



4-1-2008

Movie Editing and “The Essence of the Law of Copyright”

P. Tayler Summer

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

BYU ScholarsArchive Citation

Summer, P. Tayler (2008) "Movie Editing and "The Essence of the Law of Copyright"," *Brigham Young University Prelaw Review*: Vol. 22 , Article 13.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol22/iss1/13>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

MOVIE EDITING AND “THE ESSENCE OF THE LAW OF COPYRIGHT”

by P. Tayler Summers¹

I. INTRODUCTION

By current standards, technological advances determine the standing of civilized nations; technology is the measurement of progress, and it rapidly evolves and develops. Yet with developments in technology arise new, complex questions which the law is asked to confront and answer. *Olmstead v. United States* is one such example where the Court was obliged to answer a new question because of new technology. Roy Olmstead was convicted of bootlegging in Washington State during Prohibition. He appealed the district court’s decision because the conviction was based on evidence gathered against him by prohibition officers through the means of wire tapping. The Supreme Court heard his case based on his claim that wire tapping violated his Fourth Amendment right to protection against unlawful search and seizure and the Fifth Amendment’s protection against self-incrimination. The Supreme Court found no violation of these rights.² While the Court upheld the previous decision, one dissenting opinion adds something interesting. He comments, “[d]iscovery and invention have made it possible for the Government, by means far more effective than [previously available], to obtain disclosure in court of what is whispered in the closet.”³ Just

1 Tayler is a senior at Brigham Young University studying English. He is originally from Queen Creek, AZ. After graduating, Tayler hopes to attend law school and pursue a career in law.

2 *Olmstead v. United States*, 277 U.S. 438, 455 (1928).

3 *Id.* at 473 (Brandeis, J., dissenting).

as wire tapping allowed government greater access to Olmstead's private conversations, computer technology has facilitated consumers' ability to obtain and manipulate copyrighted work in unforeseen ways, and thus a new question has come to the court. *Clean Flicks of Colo., LLC v. Soderbergh* involves various businesses that deleted the scenes, words, and sounds which they considered inappropriate from digital copies of movies and then sold the copies of their altered movies to the public on digital video discs. The copyright holders felt that, by doing so, the movie-editing companies were infringing on their rights as copyright owners. In their defense, the movie-editing companies claim protection under the doctrine of fair use found in section 107 of the U.S. Copyright Law. As in Olmstead's case, the copyright holders have brought a new question before the court and requested a new interpretation because of changes in technology. Judge Richard P. Matsch, in order to overcome the newness of the questions brought up by technology, appeals to the "essence of the law of copyright" in his decision.⁴ Judge Matsch explains that the essence of the law of copyright is "the intrinsic value of the right to control the content of the copyrighted work."⁵ When the "essence" is found and applied, that which was unclear and indistinguishable becomes clear and easier to interpret and the new question becomes easier to answer. Therefore, this article will illustrate how companies such as Clean Flicks of Colorado, despite their efforts to prove exemption through the fair use doctrine, used technology in violation of copyright law as is shown when the question is held up to the "essence of the law of copyright."⁶

II. CONTEXTUAL BACKGROUND FOR *CLEAN FLICKS OF COLO., LLC v. SODERBERGH*

The history leading up to the case is brief since the technology that makes it possible to remove clips and sound from movies has

4 *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 79 U.S.P.Q.2D (BNA) 1302 (Colorado, 2006).

5 *Id.* at 1242.

6 *Id.*

only recently been made available to the public, yet there is some historical precedent showing the public's desire for what they consider appropriate content. In the nineteenth century, Reverend Thomas Bowlder and his daughter published a well-known volume of Shakespeare's work, removing scenes and lines that he thought were inappropriate for family audiences.⁷ Yet the lawfulness of the issue went unquestioned in this instance since the copyright on Shakespeare's work had long since been released by the nineteenth century when the volume was published. In the above-mentioned case, the counterclaim defendants Clean Flicks of Colorado; CleanFlicks, LLC; CleanFilms; Family Flix USA, LLC; and Play It Clean Video, LLC; were involved in the fairly-new industry of editing movies. In the industry, digital equipment is used in order to find and remove "objectionable content."⁸ Copies of the edited films are made then rented or sold to the public. The industry began shortly after "Titanic" was released in 1998; the first movie-editing company began removing two scenes because of allegedly unacceptable material from VHS format movies.⁹ Since that time many distributors of edited movies have been established. The editing companies bought, edited, and sold the edited copies on a one-to-one ratio, meaning that for each edited movie they sold or rented, they had bought an original copy.¹⁰ The lawfulness of their industry was officially brought into question when Clean Flicks of Colorado, LLC brought a pre-emptive lawsuit against the Directors Guild of America in order to receive legal justification for the movie-editing industry.¹¹ CleanFlicks, LLC; CleanFilms; Family Flix USA, LLC; and Play It Clean Video, LLC joined Clean Flicks of Colorado (known in the case as the counterclaim defendants) when the original suit was countered by Steven Soderbergh and fifteen other directors (including Martin Scorsese, Steven

