Who Has the Right to Edit a Movie?: An Analysis of Hollywood's Efforts to Stop Companies from Cleaning up Their Works of Art

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I. INTRODUCTION

In August 2002, a small company based in Pleasant Grove, Utah issued a press release. The press release publicized its nationwide debut of a service providing a "family friendly alternative" for watching PG-13 and R-rated movies.[1] The company, CleanFlicks, creates "E-rated" versions of Hollywood movies by editing out nudity, sexual situations, profanity, offensive language, and graphic violence from DVDs and videocassettes.[2]

The "E-rated" movies provide an alternative to people who want to avoid what they perceive as an overabundance of profanity, sex, and violence in Hollywood movies.[3] The edited movies have become popular in Utah, where many viewers have avoided watching PG-13 and R-rated movies because of scenes they find objectionable.[4] The option of watching edited movies is also appealing to parents who want to watch R-Rated movies with their children or ensure that the movies they rent or buy for their children are appropriate.[5] The editors say that viewers have a right to skip parts of a movie, just as a reader might skip parts of a book.[6]

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[1] Press Release, MyCleanFlicks, Family Entertainment Revolution – Nationwide Debut of E-Rated DVD Movie Rentals – Edited or Cleaned Up Movies Take Center Stage Again (Aug. 6, 2002), *available at* 8/6/02 Business Wire 08:04:00.

[2] *Id.*

[3] Pete Howell, *Return of the Zombie Censors – Directors Angry as Service Snips Films' Offending Parts*, TORONTO STAR, Sept. 29, 2002, at D2.

[4] "In 1998, a video shop in American Fork, Utah, clipped a nude scene from its copies of 'Titanic,' eliminating what for its many Mormon customers was the only reason not to watch the movie." Larry Williams, *Sanitized For Your Protection; Companies Make a Profit Cleaning Up Hollywood's Act*, HARTFORD COURANT, Sept. 20, 2002, at D1, republished at *Cleaning Up Hollywood – Sanitized Tapes, DVDs Have Directors Crying Foul*, CHI. TRIB., Oct. 1, 2002, at 3.

[5] *Id.*

[6] *See* Trilogy's Countercl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Dec. 23, 2002).

The editing has drawn sharp criticism from Hollywood directors and representatives of the Directors Guild of America ("DGA").[7] The directors insist that the right to edit a movie should be reserved to those people who created the movie.[8] They believe it is "wrong" to represent to the public that the edited movies are the director's work. Some directors have drawn analogies to ripping pages out of a book and selling it with the original author's name, or defacing a Van Gogh painting.[9] The directors claim that companies that edit movies or supply the means for doing so are more interested in turning a profit than protecting principles of morality.[10] The national executive director of the DGA called the editing "a direct frontal assault on all aspects of ownership and creativity."[11]

Anticipating a lawsuit from the directors, CleanFlicks and Robert Huntsman, an Idaho attorney with a patent pending in movie editing technology, filed suit jointly in federal district court against sixteen prominent Hollywood directors.[12] They sought a declaratory judgment to clarify that their business of making unauthorized edited versions of major studio release movies is legal.[13] The Directors Guild of America responded by filing a motion to intervene on behalf of the directors.[14] The DGA also sought to broaden the scope of the lawsuit by joining twelve additional companies engaged in the business of editing movies.[15] The counterclaim asserted that the "third party editors" were in violation of the Lanham Act, a federal law that prohibits false designations of origin, false descriptions, and dilution of famous marks.[16] In addition, the DGA filed a motion to bring the movie studio copyright

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[7] *See* Williams, *supra* note 4.

[8] *Id.*

[9] *Id.*; *see also* Bob Baker, *Are These Videos Rated C for Clean or Compromised? Directors Rail Against Firms Such as CleanFlick[s] That Excise Offensive Language and Scenes With Sex or Violence*, L.A. TIMES, Oct. 14, 2002, at E1 (quoting Steven Soderbergh, a vice president of the Directors Guild of America, as saying "Would anyone even attempt to defend ripping pages out of a book, leaving the author's name on it and selling it?").

[10] Greg Hernandez, *DGA Returns Fire in Film Editing Suit; Cleanflicks' Editing 'Wrong,'* L.A. DAILY NEWS, Sept. 21, 2002, at B1 (quoting Martha Coolidge, President of the Directors Guild of America). "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." *Id.* (quoting Martha Coolidge).

[11] Baker, *supra* note 9.

[12] *Id.*; Plaintiff's Original Compl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Aug. 29, 2002).

[13] *Id.*

[14] DGA's Countercl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[15] *Id.*

[16] *Id.*; *see* 15 U.S.C. § 1125(a) (2002) and 15 U.S.C. § 1125(c) (2002). The DGA also asserted a violation of California law prohibiting unfair competition. *See* DGA Counterclaim,

owners into the suit.[17] The studios were relatively quiet on the issue, but ultimately responded by filing a copyright infringement suit against the third party editors.[18]

Bob Baker most appropriately phrased the question in this case in the title of his September 2002 *Los Angeles Times* article, "Who Can Edit a Movie?"[19] This Comment answers Mr. Baker's question under the framework of trademark and copyright law. The Comment also examines the areas in which the law falls short of protecting the interests of both Hollywood directors and viewers who want more control over what they view in their homes. Part II of this Comment describes the ways in which the third party editors have edited movies. It divides the editors into two categories: those who make edited copies on videocassettes and DVDs, and those who manufacture a device which edits the movie while it is being watched at home. Part III addresses potential claims of unfair competition, including evidence of likelihood of confusion, false advertising, and dilution of famous marks under the Lanham Act. Part IV discusses the implications of copyright law on unauthorized third party editing. It highlights the fact that directors do not have standing to sue on behalf of the copyrights in their movies because they are not authors under the statutory definition of "works made for hire." This section then analyzes the movie studios' case for copyright infringement against the third party editors. It examines the case under the doctrine of fair use, eventually concluding that editing by third parties should not be protected as a fair use. Finally, the section discusses the status of moral rights of authorship in the United States and examines contractual obligations between the directors and the movie studios and how these obligations factor into the right to edit movies. Part V concludes that directors are not likely to receive an injunction against third party editors under the Lanham Act. It is up to the movie studios, which own the movie copyrights, to decide if third

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supra note 14. The state claim is not discussed in this Comment, because it sufficiently overlaps the analysis under the Lanham Act.

[17] DGA Mot. to Join Studios in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[18] Michael Cieply, *Studios Go on Offensive Against Film Sanitizers Companies Are Expected to Mount an Assault on Firms that Alter Movies to Clean Them Up*, L.A.TIMES, Dec. 13, 2002, at C1. *See* Answer to Second Am. Compl. and Countercl. by studios in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Dec. 13, 2002). The studios' counterclaim also included a charge of trademark infringement and unfair competition under the Lanham Act which parallel the directors' Lanham Act claims. *Id.* This Comment focuses on the director's Lanham Act claims and the studio's copyright infringement claims.

[19] Bob Baker, *Who Can Edit a Movie? Directors Guild Files Suit; Dispute: Companies That Delete What They Describe as Objectionable Material from Videos and DVDs Violate Copyright Law, Say the Filmmakers*, L.A. TIMES, Sept. 21, 2002, at F1.

party editing should continue. Finally, this section suggests a solution that could provide directors the opportunity to protect the integrity of their artistic vision while allowing people who watch movies the freedom to watch what they feel comfortable with at home.

II. How Do Third Party Editors Clean up Movies?

There are two distinct ways in which third party editors have edited movies. This Comment identifies these two editing methods as "soft-copy" editing and "playback" editing.[20] Neither method involves physically altering the original DVD or videocassette.[21]

A. *"Soft-Copy" Editing*

The soft-copy editing method involves copying the movie onto a computer hard drive and editing it with software, or using a computer or editing board to enact the edits while copying the movie onto another tape or digital storage device.[22] The resulting edited movie is copied back onto an original lawfully purchased videocassette or burned onto a blank DVD-R and then resold in the original videocassette or DVD packaging to a home user.[23]

Companies engaged in soft-copy editing claim that since the edited copies are only replacing lawfully purchased copies, the distributors of the movies are unharmed.[24] Distributors still receive the income from the sale of the movies used to make the edited copies for the home users. The third party editor charges a premium of sometimes 100% over the original purchase price for the editing work.[25] In one variation of soft-copy editing, people can send previously purchased movies on

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[20] The name "soft-copy" editor is nomenclature created for this Comment, based on the fact that this form of editing involves making a copy. The name "playback" editing is how this Comment describes editing that becomes effective during the actual viewing of the movie. The actual "playback" edit lists are created by the playback editors before the home-user watches the movie.

[21] A third possible way of editing movies, which does not involve making a reproduction of a movie, is to physically alter the disc or videocassette.

[22] *See generally* http://www.cleanflicks.com (last visited Jan. 14, 2004); Williams, *supra* note 4. The companies classified as "soft-copy" editors are: CleanFlicks, MyCleanFlicks.com, CleanCut Cinemas, OK Inc., Family Safe Media, EditMyMovies, Family Flix, USA LLC, and Play It Clean Video.

[23] "It's done electronically to a copy of the film, which is recorded onto the original videocassette or burned onto a DVD-R inserted into the original package." Williams, *supra* note 4. The DGA also asserts that the "soft-copy" editors create a master copy when they edit a movie and use the master to make copies on videocassettes and DVDs. *See* DGA Am. Countercl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[24] Williams, *supra* note 4.

[25] *Id.* The prices are listed on http://www.cleanflicks.com (last visited Jan. 14, 2004).

DVD or videocassette to an editor who edits the movie for a service fee and places an edited copy back on the original videocassette or on a DVD-R.[26] One company that rents edited movies claims that the renters are owners of the videocassettes collectively under a co-op arrangement and, thus, have a right to edit them.[27]

B. *"Playback" Editing*

Playback editing is accomplished by a third party editor watching a movie, creating an indexed list of the places where edits should take place, and indicating the times in the movie when the objectionable scenes appear.[28] This type of editing has also been called "masking."[29] The index of edit-points is accessed from a device that the home user purchases from the third party editor, and the device temporarily blanks the picture or drops the volume during the objectionable moments when the movie is played.[30] This type of editing provides the advantage of preserving the original movie on the DVD or videocassette and does not involve making a permanent copy of the movie.

The devices can be incorporated into a DVD player or VCR, or they can be sold independently to be hooked in between a DVD player or VCR and a television.[31] Some versions of these devices have been sold as software programs that perform the edits while playing a DVD on the DVD drive of a home computer.[32]

More sophisticated versions of these devices digitally replace images in a movie.[33] One company who produces a playback editing

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[26] Williams, *supra* note 4; *see also* http://www.cleanflicks.com (last visited Jan. 14, 2004).

[27] Williams, *supra* note 4; *see also* http://www.mycleanflicks.com (last visited Jan. 14, 2004).

[28] Williams, *supra* note 4; *see also* http://www.moviemask.com (last visited Jan. 14, 2004); http://www.clearplay.com (last visited Jan. 14, 2004).

[29] *See* Trilogy's Reply and Countercl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Dec. 23, 2002).

