

THE FAMILY MOVIE ACT AND ITS EFFECT ON U.S. COPYRIGHT LAW

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I. INTRODUCTION

IN 1997, James Cameron released his \$200 million epic *Titanic*.¹ The critically acclaimed motion picture won the 1997 Academy Award for Best Picture.² Nevertheless, some viewers were offended by the scene in which Leonardo DiCaprio sketched a nude Kate Winslet.³ To appease offended viewers in the small town of American Fork, Utah, Sunrise Family Videos began editing out the scene upon release of the film onto VHS.⁴ Demand for these altered versions spread to other conservative communities, and the unauthorized movie-editing business expanded.⁵

As technology progressed, a variety of new editing methods became available to editing companies.⁶ While some companies continued to physically alter the VHS or DVD,⁷ other companies developed methods that allowed users to filter out potentially offensive content.⁸ Companies that used the filtering method offered filters for both DVDs and television programming.⁹

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1. TITANIC (20th Century Fox 1997).

2. See, e.g., Roger Ebert, *Full Steam Ahead: The Masterful Epic 'Titanic' Pulls into Port*, CHI. SUN-TIMES, Dec. 19, 1997, at 37 ("James Cameron's 194-minute, \$200 million film of the tragic voyage is in the tradition of the great Hollywood epics. It is flawlessly crafted, intelligently constructed, strongly acted and spellbinding.").

3. See Katharine Biele, *Who Makes the Final Cut?*, CHRISTIAN SCI. MONITOR, Oct. 5, 1998, at B1, B10.

4. Jennifer J. Karangelen, Note, *Editing Companies vs. Big Hollywood: A Hollywood Ending?*, 13 U. BALT. INTELL. PROP. L.J. 13, 13 (2004).

5. *Id.*

6. *Id.*

7. One method used to alter DVDs was similar to the cut-and-splice method used for VHS. Editing companies purchased DVDs or their customers sent them purchased copies of the DVDs. Editors transferred the content of the DVDs to computer programs and deleted selected portions of the movie. Then, the editors burned the movies onto a new DVD and sent the new DVD to the customer. See Carrie A. Beyer, Note, *Fighting for Control: Movie Studios and the Battle over Third-Party Revisions*, 2004 U. ILL. L. REV. 967, 987.

8. *Id.*

9. ClearPlay offers filters for DVDs, and TV Guardian offers filters for potentially offensive language in television programming. See ClearPlay, <http://www.clearplay.com> (last visited Feb. 17,

The widespread nature of the editing industry ignited a controversy between post-release movie-editing companies and the motion-picture industry.¹⁰ In 2002, a group of movie-editing companies filed a declaratory action against members of the motion-picture industry, asking the court to find their editing methods legal.¹¹ The motion-picture industry filed a counterclaim alleging copyright and trademark infringement on the part of the movie-editing companies.¹² This lawsuit involved companies that mechanically edited movies as well as companies that digitally filtered movies.¹³

In 2004, Congress became interested in the movie filtering issue.¹⁴ Congressional representatives supporting the use of filtering technology claimed that the technology was already permissible under existing copyright and trademark law.¹⁵ Other proponents of filtering technology argued that parents had a fundamental right to choose what their families watch and filtering technology gave parents a powerful tool in protecting their children from potentially offensive content.¹⁶ In 2005, Congress passed the Family Movie Act of 2005 (FMA), protecting filtering companies from certain copyright and trademark infringement claims.¹⁷

2009); TV Guardian, <http://www.tvguardian.com> (last visited Feb. 17, 2009). Further, ClearPlay advertises its technology as working with “TV’s, cable and set-top boxes, and digital video recorders.” Press Release, ClearPlay, ClearPlay Content-Filtering DVD Player Now Being Sold Nationwide on Shelves of Best Buy Stores (Dec. 6, 2007) (on file with the University of Toledo Law Review), available at http://www.clearplay.com/t-press_ClearPlay_Content-Filtering_DVD_Player_Now_Being_Sold_Nationwide_on_Shelves_of.aspx. Filtering technology is capable of more than just skipping over scenes. See Michael P. Glasser, Note, “To Clean or Not to Clean”: An Analysis of the Copyright and Trademark Issues Surrounding the Legal Battle between Third Party Film Editors and the Film Industry, 22 CARDOZO ARTS & ENT. L.J. 129, 137 (2004). MovieMask, another filtering company, originally offered filters that digitally altered DVDs. Douglas C. Pizac, *Film-Censoring Software Angers Entertainment Industry*, USA TODAY, Feb. 3, 2003, http://www.usatoday.com/tech/news/techpolicy/2003-02-03-film-censors_x.htm. For example, MovieMask had a filter that clothed Kate Winslet in her nude scene in Titanic. Glasser, *supra*, at 137. Currently, the only companies that offer filtering technology to the public are ClearPlay and TV Guardian. See Movie and TV Filtering Review 2009—Top Ten Reviews, <http://movie-and-tv-filtering-review.toptenreviews.com/> (last visited Feb. 17, 2009). The Family Movie Act of 2005 expressly excludes liability protection for companies such as MovieMask because MovieMask adds audio and video content. 17 U.S.C. § 110(11) (2006).

10. See Karangelen, *supra* note 4, at 13.

11. See Second Amended Complaint at 18, *Huntsman v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006) (No. 1:02-CV-01662). The editing companies filed this lawsuit because of a posting on the Directors Guild of America’s website that threatened a potential lawsuit against the movie editors if they did not stop their actions. Glasser, *supra* note 9, at 139.

12. Defendants’ Answer and Counterclaims at 24-32, *Huntsman*, 433 F. Supp. 2d 1236 (No. 02-M-1662).

13. See *id.*

14. *Derivative Rights, Moral Rights, and Movie Filtering Technology, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 93 (2d Sess. 2004) [hereinafter *Filtering Hearing*].

15. H.R. REP. NO. 108-670, at 3 (2004).

16. *Filtering Hearing, supra* note 14, at 23-24 (statement of Bill Aho, Chief Executive Officer, ClearPlay, Inc.).

17. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 167, 119 Stat. 218, 223 (2005). This article only addresses the copyright aspects of the FMA.

This article contends that the FMA immunizes filtering technology in a manner contrary to existing copyright law and to the original intent behind the FMA. Part II examines the processes involved in making filters and the capabilities of filtering technology, focusing specifically on the filters produced by two representative companies, ClearPlay and CustomPlay. Part III discusses the legality of filtering technology in relation to existing copyright and trademark law prior to the enactment of the FMA. Part IV explores the legislative history and intent of the FMA. Part V asserts that the FMA fails to achieve its goal of protecting children from potentially offensive content and the language of the FMA may lead to substantial litigation involving copyright and trademark claims as technology progresses. Finally, this article recommends a solution that allows parents to protect their children from potentially offensive content but maintains the rights of the motion picture companies provided by pre-FMA copyright and trademark law.

II. FILTERING TECHNOLOGY AND CLEARPLAY

The home-use movie-editing industry began with companies physically removing content from VHS tapes and DVDs.¹⁸ These methods arguably infringed on the rights of the copyright owners because editing companies stored the movies in a fixed media, creating unauthorized reproductive or derivative works pursuant to section 106 of the Copyright Act of 1976.¹⁹ As technology progressed, companies began to use methods that did not require physically altering movies.²⁰ While working for a movie-editing company, Matt Jarman invented a process that allowed users to leave out portions of a movie on a DVD by skipping over or muting out segments.²¹ Jarman teamed up with his brother and Bill Aho to form ClearPlay, a company focused on offering filtering technology for home use.²² The ClearPlay process uses a technology invented by Nissim Corp., managed through its subsidiary CustomPlay, which allows seamless skipping from one frame to another on a video system.²³ This part first examines the process ClearPlay uses in creating filters and then looks at the capabilities of filtering technology produced by CustomPlay.

18. Karangelen, *supra* note 4, at 13. For an explanation of this process, see *supra* note 7.

19. See, e.g., Beyer, *supra* note 7, at 992. Following the passage of the Family Movie Act, the United States District Court for the District of Colorado enjoined companies making physical alterations from selling or distributing “unauthorized edited, or otherwise altered, copies of any motion picture, the copyright in which is owned or controlled by [a motion picture studio].” *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1244 (D. Colo. 2006).

20. Karangelen, *supra* note 4, at 13.

21. Charity Brunson, *BYU Grads Develop DVD-Editing Software*, *BYU NEWSNET*, Nov. 28, 2001, <http://newsnet.byu.edu/story.cfm/35350/>.

22. *Alumni News*, *MARRIOT MAG.*, Fall 2004, at 36, available at http://marriottschool.byu.edu/marriottmag/pdf/2004_Fall.pdf.

23. See U.S. Patent No. 5,589,945 col.4 l.33-41 (filed Sept. 13, 1994); Press Release, Nissim Corp., *Nissim Brings Legal Action to Halt Sales of ClearPlay’s DVD Players and Filters* (June 11, 2007) (on file with the University of Toledo Law Review), available at <http://www.nissim.com/news.2007.06.11.htm>.

A. *ClearPlay's Filtering Process*

The process of creating filters begins with filtering technicians watching a motion picture and identifying content they consider objectionable according to ClearPlay's specifications,²⁴ which stem from "either industry or community standards."²⁵ Objectionable content may include video or audio material.²⁶ ClearPlay categorizes segment references according to violence, sexual content, language, and drug use, with each of these categories divided into subcategories.²⁷ ClearPlay offers fourteen subcategories, allowing users to determine how much of each category they would like filtered.²⁸ Once a filtering technician identifies segments of potentially offensive content, the segments are submitted to filter developers and managers for approval.²⁹

After managers approve suggestions for a particular movie, developers make a file containing references for each offensive segment.³⁰ Each segment reference includes three components: a start position, a stop position, and an action to be performed (such as skipping, muting, or reframing the segment).³¹ The start and stop positions refer to the position code or time code correlating to when the segment occurs.³² The time code is a standardized track in multimedia content that contains the timing of each frame.³³ A filter program contains segment references pertaining to each of the edited segments from a particular movie.³⁴

ClearPlay customers may access filters in two ways.³⁵ Customers may use filters that are preloaded on ClearPlay's DVD player, the MaxPlay.³⁶ More commonly, customers download filters from ClearPlay's fee-based system on its website.³⁷ Either way, in order for the filtering process to work, a customer must

24. See Mike Snider, *Hollywood Riled up over ClearPlay*, USA TODAY, May 6, 2004, at 1D.

25. U.S. Patent No. 6,898,799 col.21 1.37-42 (filed Oct. 23, 2000).

26. *Id.*

27. See ClearPlay DVD Player: TVDefender.com, <http://www.tvdefender.com/faq.htm> (last visited Feb. 17, 2009).

28. *Id.*

29. Snider, *supra* note 24, at 1D.

30. See '799 Patent, col.4 1.44-53.

31. *Id.* at [57].

32. *Id.* at col.21-22.

33. CHARLES A. POYNTON, A TECHNICAL INTRODUCTION TO DIGITAL VIDEO 265 (John Wiley & Sons eds., 1996).

34. U.S. Patent No. 6,898,799, at [57] (filed Oct. 23, 2000).

35. See *id.*

36. Family Safe Media—Modem MaxPlay, http://www.familysafemedia.com/filtering_dvd_player_-_modem_m.html (last visited Feb. 17, 2009). This player comes preloaded with 1000 filters and can store up to 2000 filters. *Id.*

37. U.S. Patent No. 6,889,383 (filed Oct. 23, 2000); More About ClearPlay, <http://www.clearplay.com/HowClearPlayWorks.aspx#question> (follow the "How do I get ClearPlay filters" link) (last visited Feb. 17, 2009). ClearPlay offers a membership rate of \$7.95 a month, with discounts for signing up for twelve, twenty-four, and thirty-six month plans. A plan allows access to all filters currently in the ClearPlay library. ClearPlay Memberships, <http://www.clearplay.com/ShopCart.aspx> (follow "ClearPlay Memberships" hyperlink) (last visited Feb. 17, 2009).

have access to a filter, a MaxPlay, and a copy of the movie correlating to the filter.³⁸ Once a customer accesses a filter, he or she may choose what content to filter from the categories and subcategories through a startup menu.³⁹

ClearPlay makes filters for a wide array of movies.⁴⁰ In deciding what movies to filter, ClearPlay looks at the successful current DVD releases at the box office.⁴¹ ClearPlay also edits movies if its customers specifically request a title.⁴² Filters are available for over 2000 titles, ranging from family-friendly documentaries, such as *March of the Penguins*, to films featuring strong violence and sexual content, such as *300*.⁴³

B. Capabilities of Filtering Technology

ClearPlay uses filtering technology strictly to skip potentially objectionable content.⁴⁴ Besides ClearPlay's limited use, filtering technology has many more capabilities.⁴⁵ The idea behind filtering movies was introduced by Max Abecassis as early as 1993.⁴⁶ Abecassis believed the technology could allow artists to exercise their creativity while giving producers the ability to market motion pictures to the largest possible audience.⁴⁷ Indeed, Abecassis's filtering system, marketed through CustomPlay, features a wide array of playback methods targeted at many different audiences.⁴⁸

First, CustomPlay offers traditional family filters. CustomPlay's "Family Version" is very similar to the filters used by ClearPlay.⁴⁹ It offers fourteen settings that allow parents to skip potentially objectionable content in any movie.⁵⁰ For

38. More About ClearPlay, *supra* note 37 (follow the "What is required to use ClearPlay" link) (last visited Feb. 17, 2009). Almost any source can qualify as a copy of a movie, including DVDs, cable, satellite, personal video recorders, and video-on-demand. *See* U.S. Patent No. 6,898,799 (filed Oct. 23, 2000). At this time, ClearPlay does not offer its filtering technology for use on a personal computer. *See* More About ClearPlay, *supra* note 37 (follow the "What is required to use ClearPlay" link).

