

CLEARING CLEARPLAY'S NAME: TRACING THE LEGITIMIZATION OF DIGITAL MOVIE EDITING TECHNOLOGY

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I. INTRODUCTION

By passing the Family Entertainment and Copyright Act of 2005 ("FECA") on February 1, 2005, Congress resolved an ongoing dispute over whether non-copyright holders may commercially edit movies for home viewing.¹ This Act

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¹ Pub. L. No. 109-9, 119 Stat. 218 (2005).

contains a section called the Family Movie Act, which states that software that enables viewers to mute or skip parts of a movie does not violate the motion picture studios' copyrights.² FECA essentially declares that the handful of companies that develop this software to filter out content have won the battle in conference rooms, court, and the Capitol.

The battle began in 1998 when a crop of young companies based in the Intermountain West began developing a market for selling and renting movies that they had edited to remove potentially offensive content.³ Motion picture studios and directors responded by arguing that such conduct is illegal under copyright and trademark law.⁴ They claim these companies wrongfully disregarded the creative decisions of directors and studios under the banner of morality, in order to make an easy buck.⁵ The major players of the edited

² *Id.* §§ 201-02.

³ See generally Rebecca Buckman, *A Cottage Industry in Utah Cleans Up Hollywood's Act*, WALL ST. J., Sept. 19, 2002, at A1 ("Growing number of mom-and-pop video stores and high-tech start-ups across Utah are using software such [as that] offered by ClearPlay Inc. [which] bowdlerize home-video versions of Hollywood movies to suit Mormon sensibilities; Hollywood studios profess outrage at infringement of copyrights and artistic integrity."); Mark Eddington, *Director's Cut? Try Censor's Cut*, SALT LAKE TRIB., Apr. 14, 2002, at E1 (tracing the national growth of the edited movies industry and postulating on the legality and morality of the industry); Larry Williams, *Cleaning Up Hollywood; Sanitized Tapes, DVDs Have Directors Crying Foul*, CHI. TRIB., Oct. 1, 2002, at 3 (describing the rise of the edited movies industry and outlining the opinions of interested parties as to the legitimacy of this industry).

⁴ Ray Richmond, *Battle Lines Drawn over Who Gets to Say "Cut,"* DGA MAG., Nov. 2002, available at http://www.dga.org/news/v27_4/feat_digitalpiracy2.php3 (quoting Jay D. Roth, National Executive Director of the Director's Guild of America: "The function these companies perform without the permission of the copyright holder is illegal. . . . We understand that the law protects the integrity of intellectual property.").

⁵ Martha Coolidge, *Letter from the President*, DGA MAG., Sept. 2002, available at http://www.dga.org/news/v27_3/dept_presreport.php3 ("As directors . . . [w]e make thousands of creative decisions while creating films. . . . These companies that further edit the films for distribution or sale override these decisions without directors' input or consent").

movie industry contend that they simply provide the wholesome entertainment that some consumers demand, which Hollywood neglects to provide.⁶ They argue that copyright laws do not allow moviemakers to dictate how viewers watch their movies. If motion picture studios can prevent viewers from skipping a scene, the editors have asked, can they also tell viewers when they can get up to go to the restroom during a movie?⁷

In addition, the future of America's collective cultural experiences is at issue in this battle. Because the United States remains a heavily entertainment-focused and media-centric country, a good deal of its culture is developed and ingrained in its citizenry through movie and television screens. The motion picture industry argues that, if they do not have enough control to ensure that all viewers have similar movie watching experiences, then the value of this collective cultural experience will diminish. On the other hand, are the movies that Hollywood produces today—replete with bad language, sex, and violence—really a collective cultural experience worth preserving? And if they are, is it fair that those who frequently take offense to movie content are excluded from these collective cultural experiences?⁸

⁶ Mark S. Lee, *Clean Cut*, 26 L.A. LAW. 46, 48 (May 2003) ("Motion picture studios have long been accused of stubbornly resisting the moral values of much of the nation and aggressively promoting entertainment that uses graphic violence; racial, ethnic, and gender stereotypes; smoking; drug use; sexual irresponsibility; marital infidelity; and many other titillations to sell movies, even though the public prefers less graphic fare.").

⁷ ClearPlay Inc.'s Counterclaim for Declaratory Relief and Jury Demand ¶ 17, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 12, 2002), available at <http://viewerfreedom.org/legal/20021213CP/ClearPlayReplytoDGA.pdf>.

⁸ See Lee, *supra* note 6, at 48 (noting that frustration with offensive content in popular movies "has created a demand for edited films among people who wish to participate in the mainstream of American cultural experience but do not wish to hear words or see things that are objectionable to them").

This Note traces the history of the edited movie industry and its fight for legitimacy, with special focus on the manufacturers of software that filters out language, violence, and sex during movies. Section II focuses on the development of the edited movie industry, Section III on a recently resolved civil case between edited movie companies and movie directors and studios, and Section IV on resolving the legal issues before the court in this civil case. Section V covers the development and passage of FECA. Section VI criticizes the way Congress has handled the edited movie debate and proposes a different approach.

II. THE HISTORY OF THE EDITED MOVIE INDUSTRY

A. The Editors: CleanFlicks, CleanFilms et al.

The debate over edited movies dates back to the opening of Sunrise Video in American Fork, Utah, in 1998.⁹ Sunrise invited consumers to bring video cassette copies of the movie "Titanic," starring Leonardo DiCaprio and Kate Winslet, to their video rental store, where Sunrise employees would edit the scene in which Kate Winslet poses partially nude.¹⁰ This service immediately became popular in the surrounding community, which is dominated by members of The Church of Jesus Christ of Latter-day Saints. Leaders of this church advise its members to "[s]tay away from any movie, video, publication, or music—*regardless* of its rating—where illicit behavior and expressions are a part of the action."¹¹

⁹ See Williams, *supra* note 3, at 3.

¹⁰ *Utah Video Store Offering to Sink Titanic's Sex Scenes: For \$5, Customers Can Get PG-13 Film Edited into G-rated Version*, MILWAUKEE J. SENTINEL, Sept. 3, 1998, at 8.

¹¹ H. Burke Peterson, *Touch Not the Evil Gift, Nor the Unclean Thing*, ENSIGN, Nov. 1993, at 42; see also THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, FOR THE STRENGTH OF YOUTH: FULFILLING OUR DUTY TO GOD 17-19 (1995), available at <http://www.lds.org/youthresources/pdf/ForStrengYouth36550.pdf> (This instructional manual on moral standards for the youth of The Church of Jesus Christ of Latter-day Saints urges

An employee of Sunrise Video, Ray Lines, expanded on Sunrise's idea by creating CleanFlicks Video Stores in 1999.¹² CleanFlicks buys popular movies, edits out all profanity, graphic violence, nudity and sexual content, and then offers the product to customers for sale or rent.¹³ To make edited video cassettes, CleanFlicks makes a "copy of [the original] film and... [creates] an edited 'master' tape of the [original] film. The [company] then repeatedly [copies] their edited master... [onto] the Studio's original, authorized videocassettes from which the original motion picture has been either erased or recorded over."¹⁴ CleanFlicks edits DVDs in a similar fashion, but since they cannot copy onto

young people to "choose only entertainment and media that uplift you. . . . Do not attend, view, or participate in entertainment that is vulgar, immoral, violent, or pornographic in any way. Do not participate in entertainment that in any way presents immorality or violent behavior as acceptable.").

¹² Dan Luzadder, *CleanFlicks Offers Videos Free of Sex, Swearing*, DENVER POST, Dec. 28, 2001, at A-01.

¹³ See Frequently Asked Questions: What Content Do You Edit Out?, <http://www.cleanflicks.com/lovDetail.php?detailID=6> (last visited Feb. 22, 2005). This site provides:

We edit out: Profanity [-] This includes the B-words, H-word when not referring to the place, D-word, S-word, F-word, etc. It also includes references to deity (G-word and JC-words etc.), only when these words are used in a non-religious context[:] Graphic Violence [-] This does not mean all violence, only the graphic depictions of decapitation, impalements, dismemberment, excessive blood, gore etc.[:] Nudity [-] This refers to male and female front and back nudity[:] Sexual Content [-] This includes language which refers to sexual activity or has sexual connotation. It also includes visual content of a graphic or stimulating nature.

Id.

¹⁴ See Motion Picture Studio Defendants' Answer and Counterclaims at 14, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 13, 2002) [hereinafter *Motion Picture Studios' Counterclaim*]; see also, Eddington, *supra* note 3, at E1 (quoting an owner of several stores in Salt Lake Valley that carry edited videos: "With edited videos, we purchase the original tapes through regular sources so Hollywood gets the revenue. . . . Then we record the edited version over the original copy.").

the original DVD, they must burn their edited version onto a blank DVD.¹⁵ Lines insists that CleanFlicks purchases an original cassette or DVD for every copy made.¹⁶ In fact, CleanFlicks often keeps the disabled original DVD in the box with an edited copy to show customers that they preserve a one-to-one ratio between originals and edited copies.¹⁷ CleanFlicks has expanded into franchises, and there are now seventy-six stores in almost twenty states, in addition to services available over the Internet at www.cleanflicks.com.¹⁸

Several other companies have attempted to duplicate CleanFlicks' success in renting edited copies of movies to consumers who appreciate viewing movies without hearing words or seeing images that offend them. Some of these companies include: CleanFilms; CleanCut Cinemas; EditMyMovies; Play It Clean Video; Family Flix, U.S.A.; and Video II (hereinafter referred to as the "Editors").¹⁹

¹⁵ Laura Jeanne Monique Silvey, *Cutting Out the "Good" Parts: The Copyright Controversy Over Creating Sanitized Versions of VHS/DVD Movies*, 33 SW. U. L. REV. 419, 427 (2004).

¹⁶ *The Abrams Report 18:00* (MSNBC television broadcast Sep. 25, 2002) (transcript available at LEXIS) (CleanFlicks founder Ray Lines said, "Every movie that we edit is one that we have purchased. We go one for one for every movie that we edit.").

