FECA Matter: An Epic Copyright Infringement Trial, Congressional Interference, and the Diminution of Moral Rights in the United States of America

JACOB ARMSTRONG

ABSTRACT

Film directors suffered a setback in their collective efforts to maintain the integrity of their films after they are released to the public. In 2005, Congress passed the Family Entertainment Copyright Act, which contained the Family Movie Act, a piece of safe harbor legislation designed to save certain businesses and business practices from ongoing litigation. This Act was not only legislative interference with an ongoing trial, but also served to remove the topic of moral rights from public dialogue. Repealing the Family Movie Act would be a step towards affording directors the ability to prevent misattribution and mutilation of their works.
FECA MATTER: AN EPIC COPYRIGHT INFRINGEMENT TRIAL, CONGRESSIONAL INTERFERENCE, AND THE DIMINUTION OF MORAL RIGHTS IN THE UNITED STATES OF AMERICA

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INTRODUCTION

Film directors are used to being in control of their movies. Some directors have learned recently, however, that while they may be responsible for the creation of these artistic works, their rights as creators are greatly diminished once the films are released to the general public. Directors may be unable to prevent the unauthorized editing of their film by another party prior to a private screening. While arguments may be made for the preservation of consumers' rights, so must arguments be made for preserving artists' rights. This Comment argues for, at a minimum, the acknowledgment of film directors' rights to protect their works in the form in which they were created. Such acknowledgment would signify a commitment to ensuring motion pictures the way the directors intended them to be seen and deterring misattribution and mutilation of those works. As it is now, film directors have numerous disadvantages in their attempts to keep their films from being re-edited.

A. The Big Picture

Directors' initial disadvantage in protecting their creation against unauthorized third-party editing is inherent in the basic structure of their particular employer-employee relationship. Copyright law protects "original works of authorship fixed in any tangible medium of expression" and extends to "motion pictures and other audiovisual works." Motion pictures are generally works-for-hire, meaning the employer, a movie studio, owns the rights to the work, as opposed to the director, who is usually considered an employee. Movie studios, therefore, possess the exclusive right to authorize commercial edits of their films and guard against unauthorized usage.

However, not all unauthorized edits of motion pictures violate the copyright holder's rights. Current law exempts "the editing of motion pictures by a member of a private household" from liability for copyright violations "if no fixed copy of the

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altered version is created." A copy may be "fixed" when it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."4

In 2002, a group of unauthorized third-party editors launched an unconventional suit against sixteen prominent motion picture directors, including Steven Soderbergh, Martin Scorsese, and Steven Spielberg.5 This suit is unconventional because the plaintiffs sued the directors and not the studios that actually held the copyright.6 The lawsuit was a preemptive strike against members of the Directors Guild of America ("DGA") who had expressed concern over the ethical and legal implications of the plaintiffs' unauthorized film editing.7 At the time of the complaint, the plaintiffs had developed a niche market in which they sold and rented "sanitized" Hollywood releases.8

This market was mostly composed of conservative and religious consumers who objected to varying degrees of sex, violence, offensive language, and other adult content.9 Ironically, technology that fostered the rapid growth of this market was originally developed in order to eliminate all non-explicit content from pornographic