39. *See* ClearPlay DVD Player: TVDefender.com, *supra* note 27.

40. *See* ClearPlay Movies, <http://www.clearplay.com/filtercart.aspx> (last visited Feb. 17, 2009).

41. About ClearPlay DVD Player: TVDefender.com, *supra* note 27.

42. *Id.*

43. ClearPlay Movies, *supra* note 40.

44. *See* ClearPlay DVD Player: TVDefender.com, *supra* note 27.

45. *See generally* CustomPlay, <http://www.customplay.com> (last visited Feb. 17, 2009) (listing various versions of playback that a user can access when watching a DVD). CustomPlay does not currently offer a playback system for public use; however, it does control the content filtered by other companies such as ClearPlay through licensing agreements. *See* Press Release, Nissim Corp., *supra* note 23.

46. *See* U.S. Patent No. 5,434,678 (filed Jan. 11, 1993). *See also* Nissim Announces Breakthrough Technology in Family Home Entertainment, PR NEWSWIRE ASSOC., Dec. 12, 1995 ("Nissim Corp. has demonstrated a newly patented videodisc player that will automatically customize the motion picture according to each viewer's content preferences.").

47. *Id.*

48. *See* CustomPlay, *supra* note 45.

49. *See generally* CustomPlay Family Version, <http://www.customplay.com/FamilyVersion.htm> (last visited Feb. 17, 2009) (listing the categories of objectionable content which can be filtered out through Custom Play's technology).

50. *Id.*

example, a parent can filter out thematic material from *Finding Nemo* that depicts Nemo disobeying his father.⁵¹

In addition to offering “Family Version” filters, CustomPlay also offers other types of filters.⁵² By selecting “Focused Version” from the CustomPlay menu, a user can see an “Action Version,”⁵³ an “ActionX(treme) Version,”⁵⁴ and a “Romance Version.”⁵⁵ For example, in the movie *Spider-Man*, the “Action Version” shows the storyline and fight scenes between Spider-Man and the Green Goblin, the “ActionX Version” only shows the fight scenes between Spider-Man and the Green Goblin, and the “Romance Version” develops the storyline between Peter and Mary Jane.⁵⁶ Other movies may also support a “Comedy Version,” “Horror Version,” and “Sex Version.”⁵⁷

CustomPlay also offers a “POV (Point of View) Version.”⁵⁸ The POV Version arranges the movie in a manner that conveys the experience of a particular character.⁵⁹ For example, CustomPlay has a POV Version for the character Edward in *Unfaithful* in which the viewer does not know that Edward’s wife is having an affair until after Edward discovers it.⁶⁰ This filter “transforms the story into a compelling mystery-type journey into the mind of Edward and his suspicions towards his wife.”⁶¹

Further, CustomPlay filters have the ability to alter the length and meaning of a movie.⁶² For example, CustomPlay makes filters for “Sixty Minute” versions of movies that allow a user to condense any length film down to an hour.⁶³ The Sixty Minute filter includes only scenes essential to the plot, intellectually stimulating scenes, and memorable scenes.⁶⁴ For viewers that do not have the time to watch a sixty-minute movie, CustomPlay also offers a “Fifteen Minute” version.⁶⁵

Additionally, CustomPlay has filters that extract segments of a movie and juxtaposes the segments in a manner that offers an entirely different meaning than the original context.⁶⁶ For example, CustomPlay offers a filter for *Spiderman* named “Creepy Pete” that plays segments of Peter watching Mary Jane in a manner that

51. *Id.*

52. CustomPlay, *supra* note 45.

53. CustomPlay Focused Versions, <http://www.customplay.com/FocusedVersions.htm> (last visited Feb. 17, 2009) (excluding content and plot lines that are not related to action sequences).

54. *Id.* (minimizing any storyline that would otherwise be included in the Action Version).

55. *Id.* (excluding content and plot lines not related to the romance storyline).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. CustomPlay Subjects, <http://www.customplay.com/Subjects.htm> (last visited Feb. 17, 2009).

makes Peter look like a stalker.⁶⁷ In essence, filtering companies can potentially alter any aspect of a movie.⁶⁸

III. COPYRIGHT CLAIMS AGAINST FILTERING COMPANIES PRIOR TO THE FMA

The United States Constitution expressly grants Congress the power to create laws governing copyrights.⁶⁹ The rationale behind this power is that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”⁷⁰ Though “[t]he immediate effect of ... copyright law is to secure a fair return for an ‘author’s’ creative labor ... the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”⁷¹

Through the Copyright Act of 1976, Congress gives a copyright owner six enumerated exclusive rights, five of which pertain to the motion-picture industry: the right to reproduce the work, create derivative works, distribute copies of the work to the public, perform the work to the public, and display the work publicly.⁷² The copyright owner can authorize the use of any or all of these rights to a third party.⁷³

Copyright laws also protect the property rights of copyright owners from other parties even when those parties are not infringing on the owners’ exclusive rights.⁷⁴ The Copyright Act gives copyright owners the right to authorize their works, thereby creating a cause of action against any party who “induces, causes, or materially contributes to the infringing conduct of another.”⁷⁵

In some situations, the Copyright Act limits the scope of the exclusive rights of the copyright owner.⁷⁶ One limitation relevant to the discussion of filtering technology is the fair-use defense.⁷⁷ Fair use applies in situations where infringement technically occurs but a rigid application of copyright law would “stifle the very creativity which [it] is designed to foster.”⁷⁸

67. *Id.*

68. *See id.*

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

70. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

71. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

72. 17 U.S.C. § 106 (2006).

73. *Id.* *See also In re Patient Educ. Media, Inc.*, 210 B.R. 237, 241 (Bankr. S.D.N.Y. 1997) (noting that the Copyright Act grants “a limited monopoly to the copyright owner to exploit his creation” and that “the copyright owner can transfer these rights”).

74. *See* 3 DAVID NIMMER, NIMMER ON COPYRIGHTS § 12.04 (2007).

75. *E.g.*, *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Congress used the phrase “to authorize” to “avoid any questions as to the liability of contributory infringers.” H.R. REP. NO. 94-1476, at 61 (1976).

76. *See* 17 U.S.C. §§ 107-122 (2006).

77. *Id.* § 107; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

78. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

Prior to the FMA's enactment, the legality of filtering technology under copyright law was not clear.⁷⁹ This part examines whether a copyright holder could bring a valid claim of copyright infringement against the makers of filtering technology under the Copyright Act of 1976 before the FMA's enactment. This part first considers whether a filtered motion picture was an unlawful derivative work under copyright law prior to the FMA. Next, this part examines two related theories of infringement: whether users of the technology directly infringed the rights of the copyright holder under pre-FMA copyright law and, if so, whether there was contributory infringement on the part of the filtering companies. Finally, this part addresses whether the fair-use exception applied to either theory.

A. *Infringing Derivative Works*

To use filtering technology, a person must first obtain a copy of the movie.⁸⁰ At this time, filtering companies do not sell or distribute copies of the movies; they merely provide the filtering technology for consumers.⁸¹ Therefore, the filtering companies do not reproduce or distribute copyrighted works.⁸² Further, the technology currently is marketed for private home use.⁸³ This may eliminate the two infringement claims dealing with public use,⁸⁴ but issues may arise if filtering players are used in schools, churches, or any other public forum.⁸⁵ Prior to the FMA, many

79. See, e.g., Sharon Weinberg Nokes, *E-Rated Movies: Coming Soon to a Home Theater Near You?*, 92 GEO. L.J. 611, 660-61 (2004) (concluding that filtering technology was protected from infringement claims only if courts decided that no derivative work was created).

80. See ClearPlay DVD Player: TVDefender.com, *supra* note 27.

81. *Id.* As technology progresses, however, filtering companies may choose to distribute movies, which could lead to more legal issues. See *infra* Part V.

82. Arguably, filtering companies may make unlawful reproductive works during the process of creating the filters by copying the original motion picture to a computer or an editing program. See *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 n.54 (5th Cir. 1999) (“[S]ubject to certain exemptions, copyright infringement occurs whenever an unauthorized copy is made, even if it is used solely for the private purposes of the reproducer.”); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) (finding that files and disassembly code containing copyrighted information copied to a computer for the purposes of reverse engineering a program squarely fell within the reproductive rights protected by the Copyright Act). Filtering companies, however, may not need to make unauthorized copies of movies in order to create filters. See *supra* Part II.A. Unlike other editing methods in which editors must remove scenes from the movie, filtering editors need only to note the time codes for each offensive segment in order to create a filter. See *supra* Part II.A. Since a reproductive work must be fixed in order to be infringing, this is not a strong argument for the motion-picture industry to establish an infringing use. See *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

83. See ClearPlay, *supra* note 9 (“ClearPlay is a revolutionary way for your family to enjoy movies.”).

84. Section 106 of the Copyright Act gives a copyright owner of a motion picture the exclusive right “to perform the work publicly,” 17 U.S.C. § 106(4) (2006), and “to display [individual images of] the copyrighted work publicly.” *Id.* § 106(5). Therefore, an individual who performs or displays a work in the privacy of his or her own home does not infringe the rights of the copyright holder.

85. The Copyright Act of 1976 does not distinguish between for-profit and non-profit public use, but instead includes a list of limitations on the exclusive rights of a copyright owner. 17 U.S.C. § 110. These limitations include instructional performances and displays in a classroom environment, displays of works in religious services, and certain other non-profit, for-profit, and governmental uses. *Id.* In the context of motion pictures, a performance and a display differ in that a performance shows the images in

commentators believed the filters' legality hinged on the right to create derivative works.⁸⁶

A derivative work is any work "based upon one or more preexisting works ... [or a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship."⁸⁷ To be protected, case law suggests that a derivative work must be fixed in a tangible medium.⁸⁸ On the other hand, a copyrighted work's infringement by a derivative work can occur even in a situation where no fixed derivative work has been created.⁸⁹

Courts have had some difficulty applying the definition of derivative works to audiovisual technology.⁹⁰ In *Midway Manufacturing Co. v. Artic International, Inc.*, the Seventh Circuit addressed whether a speeded-up audiovisual display constituted a derivative work.⁹¹ Midway manufactured and distributed arcade video games.⁹² Artic created a circuit board that, when used in place of Midway's standard circuit board, increased the speed of game play, thereby making the video game more challenging.⁹³ After finding that Midway's video game fell within the definition of a protected audiovisual display under the Copyright Act of 1976, the court turned to

any sequence and a display shows the images non-sequentially. *Id.* § 101. Section 110 does not limit a copyright owner's exclusive right of performance of an audiovisual work to churches for the performance of an audiovisual work, which means that a church has no statutory protection under section 110 if it presents a copyrighted motion picture. *See id.* Language in the FMA specifically limits its protection to private home use. *See id.* § 110(11). Individuals may choose not to comply with this limitation though. For example, one website recommends the ClearPlay player for "churches using movies and movie clips." The Church Media Community, Clearplay, <http://www.churchmedia.net/movie-clips-and-videos/34916-clearplay.html> (last visited Feb. 17, 2009).

86. *See, e.g.,* Nokes, *supra* note 79, at 660; Karangelen, *supra* note 4, at 27; Alison R. Watkins, Note, *Surgical Safe Harbors: The Family Movie Act and the Future of Fair Use Legislation*, 21 BERKELEY TECH. L.J. 241, 246 (2006).

87. 17 U.S.C. § 101.

88. *See* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968 (9th Cir. 1992) (stating in dictum "[a] derivative work must be fixed to be *protected* under the Act"). *See also* Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(Gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1000 (2004) ("Like any other work, a derivative work must be fixed in a tangible medium in order to be protected by copyright."). *But see* Kelly M. Slavitt, *Fixation of Derivative Works in a Tangible Medium: Technology Forces a Reexamination*, 46 IDEA 37, 52-53 (2005) (noting that the legislative history of the Copyright Act of 1976 "explicitly states that a derivative work does not have to be fixed in a tangible form to be copyrightable").