[30] Companies who would be classified as "playback" editors are as follows: ClearPlay, Family Safe Media's TV Guardian, Trilogy's MovieMask, and Family Shield Technologies' MovieShield. Idaho attorney, Robert Huntsman has a patent pending for "playback" editing technology.

[31] Williams, *supra* note 4; *see also* http://www.familysafemedia.com (last visited Jan. 14, 2004).

[32] *See* http://www.clearplay.com (last visited Jan. 14, 2004).

[33] Trilogy demonstrated their MovieMask device for Hollywood directors. "A sword fight from The Princess Bride (1987) was altered so it looked like the characters were using Star Wars light sabers. The scene from Titanic (1997) of Leonardo DiCaprio sketching a nude Kate Winslet has been altered by covering her with a digital corset." Rick Lyman, *'Sanitized' Movies Make Hollywood Ill*, S. FLA-SUN SENTINEL, Sept. 29, 2002, at 1G.

device has reportedly signed a deal to place product advertisements into edited movies.[34]

III. THE LANHAM ACT – FALSE DESIGNATIONS OF ORIGIN, FALSE DESCRIPTIONS, AND DILUTION FORBIDDEN

The Lanham Act is the federal counterpart to the common law doctrine of unfair competition.[35] It provides a federal cause of action for "two major and distinct types of 'unfair competition': (1) infringement of even unregistered marks, names and trade dress, and (2) 'false advertising.'"[36] Traditionally the Lanham Act provides protection for trademark infringement, but the provisions have also been interpreted to provide a cause of action for authors who have been improperly credited.[37]

There are at least three distinct ways in which the conduct of the third party editors can be actionable under the Lanham Act. First, the soft-copy editors are selling the edited movies in the original packaging. This packaging may cause consumers to think that the directors or movie studios have endorsed or created the edited versions. It may also cause consumers to mistakenly purchase the edited versions. The

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[34] *Id.* "And if the directors are upset about what they have seen so far, they probably will not like to hear that MovieMask just signed a contract with a product-placement company to insert products into existing films, perhaps even region by region." *Id.*

[35] JEROME GILSON, TRADEMARKS PROTECTION AND PRACTICE § 7.02 (2002 ed.). "Section 43(a) of the Lanham Act has created a broad federal remedy against unfair competition." *Id.* The statute provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association, of such person with another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

Section 43(a), 15 U.S.C. § 1025(a) (1988).

[36] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 27:32 (4th ed. 2002). Although the word competition appears in the term "unfair competition," with the exception of the Seventh, Ninth, and Tenth Circuits, the courts have not required a plaintiff and defendant to be in direct competition in order to have standing to sue under the Lanham Act. *Id.*

[37] GILSON, *supra* note 35, at § 7.02 [6][d] ("[W]hen a performer or creative artist is miscredited—not mentioned in connection with his own work or credited for work not his own—an action may lie under Section 43(a)."); *see also* Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976) ("[A]n allegation that a defendant has presented to the public a 'garbled,' distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act, 15 U.S.C. § 1125 (a), and should be recognized as stating a cause of action under that statute." (citation omitted)).

Lanham Act prohibits use of a trademark or a false designation of origin that is "likely to cause confusion" as to affiliation, connection, or association with the rightful owners of the mark.[38]

Second, the editors may be in violation of the Lanham Act for simply leaving the name of the director or the movie title in the edited movie itself and on the packaging. Section 43(a)(1)(B) of the Lanham Act prohibits the use of false or misleading descriptions of fact in commercial advertising or promotion that misrepresent the quality of "another person's goods, services, or commercial activities."[39] Both the movie studios and the directors have argued that the edited movie versions are of inferior quality as compared to the original movies. If the edited versions are significantly different, it may be false advertising to promote the edited versions as the same movie that the director and movie studio made. Consequently, the third party editors are placed in a difficult position. They cannot simply avoid liability by removing the names of the movie studios, directors, and everyone associated with the film. Such an act would be in clear violation of Copyright law and could further be actionable under the Lanham Act as "reverse passing off."

The third possible claim under the Lanham Act differs somewhat from the first two. Even if the sale of edited movies does not cause any consumer confusion as to who authorized, endorsed, or created the edited movies, the editing could still be actionable under the Lanham Act. The sale of the edited movies may dilute the value of the famous names of the directors or the famous marks of the movie studios. "Trademark dilution" became actionable under federal law through the Federal Trademark Dilution Act of 1995, which amended the Lanham Act to include Section 43(c).[40]

A. *False Designation of Origin—A Likelihood of Confusion*

Section 43(a) of the Lanham Act prohibits use of a trademark or false designation of origin that "is likely to cause confusion, or to cause mistake, or to deceive, as to the affiliation, connection, or association of [one] person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[41]

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[38] 15 U.S.C. § 1125 (a)(1)(A) (2003).

[39] 15 U.S.C. § 1125 (a)(1)(B) (2003).

[40] Federal Trademark Dilution Act of 1995 (codified at 15 U.S.C. § 1125(c) (1995)).

[41] *See* 15 U.S.C. § 1125(a) (2003).

In June of 2003, the Supreme Court decided *Dastar Corp. v. 20th Century Fox Film Corp.*[42] Dastar released a videocassette that it produced by making minor changes to tapes of Fox's World War II television series, *Crusade in Europe*.[43] The copyright had expired on the television series leaving it in the public domain.[44] Nevertheless, Fox sued Dastar under the Lanham Act for selling the videocassettes without properly crediting the creators of the series.[45] Fox claimed that Dastar "made a 'false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of [its] goods.'"[46] The Court focused on the difficulty of determining which of the various people involved in the production and distribution of a film should be within the line of origin.[47] Ultimately, the Court refused to include the original creators of the underlying television series within the meaning of "origin of goods" under the Lanham Act.[48] The Court held that "origin of goods" extends only "to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods."[49] Dastar prevailed in a unanimous decision because it was the producer of the tangible videocassettes that it sold.[50]

At first blush, the case of the third party editors has several facts in common with *Dastar*. The soft-copy editors are the producers of the tangible edited videocassettes and DVDs that they sell. The editors have also made small changes to the underlying work. The creators of the underlying movies are suing under the Lanham Act claiming a likelihood of confusion as to the origin of the edited movies. However, there are some important differences. The television series in *Dastar* was no longer protected by copyright. The movies in the present case are still under copyright.[51] This distinction is not relevant here because copyright ownership is not necessary when seeking a remedy under the Lanham Act. But there is another twist. The soft-copy editors place the edited movies back into the original movie packaging. While *Dastar* represents a claim of "reverse passing off,"[52] the claim against the

[42] 539 U.S. 23 (2003).
[43] *Id.* at 26.
[44] *Id.*
[45] *Id.* at 26-7.
[46] *Id.* at 28.
[47] *Id.* at 28-9.
[48] *Id.* at 29.
[49] *Id.* at 31.
[50] *Id.*
[51] *See infra*, Part IV (discussing the significance of copyright).
[52] Reverse passing off means advertising someone else's product as your own product.

third party editors is for the editors "passing off"[53] their edited versions as the product of the movie creators. The soft-copy editors produce the tangible videocassettes, but they may still be "likely to cause confusion" as to the origin of their product.

There is also judicial precedent interpreting Section 43(a) of the Lanham Act to support claims of "false endorsement."[54] In the high profile case of *Waits v. Frito-Lay*, singer Tom Waits successfully brought suit against Frito-Lay for imitating his singing voice and style in a radio advertisement for SalsaRio Doritos.[55] The impersonator copied Waits' distinctive vocal style while performing a parody of Waits' song, "Step Right Up."[56] The court found that the use of the imitated voice was "likely to confuse" ordinary consumers as to whether Tom Waits sponsored or endorsed SalsaRio Doritos.[57]

The directors and movie studios assert that the editors are using their names in a way that would be "likely to confuse" or deceive the purchasing public.[58] The confusion may involve: (1) Consumers who purchase edited versions of movies believing that the directors or movie studios are affiliated with the editors or are endorsing the edited work, (2) Consumers who knowingly buy edited versions of movies believing that the directors or movie studios created the edited versions, and (3) Consumers who unwittingly buy edited versions of movies, thinking they are buying unedited versions.

The law does not require any direct, actual evidence of confusion. Such evidence of actual confusion is rarely demonstrated. Although the question of whether or not the use of a mark is "likely to confuse" is rather subjective, courts have made an attempt to place a framework around the analysis. The Court of Appeals for the Second Circuit has identified eight non-exhaustive factors, known as the Polaroid factors, to evaluate whether or not there is a "likelihood of confusion."[59]

The first Polaroid factor suggests that the stronger a senior mark is at identifying a product, the more protection it should be afforded against the junior user.[60] The most famous directors are closely identi-

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[53] Passing off means advertising your own product as being someone else's product.

[54] *See, e.g.*, Better Bus. Bureau v. Med. Dirs., Inc., 681 F.2d 397 (5th Cir. 1982); Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979); Jackson v. MPI Home Video, 694 F. Supp. 483 (N.D. Ill. 1988); Geisel v. Poynter Prods., Inc., 283 F. Supp. 261, 267 (S.D.N.Y. 1968).

[55] Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

[56] *Id.* at 1097-98.

[57] *Id.* at 1111.

[58] 15 U.S.C. § 1125(a)(1)(A) (2003).

[59] Polaroid v. Polorad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961). The other circuit courts have adopted essentially the same factor analysis.

[60] *Id.*

fied with the movies they create.[61] Steven Spielberg or Martin Scorsese would fall into this category. As a result, a court will be more likely to find a likelihood of confusion when others misappropriate these strong marks. For the lesser-known majority of Hollywood directors, a finding of likelihood of confusion is more doubtful. The movie studios will likely be given strong protection of their famous marks, which will include the titles of the movies, and any other trade dress related to the packaging of the movies.[62]

The second factor calls for a direct comparison of the two marks.[63] The more similar the marks are, the greater the chance of confusion. Both edited and unedited movie versions use the name of the director, the movie titles, and the packaging materials, so this factor favors finding a likelihood of confusion for both the director and movie studio trademarks.

The third Polaroid factor looks at the competitive proximity of the two products.[64] The edited and unedited movie versions compete for shelf space in some rental and store outlets, which tends to favor a finding of confusion.[65] However, CleanFlicks outlets only carry one version of the movie. Confusion will be less likely in stores that only carry either the edited or unedited movies.

The fourth factor looks at the likelihood that the plaintiff may enter the same market as the junior user.[66] Both the directors' unedited versions and the edited movies already occupy the same market, the market for home videos. The similarity of the markets increases the likelihood of confusion.

The fifth factor looks for evidence of actual confusion.[67] It is intuitive that evidence of actual confusion will make it easier for a court to find a likelihood of confusion. This is the most convincing and the most difficult evidence to establish in a Lanham Act case. There is currently no evidence that anyone has mistaken the edited movie versions for un-

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[61] MARTIN SCORSESE & MICHAEL HENRY WILSON, A PERSONAL JOURNEY WITH MARTINE SCORSESE THROUGH AMERICAN MOVIES 29 (Miramax Books 1st ed. 1997). "Some, like Frank Capra, Cecil B. De Mille, or Alfred Hitchcock carved a niche for themselves by excelling in a certain type of story and being identified with it. Their very name became a box-office draw. A few even achieved Capra's dream and secured their name 'above the title.'" *Id.*

[62] Trade dress would be protected where the package design is inherently distinctive or has acquired secondary meaning. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).