¹⁷ Kieth Merrill, *Cleaning Up the Movies, Part I*, MERIDIAN MAG., June 2002, available at <http://www.meridianmagazine.com/arts/020604clean.html> ("If the movie purchased by the consumer is on DVD . . . the digital master is used to burn a new DVD-R, which is returned to the customer, together with the original DVD. Some of the companies disable the original DVD to diminish any claim that the process creates a pirated copy and deprives Hollywood of revenue.").

¹⁸ See John Anderson, *On Movies: Questions of Cleaning Up*, NEWSDAY, Nov. 3, 2002, at D07 (noting that in 2001, CleanFlicks had twenty stores and, by 2002, it had seventy stores in eighteen states); Bob Baker, *Who Can Edit a Movie? Directors Guild Files Suit*, L.A. TIMES, Sept. 21, 2002, § 6 (Calendar), at 1 (reporting that in 2000, CleanFlicks had two stores but, by 2002, it had expanded to seventy-six stores in eighteen different states).

¹⁹ See Motion Picture Studios' Counterclaim, *supra* note 14, at 1; see also CleanFilms: About Edited Movies, http://www.cleanfilms.com/about_edited.phtml (last visited Oct. 20, 2005).

Most of these companies carefully structure themselves to appear as though they merely are doing for consumers what the consumers would do for themselves if they only had the technology. For example, customers must pay a fee to join CleanFilms' "co-operative," thus becoming partial owners of the CleanFilms video collection.²⁰ Acting on behalf of the collective owners of the videos, CleanFilms edits content that the owners may find offensive. By claiming to be carrying out the wishes of the collective owners, these companies strive to obscure the fact that they alter the creative works of others in an attempt to make a profit.²¹

The Editors vary the extent and nature of their editing depending on the movie.²² Some movies have only a few words and scenes removed.²³ But CleanFlicks took "139 f-words, 29 s-words and assorted other vulgarities" out of "Good Will Hunting,"²⁴ and took out "4.5 minutes worth of

²⁰ CleanFilms, *supra* note 19. The site provides:

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

Id.

²¹ Sharon Weinberg Nokes, *E-Rated Movies: Coming Soon to a Home Theater Near You?*, 92 GEO. L.J. 611, 627 (2004) ("As collective owners of the original, unedited movies, the Co-op has the right to have CleanFilms make family edited backup copies of the originals to edit out content that is objectionable to its members").

²² See Rich Vosepka, *Turning R-rated Movies into G: Utah Video Clubs Edit Films for Sex and Profanity*, SEATTLE TIMES, Aug. 18, 2001, at E1.

²³ Louis Aguilar, *Family-friendly or Defaced? Colo. Stores' Cleaned-up Movies Spur 1st Amendment Fight*, DENVER POST, Sept. 24, 2002, at A-01.

²⁴ Williams, *supra* note 3, at 3.

bloody carnage from the opening of 'Saving Private Ryan.'"²⁵ Some critics have expressed concern that CleanFlicks takes out vital portions of some movies, without which, the movie has a completely different effect.²⁶ CleanFlicks cut out ten minutes of Steven Spielberg's "Schindler's List," causing one commentator to opine, "The horrific impact of the film has actually itself been muted in the trims."²⁷ CleanFilms maintains a list of movies that they will not edit "due to the overall theme or number of required edits."²⁸

B. The Filterers: ClearPlay et al.

By establishing a market for edited versions of popular films, the Editors opened the door for another group of companies to develop a second option for cleaning up popular movies. These companies (referred to hereinafter as the "Filterers")²⁹ have developed software that allows viewers to

²⁵ Joal Ryan, *Dirty Little War over "Clean" Movies*, E! ONLINE NEWS, Sept. 24, 2002, <http://www.eonline.com/News/Items/0,1,10578,00.html>.

²⁶ Eddington, *supra* note 3, at E1 (arguing that cutting the shower scene out of "Psycho" or cutting the violence out of a Shakespearean tragedy would fundamentally change these works).

²⁷ Richmond, *supra* note 4.

²⁸ CleanFilms: Are There Any Movies That You Won't Offer as Family Edited?, <http://www.cleanfilms.com/viewmessage.phtml?help&id=37> (last visited Oct. 20, 2005). Some examples are "Frida," "Hannibal," "The Hours," and "Silence of the Lambs." CleanFilms does not spell out the exact criteria they use to determine when a movie contains so much offensive material that it is uneditable. The other companies that edit movies seem more willing to edit any and all movies, regardless of how offensive the overall theme of the movie is. No other company has publicly disclosed a list of uneditable movies like CleanFilms.

²⁹ For the purposes of the litigation between the edited movie industry and several motion picture studios and directors, these companies are collectively called "Player Control Parties." See discussion of *Huntsman v. Soderbergh* *infra* Section III. It should be noted, however, that the directors object to this appellation. They claim that "[t]he term 'Player Control Parties' is inaccurate and argumentative." They claim that the term "Electronic Editing Parties" is more accurate because these parties' software "do[es] not allow viewers to control the editing of the movies." Director Parties' Brief in Opposition to ClearPlay, Inc.'s, Trilogy Studios, Inc.'s and Family Shield Technologies, LLC's Motion for Summary

automatically skip certain types of scenes or mute certain words.³⁰ ClearPlay DVD players, made by ClearPlay, Inc., play movies simultaneously with special filters that cause the player to skip or mute offensive parts.³¹ Human reviewers watch movies, decide which parts should be edited,³² and then design a filter for each movie that instructs the DVD player to mute or skip a specific point in the run time of the movie.³³

Viewers can choose from a variety of different settings that determine what content is removed and what is left

Judgment at 1 n.1, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 13, 2002). In the interest of evenhandedness, I shall refer to these companies as “Filterers.”

³⁰ See Kieth Merrill, *Cleaning Up the Movies, Part II*, MERIDIAN MAG., June 2002, available at <http://www.meridianmagazine.com/arts/020904clean.html>.

³¹ ClearPlay: The Technology of Choice!, <http://www.clearplay.com/about.aspx> (last visited October 12, 2005) (“With ClearPlay your family will be able to enjoy more movies together because ClearPlay lets you choose content that you want skipped or muted while you watch! . . . The DVD itself is never physically altered, but the movie is filtered during playback.”).

³² Filterers would prefer not to use the word “edit” in conjunction with the software and services they provide. The word “edit” suggests permanent alteration. Filtering software only fast-forwards, mutes, or temporarily covers offensive material in movies. Regardless of which terminology is used, the final result is essentially the same as editing. A viewer sees the movie on his or her television, minus a few words and scenes.

³³ ClearPlay, *supra* note 31; The Player Control Parties’ Corrected Opening Brief in Support of Their Motion for Summary Judgment at 11 ¶ 28, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 13, 2002) [hereinafter *Filterers’ Brief*]. The brief provides:

ClearPlay’s employees . . . assign navigation instructions to the timing data identifying when to skip or mute portions of a DVD containing offensive content. If profanity is heard from 0:12:59:00 to 00:12:59:20 on a DVD, the Filter File will identify that period of two-thirds of a second to be muted. If a decapitation and bullets tearing through flesh are shown from 00:48:49:00 to 00:48:58:00 on a DVD, the Filter File will identify that nine-second segment to be skipped.

unedited.³⁴ There are four broad categories (Violence, Language, Sex and Nudity, and Other), within which the viewer can choose from various different options.³⁵ Filters are available over the Internet to subscribing members who have purchased ClearPlay's special DVD player.³⁶ ClearPlay's technology "does not enable consumers to create any copies or any altered versions of motion picture recordings."³⁷ ClearPlay claims that its service allows you to watch a movie "as if you had super-fast fingers and were able to punch remote control buttons fast and accurately enough to skip and mute certain content, but still maintain the movie's continuity and entertainment value."³⁸

MovieMask software represents another option for filtering content out of movies and functions similarly to ClearPlay by allowing users to view edited movies on a

³⁴ ClearPlay, *supra* note 31 ("ClearPlay lets you turn ON or OFF up to 14 Filter Settings for each movie! You determine the Filter settings for your family.").

³⁵ Nokes, *supra* note 21, at 621 ("Viewers can further customize their experience by adjusting the amount of material that is filtered within each category. For example, a viewer can choose to filter one or all four types of 'Sex and Nudity' ('Sensual Content,' 'Crude Sexual Content,' 'Nudity' and 'Explicit Sexual Situations'). Similarly, 'in "Language," viewers can choose to allow "Crude Language and Humor," but filter out 'Strong Profanity,' 'Graphic Vulgarity,' 'Ethnic and Social Slurs,' and 'Vain References to Deity.' Each of these fourteen filter settings can be turned on or off, generating more than 16,000 permutations of each 'ClearPlayed' film.") (quoting ClearPlay Filter Settings, <http://www.clearplay.com/settings.aspx> (last visited October 20, 2005)).

³⁶ See ClearPlay: Being a Very Cool Responsible Parent Just Got a Whole Lot Easier, <http://www.clearplay.com/shopcart.aspx> (follow ClearPlay Subscriptions "Continue" hyperlink) (noting that there are two ClearPlay membership options; customers can pay \$79 for one year access or \$7.95 for one month access to ClearPlay's library of filters) (last visited October 20, 2005).

³⁷ Filterers' Brief, *supra* note 33, at 11 ¶ 27.

³⁸ ClearPlay: The Technology of Choice!, <http://www.clearplay.com/About.aspx#How%20do%20I%20ClearPlay%20a%20movie> (last visited October 20, 2005).

computer equipped with a DVD player.³⁹ Since purchasing MovieMask software from its developer, Trilogy Studio TVG Vision, LLC⁴⁰ has entered into licensing agreements with several DVD makers to incorporate MovieMask technology into DVD players, televisions, and VCRs under the brand name TVG Vision.⁴¹ However, due to a patent dispute, MovieMask has indefinitely suspended the development and sale of its software.⁴²

Like ClearPlay, MovieMask comes with a variety of settings that allow viewers to choose how much or how little to edit out.⁴³ But unlike ClearPlay, MovieMask is also

³⁹ Motion Picture Studios' Counterclaim, *supra* note 14, at 20 ¶ 67 ("[MovieMask software], when downloaded and used by a consumer in conjunction with a computer DVD drive and a DVD containing the Studios' motion pictures, causes an edited or otherwise altered version of the Studios' motion pictures to be created and performed on a consumer's computer monitor or attached television monitor.").

