹ Then, the filter mutes portions of the film or skips any scenes that may be considered objectionable.⁴⁰ What is integral about this scheme is that ClearPlay’s program creates no permanent variation of the original film.⁴¹ Instead, the software creates nothing more than an ephemeral image on a computer monitor that is lost immediately after the image disappears from the screen.⁴² Due to the special filtering nature of its edits, ClearPlay can rely heavily on past precedents to defend its mode of business operation.⁴³

34. *See id.* (noting burning hardware creates permanent digitally edited movie).

35. *See id.* (explaining permanent works that are simply built upon other preexisting works are known under U.S. Copyright Act as “derivatives”); *see also* The United States Copyright Act, 17 U.S.C.A. § 101 (West 2004) (defining “derivative work”). For a further discussion of the United States Copyright Act, *see infra* notes 78-87 and accompanying text.

36. *See Ball, supra* note 3 (discussing fact that ClearPlay does not permanently alter films, but rather its software reads captioning script and edits on screen only). “[A]lthough a derivative is created and displayed on the computer monitor, the derivative is not maintained in a concrete or permanent form. The DVD is unaltered by the filter.” *Id.*

37. *See id.* (contending ClearPlay’s choice not to produce concrete edited film makes it difficult to attach infringement claims to them).

38. *See id.* (explaining ClearPlay’s editing software).

39. *See id.* (explaining that ClearPlay’s software taps into centralized database of filters for editing specific films).

40. *See id.* (explaining how ClearPlay’s software creates its edited output).

41. *See Ball, supra* note 3 (stating critical difference between CleanFlicks and ClearPlay is that ClearPlay’s software creates no permanent output).

42. *See id.* (explaining ClearPlay’s software editing and result).

43. *See id.* (revealing that Ninth Circuit has dealt with similar editing technique in *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir.

Following CleanFlicks' preemptive suit against the DGA in *Huntsman*, where the small Utah company sought to have court protection for its business practices, the DGA filed a countersuit against CleanFlicks and other similar firms in the industry.⁴⁴ Put simply, Martha Coolidge, the President of DGA, argues, "[i]t is wrong to cut scenes from a film – just as it is to rip pages from a book – simply because we don't like the way something was portrayed or said, then resell it with the original title and creator's name still on it"⁴⁵ The film studios are in agreement with this point of view.⁴⁶ The studios are also concerned about the poor quality of these edited films, which negatively reflect the quality of the studios' filmmaking abilities.⁴⁷ This is not the limit of the studios' concern about CleanFlicks' editing, in some instances, the editing process has led to a severe mutilation of the film.⁴⁸ By skipping over important scenes and muting necessary dialog, editing can fundamentally alter a movie, creating a different film for the viewers than was intended by the original directors.⁴⁹

Accordingly, the film studios are suing the editors for, "among other things, false advertising, trademark infringement, and dilu-

1992)). For a further discussion of *Nintendo*, see *infra* notes 121-25 and accompanying text.

44. See Ball, *supra* note 3 (noting parties involved in lawsuit against CleanFlicks).

45. Schossler, *supra* note 1, at 5 (stating argument basis of DGA). Coolidge went on to say, "[i]t is unethical, it is shameful, and the DGA will aggressively pursue these claims." *Id.*

46. See *id.* (noting studios joined with DGA in suit against CleanFlicks and other film editing companies). The studios are not satisfied by CleanFlicks' arguments. See *id.* The studios do not see this as "family-friendly" entertainment, but rather as a deception of the consumers because these editing companies are presenting the edited videos as representative of what the studios created, not as altered works. See *id.*

47. See *id.* (expressing objections of film industry to unauthorized editing of their films). The studios also are dissatisfied that these edited films, on average, draw prices of twenty dollars above the retail price of the movies when released by the studio. See *id.*

48. See Starr, *supra* note 31, at A8 (describing gross alterations to integral plot scenes due to editing).

49. See *id.* (describing extent to which editing can alter films). The Dean of the UCLA School of Theatre, Robert Rosen, viewed films edited and distributed by some of the plaintiffs included in DGA's counterclaim such as: "Proof of Life," "L.A. Confidential," "The Hurricane," "Minority Report," "Erin Brockovich," and "Ali." See *id.* He then compared these films with their original versions. See *id.* Referring to "Proof of Life," Rosen wrote that "the movie had been mutilated and the editing was choppy and it disrupts the continuity of the movie." *Id.* Moreover, Rosen felt that ClearPlay's edits of "The Hurricane" were severe because the software skipped over "key scenes and muted integral language," and in essence made a different work than that created by the original director, Norman Jewison. *Id.*

tion by marketing versions of Hollywood films that are not authorized by their creators.”⁵⁰ In its counterclaim, the DGA seeks an injunction against the defendants to prevent the unauthorized distribution of feature films.⁵¹ These altered versions of feature-length films were not authorized by either the DGA or the studios, but are still being distributed by some of the plaintiffs.⁵² The DGA feels that the unauthorized and edited works released by plaintiffs, such as CleanFlicks and Robert Huntsman,⁵³ are in clear violation of the Lanham Trademark Act.⁵⁴ This federal statute protects parties, such as the DGA and the film studios from false advertising, trademark infringement, and unfair competition being perpetrated by other parties.⁵⁵ As a result of the perceived copyright and trademark violations, the DGA and the movie studios have filed a counterclaim against CleanFlicks and joined other similarly designed editing companies in *Huntsman*.⁵⁶

III. ANALYSIS: ASSESSING THE LEGITIMACY OF VIDEO EDITING IN A COMMERCIAL SETTING

Although video editing is done for both personal use and commercial profit, it is the latter form of editing that has drawn fire from the DGA and several major film studios.⁵⁷ Accordingly, the DGA and several major film studios have joined forces in a copy-

50. Rojas, *supra* note 9 (stating counterclaims made by DGA and movie studios in their complaint against CleanFlicks and twelve other rental companies); *see also* Stephanie C. Ardito, *New Filtering and Censorship Challenges*, INFORMATION TODAY, NOV. 2002, at 20-21. In its complaint, the DGA has brought countersuit against: Video II; Glen Dickman; J.W.D. Management Corporation; Trilogy Studios, Inc., which produces and distributes the MovieMask software; CleanFlicks; ClearPlay, Inc.; MyCleanFlicks; Family Shield Technologies, LLC, which manufactures and distributes the MovieShield product; and Clean Cut Video. *See id.* at 21. DGA insists that these groups are placing altered or edited videocassettes or DVDs into the stream of commerce. *See id.*

51. *See Agency Update, supra* note 17, at 2 (describing progression of DGA's suit against CleanFlicks and joined defendants).

52. *See id.* at 2-3 (stating basic problem of defendants' modes of operation).

53. *See id.* at 2 (explaining Robert Huntsman filed preemptive suit against DGA on behalf of CleanFlicks).

54. *See id.* at 2-3 (stating legal basis for counterclaim against defendants). *See generally* Lanham Trademark Act, 15 U.S.C.A. § 1051 (West 2004). For a further discussion on the Lanham Trademark Act as applicable to DGA's suit against CleanFlicks, *see infra* notes 55-76 and accompanying text.

55. *See* 15 U.S.C.A. §§ 1051-1125 (West 2004) (identifying materials protected as copyrights and trademarks and defining penalties for any infringement or violation of protected materials).

56. For a further discussion of DGA's allegations against CleanFlicks and ClearPlay, *see infra* notes 59-87 and accompanying text.

57. *See* Rojas, *supra* note 9 (stating enterprising fans are also involved in video editing). "Legal or not, this kind of manipulation is here to stay." *Id.* "[F]an edit-

right infringement countersuit against fifteen commercial video editing establishments.⁵⁸

A. The Basis of the Lawsuit

There are two main thrusts to the DGA's counterclaim argument against the actions taken by video editors such as CleanFlicks and ClearPlay.⁵⁹ The first argument is for copyright infringement by the alleged creation of unauthorized "derivatives" of copyrighted films.⁶⁰ The second complaint involves the protection of the film directors' reputations from arguably inferior quality films resulting from the cleansing edits.⁶¹

1. Trademark Violation

The DGA looks to the Lanham Act ("Act") in order to substantiate the trademark violation claim against the editing companies.⁶² This Act, which generally protects trademarks, can also be interpreted to protect a film director's reputation.⁶³ The theory is that

ing is just catching on, [and] there are hundreds of censored versions of Hollywood films already circulating in video stores." *Id.*

58. *See id.* (noting prompt countersuit by DGA).

59. *See Starr, supra* note 31, at A8 (describing counterclaims asserted by DGA and studios).

60. *See Ball, supra* note 3 (creating inference from material on "derivatives" that DGA and studios are claiming copyright infringement by defendants' creation of unauthorized "derivatives").