[63] *Polaroid*, 287 F.2d at 495.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

edited versions.[68] The directors and movie studios may conduct consumer surveys to demonstrate actual confusion to the court.

The sixth factor examines the subjective intent of the junior user.[69] The soft-copy editors have placed disclaimers on the edited movies and, thus, are consciously trying to avoid confusing consumers, so this factor does not favor finding a likelihood of confusion.

The seventh factor looks at the quality of the junior user's product. If the junior user's product is inferior to the senior user's product, more protection is afforded to the senior user. The directors and movie studios claim that the edited movies are of lower quality than the unedited movie versions. They cite the inherent story continuity problems of removing important scenes from a movie.[70] In addition, the edited DVD-R versions do not include the extra features normally found on the original DVDs. However, the proliferation of CleanFlicks stores over the last two years and the premium charged for the edited versions suggests that the public is satisfied with the quality of the altered product.[71]

The eighth factor looks at the sophistication of the purchasers.[72] The edited movies sell for upwards of twice the price of the unedited versions.[73] The willingness to pay a higher price suggests a more sophisticated purchaser who is less likely to be confused.

An overall balance of the factors supports at most a finding of likelihood of confusion for well-known directors and for the more famous movie studio trademarks. However, many Hollywood directors will have difficulty establishing a likelihood of confusion. Lesser known directors will have the burden of showing an audience connection between their names and the movies they direct. Ultimately, the potential for confusion may be resolved by placing a prominent disclaimer on the package and by inserting a message before the movie indicating that the movie is edited and is in no way endorsed or approved of by the director or movie studio. Placing the movie in a different package and removing the name of the director entirely would also help prevent the

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[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, director Brad Silberling's comments concerning the cuts made to City of Angels. Gary Gentile, *Content-Cleaning Software Angers Some*, ASSOCIATED PRESS ONLINE, Feb. 3, 2003, *available at* 2003 WL 11477085.

[71] Louis Aguilar, *Hollywood Directors Countersue against Utah-based CleanFlicks Video Chain*, KRTBN, Sept. 24, 2002, *available at* 2002 WL 100571430 ("A year ago, CleanFlicks, founded in Pleasant Grove, Utah, had fewer than 20 stores. Now it has more than 70 stores in 18 states and 440 movie titles.").

[72] *Polaroid*, 287 F.2d at 495.

[73] *See* Williams, *supra* note 4. The extra expense in purchasing edited movies may lead to more careful consumer consideration of the product.

likelihood of confusion, but could give rise to a claim of "reverse passing off" for failure to attribute the work to the director and the rest of the people who created the movie.[74]

B. *False Advertising—Misattribution of Work*

The Lanham Act prohibits anyone from making false or misleading descriptions of fact "in commercial advertising or promotion, [that] misrepresent[ ] the nature, characteristics, qualities, or geographic origin of [someone's] goods, services, or commercial activities."[75] Courts have expanded the false advertising doctrine to prohibit misrepresentations of credits even though a movie would not typically be considered a commercial advertisement or promotion.[76] A misattribution of a director's credit in a movie is commercial in the sense that it induces someone to buy the movie or pay to see it.[77] The directors could assert that the soft-copy editors are liable for misattribution of the directors' work. Such a claim will depend on whether or not the movies are significantly altered during the editing so as to no longer be the directors' work.[78]

If the editing job were substantial to the point of creating an entirely different movie, then crediting the director's name on the movie would almost certainly be false advertising.[79] However, for many of the edited movies the degree of misattribution will fall short of creating an entirely new movie. The more appropriate question will be whether the purchasers are likely to be misled by the misrepresentations.[80]

The most noteworthy example of a misattribution of work claim under the Lanham Act is *Gilliam v. ABC*.[81] ABC broadcast an edited version of Monty Python's "Flying Circus" from which they removed twenty-four minutes from three programs totaling ninety minutes.[82] While ABC removed the footage to accommodate commercial interruptions, they also made the edits to remove anything that the network felt might be offensive.[83] Consequently, ABC removed important parts of the comedy skits including "essential elements in the schematic de-

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[74] 15 U.S.C. § 1125(a)(1)(A) (2001); GILSON, *supra* note 37, § 7.02 [6][e][ii].

[75] 15 U.S.C. § 1125(a)(1)(B) (2001); GILSON, *supra* note 37, at § 7.02 [6][d].

[76] *Gilliam*, 538 F.2d at 24; GILSON, *supra* note 37, at § 7.02 [6][d].

[77] *Id.*

[78] *See Gilliam*, 538 F.2d at 24.

[79] Stephen King v. Innovation Books, 976 F.2d 824, 829 (2d Cir. 1992).

[80] Rosenfeld v. W.B. Saunders, 728 F.Supp. 236 (S.D.N.Y. 1990).

[81] *See Gilliam*, 538 F.2d at 14.

[82] *Id.* at 18.

[83] *Id.*

velopment of a story line" and the climax of some of the skits.[84] The Second Circuit found the editing to have "impaired the integrity of [Monty Python's] work and represented to the public a mere caricature of their talents."[85] The viewing public was likely to be misled by this misrepresentation because for many viewers this was their first impression of Monty Python.[86] The court then issued a preliminary injunction preventing future broadcasts.[87]

The directors' case differs from *Gilliam* in that the edited movies are not broadcast on television. The viewing public may be more likely to be misled by an edited movie on television than a movie on videocassette or DVD that they intentionally purchase, paying a premium. This would be especially true if the package had a disclaimer. Placing a disclaimer at the beginning of the program was deemed inadequate in *Gilliam* because viewers who tuned in a few minutes late would miss it.[88] The court also suggested that a disclaimer might be inadequate at overcoming the permanent image created in the viewer's mind from watching the altered work.[89] It would be more difficult to argue that people will miss a prominently placed disclaimer on a DVD or video.

If people understand that they are watching an edited movie, there would still be a question as to which elements of the movie result from the director's choices and which come from the editor. This issue becomes more of a problem if the edits are subtle. On the other hand, people who purchase an edited movie probably do so because they know specific content has been removed. They would know that the absence of profanity, nudity, or graphic violence was the work of the editor. What they might not be able to tell is whether the edits have made the story less coherent, removed the punch-line to a joke, or changed the mood of a scene.[90]

The final element in establishing a claim of false advertising is to show a likelihood of being damaged by the act.[91] Even if viewers are misled about the director's abilities by watching the edited movies, it is unclear that this misrepresentation is likely to harm the director. Some purchasers of the edited movies only watch *because* the work is edited and would not have paid to see the director's work otherwise. Those

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[84] *Id.* at 25.
[85] *Id.*
[86] *Id.* at 19.
[87] *Id.* at 25.
[88] *Id.*
[89] *Id.*
[90] These changes would be similar to the changes made by ABC in *Gilliam*. *See Gilliam*, 538 F.2d at 25 n.12.
[91] 15 U.S.C. § 1125(a) (2003).

who watch the edited movies, but also at times watch unedited movies, still have the option of watching the unedited version before making up their minds on the director's ability. The use of a disclaimer may also lessen the likelihood of harm from the use of the directors' names on the substantially edited movies. In summary, because the directors will be unable to show likelihood of damage, a false advertising claim under the Lanham Act is not likely to succeed.

C. *Dilution*

The concept of dilution in American law is widely attributed to Professor Frank I. Schechter who espoused its importance in his 1927 article entitled, "The Rational Basis of Trademark Protection."[92] In that article, Professor Schechter describes dilution as "the gradual whittling away or dispersion of identity and hold upon the public mind of the mark or name by its use upon non-competing goods."[93] Since that time, more than half of the states have enacted anti-dilution statutes.[94] In 1995, Congress enacted the Federal Trademark Dilution Act ("FTDA"), which amended the Lanham Act to include a federal cause of action for dilution.[95] Dilution is defined under the Lanham Act as the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of: (1) the presence or absence of competition between the owner of the famous mark and other parties; or (2) the likelihood of confusion, mistake, or deception.[96]

Traditionally, dilution falls into two categories: blurring and tarnishment.[97] Blurring takes place when the use of the plaintiff's famous mark in an unrelated business lessens the ability of that mark to serve as a unique identifier of the plaintiff's product.[98] Blurring also occurs whenever a junior mark is identical or sufficiently similar to a famous mark, such that persons viewing the two will instinctively make a "mental association" between the two.[99] Tarnishment occurs "when a famous mark is improperly associated with an inferior or offensive

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[92] 40 HARV. L. REV. 813 (1927).

[93] *Id.* at 825.

[94] For a list of the state anti-dilution statutes, see Daniel H. Lee, *Remedying Past and Future Harm: Reconciling Conflicting Circuit Court Decisions Under the Federal Trademark Dilution Act*, 29 PEPP. L. REV. 689, 700 n.92 (2001).

[95] Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c).

[96] "Dilution" is defined in 15 U.S.C. § 1127 (2003).

[97] Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1326 (9th Cir. 1998).

[98] *Id.* (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §24:68 at 24-111 (4th ed. 2002)).

[99] Ringling-Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 452 (4th Cir. 1999).

product or service."[100] Although the concepts behind blurring and tarnishment are important for understanding the concept of dilution, neither is required under the FTDA.[101]

There are five elements necessary to a dilution claim under the FTDA.[102] They are: (1) the senior mark must be famous; (2) it must be distinctive; (3) the junior use must be a commercial use in commerce; (4) it must begin after the senior mark has become famous; and (5) it must cause dilution of the distinctive quality of the senior mark.[103]

The elements of fame and distinctiveness will likely be established for the most famous directors who are well known throughout the United States or, in some cases, worldwide. These directors have achieved celebrity status and are often touted by name to help market the films they direct.[104] The fact that the director's name is prominently featured in the movie credits, on movie posters, and on the DVD or videocassette, helps to satisfy the famousness requirement.[105] The movie studios will have an easy time establishing that many of their movies have well-known, famous titles. However, not all movie titles will qualify as famous for protection under the FTDA.

The names of the most famous directors are distinctive in that people generally think of their names in relation to popular movies.[106] The movie studios should be able to establish that some of their movie titles are distinctive. However, many of the directors who are represented by the Directors Guild of America will not demonstrate the famousness or

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[100] *Id.* (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:104 at 24-172 to 173 (4th ed. 2002)).

[101] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 427-28 (2003).

[102] 15 U.S.C. § 1125(c) (2003).

[103] Nabisco, Inc. v. PF Brands, 191 F.3d 208, 215 (2d Cir. 1999).

[104] For example, James Cameron and Steven Soderbergh have prominent placement on marketing for *Solaris* (20th Century Fox 2002). Other examples include Stanley Kubrick's *Eyes Wide Shut* (Warner Bros. 1999) and Steven Spielberg's *A.I.* (Warner Bros. 2001).