⁴⁰ *TVG Vision Provides Testimony to Congressional Committee Regarding Directors Guild of America Lawsuit*, BUSINESS WIRE, May 19, 2004 ("TVG Vision, LLC acquired the Movie Mask technology formerly owned by Trilogy Studios and named in the current DGA lawsuit.").

⁴¹ *Id.* (stating that MovieMask software has "been licensed into brand-name DVD players, televisions, VCRs and combination units. There are seven manufacturers, under contract, licensing TVG Vision and/or TVGuardian in their products. These manufacturers include Sanyo, Apex, Mintek, Memorex, Initial and others.").

⁴² Press Release, David "Skooby" Clayton, Farewell (Sept. 28, 2004), <http://www.MovieMask.com> (noting that MovieMask software is no longer available: "We regret to inform everyone that we can no longer be able to provide MovieMask or TVG Vision as a service. . . . This is due to licensing issues, that we are unable to proceed currently."); *see also* Press Release, Nissim Corp., Nissim: Thomson Ceases Sales of ClearPlay DVD Players (July 14, 2004) (available in PR Newswire, July 14, 2004) ("Nissim has . . . received assurances from [TVG Vision], which had been offering an infringing product similar to ClearPlay known as MovieMask, that it will also 'honor Nissim's U.S. patents.'").

⁴³ Matthew S. Bethards, *Can Moral Rights Be Used to Protect Immorality? Editing Motion Pictures to Remove Objectionable Content*, 3 VA. SPORTS & ENT. L.J. 1, 5 (2003) (citing MovieMask, <http://www.moviemask.com/ratings.php> (last visited Sept. 27, 2005)) ("The software has edits or 'masks' for three general categories: language, violence, and adult themes. The consumer then chooses a rating for each

capable of “overlaying visual content such as graphics and animation into the film.”⁴⁴ For example, while ClearPlay can only skip over Kate Winslet’s partially nude scene in “Titanic,” MovieMask “tastefully dresses Kate Winslet in a corset as she poses for a drawing, removing the nudity but leaving the scene intact.”⁴⁵ MovieMask can also make it appear that Keanu Reeves shoots guards in “The Matrix” with green goo and that characters in “The Princess Bride” fight with light sabers instead of swords.⁴⁶ Additionally, an add-on to the software enables MovieMask users to make their own customized masks, which they can share with other users.⁴⁷ TVG Vision also makes the TVGuardian, which “detects the closed-caption datastream embedded in most broadcast TV shows and videos. Then it automatically bleeps out the four-letter words.”⁴⁸

The Movie Shield, created by Family Shield, Inc., illustrates yet another type of technology that has been available to consumers in the past. The Movie Shield attaches between the user’s television and DVD player or VCR and uses information downloaded from an online database to skip objectionable parts of movies.⁴⁹ However,

category. The ratings range from ‘General’ (no immodest clothing, no heated arguments, allows only playful name calling), to ‘Teen’ (allows words such as ‘shut-up’ and ‘idiot’), to ‘Young Adult’ (permits the discussion of abortion, drug use, variations of Deity as an exclamation and racial epithets), to ‘Adult’ (basically unedited).”).

⁴⁴ *The Osgood File: DIY Censorship; New Technology Blips Violence, Sex and Profanity from DVDs* (CBS radio broadcast June 12, 2002), available at http://www.acfnewsources.org/art/diy_censorship.html.

⁴⁵ Dave Wilson, *New Software Lets Viewers Choose DVD Film’s Rating*, L.A. TIMES, Dec. 16, 2001, § 3, at 1.

⁴⁶ Nokes, *supra* note 21, at 622 (citing Gary Gentile, *Growth of Content-Cleaning Software Angers Entertainment Industry*, GRAND RAPIDS PRESS (Mich.), Feb. 12, 2003, at B11.)

⁴⁷ Wilson, *supra* note 45, at 1.

⁴⁸ Hiawatha Bray, *Hollywood on the Offensive*, THE BOSTON GLOBE, Aug. 19, 2002, at C1.

⁴⁹ *Id.* (“Family Shield Technologies . . . produce[s] a digital template that identifies, down to the split-second, every cuss word, blood splatter, or bare midriff in the movie. This database is then downloaded from the

due to the dissolution of Family Shield, Inc., Movie Shield is no longer available.⁵⁰

III. THE EDITED MOVIE CONTROVERSY IN COURT

The edited movie industry did not exist for long before attracting Hollywood's attention. Many individual directors⁵¹ and the Directors Guild of America ("DGA") have spoken out continuously and fervently against movie editing.⁵² Steven Spielberg, one of the most outspoken directors to denounce the edited movie industry, said:

The creation of art is not a democratic process. . . .
The public has no right to vote . . . on how the scenes
should be written, whether the next angle should be
a close-up or a wide shot, whether music should enter

Internet and plugged into the company's \$249 MovieShield filtering device, a box that sits between the TV and the video player. When you run a movie that's included in the database, the objectionable parts are deleted.").

⁵⁰ Christina Mitakis, *The E-rated Industry, Fair Use Sheep or Infringing Goat?*, 6 VAND. J. ENT. L. & PRAC. 291, 295 n. 57 (2004) (internal citation omitted) ("Disconnected phone numbers and no forwarding information strongly indicate [that Family Shield has] ceased operation.").

⁵¹ See Dave McNary, *Guild Girds for Anti-Piracy Battle*, Daily Variety, Feb. 28, 2003, at A2 (noting that director Martin Scorsese said, "The random alteration and distribution of these (films) by companies without the consent or involvement of the film's legal owners and the filmmakers is unacceptable and destroys the credibility of our films and our names."); see also Bethards, *supra* note 43, at 21 (noting that Steven Soderbergh said, "It is unconscionable, and unethical, to take someone else's hard work, alter it and profit from it. Would anyone even attempt to defend ripping pages out of a book, leaving the author's name on it and then selling it?" (quoting Xeni Jardin, *Film Moguls: Let Sex, Gore Stay*, Wired News, Aug. 28, 2002, available at <http://www.wired.com/news/technology/0,1282,54759,00.html>)).

⁵² Richmond, *supra* note 4 (noting that DGA Associate National Executive Director Warren Adler said, "We are, to say the least, very concerned about the way these practices have developed. . . . There's definitely the need from our perspective to put [movie editing companies] in front of a court and put an end to this once and for all. . . . These companies are turning these films into derivative works and earning money off of them. And it's illegal.").

or fade out or what kind it should be, or on any of the thousands of other artistic choices made by the artist in the turbulent process of creation. The public does have a right to accept or reject the result but not to participate in its creation.⁵³

Martha Coolidge, President of the DGA, asserts that it is wrong to edit a movie without the director's consent or input.⁵⁴ The edited movie community responds that viewers have "the right to edit out content that is objectionable"⁵⁵ and to skip parts of a movie just as a reader might skip part of a book. One commentator has noted that "it seems ironic that the entertainment industry asserts 'moral rights' in trying to protect its immoral content."⁵⁶ Coolidge responds that altering movies "in the name of 'morality' or 'family values' is the height of hypocrisy. What kind of morality and values does it teach our children when we say it is okay to cut scenes from a film, to cover up part of a painting or rip pages out of a book, simply because we don't like the way something was portrayed or said by somebody else?"⁵⁷

Both Editors and Filterers have attempted to reach a licensing agreement for their edited movies in cooperation with the directors and studios. In 2002, Breck Rice, the creator of the MovieMask, met with representatives from the DGA to demonstrate the capabilities of his software. Rice hoped that representatives from the DGA would be impressed with the software's ability to let the viewer

⁵³ Steven Spielberg, *The Creation of Art is Not a Democratic Process*, WASH. POST, Feb. 28, 1988, at G1.

⁵⁴ Coolidge, *supra* note 5 ("Regardless of the motives of those who perform these [movie edits], it is wrong for them to do so.").

⁵⁵ CleanFilms: About Edited Movies, http://www.cleanfilms.com/about_edited.phtml (last visited Feb. 22, 2005).

⁵⁶ Bethards, *supra* note 43, at 27; see also Bruce Elder, *Artificial Indignation*, SYDNEY MORNING HERALD (Austl.), Mar. 8, 2003, available at <http://www.smh.com.au/articles/2003/03/07/1046826514532.html> ("Let's be fair, 'credibility,' 'artistic integrity' and 'Hollywood director' don't sit happily in the same sentence."). For further discussion on moral rights, see *infra* Section III.

⁵⁷ Coolidge, *supra* note 5.

participate in making what appears on the screen, but instead they were greatly offended.⁵⁸ Shortly after Rice's presentation, the DGA posted documents on its website indicating its intent to file a lawsuit against movie editing companies.⁵⁹ The DGA claimed that it intended to limit access to such documents to DGA insiders, but they were accidentally posted on a publicly accessible portion of the website. Korey Smitheran, a CleanFlicks franchise owner in Boise, Idaho, and Robert Huntsman, an Idaho man with a patent pending for editing software, came across the documents and rushed to file a suit to ensure that the case would be heard outside of California.⁶⁰

Smitheran and Huntsman filed suit against the DGA and several individual directors in the U.S. District Court for the District of Colorado in Denver on August 29, 2002, seeking a declaratory judgment that renting and selling edited movies is legal.⁶¹ This angered John Dixon, President of CleanFlicks, who believed that movie editing companies still had a chance to negotiate a deal with Hollywood.⁶² The case, *Huntsman v. Soderbergh*,⁶³ has progressed slowly and grown more complicated and cumbersome as many parties have

⁵⁸ Buckman, *supra* note 3, at A1; see also *The Abrams Report*, *supra* note 16 ("When Rob Reiner saw those light sabers in his movie 'The Princess Bride,' MovieMask owners acknowledge he went ballistic.").

⁵⁹ Vince Horiuchi, *CleanFlicks Boss Wants No Part of Suit*, SALT LAKE TRIB., Aug. 31, 2002, at B1.