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5 Second Amended Complaint and Jury Demand, Huntsman v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (No. 02-M-1662(MJW)) (naming all defendants, including: Robert Altman, Michael Apted, Taylor Hackford, Curtis Hanson, Norman Jewison, John Landis, Michael Mann, Phillip Noyce, Brad Silberling, Betty Thomas, Irwin Winkler, Robert Redford, and Sydney Pollack). To clarify at the outset of this Comment, all court filings for Case No. 02-M-1662(MJW) filed in the U.S. District Court for the District of Colorado, refer to the case name, Huntsman v. Soderbergh, where Huntsman and Soderbergh are the original parties to the litigation. However, when the judge rendered his opinion, by which time numerous parties had intervened in, joined in, or been dismissed from the litigation, the case name became Clean Flicks of Colorado, LLC v. Soderbergh. The opinion is cited in the Federal Supplement as: 433 F. Supp. 2d 1236. In this Comment, all citations to the court filings will use Huntsman v. Soderbergh, all citations to the opinion will use Clean Flicks of Colorado, LLC v. Soderbergh, and both types of citations will refer to the case citation: 433 F. Supp. 2d 1236.
6 Id.
7 Id. 16 (claiming the "Defendant Directors have placed their detailed litigation plans on the internet web site of the Directors' [sic] Guild of America"); see also DGA v. Cleanflicks, et al., 4 DGA AGENCY UPDATE 3, Fall 2002 [hereinafter DGA Update] (stating it is "wrong to circumvent the studios, who are the copyright holders, and the director, who is the film's creator—all in the name of turning a profit. It is unethical, it is shameful, and the DGA will aggressively pursue these claims.").
8 Rick Lyman, Hollywood Balks at High-Tech Sanitizers: Some Video Customers Want Tamer Films, and Entrepreneurs Rush to Comply, N.Y. TIMES, Sept. 19, 2002, at E1 (noting the locations in which the third-party editing industry first grew and also reporting on certain directors' reactions to the unauthorized edits); see also Andrew Gumbel, Censored in the Name of the Lord, N.Z. HERALD, Sept. 24, 2005, at B12 (offering the basic points of argument for all the parties and stating that "without the Family Movie Act, it seems likely the company [ClearPlay] would have fallen foul of the law and lost is legal battle with the Directors Guild").
9 Aaron Clark, Not All Edits Are Created Equal: The Edited Movie Industry's Impact on Moral Rights and Derivative Works Doctrine, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 51, 62-63 (2005) (saying that by 2004, the third-party editing industry had earned national recognition, but it started in Utah in 1998 in order to accommodate the strict moral guidelines of the regional Mormon population).
films. Regardless of the reason the copyrighted material is altered by an unauthorized editor, the result is a variation of a copyrighted work that is no longer the expression of the creator's idea.

B. The Set-Up

A man purchases a motion picture on DVD, to which a movie studio owns the copyright, in order to watch it with his family. The man uses available technology that alters the film by filtering out audio and visual content while the movie is playing. The resulting motion picture, as seen by the man and his family, is drastically different than copyright holder's original version and strays from the creator's original vision.

The altered version is not the motion picture in the form in which it was created. However, because no fixed copy was created, the man and the maker of the editing technology are exempt from any liability resulting from the seeming copyright violation. What, then, has the family just watched, whose expression is it, and to what law is it subject?

C. The Storyboard

This Comment examines how various court decisions—including one in particular, Clean Flicks of Colorado, LLC v. Soderbergh—and federal statutes frame responses to the questions tendered by the scenario above. Section I provides a background and briefly recalls the technological, social, and legal factors that have created this conflict within copyright law. Section II analyzes how certain third-party editors, saved by the legislative interference, would have fared had they remained parties to the principal lawsuit. Section III proposes strategies for an important legal issue that could have been addressed had the legislative interference never occurred and concludes the Comment by suggesting that Congress repeal the Family Movie Act.

See Nissim Corp. v. ClearPlay, Inc., 351 F. Supp. 2d 1343 (S.D. Fla. 2004) (revealing that ClearPlay, Inc. and two of its creators were actually sued by Nissim Corp., a company that designed the hardware and software that filters out content from pornographic films so the viewer sees only graphic sexual content); see also Family Movie Act of 2004: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the Comm. on the Judiciary, 108th Cong. 4 (2004) [hereinafter Hearing] (statement of Rep. Howard Berman, Member, H. Comm. on the Judiciary) (noting the technology's potential for removing all nonsexual content from films).


1. The Prologue: The Factors That Have Pitted the Rights of Creators, Copyright Holders, and Consumers Against Each Other

This section first explains the different film-editing techniques that are popular with third-party editors. Then, this section tells the story of how the third-party editing business grew from a mom and pop operation to a national industry. The story introduces a lawsuit that embodied the struggle between the directors, the copyright holders, and the third-party editors. Lastly, this section explains how Congress passed a controversial law that had a direct impact on the outcome of the litigation.

a. Third-Party Digital Editing Techniques

As the public learned of third-party edited films, entrepreneurial editors sprang up to meet the demand. Commercially sanitized films quickly became available in at least eighteen states between 1998 and 2002. Although these businesses used a variety of methods to pare down the original copyrighted works, all of the processes employed can be categorized into one of two types of digital film editing technique: cut-and-spool editing or filtering.