89. *Galoob*, 964 F.2d at 968. *See also* Tamara C. Peters, *Infringement of the Adaptation Right: A Derivative Work Need Not Be "Fixed" for the Law to Be Broken*, 53 J. COPYRIGHT SOC'Y 401, 423 (2006) (stating that a "textualistic analysis leads to the conclusion that fixation is not necessary for the infringement of [a derivative work], but a derivative work does require fixation to receive copyright protection").

90. *Compare Galoob*, 964 F.2d at 968 (finding that an altered audiovisual display did not create an unlawful derivative work), *with* *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (finding that an altered audiovisual display created an unlawful derivative work where a file contained a detailed description of the audiovisual display).

91. 704 F.2d 1009, 1013 (7th Cir. 1983).

92. *Id.* at 1010.

93. *Id.*

whether Artic's circuit board infringed on the rights of Midway to create a derivative work.⁹⁴

The court determined that the speeded-up audiovisual display produced by Artic's board was substantially different than the original game's audiovisual display.⁹⁵ Since the market for speeded-up video games was significant, the court held that the definition of derivative work "must be stretched to accommodate speeded-up video games" even though speeded-up video games did not fit squarely within the definition of derivative works as provided by the Copyright Act.⁹⁶

Ten years later, the Ninth Circuit examined a copyright infringement claim relating to an altered audiovisual display in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*⁹⁷ Galoob marketed the Game Genie to Nintendo users, which allowed users to edit up to three attributes of a Nintendo game's audiovisual display by blocking the value of a single byte of data sent from the Nintendo cartridge to the console and replacing it with a new value.⁹⁸

Relying heavily on the holding in *Midway*, Nintendo contended that the altered audiovisual display created by the Game Genie constituted an unlawful derivative work.⁹⁹ The court disagreed, holding that the Game Genie did not create a derivative work for several reasons.¹⁰⁰ First, the audiovisual display created by the Game Genie did not "incorporate a portion of a copyrighted work in some concrete or permanent form."¹⁰¹ Since the Game Genie by itself could not produce an audiovisual display, it could not be considered a derivative work.¹⁰² Second, the Game Genie merely enhanced the copyrighted video games and did not replace any market demand for the video games.¹⁰³ Despite the fact that a large market existed for the Game Genie, the "existence of a market [did] not . . . determine conclusively whether a work [was] an infringing derivative work."¹⁰⁴ Finally, holding that the Game Genie created an unlawful derivative work would have required the court to stretch the definition of a derivative work beyond the intended scope of the Copyright Act.¹⁰⁵ The *Galoob* court did not want to do this because further expanding the definition of a derivative work "would chill innovation and fail to protect 'society's competing interest in the

94. *Id.* at 1011-12.

95. *Id.* at 1014.

96. *Id.*

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

98. *Id.* at 967.

99. *Id.*

100. *Id.* at 968-69.

101. *Id.* at 968. *See also* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343-44 (9th Cir. 1988) (finding that removing copyrighted images from a book and affixing the images to tiles created an infringing derivative work because it recast a portion of the copyrighted work into a new form); *Rie Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314-15 (D. Alaska 1993) (stating that framing art does not create an unlawful derivative work, whereas permanently affixing the artwork to a ceramic tile does because it recasts the artwork in a new form).

102. *Galoob*, 964 F.2d at 968.

103. *Id.* at 969.

104. *Id.* In finding this, the court used the analogy of a kaleidoscope, noting that "although there is a market for kaleidoscopes, it does not necessarily follow that kaleidoscopes create unlawful derivative works when pointed at protected artwork." *Id.*

105. *Id.*

free flow of ideas, information, and commerce.”¹⁰⁶ Accordingly, the court held that to be an unlawful derivative work, an audiovisual display must be contained or produced in “some concrete or permanent form.”¹⁰⁷

The Ninth Circuit reexamined whether an altered audiovisual display was an unlawful derivative work in *Micro Star v. FormGen, Inc.*¹⁰⁸ FormGen was the creator and copyright owner of Duke Nukem 3D, a first-person shooter video game.¹⁰⁹ The basic game came with twenty-nine levels along with a “Build Editor” that allowed users to create their own levels in MAP files.¹¹⁰ These MAP files contained specific information that told the game where to place certain objects on the screen.¹¹¹ The MAP files did not contain any of the copyrighted information from the game itself.¹¹² FormGen encouraged players to post user-created levels on the Internet so that other players could download and use them.¹¹³ Micro Star, a computer software distributor, downloaded 300 of these user-created levels, placed them on a CD, and sold the CD as Nuke It.¹¹⁴

Micro Star argued that Nuke It did not infringe on any of FormGen’s copyrights because, like the Game Genie, the MAP files on Nuke It merely replaced information relayed to the original game and did not physically alter the game itself.¹¹⁵ The *Micro Star* court, however, distinguished Nuke It from the Game Genie by noting that a permanent form of the audiovisual alteration was stored in the MAP files, whereas no such file was actually stored in the Game Genie.¹¹⁶

In response, Micro Star argued that Nuke It did not store any of the protected images but rather only made reference to the images located in the source art library file associated with Duke Nukem.¹¹⁷ On this point, the court found that the protected work in this case was the storyline associated with the game, not the images stored in the source art library.¹¹⁸ By creating Nuke It, Micro Star had in effect created a sequel to the game, a right exclusively held by FormGen.¹¹⁹ The court noted that the MAP files only worked in conjunction with the Duke Nukem game and that if the files worked with other, non-related games, then the Duke Nukem protected storyline would not be infringed.¹²⁰

106. *Id.* (quoting *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984)).

107. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 969 (9th Cir. 1992).

108. 154 F.3d 1107, 1109 (9th Cir. 1998).

109. *Id.*

110. *Id.* at 1109-10.

111. *Id.*

112. *Id.* at 1110.

113. *Id.* at 1109.

114. *Id.*

115. *Id.* at 1111.

116. *Id.*

117. *Id.* at 1112.

118. *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998).

119. *Id.*

120. *Id.* at 1112 n.5.

The *Midway*, *Galoob*, and *Micro Star* holdings make clear that an altered audiovisual display can be an unlawful derivative work.¹²¹ The distinction as to when an altered audiovisual display becomes an unlawful derivative work is less clear.¹²² The *Galoob* court addressed this distinction, stating that to be a derivative work, an altered display must “incorporate a portion of a copyrighted work in some concrete or permanent form.”¹²³

To illustrate this point, the *Galoob* court noted that a kaleidoscope may alter a viewer’s perception of a copyrighted artwork, but to claim it creates an unlawful derivative work would be misplaced.¹²⁴ Likewise, the *Micro Star* court noted that holding a piece of pink cellophane in front of a television screen makes the display appear pink to a viewer.¹²⁵ Despite this alteration, the cellophane placement does not create a derivative work because no part of the copyrighted audiovisual display is incorporated into the pink cellophane.¹²⁶ The courts’ rationale appear to be that the product creating the altered audiovisual display must incorporate some concrete or permanent form of the copyrighted work into the product itself for the altered audiovisual display to be an unlawful derivative work.¹²⁷

This rationale comports with the holdings in all three cases. In *Midway*, Artic’s circuit board incorporated much of the same information used by Midway’s circuit board to produce its audiovisual display.¹²⁸ Similarly, in *Micro Star* the Nuke It CD contained detailed information about the Duke Nukem video game.¹²⁹ In both cases, the courts found that the corresponding audiovisual display was an unlawful derivative work.¹³⁰ On the other hand, in *Galoob*, the Game Genie did not incorporate any part of a Nintendo game into the actual product.¹³¹ Accordingly, the court found that the corresponding audiovisual display was not an unlawful derivative work.¹³²

Applying this rationale to filtering technology, a court would likely find the audiovisual display created by a filter an unlawful derivative work.¹³³ Filters work

121. “To prove infringement, [a copyright holder] must show that [its audiovisual display and the derivative audiovisual display] are substantially similar in both idea and expression.” *Id.* at 1112 (citing *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)).

122. *Compare* *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 968 (9th Cir. 1992) (finding that removing data being sent to create an audiovisual display did not constitute a “concrete or permanent form”), *with* *Micro Star*, 154 F.3d at 1112 (finding that information stored in a source-art library file which could create an altered audiovisual display was a “permanent or concrete form”).

123. *Galoob*, 964 F.2d at 969.

124. *Id.*

125. *Micro Star*, 154 F.3d at 1111 n.4.

126. *Id.*

127. *See id.*

128. *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1100 (7th Cir. 1983).

129. *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998).

130. *Id.* at 1112; *Midway*, 704 F.2d at 1013.

131. *Galoob*, 964 F.2d at 969.

132. *Id.*

133. *See* *Micro Star*, 154 F.3d at 1111-12 (concluding that “an exact, down to the last detail, description of an audiovisual display ... counts as a permanent or concrete form”). *See also* Karangelen, *supra* note 4, at 28-29 (arguing that “[t]he fact that the scenes are pre-selected and entered according to a time code ... is likely to sway the court towards [finding] infringement”). *But see* Glasser, *supra* note 9,

by monitoring a movie and performing actions at specific reference points in the movie.¹³⁴ The filter creates an altered audiovisual display of a movie by incorporating the position codes or time codes of a movie into a file.¹³⁵ Further, like the MAP files in *Micro Star*, each filter is unique and only works with one particular movie.¹³⁶ Essentially, a filter is an exact description of a movie's audiovisual display, which, according to the *Micro Star* court, is concrete or permanent enough to be an unlawful audiovisual display.¹³⁷

B. Contributory Infringement

Filtering companies themselves may or may not be direct infringers of motion-picture companies,¹³⁸ but they may be infringers based on a theory of contributory infringement.¹³⁹ Contributory infringement occurs when one party “acts with knowledge of a copyright infringing activity to induce, cause, or materially contribute to the infringing conduct of another.”¹⁴⁰ For one to be liable under contributory infringement, another party must directly infringe on the copyright.¹⁴¹ Thus, in copyright law, a copyright holder can show contributory infringement if one party directly infringes on a copyright and the other party provides the means to infringe with the intent to cause an infringing use.¹⁴²

The Supreme Court recognized contributory infringement in *Sony Corporation of America v. Universal City Studios, Inc.*¹⁴³ Sony manufactured and sold the Betamax home videotape recorder, which, according to the motion-picture industry, infringed on its copyrights by allowing Betamax consumers to create unauthorized reproductions of copyrighted material.¹⁴⁴ The Court found otherwise, holding that Sony was not liable for infringing uses by users of the Betamax.¹⁴⁵

The Court began its analysis by examining the district court's findings that the average Betamax user utilized its recording ability to time-shift programs aired on television.¹⁴⁶ The Court noted that though Betamax lent itself to some infringing uses, a balance must be struck “between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others to freely engage in substantially unrelated areas of commerce.”¹⁴⁷

at 159 (arguing that ClearPlay's filters more resembled the Game Genie in *Galoob* than the Nuke It CD in *Microstar*, and therefore “the movies cannot be considered derivative works”).

134. See *supra* Part II.A.

135. See *supra* notes 29-33 and accompanying text.

136. See ClearPlay DVD Player: TVDefender.com, *supra* note 27.

137. See *Micro Star*, 154 F.3d at 1111-12.

138. See *supra* note 82.

139. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1981).

140. 18 AM. JUR. 2D *Copyright and Literary Property* § 219 (2000).

141. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005).

142. See *id.* at 941; *Sony Corp.*, 464 U.S. at 442.

143. *Sony Corp.*, 464 U.S. at 421.

144. *Id.* at 420.

145. *Id.* at 456.

146. *Id.* at 421.

147. *Id.* at 442.