⁶⁰ *Federal Lawsuit Filed Against 16 Famed Hollywood Directors to Clarify Rights of Editing for Objectionable Content*, PR NEWswire, Aug. 29, 2002 (available on LEXIS).

⁶¹ Second Amended Complaint and Jury Demand, *Hunstman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 13, 2002).

⁶² Horiuchi, *supra* note 59, at B1 ("John Dixon, president of [CleanFlicks] . . . said . . . the suit . . . will damage his chance to pursue his real mission: to work with Hollywood filmmakers instead of taking them to court. Dixon also said he wants to terminate any association with the seven CleanFlicks stores owned by Korey Smitheran, the Boise man who filed the lawsuit.").

⁶³ Second Amended Complaint and Jury Demand, *supra* note 61.

joined on both sides.⁶⁴ The DGA and the various directors filed counterclaims against the Filterers and the Editors under the Lanham Act.⁶⁵ The directors could not bring any copyright claims because none of them own the copyrights to the films in question. To litigate under copyright law as well, the directors moved to join several major motion picture studios.⁶⁶ The studios filed counterclaims for infringement of their reproduction and derivative work rights under the Copyright Act, as well as, several other claims under the Lanham Act.⁶⁷ The Filterers filed a motion for summary judgment on May 30, 2003, but the court never ruled on that motion.⁶⁸ Once the issue reached Capitol Hill, the court may have decided to wait to see whether Congress would act before going ahead with the case. After FECA passed in February of 2005, the filterers, motion picture studios and

⁶⁴ The list of the parties involved in the suit includes the filing parties (Robert Huntsman and Clean Flicks of Colorado, L.L.C. (Korey Smitheran's franchise)), the movie editing companies (Video II; Glenn Dickman; J.W.D. Management Corporation; Trilogy Studios, Inc.; CleanFlicks; My CleanFlicks; Family Shield Technologies, LLC; ClearPlay, Inc.; Clean Cut Cinemas; Family Safe Media; EditMyMovies; Family Flix, U.S.A., LLC; and Play It Clean Video), the directors (Steven Soderbergh, Robert Altman, Michael Apted, Taylor Hackford, Curtis Hanson, Norman Jewison, John Landis, Michael Mann, Phillip Noyce, Brad Silberling, Betty Thomas, Irwin Winkler, Martin Scorsese, Steven Spielberg, Robert Redford, and Sydney Pollack) and the motion picture studios (Metro-Goldwyn-Mayer Studios, Inc.; Time Warner Entertainment Co., L.P.; Sony Pictures Entertainment; Disney Enterprises, Inc.; DreamWorks L.L.C.; Universal City Studios, Inc.; Twentieth Century Fox Film Corp.; and Paramount Pictures Corporation). Motion Picture Studios' Counterclaim, *supra* note 14, at 1. There have been 236 different documents filed with the court from the various parties and several amicus filings.

⁶⁵ Motion Picture Studios' Counterclaim, *supra* note 14, ¶¶ 91-105.

⁶⁶ See Eric B. Hiatt, *The "Dirt" on Digital "Sanitizing": Droit Moral, Artistic Integrity and the Directors Guild of America v. Clean Flicks et al.*, 30 RUTGERS COMPUTER & TECH. L.J. 375, 380 (2004) ("[T]he DGA moved to join the movie studios as necessary parties to the dispute because the studios own the copyrights to the films at issue.") (citation omitted).

⁶⁷ Motion Picture Studios' Counterclaim, *supra* note 14, ¶¶ 83-137.

⁶⁸ Filterers' Brief, *supra* note 33.

directors recognized that the issues over which they were fighting had become moot.⁶⁹ The court granted a motion dismissing all claims and counterclaims on August 17, 2005.⁷⁰

IV. ANALYZING THE LEGAL UNDERPINNINGS OF THE EDITED MOVIES DEBATE

Commentators have written numerous articles analyzing the legal issues that were pending before the court in *Huntsman v. Soderbergh*.⁷¹ Many concluded that if the case had progressed to a trial on the merits, the Editors would have been found liable for infringement while the Filterers would have escaped liability.⁷² However, others have

⁶⁹ Order Dismissing Moot Claims at 2-3, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Aug. 17, 2005).

⁷⁰ *Id.*

⁷¹ Bethards, *supra* note 43; Carrie A. Beyer, *Fighting for Control: Movie Studios and the Battle over Third-Party Revisions*, 2004 U. ILL. L. REV. 967; Matthew David Brozik, *Not Yet Released and Already a Critical Disappointment: Still in Committee, the Proposed "Family Movie Act of 2004" Garners Few Accolades*, 31 Rutgers Computer & Tech. L.J. 35 (2004); Michael P. Glasser, "To Clean or Not to Clean": An Analysis of the Copyright and Trademark Issues Surrounding the Legal Battle Between Third Party Film Editors and the Film Industry, 22 CARDOZO ARTS & ENT. L.J. 129 (2004); Hiatt, *supra* note 66; Jennifer J. Karangelen, *Editing Companies vs. Big Hollywood: A Hollywood Ending?* 13 U. BALT. INTELL. PROP. L.J. 13 (2004); Ashley Kerns, *Modified to Fit Your Screen: DVD Playback Technology, Copyright Infringement or Fair Use?*, 24 LOY. L.A. ENT. L. REV. 483 (2004); Michael Kurzer, *Who Has the Right to Edit a Movie?: An Analysis of Hollywood's Efforts to Stop Companies from Cleaning Up Their Works of Art*, 11 UCLA ENT. L. REV. 41 (2004); Lee, *supra* note 6; Christine McCarroll, *Morals, Movies, and the Law: Can Today's Copyright Protect a Director's Masterpiece from Bowdlerization?*, 5 J. HIGH TECH. L. 331 (2005); Mitakis, *supra* note 50; Nokes, *supra* note 21; Silvey, *supra* note 15; Allison E. Twist, *The ClearPlay Case: When Does Copyright Protection Go Too Far?*, 2004 UCLA J.L. & TECH. 13, available at http://www.lawtechjournal.com/notes/2004/13_040809_twist.php; Darcy Williams, *Sanitizing the Obscene: Fighting for the Right to Edit Objectionable Film Content*, 12 VILL. SPORTS & ENT. L.J. 161 (2005).

⁷² See Bethards, *supra* note 43, at 17-26; Brozik, *supra* note 71, at 44-48; Kerns, *supra* note 71, at 502-09; McCarroll, *supra* note 71, at 352-54;

concluded that the Filterers would have at least been found liable for making unauthorized derivative works.⁷³ This section analyzes the state of the law before the passage of FECA, as it applies to the Filterers, and concludes that movie filtering was just as legal before FECA as it is after.

Several directors and the DGA are opposed to third-party editing because they feel that artists have a right to express themselves and to protect their creative expression from alteration by others.⁷⁴ Many European countries have laws that protect artists' "moral rights" to dictate what changes or alterations may be made to their creative works even after they cease to own them.⁷⁵ The doctrine of moral rights derives from the theory that art encapsulates the artist's personality, and thus, the artist always retains an interest in his or her works.⁷⁶

Silvey, *supra* note 14, at 426-36; Twist, *supra* note 71; Williams, *supra* note 71, at 186-89.

⁷³ See e.g., Karangelen, *supra* note 71, at 28-29; Beyer, *supra* note 71, at 993-94.

⁷⁴ See Coolidge, *supra* note 5; Spielberg, *supra* note 53, at G1.

⁷⁵ *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 816 (N.Y. 1949) ("The fact that artists, as distinguished from artisans and mechanics, have peculiar and distinctive rights in their work has been accepted in some countries of the continent of Europe, where it has been given the appellation 'droit moral.'").

⁷⁶ Hiatt, *supra* note 66, at 393 ("[Moral Rights] law developed in France under the supposition that the art was an expression of the artist's soul and under no circumstances should be diluted or altered without consent."); *Oversight Hearing on Derivative Rights, Moral Rights and Movie Filtering Technology Before the Subcomm. on Courts, The Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat061704.html> [hereinafter *Peters Testimony*] ("Any author, whether he writes, paints, or composes, embodies some part of himself—his thoughts, ideas, sentiments and feelings—in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law, such as reputation, bodily integrity, and confidences.").

The focus of American copyright law is to protect artists' economic interests in their creative works.⁷⁷ The doctrine of moral rights has been conspicuously absent through much of the history of American copyright law.⁷⁸ However, in 1989, the United States entered the Berne Convention, a treaty regarding international respect for copyrights, which fully incorporates the doctrine of moral rights.⁷⁹ Article 6bis of the Berne Convention grants artists the rights of integrity,⁸⁰ paternity,⁸¹ and disclosure.⁸² American copyright law provides scant protection of these rights, especially in comparison to other Berne Convention countries. Congress has largely refrained from enacting any sweeping legislation to grant significantly greater moral rights to authors. Congress reasoned that there are pockets of law (e.g., the derivative work right and section 43(a) of the Lanham Act)

⁷⁷ Justice Oliver Wendell Holmes established economic protection as the focus of American copyright law in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

⁷⁸ See *Gilliam v. Am. Bd. Co.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law, or the tort of unfair competition." (citations omitted)).

⁷⁹ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended in 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (did not enter into force with respect to the United States until March 1, 1989).

⁸⁰ The right to protect one's creative works from mutilation or distortion.

⁸¹ The right to claim one's works as one's own.

⁸² The right to decide when and where one's work will be displayed. For a complete discussion of these rights, see Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 215-33 (1994).

that protect moral rights to the extent required under the Convention.⁸³

In 1990, Congress passed the Visual Artists' Rights Act (VARA), which gives some artists the right to claim authorship for their own works, the ability to prevent false attribution of authorship for works that they did not create, and the right to prevent the "distortion, mutilation and modification" of their works in certain circumstances.⁸⁴ However, VARA does not extend its protection to motion pictures.⁸⁵ So, in spite of the strong objections from directors and motion picture studios, there is no direct cause of action through which they can protect their moral rights.⁸⁶ Even if the United States respected moral rights to the extent that Europeans do, there is still question as to whether the Filterers would be held liable.⁸⁷

⁸³ See Glasser, *supra* note 71, at 154-55.

⁸⁴ 17 U.S.C. § 106A (2000).