1. Cut-and-Spool Editing

Cut-and-spool editing derives its name from the act of cutting motion picture film and splicing it back together in order to accomplish an edit. Digital cut-and-spool editing requires the editor to make a digital copy of the entire movie onto the hard drive of a computer. A third-party editor must overcome such technology as a digital content scrambling protection system designed to prevent unauthorized copying in order to copy legitimately purchased DVDs. The third-party editor then uses software to edit the film. The edited copy is recorded onto a DVD-R and sold

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15 Richmond, supra note 13.
19 Id. (stating that despite the editing method and particular business practice of each respective defendant, all remaining defendants "distributed, by sale and rental, copies (albeit edited) of the Studios' copyrighted works and [were] therefore liable for infringement in the absence of any applicable defense").
20 Id. (listing some of the editing techniques, such as "redaction of audio content, replacing the redaction with ambient noise, "blending" of audio and visual content to provide transition of edited scenes, cropping, [and] fogging or the use of a black bar to obscure visual content").
or rented to the public, either directly by the third-party editor or indirectly through a retailer.21

2. Filtering

Digital filtering differs from cut-and-splice editing by requiring the editor to make a digital copy of the movie.22 The third-party editor instead purchases and watches an original copy of a film.23 The third-party editor notes the times during the film at which “objectionable” material occurs.24 These times are written onto a software program that is made available for downloading.25 Specially designed DVD players recognize the DVDs for which they have a program and mute and skip past the objectionable material.26

b. Third-Party Editing Became a Cottage Industry

Unauthorized third-party editing revealed its commercial potential to mainstream America in 1998 when Sunset Video of American Fork, Utah, used the cut-and-splice editing technique to remove the sole nude scene from a VHS cassette copy of James Cameron's Titanic.27 Sunset Video rented the edited version to customers who would previously not have rented it because they found the nudity objectionable.28 Word about the editing quickly spread and the employees of Sunset Video soon found themselves editing other people’s copies of Titanic.29 Within one year, Sunset Video edited more than 1,700 copies of Titanic and started receiving national attention.30

Paramount Pictures, copyright holder of Titanic, declined to immediately assert a legal complaint against Sunset Video.31 Entrepreneurs interpreted the film studio’s muted response as indifference and rushed to meet the new-found demand for

21 Id.


24 Id.

25 Id.


30 Scott Farwell, Sanitized For Your Protection?: A Video Chain That Edits Out Nudity and Violence Riles Hollywood and Spawns a Legal Blockbuster, DALLAS MORNING NEWS, Dec. 11, 2002, at 1A (noting many movies are “shortened and sanitized for television, airlines and export to countries such as Singapore and Thailand,” but that these edits are sanctioned by the copyright owner, the studio, and under the supervision of the work’s creator, the director).

31 Larry Williams, supra note 27.
“sanitized” movies. One Sunset Video employee left the family-owned store to start his own company, CleanFlicks.

By 2002, CleanFlicks had expanded its library to hold more than 500 films offered at sixty-three stores in fourteen states. CleanFlicks was not alone, however, as numerous other third-party editors entered into the marketplace. Hollywood finally broke its silence by announcing litigation plans on the DGA’s website. The DGA intended to seek damages and a permanent injunction barring all of the third-party editors from profiting from their unauthorized editing.

c. The Clean Flicks Litigation

The various third-party editing companies formed a legal alliance (“the CleanFlicks group”) and filed a complaint against sixteen prominent directors. The complaint sought a declaratory judgment that their editing practices were protected under federal copyright law. The DGA intervened as an interested party and compelled the joinder of seven major motion picture studios, the copyright holders of the movies in question (“the Studios”). The Studios filed counterclaims against the CleanFlicks group. The counterclaims sought declaratory and injunctive relief from the CleanFlicks group for copyright and trademark infringement.

Two members of the CleanFlicks group, ClearPlay and FamilyShield, were dismissed from the suit in 2005 because of legislative intervention. In July of 2006, the Studios prevailed against the remaining members of the CleanFlicks group on a motion for summary judgment. The Court permanently enjoined the CleanFlicks group and barred them from engaging in their respective businesses.

