Mr. Soderbergh Goes to Washington: How Congress and the Clean Flicks Court Created Moral Rights for Filmmakers

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MR. SODERBERGH GOES TO WASHINGTON:
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COURT CREATED MORAL RIGHTS FOR
FILMMAKERS

I. INTRODUCTION

The right of copyright holders to enjoy an economic monopoly on their creative works has often been in opposition with the purpose of copyright to promote social good by the dissemination of creative works.1 The artists’ social and moral values, however, can conflict with those of the public, who wish to enjoy the artists’ work.2 Because the purpose of copyright is ultimately to promote dissemination of expression for the greater social good, it seems logical that any alterations in the work that would result in a greater dissemination of the work would be in society’s best interests. This was the viewpoint of the plaintiffs in the case of Clean Flicks of Colorado v. Soderbergh, where the collection of plaintiff video companies created unauthorized derivative works yet still paid the requisite royalties for each unauthorized copy created.

In Clean Flicks of Colorado v. Soderbergh, the District Court of Colorado found that the creators of the unauthorized works had violated the rights of the lawful copyright holders.3 Part II of this paper will focus on the background and circumstances that gave rise to the infringement action and the positions of the parties


2. The Copyright Clause grants Congress the 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.” U.S. CONST. art. I, § 8, cl. 8.

involved, with a particular focus on the rights of the copyright holders under U.S. statute and the defenses raised by the plaintiffs. Part III will look at the court’s analysis, specifically the strengths and weaknesses of the court’s holding that the plaintiffs were liable for copyright infringement. Of particular importance was the court’s opinion that the newly implemented Family Entertainment and Copyright Act of 2005 (FECA) was irrelevant to the proceedings. Part IV analyzes why the court was incorrect in its analysis and how Congress, in passing the FECA, created an implied moral right of integrity for filmmakers. This implied right could possibly extend far beyond the finite economic rights provided for in the Copyright Act, thereby violating the framers’ intent behind the Constitutional grant of copyright.4

This article proposes that Congress exceeded its Constitutional grant of powers by creating new moral rights for copyright owners. Therefore, the court erred in its recognition of these new moral rights through its opinion that the plaintiffs were guilty of copyright infringement. Coupling these new moral rights with the court’s flawed fair use analysis, this decision will have a chilling effect on the rights of the purchasers of copyrighted material, even though the court stopped just short of allowing the filmmakers to control their product even after the authorized copy has been distributed.

II. BACKGROUND

A. Clean Flicks of Colorado v. Soderbergh

The case of Clean Flicks of Colorado v. Soderbergh commenced when the plaintiffs sought a declaratory judgment on the issue of whether their use of the defendants’ works infringed upon the defendants’ copyrights.5 The plaintiffs in Clean Flicks (CleanFlicks) were various video retail stores and commercial entities that generated revenue by creating and distributing edited versions of existing films.6 CleanFlicks created these edited

6. Id. at 1238.
versions by altering films through deletion of "sex, nudity, profanity, and gory violence." CleanFlicks claimed that their production and sale of the edited films was for the purpose of criticizing the objectionable sexual and violent content that they deemed to be prevalent in modern films and providing "more socially acceptable alternatives" for families who wish to view the films without the objectionable content. CleanFlicks obtained unedited copies by purchasing them from authorized retailers and it would then sell these legally obtained copies to the public after editing out the objectionable content.

In order to create an edited version of a film, CleanFlicks obtained an original copy of the film either by purchasing the film from an authorized retailer or from a customer who owned an original copy. Using the original copy as a template, CleanFlicks, having first disabled the copy's native digital content protection system, would digitally copy the entire film onto a CleanFlicks computer hard drive. The digital protection systems present on most original copies of copyrighted digital video discs (DVDs) consists of software embedded within the DVD's code that scrambles the code in a way that prevented any unauthorized copying of the DVD. CleanFlicks would then run the entire film through a digital editing software suite that allowed the operator to edit films specifically for content. These edits included, but were not limited to, deletions of audio and video portions of the films, redaction of audio portions, replacement of the redaction with

7. Id.
8. Id. at 1240.
9. Id. at 1238.
10. Id.
12. Id. The protection systems are based upon a framework called Content Protection System Architecture (CPSA). CPSA consists of 11 axioms that define standards that providers can use to regulate access and recording controls for protected content. CPSA incorporates 2 mechanisms of content-protection: 1) watermarking, where content-protection information is embedded directly into an audio or video stream, and 2) encryption, where the content is scrambled until it is decrypted by a CPSA-compliant device. Don Labriola, Digital Content Protection, PC MAGAZINE, May 16, 2002, available at http://www.baselinemag.com/print_article2/0,2533,a=27038,00.asp.
other audio noise, manipulation of the content in order to provide seamless transition of edited scenes with unedited scenes, and the use of visual effects, such as cropping, black bars, or fogging effects, in order to obscure objectionable visual content.14

Upon completion of the editing, CleanFlicks would download a completely edited copy from the computer and use this copy to create a new recordable DVD for sale to the public directly or for sale indirectly through another retailer.15 All of the DVD copies of the edited films created by CleanFlicks bore the CleanFlicks trademark.16 Customers who wished to purchase edited films would either pay CleanFlicks the retail price of an unedited version or provide CleanFlicks with a new, unedited version purchased from another authorized retailer.17 The end result of these transactions was that the customer had paid for a new, unedited copy.18 Once CleanFlicks received the unedited copy or payment for an unedited copy, it would then, for an additional fee paid by the customer, provide the customer with an edited version of the same film.19 CleanFlicks retained ownership of the unedited copy while the customer retained ownership of the edited copy.20

At all times, CleanFlicks maintained a one-to-one inventory ratio of the unedited versions to the edited copies it rented or sold to its members with the belief that the maintenance of such an inventory was in compliance with the Copyright Act’s First Sale Doctrine.21 CleanFlicks used the same unedited-for-edit
sale/exchange mechanism in providing edited films to other retailers. 22 Furthermore, CleanFlicks refused to sell its edited films to retailers who made unauthorized copies of CleanFlicks' edited films. 23 CleanFlicks did not view its actions as copyright infringement because CleanFlicks believed that the creation of edited copies of the films represented a fair use of the films and the creation of the edited films from the original works was protected under the first sale doctrine. 24

The defendants in Clean Flicks (the filmmakers) were filmmakers and film distributors of films protected under copyright law, and they were the rightful copyright holders of the films edited by CleanFlicks. 25 According to § 106 of the Copyright Act, holders of valid copyrights are entitled to certain rights: (1) the right to reproduce the copyrighted work in copies; (2) the right to prepare derivative works based upon the copyrighted works; and (3) the right to distribute copies . . . to the public by sale or by other transfer of ownership, or by rental, leasing, or lending. 26 Although the filmmakers directly distributed their films to consumers in unedited versions, the filmmakers also created edited versions of their films where the films would be distributed via other media such as network and syndicated

copy for sale to the public was allowable within the scope of the First Sale Doctrine. See Clean Flicks, 433 F. Supp. 2d at 1239.