Accordingly, the Court stated that the sale of the Betamax would not amount to contributory infringement if a substantial non-infringing use for the Betamax existed.¹⁴⁸

Until recently, courts broadly construed the holding that equipment capable of copying works “need merely be capable of substantial non-infringing uses” to mean that contributory infringement did not apply to companies supplying the equipment unless they had “actual knowledge of specific instances of infringement and failed to act on that knowledge.”¹⁴⁹ This changed in *MGM Studios, Inc. v. Grokster, Ltd.*, when the Supreme Court limited this interpretation’s scope, holding that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”¹⁵⁰

In coming to this conclusion, the Court analyzed similar provisions in patent law, stating that “where an article is ‘good for nothing else’ but infringement, there is no legitimate public interest in its unlicensed availability.”¹⁵¹ The “article” in *MGM Studios* was software that allowed users’ computers to directly communicate with other users’ computers, thereby giving access to copyrighted works.¹⁵² Though users sometimes transferred non-copyrighted material between their computers, approximately ninety percent of the shared files were copyrighted.¹⁵³ Grokster, the defendant, not only was aware this was happening, but it also openly encouraged users to distribute infringing copyrighted works.¹⁵⁴ The Court held that this effort to encourage infringement was recognized in all areas of law as a reason for liability.¹⁵⁵

If filters create unauthorized derivative works, courts likely would find distributors of filtering technology liable for contributory infringement.¹⁵⁶ First, a filtering player’s essential purpose is to alter the original copyrighted work.¹⁵⁷ Thus, filtering companies such as ClearPlay may need to show a substantial non-infringing use for filtering players to escape liability for contributory infringement.¹⁵⁸ It is not clear that there is a substantial use for a filtering player other than to skip over content in a movie.¹⁵⁹ Second, ClearPlay expressly advertises its filtering player as a method of eliminating offensive content from a movie.¹⁶⁰ In a sense, ClearPlay is

148. *Id.*

149. *See, e.g.*, *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, *MGM Studios*, 545 U.S. at 941.

150. *MGM Studios*, 545 U.S. at 919.

151. *Id.* at 932.

152. *Id.* at 919.

153. *Id.* at 922.

154. *Id.* at 925 (“[W]hen it launched the OpenNap network, the chief technology officer for the company averred that ‘[t]he goal is to get in trouble with the law and get sued. It’s the best way to get in the new[s].’”).

155. *Id.* at 935.

156. *See id.* at 919.

157. *See* ClearPlay DVD Player: TVDefender.com, *supra* note 27.

158. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1981).

159. *See supra* Part II.B.

160. ClearPlay DVD Player: TVDefender.com, *supra* note 27 (“ClearPlay is a fancy DVD Player that can play regular DVD movies—but without profanity, violence and nudity.”). *See also* Press

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“distribut[ing] a device with the object of promoting its use to infringe copyright.”¹⁶¹ Accordingly, the filtering player offered by ClearPlay is more akin to Grokster in *MGM Studios* than the Betamax in *Sony*.¹⁶²

C. Fair Use

Not all unauthorized uses of copyrighted works result in the infringement of a copyright holder’s exclusive rights. One limitation the Copyright Act places on the section 106 exclusive rights given to the copyright owner is for unauthorized “fair use of a copyrighted work.”¹⁶³ The Copyright Act sets out four factors courts should consider in determining whether an otherwise infringing use is allowable under the fair-use doctrine:

- (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.¹⁶⁴

These factors are not exclusive; rather, the fair-use doctrine is “an equitable rule of reason.”¹⁶⁵ Other factors relevant to the filtering issue include whether the plaintiff exercised good faith¹⁶⁶ and whether the defendant deliberately distorted the meaning of the copyrighted work.¹⁶⁷ This subpart will address the four statutory

Release, ClearPlay, ClearPlay Awarded Patent (May 13, 2005) (on file with the University of Toledo Law Review) (“The company’s first products allow consumers to view DVDs, purchased or rented through conventional retailers, free of unwanted content.”), available at http://www.clearplay.com/t-press_ClearPlay_Awarded_Patent.aspx.

161. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). This assumes that ClearPlay is creating an infringing derivative work. See *supra* Part III.A.

162. Compare *MGM Studios*, 545 U.S. at 919 (finding that Grokster was liable for infringement because, despite the fact that non-infringing uses existed, it encouraged users to participate in distributing copyrighted works), with *Sony Corp.*, 464 U.S. at 442 (holding that the non-infringing uses of the Betamax could preclude a finding of contributory infringement).

163. 17 U.S.C. § 107 (2006).

164. *Id.*

165. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (citing H.R. REP. NO. 94-1476, at 66 (1976)).

166. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (noting that “fair use presupposes good faith and fair dealing” but that “being denied permission to use a work does not weigh against a finding of fair use”).

167. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir. 1986) (“The commission of errors in borrowing copyrighted material is a proper ingredient to consider in making the fair use determination ... [however, o]nly where the distortions [are] so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim.”).

factors along with the other relevant factors and determine whether a court would find the filtering technology falls within a fair-use exception.¹⁶⁸

1. *Purpose and Character of Use*

The first factor courts address when deciding fair use of a copyrighted work is the purpose and character of the use.¹⁶⁹ When analyzing this factor, courts have considered three issues: the transformative nature of the work,¹⁷⁰ the commercial nature of the use,¹⁷¹ and the propriety of the defendant's conduct.¹⁷²

A transformative use is one that is productive and employs the copyrighted material "in a different manner or for a different purpose from the original."¹⁷³ A work is productive if it "adds value to the original work."¹⁷⁴ A new work adds value if the copyrighted work is "transformed in the creation of new information, new aesthetics, new insights and understandings."¹⁷⁵ The Supreme Court adopted the transformative use concept in *Campbell v. Acuff-Rose Music, Inc.*¹⁷⁶ In *Campbell*, 2 Live Crew recorded a rap parody of Roy Orbison's "Oh, Pretty Woman."¹⁷⁷ While analyzing the first fair-use factor, the Court noted that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."¹⁷⁸ Accordingly, the Court stated that less emphasis is placed on factors such as the work's commercial nature when a work is transformative.¹⁷⁹

Nevertheless, the commercial nature of a work is still an important issue when applying the first fair-use factor.¹⁸⁰ Prior to *Campbell*, the Supreme Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."¹⁸¹ The *Campbell* Court limited the presumptive weight of a commercial use, stating that

168. Courts weigh all relevant factors together in determining whether the defense of fair use applies. 4 PATRY ON COPYRIGHTS § 10:157 (2007).

169. *Campbell*, 510 U.S. at 578.

170. *Id.* at 579.

171. *Harper & Row*, 471 U.S. at 562 ("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.").

172. *Id.*

173. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

174. *Id.*

175. *Id.*

176. 510 U.S. 569, 579 (1994).

177. *Id.* at 572.

178. *Id.* at 579.

179. *Id.* See also *Blanch v. Koons*, 467 F.3d 244, 253-54 (2d Cir. 2006) (finding that the public benefit of the transformative nature of an artist's painting from another artist's photograph outweighed the fact that the artist made a substantial profit from the painting); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (concluding that the first fair-use factor weighed in favor of the defendant because it used the plaintiff's copyrighted images in a transformative manner, outweighing the commercial nature of the magazine).

180. See *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (stating that "any commercial use tends to cut against a fair use defense").

181. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1981).

“the force of that tendency [of weighing commercial use as presumptively unfair] will vary with the context.”¹⁸² For example, the commercial use of a copyrighted work in an advertisement is given far more weight against finding fair use than the commercial use of a copyrighted work in a parody.¹⁸³ After *Campbell*, courts do not rigidly find every commercial use presumptively unfair.¹⁸⁴

Finally, courts consider “the propriety of [a] defendant’s conduct” in determining the purpose and character of a use.¹⁸⁵ The Ninth Circuit examined this issue in *Sega Enterprises Ltd. v. Accolade, Inc.*¹⁸⁶ In an attempt to stymie video game piracy, Sega released the Genesis III.¹⁸⁷ The Genesis III contained a trademark security system that locked out games unless the system found the letters S-E-G-A in a specific section of the game’s code.¹⁸⁸ Accolade, a video-game developer, discovered this section through reverse engineering and incorporated it into the code for its games, making them compatible with the Genesis III.¹⁸⁹ The court noted that Accolade used only a very small portion of the code to make its games compatible with the Genesis III.¹⁹⁰

In analyzing the fair-use doctrine, the court found that the character of Accolade’s use was commercial, but the purpose of copying the code was to discover the functional requirements necessary to make its games compatible with the Genesis III.¹⁹¹ The court held that the commercial use’s presumption of unfairness can be rebutted where the use is for “a legitimate, essentially non-exploitative purpose” and where “the commercial aspect of its use can best be described as of minimal significance.”¹⁹² A non-exploitative use is one that does not “seek to avoid paying a customarily charged fee ... or simply copy [a copyrighted work].”¹⁹³

Courts also consider the benefit the public derives from an otherwise infringing use when discussing the propriety of a defendant’s conduct.¹⁹⁴ Courts have found that public-benefit uses “typically [involve] the development of art, science, and industry”;¹⁹⁵ however, the public-benefit use has been distinguished from the “purely

182. *Campbell*, 510 U.S. at 585.

183. *Id.*

184. *See, e.g., Blanch*, 467 F.3d at 253.

185. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (1984)).

186. 977 F.2d 1510 (9th Cir. 1992).

187. *Id.* at 1515.

188. *Id.*

189. *Id.* at 1515-16.

190. *Id.* at 1516. The code consisted of 20 to 25 bytes of information, with each game containing 500,000 to 1.5 million bytes of information. *Id.*

191. *Id.* at 1522.

192. *Id.* at 1522-23.

193. *Id.* at 1522.

194. *See id.* at 1523 (noting that the public benefited from “growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works”). *See also Sundeman v. Seajay Soc’y*, 142 F.3d 194, 203 (4th Cir. 1998) (discussing how the purpose of use weighs in favor of a finding of fair use when it “serve[s] the ‘public benefit’ and ‘the development of the arts’” (quoting *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966))).

195. *Sundeman*, 142 F.3d at 203.

financial interest of customers.”¹⁹⁶ Thus, for this factor to weigh in favor of fair use, the benefit must affect at least a significant portion of the public.¹⁹⁷

In applying this factor to filtering technology, the first step is to determine whether filters create a transformative work.¹⁹⁸ In some ways, filtering companies employ copyrighted works in a different manner or for a different purpose.¹⁹⁹ Arguably, filtering companies offer the public an alternative to the violence, sex, and language prevalent in motion pictures.²⁰⁰ Further, filtering technology can shorten a movie or juxtapose scenes together to establish a meaning contrary to the movie’s original message.²⁰¹ Alterations such as these may weigh in favor of finding filtered audiovisual displays transformative if a court concludes that they add value to the copyrighted work.²⁰²

On the other hand, filtering companies employ movies in the same manner and purpose as the motion-picture industry.²⁰³ That is, most filtered movies are similar to the original work in theme and storyline.²⁰⁴ ClearPlay explicitly states that its goal is to ensure that the filters are “tailor-made to preserve the entertainment value of each film ... to ensure that the integrity of the plot and story of the movie are maintained.”²⁰⁵ The copyrighted images are used in the same sequence and establish the same message.²⁰⁶ Further, the medium itself is not altered, just the audiovisual display.²⁰⁷ These factors weigh against finding filtered audiovisual displays transformative because filtering companies are not creating something productive.²⁰⁸

Along with the transformative nature of filters, courts must also consider whether the technology has a commercial use.²⁰⁹ While filtering technology is commercial in nature,²¹⁰ the weight accorded to this fact depends on whether courts

196. *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 365 (E.D. Va. 1994).

197. *See id.*

198. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

199. *See Leval, supra* note 173, at 1111.

200. *See Filtering Hearing, supra* note 14, at 93.

201. *See supra* Part II.B. Despite the fact that this does transform the work, the fair-use doctrine may not offer protection to an altered motion picture that changes the meaning if it does not add value to the original work. *See Leval, supra* note 173, at 1111.

202. *See Campbell*, 510 U.S. at 579; *Leval, supra* note 173, at 1111. Note, however, that Judge Leval somewhat limited transformative uses to those “criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it.” *Leval, supra* note 173, at 1111. This implies that a transformative use must expose the public to some other meaning or interpretation of the copyrighted work. *See id.* Accordingly, changing the length of a movie without changing its meaning may not fit within the definition of a transformative work as set out by Judge Leval. *See id.*

203. *See ClearPlay DVD Player: TVDefender.com, supra* note 27.

204. *See id.*

205. *Id.*

206. *See id.*

207. *See Leval, supra* note 173, at 1111.

208. *Id.*

209. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994).

210. The Supreme Court has referred to commerciality in the context of the fair-use doctrine as an activity “generally conducted for profit in this country.” *Id.* (quoting *Harper & Row, Publishers, Inc. v.*

define audiovisual displays as transformative.²¹¹ If a court finds that an audiovisual display is transformative, it is likely to give greater leeway to filtering technology.²¹² Alternatively, if a court finds that an audiovisual display is not transformative, this factor may weigh more towards unfair use.²¹³

To rebut this, a filtering company needs to show that the use's propriety outweighs the commercial nature.²¹⁴ This determination hinges on whether the filtering technology's use is essentially non-exploitative and the commercial aspect is minimal.²¹⁵ In the case of filtering companies, courts could find the purpose of the use non-exploitative and the commercial aspect minimally significant. Filtering companies that make filters for potentially offensive content are not trying to simply copy a copyrighted work, but instead are trying to offer an alternative product to the public that is otherwise unavailable.²¹⁶ For courts to find in favor of filtering companies, the companies need to argue that the benefit to the public outweighs any detriment to the motion-picture industry.²¹⁷

Filtering companies that strictly target potentially offensive content with their filters, such as ClearPlay, probably have a fairly strong argument that the public benefit outweighs any economic harm to the motion-picture industry;²¹⁸ however, the public benefit may vary depending on the purpose of the filter.²¹⁹ For example, a filter that changes the length of a movie to a sixty-minute movie or a fifteen-minute movie may provide very little benefit to the public while at the same time imposing substantial harm to the integrity of the movie.²²⁰ Accordingly, whether a court would find that the use's purpose and character weighs in favor of the filtering companies is not clear.

