BALANCING THE SCALES: EXPANDING THE FAMILY MOVIE ACT TO PROTECT CONSUMERS AFTER *CLEAN FLICKS OF COLORADO, LLC V. SODERBERGH*

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I. INTRODUCTION

In July 2006 the District Court of Colorado released its Memorandum Opinion and Order for the case *Clean Flicks of Colorado, LLC v. Soderbergh*.[1] The decision stands as the culmination of events that included accusations, finger-pointing, judicial appeals, massive impleadings, academic debates, congressional hearings, and even statutory intervention. The specific issue that the court faced, which is still under discussion today, was whether companies that edit consumers' personal copies of motion pictures for moral content infringed the movie studios' copyrights.[2] Although much of mainstream America was likely unaware of either the case's existence or outcome, the court's decision has the potential to affect many Americans because it directly impacts the broader question at issue: whether a proper balancing of copyright interests should recognize and protect consumers' right to control the way that they experience movies in the privacy of their own homes.

The practice of editing movies beyond the version released in theaters

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1. Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006).

2. *See* Suzanne Struglinski, *Editing of Movies Debated in House*, DESERET MORNING NEWS (Salt Lake City), Sept. 27, 2006, at A1; Arena Welch, *Legislators Urge Clean Versions of Films*, CHI. SUN TIMES, Sept. 27, 2006, at 49.

is not new. For many years, movie studios, as copyright owners, have edited their movies for airline and television use.[3] Furthermore, modern technology has given consumers the ability to control and edit their movie-viewing experiences. Devices such as VCRs, DVD players, and, most recently, TiVo allow consumers to time-shift, fast-forward, pause, and even skip materials within television shows and movies. If viewers wish to completely bypass commercials, boring love scenes, or intensely frightening sections recorded within a production, they can easily do so with a mere click of a button. Given such expectations of control, perhaps it was inevitable that concerned consumers would eventually attempt to remove movie content that they found morally objectionable.

Current copyright consideration over edited films began with a simple snip of the scissors. Catering to a morally conservative and family-friendly community, a Utah movie store offered to edit out scenes of nudity and sex from *Titanic* for five dollars if customers brought in their own video cassettes.[4] As consumer demand for edited versions of other movies grew in numbers and spread geographically, so did the businesses offering such services.[5] The practice of offering edited movies also adapted to advances in technology, moving largely away from the cumbersome practice of snipping individual cassette tapes to the easier method of digital editing for use with DVDs. While digital editors have been reluctant to share their exact methods for editing a film,[6] the process yields a different end-product than edited cassettes. Unlike the original film within a consumer's cassette, which can be directly cut and spliced, an edited version of a movie on DVD cannot usually be recorded back onto the original DVD.[7] Instead, digital editors burn the edited version onto an extra, new disc. In an attempt to avoid copyright infringement, digital editors maintain a one-to-one ratio between edited copies of a film and the consumers' original DVDs.[8]

Although digital editing became the most common method of editing an individual's copy of a movie, a more advanced technology that created

3. *See* Reply Brief of Motion Picture Studios in Further Support of Their Motion for Partial Summary Judgment Against the Mechanical Editing Parties at 11, *Soderbergh*, 433 F. Supp. 2d at 1236 (No. 02-M-1662).

4. Andy Seiler, *Near, Far, Wherever You Are, Utah Store Snips 'Titanic' Nudity*, USA TODAY, Sept. 3, 1998, at D3.

5. *See Soderbergh*, 433 F. Supp. 2d at 1238–39.

6. Kieth Merrill, *Cleaning Up the Movies, Part I*, MERIDIAN MAGAZINE, Feb. 6, 2004, *at* http://www.meridianmagazine.com/arts/020604clean.html.

7. *Id.*

8. *Id.* (noting that both discs are returned to the customer, although the original was often disabled).

edited films without permanently altering the original copy or creating another disc also entered the market. This method, commonly referred to as "filtering," focuses on the DVD player and not the DVD itself.[9] Currently, only one company, ClearPlay, markets filtering technology.[10] To utilize ClearPlay's system, consumers simply load a normal DVD into a customized DVD player that is capable of downloading specialized software. Consumers then select and purchase (through a subscription) a "filter" that time-marks objectionable sections within that particular film. After downloading the movie-specific software, consumers can select the type of content they would like removed and the level of sanitation.[11] When consumers start the movie, the DVD player (in accordance with the downloaded software) will either skip flagged scenes or mute flagged profanity. Throughout the process, the consumer's DVD is not altered in any way.[12]

Regardless of the different approaches that these editors take, the ultimate result is the same: consumers can watch their own personal copies of a motion picture without profanity, sexuality, nudity, or violence. Unsurprisingly, several prominent movie directors publicly expressed dismay when they learned that outside companies were assisting consumers in editing their films.[13] Upon hearing that these directors were contemplating bringing a lawsuit, franchise owners of CleanFlicks, a major producer of digitally edited films, filed suit against the directors seeking a declaratory judgment that their actions were legal.[14] The number of parties on each side grew until the major studios and directors were on one side and the major film-editing companies (both digital editing and filtering) were on the other. The studios also countersued the film-editing companies for copyright infringement, assuring that the loser of the lawsuit felt the maximum repercussions.[15]

The board in *Soderbergh* was set for a final showdown, winner take

9. Aaron Clark, *Not All Edits Are Created Equal: The Edited Movie Industry's Impact on Moral Rights and Derivative Works Doctrine*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 51, 66–67 (2005).

10. A second company, MovieMask, that was also capable of "masking" scenes (for example, clothing a nude actor) quietly went out of business in 2004. *Id.*

11. *See* Benny Evangelista, *DVD Player to Edit Movies: Technology Allows Viewer to Bypass Offensive Content*, S.F. CHRON., Apr. 7, 2004, at C1.

12. Clark, *supra* note 9, at 66.

13. *Id.* at 67.

14. *Id.* at 68.

15. *See* Motion Picture Studio Defendants' Answer and Counterclaims, Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (No. 02-M-1662), 2002 WL 32153736.

all—that is, until Congress intervened. Despite the fact that the lawsuit was still in progress, Congress passed the Family Movie Act of 2005.[16] The Act in essence immunized filtering editors from copyright infringement litigation while leaving the digital editors to face the court's discretion alone. A year later, the *Soderbergh* court held that digital editors, who were notably ignored and bypassed by Congress, were infringing the studios' copyrights and permanently enjoined their editing practices.[17]

This Note will analyze the state of copyright law following *Soderbergh* in relation to film editing to determine whether it faithfully and optimally serves the various interests affected and protected by copyright. Because a full understanding of the purposes of copyright law and the interests that it affects is vital to determining whether current law is effective, Part II of this Note addresses these interests and the relevant portions of copyright law that help to protect them. Part III then discusses in more detail current law concerning consumer editing of motion pictures, namely the Family Movie Act and *Soderbergh*. Part IV analyzes whether current law is optimally balancing and protecting the interests identified in Part II and determines that it is overcompensating studios while failing to fully protect the interests of the individual consumer, the public as a whole, and even the artists involved with the picture. Part V recommends that Congress take affirmative steps to balance these interests by narrowly expanding the Family Movie Act to protect fixed copies of edited films so long as the practices of the participating editing companies do not infringe upon the studios' pecuniary interests. Part VI concludes that current law fails to protect the interests affected by copyright, but can be fixed if Congress is willing to take the appropriate steps forward.

II. INTERESTS AFFECTED BY COPYRIGHT LAW

A. TRADITIONAL FORM: BALANCING INTERESTS OF THE AUTHOR AND THE PUBLIC

The foundation for all copyright law is embodied in a single clause of the Constitution. That clause states that Congress has 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

16. Family Movie Act of 2005, Pub. L. No. 109-9, 19 Stat. 218 (to be codified at 15 U.S.C. § 1114, 17 U.S.C. § 110).

17. *Soderbergh*, 433 F. Supp. 2d at 1243–44.

Discoveries."[18] This constitutional mandate, although brief, must appease two competing parties: the authors—who desire to restrict access so that they can charge the public for the right to use their works and thus receive payment for their ingenuity and labor—and the public—which desires unrestricted access to authors' works so that it can benefit from the authors' creativity. Copyright law must strike a proper balance between protecting the author's interests and promoting public availability of an author's works in order to fulfill its function of promoting artistic progress.

1. Protecting Interests of Authors

Although there are many different viewpoints regarding which specific interests should be protected,[19] traditional American copyright law focuses primarily on safeguarding an author's economic interest in his work.[20] Embodying the principle that "an author should reap the pecuniary profits of his own ingenuity and labor,"[21] American copyright law protects authors' incentives to produce and create art by granting them a limited monopoly over any reproduction of their creativity.[22] Authors are encouraged to invest in developing works of art because they are assured a healthy return from their work by charging those who desire access (either through purchasing the rights to the work or a copy of that work) whatever price the authors deem appropriate.

The specific rights guaranteed to authors to safeguard their pecuniary interests are described in 17 U.S.C. § 106.[23] This section grants authors "exclusive rights" to reproduce "copies" of their work in; prepare "derivative works" based upon their original work; distribute copies of their work to the public by sale or rental; and, in the case of motion pictures and other audiovisual works, perform their work publicly.[24] In order to

18. U.S. CONST. art. I, § 8, cl. 8.

19. *See, e.g.*, NIKOLAUS REBER, FILM COPYRIGHT, CONTRACTS AND PROFIT PARTICIPATION 5 (2000) (pointing out that European copyright law tries to protect all of the "property" interests of the authors associated with their work of art). *See generally* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278 (2003) (discussing several of the possible philosophical underpinnings of copyright law, including property interests, labor interests, natural law, and economic incentives).

20. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

21. Millar v. Taylor, 4 Burr. 2303, 2398 (1769). *But see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (explaining that mere labor, or "sweat of the brow," is not a sufficient basis in and of itself to qualify for copyright protection).

22. *See Aiken*, 422 U.S. at 154.

23. 17 U.S.C. § 106 (2000).

24. *Id.*

qualify for copyright protection, works must be both "original" and "fixed" in a tangible medium of expression[25]—a threshold that is not difficult to meet.[26] Once established, copyrights last either the lifetime of the author plus 70 years (for individuals) or the shorter of 95 years from first publication or 120 years from creation (for entity authors).[27] Such rights are also fully transferable at the will of the author.[28]

Defining many of the terms within these statutory provisions is critical in determining the parameters of copyright protection. Although a full discussion of these terms is beyond the scope of this Note, a few terms—fixation, copies, authors, and derivative works—bear special importance to the issue at hand and should at least be introduced. For instance, determining whether a work is "fixed" is necessary because fixation is a statutory condition for both federal copyright protection[29] and infringement.[30] A work is considered fixed if "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[31] Fixation is satisfied as long as the work can be perceived "either directly or with the aid of a machine or device."[32] A work is not fixed, however, if it is naturally short-lived.[33] For example, writing in sand, though tangible, is likely not fixed because "the next wave will erase it forever."[34] While the definition is generally quite expansive, determining when a copy is fixed has become increasingly complex due to advancements in art and technology.[35]

25. § 102.

26. *See, e.g.*, § 102(a) (stating that a work is fixed if it is captured "in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"); *Feist Publ'ns, Inc.*, 499 U.S. at 345 (indicating that "the requisite level of creativity is extremely low" for a work to qualify as original); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 877 (3d Cir. 1982) (emphasizing that fixation should be interpreted broadly to encompass technological advances).

27. § 302 (applying to works created after 1977).

28. § 201(d).

29. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").

30. *See* § 106(1) (granting the copyright owner the exclusive right to "reproduce the copyrighted work in copies or phonorecords"); § 101 (defining copies as "material objects . . . in which a work is fixed").

31. § 101.

32. § 102(a).

33. § 101.

34. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02(B)(2) (Supp. 2006).

35. *See generally* Douglas J. Masson, Comment, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, 71 IND. L.J. 1049 (1996) (discussing copyright's

Furthermore, what qualifies as a "copy" is critically important in determining whether someone violated the author's exclusive right of reproduction. Congress has defined copies as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated," and "includes the material object . . . in which the work is first fixed."[36] The term also covers both exact and "substantially similar" reproductions.[37] Courts, however, have often struggled in applying this simple definition to complex and abstract cases.[38] While such a simple definition gives courts a great deal of flexibility, it also provides them little guidance and thus makes consistency more difficult to maintain as complexities increase.

The use of the term "author" also holds strong significance. While one would reasonably assume that the term refers to the artists who physically and mentally create the work of art, such is not always the case. In copyright law, the author is "the person who effectively is . . . the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be . . . ."[39] This definition has led to the "works made for hire" doctrine, which defines the employer or person commissioning the work as the author and original copyright owner.[40] The justification for this doctrine is quite simple: since commissioners of a work are both advocating that the work be done and financially covering its cost, they should be the recipient of the pecuniary rights.[41] This definition is particularly pertinent in the motion picture industry, where the producers and studios are typically the employers or commissioners of a film.[42] The end result is that studios, and not the individuals directly involved with creating the film, are usually the

difficulty in adapting to technological advances).

36. § 101.

37. *Id. See also, e.g.*, Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1077 (9th Cir. 2006) (explaining that a work is "substantially similar" if an ordinary person would find the work to be substantially similar based on subjective impressions *and* the work shares objective, articulable similarities with the elements of the original work).

38. *See, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (facing the question of whether a copy is made when a computer program is transferred from a permanent storage device to a computer's Random Access Memory).

39. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884).

40. § 201(b); NIMMER & NIMMER, *supra* note 34, § 5.03(A), 5.03(B); REBER, *supra* note 19, at 10–11.