22. Clean Flicks, 433 F. Supp. 2d at 1238.
23. Id.
24. Id. at 1239-42.
25. Id. at 1238.
26. Id. These rights are part of the exclusive rights granted to copyright holders under the Copyright Act. Specifically, the Act provides the copyright holder with the exclusive rights:

1) to reproduce the copyrighted work in copies or phonorecords 2) to prepare derivative works based upon the copyrighted works, 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or by other transfer of ownership, or by rental, leasing or lending; 4) in the case of . . . motion pictures . . . to perform the copyrighted work publicly; 5) in the case of . . . the individual images of a motion picture . . . to display the copyrighted work publicly.

17 U.S.C. § 106 (2006). In Clean Flicks, only the rights to create and distribute derivative works are at issue.
All of the edits were made in order to conform to established criteria such as ratings, network standards, and practices, formatting, and run time. The filmmakers never sold or otherwise directly distributed these edited versions to consumers.

Knowing that the filmmakers planned to bring suit against them for copyright infringement, CleanFlicks peremptorily brought suit against the filmmakers. CleanFlicks sought a declaratory judgment stating that CleanFlicks' creation and sale of edited versions of the filmmakers' films did not constitute copyright infringement. The filmmakers responded by filing a counterclaim in which the filmmakers accused CleanFlicks of copyright infringement. The filmmakers claimed that under the Copyright Act the creation of these edited copies violated the filmmakers' exclusive rights to reproduce their own copyrighted films, distribute copies of their films to consumers by sale or rental, and create derivative works. CleanFlicks did not view its actions as commensurate with copyright infringement and defended their actions by asserting that the creation of edited copies of the films represented a fair use of the films and the creation of the edited films from the original works was protected under the first sale doctrine.

B. Constitutional and Statutory Copyright Protection in the United States

The United States Constitution expressly grants Congress the power to create federal copyright law. The Copyright Act grants copyright owners a monopoly for a limited time over the exercise of certain exclusive rights to reward individuals for creative

27. Clean Flicks, 433 F. Supp. 2d at 1238.
28. Id.
29. Id.
30. Id. at 1239.
31. Id. at 1236.
32. Id. at 1237.
33. Clean Flicks, 433 F. Supp. 2d at 1239.
34. Id. at 1239-42.
endeavors that promote social progress. Under the 1976 Copyright Act (the Act), copyright protection vests with the owner from the moment of creation of the copyrighted work. The Act lists various works that are eligible for copyright protection, including motion pictures. The Act grants owners of motion picture copyrights a limited monopoly over exploitation of their works for a maximum statutory period of ninety-five years following the copyright grant for works created prior to January 1, 1978 implementation date of the Act. For works created following the implementation of the 1976 Copyright Act, the term of protection is either the life of the author and 70 years after the author’s death, where the author is the sole author or a joint author of the copyright, or 95 years from the date of first publication or 120 years from the year of its creation, in the case of the work being a work made for hire, an anonymous work, or a pseudonymous work.

The Act also provides certain enumerated exclusive rights for the copyright holders. Motion picture copyright holders have the rights to: (1) make reproductions of films for distribution; (2) prepare derivative works such as sequels, based on the original films; (3) distribute copies of copyrighted films by selling or renting them to the public; (4) publicly display and perform the films; and (5) publicly display individual images from copyrighted film. Derivative works include any works based on a preexisting copyrighted work. A film sequel, therefore, would be considered a derivative work based on the original copyrighted film. For example, because Sylvester Stallone and MGM/UA are the exclusive copyright holders for the rights to the film “Rocky,” they would be the only parties under the Act with the exclusive rights to make derivative works based on “Rocky,” including film sequels.

37. Id. at 213.
39. Id. § 304(b).
40. Id. § 302(a)-(c).
41. Id. § 106.
42. Id. § 101.
In 2005, Congress amended § 110 of Copyright Act with the passage of FECA.\textsuperscript{44} One of the goals of FECA was to permit individual owners of copies of films to legally alter the content of their individual copies without running afoul of the Copyright Act's prohibition on the unauthorized creation of derivative works.\textsuperscript{45} The language of FECA accomplished this goal by narrowly defining the use permitted. Individual owners can only personally edit out content from their own copies.\textsuperscript{46} Furthermore, this editing is only allowed if no fixed copies of the altered works are created.\textsuperscript{47}

C. Defensible Uses of Copyrighted Works

1. The Fair Use Defense

Although copyright owners retain a limited monopoly in exploitation of their works, there are exceptions and limitations to the extent of this monopoly. These limitations are part of Congress' efforts to balance the promotion of the public welfare


\textsuperscript{45} Id. at 5, 2005 U.S.C.C.A.N. at 224. As one of the purposes underlying the FECA, the Judiciary Committee of the United States House of Representatives stated that United States copyright law: "should not be used to limit a parent's right to control what their children watch in the privacy of their own home." Id., 2005 U.S.C.C.A.N. at 224.

\textsuperscript{46} Id.