7 David Bevington ed., *THE NECESSARY SHAKESPEARE* xcvi (2d ed. 2005).

8 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240.

9 Sharon Weinberg Nokes, *E-Rated Movies: Coming Soon to a Home Theater Near You?*, 92 *Georgetown L.J.*, 611, 611-12 (2004).

10 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1236.

11 Weinberg, *supra* note 9, at 624.

Spielberg, and Robert Redford), eight large movie studios (including Metro-Goldwyn-Meyer, Time Warner, Sony, and Disney), and the Directors Guild of America (collectively known as the “defendants counterclaimants”).¹²

The use of computers by the public to edit and copy a protected work was previously unheard of; another question of copyright law revealed itself as a result of the newly available technology. The studios and directors ask the question of the court, “Are Clean Flicks, et al. allowed to change and sell our work without our permission?” Soderbergh, et al. allege that Clean Flicks of Colorado, et al., using technology recently made available, are defying a movie maker’s and studio’s “[E]xclusive rights to . . . (1) reproduce the copyrighted work in copies or phonorecords[,] (2) to prepare derivative works based upon the copyrighted work[, and] (3) 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” as established in the Copyright Act.¹³ In *Clean Flicks of Colo., LLC v. Soderbergh*, they asserted that the practices of the counterclaim defendants violated all of these and caused “irreparable injury to the creative artistic expression in the copyrighted movies.” Judge Matsch explains,

The Studios have not asked for damages for any loss of revenue to them; they have not sought to recover the counterclaim defendants’ profits and they do not ask for statutory damages under 17 U.S.C. § 504. Their objective in the motion for partial summary judgment is to stop the infringement because of its irreparable injury to the creative artistic expression in the copyrighted movies. There is a public interest in providing such protection despite the injury the infringers may sustain.¹⁴

The movie studios and directors’ only request that the court protect and defend their rights as copyright owners.

12 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1243.

13 Copyright Act, 17 U.S.C. § 107 (2003).

14 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1243.

III. FAIR USE DOCTRINE

The defense presented to the court by Clean Flicks of Colorado, et al. considers their rights under the fair use doctrine included in copyright law. Fair use doctrine has developed with time through the decisions of various cases and became an official part of copyright law when it was codified in section 107. Section 107 of the Copyright Act, 17 U.S.C. affords others besides the copyright owner the right to reproduction of copyrighted works without infringement *if* the copied materials are "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."¹⁵ Clean Flicks of Colorado, et al. claimed that by editing and making their edited copies available "they [were] criticizing the objectionable content commonly found in current movies and that they [were] providing more socially acceptable alternatives to enable families to view the films together, without exposing children to the presumed harmful effects emanating from the objectionable content."¹⁶ If this practice constituted educational use, it would validate their claim of working under the fair use doctrine which limits the *exclusive* copyright and distribution rights of the copyright owners. To judge the validity of any "fair use" claim there are four criteria in the doctrine which, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court "instructed that the fair use doctrine must be applied using a case-by-case analysis, considering all four of the statutory factors, [and that] no one of which should be considered controlling."¹⁷ The counterclaim defendants' work, in other words, is to be scrutinized on its own according to the four factors set down by the Copyright Act, without any precedent influencing the decision. In order to do so, Judge Matsch finds the "essence of the law of copyright" in each of the criteria, and, in this manner, resolves a new question in law.

15 Copyright Act, 17 U.S.C. § 107 (2003).

16 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240.