[105] While the first or last names of the directors may be common among less famous directors, a court would likely apply the "anti-dissection rule . . . which serves to remind courts not to focus only on the prominent features of the mark, or only on those features that are prominent for purposes of the litigation, but on the mark in its totality." V Secret Catalogue, Inc. v. Moseley, 259 F.3d 464, 470 (6th Cir. 2001), *rev'd*, 537 U.S. 418 (2003).

[106] *Nabisco*, 191 F.3d at 215.

> Distinctiveness in a mark is a characteristic quite different from fame. Distinctiveness is a crucial trademark concept, which places marks on a ladder reflecting their inherent strength or weakness . . . . The most distinctive are marks that are entirely the product of the imagination and evoke no associations with human experience that relate intrinsically to the product. The arbitrary or fanciful quality is what renders the mark distinctive; another seller of the same product or service would have no justification for using the same or a similar mark.

Id. at 215-16.

distinctiveness required for protection under the FTDA.[107] These non-famous and perhaps not so distinctive directors will need the benefit of a broad injunction against the editors if their work is to be left unedited.

The requirement of famousness also ties into the fourth element, which requires the junior use to begin after the senior mark has become famous.[108] For the directors that are currently famous, this requirement does not pose a problem. However, the unknown directors who later become famous will presumably not have a cause of action for previous editing of their earlier work, because the editing will have taken place before the mark became famous. It is not clear whether a court would need to determine the fame status of a director each time a director makes a movie, to decide if his or her movies can be edited. A broad injunction prohibiting third party editing or allowing it may keep unnecessary litigation costs down but may also involve protection for non-famous directors who fail to meet the statutory standard of dilution under the FTDA. It is important to note that third party editing takes place after release on DVD or video. Major-studio-release movies will have time to become famous from a theatrical run before being released on DVD or video. During the theatrical run, studios will market the titles of the films nationwide. Consequently, the movie studios will probably have an easier time establishing the prior famousness element in a dilution claim. Directors may also benefit from the theatrical release of their movies, but only to the extent that the studio or the press prominently use their names.

The third element of a dilution claim requires that the junior use must be a commercial use in commerce.[109] The soft-copy editors are selling and renting the movies that they have edited.[110] The directors' names are credited and are printed on the DVD or videocassette packaging and, thus, would be a commercial use in selling the edited movies. The movie titles and packaging materials are also on the edited movies that are sold. The companies that offer to edit a previously purchased personal copy of a movie are engaged in a commercial enterprise but may claim not to be using the director's name or the movie titles in commerce. A court will probably still find the practice of shipping back

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[107] The DGA represents more than 1,000 directors. Most of these directors are not famous and/or distinctive.

[108] *Nabisco*, 191 F.3d at 215. If the director's name automatically becomes famous upon use on a movie distributed nationwide, then any use by the editors would always come after the senior mark was famous.

[109] *Nabisco*, 191 F.3d at 215; *see also* 15 U.S.C. §1125(c) (2003).

[110] *See* Williams, *supra* note 4; *see also* http://www.cleanflicks.com (last visited Jan. 14, 2004).

the edited copy in the original package satisfies "use of the mark in commerce."

The final and most important element to establish in a claim of dilution under the FTDA is the requirement that the junior use "causes dilution" of the distinctive quality of the famous mark.[111] In February 2003, the Supreme Court attempted to resolve a sharp division between the circuit courts as to what is meant by the words "causes dilution."[112] Prior to the Supreme Court decision in *Moseley v. V Secret Catalogue*, there were two competing interpretations of this phrase.[113]

In *Ringling Bros. Barnum and Bailey Combined Shows v. Utah Division of Travel Development*, the Court of Appeals for the Fourth Circuit interpreted the FTDA to require a plaintiff to demonstrate the following:

> (1) a sufficient similarity between the junior and senior marks to evoke an "instinctive mental association" of the two by a relevant universe of consumers which (2) is the effective cause of (3) an actual lessening of the senior mark's selling power, expressed as "its capacity to identify and distinguish goods or services."[114]

The deciding and most important part of the test set forth in *Ringling Bros.* is the stringent requirement of objective proof of an actual harm to the senior trademark's selling power.[115]

Under the Fourth Circuit approach, set forth in *Ringling Bros.*, the directors would need to prove actual economic injury from the sale of the edited movies.[116] Presumably the directors would have to show a reduction in revenue that occurred with the use of their names on edited movies. The problem for the directors is that the marginal increase in the sale of movies that are converted into edited copies will also

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[111] "The fifth element, 'dilution of the distinctive quality of the mark' is the key operative element of the statute." *Nabisco*, 191 F.3d at 216; *see* 15 U.S.C. §1125(c)(1) (2003).

[112] Moseley v. V Secret Catalogue, 537 U.S. 418 (2003).

[113] *See, e.g.*, Daniel H. Lee, *Remedying Past and Future Harm: Reconciling Conflicting Circuit Court Decisions Under the Federal Trademark Dilution Act*, 29 PEPP. L. REV. 689 (2002); Jennifer Mae Slonaker, *Conflicting Interpretations of the Federal Trademark Dilution Act Create Inadequate Famous Mark Protection*, 26 U. DAYTON L. REV. 121 (2000); Paul Edward Kim, *Preventing Dilution of the Federal Trademark Dilution Act: Why the FTDA Requires Actual Economic Harm*, 150 U. PA. L. REV. 719 (2001).

[114] *Ringling Bros.*, 170 F.3d at 458. "This concededly is a stringent interpretation of 'dilution' under the federal Act." *Id.*

[115] *Ringling-Bros.*, 170 F.3d at 461 ("[I]n place of the 'likelihood of dilution' language of the state antidilution statutes, the [federal Act] . . . creates an *actual* dilution requirement") (citing Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 840 (1997))).

[116] *Ringling-Bros.*, 170 F.3d at 458 ("[B]y specifically defining dilution as 'the lessening of the capacity of a famous mark to identify and distinguish goods or services,' the federal Act makes plain what the state statutes arguably may not: that the end harm at which it is aimed is a mark's selling power, not its 'distinctiveness' as such.").

result in an increase of residuals paid to the director. If the use of the directors' names on edited movies takes many years before negatively affecting sales of the directors' movies, this potential dilution could not be taken into account for an action today.[117] The directors will not be able to show any direct proof of actual economic harm and, thus, would not prevail on a dilution cause of action under the Fourth Circuit test.

In *Nabisco Inc. v. P.F. Brands, Inc.*, the Second Circuit rejected the Fourth Circuit requirement of actual harm.[118] Instead, the court interpreted the phrase "causes dilution" to mean "likely to suffer economic harm in the future."[119] In other words, a plaintiff could be granted an injunction by merely showing a "likelihood of dilution."[120] The *Nabisco* court listed ten non-exclusive factors to be used in finding a "likelihood of dilution."[121]

The *Nabisco* decision was short-lived. In February of 2003, the Supreme Court decided the case of *Moseley v. V Secret Catalogue*, in which the key issue was whether or not proof of actual harm was necessary to prove dilution under the FTDA.[122] In *Moseley*, the Supreme Court made clear that the words "causes dilution" meant that the FTDA required a showing of actual dilution of the famous mark rather than a mere "likelihood of dilution."[123] The *Moseley* opinion rejected *Nabisco* in so far as *Nabisco* allowed potential future dilution to be actionable. However, the Court stated that it is not necessary to prove the *effects* of actual harm, such as a loss of sales or profits, as suggested by the Fourth Circuit in *Ringling Bros.*[124] The Court left open the possibility of proving actual dilution without any "direct evidence of dilu-

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[117] *Id.* at 460-61 ("[T]he conduct proscribed is that which 'lessens' capacity, not that which 'will' or 'may' lessen.").

[118] *Nabisco*, 191 F.3d at 223.

[119] *Id.* at 224-25 ("[W]e read the statute to permit adjudication granting or denying an injunction, whether at the instance of the senior user or the junior seeking declaratory relief, before the dilution has actually occurred.").

[120] *Id.*

[121] *Id.* at 217-22. The *Nabisco* factors are: (1) distinctiveness, (2) similarity of the marks, (3) proximity of the products and the likelihood of bridging the gap, (4) interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products, (5) shared consumers and geographic limitations, (6) sophistication of consumers, (7) actual confusion, (8) adjectival or referential quality of the junior use, (9) harm to the junior user and delay by the senior use, and (10) effect of senior's prior laxity in protecting the mark. *Id.*

[122] Moseley v. V Secret Catalogue, 537 U.S. 418 (2003); see also Amicus Brief No. 01-1015 in *Moseley v. V Secret Catalogue*, in which the Solicitor General Theodore Olson argued that the Court should find a "likelihood of dilution" standard that does not require proof of actual harm to prevail under the FTDA.

[123] *Moseley*, 537 U.S. at 433.

[124] *Id.* at 433-34.

tion such as consumer surveys."[125] In cases where the marks are identical, mere circumstantial evidence of actual dilution could be sufficient to find dilution.[126] The Court did not answer the question of what type of circumstantial evidence would suffice. In conclusion, it may still be possible for the directors to demonstrate circumstantial evidence of actual harm, despite the holding in *Moseley*.

D. *The Lanham Act Case against the "Playback" Editors*

The sellers of the playback editing devices do not sell a product with the director's name on it. It will be difficult for the directors to make out a Lanham Act case against them.[127] The movie studios may have a better case if the playback editors actually use the movie titles to sell the editing devices. The directors have argued a theory of contributory infringement of the Lanham Act because the playback editing device leaves the director's name on the edited movie that it displays.[128] This argument is not persuasive because the home users are not infringing the Lanham Act by watching the movies. Without a direct infringement, there can be no contributory infringement by the playback editors. Another important requirement to a Lanham Act claim is that use of the mark must be "in commerce."[129] Personal home use will not be considered "in commerce" and thus it is not actionable. If the sale of the device satisfies use in commerce, then any confusion caused by the device could be eliminated by the home user turning off the playback editing device and watching the unedited movie.[130] Further, the playback editing device could also be made to display a disclaimer message when playing the edited movies. So long as these companies do not advertise their device with the names of the directors or make false or misleading descriptions, or false designations of origin concerning the movies that the device edits, there will be no Lanham Act cause of action against them.[131]

IV. Copyright Infringement

American copyright law offers protection to the copyright owners of motion pictures in the form of several exclusive rights.[132] These ex-

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[125] *Id.*

[126] *Id.* at 434.

[127] 15 U.S.C. § 1125(a) (2003).

[128] *See* DGA Countercl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[129] *See* 15 U.S.C. § 1125(a)(1) (2003).

[130] This assumes that a person would be willing to watch the unedited version.

[131] *See* 15 U.S.C. § 1125(a)(1) (2003).