\textsuperscript{47} Id. This provision of the FECA, codified in the Copyright Act, permits: 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, a 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.

and the protection of copyright holders' property rights. Under the Act's provisions, courts must examine four factors in order to determine whether the use of a work in a particular instance satisfies the statutory requirements of fair use.

a. Purpose and Character of the Use

The first factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." This factor examines whether or not the alleged infringer was using the works for monetary gain rather than for other more altruistic reasons. Under the statutory affirmative defense of fair use, the use of copyrighted work for purposes such as commentary, teaching, news reporting, scholarship, or research would not be considered an infringing use of the work. The fair use doctrine satisfies Congress' mandate to promote the general public welfare because it allows the use of copyrighted work where forced payment for the use of the work might stifle public comment, criticism, or scholarly pursuits. The Supreme Court has held that when the use of a work provides such a social benefit, the unauthorized use could be considered statutory fair use under § 107.

b. Examination of the Nature of the Copyrighted Work

The second factor of the fair use defense depends on the "nature

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52. Dreyfuss & Kwall, supra note 36, at 411.
53. Campbell, 510 U.S. at 579. In Campbell, the Supreme Court held that 2 Live Crew's unauthorized use of Roy Orbison's song, "Oh Pretty Woman" in a parody rap version of the song was considered permissible under the fair use doctrine because the transformative nature of the parody provided "social benefit, by shedding light on an earlier work, and, in the process, creat[ed] a new [work]." Id. The court reasoned that, because the rap song could be perceived as commenting on and criticizing the original work in the form of parody, the use was permissively fair. Id.
of the copyrighted work." Creative works are afforded more protection than factual works because creative works more easily satisfy the two pronged requirements for originality under the Copyright Act: (1) independent creation of the work by the author rather than copying from other works; and (2) a modicum of creativity. The status of the work as published or unpublished is also critical. If the work is unpublished, the permissible scope is narrower because "the right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish." Therefore, works that satisfy the requirements of originality and that are unpublished would engender more copyright protection than a collection of published facts.

54. 17 U.S.C § 107.

55. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). In Fiest, the Supreme Court first considered the minimum requirements for a grant of U.S. copyright. The plaintiff telephone company brought suit against the defendant telephone directory publisher, arguing that the defendant's appropriation of the plaintiff's utility listings was a violation of the plaintiff's copyright. Id. at 340. The Court held that, because the plaintiff's directory was not entitled to a copyright, the defendant's use of the plaintiff's directory was not copyright infringement. Id. The Court reasoned that collections of facts do not contain the requisite authorship and creativity that are required for a grant of copyright. Id. at 361-62. The court concluded that, although compilations of facts are copyrightable, they are not copyrightable per se; they are only copyrightable if its facts have been "selected, coordinated, or arranged in such way that the resulting work as a whole constitutes an original work of authorship." Id. at 356-57 (citing 17 U.S.C. § 101 (1990)).

56. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985). In Harper & Row, the Supreme Court first considered the balancing of First Amendment rights and copyrights. The plaintiff publisher sued the defendant magazine publisher for unauthorized publication of the previously unpublished memoirs of President Ford, the rights to which were held by the plaintiff. Id. at 543. The Court held that the defendant's use of the copyrighted work was not fair use; although the quotes appropriated represented a small portion of the work, the court concluded that the quotes amounted to the "heart of the book." Id. at 565. The court further held that the defendant's use of the work was in bad faith because the intended purpose of the pre-publication was to supplant the copyright holders' right of first publication. Id. at 562.

57. See id. at 564.
c. Amount and Substantiality of Portion Used

The third factor of the fair use determination is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." 58 Courts are less inclined to find fair use where the alleged infringers appropriate large or substantial portions of copyrighted works. 59 In addition to the quantity used, this factor also requires a consideration of the "quality and the value of the materials used." 60 In its fair use analysis, the Supreme Court has coupled this factor with the first factor because the extent of permissible copying under factor one varies with the "purpose and character of the use" under factor two. 61 For example, if a significant portion of a copyrighted song is used in a commercial parody, the Court might consider such use statutory fair use notwithstanding the parody's substantial appropriation of the heart of the original work because the purpose and nature of the use was to provide commercial criticism in the form of parody. 62

d. Effect Use on Potential Market or Value of Copyrighted Work

The final factor of the fair use determination is "the effect of the use upon the potential market for or value of the copyrighted work." 63 Congress intended that the exclusive limited monopoly granted to copyright holders would reward creators for their hard work and creativity. 64 This fair use factor considers the harm on the market by dissemination of the original work, the accompanying losses incurred by the copyright holder as a result of the infringement, the market for derivative works, and the future potential markets that the copyright holder might wish to protect. 65

60. Id. at 586.
61. Id. at 586-87.
62. Id. at 588. Under Campbell, "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart." Id.
64. DREYFUSS & KWALL, supra note 36 at 212-13.
65. Campbell, 510 U.S. at 590. The Copyright Act defines a "derivative
Although courts have found a presumption of harm where the alleged fair use was for commercial gain, this presumption has not held where the purpose and nature of the use was for criticism or where the work has been so transformed as to not become a market substitution for the original work.\textsuperscript{66} Transformative works are those that add "something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message."\textsuperscript{67} For example, when a video store infringes upon the rights of a film's copyright holder for the purpose of commercial gain, there is a presumption that the infringer's actions significantly harmed the market for the lawful copyright holder's creation. Where the potentially infringing material is transformative, however, such as in the case of a commercial song parody, the presumption market substitution is less certain, because a parody does not serve as a market substitution that would diminish the public's desire for the original work.\textsuperscript{68}

2. Right of First Sale

Under the first sale doctrine, the owner of a particular authorized copy has the right to sell or transfer ownership of that particular

\textsuperscript{17} U.S.C. § 101.
\textsuperscript{66} Campbell, 510 U.S. at 591.
\textsuperscript{67} \textit{Id.} at 579.
\textsuperscript{68} \textit{Id.} at 591. The Supreme Court stated:

\begin{quote}
[\textit{A}]s to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it . . . . This is so because the parody and the original usually serve different market functions.
\end{quote}

\textit{Id.}
copy without the authority of the copyright holder.\(^{69}\) Therefore, the doctrine permits the sale of a copy of a copyrighted work without transferring complete ownership of the work's underlying copyright.\(^{70}\) For example, a consumer who has purchased a DVD from a commercial entity has the right to resell the DVD without paying a further royalty to the DVD's copyright owner, but this right is limited to the individual copy. The consumer cannot make copies of the original and sell them, as this would be a violation of the copyright holder's rights under the Copyright Act.\(^{71}\)

### III. SUBJECT OPINION

In its analysis, the District Court for Colorado carefully considered the statutory language of the Act in its determination of whether CleanFlicks had infringed upon the filmmakers' copyrights. The court found that CleanFlicks' unauthorized reproduction and distribution of the filmmakers' copyrighted work violated the filmmakers' exclusive rights to make "fixed copies" of their works and distribute their works.\(^{72}\)