41. REBER, *supra* note 19, at 12.

42. Notably, Congress expressly includes works "specially ordered or commissioned . . . as a part of a motion picture" in its definition of "works made for hire." § 101.

copyright owners.[43]

Finally, the term "derivative work" is also both highly important and highly controversial. Congress has defined a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."[44] This definition has led to much confusion and debate on two important points: first, whether a work must be fixed in order to qualify as a derivative work;[45] second, to what degree a derivative must be transformative (that is, containing original elements) to trigger statutory infringement under 17 U.S.C. § 106(2).[46] Derivative works will be revisited in discussing the court's decision in *Soderbergh*.[47]

In summary, traditional copyright law has primarily focused on protecting the pecuniary interests of whichever party is primarily responsible for a work's creation. In most circumstances, the party initially receiving a copyright will be the artists directly involved with the creation of the work; however, the copyright owner in the movie industry will usually be the studio because movies are typically "works made for hire." Studios' pecuniary interests are then protected by the receipt of a monopoly over the presentation and distribution of their works.

2. Promoting Broad Availability of Art

While traditional copyright law grants artistic authors a great deal of financial control over their works, such preferential treatment needs to be placed in the proper perspective. Because the constitutional purpose of granting copyright protection is to "promote the Progress of Science and useful Arts,"[48] copyright law is designed to stimulate artistic creativity for the good of the American public as a whole.[49] While the law attempts to

43. *See* REBER, *supra* note 19 at 10–12.

44. § 101.

45. *Compare* NIMMER & NIMMER, *supra* note 34, § 8.09(A), at 8-142.16 to 8-142.19 (stating that derivative works must be fixed both to be copyrighted and to infringe another copyrighted work), *with* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.3.1, at 7:105 (3d ed. 2005) (explaining that derivative works have to be fixed to be copyrighted, but not to infringe another copyrighted work) *and* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968 (9th Cir. 1992) (holding that a "derivative work must be fixed to be *protected* under the Act . . . but not to *infringe*").

46. Clark, *supra* note 9, at 61–64.

47. *Infra* Part III.B.

48. U.S. CONST. art. 1, § 8, cl. 8.

49. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994).

balance the competing interests of the authors and the public, the Supreme Court has emphasized that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . 'The sole interest of the United States and the primary object in conferring the monopoly . . . lie in the general benefits derived by the public from the labors of authors.'"[50]

Accordingly, authors' rights are neither unlimited nor unyielding. Aside from the restrictions imposed on copyrights by the initial threshold requirements and the built-in expiration date, Congress has expressly declared that the general rights protected by 17 U.S.C. § 106 are subject to the limitations placed upon them in §§ 107 to 121.[51] These limitations, which include allowing libraries to make a limited number of copies and allowing entities to record books onto tape for use by the blind,[52] prevent authors from recovering against entities despite owning a valid copyright.

The largest and most relevant of these limitations is the "fair use" doctrine. Designed as a safety valve for promoting free expression and furthering creativity, fair use has a long common-law tradition that dates back to the mid-nineteenth century.[53] In effect, the doctrine acts as an affirmative defense for actions that society has deemed valuable or important, but would otherwise constitute copyright infringement. It thus protects the public from authors who would seek to limit such actions despite their recognizable public value. Because of its importance in guaranteeing that copyrights truly promote the constitutional mandate for artistic progress, fair use was expressly codified by Congress in 1976.[54]

In codifying fair use, Congress stated that the doctrine is designed to protect parties that reproduce copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ."[55] In determining whether an individual's use of a copyrighted work qualifies as fair use, four factors

50. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1974) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

51. 17 U.S.C. § 106 (2000).

52. §§ 108, 121.

53. *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (holding that a finding of copyright infringement will "often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials").

54. ROBERT A. GORMAN, FEDERAL JUDICIAL CENTER, COPYRIGHT LAW 141–43 (2d ed. 2006).

55. § 107.

were included: (1) the purpose and character of the use, including whether the use is of a commercial nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in proportion to the copyrighted work as a whole; and (4) the effect of the use upon the value of the work or its potential market.[56] Congress, however, has also indicated that this list of factors is merely illustrative and not exhaustive.[57] Courts balance these (and any other relevant) factors to determine whether or not the value of the alleged infringer's use of the copyrighted work outweighs the copyright owner's interest in protecting the work from such actions.

Fair use and the other statutory exceptions to § 106 illustrate the importance that is placed on the interests of the public. While these exceptions are crafted in such a way that the balance between the interests of the author and the public is still preserved, they also emphasize that the public's interests are superior. Fair use, the primary tool for protecting such interests, however, has often proven unpredictable and indeterminate because of its inherently malleable nature.[58] Although the doctrine's indeterminacy may be necessary to adapt to changing facts and ideals, it also makes establishing clearly defined precedent impractical.

B. PERSONAL INTERESTS OF THE ARTISTS

While traditional copyright law has always tended to focus squarely on authors' pecuniary interests, artists also have personal interests in their works that are unique and separate from any economic interest. Because these personal interests lie outside the economically centered realm of federal copyright law, artists have advocated for another form of protection: moral rights. Currently, moral rights are only nominally recognized and granted in the United States under federal law.[59] Such rights, however, are particularly important to artists in the film industry, for the individuals who create the components of a film generally do not own that film's copyright.[60] Thus, if movie artists are to obtain any inherent protection over their personal interests—such as the integrity of their works or their reputations as artists—they will naturally look to moral rights for assistance.

Stemming from the French phrase *le droit moral*, "moral rights"

56. *Id.*
57. H.R. REP. NO. 94-1476, at 66 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.
58. *See* GOLDSTEIN, *supra* note 45, § 12.1, at 12:3, 12:5, 12:6.1.
59. *See infra* notes 75–81 and accompanying text.
60. REBER, *supra* note 19, at 10–11.

describes a bundle of rights which protect artists' personal interests in their own artistic creations.[61] Although moral rights—in their traditional, continental form—are similar to copyrights in that they are designed to guarantee preservation of artists' interests, the two forms of protection have important differences. First, moral rights do not continue to protect artistic works beyond the life of the artist.[62] Furthermore, moral rights are nontransferable.[63]

While there is little consensus among scholars on the precise range of interests that moral rights should protect, most moral rights advocates seek to obtain four key privileges: attribution, integrity, disclosure, and withdrawal.[64] The right of attribution allows artists to insist that their names are attached to their own works and forbids associating their names with another artist's work.[65] The right of integrity prevents alterations or modifications of the work without the artist's permission.[66] This right protects the artist's name and reputation from unauthorized changes which otherwise would be "prejudicial to his honor or reputation."[67] The right of disclosure grants artists the sole determination of when their works are deemed finished and when they can be disclosed to others.[68] The right of withdrawal is the flipside of disclosure: the artist can withdraw his work even after it is out of his possession.[69]

Despite gaining strong acceptance in Europe over the past eighty years,[70] moral rights have struggled to find acceptance in the American legal tradition. Until recently, only a single federal case, *Gilliam v. American Broadcasting Cos.*, has strongly advocated their acceptance.[71] In

61. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995). *See also* NIMMER & NIMMER, *supra* note 34, § 8D.01(A) (discussing moral rights generally).

62. 17 U.S.C. § 106A(d) (2000); Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851 (2006).

63. § 106A(e); Durham, *supra* note 62, at 865–66.

64. *See, e.g.*, Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95–96 (1997); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 45–46 (1998) (including resale royalties as a further key right).

65. Liemer, *supra* note 64, at 47–49.

66. *Id.* at 50.

67. *See* Hansmann & Santilli, *supra* note 64, at 99 (quoting Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess., at 37 (1986)).

68. Liemer, *supra* note 64, at 52–53.

69. *Id.* at 54. The right of withdrawal, however, is not usually available to visual artists. *Id.*

70. W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1151 (2005).

71. Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

Gilliam, the British comedy group "Monty Python" sought a preliminary injunction to prevent American Broadcasting Companies ("ABC") from airing heavily edited versions of their television series.[72] In enforcing the injunction, the court held in part that "ABC impaired the integrity of [Monty Python]'s work and represented to the public as the product of [the group] what was actually a mere caricature of their talents."[73] While the court's ruling was thus based in part on the moral rights of attribution and integrity, the court was also careful to point out that "American copyright law, as presently written, does not recognize moral rights . . . since the law seeks to vindicate the economic, rather than the personal, rights of authors."[74]

Fourteen years after the court's ruling in *Gilliam*, moral rights were incorporated into American law through the Visual Artists Rights Act of 1990 ("VARA")[75] in order to comply with the Berne Convention.[76] VARA expressly codifies certain moral rights by granting artists of visual works the right "to claim authorship," "prevent the use of [their] name as the author . . . in the event of a distortion, mutilation, or other modification," and "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [their] honor or reputation."[77] The rights provided by VARA, however, are extremely limited. First, only the rights of attribution and integrity are protected.[78] Second, these rights are restricted to "works of visual art."[79] As statutorily defined, this term only encompasses select paintings, drawings, prints, sculptures, and exhibition photographs.[80] Conversely, art forms such as books, magazines, posters, models, and—most notably—motion pictures are expressly excluded.[81] Such a narrow acceptance of moral rights shows that the American legal

72. *Id.* at 17–18. ABC had cut twenty-four minutes of a ninety-minute program to make time for commercials and to excise portions that contained "offensive or obscene matter." *Id.*

73. *Id.* at 25.

74. *Id.* at 24.

75. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601–610, 104 Stat. 5128 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2000)).

76. NIMMER & NIMMER, *supra* note 34, § 8D.02(D)(6); Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 6 (2005).

77. 17 U.S.C. § 106A(a)(1)–(3) (2000).

78. *Id.* Such limited extension of moral rights is further indication that Congress only passed VARA in order to comply with the moral rights requirements of the Berne Convention, which the United States had joined the previous year. *See* Clark, *supra* note 9, at 56.

79. § 106A(a).

80. § 101 (protecting works which exist "as a single copy or as a limited edition of 200 or less copies").

81. *Id.*

system is still primarily concerned with protecting artists' economic rights through granting copyrights.

The end result is that movie artists' personal interests in their work remain wholly unprotected. Copyright law's current treatment of moral rights, however, does not mean that movie artists' personal interests should continue to be ignored. Many both in and out of the movie industry argue that this lack of moral protection is unjust and advocate for change.[82] Considering that these artists are largely responsible for both the quality and continued growth of motion pictures, protecting them to the greatest extent would serve to protect America's artistic society. Thus, in establishing whether current law concerning movie editing is optimal, it should be determined whether artists' interests are truly receiving the amount of attention and protection that they deserve.

C. INTERESTS OF THE INDIVIDUAL CONSUMER

Finally, the individual interests and rights of movie consumers should be accounted for because of the strong effect that copyright law has on such interests. Unlike traditional copyright interests or moral rights, consumer rights are a relatively new concept and have not received equivalent judicial or academic attention.[83] Some may even argue that a separate analysis of consumer interests is superfluous because these interests already receive sufficient attention through traditional copyright doctrines.[84] Public choice theory, however, suggests that these doctrines will often fall short when an individual consumer's interests are personal and primarily self-serving—such as protecting personal autonomy and controlling the actions and activities within one's home.[85] Even though many consumers may share these interests, each individual's interest is too slight to motivate the individual to strongly advocate for protection of the group generally. Consumers are thus unable to advocate effectively, especially when confronted by larger entities with concentrated interests—such as the

82. *E.g.*, Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 854 (2001) (arguing that artists' interests are inadequately protected); Ted Elrick, *Martin Scorsese's Calling: To Protect and Preserve Film Artists' Rights*, 21 DGA MAG. 1 (1996) (discussing Martin Scorsese's efforts to expand moral rights protection).

83. For a broad insight into consumer rights, see generally Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003). For insight into the consumers' right of modification in particular, see generally Durham, *supra* note 62.

84. *E.g.*, 17 U.S.C. § 107 (2000) (fair use); § 109 (first sale).

85. Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2236 (2000).

movie industry.[86]

While motion picture consumers still receive some protection through doctrines such as fair use, consumers are likely to benefit from such protections only when their personal interests align with the interests of a larger entity. A great example is found in *Sony Corp. v. Universal City Studios, Inc.*,[87] in which the Supreme Court upheld as a fair use the right to "time-shift" television broadcasts by using VCRs to record them for later viewing. Although the benefits of this right are primarily received by individuals in the privacy of their own home, the Court upheld the right because Sony, a primary party in the suit, effectively advocated that the public benefit of increased accessibility to television programming through time-shifting outweighed any potential harm to copyright owners.[88] Thus, while the Court emphasized that the primary objective in granting copyrights "lie[s] in the general benefits derived by the public,"[89] the Court's reliance on Sony's advocacy shows that such benefits will be more easily recognized when a powerful entity steps forward to protect them.

Although *Sony* illustrates that fair use may protect consumer interests when they are represented by a powerful third party, wholly relying on fair use would often leave consumers at the mercy of larger entities that happen to share congruent interests. If such entities choose not to advocate for consumer interests or to give such interests short shrift, consumers would have little room for recourse because individuals normally cannot afford to undergo the litigation necessary to establish the legality of an individual use.[90] Because it "requires a hideously expensive trial to prove that one's actions come within its shelter," fair use is "a troublesome privilege" that will often leave consumer interests without adequate representation.[91]

86. *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244 (1996) (arguing that public choice theory is correct in that legislation is "more likely to reflect the interests of small but organized groups than the interests of the public at large"); Alison R. Watkins, Note, *Surgical Safe Harbors: The Family Movie Act and the Future of Fair Use Litigation*, 21 BERKELEY TECH. L.J. 241, 260 (2006) ("[B]oth common sense and public choice theory predict that where a number of firms have aligned interests and deep pockets, they will be more effective in lobbying Congress . . . than the general public.").

87. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

88. *See id.* at 421, 454–55. Sony's actions, however, were far from benevolent. Because a ruling that upholds the right to time-shifting would also uphold the technology that made time-shifting possible, Sony had a strong self-interest in advocating for consumers. *See id.* at 456 (finding that Sony's sale of the Betamax, a video recording device, does not constitute contributory infringement).

89. *Id.* at 429.

90. *See* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 45–46 (1996).

91. *Id.*

Moreover, courts and scholars are divided on "whether fair use is ever an appropriate concept for mediating 'personal' concerns, such as individual privacy and autonomy."[92] Because these interests appear to "contribute little or nothing to 'the Progress of Science,'"[93] they can easily be overlooked or ignored by courts and legislators. Regardless of the consumers' expectations or the minimal negative economic and social impact their actions may have, consumers could still be held as infringing copyrights under fair use analysis because their interests do not readily benefit the public.[94] Considering that a determination of fair use is largely left to the discretion of each court, consumers may be unable to persuade a court to immunize them from liability when their interests are inherently private and individual.

Finally, courts applying fair use may be restricted to an analysis of a third party's actions (such as a supplier) instead of the consumers who requested the third party's services.[95] For when a third party has been made party to a suit, but the consumers have not, a court will normally review only the purposes of the third party (which often will be of a commercial nature) and not any interests of the consumers. This application of fair use will only increase in regularity as technology continues to become more sophisticated and consumers look to computer and other specialists to assist them in enhancing their consumption of copyrighted works. Therefore, an analysis of consumer interests independent of fair use is highly relevant in determining the overall utility of current copyright law.

That is not to say that outside of fair use copyright law has completely ignored the movie consumers' right to control their consumption. The "first sale doctrine" also protects consumers by granting them the right to control copies of films that they have lawfully purchased.[96] While copyright

92. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform,* 23 CARDOZO ARTS & ENT. L.J. 391, 393–94 (2005). *See also* Megan M. LaBelle, *The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, 84 DENV. U. L. REV. 79, 118 (2006) ("[M]any people believe that 'personal' or non-commercial use (e.g., copying lawfully acquired copyrighted materials for one's personal use) is always fair use. This is not true. While courts have found that the fair use doctrine protects certain personal uses of copyrighted materials, there is no blanket statutory or common law rule protecting this behavior.").

93. Durham, *supra* note 62, at 854 (quoting U.S. CONST. art. I, § 8, cl. 8).

94. To see just how likely this is, one need only read *Sony*'s dissent in which Justice Blackmun fervently argues that private use is not protected by copyright law. *Sony Corp.*, 464 U.S. at 465–66. (Blackmun, Marshall, Powell & Rehnquist, JJ., dissenting) ("Congress considered and rejected the very possibility of a special private use exemption."). *See* Durham, *supra* note 62, at 882–84 (discussing the dissent's impact on consumer rights).

95. For a discussion of why such restrictions occurred in *Soderbergh*, see *infra* Part III.B.

96. 17 U.S.C. § 109 (2000).

owners do not forfeit all of their rights upon selling copies of their works to the public,[97] they do forfeit some. Once consumers purchase a legal copy, they are "entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy" and "to display that copy publicly . . . to viewers present at the place where the copy is located."[98] Although such rights do not extend to rented materials,[99] the first sale doctrine gives consumers the right to display and dispose of their copy in whatever manner they choose.

Another form of statutory protection for movie consumers is the Family Movie Act of 2005.[100] Although this Act will be discussed further below, it is worth pointing out that the Act seems to have been passed primarily to protect individuals in their private capacity for wholly personal uses of copyrighted works.[101] Thus, there appears to be some movement toward a fuller recognition of motion picture consumers' diverse interests and rights.

Because consumers' personal interests are often difficult to conceptualize within the traditional copyright framework, movie consumers may not receive sufficient protection under traditional doctrines. Thus, it is important that lawmakers independently consider the interests of the individuals who are affected by copyright decisions. As Alan Durham writes, "[t]he freedom of consumers to take charge of their own experiences . . . should be balanced against the economic and noneconomic interests of those who produce and distribute copyrighted works."[102] If serving consumers' personal interests does not significantly detract from the interests of copyright owners and movie artists, then copyright law should protect these interests even when they do not unambiguously serve recognizable interests of the public as a whole.

97. *See* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988) (holding that a purchaser may not create a derivative work with the copyrighted work and still receive the protection of the first sale doctrine); GORMAN, *supra* note 54, at 120 (stating that a purchaser still cannot alter the work in such a way that it creates a derivative work).

98. § 109(a), (c). It should be noted, however, that the rights of consumers to rent, lease or lend sound recordings and computer software are further restricted. § 109(b)(1)(A).

99. § 109(d).

100. Family Movie Act of 2005, Pub. L. No. 109-9, 19 Stat. 223 (to be codified at 15 U.S.C. § 1114, 17 U.S.C. § 110).

101. *See Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 1–2 (2004) [hereinafter *Family Movie Act Hearing*]. ("No commercialization is involved. Surely a parent can decide in the privacy of their own home what their child can watch on television.").

102. Durham, *supra* note 62, at 854.

III. CURRENT LAW SURROUNDING MOTION PICTURE EDITING

With an awareness and appreciation of the primary interests that copyright affects and the basic legal structures that are designed to protect these interests, the specific laws that address movie editing can now be more readily understood.

A. FAMILY MOVIE ACT OF 2005

Passed as one section of the Family Entertainment and Copyright Act of 2005,[103] the Family Movie Act of 2005 ("FMA") protects the use of certain types of technology in editing films for private viewing. As codified in 17 U.S.C. § 110, the statute states:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> . . . .
>
> (11) 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 . . . 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 . . . technology.[104]

Several terms within this law are important in narrowing FMA's coverage. First, Congress has clarified that "making imperceptible" does not include inserting additional audio or visual content in the place of existing content.[105] Thus, profanity cannot be replaced with euphemisms, but must simply be muted out. Additionally, Congress directly stated that this statute only protects performances of edited films displayed within an individual's home.[106] Public displays, even if using identical technology, are left unprotected. Finally, technology is immunized from infringement only if no fixed copy of the edited film is created.[107] In essence, FMA

103. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 19 Stat. 218 (to be codified in scattered sections of 2, 17, 18, 28, 36 U.S.C.).

104. 17 U.S.C.A. § 110 (West 2008).

105. *Id.*

106. *Id.*

107. *Id.*

protects filter editing (where the original copy remains unaltered), but not digital editing or splicing (where a fixed edited copy is created).[108]

Nevertheless, FMA neither discusses nor restricts the type of content that can be edited or removed. While such technology will likely be used to remove morally objectionable content such as sexuality, nudity, profanity, and violence, individuals are not limited to these categories. Instead, individuals have the right to decide for themselves what they consider objectionable regardless of whether others would agree.[109] By dictating that an individual's basis for considering content objectionable is irrelevant, the First Amendment is respected—individual decisions can be based on religious doctrine, moral philosophy, or simply personal tastes and beliefs.[110]

Despite its narrow language and limited protection, support for FMA was far from unanimous. From its initial formulation, FMA served to divide the opinions of both legislators and laymen alike. Movie industry representatives described FMA as "giv[ing] political and legal cover to companies" who help produce "a disfigured version of a movie without regard to the creative vision of the director and approval of the studio."[111] Opposing politicians insisted that allowing edited versions of a film without the creator's permission merely "encourage[s] censorship and . . . vitiate[s] freedom of expression."[112] Such complaints persisted throughout the enactment of FMA.[113]

In addition to policy reasons, many argued that the legislation was procedurally unwarranted and superfluous. Because it was developed during the litigation of the *Soderbergh* case, some felt that the issues were not yet ripe and that passing FMA would both violate legislative precedent and thwart the litigants' efforts to reach a compromise.[114] Furthermore,

108. The legislative record went further by stating that digital editing techniques appear to violate copyright law. *See* H.R. REP. NO. 109-33, pt. 1, at 6–7 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 220, 225.

109. *Id.* at 6.

110. *See id.* (stating that FMA was drafted in a content-neutral manner to avoid constitutional problems regarding offensiveness).

111. *Family Movie Act Hearing*, *supra* note 101, at 68 (oral statement of Jack Valenti, President & CEO, Motion Picture Association of America).

112. H.R. REP. NO. 109-33, pt. 1, at 76, *as reprinted in* 2005 U.S.C.C.A.N. at 239 (minority views).

113. 151 CONG. REC. H2114, H2118, H2119 (daily ed. Apr. 19, 2005) (statements of Reps. Berman & Watson).

114. *See, e.g.*, *Family Movie Act Hearing*, *supra* note 101, at 8–9 (prepared statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress); *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on*

many felt that the legislation was unnecessary because the filtering technologies protected under FMA do not result in fixation and thus do not violate copyright law in the first place.[115] According to Marybeth Peters, Register of Copyrights, "[T]he conduct that [FMA] is intended to permit is already lawful under existing law."[116] Therefore, aside from any policy issues at stake, some were upset simply because they believed that legislation on this matter was arbitrary and untimely.

Considering that FMA likely protects noninfringing conduct, Congress's decision to pass FMA illuminates two important considerations. First, legislators did not have much faith or confidence that the current system of copyright law would have led to the correct result. Lamar Smith, Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, publicly expressed this doubt by stating that "there is no certainty that all courts will agree" that companies such as ClearPlay did not violate copyright laws, and that "the only way to protect the right of parents is in fact to pass legislation."[117] Whether this means that Congress questions the fundamental ability of courts to correctly identify an infringing copy of a motion picture or that Congress only doubts courts' ability to correctly apply fair use is unclear. What is clear is that a majority of Congress had little faith that the current copyright structure would have led to the correct result, for FMA was passed in both houses despite consistent pleas by the minority to wait for the court's decision in *Soderbergh*.

Second, the right of individual consumers to control the way they experience motion pictures within their own home is so important to Congress that guaranteeing protection for this right could neither wait for

Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 2–3, 5 (2004) [hereinafter *Movie Filtering Technology Hearing*]; H.R. REP. NO. 109-33, pt. 1, at 69–72, *as reprinted in* 2005 U.S.C.C.A.N. at 232–35 (minority views).

115. Technology protected under FMA does not likely infringe copyrights because no fixed copy is created. In order for copyright to arise, there must initially be fixation. 17 U.S.C. § 101 (2000) ("A work is 'created' when it is fixed . . . ."). Also, to qualify as an infringing derivative work, the work must be fixed. NIMMER & NIMMER, *supra* note 34, § 8.09(A), at 8-142.16 to 8-142.19. Since no fixed copy is made by the technology, reproduction and distribution rights are not even implicated. *See* § 106 (1), (3).

116. *See Family Movie Act Hearing*, *supra* note 101, at 9 (prepared statement of Marybeth Peters). "The exclusive rights of the copyright owner that might arguably be implicated are the reproduction, distribution, public performance and derivative work rights, but on examination, it seems clear that there is no infringement of any of those rights." *Id.* at 11. *See also* Matthew David Brozik, *Not Yet Released and Already a Critical Disappointment: Still in Committee, the Proposed "Family Movie Act of 2004" Garners Few Accolades*, 31 RUTGERS COMPUTER & TECH. L.J. 35, 35 (2004) ("At best . . . the proposed legislation is unnecessary, as it would only make affirmatively lawful what is now not unlawful.").

117. *Family Movie Act Hearing*, *supra* note 101, at 2 (oral statement of Lamar Smith).

Soderbergh to conclude nor yield to the complaints of FMA's opponents. As the legislative history illustrates, FMA was developed first and foremost to protect individuals' ability to control their consumption of movies and not the companies whose services make such control possible.[118] While many dissenting remarks focused on editing technology's ability to censor and distort a film's message,[119] those who supported the bill focused their remarks on the benefits to families desiring to control the content of films in the privacy of their home.[120] Thus, FMA, perhaps more than any other statute, is an affirmation that consumer interests are strongly relevant to copyright law.

B. CLEAN FLICKS OF COLORADO, LLC V. SODERBERGH

While FMA absolved filter editing from any infringement liability it failed to resolve the legality of digital editing. As a result, *Soderbergh* continued in the wake of FMA in order to judicially determine the fate of CleanFlicks and other fixed copy editing companies. Approximately fourteen months after FMA was passed, the District Court of Colorado ruled that fixed copy editing practices violate the studios' copyrights and issued a permanent injunction that effectively put all digital editing companies out of business.[121] Because *Soderbergh* is the first and only case dealing with the legality of third-party companies editing their customers' personal copies of motion pictures, the court's findings are necessary for an understanding of current copyright treatment.

Due to the studios' limited claims, the court was asked only to determine whether editing companies were violating the exclusive copyrights of the studios under 17 U.S.C. § 106(1) (reproducing a copyrighted work), § 106(2) (preparing derivative works based on a copyrighted work), and § 106(3) (distributing copies of a copyrighted work to the public by sale or rental).[122] The court succinctly declared that digital editing infringed under § 106(1) because such practices created fixed

118. *See id.* at 1–2; *Movie Filtering Technology Hearing*, *supra* note 114, at 1–2; H.R. REP. NO. 109-33, pt. 1, at 5–6, *as reprinted in* 2005 U.S.C.C.A.N. at 224–25.

119. *See, e.g.*, *Family Movie Act Hearing*, *supra* note 101, at 3–4 ("The sanitization of movies allowed by this legislation may result in the cutting of critically important scenes.") (statement by Honorable Howard L. Berman, a representative in Congress from the state of California, and ranking member, subcommittee on the courts, the internet, and intellectual property).