⁸⁵ In order to receive protection under VARA, a work of art must fit the definition given in 17 U.S.C. § 101 (2000). This definition includes: "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author" or "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include any . . . motion picture or other audiovisual work." *Id.*

⁸⁶ One commentator on the edited movies debate has suggested that Congress should legislate to extend moral rights protection to directors: "[A] limited exception to VARA could be carved to include directors who retain ownership of the copyrights to their films." Nokes, *supra* note 21, at 660. Motion picture studios own the copyrights to most of the movies that the Filterers have altered, so this change would not protect many movies currently in existence. But if VARA were changed to include protection for directors, then directors who do not want their films edited have the option of retaining the copyrights.

⁸⁷ Marybeth Peters said, "I believe that this narrowly-defined activity does not violate moral rights, for several reasons: (1) it takes place in the context of a private performance of a motion picture in which the alteration of the original motion picture is not fixed in a tangible medium of expression; (2) it consists only of omissions of limited portions of the sounds and/or images in the motion picture, rather than the addition of material or alteration of material in the motion picture; and (3) it is

A. Trademark Claim under Section 43(a) of the Lanham Act

Although moral rights do not enjoy the prominence in U.S. copyright law that they do in many other countries, artists can bring claims under Section 43(a) of the Lanham Act to prevent certain unauthorized uses of their creative works.⁸⁸ The landmark case of *Gilliam v. American Broadcasting Cos.* established the moral rights implications of this section.⁸⁹ In that case, the creators of “Monty Python” sued the ABC television network for broadcasting severely edited versions of three episodes of their television series, “Monty Python’s Flying Circus.” ABC cut out twenty-four minutes from the plaintiffs’ ninety-minute program, including integral parts of the plot and the punch lines of some of the sequences, in order to conform to broadcasting regulations and to allow for commercials.⁹⁰ The plaintiffs

desired and implemented by the individual who is viewing the private performance, who is perfectly aware that there are omissions of material and that the director and studio did not consent to those omissions.” Peters Testimony, *supra* note 76.

⁸⁸ 15 U.S.C. § 1125(a) (2000) (“(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 as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by 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 act.”).

⁸⁹ *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 23-25 (1976).

⁹⁰ *Id.* at 26 n.12 (giving the following example of how ABC’s edits vitally altered Monty Python’s program: “In one skit, an upper class English family is engaged in a discussion of the tonal quality of certain words as ‘woody’ or ‘tinny.’ The father soon begins to suggest certain words with sexual connotations as either ‘woody’ or ‘tinny,’ whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence

argued that this violated their licensing agreement and mutilated their artistic work. They claimed that by showing viewers a choppy, disjointed version of their show, ABC caused an "injury to [the plaintiffs'] theatrical reputation [and] imperil[ed] their ability to attract the large audience necessary to the success of their venture."⁹¹ The Second Circuit held that ABC's edited version of the plaintiffs' work violated Section 43(a) of the Lanham Act.⁹²

A Section 43(a) claim would not have worked in the same way against the Filterers. First, there is little, if any, likelihood of confusion with filtering technology. Viewers purchase software or special equipment for the purpose of altering a film in some way. They are on notice that the film they are watching is not the original product of the motion picture studio or the director because they put their DVD in a special machine, or run it through special software, and choose from among different settings to indicate what type of content will be removed.⁹³ In his concurring opinion in *Gilliam*, Judge Gurfein suggested that if ABC had put viewers on notice that the program they were watching had been edited without the plaintiffs' approval, then they would have been free from liability under 43(a).⁹⁴ The majority did

so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without any explanation for the change in his appearance.").

⁹¹ *Gilliam*, 538 F.2d at 19.

⁹² *Id.* at 25.

⁹³ Filterers' Brief, *supra* note 33, at 22 ("It is enough here to ask a straightforward question: where a consumer (1) buys or rents an authentic videotape or DVD; (2) decides to watch it (or have his family watch it) without some of the sex, violence or language he finds offensive; (3) downloads the Play Control Parties' software templates from the Internet; (4) chooses . . . what types of visual and audio material he wants skipped or omitted; then (5) watches the movie using the [Filterers'] software to skip or mute what he chose not to see, is that consumer likely to be confused into believing that what he saw on his TV or computer screen is different from the original, authentic videotape or DVD? To pose that question is, of course, to answer it, in the negative.").

⁹⁴ *Gilliam*, 538 F.2d at 27. This is further supported by *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947), in which the Supreme

not accept this logic because those viewers who tuned in halfway through the program would not have seen this notice. But, viewers who watch movies using filtering technology are even more likely to know that what they are watching has been altered.⁹⁵

Second, the Filterers' use of the names of directors and films is not actionable under the Lanham Act because the use is nominative; in other words, they use the directors' names only to describe the directors' products.⁹⁶ Filterers do not use anyone else's names or trademarks on the products they sell, but they do use them on their websites to designate to which films their filters correspond.⁹⁷ "Such *nominative use* of a mark—where the only word reasonably available to describe a particular thing is pressed into service—lies outside the strictures of trademark law."⁹⁸

Third, the amount of material that Filterers take out is not substantial. ABC took out twenty-seven percent of

Court ruled that the defendant was not liable under Section 43(a) for selling used spark plugs (made by the plaintiff and under the plaintiff's trademark), which were labeled as "renewed."

⁹⁵ Filterers' Brief, *supra* note 33, at 22 ("Given that the consumers obtain and deploy the [Filterers'] technologies specifically to control and alter their experience of the DVDs they have purchased or rented, it is nonsensical to suggest that the consumers are misled into believing they are having an unaltered experience of the motion pictures.").

⁹⁶ *New Kids on the Block v. News Am. Publ'g*, 971 F.2d 302, 308 (9th Cir. 1992) ("[W]here the defendant uses a trademark to describe the plaintiff's product, rather than its own, we hold that a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.").

⁹⁷ Glasser, *supra* note 71, at 173 (stating that "any use of the trademarks on the websites or on the masks of the companies selling this software is merely to refer to the movies which the companies offer masks for. This is a form of fair use in trademark law known as 'nominative use' and is a defense to a trademark infringement claim.").

⁹⁸ *New Kids on the Block*, 971 F.2d at 308.

Gilliam's work.⁹⁹ Filterers generally take out no more than a few words or perhaps a scene or two.¹⁰⁰ Perhaps there are some movies that Filterers have chopped up so much that a comparison to *Gilliam* would be fair.¹⁰¹ But for the most part, Filterers change fairly little.

The United States District Court in the Southern District of New York has substantially contracted the ruling in *Gilliam* in several subsequent cases where the court ruled that material removed from a work was not substantial enough to warrant liability. In *Choe v. Fordham University School of Law*, the district court ruled that there was no substantial alteration where the defendant printed the plaintiff's law review article with several typographical errors on nearly every page.¹⁰² The district court made a similar ruling in *Lish v. Harper's Magazine*, finding that the defendant was not liable for publishing a letter written by the plaintiff that the defendant had edited heavily, but which was not "substantially distorted."¹⁰³ In *Playboy Enterprises v. Dumas*, the district court held that the defendant was not liable for altering the plaintiff's original artwork to cover the breasts of the women depicted therein.¹⁰⁴ This last case is perhaps the most analogous to filtering technology, since Filterers make the same type of adjustments to creative works (i.e., covering or skipping material thought to be inappropriate for some viewers).

⁹⁹ *Gilliam*, 538 F.2d at 19.

¹⁰⁰ Bethards, *supra* note 43, at 10 (stating that "whether or not the amount of editing rises to the level of creating a separately copyrightable work would probably have to be determined on a case-by-case, or more accurately, a movie-by-movie basis. It would be ill-advised to create a per se rule that any unauthorized editing, no matter how minor, results in the creation of an actionable derivative work.").

¹⁰¹ *Id.* at 9 n.52 ("Hypothetically, an X-rated film would probably be reduced to mere seconds or minutes if edited.").

¹⁰² 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

¹⁰³ 807 F. Supp. 1090 (S.D.N.Y. 1992).

¹⁰⁴ 831 F. Supp. 295 (S.D.N.Y. 1993).

B. Copyright Claim

The motion picture studios' copyright claim against the Filterers had a better chance of success than their trademark claim.¹⁰⁵ Under Section 106 of the Copyright Act, copyright owners have the exclusive right "to reproduce the copyrighted work" and "to prepare derivative works based upon the copyrighted work."¹⁰⁶ Clearly, the Filterers do not infringe the studios' reproduction rights, as these companies only make filters to be played along with movies and do not reproduce the copyrighted works themselves.¹⁰⁷

Whether the Filterers infringed the derivative work right is a closer question. The motion picture studios argued that a derivative work is created when filtering technology interacts with a DVD to create a visual image on a television screen that is just like the copyrighted motion picture, with only a few alterations.¹⁰⁸ The Filterers responded that images on a television screen cannot be classified as a derivative work or as any type of "work" because they are transient and intangible.¹⁰⁹ Whether filtering technology

¹⁰⁵ Motion Picture Studios' Counterclaim, *supra* note 14, at 29-32.

¹⁰⁶ 17 U.S.C. §§ 106(1)-(2) (2000).

¹⁰⁷ In this respect, the Filterers are crucially distinguishable from the Editors who generally edit one copy of a tape and then reproduce it rather than editing each copy individually. See Motion Picture Studios' Counterclaim, *supra* note 14, at 14; see also Filterers' Brief, *supra* note 33, at 2 n.1 ("The . . . Edited Video Companies create or distribute edited versions of DVDs or videotapes. Their activities and products are, both technologically and legally speaking, vastly different from the parties making this motion.").

¹⁰⁸ Motion Picture Studios' Response Brief in Opposition to ClearPlay, Inc.'s, Trilogy Studios, Inc.'s and Family Shield Technologies, LLC's Motion for Summary Judgment at 3, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Dec. 13, 2002) [hereinafter *Motion Picture Studios' Response Brief*] ("[An] edited version of the motion picture . . . is created by an Electronic Editing Party employee . . . it is not created by the ultimate consumer. It is this Edited Motion Picture . . . which is the infringing derivative work, and which they have made a business of creating, and which they distribute for profit to their customers.").