#### A. The Fair Use Defense

CleanFlicks raised the statutory affirmative defense of fair use, as provided for in the Act, as a justification for editing and distributing the filmmakers' copyrighted works.\(^{73}\) The court

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72. Id.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors
examined whether CleanFlicks met their burden of proof for the fair use defense using the Supreme Court's analytical framework from *Campbell v. Acuff-Rose Music, Inc.*

Under the first factor, the "purpose and character of use," CleanFlicks argued that although their use of the works was for commercial gain, this single factor was not dispositive in finding that the use was not fair. Although CleanFlicks used the works for the purpose of commercial gain, CleanFlicks argued that they also wanted to "establish a public policy test" by "criticizing objectionable [materials]" in motion pictures and establishing the rights of the owners of copies of films to remove such content in order to protect children from the "presumed harmful effects" that this content might engender. Although CleanFlicks never described their public policy test or the means for its implementation to the court, CleanFlicks relied on the Supreme Court decision of *Chicago Board of Education v. Substance, Inc.* as source authority for the test's applicability in the current case.

In *Chicago Board of Education*, the Court held that unauthorized use was deemed to be fair use when the infringer used only so much as necessary for effective criticism of the works in question. The District Court of Colorado found that such social value arguments were "inconsequential to copyright law" because the federal courts primary concern was to protect the "creator's rights to protect its creation in the form which it was created.”

The court then addressed whether CleanFlicks' edited films...
were transformative in nature. The filmmakers claimed that CleanFlicks’ creation of the edited films violated the filmmakers’ exclusive right to create derivative works. CleanFlicks, however, denied that their edited DVDs and videos were derivative works as defined under the Act. As part of its analysis, the court used the Supreme Court’s definition of transformative works. Works are transformative if the use “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” Under this definition, the court found that CleanFlicks’ use was not transformative, because the edits comprised only a very small fraction of the total running time of the motion picture. Therefore, the edited versions did not satisfy the definition of transformative works, and the first statutory factor of the fair use defense was not satisfied.

The court next found that the second statutory fair use factor, “the nature of the copyrighted work,” weighed against CleanFlicks. The films were expressive works that were entitled to the highest level of copyright protection. Furthermore, the court concluded that CleanFlicks’ use was not transformative. Although CleanFlicks’ editing of the films had altered some of the substantively expressive portions of the works, the court found that the amount of the work transformed never rose to the level of a new and distinctive work.

The court then concluded that the minimal alterations in the original work weighed against a finding of fair use under the third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Although the films were edited from their primary form, CleanFlicks copied

80. Id. at 1241.
81. Id. Section 106 of the Copyright Act gives the owner of a copyright the exclusive right to prepare derivative works based upon the copyrighted work. 17 U.S.C. § 106 (2) (2006).
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Clean Flicks, 433 F. Supp. 2d at 1241.
substantial portions of the whole of the copyrighted works. 89

Under the fourth statutory factor of the fair use defense, "the
effect of the use upon the potential market for or value of the
copyrighted work," CleanFlicks argued that their activities did not
harm the market for the filmmakers' original works because the
filmmakers benefited from original copy sales for every edited
copy sold which was also a different target market from that of
CleanFlicks. 90 The court was unconvinced by CleanFlicks' arguments. Instead, it reasoned that the "intrinsic value of the
right to control the content of the copyrighted work [is] the essence
of the law of copyright." 91 The court relied on the Supreme
Court's understanding that the fair use defense is "predicated on a
theory of an author's implied consent to reasonable and customary
use when he releases his work for public consumption." 92 Because
CleanFlicks exploited a market different from the filmmakers'
target market, the implied consent theory of fair use was not
applicable. 93 The use would not have been considered "reasonable
and customary," even if the target market had been the same,
because the appropriation was not for the purposes of scholarship

89. Id.
90. Id. at 1241-42.
91. Id. at 1242.
539, 550 (1985)). Here, the court, citing to Harper & Row, noted the difference
between the use of the copyrighted material for the purpose of acceptable fair
use, such as criticism, versus CleanFlicks' use of the material in a manner that
supplanted the original work, thereby harming the market for the original work.
The Clean Flicks court's reliance on the Harper & Row opinion was based, in
turn, on the Supreme Court's reliance on the Folsom v. Marsh opinion, where
Justice Story wrote:

[A] reviewer may fairly cite largely from the original work, if
his design be really and truly to use the passages for the
purposes of fair and reasonable criticism. On the other hand,
it is clear, that if he thus cites the most important parts of the
work, with a view, not to criticise, but to supersede the use of
the original work, and substitute the review for it, such use
will be deemed in law a piracy.

Harper & Row, 471 U.S. at 550 (citing Folsom v. Marsh, 9 F. Cas. 342, 344-45
(C.C. Mass. 1841) (No. 4901)).
93. Clean Flicks, 433 F. Supp. 2d at 1242.

https://via.library.depaul.edu/jatip/vol17/iss2/5
or criticism. Under the Copyright Act, the filmmakers retained the sole right to distribute their works to their chosen markets. The court concluded that when CleanFlicks offered the filmmakers' works to an audience that was not the filmmakers' target, CleanFlicks violated the filmmakers' exclusive distribution rights. The edited films might also have harmed the potential future market for the filmmakers' original works, because the edited and unedited versions were similar to the point where CleanFlicks' versions could serve as market substitutions for the filmmakers' works. Therefore, the filmmakers would not enjoy maximum income because of sales lost due to the presence of CleanFlicks' films in the market.

B. The First Sale Doctrine

In addition to the fair use defense, CleanFlicks also raised the first sale doctrine as a defense to the filmmakers' claims of infringement. By reasoning that the first sale doctrine applied solely to alienation of copies of works legally acquired from the copyright holder, the court held that the doctrine was irrelevant to the case. The filmmakers sought to halt the distribution of infringing, edited copies of their works to the public and not the resale of the filmmakers’ works legally purchased by CleanFlicks; therefore, the first sale doctrine was inapplicable.