[132] 17 U.S.C. § 106 (2003), which states:

clusive rights include the right to make copies, distribute copies by sale or rental, and to prepare derivative works.[133] There are also provisions granting the copyright owners exclusive rights to the public performance of a motion picture and to display the individual frames of a motion picture.[134] Absent a fair use exception, the third party editors may well be treading on the exclusive rights of the motion picture copyright owners.[135] The law allows the copyright owner to seek an injunction or even monetary relief for actual damages or loss of profits as a result of the copyright infringement.[136]

A. *Standing to Sue*

The problem with the directors bringing a suit for copyright infringement is that the directors do not own the copyrights in the movies.[137] In all but a few cases, the director is an employee of the studio.[138] Copyright law makes clear that work done in the scope of employment belongs to the employer.[139] The major studios own the

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Exclusive Rights in Copyrighted Works Subject to sections 107 through [122], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
to reproduce the copyrighted work in copies or phonorecords;
to prepare derivative works based upon the copyrighted work;
to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

[133] *See* 17 U.S.C. § 106 (1), (2), and (3) (2003).

[134] *See* 17 U.S.C. § 106 (4) and (5) (2003).

[135] *See* 17 U.S.C. § 107 (2003). For analysis of fair use, refer to *infra* Section III.E.

[136] 17 U.S.C. § 502 (2003) Remedies for Infringement: Injunctions; 17 U.S.C. § 504 (2003) Remedies for Infringement: Damages and Profits.

[137] *See* DGA Mot. To Join Studio Copyright Owners in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[138] *Id.*

[139] 17 U.S.C. § 201(b) (2003).

(b) Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Id. See the definition under 17 U.S.C. §101 (2003):

A 'work made for hire' is— (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work; as a part of a motion picture or other audiovisual work, as a

movie copyrights as "works made for hire."[140] Thus, if the third party editors are infringing these copyrights, it is up to the major studios to bring the infringement action.[141] Consequently, the eight major studios have decided to file a copyright infringement suit against the editors. Had the studios decided not to file the infringement claim, the directors may have attempted to gain standing as beneficial owners of the copyrights. The copyright law states that both owners and beneficial owners of a copyright may sue on behalf of that copyright.[142] The directors receive residual payments on the continued lawful use of the copyright.[143] They may have been able to assert status as beneficial owners under the theory that the studios own copyrights in equitable trust for the directors.[144] A case illustrative of beneficial ownership is *Cortner v. Israel*.[145] In *Cortner*, the two plaintiff composers created the musical score for ABC's "Monday Night Football" and later assigned all rights in the copyright to ABC for a lump sum payment and the chance to receive royalty payments on the use of the music.[146] Four years later, ABC hired a new composer to create a derivative theme based on the plaintiffs' work and discontinued use of the original theme.[147] The court decided that the plaintiffs were beneficial owners of the copyright and thus had standing to sue to protect their copyright interest.[148]

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translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

[140] *See* DGA Mot. To Join Studio Copyright Owners in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Sept. 20, 2002).

[141] 17 U.S.C. § 501(b) (2003) ("The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

[142] *See* 17 U.S.C. § 501(b) (2003).

[143] *See generally* Alliance of Motion Picture & Television Producers and Directors Guild of America, Inc. Basic Agreement of 1999 (hereinafter "DGA BA"), art. 18. Provision 18-104 lists the residual payments for use of theatrical motion pictures in supplemental markets, which include videocassette and DVD distribution.

[144] *See* DAVID NIMMER, NIMMER ON COPYRIGHT §12.02(C) (2003) "[A] 'beneficial owner' for this purpose would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees." *Id.* (citing H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 159). The theory of "Beneficial ownership" comes from "In Rem Theory" of the law of trusts. *Id.* Beneficiaries, although not the legal holders of property in trust, are considered equitable holders of the property. *Id.* Under the theory that beneficiaries own an "in rem" interest in the trust property, the beneficiary could sue to protect the equitable interest. *Id. See* GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 183 (Rev. 2d. ed. 1979).

[145] 732 F.2d 267 (2d Cir. 1984).

[146] *Id.* at 269.

[147] *Id.* at 270.

[148] *Id.* at 271.

However, they could not successfully sue ABC or its employees because ABC, as the rightful owner of the copyright in the underlying theme, did not infringe the copyright in creating the derivative work.[149]

In the present case, the directors could seek beneficial ownership status to sue the third party editors. Like the composers in *Cortner* who received beneficial ownership status to protect their interest in royalty payments, the directors could presumably sue to protect their residual payments. However, the activities of the third party editors, which may amount to infringement, likely will not prevent the directors from receiving their residual payments. Both the soft-copy editors and playback editors require the end user to lawfully purchase a copy of a movie.[150] Thus, the justification of a suit to protect the residuals may be lost.[151] While the *Cortner* opinion suggests that beneficial ownership status is required to protect against a potential wrongdoer's infringement, it does not state a requirement that the royalty or residual payment must be jeopardized by the infringement.[152] There is a larger obstacle that stands in the way of directors obtaining beneficial ownership status. The directors never assigned away the rights in the copyrights of the movies.[153] As employees under the statutory provisions for "works made for hire," they never owned the copyrights in the first place.[154]

In *Moran v. London Records, Ltd.*, the Court of Appeals for the Seventh Circuit addressed the question of whether or not an employee in a "work made for hire" relationship could sue based on the copyright as a beneficial owner.[155] The plaintiff was an announcer who was hired by the Quaker Oats Company to perform in a dog food commercial as an employee in a "work made for hire."[156] A musician who was unrelated to the Quaker Oats Company and had no rights in the commer-

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[149] *Id.* at 271-72.

[150] *See* Williams, *supra* note 4. "Every edited video is placed on a legally purchased tape, so the studio and its distributors are not cheated out of their rightful compensation." *Id.* (quoting one of the soft-copy editors); *see also*, Compl. For Declaratory Relief in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Aug 29, 2002).

[151] If the copyright infringement suit is brought under a theory of beneficial ownership, it would presumably be to protect the directors' residual payments. If the editing does not cause any loss in DVD or videocassette sales, then the there is no threat to the residuals. However, the residual payments may only be necessary to establish beneficial ownership status for directors. The residual payments themselves are irrelevant to a copyright infringement action.

[152] *Cortner*, 732 F.2d at 271.

[153] *See* Item No. 14 of CleanFlicks Compl. in Hunstman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Aug 29, 2002).

[154] 17 U.S.C. § 201(b) (2003), *supra* note 139.

[155] 827 F.2d 180, 183 (7th Cir. 1987).

[156] *Id.* at 181-82.

cial, "sampled" a recording of the plaintiff's performance in the commercial and used it in a song which defendant, London Records, distributed on a phonorecord.[157] The plaintiff sought beneficial ownership status in order to sue the infringing record company.[158] The court cited an older district court opinion and took note of legislative history in finding that beneficial ownership status should not be conferred on employees who perform "works made for hire."[159] The *Moran* court may have been presumptive in arriving at the conclusion that Congress did not intend to confer beneficial ownership status on employees who perform "works made for hire." There is no statutory provision preventing employees from becoming beneficial owners.[160] Further, the only evidence that Congress did not intend to allow employees to become beneficial owners was a single situation mentioned in the Congressional record, which involved a copyright owner who assigned his rights away in exchange for royalties.[161] The *Moran* court then proposed that the plaintiff should have contracted to secure the ownership of the copyright or an exclusive right under the copyright.[162] This solution is impractical considering the respective bargaining positions of the parties.

Considering the difficulty that the directors would have faced in asserting beneficial ownership status, they are fortunate that the studios decided to sue the third party editors for copyright infringement. Initially, the studios were not quick to get involved in the dispute. It is not clear that the movie studios lose any sales from the third party editors' activities. Both the soft-copy and playback editors require the viewer to lawfully purchase a copy of the movie.[163] The result is that the studios will likely enjoy a marginal increase in DVD and videocassette sales from purchasers who otherwise would not buy the movies with objectionable content. However, the studios receive none of the profits from the editing services or from the sale of the home playback editing devices. They also have no say in what the editors are doing with the movies. Ultimately, the studios will want to license third party editors or to reserve the editing market entirely for themselves. The studios

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[157] *Id.* at 181.

[158] *Id.* at 182.

[159] *Id.* at 183.

[160] "Beneficial owner" is not defined in 17 U.S.C. § 101 (2003). Also, 17 U.S.C. § 501(b) (2003) does not include any language indicating that an author must assign away his/her copyright in order to become a beneficial owner.

[161] *Cortner*, 732 F.2d at 272.

[162] *Moran*, 827 F.2d at 183.

[163] Williams, *supra* note 4.

have a strong case for copyright infringement, as discussed in the following sub-sections.

B. *Violation of Reproduction and Distribution Rights*

The exclusive right to reproduce copyrighted work is the first right guaranteed by statute to copyright owners.[164] This right generally covers any reproduction, including those made privately.[165] In addition, the right to distribute copies of a copyrighted work to the public by sale, or other transfer of ownership, or by rental, lease or lending is exclusively left to the copyright owner.[166]

The soft-copy editors are making unauthorized reproductions of the movies in order to edit them for content.[167] The editing process itself may involve making several reproductions, but placing the edited version of a movie onto a videocassette or DVD-R is a clear reproduction of substantially the entire movie. The making of these reproductions would presumptively be an infringement, pending a fair use exception. In addition, by selling the edited copies or renting them out, the soft-copy editors have violated the exclusive rights of the studios to distribute the movies.[168] The distribution right is limited by the First Sale Doctrine, but this doctrine only applies to lawfully made copies.[169] The edited movies do not qualify.[170]

The playback editors do not make copies of the movies. However, the software that is used to reference points in the movies where certain objectionable scenes occur may still infringe on the right to copy the movie.[171]

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[164] 17 U.S.C. § 106(1) (2003).

[165] *Id.* The exclusive rights (1) and (2) in § 106 are not limited to "commercial" reproductions or preparation of derivative works.

[166] 17 U.S.C. § 106(3).

[167] Brian McTavish, *'Clean' Movies Spark Lawsuits; Companies Selling Edited Versions of Hollywood Films*, HAMILTON SPECTATOR, Sept. 30, 2002, at C14 (stating that "[s]everal companies, most based in the Beehive State, are busy altering Hollywood's hottest hits on video and DVD without the approval from the filmmakers or the copyright-holders.").

[168] 17 U.S.C. § 106(3).

[169] 17 U.S.C. § 109 (2003).

[170] *Id.* § 109(a) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

[171] *See* NIMMER, *supra* note 144, § 8.01 [G]; Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986) (finding a ballet photograph to have infringed in a book the reproduction right of a copyrighted ballet performance despite being in a different medium).

C. *Violation of Right to Prepare Derivative Works*

A copyright owner enjoys the exclusive right to prepare derivative works.[172] This right covers works that incorporate, in some form, a part of the copyrighted work.[173] The derivative works can be in any form in which the original work is "recast, transformed, or adapted."[174] It is possible to prepare a derivative work without making a reproduction.[175]

The soft-copy editors are preparing derivative works by creating the edited movie versions. The preparation of these derivative works involves a violation of the reproduction right.[176] The provision could still be significant if third party editors find a way to edit the movies without making a copy or if there is a copyright exception allowing a copy to be legally made. The editors would still be infringing the exclusive right of the copyright owner to prepare derivative works. In determining whether or not the edited movies are derivative works, the question is whether or not the original movies have been altered enough to be "recast, transformed, or adapted."[177]

There are three schools of thought as to how much the original must be altered to be considered a derivative work.[178] In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, the Court of Appeals for the Ninth Circuit found that mounting a decorative tile in a frame constituted a derivative work because the tile was permanently bonded to the frame.[179] The *Mirage Editions* holding was controversial for finding that this seemingly minor transformation was enough to result in the infringement of the right to prepare derivative works.[180]

In *Lee v. A.R.T.*, the Seventh Circuit, when faced with similar facts, concluded that mounting a tile on a frame does not transform,

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[172] 17 U.S.C. § 106(2).