¹⁰⁹ Filterers' Brief, *supra* note 33, at 31 (stating that "the [Filterers'] software products do not alter the original copyrighted work . . . There is

creates a derivative work depends on whether or not fixation is a requirement for the creation of an infringing derivative work. If fixation is a requirement, then the claim also depends on how the court interprets "fixation." These issues have been subject to longstanding debate.

The confusion over whether or not a work must be fixed in order to be deemed an infringing derivative work dates back to the framing of the 1976 Copyright Act.¹¹⁰ The Act itself says, "The owner of copyright under this title has the exclusive rights... to prepare derivative works based upon the copyrighted work."¹¹¹ The Act defines a "derivative work" as follows:

[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.'¹¹²

Although the plain reading of the definition suggests that fixation is not required, some have argued that, because the Act says a derivative work is a "work," it must be fixed.¹¹³ The Act provides no definition for a "work," but it does define when a work has been created. "A work is 'created' when it is fixed in a copy or phonorecord for the first time."¹¹⁴ As a work is not created until it is fixed, it follows that every work that exists is fixed. Therefore, the use of the word "work" in

no fixation of the altered playback the consumer views in his home, and thus, no derivative work is created.").

¹¹⁰ 1976 Copyright Act, 17 U.S.C. §§ 101-1303 (2000).

¹¹¹ 17 U.S.C. § 106(2) (2000).

¹¹² 17 U.S.C. § 101 (2000).

¹¹³ See Peters Testimony, *supra* note 76.

¹¹⁴ 17 U.S.C. § 101 (2000).

the definition of a "derivative work" under the Copyright Act implies that fixation is required.¹¹⁵

However, legislative history suggests that Congress did not intend for courts to interpret the Copyright Act in this way. House Report 94-1476 explains that the derivative work right granted in Section 106(2) is intended to be broader than the reproduction right granted in Section 106(1): "[R]eproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form."¹¹⁶ According to the House Report, in order for a work to constitute an infringing derivative work, it need only "incorporate a portion of the copyrighted work in some form."¹¹⁷ Yet, this interpretation of the derivative work right leads to absurd results. For example, the Ninth Circuit observed that if fixation was not a necessary element for creating an infringing derivative work, then stretching a piece of pink cellophane in front of a television screen would create a derivative work of any copyrighted images on the screen.¹¹⁸

The Ninth Circuit case *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* was the first to consider whether or not non-fixed works can be deemed infringing derivative

¹¹⁵ Peters Testimony, *supra* note 76 ("If a work is created when it is fixed in a copy or phonorecord for the first time, it is difficult to imagine that the work exists prior to that time. Thus, the Copyright Act seems to have the functional equivalent of a partial definition of a work; while it may not tell us everything that we need to know in order to recognize a 'work,' it does tell us that a work must be fixed in a copy or phonorecord.").

¹¹⁶ H.R. REP. NO. 94-1476, at 62 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5675.

¹¹⁷ *Id.*

¹¹⁸ *Micro Star v. Formgen*, 154 F.3d 1107, 1111 n.4 (9th Cir. 1997) (stating that the "Pink Screener," a hypothetical product created by stretching a piece of pink cellophane over a television, would not constitute a derivative work because it does not incorporate a modified image into a permanent or concrete form).

works.¹¹⁹ Nintendo argued that Galoob's "Game Genie," a device that is inserted between a Nintendo Entertainment System and a Nintendo game cartridge in order to alter the way users play Nintendo games, was an infringing derivative work of Nintendo's copyrighted video games.¹²⁰ The Game Genie "functions by blocking the value for a single data byte sent by the game cartridge to the central processing unit in the Nintendo Entertainment System and replacing it with a new value."¹²¹

Galoob argued that the image that the Game Genie causes to appear on the screen cannot be an infringing derivative work because it is not fixed. In support of this argument, Galoob cited the Copyright Act's definition stating that "[a] work is 'created' [only] when it is fixed in a copy or phonorecord for the first time."¹²² The court rejected this argument because it "relies on a misapplication of the Copyright Act's definition of 'created'. . . . The definition clarifies the *time* at which a work is *created*. If the provision was a definition of 'work,' it would not use that term in such a casual manner."¹²³ However, the court said that a work must "incorporate a portion of a copyrighted work in some concrete or permanent *form*" in order to constitute an infringing derivative work.¹²⁴ It is unclear whether the court believed that there is any difference between requiring fixation and requiring that a work be incorporated in some concrete or permanent form. This requirement turned the case in Galoob's favor because the Game Genie itself does not contain any portion of any of Nintendo's copyrighted work. Rather, it only "enhances the audiovisual displays (or

¹¹⁹ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

¹²⁰ *Id.* at 967 (for example, the Game Genie could increase the number of lives of a player's character or allow a character to move faster).

¹²¹ *Id.*

¹²² 17 U.S.C. § 101 (2000).

¹²³ *Galoob*, 964 F.2d at 968.

¹²⁴ *Id.*

underlying data bytes) that originate in Nintendo game cartridges.”¹²⁵

In *Micro Star v. Formgen*, the Ninth Circuit revisited the issue of fixation of derivative works.¹²⁶ Formgen created a video game called “Duke Nukem,” which contains a feature that allows players to create their own new levels.¹²⁷ Micro Star compiled several hundred player-created levels on CDs and sold them under the mark “Nuke It.”¹²⁸ The CDs contained Duke Nukem MAP files, which do not contain any of Formgen’s copyrighted art, but do describe how to create Formgen’s images in painstaking detail.¹²⁹ Formgen argued that this constituted an infringing derivative work and the Ninth Circuit agreed, finding that Micro Star had embodied Formgen’s copyrighted audiovisual displays in a concrete and permanent form.¹³⁰

The motion picture studios argued that filtering technology was more analogous to Nuke It than to the Game Genie because, like the MAP files embodied on the Nuke It CDs, the filters help describe the images that will appear on a screen when played with a DVD. When consumers play the same movie over and over again through a filter, it creates the same images on the screen. If the images on the screen were fixed, it clearly would be a derivative work. Why should the legal result be any different, they argued, when a fixed filter is played along with a fixed movie to create the same end result?¹³¹

¹²⁵ *Id.*

¹²⁶ *Micro Star v. Formgen*, 154 F.3d 1107 (9th Cir. 1998).

¹²⁷ *Id.* at 1109.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1110.

¹³⁰ *Id.* at 1112 (“Because the audiovisual displays assume a concrete or permanent form in the MAP files, *Galoob* stands as no bar to finding that they are derivative works.”).

¹³¹ Motion Picture Studios’ Response Brief, *supra* note 108, at 4-5 (“[W]hat the customer views when employing the corresponding DVD and ClearPlay’s software and the Filter File to watch a ClearPlay Edited Motion Picture, is functionally equivalent to what the customer could view if they watched the same edited motion picture on one of the edited DVDs

The Filterers responded that their technology was more analogous to the Game Genie because their filters do not contain any portion of a copyrighted work in a concrete or permanent form. Filters only contain instructions that tell the DVD player, for example, "twenty-five minutes and three seconds into the film, skip ahead 20 frames." While filters may have some effect on the images that are created on the screen, they do not describe copyrighted images in detail like the MAP files on the Nuke It CDs. They are more akin to the Game Genie because they block out bits of information. Many commentators, along with the Register of Copyrights, Marybeth Peters, agree that under the standard established in *Galoob* and *Micro Star*, the Filterers should not have been held liable for infringing the derivative work right.¹³²

Even if the on-screen image could have been considered a derivative work, the Filterers argued that they do not create it.¹³³ The viewer chooses to play a movie through filtering

or VHS tapes prepared and distributed by one of the [Editors]. In both cases, the customer possesses and can repeatedly view a fixed edited version of the motion picture with the edits pre-determined by the respective editing party.").

¹³² Peters Testimony, *supra* note 76 ("[The Filterers'] software itself consists of instructions to mute the soundtrack at a point a certain number of minutes and seconds into the performance of the movie, or to skip past the part of the movie that begins at a point a certain number of minutes and seconds into the performance of the movie and ends a certain number of seconds later, I find it difficult to characterize that software as a derivative work, since none of the underlying work is actually incorporated into the software."); Glasser, *supra* note 71, at 159 ("Just like the Game Genie, ClearPlay, MovieMask, and MovieShield do not create any permanent copies of altered movies and therefore the displayed movies cannot constitute derivative works."); Bethards, *supra* note 43, at 16-17 ("[Player control technology] is much like the Game Genie, a video-game enhancing technology used in conjunction with the Nintendo game system over a decade ago. The Ninth Circuit rejected Nintendo's copyright claims against the use of the Game Genie in *Galoob*. . . . Duke Nukem and Nuke It were substantially similar when compared side-by-side. If the audiovisual display from a motion picture DVD were compared separately from the audiovisual display generated by MovieMask, the two would not look anything alike.").

¹³³ Filterers' Brief, *supra* note 33, at 3 ("The plain fact is that the alleged misconduct is that of the consumers, and that the technology

technology and chooses settings that determine what content will be removed. The motion picture studios claimed only that the Filterers directly infringed their derivative work right.¹³⁴ They did not claim contributory infringement or assert that individuals who use filtering technology are directly infringing. The studios refrained from making these claims for two possible reasons: (1) the studios were afraid that claiming that a large number of their consumers were breaking the law while watching their movies would create a public relations nightmare, and (2) the studios likely recognized that the fair use doctrine probably protects consumers who alter movies in their homes for their own personal, non-commercial use.¹³⁵

Furthermore, the Filterers could not have been liable for infringing on the motion picture studios' derivative work right because they were protected under the doctrine of first sale.¹³⁶ Once a creative work is sold on the market, the creator loses some of his or her rights in conjunction with the work.¹³⁷ The purpose of copyright law is to give artists an economic incentive to create by preserving a limited

companies' role is merely to give the consumer the tools to view movies without having to see or hear things the consumer finds offensive.”).

¹³⁴ The motion picture studios and the directors originally alleged contributory infringement as well as direct infringement but recanted this claim after “pointed questioning” from the Court at the first status conference. *Id.* at 1-3.