IV. ANALYSIS

In Clean Flicks, the District Court of Colorado erred in its analysis of both established copyright law as well as its

95. As one of their exclusive rights under the Copyright Act, copyright owners have the right to “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(3) (2006).
96. Clean Flicks, 433 F. Supp. 2d at 1242.
98. Clean Flicks, 433 F. Supp. 2d at 1242.
99. Id.
100. Id.
101. Id.
understanding of FECA. In holding that CleanFlicks violated the filmmakers' rights with regard to exclusive control of distribution and reproduction of copyrighted motion pictures, the court ignored: (1) the central foundations underlying copyright law; (2) Congress' intent behind FECA; and (3) the proper tests for determining the threshold for fair use of copyrighted materials.

A. Federal Copyright and the Reasons for Constitutional Copyright Protection

Although the primary purpose of copyright is to secure "the general benefits derived by the public from the labors of authors," the author benefits by the limited economic monopoly for the exploitation of the work.102 In Clean Flicks, the filmmakers argued that CleanFlicks unfairly infringed on the filmmakers' copyrights, but the filmmakers were unable to demonstrate any real harm that resulted from CleanFlicks' activities.103 First, in requiring customers to purchase authorized, unedited copies from the filmmakers, the filmmakers reaped the benefits of the royalties from those sales. This income might never have been realized without the actions of CleanFlicks.104 A second consideration is that if statutory copyright protection is intended to reward the copyright holders economically, the actions of CleanFlicks served the purposes of such protection, because the filmmakers reaped large benefits from CleanFlicks' infringement. CleanFlicks demonstrated that the purchasers of the edited films would not normally have been exposed to the filmmakers' works for fear of exposing the purchasers' children and family members to scenes of objectionable content.105 By providing the edited motion pictures, CleanFlicks exposed the purchasers of such films to the filmmakers' products, thereby expanding the consumer base for

103. Clean Flicks, 433 F. Supp. 2d at 1239.
104. See id. at 1236.
105. See id. at 1240 ("The accused parties . . . have submitted many communications from viewers expressing their appreciation for the opportunity to view movies in the setting of the family home without concern for any harmful effects on the children.").
the films beyond that which was targeted by the filmmakers themselves. In this way, CleanFlicks actually enhanced the value of the filmmakers' copyrights. Rather than focusing on the framers' intent in including copyright protection in the Constitution, the Clean Flicks court opined that copyright exists for existence's sake. That is, the court felt that the "intrinsic value of the right to control" copyrighted content, and not the monetary reward to "promote the Progress of Science and useful Arts," was the true "essence" of copyright law.°6

The filmmakers might have had a successful argument if the CleanFlicks copies were in direct competition with those of the filmmakers within the same market, but the filmmakers offered up no such evidence. CleanFlicks expended capital on marketing, duplication, and customer service without any financial assistance from the filmmakers, and yet the filmmakers realized large financial gains without any extra effort.

Further, by maintaining the one-to-one ratio of edited to unedited versions, CleanFlicks satisfied the framers' intent, because the filmmakers were rewarded for their intellectual property rights from the royalties gleaned from the sales of the unedited films. In justifying its position against this reasoning, the Clean Flicks court stated that the value of the filmmakers' copyrights was diminished because the edited films reached an audience that the filmmakers never "sought to reach."°7 A counterargument is that as representatives of publicly-traded companies, the filmmakers owe a duty to their stockholders to enhance the return on the value of the copyright through the widest possible dissemination of their works. The Clean Flicks court's argument with respect to the loss of property value on the part of the filmmakers is, therefore, unconvincing.

B. Interpreting FECA

Although the Clean Flicks court acknowledged the passage of the FECA, the court's analysis of the Congressional intent behind the passage of the FECA was flawed.°8 In its opinion, the Clean

°6. Id. at 1242.
°7. Id.
°8. Id. at 1240.
Flicks court stated that the legislative history "show[ed] that the amendment was not intended to exempt actions resulting in fixed copies of altered works which the House Committee believed illegal." A careful analysis of the legislative history, however, reveals that the goal of FECA was to empower viewers to "make imperceptible" segments of films that viewers might find objectionable. In their report on FECA, the Judiciary Committee, while noting that making fixed copies of altered works is illegal under copyright law, also refused to differentiate between companies that provide editing service for profit versus those that provide such service not-for-profit. The intent, however, was to prevent the sale of illegal copies of films and to curb piracy. Congress did not enact FECA with the intent to stop lawful owners of legitimately-obtained film copies from making the edits they might deem necessary. The "fixed copy" restriction that the Clean Flicks court focused on is too limited in its meaning to have lasting effects in the face of emerging technologies.

Under the reasoning in Clean Flicks, companies such as CleanFlicks are violating the law, yet if a pay-per-view video-on-demand company produced edited versions of motion pictures for a fee and broadcast the films via a streaming video format, they would not have violated FECA. The film would have been distributed in a non-fixed format. The minority views of the Congressional report explicitly identified this shortcoming in the legislation and the problems that would have remained with the

111. Id. at 6, 2005 U.S.C.C.A.N. at 225.
113. Streaming video is defined as:
[a] one-way video transmission over a data network. It is widely used on the Web as well as private intranets to deliver video on-demand or a video broadcast. Unlike movie files (MPG, AVI, etc.) that are played after they are downloaded, streaming video is played within a few seconds of requesting it, and the data is not stored permanently in the computer.

passage of FECA. The minority identified one of the Clean Flicks plaintiffs, ClearPlay, as a beneficiary of FECA and accused the majority of taking sides by "assisting ClearPlay by preemptively vitiating [their] legal claim." The employees of ClearPlay view films and, based on their experiences, create specific software filters that edit out objectionable content. Customers who purchase a specially designed ClearPlay DVD player can then download these filters. When active, these filters "make imperceptible" objectionable content on authorized copies when played. When the films are viewed, a computer program within the DVD player automatically filters out the objectionable content. Under FECA, this type of alteration is permissible, where the altered films conflict with the filmmakers' visions, because these alterations are not fixed in a tangible medium of expression. The "fixed format" argument advanced by the Clean Flicks court, however, fails to address the case's central copyright issue of alteration of copyrighted works. Under FECA, all of the filmmakers' activities, save for the fixation of the works in a tangible medium, would be legal.