17 Judge Matsch here quotes *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

A. First Factor

According to the fair use doctrine, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” must first be considered when judging any claim to protection under fair use.¹⁸ Clean Flicks of Colorado, et al. admit that their practices are commercial, but, as mentioned above, the Supreme Court has decided that one factor cannot determine the outcome. They argue that through their commercial enterprise they have endeavored to prove, through a public policy test, that they *are* criticizing what is found in movies.¹⁹ Furthermore, in *Clean Flicks of Colo., LLC v. Soderbergh*, Judge Matsch writes that the counterclaim defendants brought many testimonials from appreciative customers of the counterclaim defendants who enjoy the movies without worrying about the appropriateness of the content. All these efforts, however, were ruled inconsequential. He explained that they were of no consequence in the trial or his decision because the argument was “addressed in the wrong forum.” He also explained that his “[c]ourt is not free to determine the social value of copyrighted works. What is protected are the creator’s rights to protect its creation in the form in which it was created.”²⁰ The counterclaim defendants’ arguments for the first factor of the “fair use” act did not hold up in this light. In order to rule against the counterclaim defendants’ claim of protection under the first factor of the Act, Judge Matsch knowledgeably separated what was useful and in line with the essence of the law and what was not. Doing so, he answered one part of these new questions.

B. Second Factor

The second factor of the fair use doctrine states that the “*nature* of the copyrighted work”²¹ should also be considered when deciding on

18 Copyright Act, 17 U.S.C. § 107(1) (2003).

19 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240.

20 *Id.*

21 Copyright Act, 17 U.S.C. § 107(2) (2003) (emphasis added).

the applicability of the "fair use" act. The defendants counterclaimants' argument is that the counterclaim defendants are violating their exclusive right to create "derivative works." The counterclaim defendants attempt to establish their work as transformative, claiming, as mentioned, that they edit movies in order to criticize the movie makers' use of violent, crude, sexual, or other material in their movies. Judge Matsch claims, though, that for a work to be considered as transformative it must contribute something original enough to benefit the public. Based on *Campbell v. Acuff-Rose Music, Inc.*, the work is transformative if it adds to the existing work. In *Bill Graham Archives v. Dorling Kindersley Ltd.*, a case similar to *Clean Flicks of Colo., LLC v. Soderbergh*, the defendant used copyrighted images from Grateful Dead paraphernalia in order to make a book.²² According to that decision, as emphasized by Judge Matsch, the difference rested on the transformative nature of the work that contained the copyrighted images. The book did not seek to exploit the value of the images for gain, but that they had value in a historical book. In contrast, the counterclaim defendants of *Clean Flicks of Colo., LLC v. Soderbergh* used the actual work, removing, not adding, scenes and words for commercial purposes. This "weigh[ed] heavily in favor of the Studios under the second factor." The other factor in "the nature of the copyrighted work"²³ is the "creative expression of the movies."²⁴ Since each piece of a movie can have meaning, as is inherent in their nature, removing parts can limit the director's right to express her or himself. These factors, as determined by Judge Matsch, were enough to decide that the counterclaim defendants had infringed on the second factor used in determining whether or not a work has protection under fair use. As each factor comes into question, the law seems to become clearer and easier to understand.

22 *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

23 Copyright Act, 17 U.S.C. § 107(2) (2003).

24 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1241.

C. Third Factor

Article three of section 107 in the Copyright Act establishes that “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” must also be considered to determine if fair use is applicable to the work in question. This would mean that if an unsubstantial amount of the copyrighted work in relation to the complete is used, fair use could apply if the work met the three other factors as well. The purpose of an edited movie is to provide as much of the movie’s story as possible while eliminating what the editor considers inappropriate. Clearly an edited movie must provide most of the movie in order for them to succeed in giving the audience most of the same story given in the unedited version. Judge Matsch rules the use in edited movies as substantial because they “are copied in almost their entirety.”²⁵

D. Fourth Factor

With one last factor of the fair use doctrine to weigh, there is yet one more question to answer as a result of this intersection between law and technology. The fourth factor states that a judge must consider “the effect of the use upon the potential market for or value of the copyrighted work”²⁶ when deciding if a work truly is protected from copyright laws because of fair use. The primary argument of the counterclaim defendants lies, in Judge Matsch’s opinion, in this factor of fair use doctrine.²⁷ The counterclaim defendants claim that their business did not cause a negative effect on the “potential market or value of the copyrighted work,” but instead that their business generates more sales of the directors’ movies.²⁸ This claim is based on the fact that they buy an original copy of the movie for each movie the edit and sell. They further claim that if edited movie consumers did not have the option to buy the movies in edited form,

25 *Id.*

26 Copyright Act, 17 U.S.C § 107(4) (2003).

27 *Id.*

28 *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1239.

they would not buy them at all. Besides the "superficial appeal," this argument achieves no validity because, as Judge Matsch contends, it ignores the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright."²⁹ Again, the superficial is overlooked, as it must be, and the essence of the law is reviewed in order to overturn this argument. The questions regarding fair use and this new situation are satisfied with this conclusion.

