



A recently filed federal court case will decide whether consumers have the right to edit motion pictures against the wishes of directors and studios

C L E A N --- C U T

BY MARK S. LEE

A RECENTLY FILED federal court case—*Huntsman v. Soderbergh*—may soon decide who controls our video screens. According to the pleadings, the owner of seven Clean Flicks video stores filed suit against 16 famous movie directors in August 2002, seeking court permission to continue selling versions of motion pictures that the directors directed but from which the profanity, nudity, and violence had been removed.¹ The directors filed a counterclaim that added the major motion picture studios and about a dozen other companies to the suit. Claims and counterclaims continued flying, and months later the case is still only in its early stages.

The suit has attracted media attention because of the celebrity participants and the subject matter. The attention may be justi-

fied, as rulings in the case could have both dramatic and unexpected consequences for the participants. Understanding the implications of this lawsuit requires a review of its background, its legal issues and arguments, and its possible effects on the parties and the movie-viewing public.

There have been struggles over control of the content of motion pictures for decades. Sometimes these disputes have pitted filmmakers against their studio bosses, and sometimes the filmmakers and the studios have rallied against what from their perspective was arbitrary outside control. In fact, motion pictures have been controversial since Thomas Edison commercially introduced the kinetoscope in 1894.² Movies displayed an unprecedented vividness, intensity, and apparent real-

ity to audiences, and concerns quickly developed over how movie audiences could be influenced by what they saw on screen. Ethnic groups, animal activists, foreign interests, occupational associations, religious groups, and others all lobbied for better or more guarded depictions of their members or values in motion pictures.³

State and local governments responded to these concerns with licensing laws and censorship boards. The U.S. Supreme Court confirmed the legality of a censorship system in 1915 but reversed that ruling in the 1940s,

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acknowledging the expressive nature of motion pictures.⁴ By that time, however, the motion picture industry was regulating itself. In 1924, in response to a series of scandals, the studios founded what eventually was called the Motion Picture Association of America (MPAA) and hired attorney and former Postmaster General Will H. Hays to write a code that would govern motion pictures and allay public concerns. What came to be known as the Hays Code was announced in 1930.⁵ The overriding principle of the Hays Code was that “no picture shall be produced that will lower the moral standards of those who see it,” and it contained specific regulations to effectuate that principle.⁶

The Hays Code had a dramatic effect on American motion pictures. It doubtless frustrated the creative community, but Hollywood learned to create great motion pictures within its guidelines. Four of the top 5, 7 of the top 10, and 59 of the top 100 films on the American Film Institute’s list of the 100 greatest films were produced during the 34-year-reign of the Hays Code, as opposed to 33 in the 34 years since its abandonment.⁷

The Hays Code was abandoned, however, in 1968, after a struggle between motion picture studios and directors. Motion picture attendance plummeted in the 1950s,⁸ and studios began looking for ways to increase their box office receipts. Filmmakers in general, and especially directors, were influenced by the frankness of many European films that were riding the crest of the French New Wave. The filmmakers pressured the studios for more freedom to address adult issues, including sexual themes.⁹ The MPAA began making concessions, and the Hays Code was soon effectively broken.

The MPAA quickly replaced the Hays Code with a rating system.¹⁰ The system, which is still in effect, allows producers to depict virtually anything in a motion picture that does not constitute obscenity, and that is very much indeed. A wide array of motion pictures are now produced, from highbrow to lowbrow, uplifting to depressing, violent to circumspect, and innocent to explicit, with the predominant concern generally being that the film appeal to some group large enough to make its release profitable.

REBROADCASTING MOVIES ON TV

On the other hand, the regulation of content on television—including movies rebroadcast on television—has followed a different path. Television programming has been the subject of FCC regulation since its commercial inception. Although FCC regulations theoretically proscribe censorship,¹¹ requirements that television and radio operate for the public good have resulted in restrictions on morally

offensive broadcast programming. The Supreme Court has at least partially approved these restrictions.¹²

The relatively restrictive nature of television programming created problems for the motion picture industry, which could not afford to ignore the important television market. Network Standards and Practices Department guidelines made it impossible for many motion pictures made after the era of the Hays Code to be broadcast on television in their original form. Motion picture copyright owners edited films for broadcast television, deleting footage and substituting language to bring the films into compliance. Similar edits were made to versions aired on commercial air flights. These changes were unpopular with directors and other filmmakers, but there was little they could do about it, because studios, which generally are the copyright owner of films, have the legal right to edit them.¹³

New technologies created additional ancillary markets for motion pictures and television broadcasts and gave consumers greater control over how they experienced them. Video cassette recorders allowed consumers to use fast forward to speed through parts of a program and skip commercials.¹⁴ DVD players and digital video recorders like TiVo permit even more skips, pauses, and accelerations than are available in analog video recorders. These new media have given people significant control over how they experience motion pictures, and motion picture studios happily profit from the increased revenues derived from selling their old products in these new ways.