¹³⁵ *Id.* at 3-4 (“[T]he Studios have eschewed a contributory copyright infringement theory because they would have an insurmountable obstacle in showing an underlying direct infringement. A contributory infringement theory would rest upon the premise that the consumers are direct infringers, again an untenable position from both a legal and public relations perspective. Even the Studios’ counsel conceded in court that the consumers’ use of the technology products is probably fair use.”). The issue of fair use was not raised in the Filterers’ motion for summary judgment. Therefore, it is not discussed in this paper either.

¹³⁶ See 17 U.S.C. § 109(c) (2000).

¹³⁷ *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988) (“The ‘first sale’ doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy.” (quoting *United States v. Wise*, 550 F.2d 1180, 1187 (9th Cir. 1977))).

monopoly for them to earn money from their works. The sale of a copyrighted work should put money in the artist's pocket, thus fulfilling the purpose of copyright law.¹³⁸ After the artist has received his or her incentive, copyright offers the artist fewer protections. A consumer may not infringe on any of the rights reserved to the copyright holder in Section 106 of the Copyright Act (i.e., reproduction, distribution, derivative work, public performance, etc.), but a consumer may do anything else he wishes with the work, including alter, sell, lend, rent, or dispose of the work.¹³⁹

The Filterers argued that after consumers purchase movies, giving the studios their financial incentive to create, they should be able to watch them however they want, whether by fast-forwarding through certain scenes, turning up the volume or using filtering technology.¹⁴⁰ The motion picture studios argued that while the first sale doctrine may allow individuals to do anything they wish with the video cassettes and DVDs that they purchase, it does not allow one party to make a derivative work and then market it to others.

¹³⁸ Glasser, *supra* note 71, at 145 ("Since American copyright law is based on the economic theory that authors are given a financial incentive to create works and disseminate them to the public, the first sale doctrine is seen as being based on the satisfaction of this economic rationale. Based on this theory, it follows that once a copyrighted work has been purchased by a consumer, the copyright author's economic incentive for producing that copyrighted work has been satisfied.").

¹³⁹ The Copyright Law creates several exceptions to the first sale doctrine. There are certain types of creative works that a consumer is not permitted to rent (e.g., software). See 17 U.S.C. § 109(b)(1)(A) (2000). The consumer's right to dispose of certain types of art is limited by VARA. See 17 U.S.C. § 106A (2000).

¹⁴⁰ Brenda Sandburg, *Artistic Differences: Directors, Studios Up in Arms over Software That Filters Out Scenes of Sex and Violence*, THE RECORDER (San Francisco), May 11, 2004, at 1 (stating that using player control technology is "no different from having a remote control or having an equalizer that allows you to change the sound balance on a CD. . . . Consumers get to make certain choices about the experience they wish to have with consumer entertainment products they bought for use in the home.").

V. THE EDITED MOVIE CONTROVERSY IN CONGRESS

Shortly after *Huntsman v. Soderbergh* was filed, ClearPlay and Trilogy began lobbying Congress for legislation that would definitively state that filtering technology does not violate the Copyright Act. Rep. Lamar Smith (R-Texas) introduced the Family Movie Act of 2004 in the House on June 16, 2004.¹⁴¹ The bill proposed amending the Copyright Act to say that “the making of limited portions of audio or video content of a motion picture imperceptible... by means of consumer equipment or services” does not constitute infringement so long as the equipment used to watch the motion picture “does not create a fixed copy of the altered version.”¹⁴² Adding this provision would make it clear that filtering technology is legal, but it would have no bearing on the Editors.

In a hearing before the House Subcommittee on the Courts, The Internet and Intellectual Property on June 17, 2004, Marybeth Peters, told legislators that the Family Movie Act is not necessary because copyright law, as it stands, does not prohibit filtering technology where parties do not alter the original work or make any copies.¹⁴³ Peters also stated that the bill was badly timed because the court in *Huntsman v. Soderbergh* was deliberating over the issue at the time. Out of respect for the judiciary branch, Congress customarily waits for the outcome of pending court cases before legislating on the issues involved.¹⁴⁴ Congress makes exceptions in situations where a party to the case is suffering an egregious loss while waiting for the justice system to run its course. But, because none of the parties in *Huntsman v.*

¹⁴¹ H.R. 4586, 108th Cong. § 2 (2004).

¹⁴² *Id.*

¹⁴³ Peters Testimony, *supra* note 76.

¹⁴⁴ *Id.*; H.R. REP. NO. 108-670, at 35 (2004), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr670&dbname=cp108&> (“As a preliminary matter, the legislation is inappropriate because it not only addresses the primary issues in a pending lawsuit but also takes sides with one of the parties to that suit.”).

Soderbergh were unduly burdened in waiting for the court to rule, there was no reason why Congress should have acted before the court issued its decision.¹⁴⁵

Despite Peters' misgivings, the bill garnered support from many Republican representatives who saw the bill as an opportunity to protect family values.¹⁴⁶ But, there was enough opposition to prevent the bill from being placed on the suspension calendar. The bill was revised and combined with several other bills in the Piracy Deterrence and Education Act of 2004.¹⁴⁷ One of the additions to the bill was the qualification that filtering technology is only legal provided that "no changes, deletions or additions are made... to commercial advertisements... that would otherwise be performed or displayed before, during or after the performance of the motion picture."¹⁴⁸ Some members of the House were adamant about adding this provision because they feared that without it, filtering technology would allow viewers to skip past previews and advertisements on DVDs, and then advertisers would be less willing to pay the motion

¹⁴⁵ Peters Testimony, *supra* note 76 ("I could understand the possible need for legislation if there were substantial doubt as to the outcome of the litigation, or if there was a pressing need to settle the issue once and for all by Congressional action due to an urgent need to permit conduct which people could not engage in unless the legislation were enacted. But no injunction has been entered. The defendants are still producing their products. . . . I cannot endorse the notion that there is a pressing need to resolve the issue here and now.").

¹⁴⁶ See, e.g., Press Release, Senate, Hatch Introduces Family Entertainment Act: Legislation Will Help Parents Control What Kids Watch (Jan. 25, 2005), available at http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1267 (statement of Sen. Orrin Hatch (R-Utah)). Hatch said on the Senate Floor, "I would like to express my particular support for the Family Movie Act, which has been included in this legislation . . . It's important legislation . . . to parents who want the ability to use new technologies to help shield their families from inappropriate content. . . . The Family Movie Act will give parents more say over what their children see, without limiting the creative control of directors and movie studios.").

¹⁴⁷ H.R. 4077, 108th Cong. § 112 (2004).

¹⁴⁸ *Id.* § 112 (b)(B).

picture studios to advertise.¹⁴⁹ With this change, the bill passed the House.¹⁵⁰

The Senate resisted several sections of the Piracy Deterrence and Education Act of 2004, including the Family Movie Act. Sen. John McCain (R-Arizona) expressed his concern that the Family Movie Act “creates an implication that certain basic practices that consumers have enjoyed for years—like fast-forwarding through advertisements—would constitute criminal copyright infringement.”¹⁵¹ To resolve concerns, the Family Movie Act was rewritten and repackaged in the Family Entertainment and Copyright Act of 2004.¹⁵² The final version of this bill removes the portion referring to commercial advertisements and clarifies that it is not intended to cover “the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture” (e.g., MovieMask technology that adds images on top of movie images).¹⁵³ This bill passed the Senate, but not before several pet bills were tacked on, including a McCain-sponsored bill that would reform professional boxing regulations.¹⁵⁴ Some of the

¹⁴⁹ *House Judiciary Committee Approves Intellectual Property Bills*, TECH L.J., Sept. 8, 2004, <http://www.techlawjournal.com/topstories/2004/20040908b.asp> (“Rep. [John Howard] Coble [R-North Carolina] stated that he was concerned that the language of the bill would also protect companies that make products that enable users to remove commercial advertisements.”).

¹⁵⁰ *See House Approves Copyright Bill*, TECH L.J., Sept. 28, 2004, <http://www.techlawjournal.com/topstories/2004/20040928.asp>.

¹⁵¹ Sarah Lai Stirland, *Movie Industry Still Hopes Anti-piracy Package Will Move*, NAT'L J. TECH. DAILY, Oct. 22, 2004, available at <http://nationaljournal.com/about/technologydaily>.

¹⁵² S. 3021, 108th Cong. §§201-02 (2004).

¹⁵³ *Id.* § 202(a)(4).

¹⁵⁴ *Id.* §§ 701-723; see also Brooks Boliek, “Camcord” Bill Hits Pause, BACKSTAGE, Dec. 10, 2004, available at http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000732660 (“[The Family Entertainment and Copyright Act of 2004] was stalled as lawmakers attempted to use it to move other pet bills, according to congressional and industry sources. Among those bills was one reforming the nation's boxing regulations, sponsored by Sen. John McCain, R-Ariz., and one that would outlaw spyware, sponsored by Rep. Joe Barton, R-Texas.”).

additions raised concerns with members of the House and the bill was not passed before the 2004 term ended.¹⁵⁵

Sen. Orrin Hatch (R-Utah) placed the bill among his first priorities for the 2005 term. He reintroduced the Family Movie Act into the Senate as part of the Family Entertainment and Copyright Act of 2005¹⁵⁶ on January 25, and it passed easily on February 1.¹⁵⁷

VI. CONSIDERATIONS AND RECOMMENDATIONS

Now that FECA has passed, all doubts as to the legality of filtering technology under the Copyright Law have resolved. The members of Congress who supported the bill along with their constituents may feel as though they have been won the battle in the name of family values. But upon closer examination, FECA may not be as great a victory for family values as it first seems. The bill may do more harm than good to conscientious movie watchers because (1) it may cause motion picture studios to create more movies with even more offensive content and (2) it may open the door for technology that can be used to add offensive content into movies.

¹⁵⁵ Boliek, *supra* note 154 ("It looks like the Family Movie Act is dead," said one House Judiciary Committee aide. "There are a number of holds on it, and McCain is still trying to use it as a vehicle for his boxing legislation.").