C. Application of the Statutory Test for Fair Use

In Campbell v. Acuff-Rose, the Supreme Court stated that no one fair use factor weighs in the balance more heavily than the others. In Campbell, the Court concluded that parody was protected as fair use because of its important role in social criticism. In Clean Flicks, CleanFlicks stated that part of the reason for their manufacturing of edited copies of copyrighted motion pictures was to draw attention to the need for films without

121. Id. at 592.
objectionable content. However, the Clean Flicks court felt that judicial forums were the wrong place to bring such public policy arguments.\(^{122}\) This reasoning goes against the Supreme Court's fair use doctrine as established in Campbell.

In analyzing the "purpose and character of the use," the Campbell Court examined the fair use of a song that had been transformed into an alleged parody sold for commercial gain.\(^{123}\) In holding that parody was protected fair use, the Court used public policy arguments to justify its holding.\(^{124}\) In Clean Flicks, however, the court dismissed CleanFlicks' public policy arguments and focused exclusively on the commercial aspects of CleanFlicks' creation and distribution of the edited films.\(^{125}\) The Clean Flicks court was solely concerned with protecting the creators' rights, regardless of the social relevancy of the nature of the infringement. As such, the Clean Flicks court blatantly disregarded the Supreme Court's analytical framework for considering the first prong for fair use determination.\(^{126}\) Under the Campbell Court's analysis, both CleanFlicks' public policy arguments for its fair use of the filmmakers' works as well as the commercial benefits gained by CleanFlicks' infringements should have been considered.

The court also ignored the issue of how free speech concerns and copyright can be reconciled.\(^{127}\) Part of CleanFlicks' argument

123. Campbell, 510 U.S. at 578-79.
124. Id. at 584.
125. Clean Flicks, 433 F. Supp. 2d at 1240.
126. Id.
127. 1 NIMMER, supra note 102, § 1.10. Professor Nimmer writes:

It might be contended that copyright laws fall within a built-in exception to First Amendment protection, not by the words of the First Amendment, but by reason of another passage of the Constitution, namely the Copyright Clause, expressly authorizing Congress to grant to authors "the exclusive right" to their "writings." However, there are several reasons why refuge for copyright may not be found in this manner. First, if a completely literal reading of the First Amendment is to be made, then we must likewise recognize that the First Amendment is an amendment, hence superseding anything inconsistent with it that may be found in the main body of the
was that their appropriation of the filmmakers' works was a criticism that was meant to bring attention to the need for more "socially acceptable alternatives" for the works made by the filmmakers. CleanFlicks' actions could have been considered free speech because their creation of the edited films was a form of protesting the absence of alternative versions of films containing objection content. Previous federal court decisions have protected such forms of public criticism as justification for the unauthorized copying of copyrighted work. Nevertheless, the court dismissed the free speech concerns and focused on its role of protecting "the creator's rights to protect its creation in the form in which it was created."

The *Clean Flicks* court also erred in its analysis of the third prong of the fair use defense by not following the analytical framework set forth in the controlling opinion of *Campbell*.131

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Constitution. This, of course, includes the Copyright Clause. In any event, even were the original Constitution and the Bill of Rights to be viewed as a single instrument, the Copyright Clause may not be read as independent of and uncontrolled by the First Amendment.

Id. 128. *Clean Flicks*, 433 F. Supp. 2d at 1240.

129. See Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003). In *Chicago Board of Education*, the 7th Circuit considered the case of a Chicago public school teacher names Schmidt who had created unauthorized copies of standardized test created and copyrighted by the Chicago Board of Education. *Id.* at 626-27. Without getting prior permission from the Board, Schmidt reprinted the tests as part of a newsletter edited by him. *Id.* at 627. Schmidt's reasons for the copying was to criticize the tests. *Id.* In addition to arguing that his actions were protected under the fair use doctrine, Schmidt argued that his unauthorized publication was within his First Amendment. *Id.* at 628. The court noted that the First Amendment defense "is the point of balance between the right to criticize, which is one aspect of freedom of expression, and the incentive to create expressive works, which is another aspect of the same freedom ...." *Id.* at 631. Although the 7th Circuit did not find the First Amendment defense applicable here, the court acknowledged the Supreme Court's opinion in *Eldred v. Ashcroft* that "copyright law contains built-in First Amendment accommodations." *Id.* (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)).


131. *Id.* The third fair use prong considers the amount and substantiality of the portion used in relation to the whole. See 17 U.S.C. § 107(3) (2006).
Under *Campbell*, inquiries into the third statutory prong for fair use must "recognize that the extent of permissible copying varies with the purpose and character of the use." \(^{132}\) In *Clean Flicks*, the amount and substantiality of the use were not the type that would deny the filmmakers the financial benefits of exploiting their ownership of the copyrighted motion pictures. CleanFlicks paid the filmmakers for each copy of the edited films that CleanFlicks had in their distribution channels. \(^{133}\) Furthermore, the films were edited for financial gain and for the purpose of satisfying a public need for films edited for content. \(^{134}\) As with the first prong of the fair use defense, the third prong calls on the fact-finder to examine the policy reasons that might militate against excessive use of the underlying copyrighted materials by the alleged infringer. \(^{135}\) The *Clean Flicks* court, as it did in its analysis for the first prong, never considered policy reasons for the alleged infringement in the court's analysis of the third prong. \(^{136}\)

Although the *Clean Flicks* court failed to use the appropriate analysis with regard the first and third statutory prongs for fair use, the court focused on the fourth statutory prong as the true area of contention. \(^{137}\) Once again, the court failed to consider the framers' intent behind the law of copyrights.

The fourth statutory prong considers the "effect of the use upon the potential market for or value of the copyrighted work." \(^{138}\) The Supreme Court's decision in *Campbell* stated that, in evaluating whether the use has satisfied this prong, courts should consider "not only the extent of market harm caused by the particular actions of the alleged infringer," but also whether the conduct resulted in a "substantially adverse impact on the potential market for the original [work]." \(^{139}\) However, the *Clean Flicks* court disregarded both the analytical framework from the controlling decision of *Campbell* as well as the plain language of the statute.