120. *See, e.g.*, *id.* at 1 ("Parents should be able to mute of [sic] skip over anything they want if they feel it's in the interest of their children.").

121. Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1243–44 (D. Colo. 2006).

122. *Id.* at 1239.

copies of the edited versions of movies.[123] The court also found without discussion that these companies were infringing under § 106(3) because they either sold or rented edited copies of the studios' films.[124] Thus, the court found that it was obligated to find for the studios unless the digital editors were able to prove an applicable defense.

The court's analysis of derivative works under § 106(2), however, was neither clear nor concise. Yet this is not surprising. As previously noted, courts and scholars alike have struggled to determine what is required to qualify as a derivative work. Whether works need to be "fixed" and to what degree a work must be "transformative" before they qualify as a derivative work under § 106(2) are both questions that have consistently been raised by copyright scholars, but have received insufficient clarification from both Congress and the Supreme Court.[125] While the *Soderbergh* court did not need to worry about whether the edited versions produced by digital editing were fixed, it still had to address whether they were sufficiently "transformative" to cross the vague threshold created by Congress.

Unfortunately, neither set of parties made the question any easier. Each side gave inconsistent and contradictory reports about the transformative nature of editing films. The digital editors argued that they were making a transformative use for purposes of the fair use doctrine, but denied that their edited versions added enough originality to qualify as derivative works.[126] Conversely, the studios denied that edited versions are transformative under the fair use doctrine, but insisted that they still meet the definition of derivative works.[127] Despite this confusion, the court eventually decided that "a use is transformative if it 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'"[128] Since editing simply deletes scenes and dialogue without adding anything new, the court held that edited versions of films were not transformative and did not qualify as derivative works. As a result, the studios' claim under § 106(2) was denied.[129]

Because the court had already determined that digital editing infringed § 106(1) and § 106(3), the court still had to determine whether such editing

123. *Id.* at 1240.

124. *Id.* at 1259. ("[I]t is undisupted that all four [editing companies] distributed, by sale and rental, copies (albeit edited) of the Studios' copyrighted works and are therefore liable for infringement . . . .").

125. *See supra* notes 34–36 and accompanying text.

126. *Soderbergh*, 433 F. Supp. 2d at 1241.

127. *Id.*

128. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

129. *Id.* at 1242.

practices could avoid liability through an affirmative defense. In response to the editors' claims of protection under the first sale doctrine, the court held that first sale had no relevance to the case because the studios never asserted that the editor's creation of a master digital copy from a lawfully acquired copy was an infringement.[130] While the discussion of this doctrine is very brief, the court found first sale inapplicable because the studios' sole complaint was that the master copy was being used to create copies of edited movies. The court's brief examination of this doctrine is due in large part to the focus on the digital editing companies and not their patrons. While consumers would have a stronger argument under this doctrine given that it was their individual copies being replaced by the edited version, the consumers' absence in the courtroom led the court to ignore their interests.

This focus on the editing companies also appeared in the court's assessment of the editors' fair use defense. Despite the fact that the digital editing companies were acting on their customers' behalf, the court did not consider the consumers' interests because they were not party to the suit.[131] Thus, in applying the four factors of the fair use test, the court concentrated on the business aspects of edited films. With this limited focus, the court held that the factors weighed against granting a fair use exception. The court found that the first factor, the purpose and character of the use, weighed in favor of infringement because of the admittedly commercial nature of the digital editors' work and because the editing was not transformative in nature.[132] The court found that the second factor, the nature of the copyrighted work, also weighed in favor of infringement because of the nontransformative nature of the editing coupled with the creative expressions of the films.[133] The third factor, the amount of the original work used by the copy, was further found to weigh in favor of infringement because a substantial amount of each film was copied for "non-transformative use."[134]

Finally, the fourth factor, the effect of the editing upon the potential market, was also held to weigh in favor of infringement. Because the court's analysis on this factor is less straightforward, it warrants further attention. The court admitted that the digital editors' practices (assuming the one-to-one ratio) do not have an adverse effect on—and in fact help—the studios' pecuniary interests because studios will sell more copies of

130. *Id.*
131. *See id.* at 1240 ("This Court is not free to determine the social value of copyrighted works.").
132. *See id.* at 1240–41.
133. *Id.* at 1241.
134. *Id.*

their films when consumers who desire the film but for the objectionable scenes are able to purchase a version that suits their needs.[135] The court, however, excused this argument as having only "superficial appeal."[136] The court declared that the essence of copyright is control over the content of an author's work, and that editing films violates this essence by extending the market beyond the author's intentions.[137] The court justified its finding by concluding that fair use is predicated on a theory of an author's implied consent and that skipping portions of films is not a reasonable use within such implied consent.[138]

The mid-suit establishment of FMA also clearly influenced the court's conclusion that digital editing infringed copyright law. Despite the fact that FMA had nothing to do with digital editing,[139] the court felt that Congress's silence toward digital editing spoke volumes. When the digital editing companies argued that public policy supported their practices because they assisted consumers' right to control their viewing experience, the court referenced FMA and noted that digital editing was conspicuously left unprotected.[140] The court went even further by concluding that Congress itself failed to include digital editing within its statutory parameters because it felt that such editing was illegal.[141] Two important conclusions can be reached from this: first, digital editing companies were adversely affected by Congress's decision to intervene because the court interpreted Congress's silence toward digital editing as an indication that such practices are unlawful; second, if consumer interests are going to influence the determination of whether digital editing is legal, they will have to be addressed at the legislative level.[142]

Although *Soderbergh* is subtly complex in its analysis and determinations, the legal result is relatively straightforward: the practice of editing films, even if done at the behest of individual consumers who have purchased authorized copies of such films, infringes the studios' copyrights

135. *Id.* at 1241–42.

136. *Id.* at 1242.

137. *Id.*

138. *Id.*

139. It merely established that filter editing was not subject to infringement. *See* 17 U.S.C.A. § 110(11) (West 2008).

140. *Soderbergh*, 433 F. Supp. 2d at 1240.

141. *Id.* (citing H.R. REP. NO. 109-33, pt. 1, at 6–7 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 220, 225).

142. *See id.* (stating that any argument on behalf of consumers "is inconsequential to copyright law and is addressed in the wrong forum"). *See also id.* at 1243 (suggesting that in-home viewing of edited films only offers consumers "entertainment value").

if a fixed copy is created in the process.[143] While this outcome is not unexpected in light of the importance of fixation in copyright law, the practical results of the case are most intriguing. Following both FMA and *Soderbergh*, families who wish to watch a motion picture edited for objectionable content in their home can do so if the editing does not permanently alter the original copy, but not if the exact same editing remains fixed on a DVD. Whether differentiating between fixed and nonfixed copies of edited films is necessary or warranted by the interests and purposes of copyright is the focus of the rest of this Note.

IV. THE CURRENT LAW'S FAILURE IN BALANCING THE RELEVANT INTERESTS

With a broad understanding of the interests and purposes served by copyright law as well as the current state of the law in regards to editing motion pictures, it can be determined whether current law optimally serves the interests and purposes of the copyright system. Although this determination can be approached in several different ways, perhaps the clearest is to analyze the current system's fit with the interests identified in Part II of this Note. After analyzing the law's effectiveness in each of these areas, the separate analyses can be juxtaposed to determine if the interests are balanced.

A. EFFECT ON TRADITIONAL COPYRIGHT INTERESTS

1. Interests of the Author

In determining whether current copyright law protects the interests of a motion picture's author, it is important to recall two things mentioned above. First, the studios are considered the "authors" of most motion pictures. Thus, the interests of the artists—that is, directors, screenwriters, actors, composers, and everyone else directly involved with the film's creation—will be discussed separately in Part IV.C *infra*. Second, copyright law is primarily designed to serve the pecuniary interests that authors have in their works by granting them a limited monopoly over the reproduction, distribution, and display of their works.

In this light, it is easy to see that FMA has had minimal impact on the economic interests of the studios.[144] Because the technology protected

143. *See id.* at 1243–44.

144. *See Family Movie Act Hearing*, *supra* note 101, at 79 ("The financial [objection of studios to FMA] doesn't seem to have much merit . . . at this point.").

under FMA merely makes content from an existing copy unintelligible, the consumer cannot even use the technology without first obtaining a legitimate copy of a motion picture.[145] Furthermore, because FMA protects only those editing practices that do not result in a fixed copy of the edited version,[146] studios do not even need to be concerned that illegitimate copies of the edited version are being sold in place of the legitimate copies authorized by the copyright owner. Finally, because these editing practices do not likely infringe the studios' copyrights under 17 U.S.C. § 106 in the first place,[147] the studios cannot reasonably complain that their interests are being adversely affected.

The studios' interest in controlling public showings of their film is also not threatened because FMA only applies to "private home viewing[s]" of a film.[148] Thus, privately edited versions of films cannot supplant the original edition in areas where copyright owners have publicly displayed their works. If television networks, airlines, or movie theaters wish to publicly show edited versions of a film, they must still obtain permission from the studios before doing so. This assures that copyright owners do not have to compete with the technology protected under FMA in arenas where they have historically controlled the distribution and presentation of edited films.

Finally, FMA actually has the potential to assist the pecuniary interests of studios by expanding the audience willing to purchase particular films. Because FMA allows consumers who desire to see particular films, but are deterred by objectionable content to remove those portions from their viewing experience,[149] more people are likely to either purchase or rent these particular movies. As a result, the general demand for films will increase and the studios will be able to either sell more copies of a film or raise the price of available copies. It thus seems readily apparent that the constitutional desire to protect authors' financial reward for their artistic creations is not negatively impacted by FMA.

The pecuniary impact under *Soderbergh*, however, is less clear. Some may celebrate the holding as protecting copyright owners from editors who skirted around the original disc's encryption, recorded the movie onto a computer, manually deleted or muted scenes within the picture, and then burned the edited version onto a new disc. If the original copy remained on

145. *See* 17 U.S.C.A. § 110(11) (West 2008).
146. *See id.*
147. *See supra* notes 115–16 and accompanying text.
148. *See* 17 U.S.C.A. § 110(11) (West 2008).
149. *See id.*

the computer, an innumerable amount of fixed copies could be created from this one recording, threatening to replace the market for authorized copies with the unauthorized, edited copies. Furthermore, fixed copies could potentially be transferred from individual to individual, thus creating an underground market for unauthorized copies of the edited film. The mere existence of a fixed copy of the edited version could thus be seen as endangering the studios' financial position. Under this view, permanently proscribing all editing practices which create a fixed copy is not only consistent with copyright's treatment of fixed copies, but also protects the studios' pecuniary interests from unwarranted invasion.

This view of *Soderbergh*, however, fails to take into account the full reality of the situation. A closer reading of the facts shows that the editing companies were not seeking to replace the studios as distributors nor to infringe on their pecuniary gains. In fact, they had formatted their practices in an attempt to comply with the spirit of copyright by assuring that the artists' economic interests were not negatively impacted. While the court eliminated practices that the studios insisted endangered their interests, such interests were never significantly threatened by the editing companies in the first place.

Soderbergh's economic protection is minimal in large part because the digital editing companies had already established a practice of requiring each fixed copy of an edited film to correspond to an authorized version purchased from the studios' distributors.[150] Some digital editors even went so far as to deactivate the original disc to assure that their practices were not increasing the number of copies of any given film.[151] By following a strict one-to-one ratio between the fixed copies of edited versions and their corresponding original versions, the editing companies assured that the profits from all DVD sales went back to the studios. The editing companies' profits, therefore, did not come at the studios' expense, but at the consumers' expense. The mere fact that consumers are willing to pay additional costs to obtain an edited version from editing companies certainly does not mean that the studios are entitled to such profits, for the services rendered by the editing companies were in addition to—and not in place of—those offered by the studios.

Notwithstanding these practices, the studios had some legitimate complaints against the digital editors' practices. First, there was no

150. *See* Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238–39 (D. Colo. 2006).

151. *Id.* at 1238.

established legal obligation requiring the editing companies to maintain the one-to-one ratio. While these companies elected on their own to establish such practices, they could have easily decided to abolish them if the *Soderbergh* court had ruled in their favor. Moreover, the methods elected by these companies to maintain the ratio varied, with some companies relying on others' representations that they were honoring the practice instead of establishing in-house procedures that ensured that the ratio was truly being maintained.[152] With such inconsistencies, the studios had little assurance that the editing companies were actually following their own policies and not depriving the studios of revenue. Finally, since not all of the digital editors deactivated the original copy,[153] those editors who did not were in fact creating an extra copy—though obviously not a perfect substitute—of each movie they edited. Under such practices, the consumer could simply sell the original copy of the DVD to another individual while keeping the edited version. The economic benefit of this transaction would inure to the consumer and not the studio, thus depriving the studio of revenue it would otherwise have obtained. If the court had simply dismissed the complaint against the digital editors, these concerns would have been left unresolved.

Permanently halting the practices of all digital editing companies, however, was not necessary to solve these problems. As an alternative, the court could have issued a narrow opinion holding that digital editing companies who adopted a one-to-one ratio were not liable to the studios. If the court was still concerned that creating an additional disc could threaten the studios, the court could have narrowed its holding even further by absolving only those companies that deactivated the original discs. By excusing from liability the companies that followed these requirements, the court would have eliminated the studios' concerns without shutting down the practice entirely.