61. *See Starr, supra* note 31, at A8. In an interview, Ernie Getto, an attorney representing the DGA revealed, "[t]he Lanham Act protects a trademark, and in this case the mark is the director's reputation." *Id.* at A1. For a further discussion of CleanFlicks' editing techniques, see *supra* notes 28-35 and accompanying text. For a further discussion of ClearPlay's editing techniques, see *supra* notes 36-43 and accompanying text.

62. *See Starr, supra* note 31, at A1, A8 (providing statutory basis for trademark violation claim).

63. *See* 15 U.S.C.A. § 1125 (West 2004). Section 1125 provides:

(a) Civil action.

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person . . . or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act.

Id.

the quality of a film can be assumed if a certain director's name is attached to the project.⁶⁴

As a result, the DGA, supported by an assortment of concerned film directors, accused the editors of trademark dilution.⁶⁵ Trademark dilution, which is the impairment of a trademark's strength due to its use in conjunction with an unrelated product, is codified under 15 U.S.C.A. § 1125.⁶⁶ In order to prove trademark dilution, the DGA needs to show: (1) its mark is distinctive and famous; and (2) "the defendant's use of the same . . . mark creates a likelihood of dilution through tarnishment or blurring."⁶⁷

To determine whether a mark is distinctive and famous, the Act sets forth eight factors to consider, including the degree of recognition of the trademark and the nature and extent of the use of the trademark by third parties.⁶⁸ Using Steven Spielberg and his production company, DreamWorks Inc., as an example, a court could easily construe that the director's mark is distinct and famous using the eight statutory criteria.⁶⁹ Not only are Spielberg's and DreamWorks' films distributed across the world, but when the

64. See Starr, *supra* note 31, at A1 ("Marketing a film by director Steven Spielberg when it is not an exact film Spielberg made is a violation of those rights . . .").

65. See *Frankly, Hollywood Does Give a Damn About Video Editing*, ENT. INDUSTRY LITIG. REP., Oct. 31, 2002, at 6 [hereinafter *Frankly*] (revealing Steven Spielberg, Robert Redford, Steven Soderbergh, Martin Scorsese, and other film directors are involved in CleanFlicks suit); see also Rojas, *supra* note 9 (listing claims against defendants by DGA, numerous film directors, and several major studios).

66. See Lanham Trademark Act, 15 U.S.C.A. § 1125 (West 2004) (listing elements of trademark dilution).

67. *Wilcom Pty. Ltd. v. Endless Visions*, 128 F. Supp. 2d 1027, 1032-33 (E.D. Mich. 1998) (stating requirements for dilution claim pursuant to 15 U.S.C.A. § 1125).

68. See *id.* at 1033 (citing consideration factors of 15 U.S.C.A. § 1125(c)(1)). In determining whether a trademark is distinctive and famous, the court should consider:

- (1) the degree of inherent or acquired distinctiveness of the mark,
- (2) the duration and extent of use of the mark in connection with the goods or services with which the mark is used,
- (3) the duration and extent of use of advertising and publicity of the mark,
- (4) the geographic extent of the trading area in which the mark is used,
- (5) the channels of trade for the goods or services with which the mark is used,
- (6) the degree of recognition of the mark in the trading areas and channels of trade of the mark's owner and the person against whom the injunction is sought,
- (7) the nature and extent of the use of the same or similar marks by third parties, and
- (8) whether the mark was registered under the Act of March 3, 1881, or the Act of Feb. 20, 1905, or on the principal register.

Id.; see also 15 U.S.C.A. § 1125(c)(1)(A)-(H).

69. See DreamWorks Website, at <http://www.dreamworks.com> (last visited Nov. 20, 2004) (discussing creation in "company" section). "Steven Spielberg, Jeffrey Katzenberg and David Geffen launched DreamWorks SKG in October 1994. Their vision was to create an artist-friendly studio to develop, produce and dis-

name "Spielberg" is associated with a film, it suggests that the film will be of high quality.⁷⁰

The DGA also asserts that CleanFlicks is renting films purchased from the studios without any corresponding indications on packaging that the films are changed from their original form.⁷¹ Furthermore, film experts have determined that the films are inferior in quality compared to the versions originally released by the studios.⁷² Accordingly, the DGA argues that the public is losing loyalty to directors because there is a belief that they created these inferior films.⁷³ Because of the failure to alter the packaging of the edited films, which may cause confusion to an uninformed viewer about the director's affiliation with the film, section 1125 places CleanFlicks in a position where it may be liable for trademark violation in a civil action.⁷⁴ The DGA maintains that CleanFlicks' "use of studio trademarks on [the packaging of] the sanitized films 'falsely and erroneously' suggests a connection with the studios that deceives consumers as to the source of the sanitized works."⁷⁵

What is unusual in this case is the DGA's leniency in its selection of damages against the defendants. The DGA can technically pursue damages of all of the defendants' profits from marketing

tribute superior film and musical entertainment that would inspire and delight audiences worldwide." *Id.*

70. See *About MPA, MPAA*, at <http://www.mpa.org/about/> (last visited Nov. 20, 2004) (stating American films are shown in 150 countries across world). Among the studios involved in the world-wide American film dissemination are: The Walt Disney Company, Sony Pictures Entertainment, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures, Inc., Twentieth Century Fox Film Corp., Universal Studios, and Warner Bros. See *id.* The Motion Picture Association ("MPA"), which is the international counterpart to the Motion Picture Association of America ("MPAA"), seeks to uphold the global approval of American films. See *id.*

71. See Schossler, *supra* note 1, at 5 (stating movie industry objections to packaging of edited rental movies). "It is wrong to cut scenes from a film . . . then resell it with the original title and the creator's name still on it . . ." *Id.* (quoting DGA President Martha Coolidge).

72. For a further discussion of the effect of editing on film quality, see *infra* notes 179-83 and accompanying text.

73. See Starr, *supra* note 31, at A1. It is a violation of the Lanham Trademark Act to market a film as being made by Steven Spielberg when the film being rented is not exactly the same as the film made by Spielberg. See *id.* The editing companies, however, argue that the directors are not actually harmed by the edited films. See *id.* at A8. "There is money coming in from the purchase of the movies and exposure to a wider audience . . ." *Id.* (quoting Eric Frame, owner of Cleanedupmovies). Therefore, the studios are still benefiting despite the unauthorized editing. See *id.*

74. See Lanham Trademark Act, 15 U.S.C.A. § 1125(a)(1)(A) (West 2004) (describing provisions for civil liability).

75. Schossler, *supra* note 1, at 5 (quoting studio representative statements regarding trademark violation allegations against CleanFlicks).

the edited films, any damages sustained by the DGA, and attorney's fees.⁷⁶ It is, however, seeking only an injunction preventing the defendants from marketing the unauthorized edited films.⁷⁷

2. *Copyright Infringement*

In addition to the allegation of trademark violation, the DGA also seeks copyright infringement sanctions against the defendants.⁷⁸ The United States Copyright Act is the basis for DGA's claim of copyright infringement against the defendants.⁷⁹ More specifically, the DGA claims that the defendants are creating unauthorized "derivatives" through their editing of the films released by the studios.⁸⁰

To prove copyright infringement, the plaintiff must first demonstrate: (1) ownership of a valid copyright; and (2) infringement of the copyrighted work.⁸¹ In this instance, it is unequivocal that the studios hold valid copyrights to the films being edited by the defendants.⁸²

76. See 15 U.S.C.A. § 1125(c)(2); see also 15 U.S.C.A. § 1117(a). Section 1117(a) provides: "When a violation . . . under section 1125(a) . . . shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." *Id.*

77. See *Frankly*, *supra* note 65, at 6 (stating DGA seeks only injunction preventing defendants from their editing practices).

78. See *Ball*, *supra* note 3 (discussing DGA's copyright infringement claim).

79. See *id.* (revealing DGA's copyright infringement claims against defendants are based on unauthorized creation of "derivatives"). See generally Copyright Act, 17 U.S.C.A. §§ 101-07 (West 2004) (stating copyright laws applicable to "derivatives").

80. See 17 U.S.C.A. § 101 (defining "derivatives" as applied to copyright law). Section 101 provides:

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."

Id.

81. See *Ronald Mayotte & Assocs. v. MGC Bldg. Co.*, 885 F. Supp. 148, 152 (E.D. Mich. 1994) (stating test required to uphold copyright infringement action); see also *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 276 (6th Cir. 1988) (describing same test).