[173] H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 62 (1976).

[174] 17 U.S.C. §101 (2003).

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

Id.

[175] Nat'l Geographic Soc'y v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939).

[176] *See* discussion *infra* Part III.B.

[177] Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997).

[178] *Id.*

[179] Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988).

[180] *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 255 n.401 (1992).

adapt, or recast the original work.[181] The court found this activity to be closest to a transformation but decided that this was not enough to infringe the derivative work right.[182]

Professor David Nimmer suggests a third possibility for determining whether or not a work is altered enough to be considered a derivative work.[183] Nimmer proposes that in order to be considered a derivative work, the alteration must create a work that is sufficiently creative enough to be independently copyrightable, had the use of the underlying work not been infringing.[184]

Under the Ninth Circuit, perhaps a few simple changes to a movie could result in the new version being considered a derivative work.[185] However, neither the Seventh Circuit nor the Nimmer test would likely find most edited movies to be derivative works. The Seventh Circuit may not even consider the edited movies to be transformative of the original. Had the studios simply removed profanity and clipped a few scenes, it is not likely that the resulting movie would be sufficiently original to receive independent copyright protection. If additional footage were added to movies, or if new images were placed on top of original footage, there would be a much better case for calling the resulting movie a derivative work under all three tests.[186]

A more complicated question is whether or not the playback editors are infringing the derivative work right. The playback editing device does not require reproduction of any part of the unedited movies. However, a derivative work must incorporate protected material from a pre-existing work.[187] The use of the pre-existing work can amount to facsimile reproduction as demonstrated above in the case of the soft-copy editors. Actionable copying may also occur in a different medium in any form "otherwise duplicated, transcribed, imitated, or simulated."[188] In any case, the test for infringement will be whether or not the new work is substantially similar in ideas and expression to the pre-

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[181] *Lee*, 125 F.3d at 582.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See Mirage Editions*, 856 F.2d at 1343-44.

[186] The additional footage may be sufficiently transformative to meet Seventh Circuit standard and could satisfy the Nimmer test of sufficient original expression. *See* Lyman, *supra* note 33 (discussing devices that digitally superimpose new images over an existing movie).

[187] H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 62 (1976); *see also* Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).

[188] *See* Addison-Wesley Pub'g Co. v. Brown, 223 F. Supp. 219, 227 (E.D.N.Y. 1963); *see also* NIMMER, *supra* note 144, §8.01[F] (suggesting the possibility of infringing the derivative work right even when no protectible expression is copied).

existing copyrighted work.[189] How is it possible to compare the playback editing device with a movie? The Ninth Circuit has twice approached the question of whether or not works that electronically reference pre-existing works, without reproducing any of the pre-existing work, should be considered derivative works.[190]

In *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, the plaintiff Nintendo sued Galoob Toys for marketing a product named the Game Genie.[191] The Game Genie could be connected between the Nintendo video game console and video game cartridges inserted into the console.[192] The Game Genie allowed the home user to manipulate the characteristics of video games by selectively blocking information bits traveling from the game cartridge to the game console.[193] The home user did not have to know anything about the electronics of the Game Genie; he or she could merely enter codes that were predetermined by the Game Genie manufacturer to cause the desired effect on the video game output.[194] Nintendo argued that the Game Genie produced audiovisual displays that should have been compared to the original displays produced by the game console without the Game Genie interface.[195] While the court did not disagree with comparing the resulting audiovisual output, it made clear that "a derivative work must incorporate a protected work in some concrete or permanent form."[196] The court focused on the actual source of the Game Genie's display.[197] It determined that the Game Genie was useless by itself and could not recast a Nintendo game's output.[198] The source of the display was not in concrete form because there were billions of ways in which Game Genie codes could change the game.[199] The court concluded that the Game Genie did not contain or produce a video game's output and thus was not a derivative work.[200]

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[189] Judge Learned Hand's test asks whether an ordinary observer would regard two items to have the same aesthetic appeal. Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[190] Micro Star v. Formgen, Inc., 154 F.3d 1107 (9th Cir. 1998); Lewis Galoob Toys v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992).

[191] 964 F.2d at 967.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 969.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

In *Micro Star v. Formgen, Inc.*, the Ninth Circuit again considered the question of whether or a not a work that electronically references a pre-existing work should be considered a derivative work.[201] This case involved a third party company, Micro Star, that marketed a CD-ROM containing new levels for use in the popular computer game, Duke Nukem 3D.[202] Duke Nukem 3D consisted of three parts: the game engine, source art library files, and MAP files.[203] MAP files indicated the positions of objects in the virtual game world.[204] The game engine referenced the MAP files and then applied the source art to create the images on the computer screen.[205] Micro Star sold independently created MAP files.[206] While Micro Star tried to analogize the MAP files to the Game Genie in *Galoob*, the court disagreed.[207] The audiovisual display that appears on the computer screen was described in exact detail within the MAP files and, thus, was in permanent or concrete form for the purposes of *Galoob*.[208] Although the MAP files themselves did not reproduce any part of the original game, the court found that audiovisual display generated by using the MAP file was substantially similar in both ideas and expression to the original game.[209] The court concluded that the MAP files were derivative works that infringed the story of the Duke Nukem 3D game, in effect creating an unauthorized sequel.[210]

Applying the Ninth Circuit analysis, the playback editing device is somewhere in between the Game Genie and the Duke Nukem 3D MAP files. The device interfaces the VCR or DVD player and electronically skips objectionable movie scenes and lowers the volume when profanity is spoken.[211] The device is similar to the Game Genie in that they both alter the visual output that the user experiences. The Game Genie blocks information between the game cartridge and the console, whereas the playback editing device blocks information sent from the VCR or DVD player to the television. Both the Game Genie and the playback editing device would be useless by themselves. Neither of the two devices reproduces any information from the pre-

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[201] Micro Star v. Formgen, Inc., 154 F.3d 1107 (9th Cir. 1998).
[202] *Id.* at 1109.
[203] *Id.* at 1110.
[204] *Id.*
[205] *Id.*
[206] *Id.* at 1109.
[207] *Id.* at 1111.
[208] *Id.* at 1111-12.
[209] *Id.* at 1112.
[210] *Id.*
[211] *See* Williams, *supra* note 4 (providing descriptions of ClearPlay, MovieMask, and MovieShield).

existing works they interface. The key difference is that the playback editing device contains an index with the locations of the edits. This indexed list analogizes better to the MAP files because both are specific descriptions for generating audiovisual output. Thus, the indexed list would be a concrete or permanent form for the purposes of *Galoob*.

In order to find an infringement of the derivative work right, the audiovisual output generated by the playback editing device must be substantially similar in ideas and expression to the original movie.[212] There is little doubt that the edited and unedited movie versions will share the same "concept and feel."[213] The plot, theme, dialogue, mood, setting and characters would also be the same.[214] However, the analogy to the MAP Files in Micro Star is not complete. The *Micro Star* court likened the MAP files to sequels of the Duke Nukem 3D game.[215] The MAP files contained new adventures for the game player.[216] Once again, the question arises as to whether or not the edited movie is sufficiently recast, transformed, or adapted from the original to be considered a derivative work.[217]

The playback editing device would also be different from the MAP files if the end user were able to make fine adjustments to how much a movie is edited—for example, if the user were able to choose to remove profanity, but not violence, or to only remove nudity. If the editing device were to become a user adjustable knob, it may no longer meet the requirement of having a concrete or permanent representation of the audiovisual display.[218] If the number of editing choices is limited, a court will probably still find the index to be a concrete or permanent representation.

In summary, there are two obstacles to overcome in finding the playback editors liable for infringing the derivative work right. The devices do not incorporate any part of the pre-existing work and the edited movies may not be sufficiently altered from the originals to be considered derivative works. The result will largely depend on whether the Seventh Circuit, the Ninth Circuit, or the Nimmer analysis is used. It seems likely that the Ninth Circuit would find an infringement of the derivative work right by the playback editors.

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[212] *See Peter Pan Fabrics*, 274 F.2d at 489.

[213] *See Micro Star*, 154 F.3d at 1112 (citing Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984)) (using a "total concept and feel" test of substantial similarity).

[214] *See id.*

[215] *Id.* at 1112.

[216] *Id.*

[217] 17 U.S.C. § 101 (2003) (listing the definition of a "derivative work").

[218] *See Micro Star*, 154 F.3d at 1111.

D. *Contributory Infringement and Vicarious Liability*

Although the Copyright Act does not expressly impose liability on anyone other than direct infringers, courts have recognized that both contributory and vicarious liability should apply to copyright infringement.[219] If the use of the playback editing device results in the creation of derivative works, the manufacturers and sellers of playback editing devices could be found liable.[220] In order to be a contributory infringer: (1) the editors must have known or should have known about the conduct of the home user; and (2) they must materially contribute to the infringing conduct.[221] In order to be vicariously liable: (1) the editors must be able to control the infringing conduct; and (2) they must obtain direct financial benefit from the conduct.[222]

Applying the Ninth Circuit's requirement that a derivative work must take on a concrete or permanent form, the home user would need to videotape or capture in digital form, at least temporarily, the resulting edited movie.[223] The required step of capturing the edited movie will make finding vicarious liability difficult because the device manufacturer and seller will receive no direct financial benefit from this copying.[224] The manufacturers and sellers of the editing device are also not likely to be contributory infringers because they would have no reason to suspect that home viewers would tape or digitally capture versions of the edited movies.[225]

If we ignore the Ninth Circuit's requirement that derivative works be in some concrete or permanent form, the end users would be able to create an infringing derivative work by simply watching the movie through the playback editing device. In any event, the end users probably have an implied license to carry out the functions that the editing device performs on the movies.[226] It would be difficult to argue that people do not implicitly have the right to adjust the volume on their

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[219] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).

[220] *Id.*

[221] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) ("[O]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." (quoting Gershwin Publ'g v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (2d Cir. 1971))).

[222] Gershwin Publ'g v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (2d Cir. 1971).

[223] *See Galoob*, 964 F.2d at 969.

[224] *See Gershwin Publ'g*, 443 F.2d at 1162.

[225] *Id.*

[226] The copyright owners conduct in allowing the movie to be played on a television would lead a reasonable person to believe they have a right to adjust the volume and picture. *See, e.g.*, Effects Assocs. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990) ("A nonexclusive license may be granted orally, or may even be implied from conduct." (citing Nimmer, *supra* note 144, §10.03[A], at 10-36)).

television set, or to change the channel momentarily while watching a movie. As a result of reliance on the implied license, there would be no direct infringement of the derivative work right.