[32] Id.
[33] Farwell, supra note 30.
[34] Id.
[36] Id.
[38] Second Amended Complaint and Jury Demand, supra note 5.
[40] Dirs. Guild of Am.’s Motion to Intervene, Huntsman, 433 F. Supp. 2d 1236 (No. 02-M-2662 (MJW)).
[41] Motion to Compel Joinder of Third-Party Copyright Holders as Necessary Parties Pursuant to Fed. R. of Civ. P. 19 and 17 U.S.C. § 501(b), Huntsman, 433 F. Supp. 2d 1236 (No. 02-M-2662 (MJW)).
[42] Motion Picture Studio Defendants’ Answer and Counterclaims, Huntsman, 433 F. Supp. 2d 1236 (No. 02-M-2662 (MJW)).
[43] Id. ¶ 18.
[45] Id. at 1243–44.
[46] Id. at 1244 (effectively barring the CleanFlicks group from conducting their businesses as they had and enjoining all of the defendants’ officers, agents, servants, and employees, and all persons who were acting in concert or even just “in participation” with any of them engaging in any such business that would violate the Studios’ copyrights).
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d. FECA Saved Family Shield and ClearPlay

Congress directly addressed the subject matter of the Clean Flicks litigation by passing a bill that expressly permitted digital filtering.\(^4\) Three years into the Clean Flicks litigation, the Family Entertainment and Copyright Act of 2005 ("FECA") garnered approval in both Houses due to its aim to increase penalties for copyright.\(^4\) Despite general Congressional consensus to include copyright protection and anti-piracy legislation in FECA,\(^4\) there was bipartisan disagreement regarding the insertion of the Family Movie Act of 2005 ("FMA"). The FMA is a safe-harbor provision created in response to conservative lobbyists attempting to protect the third-party editors in the Clean Flicks litigation.\(^5\)

Supporters of the Act strongly believed the FMA would serve to prevent copyright and trademark law from "limit[ing] a parent's right to control, what their children watch in the privacy of their own home."\(^5\) The FMA purports to accomplish this goal by exempting from copyright and trademark actions the "making imperceptible . . . of limited portions of audio or video content" provided no fixed copy is created.\(^5\) This exemption expressly saved the third-party editors in the Clean Flicks group who employed the digital filtering method.

Opponents of the FMA did not deny the Act’s utility as a parenting tool, but instead attempted to focus on the larger legal implications.\(^5\) The opponents addressed the right to make derivative works, fixed or non-fixed, from a copyrighted work.\(^5\) Opponents voiced concern over the legislature’s express intervention in a battle that was being handled competently in the courts and rapidly in the marketplace,\(^5\) and these opponents further expressed a concern over the apparent


\(^4\) Id.


\(^5\) Id. at 6-7.

\(^5\) See, e.g., Hearing, supra note 10, at 7-14. (statement of the Hon. Marybeth Peters, Witness, Register of Copyrights) (discussing diminution of moral rights and whether derivative works need to be fixed, and proposing a sunset clause on the FMA).

\(^5\) Id. at 69 (statement of Jack Valenti, Witness, Former President of Motion Picture Association of America) (claiming that the owner of a copyrighted work, and that owner exclusively, had the authority to decide if someone else could produce a product derived from the original copyrighted work); see also 17 U.S.C. § 101 (2006).

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work". A "device", "machine", or "process" is one now known or later developed.

\(^5\) Id.

\(^5\) Hearing, supra note 10, at 3 (statement of Rep. Howard Berman, Member, H. Comm. on the Judiciary).
retreat from a recent trend toward recognizing moral rights. These legal implications were not grave enough to outweigh the benefits contained in the rest of FECA, which predominantly consisted of the increased penalties for pirating movies.\textsuperscript{56}

\textbf{2. An Alternate Ending: How the CleanFlicks Decision Would Have Panned Out had Congress not Included the EMA in the FECA}

The Studios, in the aggregate, had valid copyrights for their movies and maintained the exclusive rights granted by \textsection{106} of the Act.\textsuperscript{57} Under federal copyright law, the editing companies would be found to be infringing upon these exclusive rights if, without authorization, they (1) reproduced copies of the works, (2) prepared derivative works, or (3) distributed copies of the works.\textsuperscript{58} All remaining members of the CleanFlicks group distributed, by sale or rental, copies of the Studios' copyrighted works and would be presumed liable for any infringement, save for an affirmative defense.\textsuperscript{59}

\textit{a. The Third-Party Editors' Affirmative Defenses}

The remaining third-party editors contended that they were making "fair use" of the copyrighted movies.\textsuperscript{60} Fair use is an affirmative defense on which the party making the assertion has the burden of proof.\textsuperscript{61} In order for the court to determine whether the third-party editors made fair use of the copyrighted movies, the court considers four factors:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes:

2) the nature of the copyrighted work:

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{62}

Regarding the first factor, the CleanFlicks group contended that although their use of the copyrighted works was for commercial gain, the public policy behind the


\textsuperscript{58} 17 U.S.C. \textsection{106}.