82. See 17 U.S.C.A. § 102(a). In order to qualify as copyrightable material, section 102(a) provides:

(a) Copyright 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. Works of authorship include . . . :

To qualify as a “derivative,” the edited movie would have to be manifested in a fixed form.⁸³ This is a touchstone requirement for copyright infringement.⁸⁴ Accordingly, it is this requirement that makes ClearPlay’s business model more legally tenable. The original copyrighted movies from the studios were shipped to CleanFlicks in the preexisting fixed forms of videocassettes or DVDs.⁸⁵ It is at this point where there is a divergence in the potential liability of ClearPlay and CleanFlicks under copyright infringement law.⁸⁶ Due to the creation of physically edited videocassettes and DVDs, CleanFlicks, as opposed to ClearPlay, is actually creating a permanently altered form of the copyrighted material, and without an appropriate defense, will most likely be liable for copyright infringement.⁸⁷

B. Defending Against DGA’s Claims: Two Very Different Defenses

Given the differences in their business models, ClearPlay, which has very carefully constructed its business model to avoid copyright problems, boasts excellent chances of success in *Huntsman*.⁸⁸ Meanwhile, CleanFlicks, a firm that seems to be flagrantly in violation of copyright laws, must use precarious legal arguments and may face legal consequences for its editing actions.⁸⁹

(6) motion pictures and other audiovisual works

Id.

83. See Ball, *supra* note 3 (stating “[a] derivative must incorporate a copyrighted work in some concrete or permanent form”); see also 17 U.S.C.A. § 101 (stating definition of “derivatives”).

84. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 969-71 (9th Cir. 1992) (holding Game Genie device did not create derivative works and Galoob’s use of copyrighted material was protected by fair use doctrine).

85. See *Nintendo*, 964 F.2d at 967 (stating copyrighted material must be in preexisting fixed form).

86. For a further discussion of ClearPlay’s legal position involving the studios’ copyrights, see *infra* notes 187-213 and accompanying text. For a further discussion of CleanFlicks’ liability under copyright law and any possible defenses, see *infra* notes 129-86 and accompanying text.

87. See Ball, *supra* note 3 (stating CleanFlicks makes fixed copies of DVDs and videocassettes that have been edited for offensive content). For a further discussion of CleanFlicks’ possible defenses to the allegations of copyright infringement, see *infra* notes 129-86 and accompanying text.

88. See Ball, *supra* note 3 (revealing ClearPlay’s business model and editing techniques may adequately withstand scrutiny under copyright and trademark infringement analysis).

89. For a further discussion of CleanFlicks’ legal arguments, see *infra* notes 129-86 and accompanying text.

In *Huntsman*, CleanFlicks will assert its First Amendment and fair use rights as a defense to the DGA's counterclaims.⁹⁰ One First Amendment argument considered by CleanFlicks is the right on behalf of its viewers to have their homes clean of objectionable content.⁹¹ This argument has been utilized previously by both the Federal Communications Commission ("FCC") and the radio industry.⁹² In order to be successful, CleanFlicks must demonstrate that it has a Constitutional right to have its edited videos portray whatever messages it wishes.⁹³

At the root of CleanFlicks' argument is one basic assertion: CleanFlicks, and many other rental companies like it, contend that because they purchased one copy of the film for each copy being edited, they should be allowed to alter and edit the films as they see fit.⁹⁴ John Dixon, the president of CleanFlicks, maintains that there is nothing illegal about what his company is doing.⁹⁵ "'We're paying for these films up front . . .'"⁹⁶ "'For every single copy we send out we have the original, so the studios are receiving full payment.'"⁹⁷ This argument raises an important issue, namely: how extensive are the ownership rights to a copy of a motion picture

90. See *Huntsman Complaint*, *supra* note 17 (matching movie editing companies against DGA and several major movie studios to determine right to edit movies for sexuality, violence, and language); see also Ardito, *supra* note 50, at 20-21 (stating CleanFlicks' proposed defenses of "fair use" and First Amendment protection).

91. See Ball, *supra* note 3 (proposing possible defense for CleanFlicks to use against DGA); see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

92. See Ball, *supra* note 3 (detailing Supreme Court opinion on explicit materials carried over radio airwaves); see also *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (noting Supreme Court held that because content flowed into residences without invitation or warning, government regulation in this forum was permissible).

93. See Ball, *supra* note 3 (exploring CleanFlicks' possible arguments under First Amendment).

94. See *id.* (likening CleanFlicks to similar businesses such as Netflix). CleanFlicks contends that it has the right to rent out edited versions of films because they are the owners of the original unedited copies. See Ardito, *supra* note 50, at 20 (noting because of this one-to-one purchase-to-edit ratio, CleanFlicks feels it has right to do what it wishes with its property).

95. See Rojas, *supra* note 9 (explaining Dixon's belief that CleanFlicks is within its legal rights to edit films because once paid for, complete ownership is transferred to his company).

96. *Id.* (quoting John Dixon, president of CleanFlicks) (indicating CleanFlicks does not make copies of films they are editing).

97. *Id.* (quoting John Dixon, president of CleanFlicks) (revealing there are no copies made of original film purchased from the studio).

that one has purchased from a studio?⁹⁸ The studios contend that CleanFlicks, and other companies like it, are creating unauthorized “derivatives despite the purchase of the video that is ultimately edited.”⁹⁹

To avoid violating copyright law, CleanFlicks is citing the traditional notion of fair use.¹⁰⁰ Fair use, as its name implies, allows “for the limited use of a copyrighted work by a person or organization that does not have the exclusive right to use that work.”¹⁰¹

Applying fair use to CleanFlicks’ business model, however, may prove to be a difficult task. Due to the limitations of the types of uses for copyrighted material, fair use may not be applicable to commercial businesses that rent out standard box-office movies.¹⁰²

Although this sort of editing work is relatively new to the movie industry, analogous situations have already been observed in the world of music.¹⁰³ In the music industry, the most common types of such infringement occur through remixing and sampling.¹⁰⁴ Re-

98. *See id.* (“[T]here’s a wider principle at stake here than censorship: whether or not people should be able to do what they want with their entertainment.”). CleanFlicks’ president, John Dixon, contends that once a studio sells its copy to the consumer, the studio has essentially given up its rights to interfere with that movie’s use by the consumer. *See id.* Further:

Paul Weiler, a professor at Harvard Law School and the author of *Entertainment, Media and the Law*, says, “There is a qualitative difference between someone making a whole host of free copies from the original, and someone making changes in a whole host of originals they’ve bought. [CleanFlicks] bought these copies, and if consumers want to use their computers to edit out something, clearly they have the right to do that.”

Id. (emphasis and alteration in original).

99. *See id.* (explaining CleanFlicks is most likely creating unauthorized derivatives); *see also* Copyright Act, 17 U.S.C.A. §§ 101-07 (West 2004) (defining “derivatives” and setting forth legal criteria for their use and sanctions for their unauthorized use).

100. *See* Rojas, *supra* note 9 (stating CleanFlicks intends to avoid sanctions for copyright infringement by using fair use rule); *see also* 17 U.S.C.A. § 107 (describing rules of fair use). Section 107 indicates: “[n]otwithstanding [the exclusive rights granted above], the fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.” *Id.*

101. Ball, *supra* note 3 (giving general nature of fair use as dictated by 17 U.S.C.A. § 107).

102. For a further discussion of the fair use doctrine as it applies to CleanFlicks and other businesses like it, *see infra* notes 158-83 and accompanying text.

103. *See* Rojas, *supra* note 9 (showing it is common to litigate in music industry due to unauthorized use of other artists’ works).

104. *See id.* (noting remixing is alteration of original work to fit in different musical form). Sampling is the adoption of another work’s melody into a new song. *See e.g.*, *Pop Culture Madness.com: Music Sampling*, at <http://www.popculturemadness.com/Music/Samples.html> (last visited Nov. 20, 2004) (supplying consumers with music that has been sampled).

cently, a new type of unauthorized use has emerged in the music industry known as the bootleg or “mash-up.”¹⁰⁵ One can see the similarity between editing a feature length motion picture for offensive content and the alteration of an artist’s song.¹⁰⁶ In fact, the current copyright issues at stake in *Huntsman* have been at issue within the musical industry for years.¹⁰⁷

Although included in the same lawsuit, some editing companies, such as ClearPlay and Family Shield, may have substantially better odds of withstanding the allegations of copyright infringement than some of their competitors.¹⁰⁸ Their defense lies in the manner in which they edit the films.¹⁰⁹ ClearPlay’s software does not edit objectionable content from a film permanently, but instead only filters objectionable content from playback of the film.¹¹⁰

The DGA joined Family Shield, ClearPlay, and many others in its countersuit against CleanFlicks.¹¹¹ With regard to the companies that simply filter objectionable content using software or hardware, the DGA may have to adopt a different legal approach if it intends to topple companies like ClearPlay.¹¹² One such tactic recently undertaken by the studios and the DGA is to place the threat on the consumers who use ClearPlay’s products.¹¹³

105. See Rojas, *supra* note 9 (stating under mash-up, artist takes vocal component of one work and splices it into instrumental component of another song).

106. See *id.* (comparing DJ-constructed remixes of songs to conservatives editing nude scene out of “Titanic”).

107. See *id.* (“Every advance in technology that has put a little more power into the hands of consumers engenders a negative reaction from an industry scared to death about not being able to control how, when, where, and what consumers watch or listen to.”).

108. See *Huntsman Complaint*, *supra* note 17 (listing companies involved in lawsuit); see also Ball, *supra* note 3 (“In contrast [to CleanFlicks], ClearPlay has put forth a business model that appears to be legally tenable.”).