Another complaint that the studios may have had against the digital editors—and the one that the *Soderbergh* court seemed to adopt as the most important—is that their practices introduced the studios' films to a market that the studios never intended to reach.[154] There is no support offered, however, for why those consumers who purchase films with the intent to remove objectionable material are not part of the studios' intended market. Most, if not all, of the studios' motion pictures are advertised and released to the general public for private consumption. While these movies usually

152. *See id.* at 1238–39.
153. *See id.*
154. *See id.* at 1242.

receive ratings from the Motion Picture Association of America ("MPAA") "intended to provide parents with advance information" about a movie, these ratings are solely to inform consumers and not to limit their decision on whether to see a particular film.[155] By design, any consumer can elect to purchase a copy of any film.[156] Therefore, there is little support for the argument that those who purchase films from the studio with the intent to edit their personal copy are not within the general market that such a film targets.

Furthermore, this complaint seems to run contrary to the constitutional goal of promoting broad availability of art for the good of the public.[157] Although copyright law is designed to give authors some rights over their works, such rights are inherently limited and are not designed to unduly impact the public's ability to access and experience works of art.[158] To conclude that studios can somehow restrict access to their films beyond their economic monopoly by broadly controlling consumers' individual and private behaviors toward the films is to reach beyond the mark and grant studios more control than copyright is intended to bestow. It places the copyright owner—and not the public—as the primary beneficiary of the law, which directly counters the purposes of copyright law.[159]

In the end, *Soderbergh* may actually end up harming the studios' pecuniary interests instead of protecting them. By permanently prohibiting the practice of digital editing, the court did not eliminate much actual danger to the studios' economic return. Since digital editing companies were already acting in a manner that preserved the studios' interests, shutting down the companies had little practical value. Moreover, because digital editors (just like the companies protected under FMA) expanded the audience willing to purchase films without dipping into the copyright owners' returns, studios will now receive fewer economic returns.

Overall, current copyright law's protection of the motion picture studios' interests produces mixed results. While FMA protects the authors' interests by assuring both that the authorized version of a film remains unaltered and that edited versions will not be displayed in public, the

155. Motion Picture Association of America, Film Ratings, http://www.mpaa.org/FilmRatings.asp (last visited Jan. 28, 2008).

156. The exception to this seems to be movies that are rated R or NC-17; only patrons who are 17 or older are permitted to view these movies in participating theaters without parental consent. Motion Picture Association of America, Ratings: What Do the Ratings Mean?, http://www.mpaa.org/FlmRat_Ratings.asp (last visited Jan. 28, 2008).

157. *See* U.S. CONST. art. I, § 8, cl. 8.

158. *See supra* Part II.A.2.

159. *See supra* notes 48–50 and accompanying text.

Soderbergh ruling does little to provide any additional protection. Under a more limited ruling, studios could still be assured that their authorized copies would not be replaced by an illegitimate market and that edited versions of a film would not be displayed publicly without prior consent. Thus, the different types of editing—despite the fact that one creates a fixed copy—do not produce different practical results. Though copyright infringement is traditionally triggered by the creation of a fixed copy, legally distinguishing the editing practices on this basis makes little sense if the proposed desire is to protect the authors' interests. For the pecuniary interests of the studios do not benefit, and in fact may suffer, from the elimination of digital editing.

2. Interests of the Public

Considering that "[t]he foremost intention of copyright is not to reward the creator," but to secure the fruits of such labor "for the good of the public,"[160] it is perhaps most important to ensure that current law is effectively promoting the broad availability of art. The public's interests, however, still must be balanced with the pecuniary interests of the author to ensure that artists' incentives are not unduly hampered. Because the previous Part determined that the authors' interests are neither harmed by FMA nor helped by the ruling in *Soderbergh*, current law should be able to greatly encourage access without fear of destroying this balance. Under such a view, however, current law concerning edited films succeeds only on a limited level.

Availability of motion pictures was undoubtedly encouraged by the enactment of FMA. By protecting practices that allow consumers to watch movies without objectionable material in the privacy of their own homes, more consumers will be willing to purchase certain films than before. FMA does not protect all forms of film editing technology and practices, however. Thus, its effectiveness must be considered in tandem with the limitations imposed in *Soderbergh*. Because the court in *Soderbergh* proscribed digital editing practices, current copyright law only permits the public to view edited movies if they are created by technology protected under FMA. As a result, consumers are highly restricted in their ability to privately produce edited versions from their personal copies of films.

There are both negative short- and long-term effects that stem from the legal precedent established by FMA and *Soderbergh*. The short-term effects come from the fact that only one company, ClearPlay, currently

160. REBER, *supra* note 19, at 6.

sells the type of technology that is protected under FMA.[161] Because *Soderbergh* eliminated the digital editing companies that were ClearPlay's only competition, current law has in effect granted a monopoly to ClearPlay over the personal edited film industry.[162] Simple economics dictates that such a system will allow ClearPlay—at least until there are other entrants to the market—to charge higher, noncompetitive rates for its services. These higher prices will deter consumers who would otherwise partake of and benefit from a motion picture.

There are also negative effects that will continue to linger after ClearPlay's monopoly ends. Because FMA does not protect fixed copies of edited movies and *Soderbergh* has expressly ruled that they are illegal, consumers can never keep a permanent version of a film that they have edited from their own personal copy. Considering that the public's right to privately view edited films is so important that Congress passed FMA despite the fact that such legislation likely protects noninfringing practices, it seems inconsistent to conclude that this right is valuable only so long as an individual consumer's DVD is not permanently altered. Whether an unaltered copy is played in an altering DVD player or an altered copy is played in a regular DVD player, the end result for consumers is the same—individuals are able to watch a film edited for their needs and tastes in the privacy of their own homes. Requiring the public to purchase specialized equipment to avoid altering a DVD instead of allowing an individual's personal copy to be permanently altered, however, merely rewards those who edit large amounts of movies (and thus can economically justify purchasing specialized media players) while deterring those who wish to watch fewer edited films. Selectively promoting availability in this way seems inconsistent and unnecessary, regardless of whether traditional definitions dictate that it should be so. Unfortunately, such problems will not simply disappear with an increased amount of competition. They are inherent in the legal system that has been created and will last as long as the laws remain unaltered. Until they are changed, the law's ability to promote and encourage broad availability of motion pictures will be impeded.

Copyright law's interest in promoting the availability of artistic works would be greatly served by expanding FMA to include fixed copies of edited films so long as they replace the consumer's original copy. As stated

161. *See supra* note 10 and accompanying text.

162. *See* 151 CONG. REC. H2114, H2118 (daily ed. Apr. 19, 2005) (statement of Rep. Berman) ("The Family Movie Act . . . shields one specific company from liability for altering the viewed performance.").

above, protecting fixed copies in this limited fashion would encourage more families and individuals to purchase movies with objectionable material because there would not be a need to purchase expensive equipment in order to avoid the unwanted content. Also, households with multiple televisions and media players would not have to worry about their children being accidentally exposed to objectionable material because their copies of the movie would be permanently altered. By expanding the public's ability to create edited versions from their personal copies, the law could thus expand the overall public consumption of films.

Expanding the sale and consumption of films would also serve to promote the benefits obtained from experiencing motion pictures. Although the *Soderbergh* court suggested that the primary value of watching motion pictures at home is entertainment,[163] the industry that produces them, the artists who make them, and the viewers who partake of them would assert that movies—especially those that are well made—have a greater value to society.[164] Because films utilize many different types of artistic practices, they hold a unique and important position in offering society a wide spectrum of artistry in a single production. Increasing public access to such creative endeavors is exactly what copyright is intended to accomplish.

Nonetheless, both the studios and the artists assert that permitting companies to privately edit films on behalf of their consumers actually detracts from the public good.[165] The studios, for example, have argued that extending the rights granted under FMA is neither necessary nor beneficial because the public already has the ability to avoid objectionable content.[166] After all, the studios both release many new G-rated and PG-rated motion

163. *See* Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1243 (D. Colo. 2006).

164. *See Movie Filtering Technology Hearing*, *supra* note 114, at 87 (prepared statement of Taylor Hackford, on behalf of the Directors Guild of America) ("The films we directors create tell the story of people's lives, be they in the present or the past, in our country or in a foreign culture. In telling our stories . . . filmmakers seek to capture not only who we are, but also who we want to be."). *See also* Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 757 (2005) ("Cultural works provide a variety of complex and important functions for users. These experiences extend beyond simple entertainment or desire to pass time. Users engage with cultural works as a way of projecting and exploring their idealized 'true' selves.").

165. *See, e.g.*, *Movie Filtering Technology Hearing*, *supra* note 114, at 86, 88–90 (prepared statement of Taylor Hackford, on behalf of the Directors Guild of America) (arguing that edited versions of a film mislead the public by removing elements of a film that are vital to the film's message and power). Artists' concerns are discussed in-depth in Part IV.B *infra*.

166. *See* Reply Brief of Motion Pictures Studios in Further Support of Their Motion for Partial Summary Judgment Against the Mechanical Editing Parties at 11, *Soderbergh*, 433 F. Supp. 2d at 1236 (No. 02-M-1662).

pictures each year and provide edited versions of their movies for broadcast on television networks.[167] If there are other movies that contain objectionable materials, then consumers can exercise their right to simply not view a film at all.[168] Thus, according to the studios, there are already sufficient avenues in place for the public to benefit from motion pictures that do not contain objectionable material. Expanding the availability of edited films would not benefit the public, but simply line the pockets of the editing companies.[169]

Although such arguments are not without appeal, they merely serve to deflect the focus away from the public good and onto the commercial nature of the digital editing companies. While there is no doubt that digital editing companies' business goals include earning profits, this fact alone certainly does not mean that such businesses do not provide important public benefits. Through such a narrow vein of thought, news stations, copier companies, and other for-profit businesses should never be able to work with copyrighted materials without the copyright owner's permission—regardless of how valuable their services are to their customers or to the general public—because they make money through their services.[170] By expanding the ability of consumers to edit personal copies of motion pictures (without harming the studios pecuniary interests), digital editing companies serve the public by encouraging consumers to access works of art.

Furthermore, the mere fact that studios have granted the public access to some family-friendly films does not mean that digital editors will not greatly benefit the public by helping consumers to edit other valuable motion pictures. While the studios are correct in asserting that they provide the public with many G-rated and PG-rated films, they cannot truthfully assert that such films represent the best or most important pieces of artistic work produced each year. Although it is always difficult to determine which works should be considered the best or most important, the movie industry makes such a determination easier by granting awards to the best pictures produced annually. While a full analysis of these awards is beyond the scope of this Note, a brief review of the films recently nominated for

167. *Id.*

168. *Id.*

169. *See id.* at 11–14.

170. It would be hard to argue that the public would not be injured if Kinko's, Xerox, or other companies who sell copying services were forced to go out of business because they charged teachers to make copies of copyrighted works for use in their classrooms. Yet this would be the result if the law focused solely on the for-profit companies providing the copying services instead of the public benefits that such services make possible.

the Academy Award for Best Picture quickly shows that the majority of the best films do not qualify as family-friendly.[171] Of the ninety movies nominated for this award between 1990 and 2007, only seven (or 7.78 percent) have received a rating of PG or G.[172] Thus, if members of the public who are unable or unwilling to subject themselves or their families to objectionable material follow the studios' advice and simply forgo seeing movies containing such materials, these individuals will be effectively excluded from over ninety percent of the best films produced in the last two decades. Because all members of the public can benefit from these important films when consumers are allowed to have their own copies edited, the public is clearly benefited by FMA.[173] Further expanding access beyond *Soderbergh*'s holding would further benefit the public by encouraging a larger portion of consumers to access the best works of art while simultaneously benefiting the studios financially.

The current copyright system could expand accessibility to films without harming the author's interests. By significantly restricting the methods by which the public could obtain edited movies, *Soderbergh* discouraged a portion of the public from accessing many movies despite the fact that its holding was unnecessary to protect the studios. Therefore, availability of motion pictures would be increased by either reversing *Soderbergh* or extending FMA's protection to include editing practices that result in a fixed copy of an edited version.

B. EFFECT ON MORAL RIGHTS

Establishing that traditional copyright balancing weighs in favor of further extending protection to private movie editing does not end our inquiry. As mentioned in Part II.B *supra*, the artists' interests in their own

171. A focus on this award is not happenstance. The Academy Awards are widely considered the most important and prestigious honors that members of the motion picture community can receive. *E.g.*, EMANUEL LEVY, ALL ABOUT OSCAR: THE HISTORY AND POLITICS OF THE ACADEMY AWARDS 15, 67–70, 107 (2003). Of the various awards granted each year in this ceremony, perhaps the most revered is Best Picture. *Id.* at 298 (stating that "[t]he goal of every studio in Hollywood is to win the Best Picture . . ."). For unlike other awards that recognize specific aspects within a film—such as those for acting, costumes, lighting, or effects—movies nominated for Best Picture are recognized as the finest and most important films of the year. *See id.* at 144 (referring to Best Picture as the "top award" that a film can receive).

172. Joel M. Purles, Best Picture Nominations Since 1990 (Jan. 24, 2008) (unpublished spreadsheet, on file with author).

173. *See* Bradford, *supra* note 164, at 758–59 ("Cultural works also assist in defining and establishing social networks. Common consumption of the new hit show or novel creates a shared experience. In the absence of tightly knit communities or shared rituals, expressive goods provide outlets for interacting with others.").

works and reputations also merit consideration because of the artists' importance in both the artistic and political spectrum. Thus, in constructing an ideal legal structure for handling movie editing, copyright law should assure that artists' interests are protected to the greatest extent feasible. Although an analysis of current copyright law shows that FMA and *Soderbergh* are largely consistent with prior legal treatment of artists' moral rights, copyright law could be adapted to further protect the artists' interests without harming other relevant interests.