Nation Enters., 471 U.S. 539, 592 (1985)). ClearPlay is a for-profit company that charges fees for its filters. ClearPlay DVD Player, *supra* note 27.

211. See *Campbell*, 510 U.S. at 585. See also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986) (finding that the public interest in defending oneself against derogatory personal attacks rebutted the presumption of unfair use when the copyrighted material was used as a means of raising money).

212. See *Campbell*, 510 U.S. at 585.

213. See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1994) (finding that it is appropriate for a court to weigh the for-profit nature of a company in a situation where non-transformative use of a copyrighted work does not directly lead to a commercial gain to the company).

214. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

215. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992).

216. *Id.* See also Karen E. Georgenson, Comment: *Reverse Engineering of Copyrighted Software: Fair Use or Misuse?*, 5 ALB. L.J. SCI. & TECH. 291, 301 (1996) (stating that the court in *Sega* relied in part on the fact that Accolade's use led to an increase in products otherwise unavailable to the public).

217. *Sega Enters.*, 977 F.2d at 1523.

218. See *Filtering Hearing*, *supra* note 14, at 23 (testimony of Joanne Cantor, Professor Emeritus, University of Wisconsin-Madison) (stating that studies show "children often behave more violently after watching media violence").

219. Cf. Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 73 (2004) (stating that the public's benefit is enhanced by works that are "not likely to be possible through any pre-existing means").

220. See *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939 (9th Cir. 2002) ("There must be real, substantial condensation of the materials ... and not merely the facile use of scissors; or extracts of the essential parts, constituting the chief value of the original work.").

2. *Nature of Copyrighted Work*

The second factor a court weighs in determining fair use is the nature of the copyrighted work.²²¹ As noted in the *Campbell* opinion, “some works are closer to the core of intended copyright protection than others.”²²² Not all copyrighted works are given the same protection, with more protection entitled to creative works than factual works.²²³ Most filters offered by ClearPlay correspond to entirely creative works.²²⁴ While ClearPlay also creates filters for documentaries, even a documentary is considered a creative work.²²⁵ Since filtering companies primarily target works that are either entirely fictional or provide creative twists on nonfictional events, this factor weighs in favor of the motion-picture industry.²²⁶

3. *Amount and Substantiality of Copyrighted Work Used*

The third factor in the fair-use doctrine is the amount and substantiality of the use of the copyrighted work.²²⁷ Courts generally will not find fair use in situations where an entire copyrighted work is reproduced.²²⁸ In most cases, a copyrighted work’s fair use is inversely proportional to the amount of the copyrighted work used,²²⁹ but there is no bright-line rule.²³⁰ Further, this factor not only refers to the quantitative amount of the copyrighted work used but also to the qualitative amount used.²³¹

221. 17 U.S.C. § 107(2) (2006).

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

223. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985). Far less protection is given to a compilation of factual information because of the public’s interest in the dissemination of the information; therefore, courts are more willing to find fair use in situations where the nature of the work is primarily factual. *See also* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991).

224. *See* *ClearPlay Movies*, *supra* note 40.

225. *See Feist Publ’ns*, 499 U.S. at 344 (“[F]acts are not copyrightable; ... [however,] compilations of facts generally are.”).

226. *See* *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629-30 (9th Cir. 2003) (finding that the district court did not abuse its discretion in holding that television footage, still photographs, and sound recordings were creative works and thereby weighing the second factor against the defendant). *Cf.* Jennifer Suzanne Bresson Bisk, Comment, *Book Search Is Beautiful?: An Analysis of Whether Google Book Search Violates International Copyright Law*, 17 ALB. L.J. SCI. & TECH. 271, 293-94 (2007) (arguing that the second factor weighs against Google Books even though some of the books are fact based).

227. 17 U.S.C. § 107(3) (2006).

228. *See, e.g.*, *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998); *Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989). *See also* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978) (stating that the defense of fair use cannot be raised for “copying that is virtually complete or almost verbatim”). *But see* *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 678-79 (D. Minn. 1995) (finding that the reprinting of a story in its entirety by a newspaper was justified because of the unique nature of the story).

229. *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003).

230. *See Harper & Row*, 471 U.S. at 569; *Belmore*, 880 F. Supp. at 679.

231. *Compare Harper & Row*, 471 U.S. at 569 (finding that the reproduction of 300 words in a 2250-word article was substantial use), *with* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994)

In *Campbell*, the Court stated that the amount copied must be “reasonable in relation to the purpose of the copying.”²³² In determining the qualitative aspects of a copyrighted work’s use, a court must first consider the “persuasiveness of [the] justification for [a] particular copying done, and [then] the enquiry will harken back to the first of the statutory factors, ... recogniz[ing] that the extent of permissible copying varies with the purpose and character of the use.”²³³

Filtering technology requires a copyrighted work’s use to function.²³⁴ In essence, the entire work is used, with only small portions of the motion picture removed.²³⁵ Therefore, filtering companies must argue that the quantity of copyrighted material used is justified in relation to the use’s purpose.²³⁶ Whether the third factor weighs in favor of the filtering companies depends on whether a court finds that the use’s purpose and character also weighs in favor of the filtering companies.²³⁷ Due to the quantitative amount of copyrighted work used in relation to filtered movies, the purpose-and-character-of-use factor likely has to favor filtering companies strongly in order for this third factor to also weigh in their favor.²³⁸

4. *Effect of Use upon Potential Market*

The fourth factor the Copyright Act sets forth in determining whether a copyrighted work’s use is a fair use is the “effect of the use upon the potential market for or value of the copyrighted work.”²³⁹ In applying this factor, a court must consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the [copyright holder’s] potential market.”²⁴⁰ Further, a court “must take account not only of harm to the original but also of harm to the market for derivative works.”²⁴¹ This factor is the “most important, and indeed, central fair use factor.”²⁴²

The Supreme Court has stated that “to negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’ This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.”²⁴³ In

(questioning whether “copying can be excessive in relation to [a] parodic purpose, even if the portion taken is the [original work’s] ‘heart’”).

232. *Campbell*, 510 U.S. at 586.

233. *Id.* at 586-87.

234. *See supra* Part II.A.

235. *See id.*

236. *See Campbell*, 510 U.S. at 586.

237. *See id.*

238. *See id.*

239. 17 U.S.C. § 107(4) (2006).

240. *Campbell*, 510 U.S. at 590 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985)).

241. *Harper & Row*, 471 U.S. at 568.

242. *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (citing 3 NIMMER & NIMMER, *supra* note 185, § 13.05[A]).

243. *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

Campbell, the Court further noted that a work that merely duplicated the original work was more likely to harm a potential market than a transformative work.²⁴⁴ Accordingly, this factor tends to weigh against fair use when a work is duplicative and for fair use when a work is transformative.²⁴⁵

Filtering companies offer a product that allows a user to watch a movie in a manner different from its original intent.²⁴⁶ ClearPlay, for example, cleanses movies of potentially offensive conduct.²⁴⁷ In doing so, ClearPlay turns R-rated movies into movies with the equivalent of PG-13, PG, or even G ratings.²⁴⁸ This is arguably a potential market for the motion-picture industry.²⁴⁹ In fact, the motion-picture industry currently licenses companies to create edited films for television and airlines.²⁵⁰ Further, many motion pictures are already released in multiple versions, such as a PG-13 and R-rated version,²⁵¹ or an R-rated and unrated version.²⁵² Filtering technology takes away from this potential market. For instance, if a motion picture is released in both a PG-13 and R-rated version, a parent who wants to watch the R-rated version but only wants his children to see the PG-13 version has to buy or rent both copies. With filtering technology, a parent can buy just the R-rated version and filter out the content he does not want his children to watch.²⁵³

If use of filtering technology becomes widespread, movie-rental stores could also buy only the R-rated version, knowing that parents who wanted their children to see the PG-13 version could filter out the R-rated content. This would significantly cut into the market for derivative works by the copyright holder, a right the Copyright Act expressly grants to the copyright holder.²⁵⁴ Because a filtering technology potentially usurps the prospective market for the motion-picture industry, this factor weighs against the filtering companies.²⁵⁵

5. *Additional Factors*

The fair-use doctrine is not exclusively limited to the four factors in the Copyright Act, and courts must analyze fair-use claims on a case-by-case basis.²⁵⁶

244. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

245. *Id.* at 579.

246. See Clearplay DVD Player: TVDefender.com, *supra* note 27.

247. *Id.*

248. See *id.*

249. See *Family Movie Act of 2004, Hearing on H.R. 4586 Before the Subcommittee on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 91 (2d Sess. 2004) (response of Marybeth Peters to post-hearing questions from Rep. Howard Berman) [hereinafter *FMA Hearing*].

250. See *id.* See also DIR. GUILD OF AM., 2005 BASIC AGREEMENT § 7-509, at 76-79 (discussing the licensing agreement for directors of theatrical motion pictures).

251. See, e.g., *MY BOSS'S DAUGHTER* (Dimension Films 2003).

252. See, e.g., *AMERICAN PIE* (Universal Pictures 1999).

253. See ClearPlay DVD Player: TVDefender.com, *supra* note 27.

254. 17 U.S.C. § 106 (2006).

255. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

256. *Harper & Row, Publishers, Inc. v. Nations Enters.*, 471 U.S. 539, 553 (1985).

Courts have considered several factors in addition to those section 107 expressly provides.²⁵⁷

For filtering companies, the most relevant additional factor is whether the defendant acted in good faith or bad faith.²⁵⁸ A defendant's good-faith use does not preclude a finding of infringement,²⁵⁹ but a defendant's bad faith "militates against a finding of fair use ... [and] may bar an otherwise legitimate fair use claim."²⁶⁰ Bad faith is the "[k]nowing exploitation of a copyrighted work for personal gain."²⁶¹ Bad faith does not exist in every case of infringement; courts have consistently ruled that a copyrighted work's use without permission of the copyright owner does not constitute bad faith.²⁶²

In determining a defendant's good faith or bad faith, courts also consider whether the defendant deliberately distorted the copyrighted work's meaning.²⁶³ In *Maxtone-Graham v. Burtchaell*, the plaintiff published a book consisting of interviews with women discussing their unwanted pregnancies.²⁶⁴ The defendant later published an essay using direct quotations from the plaintiff's book.²⁶⁵ In writing the essay, the defendant construed some of the quotations regarding adoption in a manner suggesting that they regarded abortion.²⁶⁶ The *Maxtone* court stated that the "commission of errors is a proper ingredient to consider in making the fair use determination."²⁶⁷ The court limited this factor as dispositive to a finding against fair use to cases where the errors were "so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness."²⁶⁸ Thus, the court found that the defendant's use of quotations

257. See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478-79 (2d Cir. 2004) (weighing the defendant's bad faith but finding that "the bad faith of a defendant is not dispositive of a fair use defense"); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 522 (7th Cir. 2002) (finding that the district court was incorrect in granting summary judgment because it failed to consider whether "the use of photos [in a collector's guide] is fair use because it is the only way to prepare a collector's guide"); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988) (considering whether "the protection of privacy" was a relevant factor in analyzing fair use).

258. *Campbell*, 510 U.S. at 585 n.18 (noting that "fair use presupposes good faith and fair dealing").

259. See *id.* (noting that "good faith does not bar a finding of infringement") (citing *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841)).

260. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (finding that removing a copyright mark from the plaintiff's work suggested "bad faith in defendant's use of plaintiff's work, and militate[d] against a finding of fair use").

261. *Id.*

262. See *Campbell*, 510 U.S. at 585 n.18 ("If the use is otherwise fair, then no permission need be sought or granted."). See also *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) ("[I]t can hardly be said to have been an act of bad faith for Koons to have neither 'sought [n]or [been] granted' permission for the use of 'Silk Sandals' so long as, as we conclude here, the use is 'otherwise fair.'" (quoting *Campbell*, 510 U.S. at 585 n.18)); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (finding that the fair use defense for parodies "exists precisely to make possible a use that generally cannot be bought").

263. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-61 (2d Cir. 1986).

264. *Id.* at 1256.

265. *Id.*

266. *Id.* at 1257.