109. See Ball, *supra* note 3 (introducing ClearPlay’s business model as more “legally tenable” than CleanFlicks and other editors that permanently change videos being rented to customers); see also Rojas, *supra* note 9 (noting Family Shield sets forth business model substantially similar to ClearPlay). Instead of permanently altering the DVD, Family Shield’s MovieShield device connects to a DVD player or personal computer and uses closed-captioning cues from the DVD to block offensive content. See Ball, *supra* note 3.

110. See Ball, *supra* note 3 (describing ClearPlay’s technology merely filters objectionable content from films).

111. See Rojas, *supra* note 9 (stating DGA and studios’ claims against ClearPlay, CleanFlicks, and other joined defendants).

112. See Aimee Grove & Lee Jarman, *ClearPlay Fires Back to Latest Legal Moves from DGA, Studios: Hollywood Still Seeking Ban on DVD Parental Controls*, PR NEWSWIRE, at <http://web.archive.org/web/20031121173841/http://clearplay.com/3feb2003.asp> (Feb. 3, 2003) (giving ClearPlay’s response to recent adverse legal actions taken by DGA and studios).

113. See *id.* (revealing ClearPlay’s customers may face civil legal consequences for using ClearPlay’s products). The eight movie studios involved in the lawsuit

The basic problem faced by the DGA and the studios is the different technology that ClearPlay uses to produce edited versions of movies.¹¹⁴ Although ClearPlay creates edited versions of films, it does not copy, market, or resell tapes or DVDs.¹¹⁵ Furthermore, no additional content is used to mask offensive scenes.¹¹⁶ Instead, any deletions of offensive material are made as one's computer is playing the DVD.¹¹⁷ When a consumer plays a DVD using the ClearPlay software specifically designed for that movie, the filtering program detects and mutes scenes containing objectionable words or skips scenes containing violence or sexuality.¹¹⁸ Although "derivative" subject matter is displayed on the computer monitor, the edited material does not manifest itself in any permanent form.¹¹⁹ Because the DVD is left unaltered throughout the editing process, the DGA and the studios will have difficulties classifying these edited versions as "derivatives."¹²⁰

Furthermore, it seems that ClearPlay has the common law on its side.¹²¹ In the early 1990s, Lewis Galoob Toys marketed the

are taking "an extremely aggressive stance against not only the technologies that consumers want, but also against the consumers themselves, even when they are playing DVDs they have lawfully purchased." *Id.* (quoting ClearPlay attorney Andrew Bridges). In justifying its position against ClearPlay's patrons, the DGA stated, "consumers need to be protected from their own choices." *Id.* Apparently the Director's Guild feels that the consumers will buy a DVD and without knowing that they have downloaded the ClearPlay software, will watch the movie without realizing that it is being edited. *See id.* ClearPlay asserts that this argument by the studios and DGA "defies belief." *See id.*

114. *See id.* Although ClearPlay has been included in the lawsuit along with the twelve other defendants, ClearPlay uses entirely different techniques than does CleanFlicks. *See id.*

115. *See id.* (explaining ClearPlay's editing technique); *see also* Rojas, *supra* note 9 (explaining Family Shield's MovieShield edits films in manner similar to ClearPlay software).

116. *See* Grove & Jarman, *supra* note 112 (stating there are no alterations made to DVD itself).

117. *See* Ball, *supra* note 3 (describing ClearPlay software process).

118. *See id.* ("The filters mute portions of the film that contain objectionable words, or skip violent or sexually oriented scenes.")

119. *See* Copyright Act, 17 U.S.C.A. § 101 (West 2004) (defining "derivative work"); *see also* Ball, *supra* note 3 (explaining DVD is left unchanged after editing is completed by ClearPlay's software); Grove & Jarman, *supra* note 112 ("Basically, the studios are insisting that ClearPlay and consumers are creating altered copies of movies, a fact anyone familiar with the products knows to be false.').

120. For a further discussion on whether the ephemeral derivatives created by ClearPlay and MovieShield should be classified as copyright infringement, *see infra* notes 187-213 and accompanying text.

121. *Cf.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 969-72 (9th Cir. 1992) (holding Game Genie device did not create derivative works of copyrighted Nintendo games and Galoob's use of copyrighted material was protected by fair use doctrine).

“Game Genie,” which was an accessory for the Nintendo Entertainment System (“NES”).¹²² The Game Genie would attach to a regular Nintendo game and could be inserted into the NES.¹²³ Once inserted, the Game Genie would change the parameters of the game so that the player could, among other things, automatically receive all available weapons or be impervious to injury.¹²⁴ In a manner similar to ClearPlay’s editing techniques and virtually identical to Family Shield’s MovieShield device, the Game Genie would only alter the image of the game on the television screen, leaving the original Nintendo game unaltered; therefore, the Ninth Circuit Court of Appeals held that the Game Genie did not create a “derivative work.”¹²⁵

Finally, ClearPlay has yet another legal advantage over its editing competitors. ClearPlay has been very particular about the impact its software filter has on the DVD from the studio.¹²⁶ ClearPlay’s software only mutes objectionable words and skips over scenes as the DVD plays.¹²⁷ It does not seem logical to deem ClearPlay’s technique as “derivative” copyright infringement when fastidious viewers can achieve the same result simply by using their remote control as the movie plays in front of them.¹²⁸

These defenses are further elaborated in the following defensive analysis section.

122. See Ball, *supra* note 3 (giving history of Game Genie and Nintendo conflict).

123. See *Nintendo*, 964 F.2d at 967 (explaining link between Game Genie and Nintendo System).

124. See *id.* (giving examples of gaming benefits derived from Game Genie device).

125. See *id.* at 969 (holding Game Genie did not create derivative works of copyrighted material). For a further discussion of *Nintendo* and its ramifications on video editing, see *infra* notes 195-206 and accompanying text.

126. See Ball, *supra* note 3 (explaining ClearPlay manifests its editing in very specific form).

127. See *id.* (“The filters mute portions of the film that contain objectionable words, or skip violent or sexually oriented scenes.”).

128. See *id.* (implying common sense would not allow one form of editing to remain legal while another is illegal simply by virtue of means through which results are produced). A viewer could achieve the same editing result by using the remote control’s mute and fast forward buttons. See *id.* ClearPlay’s “filters merely accomplish the same task that a consumer could, but leaves the consumer to enjoy the film rather than play censor,” while the software does the work. *Id.*; see also Dave McNary & Paul Sweeting, *Intel backs ClearPlay against Suit*, DAILY VARIETY, Aug. 12, 2003, at 8 (reporting because of nature of ClearPlay’s editing techniques, Intel, the computer chip manufacturer, filed court brief in support of ClearPlay). “In a[n] [*amicus* brief] filed last month with the federal court in Denver, Intel argued that ClearPlay’s technology does not violate studio copyrights or the trademarks of directors.” *Id.*

1. *CleanFlicks on the Defensive*

To justify its editing techniques, CleanFlicks has adopted somewhat precarious defensive arguments.¹²⁹ The first defense being asserted by CleanFlicks involves the studios' First Amendment rights.¹³⁰ More specifically, on behalf of its viewers, CleanFlicks may assert a right to have its viewers' homes free from the invasions of objectionable film materials, which will override the studios' First Amendment rights.¹³¹

One critical weakness in an argument such as this is the lack of both federal and state involvement in the suit.¹³² In the situation at hand, the film studios are certainly not government organizations, and as such, the lack of government involvement weakens CleanFlicks' First Amendment argument.¹³³ Suits involving First Amendment rights are usually objections to government restrictions of the speech of private citizens or organizations.¹³⁴ In actuality, it could be argued that the editing industry is violating the studios' right to freedom of speech, and it fails to possess the moral protection power that is in the hands of the government.¹³⁵

Nonetheless, in opposition to the right of freedom of speech, a series of United States Supreme Court opinions exist that deal with the right for an individual's home to be free of objectionable content.¹³⁶ This idea stems from the "ancient concept that 'a man's

129. See Ball, *supra* note 3 (stating CleanFlicks has some possible arguments in defense of its business techniques). These defenses, however, "may or may not hold water." *Id.*

130. See *id.* (stating CleanFlicks' first defensive argument). See generally U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or the press . . .").

131. See Ball, *supra* note 3 (asserting CleanFlicks' First Amendment argument is on behalf of video renters).

132. See *id.* (noting First Amendment defense is usually reserved for situations in which government is restricting rights guaranteed under First Amendment).

133. See *id.* (stating film studios involved in suit are not government organizations).

134. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding FCC could impose regulations against radio stations where subject matter was deemed offensive pursuant to 18 U.S.C.A. § 1464); see also *Carey v. Brown*, 447 U.S. 455 (1980) (concerning government regulations barring certain statements made while picketing).