\textsuperscript{59} \textit{Clean Flicks}, 433 F. Supp. 2d at 1239.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} 17 U.S.C. \textsection{107}.
purpose and character of that use should be examined. The third-party editors proffered a public policy argument that they were “criticizing the objectionable content commonly found in current movies and that they are providing more socially acceptable alternatives to enable families to view the films together.” The court, however, regarded the policy argument as “inconsequential to copyright law.” The court instead focused on protecting “the creator’s rights to protect its creation in the form in which it was created.”

The first factor required the court to determine whether the filtered movies were “transformative.” The presiding judge noted that the transformative character “of the use of copyrighted materials requires such a contribution of originality as may be of such public benefit as would serve the underlying purpose of providing copyright protection, as identified in Article 1, § 8 of the Constitution: ‘...to Promote the Progress of Science and useful Arts.’”

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that a use is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” The defendants argued that they were making a transformative use of the copyrighted works for purposes of the first factor under § 107(1)—that the purpose and character of their edits was fair use criticism of the objectionable content of the movies. The Studios rejected the notion this use was transformative within the scope of the fair use defense. Third-party editors, whether cut-and-splice or filtering editors, do not add anything to a film. They simply redact audiovisual elements.

Addressing the second factor, the nature of the copyrighted work, the court noted the patently creative expressions of the original works coupled with the non-transformative (and thereby inherently not creative) nature of the edited films also greatly favored the Studios. The third factor, too, disfavored the fair use defense as the third-party editors completely composed the edited films from the original works.

In addressing the third factor, the court considered that the redacted portions of the original films constituted only a slight fraction of the total work. In *Bill Clean Flicks*, noting the CleanFlicks group argued that the court’s granting of the requested injunction would result in the destruction of their businesses and deprive society of the benefit of watching the movies without subjectsing their sense and sensibilities to matter they would deem objectionable and inappropriate for consumption).

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63 *Clean Flicks*, 433 F. Supp. 2d at 1240. (noting the CleanFlicks group argued that the court’s granting of the requested injunction would result in the destruction of their businesses and deprive society of the benefit of watching the movies without subjectsing their sense and sensibilities to matter they would deem objectionable and inappropriate for consumption).

64 *Id.*

65 *Id.*

66 *Id.* at 1240–41.

67 *Id.* at 1241.


70 *Id.*

71 *Clean Flicks*, 433 F. Supp. 2d at 1241.

72 *Id.* at 1241.

73 *See id.*

74 *Id.*

75 *See id.*

76 *See Counterclaim Defendant Cleanfilm Inc.’s Response Brief to Defendant Motion Picture Studios Motion for Partial Summary Judgment at 4, Huntsman v. Soderbergh*, 433 F. Supp. 2d.
Graham Archives v. Dorling Kindersley Ltd., the U.S. Court of Appeals for the Second Circuit decided that the publisher of a book relating the story of the Grateful Dead made fair use of that rock group’s artistic images on its promotional items, such as showbills and tickets. The opinion emphasized that a principal reason the book was transformative was because its use of the images was not exploitative and their appearance was only incidental to the commercial value of the historical/biographical book.

Just as the Clean Flicks court distinguished its own case from Bill Graham Archives, so could the argument be made against the exempted filtering parties. The edited films are clearly not very different from the original works' expressive purpose and marketed for a clearly commercial gain. The court thus found the edited films to not be transformatively different from the original works and, so, the first factor weighed against the CleanFlicks group and would have weighed against the exempted parties.

The fourth factor, the strongest argument for fair use, similarly favored the Studios. The CleanFlicks group argued that the “Studios benefit because they 'sold' more copies of their movies as a result of the editing parties' practice,” a reasonable argument considering that people who would not have otherwise paid for the Studios' products would now do so. The court weighed the statutory policy against this economic theory, which it found to have only a superficial appeal. Intrinsic in the copyright owners' rights is the essential right to control the content of their work.

The court's decision pertains to all third-party editors: copyright owners should be able to determine in what manner their films are edited in because it is “more than merely a matter of marketing; it is a question of what audience the copyright owner wants to reach.” The Studios' fundamental prerogative outweighs the filtering third-party editors' assertion of their activities' economic passivity.