Seemingly in keeping with technological advances, public dissatisfaction with the content of films has also increased. Saturation marketing, heavy media coverage of motion pictures, and the successive distribution of motion pictures through various ancillary outlets have caused unprecedented levels of sustained attention to motion pictures. The virtual ubiquity of film in American society makes it obvious that motion pictures are a powerful social force, whether the studios that create them want them to be or not. Motion picture studios have long been accused of stubbornly resisting the moral values of much of the nation and aggressively promoting entertainment that uses graphic violence; racial, ethnic, and gender stereotypes; smoking; drug use; sexual irresponsibility; marital infidelity; and many other titillations to sell movies, even though the public prefers less graphic fare.¹⁵

Offended consumers can, of course, simply refuse to see the motion pictures that offend them, but it is often not easy to avoid certain content while looking for entertain-

ment. Studios spend millions to sell motion pictures, with considerable success. Filmmakers may include offensive elements in movies that people would very much want to see if the offensive elements were removed. Such elements—amounting to a few words or a few seconds from a few scenes—often constitute a small portion of what are perceived as otherwise excellent films. Suspicion that such elements are gratuitously inserted for marketing rather than artistic reasons adds to the perception of many consumers that their concerns are being ignored.¹⁶

This frustration has created a demand for edited films among people who wish to participate in the mainstream of American cultural experience but do not wish to hear words or see things that are objectionable to them. Accordingly, entrepreneurs took action to meet that demand when a few video stores in the intermontane West began offering altered versions of major motion pictures in the late 1990s.

The methods used to edit the films vary from company to company (and some are factually disputed in the federal lawsuit). Edited video retailers offer copies of films from which sex, violence, and profanity are removed by cuts to VHS tape. Most retailers either rent edited videos, require customers to buy unedited copies before providing them with edited versions, or form “clubs” in which members gain the opportunity to view a given number of edited videos in return for a monthly fee. Another group, known as software providers, offer computer software with which consumers can edit individual copies of DVDs according to taste.¹⁷ Demand for such products is apparently greater than many realize; the largest edited video retailer, Clean Flicks, expanded from 1 to over 70 franchise stores in 17 states in two years, and about a dozen companies have begun offering similar services.¹⁸

The extent to which the edited versions differ from the original varies from film to film. Some edits are significant; one company reportedly cut about 4 minutes from *Saving Private Ryan* to eliminate graphic violence, and another announced that it can put a corset on Kate Winslet in her nude scene in *Titanic* or replace the swords used in *The Princess Bride* with light sabers.¹⁹ However, edits on other films are relatively minor, amounting to muting a few words or deleting a few seconds from a few scenes. These alterations, on the other hand, are crude in comparison to the original editing.

These editing efforts were known to the motion picture studios, but, apparently sensitive to public reaction, they made no effort to stop the unauthorized editing.²⁰ Directors reacted differently. Many were outraged by

what they perceived as amateurish, crude cuts to their work by video store operators. American movie directors have long chafed at the lack in the United States of significant moral rights, which, from their perspective, allows studios to bowdlerize their work for television and airline use. Most foreign countries recognize moral rights, which include the author's right to limit the alterations to a work without the author's permission even if the copyright in the work is owned by others. However, Congress has provided minimal support for such rights in the United States.²¹

Channeling the indignation of many of its high-profile members, in 2002 the Directors Guild of America developed plans to file a lawsuit to stop unauthorized editing. A Clean Flicks franchisee learned of these efforts and filed a preemptive suit in federal court in Colorado, seeking declaratory relief that the company's edited films violated no rights. Parties are still appearing in the Clean Flicks litigation, and no discovery or briefing has taken place at the time of this writing, but certain legal theories have emerged from the pleadings that have been filed so far.

THE SUIT DEVELOPS

Virtually all the claims rely on trademark, unfair competition, and copyright law. The directors and studios allege unfair competition and trademark dilution based on the sale of altered versions of motion pictures that continue to display the directors' names or studios' marks. The studios also generally allege copyright infringement, without specifying which rights are violated.²²

The case has engendered strong feelings about which side is doing the right thing, but the legal issues are more complicated than one might expect. For example, relevant case law is limited and ambiguous. *Gilliam v. American Broadcasting Company*²³ held that broadcast of "mutilated" versions of episodes of *Monty Python's Flying Circus* constituted unfair competition by misleading the public into believing that the edited versions of the programs were, in fact, Monty Python's work. However, the Gilliam plaintiffs owned common law copyrights in the underlying scripts, the changes deleted up to 27 percent of the original episodes (often rendering them virtually unintelligible), and there was no way the public could have known that the broadcast Monty Python programs had been significantly altered. A concurring judge opined that providing notice of the alteration would have eliminated the unfair competition claim.²⁴ Subsequent case law has limited *Gilliam* to situations in which the edited version "departed so substantially from the original work that the 'edited version' simply made no sense,"²⁵ and one court characterized as