135. See Ball, *supra* note 3 (implying CleanFlicks, not movie studios, is violating First Amendment).

136. See *id.* (stating issue of First Amendment right of freedom of speech has been overridden in certain circumstances where pervasive explicit content is forced on unwilling public); see also *Pacifica*, 438 U.S. at 749 (holding in order to protect "well-being of its youth," government was allowed to impose regulatory restrictions on freedom of speech of radio communicators, motion picture theatres, and even bookstores).

home is his castle' into which 'not even the king may enter.'"¹³⁷ In *Rowan v. United States Post Office Department*,¹³⁸ lewd and salacious materials were being delivered to people's homes in violation of a statute that allowed householders to remove their names from certain mailing lists. Consequently, due to the heavy emphasis the Supreme Court placed on the sanctity of the home, the Court adopted a balancing test in *Rowan* in which the right of a person to be left alone in his own home must be balanced with another's right to communicate.¹³⁹ Thus, in *Rowan*, the Court held that although commercial speech receives a degree of protection under the Constitution, a mail recipient could order a cessation of mail from undesired commercial sources.¹⁴⁰ In a similar case, the Supreme Court upheld statutes that allowed the FCC to limit the amount of obscene material being disseminated over the airwaves.¹⁴¹ The Supreme Court added another layer to this issue in *Schenk v. United States*.¹⁴² The Court revealed that rights under the First Amendment are subject to the appropriateness of the message conveyed, given the factual situation.¹⁴³ Through Justice Holmes, the Court asserted, "the character of every act depends upon the circumstances in which it is done."¹⁴⁴

137. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) (holding there exists some aspects of speech that can be limited by government intervention).

138. 397 U.S. 728 (1970).

139. See *id.* at 736 (stating individual homeowners must be allowed to have control over unwanted mail); see also *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (giving "the homeowner himself" power to decide "whether distributors of literature may lawfully call at a home").

140. See *Rowan*, 397 U.S. at 738 (holding vendors have no Constitutional right to send otherwise unwanted materials to people's homes).

141. See *Pacifica*, 438 U.S. at 749 (basing circumvention of broadcaster's First Amendment rights on nuisance theory). Under the facts of *Pacifica*, the Supreme Court stressed the time of day in which the inappropriate material was aired. See *id.* at 749-50. The Court did not hold that the material was inappropriate in all circumstances, but rather, it was inappropriate only during the time of day when it was aired, consequently putting it under section 1464. See *id.* A "nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard." See *id.* at 750 (quoting Justice Sutherland in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

142. 249 U.S. 47 (1919) (upholding Espionage Act, which prevented conspiracies, and found that Schenk was in violation of Act when he circulated possibly inflammatory letter).

143. See *id.* at 48 (stating context may determine existence of limited First Amendment rights).

144. *Id.* at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre causing a panic."). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*

Under this argument, CleanFlicks, on behalf of its customers, can play the role of the government.¹⁴⁵ CleanFlicks can argue it is appropriate, in certain circumstances, to prevent unwanted objectionable material from entering the homes of its customers.¹⁴⁶ This argument falls apart when distinguished from the facts of *FCC v. Pacifica Foundation*.¹⁴⁷ The exception to the right of freedom of speech as illustrated in *Pacifica* was based on objectionable material in a famous George Carlin comedy monologue being transferred over the radio airwaves at two o'clock in the afternoon.¹⁴⁸ In order to justify the limitation of free speech, the Supreme Court adopted a nuisance theory solution to the problem, emphasizing that it was not the message delivered by the station that was the problem, but rather, it was a combination of contributing factors that made the program inappropriate, such as the volume of offensive material and the time of day when the program was aired.¹⁴⁹ The Court even admitted that the George Carlin monologue aired in *Pacifica* might have had social value, however, this value varied with the surrounding circumstances.¹⁵⁰

Given the situational considerations of *Pacifica*, it becomes clear that CleanFlicks cannot violate the plaintiffs' First Amendment rights by editing out offensive material entering its customers' homes in the form of commercial films.¹⁵¹ In *Rowan*, the Supreme Court allowed government regulation of commercial mail entering people's homes based on the citizens' right to have their homes

145. See Ball, *supra* note 3 (suggesting CleanFlicks argue it is adopting role as government censor).

146. See *id.* ("However, this defense is usually reserved for situations involving a government agency that is restricting speech.").

147. 438 U.S. 726 (1978); see also Ball, *supra* note 3 (stating CleanFlicks' argument for exception to First Amendment rights has critical distinguishing factor).

148. See *Pacifica*, 438 U.S. at 729-30 (explaining offensive radio broadcast of George Carlin comedy act was aired over radio at two o'clock in afternoon on Oct. 30, 1973). The comedic monologue, entitled "Filthy Words," was aired on a New York radio station owned by Pacifica, Inc. See *id.*

149. See *id.* at 750 (listing factors to consider under nuisance theory). The majority opinion emphasized that the limitation on freedom of speech was very narrow. See *id.* The Court noted that the decision in no way banned expletives in a two-way radio conversation between cab drivers, or foul language in a broadcast of an Elizabethan comedy. See *id.* Instead, the Court felt that variables, such as the time of day of the broadcast, the obscene nature of the content, the medium of communication, and the composition of the audience were relevant in deciding what materials are given free speech protection. See *id.*

150. See *id.* at 747 (recognizing words have different meanings depending on the social setting). "One occasion's lyric is another's vulgarity." *Id.*

151. See Ball, *supra* note 3 (discussing weakness of CleanFlicks' First Amendment argument).

free of unwanted material.¹⁵² The intentional rental of a DVD or video, which contains offensive material, however, is very different than turning on the radio and hearing objectionable language or opening the mailbox and finding an advertisement for pornography.¹⁵³ “A consumer of CleanFlicks’ products actively invites the materials into their home,” whereas the materials in *Rowan* and *Pacifica* were imposed upon the receiver by the nature of the medium of communication.¹⁵⁴ In addition, the motion picture viewer cannot make the argument that they were surprised by the content of the film, because every motion picture is rated before its release by the Motion Picture Association of America’s (“MPAA”) rating system.¹⁵⁵

Given voluntary video rental by CleanFlicks’ customers and the warnings on the films in the form of MPAA ratings, there is little chance of the *Rowan* and *Pacifica* exceptions to the First Amendment applying as a defense.¹⁵⁶ Because renters voluntarily invite the objectionable material into their “castle,” while being in full knowledge of its offensive nature, regulation in the form of editing no longer applies as an option to CleanFlicks.¹⁵⁷

An additional, and perhaps stronger argument, involves CleanFlicks’ ability to permanently alter films using the “fair use” rule.¹⁵⁸ In general, copyright policy was based on congressional “inten[t] to motivate the creative thought of authors . . . by the provision of a

152. See *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 737 (1970) (holding nothing in Constitution forced Americans to view unwanted material, including pictures and advertisements sent through mail).

153. See Ball, *supra* note 3 (“However, radio waves and VHS or DVD formats are remarkably different.”).

154. See *id.* (stating involuntary nature of receiving communicated materials in United States court cases); see also *Rowan*, 397 U.S. at 738 (explaining difference between free speech rights in public setting and home setting). “That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.” *Id.*; see also *Pacifica*, 438 U.S. at 750 (holding radio broadcasts during certain time slots are subject to government scrutiny of their content despite First Amendment).

155. See Ball, *supra* note 3 (stating movie renters have prior notice of potentially shocking material in films due to their film ratings); see also *Movie Ratings*, MOTION PICTURE ASSOCIATION OF AMERICA, at <http://www.mpa.org/movieratings/index.htm> (last visited Nov. 20, 2004) (giving five standard movie ratings available to commercial motion pictures in United States).

156. See Ball, *supra* note 3 (stating “it is doubtful that a defense based on freedom of speech will be effective”). Instead, it simply appears as though CleanFlicks is inexcusably restricting the Director’s Guild and the movie studios’ freedom of speech. See *id.*

157. For a discussion of the “home as a castle” rationale and involuntary reception of offensive material, see *supra* notes 136-44 and accompanying text.

158. See Ball, *supra* note 3 (introducing “fair use” rule as Clean Flicks’ second argument in defense of its business model).

special reward, and to allow the public to access the products of their genius after the limited period of exclusive control has expired.”¹⁵⁹ When this protective policy gets taken too far and results in the stifling of the very creativity that Congress wants to protect, then fair use arguments might arise.¹⁶⁰

Title 17 of the Copyright Act provides an exception to the rights of copyright holders in the form of fair use.¹⁶¹ Generally, this exception to copyright law is available to both organizations and individuals, provided they meet the enumerated statutory criteria.¹⁶²

In applying section 107, a court must look at the four enumerated criteria found within the statute.¹⁶³ These four factors, however, “do not represent a score card that promises victory to the

159. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating Congress intended to promote creative artistic activity through protection of ideas using copyright law).

160. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (stating situation that gave rise to need for fair use exception to copyright rights); see also *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (quoting *Campbell*, 510 U.S. at 577). In *Pipeline*, an Internet Company was using short video clips that it compiled from copyrighted films as movie trailers on its commercial website, which were then sold to various internet movie dealers for advertising purposes. See *id.* at 191-96. In finding the fair use rule inapplicable to *Video Pipeline*, the court adopted a four-part analysis based on the fair use exception codified as 17 U.S.C.A. § 107. See *id.* at 198-203.

161. See *Ball*, *supra* note 3 (stating fair use is exception to copyright rights). See generally Copyright Act, 17 U.S.C.A. § 107 (West 2004). Section 107 provides in relevant part:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

162. See *Ball*, *supra* note 3 (explaining who qualifies for exception to copyrights under fair use rule).

163. See *Pipeline*, 342 F.3d at 197-98 (describing how courts must consider factors in statute when determining fair use). Although the four factors are not exhaustive, the court must look at the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in rela-

winner of the majority.”¹⁶⁴ Instead, the court considers each factor and weighs the results in light of the purposes of the copyright.¹⁶⁵

The first inquiry ascertains the character and use of the edited films by CleanFlicks.¹⁶⁶ This inquiry includes deciding whether the edited works are being used for a commercial or nonprofit purpose.¹⁶⁷ In this case, because CleanFlicks charges a fee to rent its videos, it is commercial.¹⁶⁸ Despite the fact that there is no nonprofit component to CleanFlicks, it can ameliorate its position by arguing that some of its films serve an educative purpose. For instance, historically based films such as “Saving Private Ryan” or “All Quiet on the Western Front” may have historical and educational qualities.¹⁶⁹

Besides determining whether the purpose is commercial, the court must determine if CleanFlicks altered the nature of these films through its editing techniques.¹⁷⁰ Here, depending on the extent of the alteration of the specific film being examined, the court may find that CleanFlicks has changed the meaning of the films being edited.¹⁷¹ Because of the commercial purpose for the edited films and the sometimes drastic affect the edits have on the plot or artistic aspect of the film, CleanFlicks does not emerge from the first part of the analysis with a strong basis for fair use.

The second stage of the analysis requires the court to consider the nature of the copyrighted work being edited by CleanFlicks.¹⁷² “This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the conse-

tion to the work as a whole, and the effect of the use upon the potential market for, and value of the copyrighted work. *See id.*

164. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (discussing suggested application of fair use exception).

165. *See Campbell*, 510 U.S. at 578 (stating balancing test to determine fair use rights using four main criteria of § 107).

166. *See Pipeline*, 342 F.3d at 198-200 (beginning analysis of Pipeline’s fair use claim with ascertainment of purpose and character of Pipeline’s video clips).

167. *See id.* at 198 (listing critical distinction of nature of use of film). “If a new work is used commercially, rather than for a nonprofit purpose, its use will less likely qualify as fair.” *Id.* at 198 (citing *Campbell*, 510 U.S. at 585).

168. *See id.* (determining nature of business).

169. *See Ball*, *supra* note 3 (stating “Saving Private Ryan . . . is based on historical events and is firmly grounded in reality”).

170. *See id.* (discussing CleanFlicks’ editorial process).

171. *See Starr*, *supra* note 31, at A8 (discussing Prof. Rosen’s findings that CleanFlicks’ edits on films, such as “Proof of Life” and “The Hurricane,” were either severe mutilations or they skipped key scenes resulting in totally different films than directors intended to create).

172. *See Pipeline*, 342 F.3d at 200 (stating second stage of analysis forces court to consider original work’s nature, and not edited work).

quence that fair use is more difficult to establish when the former works are copied.’”¹⁷³ In this case, there seems to be a mixture of both fictional and factual films being edited by CleanFlicks.¹⁷⁴ Therefore, it seems an analysis is necessary on a film-by-film basis, giving more leniency for fair use rights to the films sending a historically accurate message and less leniency for fictional or artistic works in an effort to protect the director’s creative vision.¹⁷⁵

The third stage analyzes the amount and substance of the edits with respect to the size of the copyrighted original pursuant to section 107(3).¹⁷⁶ The third factor requires not only thought about the quality of the materials used, but also demands that a court look at the quality and importance of the works as well.¹⁷⁷ Although in most instances the “heart” of the film remained after the edits by CleanFlicks, it is also true that with some edits, such as “The Hurricane,” CleanFlicks’ alterations to critical scenes in the film resulted in a different film being created altogether.¹⁷⁸ Once again, it is essential to review the edited films on an individual film basis, deciding whether the edits are so drastic or lengthy that a fundamentally new film has been created.

The fourth and final analysis that a court must undertake is the determination of the effect of the market for the copyrighted work as a result of the edited versions.¹⁷⁹ As the DGA argues, the edited films are serving to tarnish the reputation of the directors and the studios by causing the public to believe that the directors are creat-

173. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)); see also *Harper & Rowe Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

174. See Ball, *supra* note 3 (stating films like “Evil Dead II” are purely fictional or fantasy, while films like “Saving Private Ryan” have scenes based on actual historical fact and are “firmly grounded in reality”).

175. See *Pipeline*, 342 F.3d at 200-01 (applying analysis to videos released by Disney and made into clips by Pipeline Video).

176. See *id.* at 201 (stating third part of analysis measures effect of edit on finished product). See generally Copyright Act, 17 U.S.C.A. § 107(3) (West 2004).

177. See *Campbell*, 510 U.S. at 586-87 (adding additional layers to third prong’s analysis).

178. See Starr, *supra* note 31, at A8 (stating that edits have mutilating affect on film resulting in fundamentally different movie).

179. See *Pipeline*, 342 U.S. at 202 (quoting *Campbell*, 510 U.S. at 590) (“[T]his final factor ‘must take [into] account not only . . . harm to the original but also . . . harm to the market for derivative works.’”). In *Pipeline*, the Supreme Court easily found that Pipeline Video’s clips of Disney films affected the market for video trailers because Disney’s official trailers were now forced to compete against the compiled trailers of Pipeline Video. See *id.*

ing these inferior quality films.¹⁸⁰ On the contrary, an argument can be made that these edits are actually creating more business for the film studios. A CleanFlicks edited film is difficult to obtain.¹⁸¹ In order to do so, a potential customer must knowingly seek out the edited films from the CleanFlicks' website or visit one of the forty stores in the western United States.¹⁸² Because there is so much effort involved in finding the sources for edited films, an argument could be made that these people would not be willing to watch films deemed offensive by the MPAA rating system unless the offensive material was edited out. The studios and the DGA are actually benefiting from this situation. They are selling the original copies to CleanFlicks who edits the films and rents them to a previously uninterested audience.¹⁸³

In the end, CleanFlicks' business model faces slim chances of success in the courtroom. CleanFlicks will undoubtedly come up short in the court's balancing test set forth in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*¹⁸⁴ CleanFlicks' strong commercial motives combined with its drastic editing of some films are strong factors preventing it from qualifying for free use.¹⁸⁵ Furthermore, little protection will stem from the First Amendment due to the simple fact that motion pictures are not imposed on an unwilling public; one watches a movie only if one actively chooses to do so.¹⁸⁶

180. See *Agency Update*, *supra* note 17, at 3 ("It is wrong to circumvent the studios, who are the copyright holders, and the director, who is the film's creator – all in the name of turning a profit.'").

181. See *Preview Titles*, CLEANFLICKS.COM, at <http://www.cleanflicks.com/previewTitles.html> (last visited Nov. 21, 2004) (listing various videos CleanFlicks offers for rental); see also *Store Locator*, CLEANFLICKS.COM, at <http://web.archive.org/web/20040201235734/http://www.carttonic.com/catalog/index.php?file=storelocator&uid=581&main=1> (last visited Nov. 21, 2004) [hereinafter *Store Locator*] (showing CleanFlicks has a very limited number of stores available to public). There are forty CleanFlicks stores in nine states, however, eighteen of these stores are in Utah. See *id.* The remainder of the stores are distributed among various western states and Hawaii. See *id.*

182. See *Store Locator*, *supra* note 181 (listing CleanFlicks' store locations).

183. See *Rojas*, *supra* note 9 (explaining CleanFlicks buys one copy of film from studio for each copy that is edited).

184. 342 F.3d 191 (3d Cir. 2003). For a further description of the application of section 107 and the *Pipeline* balancing test, see *supra* note 160.

185. For a discussion of CleanFlicks' defense under fair use and its shortcomings under 17 U.S.C.A. § 107 (West 2004), see *supra* notes 158-83 and accompanying text.

186. For a discussion of CleanFlicks' proposed defense under an exception to the First Amendment, see *supra* notes 129-57 and accompanying text.