Unsurprisingly, most movie artists are vehemently opposed to unauthorized editing. They argue that public policy warrants banning outside editing practices because such edits mislead consumers and harm the artists' artistic and economic interests.[174] By allowing outside companies to edit their films without consent, the artists' ability to protect the content of their films is diminished. Because the artists' names are inextricably connected with the movies they create, it is argued that viewers will believe that unauthorized edits in movies are the intended product of the artists.[175] Since outside editing can result in versions that lack the original version's meaning and vision, the power and importance of these films may be largely lost.[176] Thus, the artists' films and reputations will be irreparably harmed because a "bastardization" that still bears their name is being released to the public.[177] As one director puts it, "The distortion and manipulation of a film by nameless, faceless programmers is

174. *See Movie Filtering Technology Hearing*, *supra* note 114, at 86–90 (prepared statement of Taylor Hackford, on behalf of the Directors Guild of America); H.R. REP. NO. 109-33, pt. 1, at 75–76 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 220, 238–39 (minority views); Ray Richmond, *They're Editing My Film!*, DGA MAG., Sept. 2002, *available at* http://www.dga.org/index2.php3?chg=. The studios have also attempted to argue on behalf of the artists' interests in these regards. Such arguments tend to emphasize that editing companies should not be protected under copyright law because their practices harm those directly responsible for its creation. For example, Jack Valenti, President of the MPAA, has emphasized that artistic integrity needs to be preserved by eliminating practices that create a film version outside of the creator's intent. *See Family Movie Act Hearing*, *supra* note 101, at 67 (statement of Jack Valenti, President & CEO, Motion Picture Association of America). Mr. Valenti also expressly affirmed the studios' objection to giving legal cover to editing companies that offer "a disfigured version of a movie without regard to the creative vision of the director." *Id.* at 68. Such statements, however, should be taken with a grain of salt, for the MPAA, on behalf of the studios, is largely responsible for the "works made for hire" doctrine that effectively excluded movie artists from obtaining traditional copyright protections. *See* REBER, *supra* note 19, at 12. Thus, any claim by studios that they are acting on behalf of the artists' interests is likely self-serving at best and hypocritical at worst.

175. *See Movie Filtering Technology Hearing*, *supra* note 114, at 88 (prepared statement of Taylor Hackford, on behalf of the Directors Guild of America).

176. *See id.* at 90 (arguing that an edited version of *Schindler's List* "cuts deeply into the horror the film seeks to document"); Richmond, *supra* note 174 (arguing that films are changed so severely that they become something that the artist never intended).

177. Richmond, *supra* note 174 (quoting director Irwin Winkler).

the distortion and manipulation of the reputation and achievement of the director whose name is attached to that film."[178] Consequently, many argue that to permit private parties to edit films without the consent of the artists is ultimately "to encourage censorship and to vitiate freedom of expression."[179]

Directors further argue that legalizing third party editing of films will interfere with their hard-earned contractual rights over edited versions of their films. Currently, directors' interests in protecting their films from alteration—including the right to "first edit"—are protected through collective bargaining agreements with the studios.[180] Often, the versions produced for television networks or airlines are edited by the directors through these agreements.[181] Directors may even prepare alternate footage and audio clips in order to create an alternate version of the film that still remains true to their vision.[182] At a minimum, directors are consulted when their films are edited.[183] Directors argue that allowing individuals and companies to create edited versions of a film wholly divorced from their influence diminishes these bargained for rights and destroys the directors' visions even though their names are still prominently tied to the film.[184]

Notwithstanding the movie artists' dramatic policy arguments and emotional pleas for protection, moral rights were, in large part, correctly dealt with by Congress when it enacted FMA. Congress's decision to ignore the moral rights of motion picture artists in enacting FMA is both consistent with legal precedent and appropriate given the nature of the business. After all, directly protecting moral rights in motion pictures would be incongruous with VARA. Since VARA explicitly excludes motion pictures from moral rights coverage,[185] Congress would be contradicting itself if it included moral rights coverage in the field of private movie editing.

Congress, of course, should overturn statutory precedent when the occasion warrants it. If adhesion to precedent made previously adapted law

178. *Id.* (quoting director Kathryn Bigelow).

179. H.R. REP. NO. 109-33, pt. 1, at 76 (2005), *as reprinted in* 2005 U.S.C.C.A.N. at 239 (minority views).

180. *See Movie Filtering Technology Hearing*, *supra* note 114, at 87 (prepared statement of Taylor Hackford, on behalf of the Directors Guild of America) (noting that well-established and respected directors can often acquire "final cut" rights as well).

181. *Id.* at 87–88.

182. *Id.* at 87.

183. *Id.* at 87–88.

184. *Id.* at 88.

185. *See supra* text accompanying notes 68–70.

unalterable, then there would be little room for legal growth and progression. In order to overrule current statutes, however, Congress should have sufficient reason and basis to do so. In regards to motion pictures, there is no reason to remove all of VARA's restrictions and broadly protect the artists' moral rights because, on a practical level, protecting moral rights for the artists in motion pictures would be unworkable. An examination of the right of integrity illustrates this point further.

The right of integrity, as previously mentioned, prevents alterations or modifications of the work without the artist's permission.[186] While this right is relatively simple to apply to a work created by a single artist, it is infinitely more difficult to apply to a movie. For unlike paintings, sculptures, photography, novels, and other works of art that are produced by one or two artists, major motion pictures require the input of dozens of different artists in order to create the final product. To grant the right of integrity to each of these artists would make changing a portion of a movie impossible, for every artist would have to give approval before the change was made. Because each artist would in effect own a veto right to any changes, "transaction costs would be prohibitive."[187] Studios, directors, editors, and all other interested individuals would be unable to make any edits to a film regardless of their reasons or justifications.

On the other hand, granting this right to a select few (for example, the directors and screenwriters) would arbitrarily divide the artists by making some positions worthy of moral rights and others unworthy despite the fact that all are necessary to complete the film.[188] Moreover, there is no reason to believe that those elected to receive this right would act in the best interests of those who contributed but did not receive the right. Because similar problems also exist with other moral rights, Congress's decision to not extend these rights to films was correct. Focusing on the pecuniary interests of the movie studios allows motion pictures to overcome the transaction costs that would otherwise paralyze the industry.[189] While this explanation may not appease the directors and other artists who desire further control, it is a practical necessity born out of the nature of the art.

186. *See supra* notes 66–67 and accompanying text.

187. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 274 (2003) (finding that VARA's exemption for works made for hire is "a way of economizing on transaction costs" because studios and other employers would simply require that their employees waived such rights anyways).

188. Though directors may feel that their position is the most important, they would not be able to create films without the assistance of others.

189. *See* LANDES & POSNER, *supra* note 187, at 272–74.

Furthermore, Congress effectively dealt with the artists' interests through FMA because the Act does not disrupt any contractual rights that artists may have gained over edited versions created for television networks and airlines. As previously discussed, FMA only protects edited films insofar as they are performed in a "household for private home viewing."[190] Any public displays of an edited film—whether in a theater, on television, or on an airplane—are still liable for copyright infringement. Because the artists' agreements with studios cover only these public showings, FMA will not interfere with these contractual rights. Thus, FMA does not diminish the artists' contractual rights to control any version of their film displayed to the general public.

Finally, the fear that edited versions created by third parties will diminish the artists' names and reputations because the individual consumers will associate any negative effects of the edited version to the artists is overstated. Under FMA, an edited version of a film can be created only "by or at the direction of" the individual consumers.[191] If consumers are viewing a movie edited by a company protected under FMA, they must have taken affirmative steps to ensure that the version they are watching differs from the original. After all, they specifically solicited these companies' help to watch movies without objectionable content. These consumers are thus aware that the film has been altered outside of the studio. Consequently, the artists' argument that viewers will attribute any porous editing to the artists is largely without merit. It assumes that participating individuals are either unaware that they are seeing an altered version or that they lack the intelligence to realize that an altered version is different from the original version endorsed by the artist. In this context, either assumption is simply unreasonable. Overall, the artists' public policy arguments are insufficient to justify expanding VARA by broadly applying moral rights to the movie industry.

Nevertheless, FMA could still be improved by requiring outside editing companies to visually indicate that their version of the film was created independently of the artists' input or consent. Perfect examples of the notice that could be required are the labels that often accompany movies edited for television. These labels state that a movie has been edited from its original version, either for length or for content or both.[192] By

190. 17 U.S.C.A. § 110 (West 2008).

191. *Id.*

192. *E.g.*, *Mission: Impossible* (USA television broadcast Mar. 14, 2007) ("This film has been modified from its original version. It has been formatted to . . . run in the time allotted, and edited for content.").

requiring this type of notice, FMA would protect both the artists' interest in being identified only for their contributions and the artists' reputation from any damage that might occur if viewers presumed that the additional editing was approved—either expressly or tacitly—by the film's creators. In short, FMA should further protect artists' interests by requiring editing companies to indicate that their actions lie outside the artists' domain.

Soderbergh, although ruling against editing practices, was also as efficient as FMA in its handling of moral rights. Just as FMA correctly declined to extend complete moral rights coverage, the *Soderbergh* court also correctly ignored the artists' moral rights claims. Despite the fact that several directors had been named as parties to the suit, no mention of moral rights was made in the court's entire opinion. While this was undoubtedly influenced by the fact that the court ended the suit by granting the studios' motion for summary judgment,[193] any discussion of granting moral rights to movie artists would also have been wholly inconsistent with VARA.[194] Since it has been determined that VARA handled moral rights correctly in regards to motion pictures, *Soderbergh*'s failure to either uphold or protect moral rights was the correct course of action.

Furthermore, any claim that digital editing practices inherently harm artists more than the editing practices covered under FMA is unwarranted. In either digital editing or filtering, the editing is still accomplished by an outside agency rather than actual members of a private household.[195] The editors employed by ClearPlay, for example, have the right to edit whatever content they choose so long as their editing consists of merely muting undesired audio and skipping undesired scenes.[196] While ClearPlay offers consumers the ability to narrowly define what specific aspects of the film are to be edited, digital editors could easily have adopted similar practices by requiring their customers to specify the type and level of objectionable content to be edited before a fixed copy is prepared. Therefore, the differences between the edited versions created by each party could easily be resolved by requiring that digital editors adopt practices that both give consumers more choices and limit their editing to "making

193. Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1243–44 (D. Colo. 2006).

194. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601–610, 104 Stat. 5128 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2000)); Clark, *supra* note 9, at 55.

195. This, of course, does not answer the question of whether editing companies should be able to edit films on behalf of households. For a full discussion of this question, see *infra* Part IV.C.

196. *See* 17 U.S.C.A. § 110 (West 2008).

imperceptible . . . limited portions of audio or visual content."[197] Such minor requirements would assure artists that digital editing has the same impact on moral rights as FMA.

The fact that *Soderbergh*'s decision to disregard moral rights was correct also supports expanding protection to the editing practices that *Soderbergh* condemned. If the court had no public policy basis for granting a permanent injunction against the editing companies as pertaining to moral rights, then a decision to remove this injunction and offer some protection to digital editing would have no additional adverse impact on the artists' interests. Furthermore, the artists' reputation could also receive additional protection by requiring digital editing companies to post notice on the fixed copy and within the edited version that the film has been altered from its original version without the studios' or artists' approval. Thus, the editing practices condemned in *Soderbergh* are just as capable of effectively safeguarding artists' interests as the practices protected under FMA. Distinguishing between the two punishes one type of editing despite the fact that the effect on artists' rights would be identical.

In summary, the artists' interests are, for the most part, handled correctly by current copyright law. Given the large number of artists involved with a movie's creation, broadly granting moral rights to all artists would paralyze the film-making process with exponentially high transaction costs, whereas granting them to only a few would arbitrarily dictate rank among movie artists without assuring that the differing artists' interests are protected. Requiring editing companies to post notice within an edited version that the film has been independently altered, however, would more fully protect the artists' reputation from harm by ensuring that consumers are aware that outside editing was done without the artists' involvement. Given that these interests could just as easily be protected by the editing practices banned by *Soderbergh*, the permanent injunction against digital editing companies is unnecessary. Artists' interests would still be protected to the greatest extent feasible by assuring that all editing practices were limited to skipping content and edited versions were appropriately labeled to indicate that they have been altered.

C. EFFECT ON CONSUMER INTERESTS

Finally, current copyright law should be analyzed to determine whether it properly balances the individual interests of copyright

197. *Id.*

consumers. As mentioned before, consumer interests are often difficult to identify and determine.[198] While this Part's emphasis will be on consumer interests that generally do not fit into the traditional copyright mold—such as personal autonomy, privacy, and control within an individual's home and over an individual's possessions—other interests normally recognized by traditional copyright law should not be ignored because such interests can still be unfairly disregarded if consumers cannot effectively advocate for such interests.[199] With this understanding, an analysis of current copyright law's treatment of edited movies clarifies two points. First, FMA, despite being unnecessary to protect filter editors from infringement liability, is a huge step forward in properly recognizing and protecting consumer interests. Second, current copyright law still has not gone far enough in extending protection to consumers.

In statutorily immunizing companies and individuals who create edited versions of films for personal use from copyright infringement liability, FMA correctly upholds individual consumer interests. Giving consumers the right to control how they use their own possessions in the privacy of their own homes, so long as other parties are not harmed in the process, is consistent with general American notions of individualism and privacy rights.[200] Indeed, individual consumers have several legitimate reasons for desiring to view edited films in their homes.

First, consumers desire the ability to control their personal experience of a copyrighted work.[201] Even critics of editing films recognize that consumers have some rights of control; however, their interpretation of these rights—"take it or leave it"[202]—is too narrowly defined. Under such a conception, consumers should not be able to fast forward, skip chapters on a DVD, mute dialogue, avert their eyes from particular scenes, or participate in any other individualized action that would detract from the experience the artists intended. Such strict control over consumers'

198. *See supra* Part II.C.