"minor" (and thus not actionable under *Gilliam*) the changes that were made to several reproductions of *Playboy* magazine illustrations that covered a woman's exposed breast.²⁶

General trademark law involving the sale of altered goods is similarly limited. A party typically cannot sell altered trademarked goods as if they were the genuine, original product, but a party can sell those goods if the

For example, in *Chamberlain v. Columbia Pictures Corporation*, the Ninth Circuit held that there was no secondary meaning in the name Mark Twain when it appeared on a literary work because it "merely identified the author of those works."²⁹ More recently, in *Lord Simon Caerns v. Franklin Mint Company*, a federal district court in California held that there were no trademark rights in the name Diana, Princess of Wales, because the term



labeling adequately describes the modifications and if the alterations are not so severe as to create a "new product."²⁷

It is anyone's guess whether the Clean Flicks court will find any of the edited films "unintelligible" under the *Gilliam* standard or constituting a "new product" under trademark law. But every consumer who buys the altered versions or enabling software should know that the altered versions have, in fact, been altered by a third party rather than a filmmaker or studio. Packaging and advertising materials accompanying the altered versions should make that abundantly clear, if for no other reason than because that is their biggest appeal. Consumers who purchase altered versions do so precisely because they are dissatisfied with the studio versions and want a different version edited by someone outside the studio system. Therefore, any risk of confusion due to inadequate labeling appears low.

Another possible claim is trademark dilution. Such claims do not require proof of likely confusion, but they present other problems. Dilution requires ownership of a famous mark²⁸ and, thus, the directors will have to prove that their names function and have achieved fame as marks. The directors might be able to make that showing, but some case law has been unsympathetic to the argument.

merely described the princess.³⁰ Further, some courts have held that only "inherently distinctive" marks qualify for dilution protection.³¹ Names are generally viewed as descriptive marks that by definition cannot be inherently distinctive.³²

Dilution claims generally involve a third party who uses a mark to identify unrelated goods or services the third party produces. The third-party editors use marks on altered motion pictures that actually originated with the studios. No reported decision has applied trademark dilution law in such a factual scenario.

Additionally, the harm required in a dilution claim makes the result in the Clean Flicks case uncertain. The Supreme Court recently clarified that actual dilution, as opposed to a likelihood of dilution, must be shown to establish a federal trademark dilution claim.³³ Whether the studios will be able to produce such evidence is difficult to predict.

Unfair competition claims against the software providers present other difficulties. The software providers claim they neither sell motion pictures nor use any director's or studio's mark to sell their software products. Confusing or diluting use of a mark in commerce is a necessary predicate to an unfair competition claim, and it would appear difficult to establish trademark dilution or unfair

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competition against entities that neither use the marks nor sell the trademarked goods.³⁴

COPYRIGHT CLAIMS

The motion picture studios' copyright claims are in some respects more straightforward, significantly because they are the actual copyright holders in the altered films, but there are still complications. For example, the studios might assert violation of their exclusive reproduction right under federal copyright law. Unless retailers manually edit individual copies that are then legitimately purchased by consumers (and some alteration schemes include this method), infringing copying will be found to have occurred, and retailers would be exposed to liability. However, the retailers will inevitably defend their conduct by employing the fair use defense, which is available under copyright law.³⁵

The fair use defense involves four factors. Judicial application of these factors is notoriously unpredictable, but the studios may successfully challenge some with relative ease. Under the first factor, "purpose and character of use," commercial uses tend to weigh against fair use unless they are "transformative" (e.g., if they are used in a new work to give a significantly different purpose, character, meaning, or message.)³⁶ The retailers' use is certainly commercial. The "transformative" nature of an edited film with only slight deletions is debatable. No new purpose, meaning, or message is intended in the edited films, which seek to remain as close to the original as possible, but, arguably, removal of graphic language, sex, and violence gives these films a different character. Accordingly, this factor should favor the studios, but there is room for debate.

The second factor, the nature of the copyrighted motion pictures, would likely weigh against fair use, since the more creative a work is, the less likely unauthorized copying will be permitted. Motion pictures obviously are very creative works. However, some courts have given this factor less weight in certain cases.³⁷

The third factor involves "the amount or substantiality of the portion used." This would certainly appear to work against a fair use defense, since retail editors quantitatively use almost all of each motion picture, and thus qualitatively are likely to be viewed as copying the heart of virtually all the films they alter.

The final factor, the effect of the retailers' use on the potential market for the motion pictures, is actually the least clear-cut. The retailers claim the studios lose no sales of their original versions, since purchasers obtain an original version before they may acquire an edited one. They doubtless will

also produce evidence that they sold or rented edited films to people who never would have rented or purchased the motion pictures in their original versions. This factor may favor the retailers until motion picture producers rent or sell edited versions themselves.