2. *ClearPlay on the Defensive*

ClearPlay faces significantly greater odds of success in copyright and trademark litigation than its counterpart, CleanFlicks, due to the nature of its business model.¹⁸⁷ Because both CleanFlicks and ClearPlay essentially edit the same films released by the studios, many of the defenses available to CleanFlicks are also available to ClearPlay.¹⁸⁸ ClearPlay, however, is not restricted to these somewhat precarious arguments given the special nature of ClearPlay's editing techniques.¹⁸⁹ In fact, ClearPlay can rely on the common law as a shield from copyright infringement allegations based on the Ninth Circuit's findings in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*¹⁹⁰

The *Nintendo* court found that the Game Genie, a device that altered the data-flow between a video game and the game console, did not create a derivative pursuant to copyright law.¹⁹¹ In coming to this decision, the court ruled that in order to be a derivative, it "must incorporate a protected work in some concrete or permanent form."¹⁹² ClearPlay does not create a derivative; although ClearPlay's software creates an altered image on the television screen, the new work is not stored in any permanent form, and accordingly, is not a derivative.¹⁹³ Thus, ClearPlay's output fails under the *Nintendo* derivatives test because there is no concrete

187. See Ball, *supra* note 3 ("In contrast [to CleanFlicks], ClearPlay has put forth a business model that appears to be legally tenable.").

188. For further discussion of the defenses against copyright infringement and trademark violations available to CleanFlicks, see *supra* notes 129-86 and accompanying text.

189. For a further discussion of ClearPlay's editing technique, see *supra* notes 36-43 and accompanying text.

190. 964 F.2d 965 (9th Cir. 1992). Nintendo of America contested the marketing of Galoob's "Game Genie" device as a violation of copyright law. See *id.* at 967. The "Game Genie" is a device that attaches to a Nintendo Entertainment System video game. See *id.* The Game Genie could give a game player invincibility, increased speed or a variety of other benefits after entering a code into the device from a codebook. See *id.* The Game Genie blocks the value of a data byte coming from the Nintendo game cartridge into the Nintendo Entertainment Console and replaces it with a different information byte. See *id.* It was this newly added data byte that was responsible for giving the player requested on-screen change to the functioning of the game. See *id.* Most importantly, "[t]he Game Genie does not alter the data that is stored in the game cartridge. Its effects are temporary." *Id.*

191. See *id.* at 969 (holding output created by Game Genie was not derivative pursuant to Copyright Act).

192. *Id.* Section 101 does not stipulate, "that a work can be a derivative regardless of the nature of the objects in which the work is embodied." *Id.* Instead, the court indicates that it is important to consider the nature of the actual source of the Game Genie's display. See *id.*

193. See Ball, *supra* note 3 (stating critical difference between CleanFlicks and ClearPlay is that ClearPlay creates no permanent derivative, whereas CleanFlicks

computer output, but rather, there is only a mere edited image on the screen which is lost forever as the movie proceeds onwards.¹⁹⁴

The court in *Nintendo* also expressed its belief that in the world of technology, innovation springs from improvement rather than by replacement.¹⁹⁵ As an example, the court referred to the early days of word processors when spell-checking programs had to be purchased separately.¹⁹⁶ If a court had found that the spell-checking programs were impermissible derivatives, then word processing may never have progressed to the point where useful spell-checkers were commonly integrated in word processing software.¹⁹⁷ ClearPlay's filtering software, similar to a spell-checking program, is useless by itself.¹⁹⁸ Both the spell-checker and the ClearPlay software do not produce any concrete or permanent output, nor do they supplant demand for word processors or studio-produced films. "Such innovations rarely will constitute infringing derivative works under the Copyright Act."¹⁹⁹

Similar to the case with the Game Genie, the court in *Huntsman* will undoubtedly find that given the non-concrete nature of ClearPlay's edits, there is no basis for a finding of the creation of a derivative because there is no permanent output. More importantly, as was the case with the Game Genie or an early version of a spell-checking device, the ClearPlay editing software is useless by itself.²⁰⁰ Instead, Game Genie needs a Nintendo system and a

does); see also Grove & Jarmen, *supra* note 112 (stating nature of Clearplay's business). The Press Release states:

ClearPlay does not copy, market or resell tapes or DVDs. ClearPlay also does not add any content to mask or overlay scenes in films. Rather, the company's software is incorporated into DVD players or downloaded to a PC and allows families to view a movie in the home while skipping or muting over graphic violence, profanity or explicit sex.

Id.

194. See Ball, *supra* note 3 (applying *Nintendo* rationale to ClearPlay's video output).

195. See *Nintendo*, 964 F.2d at 969 (quoting Christian H. Nadan, Comment, *A Proposal to Recognize Component Works: How a Teddy Bears on the Competing Ends of Copyright Law*, 78 CAL. L. REV. 1633, 1635 (1990)).

196. See *id.* (giving historical, yet pertinent example of situation analogous to potential progressive power of Game Genie device).

197. See *id.* (suggesting progress of word processors with spell-checkers at mercy of judicial system's interpretation of copyright law).

198. See *id.* (creating parallel between spell-checking programs and Game Genie).

199. *Id.* (creating inference that Galoob's Game Genie is non-infringing derivative and poses possible progressive value to technological community). See generally Nadan, *supra* note 195, at 1667-72 (stating courts are wary of finding such adaptive items as infringing on copyright protections).

200. For a further discussion of the *Nintendo* court's theory of supplanted demand for copyrighted products, see *supra* notes 190-99 and accompanying text.

game, and, just as a spellchecker needs a word processing program, ClearPlay's software requires a movie purchased from a studio. Therefore, as the court in *Nintendo* would maintain, there is no supplanting demand for the studio's product as a result of ClearPlay, and moreover, even if there was, ClearPlay is still not violating the law because there is no production of any concrete derivatives.²⁰¹

As a counterargument, the DGA and the studios may assert that under the holding of *Midway MFG. Co. v. Artic International, Inc.*,²⁰² ClearPlay violates copyright law because of the creation of a concrete derivative.²⁰³ In *Midway*, Artic was marketing a microchip that openly competed with, and was substantially based upon, Midway's microchip for the Galaxian video game.²⁰⁴ The facts in *Midway*, however, can be distinguished from the situation at hand.²⁰⁵ ClearPlay does not create a product that competes with a motion picture produced by a major studio. Instead, ClearPlay merely sells a computer program that edits an existing DVD produced by a film studio.²⁰⁶ This symbiotic relationship actually requires an original film from the movie studios complete with its closed-captioning cues in order to perform an edit.²⁰⁷ Accordingly, the studios are still selling their films to the customers regardless of whether they ultimately wind up being edited for objectionable content.

201. For a further discussion of the *Nintendo* court's rationale, see *supra* notes 190-200 and accompanying text.

202. 704 F.2d 1009 (7th Cir. 1983).

203. See *id.* at 1013-14 (holding Artic violated Copyright Act through its manufacture of microchips).

204. See *id.* (stating Artic's microchip was based on Midway's microchip and both chips competed on open market).

205. See *id.* (noting defendant Artic was producing microchips that were intended to be inserted into Galaxian video game systems and would speed up game's rate of play). Artic's chip was a substantial copy of the original chip produced by Midway, and the new chip was sold to consumers instead of the original chip marketed by Midway. See *id.* In this situation, the court stressed that Artic was benefiting economically because of the chip at the expense of Midway, whose sales of the chip were diminished. See *id.* The court in *Midway* acknowledged that the Copyright Act's definition of derivative work must be stretched to accommodate speeded-up video games. See *id.* at 1014. But see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (holding that stretching definition of derivative works any further would chill innovation and fail to protect "society's competing interest in the free flow of ideas, information, and commerce").

206. See Ball, *supra* note 3 (stating ClearPlay's software merely filters material as DVD purchased from studio plays in computer).

207. See Rojas, *supra* note 9 (noting Family Shield has set forth a business model that is substantially similar to that of ClearPlay). Instead of permanently altering the DVD, Family Shield's device, called MovieShield, connects to a DVD player or personal computer and uses the closed-captioning cues from the DVD to block offensive content. See *id.*

ClearPlay's careful selection of their editing method should also ensure that the DGA does not have a strong case for the besmirching of a director's reputation under the Lanham Act.²⁰⁸ "Rather than replace objectionable language with lighter language, the filter merely mutes the words."²⁰⁹ "These are functions that could, in theory, be accomplished by any consumer with a vigilant finger on the mute and fast forward buttons."²¹⁰ If the option to mute or fast forward a movie is available to any viewer through the use of his remote control, it seems inconsistent for a court to hold ClearPlay liable for trademark and copyright infringement. ClearPlay is simply making the consumer's remote control-work less cumbersome during movie watching, while resulting in the same finished product of a muted or fast-forwarded film.²¹¹

Based on the nature and final form of ClearPlay's editing techniques, it is apparent that ClearPlay faces a much more favorable legal battle against the DGA and the studios than does CleanFlicks.²¹² Although both companies create an edited version of a film, the method in which the editing is carried out is critical in evading copyright infringement sanctions.²¹³

C. Suggested Solutions

A lawsuit such as this one serves to diminish the ability of parents to control the type of films their families watch.²¹⁴ If CleanFlicks and the other parties joined under *Huntsman* are enjoined from creating edited films, conservative consumers across the world may lose access to what amounts to the only source for unobjectionable Hollywood entertainment.²¹⁵ In addition to this consideration, technological innovation in the form of progressive computer

208. See Ball, *supra* note 3 (ClearPlay has been very careful about methods in which filter interacts with DVD).

209. *Id.* Additionally, sexually explicit or violent scenes are not deleted from the DVD, as they are by CleanFlicks, but are instead simply skipped over by the filter as the DVD plays. See *id.*

210. *Id.* (implying potentially unfair situation if ClearPlay is penalized for accomplishing what viewer can do with remote control).