199. *See supra* text accompanying notes 85–90.

200. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

201. *See generally* Liu, *supra* note 83, at 406–11 (recognizing consumers' interest in "autonomy").

202. Durham, *supra* note 62, at 851. *See Family Movie Act Hearing*, *supra* note 101, at 9–10 (prepared statement of Marybeth Peters); *Movie Filtering Technology Hearing*, *supra* note 114, at 90 (prepared statement of Taylor Hackford, on behalf of Directors Guild of America).

experiences would not only be impossible to enforce, but would chill consumers' participation in movies and all other types of art.[203] Because this would actually harm the public, copyright law already offers some protection over the consumers' right to control artistic experiences.[204] Therefore, consumers' right to control their own experiences should be protected from needless intervention, especially when exercising this right has a minimal detrimental effect on the interests of either the copyright owner or the participating artist.

In addition, consumers desire the ability to exhibit control over their own possessions within their households. In purchasing copies of artworks—whether movies, posters, statues, or novels—consumers expect to use products in the manner most consistent with their individual lifestyle. Indeed, copyright law has even promoted this expectation by protecting consumers in several of their personal uses.[205] This expectation of control is no less with personal copies of movies. While critics may again argue that consumers can exercise control by foregoing the purchase of particular movies if they object to any portion therein, such an argument is ineffectual. Households purchase copies of movies both because they find the movies valuable and because owning a copy gives them the ability to personally control how, when, and why the film is used. Simply foregoing movie purchases deprives the consumer of any potential benefits.[206] Extending to consumers the right to modify their copies of movies for personal use thus protects the control that is necessary to allow individuals to maintain an individual lifestyle for themselves and their families while still benefiting from the movies that they have purchased.

Considering that Congress was already informed that the practices protected under FMA likely did not infringe the studios' copyrights under

203. *See* Bradford, *supra* note 164, at 759–60 ("Only a copyright zealot would suggest that an individual's experience of a text somehow belongs to the copyright owner.").

204. *See, e.g.*, 17 U.S.C. § 109(a), (c) (2000) (granting consumers the right to display or dispose of works of art at their leisure (first sale doctrine)); § 1008 (granting consumers the right to use digital audio recording devices for noncommercial uses); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (granting consumers the right to time-shift by recording televised programs and watching them at their leisure); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that Rio, a portable MP3 player, does not infringe because it makes copies of musical pieces "in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. Such copying is . . . personal use entirely consistent with the purposes of the [Copyright] Act.") (internal citation omitted).

205. *See* sources cited *supra* note 204.

206. *See* Durham, *supra* note 62, at 909 ("[C]opyrighted expression is such an important part of our culture, and so much of what creates a sense of community, that avoidance may be too high a price to ask consumers to pay. This is particularly true if the marketplace cannot support alternatives . . . that appeal only to a minority of consumers.").

existing law,[207] the decision to pass FMA demonstrates that Congress's primary concern was recognizing and protecting consumer interests. After all, FMA was designed to "address[] the growing desire of parents to be able to control what their children see in the privacy of their own homes."[208] Congress felt that movie consumers should have a protected right to control films played in their homes by removing objectionable content,[209] and that "a studio or director should not be able to force [consumers] to watch a movie in a particular way."[210] In passing the bill, Congress upheld the consumers' right to control both their family's viewing experiences and the content of movies that they purchase for private consumption. Congress also assured that consumers' individual interests would be protected by not specifying what type of content could be edited. In creating a protective scheme that is content-neutral, Congress achieved its goal of allowing consumers to edit content that they "choose[] 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."[211] FMA, despite its limited value in protecting editing practices from actual infringement claims, is thus an important congressional affirmation that consumers' rights should be recognized and respected within the copyright realm.

Finding that consumers should have the right to edit their personal copies of movies, however, does not resolve the question of whether consumers should be able to have third parties do it for them. This question can be easily answered by balancing the interests of the parties involved. Consumers have a strong interest in soliciting companies for such services both because of the technical requirements of editing and because the consumers' desire is to limit exposure to certain content. In an era where technology is increasing in importance and complexity, consumers' reliance on specialists trained in using the necessary equipment should be expected. Indeed, if editing was left to consumers, many would be wholly incapable of creating edited films. Furthermore, most consumers are looking for edited movies because they desire to avoid content they find objectionable. Requiring consumers to edit the movies themselves would essentially force them to watch objectionable content in order to identify its

207. *See supra* notes 115–16 and accompanying text.

208. 151 CONG. REC. H2114, H2117 (daily ed. Apr. 19, 2005).

209. *Id.* at H2119 ("Parents should have the right to watch any movie they want and to skip over or mute any content they find objectionable. This legislation will allow parents to have the final say in what their children watch.").

210. *Id.* at H2118.

211. H.R. REP. NO. 109-33, pt. 1, at 6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 220, 224.

location. This would largely defeat the interests of the consumer.[212] Without outside editing companies, therefore, the individual interests of the consumers would be frustrated.

Furthermore, the studios and artists are not harmed by the presence of a third party. Because consumers still purchase authorized copies of each film, the editing companies do not usurp any of the studios' profits. Consumers merely pay for the services of editing companies on top of the amount that they give to the studios for their personal copy. Artists are also not harmed because consumers affirmatively seek the services of the editing companies and thus know that their copy of the film has been altered by a third party. As discussed above, editing companies can also be required to label and mark their products in order to assure that consumers are put on notice that the artists have not authorized any changes made by the third party.[213] Since the practices of the editing companies greatly benefit consumer interests without harming any competing interests, Congress correctly protected editing companies from liability.

Because it is specifically designed to protect consumers' ability to create edited versions of films for personal use, FMA, despite its inherent redundancy, is an important and worthwhile piece of legislation. FMA falls short, however, by wholly disregarding editing practices that create fixed copies of an edited version. Because it elected to ignore fixed editing practices within FMA, Congress failed to extend statutory protection to digital editing and similar practices despite the fact that the consumers' interest in fixed copy editing is equally as strong as their interest in filter editing. Instead, Congress left it to the courts to determine fixed copy editing's fate.

Unfortunately, Congress's decision ultimately left consumer interests without adequate protection because the *Soderbergh* court asserted that the judicial system is the "wrong forum" for arguments based in public policy interests and that Congress (in electing to leave fixed copy practices unprotected) rejected such arguments anyhow.[214]

In light of both FMA and *Soderbergh*, current copyright law only goes half-way in properly balancing consumer interests. It succeeds in offering consumers control over personal copies of a movie if the film is edited by filtering companies, but fails to offer the same control if the film is edited

212. *See Family Movie Act Hearing*, *supra* note 101, at 1–2 ("Parents need all the help they can get . . . . They need an assist.").

213. *See supra* Part IV.D.

214. Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006).

by digital editing companies or others who create fixed copies. Creating a dividing line between editing practices is not justified, however, because both types of editing further the consumer interests without necessarily harming the competing interests of the studios and the artists. In order to maximize the utility of current copyright's treatment of consumers' rights, the law should be expanded to protect the consumer interests in both types of editing.

D. PUTTING IT ALL TOGETHER

In order to accomplish the constitutional mandate of "promot[ing] the Progress of Science and useful Arts" for the benefit of the American public,[215] copyright law should properly protect and balance the interests affected by its purpose and parameters. A comparison of the law's treatment of these interests, however, shows that copyright law concerning edited films falls short in protecting these interests in an ideal fashion. In particular, the law's protection of the studios is excessive, whereas the protection of the public as a whole, consumers individually, and even film artists remains inadequate. The end result is a legal system that fails to fully balance the recognized interests affected by copyright's treatment of edited films because of an unnecessary and counterproductive preference for copyright owners. By failing to include the practices of digital editors within FMA's coverage, Congress allowed the *Soderbergh* court to draw a line between editing techniques by outlawing only those practices that create fixed copies of an edited version of a film. While legally distinguishing practices on the basis of fixation is typical within the current copyright structure,[216] maintaining a firm line in this area is unwarranted. It does not guarantee any additional protection to the studios because studios are not harmed by the presence of fixed copies of edited films so long as they are derived from an authorized copy of the film that consumers have already purchased.

Due to this dividing line, a needless demarcation is born. Individuals can watch identical versions of an edited movie, yet one version is legal because the editing techniques do not physically alter the DVD and the other is illegal because such techniques permanently edit the DVD itself. Since proscribing fixed copy editing harms the interests of consumers individually and the public as a whole without harming studios or even

215. U.S. CONST. art. 1, § 8, cl. 8.

216. *See supra* notes 29–30. *See also* NIMMER & NIMMER, *supra* note 34, § 8.09(A), at 8-142.16 to 8-142.19 (arguing that infringement under § 106(2) requires a derivative work to be fixed).

artists, legally basing a dividing line on the presence of fixed copies is supported by neither public policy nor the purposes of copyright law. These purposes would be better served by overcoming the limits imposed in *Soderbergh* and extending FMA's protective coverage to all types of editing so long as the studios' economic interests remain unaffected.

V. ADAPTING THE FAMILY MOVIE ACT TO ACHIEVE PROPER BALANCE

Identifying that current copyright law concerning privately edited films is out of balance is only half of the problem; devising a solution that is both feasible and effective is equally as important. Given the technological complexity of editing and the legal complexity of the copyright structure, finding an adequate cure may seem even more daunting than diagnosing the problem. Fortunately, because the current legal landscape was only recently established through FMA and *Soderbergh*, there is no need to follow precedent in order to protect well-founded expectations. Therefore, the sooner the primary interests of privately edited films are properly balanced by extending legal protection to editing practices that create a fixed copy, the better.

While the easiest way to extend protection to all private editing practices would be for *Soderbergh* to be reversed, attempting to solve the problem in this manner would be insufficient in a number of ways. First and foremost, reversing the court's decision would not adequately protect the interests of the studios. As previously discussed, the digital editors' policy of maintaining a one-to-one ratio between edited versions produced and original copies purchased was never legally required.[217] Moreover, editing companies that create fixed copies were never legally obligated to either produce the edited version on the original disc or at least deactivate the original disc to ensure that additional copies of the movie did not enter the market. Without these defenses, the studios' pecuniary interests would be substantially endangered because additional copies of the film could be produced and sold without the studios receiving revenue. Thus, reversing *Soderbergh* would not help balance the competing interests of the studios and the public, but would simply shift the scales in the public's favor. Finally, editing companies were never required to protect the artists' reputations by labeling their edited copies to indicate that their version of the film was created independently of the artists' input or consent. Since merely reversing *Soderbergh* would not create any additional legal

217. *See supra* note 8 and accompanying text.

obligations for editing companies, attempting to solve the law's deficiencies in this way would create as many problems as it would correct.

Aside from the fact that a reversal of the *Soderbergh* injunction will not properly rebalance the affected interests, the case's ruling and analysis also expose deeper issues that only Congress can resolve. For the *Soderbergh* court, in attempting to follow precedent, was reasonable in ruling the way it did. The court's failure to properly balance the interests involved in privately edited versions of motion pictures was not solely because the court incorrectly analyzed the law, but also because the legal structure that the court relied on did not lead to a full and proper analysis of all relevant factors.

For instance, the court's focus on the editing companies and not on the consumers who were requesting such services was inevitable because only the companies were parties to the suit. Since it was these companies (and not their patrons) who were sued for copyright infringement, the commercial nature of the companies' actions logically came to the forefront of the case. Moreover, it would have been impossible for all relevant consumers to join the suit and defend their interests. Not only would such a large body have made efficient administration of the case impossible, but identifying a single individual to adequately represent the consumer interests would have been unfeasible considering the inherently personal reasons that consumers have for removing objectionable content. Thus, the limitations of the court system itself led to an unbalanced focus on the companies' interests and not the primary interests at stake.

In addition, the *Soderbergh* court's presumption that consumer interests were already sufficiently addressed in FMA should have been expected because Congress failed to include digital editing in its coverage.[218] In deciding that the digital editors' public policy argument was ineffectual, the court states that this argument was "addressed in the wrong forum" because courts are "not free to determine the social value of copyrighted works."[219] Thus, courts directly rely on Congress to solve balancing problems within copyright. Considering that FMA's House Committee stated that FMA "does not create an exemption for actions that result in fixed copies of altered works" because "such practices are illegal,"[220] the court's assumption that Congress had already addressed issues concerning consumer interests was wholly justified.

218. *See* Family Movie Act of 2005, 17 U.S.C.A. § 110 (West 2008).

219. *Soderbergh*, 433 F. Supp. 2d at 1240.

220. H.R. REP. NO. 109-33, pt. 1, at 7 (2005), *as reprinted in* 2005 U.S.C.C.A.N. at 225.

Finally, the court's failure to attempt its own balancing act of the primary interests should be expected because the current legal structure does not indicate that such a balancing act is necessary or appropriate. In determining whether copyrights have been infringed, a court focuses on whether outside individuals have created a fixed copy, a derivative work, or distributed copies to the public.[221] While the interests of the public may eventually be addressed through fair use, this doctrine is insufficient for a variety of reasons. Because fair use is treated as an affirmative defense, the court already presumes infringement when first applying this doctrine.[222] Furthermore, fair use gives little guidance to courts. Although the Supreme Court has given some direction on how to apply the four factors,[223] the interests that fair use can support are still left open.[224] As a result, "[n]o doctrine in copyright is less determinate than fair use."[225] Although such discretion leaves fair use flexible, it also gives courts little guidance on what interests should be balanced and how such balancing should be achieved. Consequently, courts—even when applying fair use—are ill-prepared to determine whether specific practices assist or hinder copyright in accomplishing its overall purposes.[226]

Any permanent solution, therefore, needs to come from Congress. While courts may be able to skirt around some of the surface problems that would come from merely reversing *Soderbergh*, the deeper problems—that copyright law in and of itself does not directly encourage a full analysis of the law's effect on all relevant interests—would continue to fester without congressional intervention. Ideally, these deeper problems could be solved by further refining FMA to protect fixed copies of edited movies. FMA is particularly ideal for a variety of reasons. First, it is already narrowly tailored because it addresses the motion picture industry exclusively. Second, it addresses a contemporary issue that is not already bound by the strong presence of stare decisis. Since Congress continues to debate the editing of motion pictures despite having already passed FMA,[227]

221. *See Soderbergh*, 433 F. Supp. 2d at 1239, 1240–41 (applying 17 U.S.C. §106(1)–(3) (2000)).