In conclusion, the playback editors should not be found liable for contributory infringement, nor should they be found vicariously liable for home use of their editing device.

E. *Fair Use*

If the third party editors infringe the studios' exclusive rights to reproduction and distribution, or their right to prepare derivative works, then they still have the chance to demonstrate a fair use exception.[227] Fair use is an affirmative defense which allows "would be infringers" the privilege to utilize copyrighted material in a reasonable manner without the consent of the copyright owner.[228] Examples of fair uses are parody, news reporting, teaching, and "time shifting."[229] In determining if a use is a fair use, there are four non-exclusive factors that must be examined: (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.[230]

The soft-copy editors will claim that reproductions made by copying a movie from one medium to another should be allowed as a fair use. They may argue that this copying amounts to "space-shifting" because the edited versions are only made one for one in place of lawfully purchased copies.[231] If the edited movies are considered derivative works, a fair use defense could justify the making of these derivative

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[227] 17 U.S.C. § 107 (2003); *see also* Campbell v. Acuff-Rose Music, 510 U.S. 569, 576 (1994) (discussing the history of the fair use doctrine).

[228] *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986); *see also Campbell*, 510 U.S. at 590 (indicating that fair use is an affirmative defense); *see also id.* at 575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'" (citing U.S. CONST., art. I, § 8, cl. 8.)).

[229] 17 U.S.C. § 107; *Campbell*, 510 U.S. at 594 (finding fair use of a parody of Roy Orbison's "Pretty Woman"); *Sony*, 464 U.S. at 454-55; *see also* H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-66 (1976).

[230] 17 U.S.C. § 107.

[231] *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that a portable MP3 player which downloads copies of sound recordings, merely "space-shifts" the files that reside on the user's hard drive and, therefore, the "space-shifting" was a fair use).

works.[232] The playback editors will argue that any potential derivative works created through the use of their device are a fair use.

1. Purpose and Character of the Use

In examining the purpose and character of the use, there are two important questions to answer. First, is the use commercial or for non-profit educational purposes? Second, to what extent is the use transformative?[233]

The answer to the first question is straightforward. Both the soft-copy and playback editors are engaged in a commercial enterprise. The soft-copy editors are selling unauthorized reproductions of the movies. This activity clearly cuts against a finding of fair use.[234] One company operates a co-op in which all of the members share in the ownership of the co-op's movie collection.[235] As the rightful owners of the DVDs and videocassettes that they purchase, they choose to edit their copies.[236] The editors may argue that these potentially infringing edits of copyrighted movies are done by the end users and thus are non-commercial.[237] Nevertheless, the operation of the co-op itself is a profit-making commercial enterprise for the soft-copy editors.[238] The playback editors sell a device that may prepare unauthorized derivative works. If the makers of the device did not prepare these derivative works themselves, then home users may create them by watching a movie with the device. However, the home users probably have no intention of selling the derivative works they create with the playback editing device and, thus, are not making them for commercial use. The

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[232] All of the exclusive rights granted in 17 U.S.C § 106 are subject to the fair use exception in 17 U.S.C. § 107, including the preparation of derivative works. *See* 17 U.S.C. §106 (2003).

[233] *Campbell*, 510 U.S. at 579.

[234] "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ." *Sony*, 464 U.S. at 451.

[235] Howell, *supra* note 3. "Users of the service must become co-op members, meaning the edited videos are in effect their shared property, which they can do with as they see fit." *Id.*

[236] *Id.* CleanFlicks also states that "[a]s owners of the original, unedited movies, the co-op has the right to edit out content that is objectionable to its members . . . ." *Id.*

[237] "Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended . . . . But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit." *Sony*, 464 U.S. at 450-51.

[238] The operators of the co-op charge a substantial premium to rent the edited versions of movies. The price for MyCleanFlicks service is significantly higher ($22.85 for two movies a month) than NetFlix ($19.95 for three movies a month), a similar internet rental company which rents un-edited movies. *See* Williams, *supra* note 4.

Supreme Court made a distinction for ultimate use of the VCR by consumers as being non-commercial in *Sony Corp. of America v. Universal Studios, Inc.*[239] However, "every commercial exchange of goods involves both the giving of the good or service and the taking of the purchase price. The fact that [one] focuses on the giving rather than the taking cannot hide the fact that profit is its primary motive for making the exchange."[240] The Supreme Court clarified this point in *Harper & Row v. Nation Enterprises*.[241] The profit-making motive of the editing companies cannot be hidden simply by focusing on the home use of the edited movies.

Is the creation of edited movies transformative? In other words, does the new work merely replace the object of the original creation or does it add a further purpose or character?[242] The edited movies are products that allow people who would not otherwise watch certain movies, because of content they consider objectionable, the opportunity to watch popular Hollywood movies.[243] The fact that people are willing to pay a high premium for the editing service speaks to the value added by the editing service.[244] The potential of the editing technology as a new way to watch movies tends to favor fair use. On the other hand, the editors often change the movies very little. The purpose and character of an edited movie is the same as that of an unedited version. Both versions are intended for entertainment purposes. The fact that soft-copy editors place the edited version back into the original movie packaging also suggests that the new use merely replaces the original.[245] A lack of transformative use weighs against fair use.[246]

2. The Nature of the Copyrighted Work

In examining this factor, it is important to recognize that some works are closer than others to the core of protection intended by copy-

[239] *See Sony*, 464 U.S. at 449.

[240] Pac. and S. Co. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984).

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

[242] *Campbell*, 510 U.S. at 579.

[243] Rebecca Buckman, *A Cottage Industry in Utah Cleans Up Hollywood's Act*, WALL ST. J., Sept. 19, 2002, at A1 ("Companies such as CleanFlicks say Hollywood should instead embrace the edited movie trend, since religiously devout people in Utah are now renting R-rated videos, creating a new market for movie studios.").

[244] *See* Williams, *supra* note 4.

[245] *Id.*

[246] *See Campbell*, 510 U.S. at 579.

right law.[247] This type of distinction is made between creative works and bare factual compilations.[248] A fair use finding should be more difficult for the former and more appropriate for the latter.[249] Most movies would be considered closer to creative expression than factual compilations. Movies have even been called "the quintessential art of the twentieth century."[250] The creative nature of movies tends to go against a finding of fair use.[251]

3. The Amount and Substantiality of the Portion Used

If the infringing use were only a small portion of the copyrighted work as a whole, then a finding of fair use would be more likely than if the entire work is appropriated.[252] The soft-copy editors are making copies of the movies substantially in their entirety.[253] The only difference might be a few minutes cut from a two-hour movie.[254] Courts still allow a fair use defense when the entire work is used, but this copying "militat[es] against a finding of fair-use."[255]

The playback editors are potentially not using any of the copyrighted expression from the movies.[256] But if the court considers the playback device to create derivative works, then perhaps these editors also substantially use the entire movies.[257]

4. The Effect on the Market Value

This factor is the most important component of the fair use analysis.[258] It looks at how the potential market for the copyright could be harmed should the infringement become widespread.[259] If the infringing use does not demonstrate any harm to the market of the copy-

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[247] *Id.* at 586.

[248] *Id.*; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348-51 (1991).

[249] *Feist*, 499 U.S. at 348-51.

[250] Craig A. Wagner, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 635 (1989).

[251] *Harper & Row*, 471 U.S. at 594.

[252] *See Campbell*, 510 U.S. at 586 (citing Justice Story's words from *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841), in asking whether or not "'the quantity and the value of the materials used' are reasonable in relation to the purpose of the copying").

[253] *See* Williams, *supra* note 4.

[254] *See* Aguilar, *supra* note 71.

[255] *See Sony*, 464 U.S. at 449-50.

[256] *See CNNfn: Market Coverage: Tough Call: Turning R into PG, Rhonda Schaffler* (CNN television broadcast, Sept. 27, 2002 (morning)) (Statement of ClearPlay CEO, Bill Aho: "We're very different from most of the other companies . . . . [W]e don't create an alternate version.").

[257] The resulting derivative work would include the entire movie minus the edited scenes.

[258] *Harper & Row*, 471 U.S. at 566.

[259] *Campbell*, 510 U.S. at 590.

righted work, then a finding of fair use is appropriate.[260] One important reason is that the non-harming use would not create any disincentive to those who create copyrightable works.

The soft-copy editors will argue that placing the edited movies onto lawfully purchased original tapes or putting the DVD-R copies into original packaging causes no harm to the studios' existing home video or DVD market.[261] Both the soft-copy editors and playback editors can argue that the editing will cause an increase in the sale of unedited movies. Both of the editing options require a lawfully purchased copy in order to watch the edited version.[262]

One important question is whether or not the selling of the edited movie versions or the sale of the playback editing device will harm the studios' potential market to sell their own edited versions.[263] The studios are not in this business at the moment, but there is no reason that the studios could not get into the business of selling edited movies. Studios produce edited versions for play on network television and for in-flight performances on airlines.[264] Since the studios can easily sell their own edited versions and it is also within their copyright to license others to make the edited versions, this fourth factor goes against a finding of fair use in third party editing.

The final step in the fair use analysis is to balance the factors in accordance with Supreme Court precedent.[265] In balance, the commercial nature of the editing enterprises and the loss of the market to license the edited versions will make finding a fair use for both soft-copy and playback editing difficult.[266] Thus, third party editors are infringing the copyrights in the movies they edit.

5. Beyond the Usual Fair Use Factors

The statutory fair use provisions make clear that the statutory factors are non-exclusive and that courts are free to consider other relevant matters in the fair use analysis.[267] Several of the editing

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[260] *See id.* at 593-94.

[261] Williams, *supra* note 4.

[262] *Id.*

[263] *Harper & Row*, 471 U.S. at 568 (indicating that the test "must take account not only of harm to the original but also harm to the market for derivative works").

[264] *See* DGA BA, *supra* note 143, *provision* 7-509.

[265] The Supreme Court has approached the "fair use" question three times since 1984. In balancing the factors, these benchmark decisions act as guideposts.

[266] The importance given to the first and fourth factors in *Sony* and *Harper & Row* are persuasive.

[267] *See Campbell*, 510 U.S. at 575; *see also Harper & Row*, 471 U.S. 550 n.3 ("This 'equitable rule of reason,' permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." (citations

companies have claimed that viewers have a First Amendment right to watch edited movies in their homes.[268] This argument would probably fail for the reason that people could choose to turn off the television rather than watch PG-13 or R-rated films. However, the argument need not even be considered, because the Supreme Court has ruled that the fair use doctrine effectively replaces the First Amendment defense of copyright infringement.[269] Perhaps there is an argument that people need to watch edited movies for religious reasons. Could an action be brought under the Religious Freedoms Restoration Act, better known as RFRA?[270] There is no religious exercise that requires people to view these movies.[271] As a result, RFRA will not offer any relief to the editors.