The Clean Flicks court found that the four factors lent their aggregate weight against the third-party editors' fair use defense. This finding eliminated the most substantial affirmative defense presented by the CleanFlicks group. The legal conclusions were presented in a manner that did not distinguish between the actions of the cut-and-splice editors and the filtering editors. In fact, the court mentioned that the FMA was legislation exempting the filtering parties as a policy choice, as opposed to an established legal conclusion.
The filtering companies would also not have been able to successfully assert the "first sale" doctrine as a defense. The "first sale" doctrine protects the purchaser in any use of the authorized copy acquired, but does not permit the making of additional copies. However, because the Studios were only asking the court to prevent use of the master copy in making the edits and creating the copies that are distributed to the public, the doctrine did not apply. The first prong in the Studios' plea, using the master copy to make edits, applies to the digital filtering companies as much as it did to the cut-and-splice editors. The plain language exhibits a likelihood the "first sale" doctrine would not have been afforded to the filtering companies as a valid defense.

The last line of defense asserted by the CleanFlicks group was a public policy plea. They argued that enjoining the third-party editors would deprive the public of a useful and much-needed service that, when compounded with the fact they were not competing with the Studios, called for judicial mercy. The court looked at the relief requested, however, and found that the Studios were not lamenting a loss of revenue; rather, the court found that the injunction was sought because of the "infringement's irreparable injury to the creative artistic expression in the copyrighted movies." The court found the third-party editing to be an illegitimate business when viewed through the prism of copyright law: public interest is best served by protecting the copyright owners despite the injuries sustained by the infringers.

b. Third-Party Editors Did Not Create Derivative Works

With the third-party editors' affirmative defenses destroyed, the Studios were granted summary judgment as to their claims of infringement of their respective rights to reproduce and distribute their works. However, when the court held that the third-party editors' final cuts were not transformative, the court also held that those cuts could not be derivative works. A "derivative work" is defined in §101 as:

[A] work based upon one or more preexisting works, such as 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

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90 Id.
91 Id. at 1242–43.
92 Id. at 1242.
93 Id. at 1242–43.
94 Id. at 1242–43.
95 But see Brief Amicus Curiae of Electronic Frontier Foundation at 2, Huntsman v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (No. 02-M-1662(MJW)) (asking that the court be careful in its decision and in its dicta so as not to upset an understanding that necessary intermediate copying is fair use when such a reproduction is a necessary step in the course of making a final non-infringing product).
97 Clean Flicks, 433 F. Supp. 2d at 1242.
modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

The Studios maintained that the derivative use violation applied to the filtering companies because the right to create derivative works allows the copyright owners to ensure the artistic integrity of the work throughout the term of the copyright. The defendants denied that their edited versions were derivative works because they were not recasting or revising the copyrighted material in a fashion capable of being characterized as a work of authorship. The third-party editing companies prevailed on this argument, but it did not save them from a permanent injunction against operating their businesses. Because these fixed works were not found to be derivative, however, the filtering companies’ unfixed works would surely not be held liable for infringement.

It appears as though the FMA was successful in its goal to preserve ClearPlay and Family Shield from a legal demise, if not a demise in the marketplace. The Clean Flicks court’s reasoning would not have held either of the companies to be in violation of any of the copyright provisions the court addressed. However, a look at one particular issue the court never had occasion to entertain reveals legal inconsistencies and possible litigation strategies that may be employed by the authors of creative works, copyright holders, and the proponents of third-party editing.

c. The Moral Rights Issue

When Congress saved the filtering companies from the Clean Flicks litigation, they also saved the district court from deliberating the issue of moral rights. Just as copyright law principally serves to protect copyright owners’ economic interests, moral rights exist to protect authors’ interests, which may be more difficult to quantify under the American judicial system than under the European system.  