222. *See, e.g.*, *id.* at 1239 (determining first that the digital editors' actions infringed copyright law and then applying the fair use test).

223. *See* GORMAN, *supra* note 54, at 143–47.

224. *See id.* at 142 (noting that several Supreme Court decisions construing fair use "do not appear comport with the statutory illustrations" of § 107 and that the Supreme Court has held that such illustrations are not exhaustive or even presumptively fair use).

225. GOLDSTEIN, *supra* note 45, § 12.1, at 12:3.

226. Congress seems to acknowledge fair use's shortcomings and inadequacies in proactively passing FMA in the middle of the *Soderbergh* litigation. *See supra* notes 115–17 and accompanying text.

227. *See* Struglinski, *supra* note 2.

additional changes to FMA would be neither drastic nor unexpected. FMA is also ideal because it currently protects practices and technologies that are likely not infringing copyright in the first place.[228] By expanding FMA to cover fixed copies of edited versions, Congress would not only give substantive meaning to the legislation by safeguarding practices that need additional protection, but would also materialize its interest in truly protecting consumers' personal interests. Finally, adapting FMA would allow Congress to properly balance the primary interests involved.

In order to reach this balance, FMA should be expanded to cover editing practices that result in a fixed copy of the edited version. Congress should be careful not to merely reverse the ruling in *Soderbergh*, however, for the myriad of reasons stated above. Instead, a more moderate statute should be created that allows fixed copies to be produced only insofar as the copy replaces an original version authorized by the copyright owner and lawfully purchased by a consumer. In this way, edited versions of movies could be stored on DVDs and other discs and played on normal media players, but studios' interests are not endangered because each edited version produced would directly stem from an original version purchased by the consumer from the studios. Furthermore, the statute would only apply when there would otherwise be infringement in order to avoid diminishing the consumer protections already established within copyright law. The statute would effectively balance the relevant interests without endangering any existing rights.

Fortunately, most of the language currently within FMA already serves to protect the studios and create a balance among interests. Thus, the majority of the statute would need to undergo little change. For example, Congress would still maintain that editors must restrict their techniques to merely "making imperceptible . . . limited portions of audio or video content of a motion picture" in order to qualify for FMA protection.[229] This would ensure that protection for privately edited movies would not accidentally protect derivative works that could be created by adding to or changing a movie's audio or visual content.[230] Furthermore, Congress

228. *See supra* notes 115–16 and accompanying text.

229. Family Movie Act of 2005, 17 U.S.C.A. § 110(11) (West 2008).

230. This, of course, assumes that the court in *Soderbergh* was correct in its analysis that edited films in and of themselves do not qualify as derivate works. Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006). The court's analysis, however, appears to be consistent with FMA insofar as the editing is merely used to delete objectionable content. *See* § 110(11). A full analysis of whether edited films should qualify as derivative works is beyond the scope of this Note. For further discussion on the matter, see generally Clark, *supra* note 9; Durham, *supra* note 62.

would maintain that the use of edited films is still restricted to "household[s] for private home viewing."[231] In this way, Congress would protect the interests of both the studios and the artists by not accidentally giving editing companies the ability to cross into publicly displayed works.

Indeed, the most substantive change to FMA would be removing the language indicating that editing techniques are not protected "if no fixed copy of the altered version of the motion picture is created."[232] Instead, Congress would indicate that fixed copies of an edited movie can be created by technology or third parties in limited circumstances. Congress could then choose to indicate this in one of two ways. If it felt that such practices would not unduly endanger the studios' interests, Congress could simply formalize the digital editors' requirement that only one edited copy could be created from any one authorized copy. In order to ensure that copies were not multiplied, Congress should require both that editing companies deactivate the consumers' copy of the original DVD and keep strict records detailing the amount of edited copies produced in comparison to the number of original copies purchased. Congress should also protect the editing companies by clearly indicating that they are not liable under the Digital Millennium Copyright Act so long as their actions are consistent with FMA.[233] By legally requiring the one-to-one ratio in this way, Congress could give consumers the benefit of obtaining a fixed copy of an edited movie while still protecting the studios' economic interests.

If Congress felt that the potential for fraudulent record keeping and the possibility of additional copies of a movie entering the stream of commerce were too great, it could still allow fixed copies of edited films to be produced by requiring that the edited version be kept on the same disc as the original. Under such restrictions, the editor could record the edited version onto the disc by either wiping the disc clean, recording the edited version over the original version, or even develop a system of marking the disc in such a way that the media player would automatically skip or mute the objectionable content. Unfortunately, present-day limits in current technology may constrain the ability of digital editors and like businesses to create fixed copies on the original DVD. Such limits could still be overcome in the long run through advances in technology, however. Furthermore, by permitting edited films to be recorded onto fixed copies of the original in these circumstances, Congress would give companies

231. § 110(11).

232. *Id.*

233. *See* 17 U.S.C. § 1201(a) (2000) (making it a violation to "circumvent a technological measure that effectively controls access to a work protected under" copyright).

incentive to develop applicable technology and thus further benefit the public through such advancements. While this may impede consumer interests in the short term, it would assure that studios' interests are fully protected and appease the more traditional notions of copyright by eliminating the presence of an entirely separate DVD. Regardless of which method Congress ultimately chooses, the balance between the interests of the studios and the consumers both individually and as a whole would be better served than through the current system.

Even though it is extending FMA's protective coverage to include fixed copies of an edited version, Congress should still require that any and all fixed versions of a film are prepared "by or at the direction of a member of a private household."[234] Congress should further elucidate this requirement by stating clearly that companies who prepare fixed copies of edited versions must first receive instructions from consumers on what type of content should be edited before preparing the fixed copy. After receiving these individualized instructions, the editing company could then either purchase a copy of the original film for the consumer or receive the consumer's copy directly.[235] This requirement would ensure that the law primarily serves the individual consumer interests and not those of the editing companies. It would also ensure that the artists' interest in protecting their reputations is safeguarded because a consumer in this context would know with certainty both that the original version has been modified by a third party in addition to the specific type of content that has been removed.

Congress should also proactively protect the artists' interests by requiring that all versions of an edited film give notice that the film has been modified from its original version without the consent or approval of the studios or artists. For fixed copies, this notice could be required to be posted on the cover, the copy (the disc or other medium), and in some portion of the production itself. When no fixed copy is created, editing companies should still be required to post notice before the edited version begins playing.

By narrowly drafting FMA in this way, any concerns about unduly impacting other statutes or types of artwork are effectively negated. First, expanding FMA would not be unduly harmful to the Digital Millennium

234. § 101(11).

235. This would likely destroy the concept of renting edited DVDs to the public. For although such actions could still be analyzed under traditional fair use analysis, it is unlikely that such protection would be readily forthcoming considering that the court in *Soderbergh* already ruled against such practices. *Soderbergh*, 433 F. Supp. 2d at 1242.

Copyright Act ("DMCA").[236] Since DMCA outlaws circumventing encryption codes on DVDs and other copyrighted media,[237] granting companies permission to crack the encryption in order to edit movies could seemingly be viewed as rendering DMCA ineffective. There is no reason to believe, however, that fixed copies of an edited film cannot be created without violating DMCA. Notably, the studios affirmatively decided not to assert that the digital editors in *Soderbergh* were in violation of DMCA.[238] Even if such methods were in violation, protecting only those practices which qualify under FMA would not render DMCA useless as a whole, but would simply protect specific actions that Congress has found worthwhile.[239] Congress could also reinforce the overall importance of DMCA by requiring that the editing companies replace the encryption on each edited copy made.

Furthermore, expanding FMA in this way would not create a general line-drawing problem by extending the right to create edited fixed copies to all types of copyrighted works. Since fixation is an essential element that triggers copyright infringement, simply ignoring the distinction between fixed and nonfixed versions could seemingly destroy the traditional dividing line without indicating where a new line should be drawn. Congress would have eliminated this concern, however, by drafting FMA as a specific carve-out exclusively covering practices and technologies that create edited versions of motion pictures. Unlike fair use, which is designed to apply generally to all types of copyrighted works, FMA does not apply beyond the realm of edited films. In fact, extending FMA beyond its statutory boundaries by attempting to analogize the scenario in FMA with other types of art (for example, editing profanity in musical lyrics or nudity in paintings) would lead to the exact problems that helped cause the court

236. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17, 28 U.S.C.).

237. *See* 17 U.S.C. § 1201 (2000).

238. *But see* Motion Picture Studio Defendants' Answer & Counterclaims, *Soderbergh*, 433 F. Supp. 2d at 1236 (No. 02-M-1662), 2002 WL 32153736 (noting that even though the studios did not claim that the digital editors violated DMCA, such a claim could have been made).

239. DMCA currently prevents consumers from circumventing encryption measures even when they are "legally engaging in a fair use of a technologically protected work." Devon Thurtle, Comment, *A Proposed Quick Fix to DMCA Overprotection Problem That Even a Content Provider Could Love . . . or at Least Live With*, 28 SEATTLE U. L. REV. 1057, 1074 (2005). Such tight restrictions greatly endanger fair uses of copyrighted works. *Id.* As a result, a legislative bill has recently been introduced that would amend DMCA by protecting fair use rights and "enabl[ing] consumers of digital media to use it in ways that enhance their personal convenience." *Reps. Boucher, Doolittle Introduce FAIR USE Act of 2007*, U.S. FED. NEWS, Feb. 27, 2007 (introducing the FAIR USE Act of 2007). Protecting editing practices under FMA would thus be consistent with this congressional desire to restrict DMCA when its coverage unduly impinges on consumer interests.

in *Soderbergh* to go astray in their analysis.[240] FMA's narrow language would assure that only fixed copies of edited films meeting the requirements outlined in FMA would receive statutory protection, whereas all others would still be subject to suit for copyright infringement.

Nonetheless, FMA's narrow coverage is not meant to suggest that consumers should necessarily be denied the right to edit personal copies of other types of copyrighted works. Because FMA would have no effect on existing consumer protections, fair use and similar safeguards would still be applied to determine whether an individual practice is infringing. If there are other actions that result in a fixed work, but lay outside the parameters of these protections, then Congress could employ the same balancing techniques utilized above to determine the outcome. For example, whether consumers should be able to create fixed copies of edited music compilations would depend on the effect that such practices would have on the relevant interests specifically within the music industry. For it is the process of balancing the actual and relevant interests in a given artistic field, and not any individual result, that is most important. While this balancing act might lead to a determination that other types of edited fixed copies should be legally permitted, it might not. Any actual determination, while no doubt worthwhile, goes beyond the scope of this Note. In balancing the interests that copyright law affects in regards to specific types of works, however, lawmakers will end up with the result that benefits both American authors and consumers to the greatest possible extent.

In conclusion, Congress would achieve two valuable and important objectives by extending FMA as outlined above. First and foremost, it would create a legal system within copyright law that most effectively balances the primary interests affected by privately edited versions of movies. In removing the legal distinction between a fixed and nonfixed version of an edited film, the law would more fully promote broad availability of important artistic works, more fully recognize the consumers' interest in maintaining control of their artistic experience, and even protect some moral interests of the films' artists without compromising the studios' pecuniary interests in their films. Second, it would recognize that to truly promote the progress of art in America, the

240. *See Soderbergh*, 433 F. Supp. 2d at 1240 (attempting to compare editing films to covering Michelangelo's David with a fig leaf); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 289 (2007) (arguing that this "comparison is inapt"). *See also* 151 CONG. REC. H2114, H2118, H2119 (daily ed. Apr. 19, 2005) (statements of Rep. Berman) (comparing editing films to selling abridged versions of novels).

law must work to balance competing interests and not simply focus on whether a fixed copy is being created by any given practice.

VI. CONCLUSION

Following the congressional approval of FMA and the judicial ruling in *Soderbergh*, copyright law concerning the practice of privately editing motion pictures for personal use has finally taken shape. The end result is a firm and seemingly impenetrable line that divides editing practices with similar results. For on the one hand, editing practices that do not create a fixed copy of an edited version have received copyright law's blessing. On the other hand, editing practices that do create a fixed copy of the edited version have received copyright law's condemnation. Yet, after analyzing the effect of FMA and *Soderbergh* on the competing interests within copyright's influence, it is clear that current copyright law's creation of this dividing line does not effectively balance these interests in regards to edited movies.

With the scales weighing disproportionately and wastefully in the studios' favor, the interests of the public as a whole, of consumers individually, and even of the artists creating the film receive neither adequate recognition nor protection. By expanding FMA to protect editing practices that produce fixed copies of edited films, Congress would more equally balance these interests with the interests of the studios. In the process, Congress would also show that when it effectively balances all of the interests affected by copyright law, it truly "promote[s] the Progress of . . . useful Arts."[241]

241. U.S. CONST. art. I, § 8, cl. 8.