267. *Id.* at 1261.

268. *Id.*

misrepresented the plaintiff's work, but that it did not cross the threshold of being deliberately misrepresentative.²⁶⁹

In relation to filtering companies, whether a court would find that this factor weighs in favor of the filtering companies likely depends on the type of filter offered by the company.²⁷⁰ Courts are far more likely to weigh this factor in favor of filtering companies that remove small portions of potentially offensive content than for filtering companies that juxtapose scenes of a movie in a manner that misrepresents the original work.²⁷¹

6. *Weighing the Factors*

The fair-use doctrine is an "equitable rule of reason"; therefore, the factors need to be weighed together to determine whether an otherwise infringing use is fair.²⁷² Accordingly, the factors are not tallied separately like "a score card that promises victory to the winner of the majority."²⁷³ Courts should instead "examine the issue from every pertinent corner and ... ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright."²⁷⁴ As stated earlier, copyright law's object is to "secure a fair return for an 'author's' creative labor ... [and] the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."²⁷⁵

The motion-picture industry has two main arguments against a finding of fair use. First, the motion-picture industry can argue that filtering technology's purpose and character is not transformative, and therefore, the filtering companies' commercial nature is dispositive of a finding of fair use.²⁷⁶ For this argument to have force, the motion-picture industry must show that the filtering companies are exploiting the copyrighted movies and the commercial aspect is more than minimal.²⁷⁷

A stronger argument for the motion-picture industry is that the filtering companies are usurping a potential market for derivative works.²⁷⁸ Because filtered movies tend to be more duplicative than transformative, courts may give more

269. *Id.*

270. Though ClearPlay filters out only potentially offensive content, filtering players are capable of filtering essentially anything out of a movie. *See CustomPlay, supra* note 45.

271. Arguably, a filtering company that juxtaposes scenes in a manner that is misrepresentative of the original work is knowingly exploiting the original movie because such juxtaposition does not benefit the general public but only benefits the filtering company. *See Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992). Additionally, a deliberate misrepresentation likely militates against a finding of fair use. *Maxtone-Graham*, 803 F.2d at 1261. CustomPlay discusses filters capable of juxtaposing scenes in such a manner on its website. *See CustomPlay, supra* note 45.

272. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

273. Leval, *supra* note 173, at 1110.

274. *Id.* at 1110-11.

275. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

276. *See Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1994).

277. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992).

278. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1984).

deference to this factor than the other fair-use factors.²⁷⁹ Accordingly, by usurping a potential market, filtering companies are stymieing “artistic creativity for the general public good” by taking away from the motion-picture industry a “fair return for [their] creative labor.”²⁸⁰

Filtering companies have two countervailing arguments. First, filtering companies can argue that the benefit to the public outweighs the harm to the motion-picture industry.²⁸¹ As discussed previously, this argument’s force depends on the type of filter the company provides.²⁸² Second, filtering companies can argue that the filters’ use only minimally effects the potential market because the filtering companies are merely filling in gaps in the market where the motion-picture industry has decided not to participate.²⁸³

In addressing both sides, a court needs to look at the objective of copyright law—to encourage creativity for the benefit of the public.²⁸⁴ In support of the filtering companies, removing potentially offensive content probably does not discourage creativity in most cases. In support of the motion-picture industry, filters are capable of more than removing potentially offensive content.²⁸⁵ If a court were to apply the fair-use analysis to cases where a filtering company creates filters that juxtapose scenes from a movie in a manner inconsistent with the meaning of the movie, the court would likely find against fair use.²⁸⁶

A gray area lies in between these two uses. Sometimes potentially offensive content is necessary to convey a certain message, and filtering out such content materially changes the meaning of the movie.²⁸⁷ For example, Steven Spielberg used nudity in *Schindler’s List* to convey the debasement of humanity that occurred in Nazi concentration camps.²⁸⁸ If a filtering company is allowed to filter out these scenes and change the meaning of the movie, the filtering company’s actions do not benefit the public because the public misses out on a critical message in the movie.²⁸⁹ Accordingly, a case-by-case analysis of the fair-use doctrine is necessary in relation to filtering technology under pre-FMA copyright law.

279. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

280. *Aiken*, 422 U.S. at 156.

281. See *Sega Enters.*, 977 F.2d at 1523.

282. See *supra* Part III.C.1.

283. See *id.* But see *Harper & Row*, 471 U.S. at 569 (stating that a court “must take account not only of harm to the original but also of harm to the market for derivative works”).

284. *Aiken*, 422 U.S. at 156.

285. See *supra* Part II.B.

286. See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-61 & n.7 (2d Cir. 1986).

287. See *id.* at 1261 (stating that unintentional misrepresentations are not dispositive of fair use, but are a factor weighing against fair use).

288. *SCHINDLER’S LIST* (Universal Pictures 1993).

289. See Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 13 (1995) (stating that one type of “public benefit is the direct benefit that occurs because the public can learn from the ideas and expression of the first work”).

IV. THE FAMILY MOVIE ACT

Congress passed the FMA as part of the Family Entertainment and Copyright Act of 2005.²⁹⁰ The FMA protects both filtering technology and the filters commercially provided by the filtering companies from certain copyright and trademark infringement claims.²⁹¹ First, this part looks at the FMA's legislative history to determine the legislative intent of and objections to the act. Second, this part analyzes the language of the FMA in order to establish the meaning of the statute.

A. *Legislative History of the FMA*

In response to ongoing litigation between movie-editing companies and the motion-picture industry, the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary held a hearing regarding the legality of filtering technology on May 20, 2004.²⁹² Within a month of this hearing, Representative Lamar Smith introduced legislation to provide protection from copyright and trademark infringement suits to companies offering filtering technology for use in private home settings.²⁹³ Some members of the subcommittee argued that legislation was "necessary to end the unnecessary [*Huntsman v. Soderbergh*] litigation."²⁹⁴ Other members maintained that the legislation was premature and that the marketplace and the courts were the best venues to resolve the conflict between the filtering companies and the movie producers and creators.²⁹⁵ Despite the opposing members' objections, the bill passed favorably through the subcommittee.²⁹⁶

Once before the House, the FMA was combined with the Piracy and Education Act of 2004.²⁹⁷ Those members that objected to the FMA strongly supported the Piracy and Education Act, so the FMA easily passed a House vote.²⁹⁸ Upon introduction into the Senate, the Senate amended the Act's language to remove any reference to advertisement skipping and re-titled the legislation the Family

290. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 167, 119 Stat. 218, 223 (2005).

291. *Id.*

292. *Filtering Hearing, supra* note 14, at 93.

293. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2d Sess. 2004).

294. *FMA Hearing, supra* note 249, at 2 (statement of Hon. Lamar S. Smith). Representative Smith contended that litigation imposed an undue financial burden upon ClearPlay because ClearPlay's filtering process was already legal. *Id.*

295. *Id.* at 8 (testimony of Hon. Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress).

296. *Id.* at 39.

297. 150 CONG. REC. H7660 (daily ed. Sept. 28, 2004).

298. *Id.* (statement of Rep. Conyers) ("Unfortunately, I am disappointed that our year-long bipartisan effort has been tainted by the addition of ... the Family Movie Act of 2004 ... [but] I urge my colleagues to vote 'yes' on this legislation.").

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Entertainment and Copyright Act of 2004.²⁹⁹ By April 19, 2005, the Family Entertainment and Copyright Act of 2005 passed both houses of Congress, and President George W. Bush signed it into law on June 30, 2005.³⁰⁰

1. *Proposed Objective of the FMA*

From the FMA's onset, its sole purpose was to create "a safe and nurturing home environment" for families through the use of filtering technology.³⁰¹ Those in favor of filtering companies focused on the effects of violence and sex in motion pictures on children.³⁰² Experts pointed to (1) studies showing a tendency of more aggressive and violent behavior in children after watching violence on television and in movies;³⁰³ (2) research and publications concluding that repeated exposure to media violence leads to increased aggression, desensitization to violence, and increased fear of becoming a victim;³⁰⁴ and (3) the current rating system's lack of clarity and effectiveness.³⁰⁵ Witnesses at the congressional hearing posited that parents have the fundamental right to decide what programming should be viewed in their homes and that the filtering companies merely offered parents the ability to expand their choice of viewing content.³⁰⁶ As stated by Representative Smith, "The issue isn't whether a movie loses some of its authenticity due to skipping of various audio and video but whether parents have a right to shield their children from offensive content."³⁰⁷

2. *Opposition to the FMA*

The earliest objection to the FMA was the effect such proposed legislation would have on the ongoing negotiations between the parties involved in the *Huntsman* litigation.³⁰⁸ As noted by Representative Conyers, "Congressional pressure would automatically appear by just holding [a] hearing, so to think that it would facilitate a legitimate resolution of the [filtering issue was] very hard ... to understand."³⁰⁹

299. 150 CONG. REC. S11852 (daily ed. Nov. 24, 2004) (statement of Sen. Cornyn) ("The Copyright Office has confirmed that [an express 'ad-skipping'] provision is unnecessary to achieve the intent of the bill, which is to avoid application of this new exemption in potential future cases involving 'ad-skipping' devices; therefore, the Senate amendment we offer removes the unnecessary exclusionary language.").

300. 151 CONG. REC. H5598-01 (2005).

301. *Filtering Hearing*, *supra* note 14, at 1 (statement of Hon. Lamar S. Smith).

302. *See, e.g., id.* at 8 (statement of Ms. Joanne Cantor, Professor Emerita, University of Wisconsin-Madison).

303. *Id.*

304. *Id.* at 19 (statement of Jeff J. McIntyre, Senior Legislative and Federal Affairs Officer, American Psychological Association).

305. *Id.* at 20.

306. *Id.* at 14, 23 (statement of Bill Aho, Chief Executive Officer, ClearPlay, Inc.).

307. *Id.* at 2 (statement of Hon. Lamar S. Smith).

308. *Id.* at 2, 5 (statements of Hon. Howard L. Berman, Hon. John Conyers, Jr.).

309. *Id.* at 6 (statement of Hon. John Conyers, Jr.). Even those in favor of the hearing acknowledged the effect such a hearing would have on the negotiations. Representative Smith, presiding over the

Other arguments against legalizing filtering technology focused on possible First Amendment issues,³¹⁰ unintended uses of the technology,³¹¹ and possible overflow into other copyrighted works.³¹² Those against legalizing the technology further argued that filtering technology simply allowed parents to avoid the responsibility of teaching their children how to critically evaluate media messages.³¹³ They likened filters to trying to protect children from the dangers of a swimming pool by locking them out of the swimming area when the most effective method was teaching them to swim.³¹⁴ Finally, some argued that the filtering technology was an “affront to the artistic freedom of creators.”³¹⁵

In the Family Entertainment and Copyright Act’s final report, the minority members listed four specific arguments against the FMA.³¹⁶ First, these members feared that passing the Act would eliminate the courts’ power to interpret copyright and trademark rights in new technology and terminate ongoing good-faith negotiations between the motion-picture industry and movie-editing companies.³¹⁷ These members believed that the marketplace was the best place to determine issues surrounding new technology and that “fundamental fairness prohibit[ed] Congress from passing legislation to influence ... private business negotiations.”³¹⁸

Second, the minority members believed the legislation was unnecessary because parents had other options to control what their children watched.³¹⁹ The motion-picture industry already voluntarily rated movies to inform consumers of the presence of violence, sexual content, and language.³²⁰

Third, the minority members argued that the Act was “incomprehensible and overbroad and would lead to an increase in undesired content.”³²¹ They proposed possible filters that would eliminate racial conflict, interracial marriages, political content, and a variety of other possibilities.³²² Also, since the Act was not limited to

hearing, stated that he hoped the parties would reach an agreement soon; however, in the case that a timely agreement was not reached, the committee was “prepared to introduce legislation or use other legislative vehicles to protect the right of parents to shield their children from violence, sex, and profanity.” *Id.* at 2 (statement of Hon. Lamar S. Smith).

310. *Id.* at 26 (testimony of Marjorie Heins, Fellow, Brennan Center for Justice, New York University of Law, and Founding Director, Free Expression Policy Project) (“Singling out constitutionally protected expression for adverse treatment under the law ... is precisely what the first amendment says Congress cannot do.”).

311. *Id.* at 91 (written testimony of Taylor Hackford, Co-Chair of the Social Responsibility Task Force, Directors Guild of America) (arguing that since legislation could not discriminate between types of content to be filtered, the effect of possible legislation could lead to filtering of political content).

312. *Id.* at 4 (statement of Hon. Howard L. Berman) (suggesting that plug-in filters could be used on video games and e-books).

313. *Id.* at 26 (testimony of Marjorie Heins).

314. *Id.* at 27.

315. *Id.* at 3 (statement of Hon. Howard L. Berman).