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133. *Clean Flicks*, 433 F. Supp. 2d at 1238.
134. *Id.* at 1239-40.
137. *Id.* at 1241-42.
139. *Campbell*, 510 U.S. at 590.
Rather, it presumed the meaning behind the Act was to protect a copyright holder’s right to control the content of the work.\textsuperscript{140}

This conclusion is inappropriate because the Act lacks any language supporting this proposition. Only if the filmmakers could prove that they had or intended to target the market in the future could they make the argument that they were damaged by CleanFlicks’ use of their works. The filmmakers offered no such proof. CleanFlicks argued instead that their business actually enhanced the value of the filmmakers’ copyrights by providing extra revenue from a population that would otherwise never have been exposed to the films.\textsuperscript{141}

Additionally, although there is a presumption of substantial market harm where the infringer’s use is for commercial gain, such a presumption in the current case was erroneous. The affected market was not targeted by the filmmakers.\textsuperscript{142} Only in the event that the filmmakers decided to expand into that market in the future might CleanFlicks’ activities be considered infringing. However, as the filmmakers were not currently targeting the same market, the argument that this would harm their future market is tenuous at best.

Finally, there is no empirical evidence to suggest that CleanFlicks’ use would have affected the filmmakers’ future market for edited works. The filmmakers provided no evidence that they were either planning on expanding in the market in the future or losing money because of CleanFlicks’ targeting of the underserved target market. Under this line of reasoning, CleanFlicks satisfied the fourth prong of their fair use defense. In failing to apply such reasoning, the court ignored the statutory language and intent of the Act.

\textbf{V. IMPACT}

The \textit{Clean Flicks} decision will result in a further muddying of the waters concerning the property rights of the consumer, the intellectual property rights of copyright owners, and the moral

\textsuperscript{140} \textit{Clean Flicks}, 433 F. Supp. 2d at 1242.

\textsuperscript{141} \textit{Id}.

rights of the creators of creative works. Because fixation was the element of the infringement that was deemed most damaging to the copyright holders, future technologies will build upon the ClearPlay model, whereby the intellectual property creations of filmmakers are altered but not fixed, thereby insuring that such alterations do not run afoul of existing U.S. copyright law. Furthermore, the creation of this new moral right of film creators does more than merely expand the rights of the copyright holders: it infringes upon the property rights of the owners of the authorized copies of the films. Another possible fallout will be a chilling effect on the permissible free speech use of protected works for the purpose of social criticism.

A. Contraction of the Real Property Rights of the Consumer

Under the Copyright Act, an individual who makes infringing copies of a work infringes on the copyright owner’s reproduction rights even if there is no violation of the copyright owner’s exclusive right of distribution.143 This provision is also subject to the fair use provisions § 107 of the Act, but in the Clean Flicks court’s decision and its interpretation of FECA, fair use does not appear to be a valid defense. The Clean Flicks court interpreted FECA as prohibiting any actions resulting in fixed copies of altered works, even if the works have been created by an individual who lawfully purchased an authorized copy and created the altered work for his own private use.144 This abrogation of the rights of the property owner for the benefit of the copyright holder goes against both the framers’ intent behind the Copyright Clause and the protections built into the Copyright Act for fair use. The framers intended to enhance the dissemination of artistic endeavors while encouraging the creation of creative expression by rewarding it by grant of a limited monopoly.145 Once the purchaser paid for the authorized copy, the purchaser should be free to treat

143. 8 NIMMER, supra note 102, § 8.02[C].
144. Clean Flicks, 433 F. Supp. 2d at 1240.
145. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). In Aiken, the Supreme Court stated that “[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” Id at 156.
the copy in whatever fashion he or she chooses, so long as the treatment does not run afoul of the copyright owner's remaining rights.

Even where the purchaser has created a copy of the work for his own use without disseminating the copy to the public, the Clean Flicks court held that such use would violate FECA even though it might satisfy all four prongs of the fair use defense. The purpose and nature of the creation of an altered title for personal use would be considered non-commercial because the owner would not be sharing the work with the general public. The nature of the copy would be a copy of an expressive work, but once again, the copy is not made for public dissemination but for home viewing. The amount and substantiality of the portion copied would translate into most of the film being copied, but the purchaser already paid for the right to own a copy of the film. Therefore, this factor would not necessarily be dispositive of a finding of unfair use. The effect of the use upon the market or value for the original work would be non-existent because, as stated previously, the purchaser has already paid the requisite copyright royalty by purchasing an authorized copy, and the creation of the edited version would be for the purchaser's private use. Taken together, it is likely that the purchaser's actions would be considered fair use under the Copyright Act.

B. Expanding the Copyright Owner's Intellectual Property Rights and the Creation of a New Moral Right

Once the copyright owner has been granted a royalty for the copy of the work, the owner does not have the right to dictate how the purchaser uses the work, so long as the purchaser's use does not infringe upon the owner's rights. By expanding the rights of the owner to include control over the purchaser's use of the copy in the purchaser's home, the court stepped towards a grant of indefinite copyright for each individual copy and the validation of FECA's creation of a new moral right for the copyright holders of films.

Although many countries have long recognized certain non-
economic, or "moral" rights for authors of creative works, numerous federal and state judicial decisions have suggested that such moral rights are not recognized in the United States. Only with the passage of the Visual Artists Rights Act of 1990 did Congress recognize the moral rights of authors, albeit the rights of integrity and attribution for visual artists. The moral rights that are recognized in other countries, such as other Berne Convention signatory countries, similarly grant such rights to authors engaged in the fine arts, such as sculpting, painting, photography. However, those countries have not extended such rights to the creators of audiovisual works. In light of Congress' long standing reluctance to recognize moral rights to the extent of the other Berne signatories, Congress' passage of FECA and the accompanying grant of a substantive moral right were all the more shocking. In effect, Congress granted copyright holders the right to control alterations of their work long after having been paid. Because there is no economic incentive, the only incentive present by preventing the creation of a fixed altered work would be non-economic, or moral, if the Clean Flicks court's interpretation of FECA is correct.