¹⁵⁶ Pub. L. No. 109-9, 119 Stat. 218 (2005). Along with the Family Movie Act, the Family Entertainment and Copyright Act of 2005 contains the ART Act (which criminalizes the use of camcorders in movie theaters to pirate movies), the Film Preservation Act (which provides for the preservation of films in the collections of the Library of Congress) and the Preservation of Orphan Works Act (which corrects a technical error in the copyright law concerning application of the law to librarians and archivists).

¹⁵⁷ Paul Sweeting, *Hill's Anti-Camcording Act Advances*, VIDEO BUS., Feb. 2, 2005, available at <http://www.videobusiness.com/article/CA611999.html> ("Acting with unusual swiftness, the U.S. Senate on Tuesday passed the Family Entertainment and Copyright Act by voice vote.").

A. FECA May Unintentionally Increase the Amount of Offensive Content in Movies

Ironically, FECA may have the unintended consequence of increasing the amount of offensive material in movies and increasing the production of offensive movies overall.¹⁵⁸ Filtering technology increases the circulation and revenue for the movies that some viewers find offensive. As these movies sell more, motion picture studios will have greater incentives to create them. At the same time, motion picture studios that make more family-friendly movies will find that they suddenly have to compete harder for viewers.

Currently, the studios are somewhat sensitive to how their films are rated. It is not unusual for a motion picture studio to remove a scene from a movie in order to get the MPAA to rate the movie PG-13 rather than R because, for some movies, the lower rating increases the number of people who will see the movie.¹⁵⁹ However, if the studios

¹⁵⁸ One could also argue that the motion picture studios are similarly fighting against their own best interest by opposing player control technology. Player control technology opens up new markets for motion picture studios and makes movies accessible to audiences that otherwise would not have watched them. At least some directors (especially prominent "final cut" directors, who have full creative control over the final movie product) would argue that it is not worth it to them to have their works edited just to make more money. For example, Steven Spielberg has never authorized editing of his award winning films "Schindler's List" and "Saving Private Ryan" because he believes that the scenes of graphic violence and nudity are too essential to the message that he sought to portray in these films. Incredibly, the movie editing companies are making money by editing these movies while the copyright owning studios cannot. Perhaps some consumers who watch choppy, edited movies will get a bad impression of the director and refrain from watching future movies by the director. But, most directors would probably benefit from allowing their films to be altered so that they could be more widely viewed. Encumbering and limiting the ways in which viewers can watch movies would logically only make fewer people want to watch movies.

¹⁵⁹ See, e.g., Rachel Abramowitz, *No Anxiety for Ben Stiller? OK, a Little; 'Zoolander' Star Uses Neuroses to Get a Laugh*, CHI. TRIB., Sept. 23, 2001, at C8 (describing how Ben Stiller lobbied the MPAA to reduce the rating of his movie, "Zoolander" from R to PG-13; noting that Stiller sent

know that many viewers who are offended by some of the movie's content will watch the movie with filtering technology, then the studios might be less willing to take out content in order to get a lower rating. Those who are truly offended by movie content today would probably rather see movie makers produce more wholesome movies.¹⁶⁰ These consumers likely would be better off choosing not to buy or rent movies that offend them.¹⁶¹ If filtering technology becomes the norm, the end result will be more movies on the market with rampant bad language, violence, and sex.

B. FECA May Enable Technology That Can Add Offensive Content To Movies

By declaring filtering technology legal, FECA affirms the notion that fixation is required for the creation of an infringing derivative work under the Copyright Act. This interpretation legitimizes not only software that can skip and mute, but also software that can add in extra material to movies without fixing it in a permanent form. Section 202(a) clarifies that FECA does not legalize "the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture."¹⁶² However, it stops short of prohibiting the addition of content to a movie.

Software capable of laying visual images over the top of a movie already exists,¹⁶³ and more will likely be created.¹⁶⁴

five different recut versions of the movie to the MPAA before finally convincing them to lower the rating).

¹⁶⁰ Eddington, *supra* note 3, at E1 (quoting film critic Michael Medved, "[M]oviemakers can keep their f-bombs and a-bombs. All consumers want is for studios to release sanitized versions of R-rated and PG-13 movies, something the studios do now for airlines and television.").

¹⁶¹ Peters Testimony, *supra* note 76 ("There is an obvious choice—one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie.").

¹⁶² Pub. L. No. 109-9, § 202(a), 119 Stat. 218 (2005).

¹⁶³ MovieMask software (which is not currently available for purchase) has features that allow users to create their own masks.

¹⁶⁴ New technology that adds offensive content was anticipated in a "spoof" story reported at <http://www.guidetohometheater.com>. The

This technology would allow users to add pornography or other inappropriate content¹⁶⁵ and to deface and distort movies in ways that are much more severe than the current practices of the edited movie industry.¹⁶⁶ George Lucas, in anticipation of the development of digital movie-altering technology, said: "We may live to see [our motion picture creations] re-cast with stars we never directed, uttering dialogue we never wrote—all in support of goals and masters we never imagined we would serve."¹⁶⁷

Surely Congress did not intend to allow *any* kind of alterations to a movie as long as the alteration is not fixed. Consumers of edited movies would likely change their position upon hearing that the technology used to keep movies clean is also being used to infuse them with offensive language, sex, and violence. Although moral rights doctrine does not have a firm foundation in American copyright law, most judges, legislators, or movie watchers would agree that a line ultimately should be drawn to prohibit at least some types of alterations to movies. However, deciding where to draw that line is difficult.

website jokes about a fictional company called FilthyFlicks, which adds violence, profanity, and sex to movies to cater to special audiences. In the FilthyFlicks version of "Raging Bull," the boxers fight so long that their heads come off. Barry Willis, *DGA vs. CleanFlicks*, Sept. 29, 2002, <http://www.guidetohometheater.com/news/11395>.

¹⁶⁵ *House Judiciary Committee Approves Intellectual Property Bills*, *supra* note 149 ("Rep. [Howard] Berman [D-California] . . . argued . . . that this bill . . . might be used to insulate from copyright infringement claims products that not only to decrease the level of violence or pornography, but also those that increase the level of violence or pornography. He said that it might turn out to be the 'pornography enhancement act.'").

¹⁶⁶ Peters Testimony, *supra* note 76 ("[I]t is not difficult to imagine technologies that, without creating a fixation of a new derivative work, result in performances that do not simply edit out limited portions of the work that many viewers would find offensive, but either add new material or result in a rendition of the copyrighted work that so changes the character or message of that work that it constitutes an assault on the integrity of the work.").

¹⁶⁷ Helen K. Geib, *Comments on Classic Films and Historic Landmarks: Protecting America's Film Heritage from Digital Alteration*, 33 J. MARSHALL L. REV. 185, 189 (1999).

C. Reconsidering Fixation and Rewriting FECA

Marybeth Peters suggested that, rather than pass FECA, Congress should take a "fresh look" at whether or not fixation should be required, or alternatively, required in some situations but not others.¹⁶⁸ Since technology has changed radically since the passage of the Copyright Act in 1976, Congress should revisit the issue of fixation in order to update the law for enhancements in technology. Advancements in digital technology have made it possible to copy and alter creative works without permanently fixing them in ways that no one would have ever imagined in 1976.

As Peters suggested, Congress should consider several factors in drafting a new law that requires fixation for the creation of derivative works only in certain situations. First, works made for public performance should be treated differently from works that are made to be viewed in a more continuous or permanent fashion. As the House Report for the 1976 Copyright Law suggests, fixation should not be required "in order to infringe the derivative work right in cases where there is a derivative public performance—e.g., of a play, or a ballet."¹⁶⁹ Second, works that are easily shared or distributed should be treated differently from works that are enjoyed on a more personal basis. An unfixed derivative work that may be widely distributed to compete with the original can cause much greater damage to creators than an unfixed derivative work that is only enjoyed privately and not easily shared. Finally, drastic alterations of a work should be treated differently than slight alterations because drastic alterations can cause more harm to the moral rights of the author.

¹⁶⁸ Peters Testimony, *supra* note 76 ("We should take a fresh look at that judgment and ask under what circumstances, if any, fixation should be a requirement.").

¹⁶⁹ H.R. REP. NO. 94-1476, *supra* note 116, at 62. This suggested change seems logical and necessary because, according to Peters' interpretation of the law, a theater troupe could perform a derivative work of a play, and they would not be infringing on the derivative work right unless the play were written down, taped, or otherwise fixed.

Rather than reworking the doctrine of fixation, Congress could, with a few small changes, fix FECA to discourage more malicious types of filtering software. Peters suggested that Congress seek out a "more nuanced approach" for the movie editing industry, by "looking at the nature of the alteration from the original work."¹⁷⁰ If Congress attempted to draw a line between harmless alteration and alterations that go too far, one of two things would likely happen. They might end up with a vague, unenforceable standard (e.g., making it illegal to edit out the essence of a movie or to substantially alter the nature of a movie through editing). Alternatively, they might end up with an over- and under-inclusive rule (e.g., making it illegal to mute or edit more than ten percent of a movie).

Rather than focusing on the nature of the alterations, Congress would be better off focusing on the methods of alteration. The easiest and most obvious change would be to clearly prohibit technology that adds content into movies rather than taking it out.¹⁷¹ Congress could also change the law to ensure that filtering technology gives viewers a choice between viewing an edited version of the film and its original. Additionally, they could legalize only that filtering technology that offers multiple settings like ClearPlay's.¹⁷² These additions would make the proliferation of non-family-friendly filtering technology more difficult, while preserving for the viewer the opportunity of choosing which alterations to make to a movie rather than accepting wholesale the editing decisions of third parties.

VII. CONCLUSION

The battle over edited movies has ended, and the Filterers are the apparent winners. FECA has passed into

¹⁷⁰ Peters Testimony, *supra* note 76.

¹⁷¹ *Id.* ("I strongly believe that any legislation that affirmatively permits the use and marketing of the technologies we are discussing today should also expressly prohibit the use and marketing of technologies that result in performances of those more harmful alterations of a work.").

¹⁷² See *supra* notes 34-36.

law and all claims were dismissed in *Huntsman v. Soderbergh*. However, it is not clear whether conscientious movie viewers are better or worse off as a result. In the long run, FECA may not be as family-friendly as Congress believes.