316. H.R. REP. NO. 109-33, pt. 1, at 69-76 (2005).

317. *Id.* at 69-71.

318. *Id.* at 69, 72.

319. *Id.* at 72.

320. *Id.*

321. H.R. REP. NO. 109-33, pt. 1, at 73 (2005).

322. *Id.* at 74.

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the filtering of objectionable content, companies could potentially create filters that skip everything except violence or nudity.³²³

Finally, the minority members addressed the Act's effect on the motion picture creator's "artistic freedom and integrity."³²⁴ They pointed to the protections offered to artists through copyright and trademark law and argued that the passage of this Act "represent[ed] a threat to an artist's right to his or her artistic integrity [and] [t]o permit editing of a creation without the permission of the creator [was] to encourage censorship and to vitiate freedom of expression."³²⁵

B. Language of the FMA

The FMA allows protection from copyright infringement to those involved in

the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.³²⁶

The FMA only applies to individuals and companies that filter out content; the addition of audio or video content to a motion picture, even if no fixed copy of the altered version is created, is expressly excluded from infringement protection.³²⁷ The first part of the Act applies to the end user.³²⁸ "[B]y or at the direction of a member of a private household" requires that the filtering technology allows the end user to make a choice about what gets filtered.³²⁹ This language strongly suggests that a system with inflexible settings that filter only a fixed or limited amount of content would not comply with the Act; however, it is not clear how many options filtering companies must make available to the end user.³³⁰

323. *Id.*

324. *Id.* at 75.

325. *Id.* at 75-76.

326. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(11), 119 Stat. 218, 223 (2005) (codified as 17 U.S.C. § 110(11) (2006)).

327. *Id.* ("[T]he term 'making imperceptible' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.")

328. *Id.*

329. *Id.*

330. See 150 CONG. REC. S11853 (daily ed. Nov. 24, 2004) (noting that the FMA requires "that the making imperceptible be made at the direction of [the] individual in response to the individualized preferences expressed by that individual. The test of 'at the direction of an individual' would be satisfied when an individual selects preferences from among options that are offered by the technology.").

Congress left open the definition of “limited portions,” suggesting that this would allow courts to make a decision on a case-by-case basis.³³¹ Also, the Senate concluded that combining “limited portions” with “motion picture” disallowed users from eliminating commercial advertisements.³³² Motion pictures are defined as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”³³³ Accordingly, each commercial advertisement was in and of itself a motion picture and could not be filtered out by the user.³³⁴

The FMA applies to both “audio and video content of a motion picture.”³³⁵ This protects not only companies like ClearPlay that offer filters, but also companies like TV Guardian that screen offensive language from broadcast, cable, and satellite television programming.³³⁶

Congress uses the language “during a performance in or transmitted to that household” to protect filtering companies and end users regardless of the movie’s source.³³⁷ ClearPlay states that it is capable of filtering movies from almost any source, including DVDs, cable, satellite, personal video recorders, and video-on-demand.³³⁸ The FMA’s plain language is broad enough to cover any of these sources.³³⁹ Additionally, the language may be broad enough to cover movies downloaded from the Internet, as long as the movies are “an authorized copy of the motion picture.”³⁴⁰

The FMA clearly limits the scope of protection to private households.³⁴¹ Though “private households” is not defined in the Copyright Act, the statute’s plain language precludes infringement protection for use of filtering technology in churches, schools, or any other public forums.³⁴² Additionally, the legislative history

331. S. REP. NO. 109-33, pt. 1, at 6 (2005) (“Although the Committee has not adopted a specific percentage or quantity of time test in place of the ‘limited portions’ language, the Committee will rely upon judicial determination for what is a ‘limited portion’ of the work as a whole. It would be contrary to the legislation to interpret the ‘limited portions’ test in a manner that would exclude actions that result in making imperceptible of 20 minutes of a particular type of content (violence, sexual scenes, profanity, etc.) from a 100-minute motion picture.”).

332. 151 CONG. REC. S450-01 (daily ed. Jan. 25, 2005) (statement of Rep. Kohl).

333. 17 U.S.C. § 101 (2006).

334. 151 CONG. REC. S450-01 (daily ed. Jan. 25, 2005) (statement of Rep. Kohl). Congress’s concern with the inclusion of any “ad-skipping” language in the FMA was that courts may improperly read the FMA to apply to current “ad-skipping” cases, and “it was never the intent of [the FMA] to resolve or affect those issues in any way.” *Id.*

335. 17 U.S.C. § 110(11).

336. S. REP. NO. 109-33, pt. 1, at 22 (2005) (“This new subsection ensures that U.S. copyright law does not prohibit . . . the use of any filtering service or technology that mutes or skips content.”).

337. *Id.*

338. U.S. Patent No. 6,889,383 (filed Oct. 23, 2000).

339. *See* 17 U.S.C. § 110(11) (2006).

340. *See id.*

341. *Id.*

342. *See id.*

states that the FMA only applies to individuals viewing a movie in a private household,³⁴³ which supports a plain-meaning definition of “private households.”

The Act’s second part protects filtering technology distributors such as ClearPlay.³⁴⁴ The protection extends to computer programs or “other technology.”³⁴⁵ “Other technology” is not defined, making it broad enough to cover a wide array of possible filtering technologies.³⁴⁶ This implies that any technology will be protected as long as it does not create a “fixed copy of the altered version of the motion picture.”³⁴⁷ The Copyright Act states that a work is “fixed” when “its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³⁴⁸

V. THE EFFECT OF THE FAMILY MOVIE ACT

Since the FMA’s passage in 2005, ClearPlay is the only company that offers filtering technology to the public.³⁴⁹ ClearPlay’s filtering technology conforms to the intent and purpose of the FMA.³⁵⁰ In the future, however, providers of filtering technology may not conform to the intent and purpose of the FMA and legal issues may arise regarding the definition of “limited portions” and “fixed copy of the altered version.”³⁵¹ This part first addresses whether the FMA’s language adequately achieves the Act’s original intent. Next, this part addresses two copyright issues that may arise because of the FMA’s broad language.³⁵²

343. *FMA Hearing, supra* note 249, at 14 (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States) (“Private home viewing’ would be defined as viewing for private use in a household, by means of consumer equipment or services that are operated by an individual in that household and that serves only that household. This definition is adapted from the definition of ‘private home viewing’ found in section 119 of the copyright law, the statutory license for secondary transmissions of television broadcast signals by satellite carriers.”).

344. *See* 17 U.S.C. § 110(11) (2006).

345. *Id.*

346. This may create copyright issues in the future if filtering technology is combined with movie storage systems. *See infra* Part V.B.2.

347. *See* H.R. REP. NO. 109-33, pt. 1, at 7 (2005) (“The Act does not create an exemption for actions that result in fixed copies of altered works.”).

348. 17 U.S.C. § 101 (2006).

349. Press Release, ClearPlay, ClearPlay Responds to CleanFlicks Ruling (July 7, 2006) (on file with the University of Toledo Law Review), available at http://www.clearplay.com/t-press_ClearPlay_Responds_to_CleanFlicks_Ruling.aspx.

350. *See Filtering Hearing, supra* note 14, at 1 (statement of Hon. Lamar S. Smith).

351. *See* CustomPlay, *supra* note 45.

352. These issues are not the only legal issues that arise because of the FMA; however, they are the only issues addressed in this article. Potentially, the FMA may violate international obligations under Article 6bis of the Berne Convention. *See* Brandi L. Holland, Note, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT’L L. 217, 251 (2006). Additionally, legal issues may arise in relation to the Digital Millennium Copyright Act. *See* Nokes, *supra* note 79, at 649.

A. *The FMA Fails to Achieve Its Goal of Protecting Children*

The FMA's purpose is to protect children from objectionable content.³⁵³ Due to possible First Amendment claims, however, the FMA's language could not limit the content filtering to any particular category.³⁵⁴ Thus, companies can create filters for any content.³⁵⁵ As noted earlier, CustomPlay has already created standards for adult-oriented material.³⁵⁶ Accordingly, it is foreseeable that future companies will market filters that skip over content that is not objectionable.³⁵⁷ This is counter to the purpose of the Family Movie Act.³⁵⁸

Because of a recent dispute involving filtering technology, there is a possibility that companies besides ClearPlay could begin to market adult-oriented filters to the public. Currently, there is ongoing legislation regarding patent infringement between ClearPlay, the only filtering technology provider for movies, and Nissim Corp., which owns several patents related to movie filtering.³⁵⁹ ClearPlay owns two patents: one for the data that instructs the ClearPlay DVD player to skip portions of the DVD and another for the method of delivering the instructions to the player.³⁶⁰ Nissim owns a patent on technology that allows for the seamless skipping of content in a DVD or through cable or other media.³⁶¹

Nissim, through its subsidiary CustomPlay, licenses its technology to ClearPlay to use in ClearPlay players according to specifications listed in the licensing agreements.³⁶² According to Nissim, ClearPlay's current player is not within the specifications of the agreement.³⁶³ CustomPlay has a detailed set of standards for removing objectionable content to which Nissim alleges ClearPlay does not adhere.³⁶⁴ Nissim has notified retailers that the current ClearPlay player is not in compliance and that they should discontinue its sale.³⁶⁵

ClearPlay's system uses Nissim's technology to seamlessly move between any designated points in the DVD.³⁶⁶ Thus, ClearPlay's system needs Nissim's technology to work properly.³⁶⁷ On the other hand, Nissim's technology works

353. *See Filtering Hearing, supra* note 14, at 1 (statement of Hon. Lamar S. Smith).

354. *Id.* at 26 (testimony of Marjorie Heins, Fellow, Brennan Center for Justice, New York University of Law, and Founding Director, Free Expression Policy Project) ("Singling out constitutionally protected expression for adverse treatment under the law ... is precisely what the first amendment says Congress cannot do.").

355. *See supra* Part II.B.

356. CustomPlay Focused Versions, *supra* note 53.

357. *See Filtering Hearing, supra* note 14, at 3 (statement of Hon. Howard R. Berman).

358. *Id.* at 1 (statement of Hon. Lamar S. Smith).

359. Press Release, Nissim Corp., *supra* note 23.

360. U.S. Patent No. 6,889,383, at [57] (filed Oct. 23, 2000); U.S. Patent No. 6,898,799, at [57] (filed Oct. 23, 2000).

361. U.S. Patent No. 5,589,945, at [57] (filed Sept. 13, 1994).

362. Press Release, Nissim Corp., *supra* note 23.

363. *Id.*

364. *Id.*; CustomPlay Family Version, *supra* note 49.

365. Press Release, Nissim Corp., *supra* note 23.

366. *See supra* Part II.A.

367. *Id.*

without ClearPlay's system.³⁶⁸ This means that Nissim could license its technology to other filtering companies that are not as family friendly.³⁶⁹

Further, the controversy between Nissim and ClearPlay points to the inconsistent definition of "offensive."³⁷⁰ Companies creating filters are not required to follow any specific guidelines, thereby creating a wide array of content that is considered offensive.³⁷¹ Also, filtering companies only remove specific scenes from a movie but do not remove the overall themes.³⁷² Filtering technology exposes children to the same theme, such as violence, even without the specific acts being shown.³⁷³ In contrast, the Motion Picture Association of America offers ratings for motion pictures not based solely on specific scenes but also on the overarching content of the movie.³⁷⁴ By enacting the FMA, Congress allows each company to set its own standards for what constitutes offensive content, whereas negotiations between the parties may have led to an industry standard.³⁷⁵

B. Possible Legal Issues Arising from the FMA

The FMA created several legal issues that were not adequately addressed in the Act's language and history.³⁷⁶ The most readily apparent of these issues regard the scope of protection afforded in two areas: (1) how much content can a filter skip before it is too much, and (2) at what point is an altered version of a movie fixed? This subpart addresses both of these issues.

1. Limited Portions: How Much Is Too Much?

Congress did not expressly define "limited portions" in the FMA.³⁷⁷ Rather, Congress left the task of defining "limited portions" to the judiciary, noting that it did not want to set a specific percentage for the amount of filtered content because doing

368. See '945 Patent.

369. CustomPlay does not limit its filtering capabilities to family-friendly content. See *supra* Part II.B; CustomPlay Focused Versions, *supra* note 53; CustomPlay Subjects, *supra* note 66.

370. See Press Release, Nissim Corp., *supra* note 23 ("Specifically, the player fails to provide any filtering whatsoever of entire categories and levels of explicitness of content which the menu screen of the player leads consumers to believe can be filtered. The player also does not filter the same objectionable content consistently across different movies and within a single movie.").

371. *Filtering Hearing*, *supra* note 14, at 3 (testimony of Hon. Howard R. Berman).