In response to the ruling, various questions have been asked, questions that also help explain copyright law, answering questions of their own. Many people, in reaction to the ruling, have wondered why it is illegal to edit something they own, a DVD or videocassette in this case. The essence of the law of copyright provides an answer to this question as well. The essence of the law, according to Judge Matsch, states that those who produce the work have the right to control it. The Copyright Act permits the producer to distribute their work in the form they desire and limits a purchaser's ability to make changes to the distributed work unless it is justified by the fair use doctrine. Since 2005, some leniency has been granted on the issue. According to the Family Movie Act passed by Congress in 2005, a person may edit a work for personal, in-home use, but that person may not make a fixed copy, such as a copy on DVD, of what she or he edited.³⁰ The right to make fixed copies of any movie that was edited for that private household use was not granted. This is a partial concession and acknowledgement by Congress of the need that Clean Flicks, et al. presented to the court for movies without objectionable content, yet it does not completely remove the copyright owner's rights to control over her or his work as Clean Flicks, et al. were doing.

Others contend that there is an inconsistency in the law since airlines and television stations are allowed to show edited forms of movies without any adverse action taken against them. In order to understand this seeming dichotomy, Allen Goluboff, president of the Directors Guild of Canada, explains that an airline or television sta-

29 *Id.* at 1242.

30 *Id.* at 1240.

tion must buy a license from the owner of the copyright in order to receive permission to show the films in an altered state.³¹ After the director, or whoever else is involved, receives an agreed-upon amount of money, the compensator is given permission to show the edited versions of the director's work. If a television station or airline is showing an edited movie it is because there is a legal agreement between the copyright owner and the airline companies giving them the right to do so. Those companies have bought the right to show edited movies whereas Clean Flicks of Colorado, et al. had not, and could not claim the same approval from the copyright owners. Consequently, it is possible that the industry of movie editing has a future if the studios or directors agreed on allowing them to edit and distribute their films. For now, though, there is no legal contract between any movie studio and the editing companies as exists with airlines and television stations.

Recently, more movie-editing companies in Utah were closed as a result of the ruling in this case. Flix Club of Orem and Cougar Video of Provo, among others, were operating under the pretense of educational use. They continued to edit, sell, and rent movies in a manner that had been found in violation of copyright law in *Clean Flicks of Colo., LLC v. Soderbergh*. With the ruling of *Clean Flicks of Colo.* clearly in their favor, movie studios have begun seeking out the last of the movie-editing companies like Flix Club and Cougar Video and ordering the termination of their illegal activity. As of December 31, 2007, these companies agreed to close their doors in light of the fact that they have no protection under the law.³²

31 CBC-TV & Andrew Nichols, *Axing Sex, Swearing from Films Violates Copyright: Court*, 2006 CBC.CA, July 9, 2006, <http://www.cbc.ca/clips/mov/nichols-scrub-flim-intvu-060710.mov> (Quicktime movie).

32 Sara Israelsen-Hartley, *Edited-films Stores in Utah County Closing*, DESERET MORNING NEWS, (2007), available at <http://deseretnews.com/article/1,5143,695233362,00.html>.

IV. CONCLUSION

When new technology becomes available, it is necessary for the subtle lines of the law to be more carefully defined in order to encompass the technological advances. In *Clean Flicks of Colo.*, it was incumbent upon Judge Matsch to seek out the core principles of copyright law. With these core principles in hand, he was able to reassess the application of copyright law in reference to film editing. Editing and distributing edited movies for profit has been found illegal by weighing it against those core principles. Although companies like Clean Flicks argue that their work should be exempt from copyright restrictions because they are criticizing the directors' work, they were found to be in the wrong and outside of the protection of fair use doctrine. Though it was a new question, with new complications brought about by the rapid advances of the present technological age, it has been solved by looking to and interpreting the law in light of the new question. In the face of the true core of the essence of the law of copyright, though the specific question was new to the legal realm, the claims made by Clean Flicks, et. al are simply found wanting.