98 Motion Picture Studio Defendants’ Answer and Counterclaims, supra note 41 ¶ 22.
99 Clean Flicks, 433 F. Supp. 2d at 1241. But see Robert J. Bernstein & Robert W. Clarida, Court Nixes ‘Fixed’ Flicks, N.Y.L.J., July 21, 2006, available at WL, 7/21/2006 N.Y.L.J. 3, (col. 1) (reasoning the 1976 Copyright Act defined derivative works to include, among other things, “any form in which a work may be recast, transformed or adapted,” and that the Act was molding an expansive exclusive right under § 106(2): articulating the privilege of a copyright owner to prevent unauthorized uses even where an original copyrighted work has been transformed in considerable respects, like the Broadway adaptation of a film or the book version of a Hollywood movie).
100 Clean Flicks, 433 F. Supp. 2d at 1243.
101 Hearing, supra note 10, at 3 (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary) (expressing a belief that the financial burden of the Clean Flicks litigation being imposed on companies like ClearPlay and Family Shield, which he assumed to be operating legally despite the ongoing litigation, necessarily required the passage of the FMA as a component of FECA).
In 1886, numerous European nations agreed to become members of the Berne Convention for the Protection of Literary and Artistic Works, which required all member governments to provide minimum protections to its copyright holders. The Berne Convention recognizes the moral rights of integrity and attribution, as well as the traditional economic rights associated with copyright law. However, in 1990, Congress passed the Visual Artists Rights Act (VARA), which recognizes and protects limited moral rights to a specific subclass of artists. Contradictorily, the FMA’s protection of third-party editors exempts parties that may otherwise be found liable for infringing upon artists’ moral rights.

3. The Pitch: How the Original Clean Flicks Parties Could Have Addressed the Moral Rights Issue the Court Never Reached

Congress should repeal the FMA. Directors’ moral rights are just as vital to this country’s artistic and educational growth as any other art. Whatever recent progress this country has made in recognizing and protecting moral rights was retarded by the FMA. An examination of the perception of moral rights may offer insight as to the reasons one side embraces and the other opposes the concept.

This section examines the perception of moral rights in America and how these rights are being protected. Addressed first is the apparent contradiction between the FMA and the United States’ obligations under the Berne Convention. This section then presents several prominent cases in support of the directors’ strong argument for the protection of their moral rights. Highlighted next are the third-party editors’ assertions as to why their actions are legal. Finally, this section concludes by suggesting the possibility of a constitutional attack on the FMA and advocating a review and repeal of that controversial statute.

a. The Directors’ Point of View, as Authors of Creative Works and Subscribers to Moral Rights

Directors perceive the final version of their films as something more than copyrighted material: they primarily see it as a creative expressions representative of their intention. Directors then tend to see the unauthorized edited versions of their films as “bastardizations” of the original works. Since the FMA created the
legal void that has left films directors’ artistic expression vulnerable to unauthorized alteration, it is necessary to see what other artistic expressions are protected.

VARA was a significant step forward in American copyright law. VARA provides visual artists with certain moral rights attached to their works, such as the right to protect their creations from destruction or defacement during their lifetimes or to receive compensation for the destruction of their work. Although motion pictures are not “visual works” under American copyright law, examining VARA may help determine the impact of unauthorized edits on original film works.

VARA grants the rights of attribution and integrity to authors of visual artworks. It entitles authors of visual works the right of attribution by allowing them to claim authorship of their work and prevent the use of their names as the author of any work they did not create. VARA protects artists’ right of integrity by permitting them to prevent the use of their name “as the author of the work of art in the event of a distortion, mutilation, or other modification” prejudicial to their honor or reputation. Lastly, and perhaps most importantly, VARA gives artists the right to prevent against intentional distortion, mutilation, or modification of their work, and against any destruction of “works of recognized stature,” whether intentional or grossly negligent.

In Flack v. Friends of Queen Catherine Inc., a sculptor sued the group that commissioned her to create a large statue of Queen Catherine of Braganza. The defendants hired another artist to resculpt the face of the clay figure after it was damaged by the elements. The original artist did not authorize the reconstruction, which allegedly resulted in a “distorted, mutilated” clay model. The court held that, although the resculpting was an attempt at conservation, a noble cause usually exempt from VARA claims, it could be a violation of the original artist’s moral rights. This decision was supported by the plaintiff’s assertion that the second sculptor was “not trained in conservation, was not competent to perform work without her supervision, had not previously undertaken unsupervised work, and had little knowledge or experience in the field.”

Directors argue that the “distorted, mutilated” results sufficient for a claim under VARA are analogous to their objections to unauthorized third-party editing. Like artists protected under VARA, “[d]irectors put their skill, craft and often years of hard work into the creation of a film.” And just as the creative works protected

114 Id. § 106A(a).
115 Id. § 106A(a)–(b).
116 Id. § 106A(2).
117 Id. § 106A(3).
119 Id. at 529.
120 Id. at 530.
121 Id.
122 Id. at 535.
123 Id.
under VARA, these films carry their directors' names and are paramount in determining their reputations. The directors are the authors of the work and, as such, "have great passion about protecting [their] work ... [their] signature and brand identification, against unauthorized editing." Aside from the Berne Convention's protection of attribution and integrity, inapplicable to such work-for-hire situations, there is no statute standing in support of movie directors' moral rights.