372. *Id.* at 29 (testimony of Marjorie Heins, Fellow, Brennan Center for Justice, New York University of Law, and Founding Director, Free Expression Policy Project). See also ClearPlay on the Today Show, <http://www.clearplay.com/Movies/ClearPlayTodayShow.aspx> (last visited Feb. 17, 2009) (showing the edits ClearPlay makes in *The Matrix*).

373. See Motion Picture Association of America, What Do the Ratings Means?, http://www.mpa.org/FilmRat_Ratings.asp (last visited Feb. 17, 2009).

374. See Motion Picture Association of America, How Movies Are Rated, http://www.mpa.org/Ratings_HowRated.asp (last visited Feb. 17, 2009).

375. See *Filtering Hearing*, *supra* note 14, at 98 (prepared statement of Hon. Howard R. Berman) ("If the government should let the marketplace develop solutions to environmental pollution, shouldn't it also let the marketplace develop solutions to so-called cultural pollution?").

376. See S. REP. NO. 109-33, pt. 1, at 69-76 (2005).

377. See *supra* note 331.

so would be contrary to the FMA's purpose.³⁷⁸ If "limited portions" was classified as a percentage, the FMA may require that filters for certain movies leave in some potentially offensive content because the movie contains too much potentially offensive content.³⁷⁹

The problem with having such a broad definition of "limited portions" is that it circumvents a fair-use analysis and replaces it with a different type of qualitative analysis.³⁸⁰ Courts do not have to analyze whether the filters change the meaning of the movie or how such changes affect the potential market for the motion-picture industry.³⁸¹ Instead, courts can focus on whether the filtered content is consistent with the FMA's intent.³⁸²

It is not difficult to see how filtering content can drastically change a movie's meaning. Imagine the amount of filters necessary to remove offensive language from *The Departed*,³⁸³ the violence from *Kill Bill: Vol. 1*,³⁸⁴ or the sex from *Eyes Wide Shut*.³⁸⁵ Under a fair-use analysis, filtering out such content is probably not a fair use.³⁸⁶ Under the FMA, though, filtering out such content is allowable because it only removes limited, albeit necessary, portions of the movies.³⁸⁷ To avoid constitutional issues of free speech, Congress did not enunciate what type of content filtering companies could skip.³⁸⁸ This strongly suggests that "limited portions" could include any type of content as long as too much content was not filtered out.³⁸⁹

2. *Technological Progression: What Is Fixation?*

One of the FMA's requirements is that "no fixed copy of the altered version of the motion picture is created,"³⁹⁰ but the Act does not define "fixed copy of the

378. *Id.*

379. For example, movies such as *300* are going to have more content filtered than *Finding Nemo*. ClearPlay offers filters for both of these movies. See ClearPlay Movies, *supra* note 40.

380. See *supra* Parts III.C., IV.B.

381. See *supra* Part IV.B. A fair use analysis weighs each of these along with other considerations. See *supra* Part III.C.

382. H.R. REP. NO. 109-33, pt. 1, at 6 (2005) ("It would be contrary to the legislation to interpret the 'limited portions' test in a manner that would exclude actions that result in making imperceptible of 20 minutes of a particular type of content (violence, sexual scenes, profanity, etc.) from a 100-minute motion picture.>").

383. *THE DEPARTED* (Warner Bros. 2006).

384. *KILL BILL: VOL. 1* (Miramax Films 2003).

385. *EYES WIDE SHUT* (Warner Bros. 1999).

386. First, such a work is transformative probably only if it changes the meaning of the original work. See Leval, *supra* note 173, at 111. If this is the case, then it misrepresents the meaning of the original work, which weighs against a finding of fair use. See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-61 (2d Cir. 1986). If this is not the case, the commercial character of the work weighs against a finding of fair use. See *Blanch v. Koons*, 467 F.3d 244, 253-54 (2d Cir. 2006).

387. See 17 U.S.C. § 110(11) (2006).

388. *Filtering Hearing*, *supra* note 14, at 26 (statement of Marjorie Heins, Fellow, Brennan Center for Justice, New York University School of Law, and Founding Director, Free Expression Policy Project).

389. See *supra* note 331.

390. 17 U.S.C. § 110(11).

altered version.”³⁹¹ The Copyright Act states that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³⁹²

While filters do not currently create fixed copies, this may change as technology develops. Filtering players can already store a large number of filters on their hard drives.³⁹³ In fact, some players come with preloaded filters.³⁹⁴ At the same time, technologies such as TiVo, Vudu, and the Xbox 360 allow users to access and store volumes of entire motion pictures.³⁹⁵ The next logical step in user-friendliness seems to be to combine these technologies together.

The FMA’s language suggests that if a DVD was offered that contained both a motion picture and the filter for it, such a DVD would be an infringing work.³⁹⁶ Logically, this conclusion should be the same regardless of the medium on which the two components are stored.³⁹⁷

Despite this, the FMA’s language does not support such a conclusion.³⁹⁸ The Act specifically refers to “the altered version of the motion picture” as the article not to be stored in a fixed medium.³⁹⁹ This implies that the file in which the motion picture is stored must not be altered, regardless of whether other files stored in the same system can alter the file while it is in use without permanently altering it.⁴⁰⁰ For example, if a Vudu system was equipped with ClearPlay filters, this system could store potentially both a movie and its corresponding filter.⁴⁰¹ A user could set

391. *See id.*

392. 17 U.S.C. § 101 (2006).

393. *See, e.g.*, ClearPlay, Shopping Cart, <http://www.clearplay.com/shopcart.aspx> (last visited Feb. 17, 2009).

394. The MaxPlay DVD Player comes pre-loaded with 1000 filters and is capable of storing an additional 2000. MaxPlay DVD Player, *supra* note 36.

395. *See* TiVo, What Is TiVo Digital Video Recorder?, <http://www.tivo.com/whattivo/index.html> (last visited Feb. 17, 2009); Vudu.com, About Us, http://www.vudu.com/aboutus_background.html (last visited Feb. 17, 2009); X-Box.com, Movies & TV Shows, <http://www.xbox.com/en-US/live/marketplace/moviestv/default.htm> (last visited Feb. 17, 2009). Vudu actually stores as many as 5000 movie titles at one time using simply the Vudu box and a high-speed Internet connection. Vudu.com, *supra*.

396. This would probably be considered an unauthorized reproduction, even if each DVD was made from an authorized DVD. *See* CleanFlicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1244 (D. Colo. 2006).

397. Burning an authorized version of a copyrighted movie to DVD is an infringement of the copyright. *See id.* This should not change even if the DVD is rewriteable. The question is why a hard drive is any different than a DVD. Interchangeable hard drives are almost as portable as DVDs.

398. *See* 17 U.S.C. § 110(11) (2006) (protecting a filtering system from liability “if no fixed copy of the altered version of the motion picture is created”).

399. *Id.*

400. *See* H.R. REP. NO. 109-33, pt. 1, at 7 (2005) (“The Act does not create an exemption for actions that result in fixed copies of altered works.”).

401. Vudu is already capable of storing up to 5000 movies. Vudu.com, *supra* note 395. Filtering files are much smaller than the actual movies, so presumably they would fit easily on a Vudu system. ClearPlay states that it “look[s] forward to featuring ClearPlay in a variety of consumer electronic products ... including DVD, PVR and cable and satellite set-tops.” Press Release, ClearPlay, ClearPlay Settles Nissim Lawsuit; Licensing Arrangement Reopens Door to Consumer Electronics Integration

the filter to always play the movie in the same manner. This seems sufficiently permanent to constitute a fixed work under section 101 of the Copyright Act; however, it is not clear that it would be a fixed work under the FMA. It is difficult to justify that a DVD containing both a movie and its filter may be an infringing work under the FMA, but if a Vudu system capable of storing 5000 movies is equipped with ClearPlay filters for each of those movies, it is protected under the FMA.

VI. CONCLUSION

Arguably, the FMA's goal is commendable.⁴⁰² A majority of movies produced by the motion-picture industry are R-rated and may contain a combination of graphic violence, sex, language, and drug use.⁴⁰³ Filtering players may be a valuable tool for parents to help protect their children from overexposure to these elements.⁴⁰⁴ The problem with the FMA is not that it protects companies distributing filtering players, but rather that it protects companies distributing the actual filters.⁴⁰⁵ By doing so, the FMA fails to achieve its goal and is inconsistent with pre-FMA copyright law.⁴⁰⁶

One possible solution is to limit the FMA's scope of protection to companies that make the filtering players and to the end users, but not to companies that make the actual filters.⁴⁰⁷ To do this, Congress needs to amend the portions of the FMA that provide protection for filters distributed by companies.⁴⁰⁸ First, Congress needs to remove "at the direction of" from the FMA's first portion and the words "creation" and "computer program" from the FMA's second portion. Second, Congress must define "fixed copy" to include any computer program or other technology that contains portions of a motion picture or a detailed description of a motion picture. Finally, Congress needs to add language prohibiting the distribution of any filter created by a private household member. The amended FMA would read as follows:

[the following is not an infringement of copyrights . . .]

the making imperceptible, by the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the provision of technology that enables such making

(Nov. 30, 2005) (on file with the University of Toledo Law Review), *available at* http://www.clearplay.com/t-press_ClearPlay_Settles_Nissim_Lawsuit_Licensing_Arrangement_Reopens_Door_to_Consumer_Electronics_Integration.aspx. Accordingly, it is not a stretch to think that ClearPlay may negotiate with companies such as Vudu to have its filtering system placed in their products.

402. See *Filtering Hearing*, *supra* note 14, at 1 (statement of Hon. Lamar S. Smith).

403. See Dove Foundation, National Consumer Opinion Poll, <http://www.dove.org/opinionpoll.asp> (last visited Feb. 17, 2009) (stating that movie producers release twelve times more R-rated movies than G-rated movies).

404. See ClearPlay DVD Player: TVDefender.com, *supra* note 27.

405. See 17 U.S.C. § 110(11) (2006).

406. See *supra* Part IV.A.1.

407. Right now, the FMA protects all three. See 17 U.S.C. § 110(11).

408. The relevant section states "the creation . . . of a computer program . . . that enables such making imperceptible." See *id.*

imperceptible and that is designed and marketed to be used, by a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such technology and distributed to the public of the United States.

For the purposes of this section, an altered version of a motion picture is “fixed” when its embodiment, or a detailed description of its embodiment, in a copy or phonorecord is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Eliminating the phrase “at the direction of” and the terms “creation” and “computer program” requires end users to create their own filters. This affords protection to companies that offer technology enabling the private households to filter content.⁴⁰⁹ Additionally, this maintains protection for private households that create filters for movies as long as the filters are not distributed to the public.

By eliminating language in the FMA that protects filter-making companies from liability, Congress would still allow parents to protect their children by programming a system to automatically skip movie segments.⁴¹⁰ Instead of having a for-profit company define “objectionable content,” however, this method places the responsibility of defining “objectionable content” on the parents.⁴¹¹ With such a system, parents would have to first watch a movie to filter it. By watching the movie, parents could understand the movie’s context and decide whether material that might otherwise be objectionable is necessary within the context.⁴¹² Thus, the FMA would conform to its original purpose, to create “a safe and nurturing home environment.”⁴¹³

Changing the language of the FMA also would be more consistent with pre-FMA copyright law. First, by only protecting the filtering player and the end users, filtering companies complying with the FMA would avoid the risk of creating any unlawful reproductive or derivative works.⁴¹⁴ As noted in Part II.A, under pre-FMA copyright law, the filtering companies may make unlawful reproductive works in the process of creating filters.⁴¹⁵ Additionally, the filter itself may constitute an unlawful derivative work.⁴¹⁶ Removing such language also avoids any future issues regarding the definition of “limited portions” or “fixed copy.” As discussed in Part V.B, the FMA may not protect certain filtering companies for filters that skip over too much content or that store a movie and its filter on the same medium.⁴¹⁷

409. See *supra* notes 328-330 and accompanying text.

410. Because the intent of the legislation is to create “a safe and nurturing home environment,” offering a method of filtering for private home use without offering the actual filters still meets the goals of the FMA. See *Filtering Hearing, supra* note 14, at 1.

411. See *id.* at 27 (testimony of Marjorie Heins).

412. See *id.* at 26-27 (arguing that children are more protected from the effects of media violence and sex through education from their parents than from avoiding the potentially harmful content).

413. See *id.* at 1.

414. See *supra* Part III.A.

415. See *supra* Part II.A.

416. See *supra* notes 133-137 and accompanying text.

417. See *supra* Part V.B.2.

Second, a court is less likely to validate any claims of contributory infringement if the filtering companies are not distributing the filters themselves but instead just distributing filtering players. As discussed in Part III.B, a court may find a filtering company liable under a claim of contributory infringement; however, the fair-use defense is more likely to apply to filtering companies if they are only distributing the player and not the filters.⁴¹⁸

418. *See supra* Part III.C.6.