The intent behind FECA, however, was not to stop the creation of unauthorized derivative works by purchasers of legally authorized copies of protected works. The purpose was to prevent distribution of these unauthorized works. The average consumer who wishes to make fixed copies of films after having already edited out objectionable content is an unlikely pirate because their actions are limited to a single copy for their own use, not for the purpose of selling illegal copies of the work in violation of the

147. 8 NIMMER, supra note 102, § 8D.02[A].
149. 8 NIMMER, supra note 102, § 8D.02[B]. The Berne Convention for the Protection of Literary and Artistic Works is the oldest continuing copyright protection international treaty. See The UK Copyright Service, http://www.copyrightservice.co.uk/copyright/p08_berne_convention (last visited Nov. 1, 2007). First adopted in Berne Switzerland in 1886, the Berne Convention attempts to harmonize intellectual property rights world wide by providing a framework of minimum standards for copyright protection for authors. Id. The United States joined the Berne Convention in 1989, and under the Berne Implementation Act of 1988, Congress incorporated Berne by reference into the Copyright Act. Id.
rights of the filmmakers. Indeed, the Committee for the Judiciary’s report on FECA expressly states that the primary reason for the provisions was to cut down on piracy.\textsuperscript{150} The Committee even went so far as to state that FECA was not granting the filmmakers moral rights, because under the new law, purchasers were allowed to electronically “make imperceptible limited portions of work that he or she chooses not to see for themselves or their family, whether or not the skipped content is viewed as objectionable by most, many, few, or even one viewer.”\textsuperscript{151} The Committee failed to realize, however, that by not allowing purchasers to similarly create fixed copies of the edited purchasers, FECA granted the directors a narrow exception to the very same moral rights that the Committee claimed to be denying them.

With the developing technologies such as video on demand and streaming video, the Committee’s narrow exception may prove to have a more expansive future effect upon the moral rights enjoyed by filmmakers. The \textit{Clean Flicks} court’s interpretation of FECA represents an erosion of the rights of the purchaser of a copyrighted work and a corresponding increase in the power of the creator to control his creation outside the bounds of copyright law. If the purpose of copyright law is to promote public access to creative works by providing a limited economic monopoly on said creative works, FECA’s apparent grant of copyright law represents an expansion of the law beyond the bounds of economic reward and an erosion of statutory fair use.

\textit{C. Validation of Other Technologies}

The fixation requirement that the \textit{Clean Flicks} court focused on does not solve the issue of alteration of the filmmakers’ works. If the filmmakers were truly troubled by the alterations of their artistic creations, they would have pushed for all technologies that enable alterations to their works, regardless of fixation, to be banned. This is not the case. Under the ruling, ClearPlay can continue to manufacture their DVD players with filtering software


\textsuperscript{151} \textit{Id.} at 6, 2005 U.S.C.A.A.N. at 225.
so long as the players do not create fixed copies of the films. Technologies, however, are ever changing and adapting. Currently, the expansion of digital transmission via streaming video, video-on-demand, and television providers makes the court’s preoccupation with fixation all the more puzzling. It remains to be seen whether the law will be changed in the future to adapt to these changing technologies. For the present, however, the court validated these other technologies as satisfying the requirements of copyright law in that they do not create fixed versions of protected works.

VI. CONCLUSION

The Clean Flicks decision cast a chilling pall on the rights enjoyed by purchasers of protected material, all while expanding the rights of filmmakers beyond the boundaries of the established economic rights of legal copyright holders. Of particular import in the decision was the court’s failure to find nominative fair use when an analysis of the fair use test, as articulated by the Supreme Court in Campbell, would suggest that CleanFlicks had met its burden of proof.

The Clean Flicks court went against the established intent of the framers of the Constitution. CleanFlicks’ actions fulfilled the underlying public policy of the Copyright Act by insuring that the filmmakers’ works would be disseminated to as broad an audience as possible. At the same time, CleanFlicks insured that the filmmakers were rewarded for their limited monopoly in their works via payments made for each legally obtained copy. If the Copyright Act is to promote the broad dissemination of artistic works, then, arguably, CleanFlicks was aiding in the fulfillment of the framers’ intent. Unfortunately, the Clean Flicks court viewed CleanFlicks actions in a different light.

One of the more troubling aspects of the decision is the court’s dismissal of FECA as inapplicable to the current case on the basis that the works in Clean Flicks were fixed while the works in FECA were not. The court missed the fact that FECA expands the rights of the copyright holder by preventing the purchaser from making copies of his legally purchased item for personal use or altering the content in any way if the result will be a fixed form.
The court also failed to acknowledge the free speech aspects of CleanFlicks’ efforts and their protest against films of objectionable content. By refusing to recognize the free speech arguments, the court established a precedent where a party may not claim the fair use defense even where the party may have been appropriating the copyrighted material for the purpose of criticism or to instigate social change.

In answer to the uncertainty surrounding the rights of the consumer versus the rights of the copyright holder, Congress should amend FECA to either ban any fixed and unfixed alterations of audiovisual works, thereby creating a new moral right on the part of the director, or allow the creation of altered works in either fixed or unfixed formats. This would recognize the long established rights of property owners in allowing them to enjoy their copies as they see fit within the auspices of the fair use defense. Currently, there is no clear answer as evidenced by the Clean Flicks court’s dismissal of FECA as inapplicable to the case.

The Clean Flicks court also erred in its application of the fair use test. The purpose and nature of CleanFlicks use could have been considered a First Amendment exercise of CleanFlicks’ right to protest the lack of available alternatives to the objectionable versions of the filmmakers works, but the court dismissed this by saying the courtroom was the wrong forum for these arguments. The problem with the opinion is that the court never specifies which forum is proper for bringing a cause of action for an alleged First Amendment violation.

The court also failed to recognize that the amount and substantiality of CleanFlicks’ use was not of the type that would inhibit the filmmakers from financially benefiting from their works. Under this reasoning, CleanFlicks satisfied the third prong of the fair use defense, but the court dismissed this argument and read the application strictly without consideration of the public policy. This was in direct opposition to the Supreme Court’s reasoning in Campbell, where the Court stated that the fact finder should examine public policy concerns that might permit excessive use of copyrighted materials.152

The court also failed in its analysis of the fourth prong of the fair

use defense because the filmmakers could not point to any evidence that suggested the present or future markets for their works were harmed. In fact, CleanFlicks argued that the value was enhanced because of the introduction of the works to a new audience. In failing to consider this argument, the court allowed the filmmakers to reap the benefits of CleanFlicks’ work without recognizing that CleanFlicks had not demonstrably affected the current and future market for the filmmakers’ works.

In this age of digital media, the *Clean Flicks* decision created more issues than it answered. The lines between permissible fair use for personal and professional uses has been blurred, and this line was further blurred by the passage of FECA. The *Clean Flicks* court had the opportunity to interpret the manipulation and sale of copyrighted digital medium in this case of first impression, but it failed to do so. The long-term effect of this decision will be continued confusion over the property rights of consumers versus those of the nation’s media conglomerates. In this dawn of the age of digital media, this case is the first of many yet to come.

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