In *Gilliam v. American Broadcasting Cos.*, the British sketch Comedy troupe, Monty Python, sued an American television network because it edited portions of the troupe's television show. The network edited the television program in order to create more time for commercials and to remove humor it deemed offensive. The troupe members did not authorize the redactions and claimed that the resulting edit was a "mutilation" of their work.

The *Gilliam* jurists watched both the original and the "sanitized" version and found that "the truncated version at times omitted the climax of the skits to which appellants' rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line." The court then held that the "edited version ... impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents." The violation of the artists' rights of attribution and integrity were thus violated and the court upheld a preliminary injunction against the network.* Gilliam indicated courts recognizing authors' moral and non-economic rights more than a decade before the United States acceded to the Berne Convention and passed VARA. Obviously, the question arises: couldn't Congress pass legislation affording directors protections similar to those afforded VARA's protected artists?

*b. The Third-Party Editors' Point of View, as Harmless "Moral" Guardians*

The digital-filtering companies assert that nothing new is fashioned from the content filtering process because the original DVD remains intact and unaltered. Therefore, the argument proceeds, the altered movie watched is essentially the same as the original movie. One case particularly supports this corporeal view.

In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, a popular video game system maker sued the manufacturer of a device, the Game Genie, which allowed

\[125\] Id.
\[126\] Id.
\[127\] 538 F.2d 14 (2d Cir. 1976).
\[128\] Id.
\[129\] Id. at 18.
\[130\] Id.
\[131\] Id. at 25.
\[132\] Id.
\[133\] Id.
\[134\] Clark, supra note 9, at 66.
\[136\] 964 F.2d 965 (9th Cir. 1992).
video game players to alter up to three features of the game. The player controlled
the changes made by the Game Genie by entering codes provided by an
accompanying manual. The Game Genie functioned by filtering the value of data
flowing from the original game cartridge to the game system. Although the Game
Genie would substitute some data with a new value, it did not alter the data stored
in the original game cartridge. The Galoob court concluded that, since the altered
displays did not incorporate a portion of the copyrighted work into a fixed form, it
could not be a derivative work.

Attempting a more abstract answer, the digital-filtering companies insist their
redactions neither hurt nor even significantly alter the story-telling of the films. If
anything, they argue, the edits complement the director’s expression. Furthermore, consumers claim the ability to distinguish creative violence essential to
the story from gratuitous violence. Proponents of the practice assert that editing
gratuitous violence from films does not alter the social and political tones vital to a
director’s work. And remember, the FMA was enacted in order to ensure that
parents retain control over their children’s viewing choices.

CONCLUSION

It is apparent that the legislative efforts to address the issues in the Clean
Flicks case not only made it impossible for the district court to make a forward-
looking ruling on the issue of moral rights, but also precluded any court from finding
that the digital third-party editors could be found liable for copyright infringement.
While the FMA is a well-crafted statute in terms of its exculpating only a very
limited group and letting other third-party editors be the sacrificial lamb, the DGA
and the Studios may be able to attack the Act’s constitutionality by asserting that it
is overbroad. While the statute does address a small and select group of businesses,
broad exemption from all copyright infringement liability is just too great a reward
for companies’ falling into specially-crafted guidelines.

The 110th Congress may have the opportunity to present this argument. If
more cases based upon VARA and other moral rights statutes are brought before the
courts and decided in favor of moral rights, the authors of these expressions may find
that the legal tide is turning their way and their artistic rights are protected.
Hopefully, the legislature will affirm the country’s commitment to the Berne
Convention and strengthen legislative protection of moral rights. Congress should

137 Id. at 967.
138 Id.
139 Id. at 968.
140 Id.
141 Id.
142 Id.
144 Counterclaim Defendant Cleanfilm Inc.’s Response Brief to Defendant Motion Picture
Studios’ Motion for Partial Summary Judgment, supra note 75 at 24.
145 Id.
146 Hearing, supra note 10, at 1–2 (statement of Rep. Lamar Smith, Chairman, H. Comm. on
the Judiciary).
repeal the FMA. Such a step would show a governmental commitment to acknowledging “the creator’s rights to protect its creation in the form in which it was created.”147