211. See *id.* ("The filters merely accomplish the same task that a consumer could, but leaves the consumer to enjoy the film rather than play censor.")

212. See *id.* (comparing litigation strategies of CleanFlicks and ClearPlay).

213. See Ball, *supra* note 3 ("Because both companies use greatly differing models to accomplish the same end, the outcome of each case may be vastly different.")

214. See McNary & Sweeting, *supra* note 128, at 8 (revealing possible effects of judgment against video editors in *Huntsman*).

215. See *id.* (mentioning decision would "remove a parent-friendly tool from the market").

software may be stifled by a cessation of film editing.²¹⁶ Given the far-reaching repercussions of this lawsuit, it is critical that measures be taken to ensure that video editing be continued in a form that falls within the boundaries of the law.

1. *The DGA and the Studios*

Despite the fact that they are not the party doing the unauthorized editing, the movie studios may be part of the problem. It is obvious from the growth of the CleanFlicks video rental chain across the western United States that there is a very real demand for films that have been edited for objectionable content.²¹⁷

A simple solution to the problem involves the studios undertaking the creation of sanitized films themselves.²¹⁸ This approach would also satisfy the DGA, because the films would remain within the power of the studios, and the final cut would ultimately still remain with the director of the film.²¹⁹

The studios could also try to license firms like CleanFlicks and ClearPlay to edit films.²²⁰ Another option available to the studios is to purchase existing software, such as that produced by ClearPlay, improve it, and then market it.²²¹ Although this is not an exhaustive list of options available to the studios and the DGA, implementation of any of these plans would decrease the need for litigation of cases such as *Huntsman*.

216. *See id.* (stating not only technological innovation would be stunted by judgment against defendants, but injunction would serve to curtail ability to use products to enhance quality of lawfully acquired entertainment); *see also* Nadan, *supra* note 195, at 1634 (technology in such areas advances by improvement rather than replacement).

217. *See Store Locator, supra* note 181 (listing forty store locations across western United States).

218. *See Ball, supra* note 3 (stating film studios do occasionally create edited versions of feature-length films). These edited versions suitable for airplay on television, however, are usually of poor quality as they are full of "shoddy attempts to alter dialogue and choppy editing meant to remove as little as possible." *Id.* As a consequence, "[t]hese cleansed films never see the consumer market." *Id.*

219. *See id.* (stating leaving control of voice-overs and edits in hands of directors is optimal choice for studios).

220. *See Rojas, supra* note 9 (stating "[s]ome sort of licensing system would save everyone a lot of trouble at that point, something CleanFlicks has unsuccessfully proposed to the movie industry"). Sadly, there appears to be little prospect of the studios adopting licensing measures in the near future, despite the fact that they would like to make some extra money and consumers would get to see the films that they wanted without the objectionable content. *See id.*

221. *See Ball, supra* note 3 (listing options available to studios to avoid litigation in this area while still maintaining their sole power over films final appearance).

2. *CleanFlicks and ClearPlay*

If the studios and the DGA remain obstinate and litigation is truly necessary, there are measures that can be taken by video editors such as CleanFlicks and ClearPlay in order to maximize their chances of success in the courtroom. To strengthen an argument for the fair use exception under the Copyright Act, the video editors are well advised to change the nature of the films being edited.²²² Instead of editing the varied films that are currently selected for editing, these companies should only choose to edit films that serve an educational purpose.²²³ Another option is to run their businesses on a nonprofit basis.²²⁴ One need only use common sense, however, to see how both these options would lead to the death of the video-editing industry. Not only would the demand for edited videos drop significantly, but also many editors would leave the market due to the nonprofit nature of the industry. Therefore, this does not seem like a viable option for the editing companies.

A more reasonable precaution for firms like CleanFlicks is to label the boxes of the movies in such a manner that it is clear to the consumer that the film was edited.²²⁵ By taking this simple measure, their liability under the Lanham Act will markedly decrease because the director's reputation is no longer on the line.²²⁶ Even ClearPlay must take measures to disassociate a director with the edited version of the film being produced by the filtering software.²²⁷ ClearPlay can program its filtering software in such a way that a notice disassociating the director with the film can appear on the screen when the software reads a certain closed-captioning cue on

222. See Copyright Act, 17 U.S.C.A. § 107 (West 2004) (listing requirements for fair use exception to copyright laws).

223. See 17 U.S.C.A. § 107(1) (giving preference under four-part balancing test for educational uses of copyrighted material).

224. See *id.* (suggesting preferential treatment to nonprofit organizations under four-part analysis); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (holding whether or not firm is a commercial entity or not is one of most important factors in court's considerations of applicability of fair use exception).

225. See Schossler, *supra* note 1, at 5 (stating movie industry objections to packaging of edited rental movies).

226. See Lanham Trademark Act, 15 U.S.C.A. § 1125 (West 2004) (providing criteria for trademark violation under Lanham Act).

227. See Grove & Jarman, *supra* note 112 (explaining DGA fears consumers are buying DVDs and unwittingly playing them using ClearPlay software, causing them to generate erroneous opinion about quality of director's work).

the DVD. By taking this measure, much of the DGA's claim under the Lanham Act will be negated.²²⁸

IV. CONCLUSION

Despite the fact that CleanFlicks puts forth some complicated arguments, it seems that ClearPlay holds a more secure position in litigation against the DGA. Essentially, the matter comes down to the strength of the individual firms' business models.²²⁹ The subtle differences between the two business models are absolutely crucial when it is time to scrutinize CleanFlicks and ClearPlay for copyright and trademark violations.

There is no disputing the fact that CleanFlicks creates an unauthorized derivative based on copyrighted films.²³⁰ Both CleanFlicks' defenses of fair use and the viewers' right to have their homes free of objectionable content, however, are extremely precarious, which may result in negative treatment in *Huntsman*.²³¹

Meanwhile, due to careful planning, ClearPlay has avoided this problem by selecting a method of editing that not only creates no permanent derivative, but also does not substantially alter the content or meaning of the film being edited.²³² Therefore, the touchstone requirement for copyright violation is not met, and ClearPlay need not present fair use or First Amendment defensive arguments as does CleanFlicks. Also, because an average consumer can create the same result as ClearPlay's software simply by using a remote control, there would be an inherent inconsistency in a court finding one form of editing improper and the other perfectly legal.²³³

This lawsuit strikes at issues more important than a few isolated firms' abilities to create edited movies. At stake in this litigation is the right to treat one's own property with complete freedom.²³⁴

228. For a further discussion of the DGA's claim under the Lanham Act for trademark violation, see *supra* notes 187-213 and accompanying text.

229. See Ball, *supra* note 3 (comparing CleanFlicks' business model with ClearPlay's).

230. See *id.* (stating CleanFlicks' edited versions of films are clearly derivatives).

231. For a discussion of CleanFlicks' fair use and First Amendment arguments, see *supra* notes 129-86 and accompanying text.

232. See Ball, *supra* note 3 (explaining ClearPlay painstakingly selected business model that limits interaction of filter software with DVD).

233. See *id.* (revealing ClearPlay's filter software only skips objectionable scenes or mutes offensive dialog).

234. See Rojas, *supra* note 9 (asserting right to do with one's own legally purchased entertainment as one pleases). The article states:

Should CleanFlicks prevail, an interesting precedent could be established in which anyone can do what they want with somebody else's film or song

Thus, although it seems that companies like CleanFlicks and Clear-Play are performing censorship, companies such as these are arguably fighting for the right to do what they please with their property.²³⁵

There are potential solutions available to the studios that would avoid litigation of this matter altogether.²³⁶ Moreover, these same proposed solutions would allow the movie studios to retain power over their films and fill the market demand for edited movies.²³⁷ Sadly, however, it appears as though the studios wish to obstinately cling to the *status quo* and disregard a potentially valuable market for edited versions of their films.

Darcy Williams

and sell it to the public as long as there is one paid copy extant for each copy manipulated. The myth of creative control would be shattered, something that would legitimize the creative output of thousands who use the films and music of others as raw material for their own work.

Id.

235. See MacNary & Sweeting, *supra* note 128, at 8 (stating controversy involves right to enjoy legally purchased entertainment).

236. For a discussion of the solutions available to the DGA and the studios, see *supra* notes 214-21 and accompanying text.

237. See *Store Locator*, *supra* note 181 (listing forty store locations across western United States).