Should the benefits of having edited movies be considered under fair use? The four listed statutory factors focus heavily on market harm to the copyright owner and do not give much consideration to possible benefits from the infringing use. Under a traditional fair use analysis, the direct benefits of editing technology to consumers are likely to be taken into account only when considering the transformative nature of "the purpose and character of the use."[272] The benefits may be discounted if the edited movies do not amount to new "expression, meaning, or message."[273] Finally, consideration of these benefits may be overwhelmed in traditional fair use analysis because the "purpose and character of the use" is dominated by the fact that the use is commercial.[274]

The purpose of fair use is to ensure the public benefit by encouraging the creation of new works.[275] Fair use exceptions are given to in-

omitted)); 107 U.S.C. §107 (2003) (stating that the factors to be considered "shall include" the numbered factors); H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65-66 (1976) ("[T]here is no disposition to freeze the [fair use] doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

[268] *See* Item No. 14 of Original Compl. in Huntsman v. Soderbergh, Civ. No. 02-M-1662 (MJW) (D. Colo. filed Aug 29, 2002).

[269] *Harper & Row*, 471 U.S. at 560.

[270] 42 U.S.C.A. §2000bb (2003).

[271] *Id.* (RFRA requires that "governments should not substantially burden religious exercise without compelling justification."); *see, e.g.*, Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000).

[272] *Campbell*, 510 U.S. at 579.

[273] *Id.*

[274] *Id.* 578.

[275] *Id.* at 579 ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . .").

fringing uses when the incentive for creation of new works is not hindered.[276] The relatively small amount of third party movie editing will probably not cause the movie studios to consider creating fewer new movies. Any hindrance from this infringement may be minuscule when compared to the profits made by studios in the home video market. On the other hand, directors may feel less inclined to create new movies when they feel the work will be altered without their consent.[277] There is also a possibility that the editing will become widespread to the point of squeezing out the unedited versions.

There are many valid reasons why home viewers should be able to watch movies without profanity, violence, or nudity. The edited movies protect children, satisfy moral objections, and generally allow viewers the comfort of knowing that the movies they watch for entertainment purposes will entertain without being offensive.[278] It is true that people could choose to watch only G-rated films, but the selection of films would be extremely limited.[279]

In summary, the interests of the home viewers in having the choice to watch edited movies are best accounted for by including some analysis of these benefits under the fair use defense.

F. *Moral Rights and Substitutes*

In several European countries, including most notably France, authors of creative works enjoy additional inalienable rights alongside the economic rights set forth in American copyright law.[280] These additional rights of attribution and integrity allow an author who has parted with his economic rights in a copyright to prevent any intentional mutilation or distortion of his works.[281] The U.S. has been cautious in allowing moral rights into American law.[282] At least one commentator

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[276] The Copyright Clause, U.S. CONST. Art. I, § 8, cl. 8, empowers Congress "[t]o promote the Progress of Science and useful Arts . . . ."

[277] Some video stores will only carry one version of a movie, either edited or un-edited. *See* Lyman, *supra* note 33.

[278] *See* Aguilar, *supra* note 71.

[279] Of the films released and rated by the Motion Picture Association of America ("MPAA") between January 1 and November 24, 2002, 68% were rated R, 18% were PG-13, 9% were PG, and 4% were rated G. All of the MPAA movie ratings are available at http://www.MPAA.org (last visited Jan. 14, 2004).

[280] France, Law of March 11, 1957, art. 1 (amend. July 3, 1985) (UNESCO translation). For an overview of moral rights in France, see Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHTS SOC'Y 269 (1989).

[281] *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

[282] For a discussion of why the United States should not be so quick to adopt a doctrine of moral rights, see Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 422 (1990) and Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990).

has suggested that by joining the Berne Convention in 1989, the U.S. has implicitly recognized that artists have a legal interest in what happens to works they create even after they part with the copyright.[283] With passage of the Visual Artists Rights Act ("VARA") in 1990, Congress granted rights of attribution and integrity to authors of visual art.[284] Motion pictures do not fall within the statutory definition of a "visual art" and, furthermore, authors who create "works made for hire" are excluded from receiving rights of authorship under VARA.[285] Moreover, American copyright law is clear in stating that adherence to the Berne Convention does not in any way enlarge the rights of artists under Title XVII.[286] In addition, Berne does not prevent moral rights from being waived or transferred to the studio copyright owners at the time a director is employed.[287]

Some commentators have suggested that other aspects of U.S. law provide an effective equivalent of a moral rights doctrine.[288] These commentators propose that by combining tort law remedies of defamation, rights of publicity and privacy, along with contractual remedies and provisions of the Lanham Act, it may be possible for authors to protect their work from being mutilated or distorted in a way that negatively affects their honor or reputation.[289] Of these options, the Lanham Act probably offers the directors their best chance at an injunction, but courts have stopped short of holding that the Act implies any moral rights of authorship.[290]

Having established that the directors are not the copyright owners of the movies they direct, there may still be a contractual obligation on

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[283] *See* Wagner, *supra* note 252, at 633.

[284] Rights of Certain Authors to Attribution and Integrity, 17 U.S.C.A § 106A (2003).

[285] 17 U.S.C. § 101 (2003) (stating the definition for "work of visual art").

[286] *See* Section 2 of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988) (providing that the Act is not self-executing under the laws of the United States, and that no further rights or interests are created for purposes of Berne adherence).

[287] ROBERT A. GORMAN & JANE C. GINSBERG, COPYRIGHT 533 (4th ed. 2002) ("The Berne Convention, however, does not prohibit waiver or alienation of [rights of attribution and integrity], so long as a transfer of economic rights is not deemed of itself to effect a transfer of moral rights.").

[288] *See* Martin Raeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 575 (1940); *see also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 21-23 (1985).

[289] *See* Kwall, *supra* note 289. A discussion of the common law tort remedies is beyond the scope of this Comment.

[290] Foremost, the Lanham Act is a federal law whereas the other tort remedies are a mix and match of state laws which may not afford consistent protection nationwide. For an example of the Lanham Act as a moral rights alternative, see Gilliam v. ABC, Inc., 538 F.2d 14 (2d Cir. 1976).

the studio copyright owners to protect the directors' interests. Depending on the status of the directors, they may have provisions in their personal services contracts that limit the ways in which their movies can be edited.[291] These provisions can restrict ways in which the studio can edit the movies or license other parties to edit them. The terms may also extend to work done by third party editors. Unfortunately for the directors, courts have often construed ambiguities in personal services contracts in favor of the studios.[292]

The Directors Guild of America represents the major Hollywood directors.[293] With respect to the editing of movies, the guild has secured guarantees from the studios through collective bargaining.[294] One guild provision gives the director the opportunity to participate in editing versions of their movies for DVD or videocassette distribution, receiving in return no compensation.[295] The fact that directors would agree to work for no compensation, demonstrates how important the issue of editing movies is to them. The current DGA Basic Agreement only limits editing that is performed by the studio and at the studio facilities.[296] There are no provisions guaranteeing the enforcement of the copyrights in motion pictures and, thus, the DGA has no recourse against third party companies that edit the movies.[297] In sum, the current collective bargaining agreement does not allow the directors any say in how their movies are edited by third parties that are not authorized by the studios.

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[291] *See* John J. Dellaverson, *The Director's Right of Final Cut—How Final is Final?*, 7 ENT. & SPORTS LAW, Summer/Fall 1988, at 8-9 (discussing the common provisions of a director's personal services contracts as they relate to the final cut of a motion picture).

[292] Wagner, *supra* note 252, at 660 (citing Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (Sup. Ct. 1966) and Stevens v. NBC, 76 Cal. Rptr. 106 (1969)).

[293] See http://www.dga.org for a description of the Directors Guild of America (last visited Jan. 14, 2004).

[294] *See* DGA BA, *supra* note 143, provisions 7-501 to 7-520.

[295] *Id.* at 7-509(g) ("If a theatrical motion picture is licensed by the Employer for exhibition on a domestic national basic cable service, or for domestic in-flight exhibition or for domestic videodisc/videocassette distribution, and the Employer edits such motion picture at its own facilities in the United States, the Director shall have the right to edit the English language version of the motion picture at no additional compensation . . . .").

[296] *Id.*

[297] Article 50 of the Writers Guild of America 1998 Theatrical and Television Basic Agreement protects the copyrighted work of guild signatory writers of television programs, giving the writers the standing to sue to protect the copyright. The language is similar to that of "beneficial ownership" of copyright. (The writers are ineligible to become "beneficial owners" because their writings are "works made for hire.") Writers under this agreement would have standing to sue third party copyright infringers. There is no corresponding provision in the DGA BA.

V. CONCLUSION

In conclusion, the directors are not likely to prevail in securing an injunction under the Lanham Act against the third party editors. The use of a clearly labeled disclaimer will probably prevent a finding of likelihood of confusion, and the editing of a few minutes of movies will in most cases not be substantial enough to sustain a claim of false advertising. In addition, there is a valid argument that the directors are not likely to be harmed economically by the third party editing. The directors are also not likely to prevail on a claim of dilution of their famous names. Only a few of the directors will satisfy the requirements of fame and distinctiveness, and even these directors will find difficulty in proving actual harm as required by the Supreme Court in *Moseley*.

On the other hand, the case for copyright infringement is much stronger. It seems clear that the soft-copy editors are infringing the copyright owners' exclusive rights to reproduction and to make derivative works of their movies. The playback editors may be infringing the reproduction right by creating the indexed edit lists. There is also a solid argument that the playback editors are infringing the derivative works right by making and selling a device that sends edited movies to a television screen. The directors will not be able to establish beneficial ownership rights in the copyrights and do not have standing to sue for copyright infringement. They must rely on the movie studios.

The studios are not obligated to enforce the movie copyrights in favor of the directors' desires and may allow the editing to continue in some form. It is up to the studios to decide if the editing of movies should take place. One possible outcome of this litigation is that the movie studios could completely side with the directors by preventing third party editing. Such a scenario may be wishful thinking for filmmakers. The potential market for product placement advertising and market demand for more viewer choice will likely entice studios to create their own digitally altered movies. At the very least, they may want to open up an additional revenue stream by licensing the editing work. The issue of artistic integrity of the movies could eventually be resolved through collective bargaining negotiations between the studios and directors.[298]

Although the directors cannot completely stop the editing of their movies without help from the studios, they may be able to gain a voice in the editing process. If the studios license the third party editors or decide to sell their own edited versions, then the directors could con-

[298] The next scheduled negotiations between the Directors and Studios will be in 2005, but the parties could come to an agreement at any time.

tract with the studios for a say in the editing. One possibility is to bargain for a provision in the DGA Agreement that would allow a director to supervise editing done by licensed third party editors. Such a provision could allow a director to state reasonable objections to the studio that licenses the editing. Any dispute as to the reasonableness of a director's objections would be subject to neutral arbitration.[299] As a concession, the directors could agree to supervise the edits for little or no compensation.

The interests of home viewers who prefer not to watch objectionable content in movies would ideally be satisfied by the rightful copyright owner meeting the market demand and offering edited versions. If the copyright owner chooses not to offer edited versions, there is a much better case for allowing unauthorized third party editing under a fair use exception. A proper fair use inquiry will balance the interests of all parties involved by taking into consideration the important benefits of having the choice to watch edited movies at home.

[299] DGA BA, *supra* note 143, provision 2-101.