The retailers of edited videos are only one of the challenges facing the studios, however. The application of copyright reproduction claims against the providers of editing software is a more daunting legal task. The software providers do not provide copies of motion pictures to consumers, and the providers may or may not make interim copies of the DVDs to create their masking software. If they do not, there is no copying and no liability under this theory. Even if they do make interim copies, liability is not assured. Software providers could argue that any interim copying is a fair use under copyright law because it is necessary to a subsequent noninfringing use. This argument is backed by some supporting case law.³⁸ However, the software providers might have to circumvent the copy protection systems within the DVDs to make those interim copies and, if they do, they may violate provisions of the Digital Millennium Copyright Act. This act is controversial in that it arguably prohibits a practice that traditionally has been considered fair use: the creation of copies of works for a consumer's own use.³⁹ Thus, how the Clean Flicks court will interpret it is unpredictable.

Besides infringement of the copyright law's reproductive rights, the studios also could assert that the edited video retailers and software providers are infringing based on the creation of unauthorized derivative works. The studios will obviously have to establish that the edited versions qualify as derivative works, but that standard is not hard to meet. A work is derivative if it is a "distinguishable variation" with changes that are more than "merely trivial."⁴⁰ The edited video retailers add no obvious copyrightable elements to the films but instead delete scenes or mute words in the original version, with the extent of the alteration varying from picture to picture. Although one court held that one edit added enough to create a derivative work,⁴¹ it is unclear whether muting a few words or deleting portions of a few scenes will be sufficient in many of the edited films.

A theory that an edited film is a derivative work might be more difficult against the software providers, whose products allegedly make no change to the original work at all but instead merely allow the end user to alter how he or she experiences an unaltered copy of the work. Proving that transitory changes in the user experience are sufficient to create derivative works is the key to a studio claim

under this theory, but precedents are few and far between. In fact, arguably analogous case law involving video games indicates that they may not be. *Louis Galoob Toys v. Nintendo of America*⁴² held that the manufacturer of a "game genie" video game device that allowed players to alter how they experienced a video game so they could win more easily did not violate the underlying video game owner's copyright, because the user experience made possible by the game genie did not constitute a derivative work. The *Galoob* court further held that, even if the game genie were derivative, Galoob's use was a fair use under copyright law, arguing that "*Sony [v. Universal]* recognizes that a party who distributes a copyrighted work cannot dictate how that work is to be enjoyed."⁴³

One final argument that the studios may employ is that the distribution of altered videos constitutes unauthorized public performances of their motion pictures. This would seem to be a difficult argument, and the studios appear to avoid it.⁴⁴ A public performance claim might be especially difficult against the software providers, since their software product is intended to be used by a single purchaser of a single copy in his or her home.

POSSIBLE RESULTS

Regardless of the outcome of *Huntsman v. Soderbergh*, consequences—anticipated and otherwise—will flow to all concerned. Most obviously, a victory for the edited video retailers and/or software providers would allow them to continue selling, and the public to continue viewing, edited films. This result would effectively destroy the control that directors have over their films after completion and weaken the hold of studios on their copyrighted works.

A victory for the software providers could determine who controls the content of television and video screens at home—the people who create motion pictures or the viewers who purchase and view them. The software providers use technology to give individuals greater control over how they experience the movies they watch without altering the original content. One can imagine software that would allow users to dramatically alter the motion picture viewing experience by, for example, personalizing stories by changing names or superimposing images of family members on characters depicted in the motion picture or interacting with the motion picture in other ways. An entirely new industry could arise to service these consumer desires that legally would owe nothing to the directors or motion picture studios. Whether that would be good or bad for motion pictures or the public is an important question

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that the Clean Flicks litigation may not be well equipped to consider, let alone answer.

A victory for the directors could establish their right to control the content of their motion pictures after they complete them and could also generally strengthen moral rights in the United States. This could have consequences that the directors do not anticipate or intend. Motion pictures are, after all, a collaborative art form, with artistic contributions from the screenwriters, costume designers, actors, and numerous others. All arguably could have some claim of authorship in the motion picture, and all could have moral rights that they could assert.

Further, success for the directors might negatively affect the studios in particular and copyright owners generally. Directors (and perhaps others) would have judicially established rights that continue after they have completed a film. Such rights could be exercised against the studios as well as the public and might give directors and others more power over how studios edit their films. Such issues would at least have to be factored into contract negotiations and might make obtaining permission to alter films for television, air-line, or other use more expensive.

Success by the motion picture studios would vindicate their copyrights and give them effective control over any new motion picture art form. However, it could exacerbate their ongoing public relations problems. Administering legal thrashings to small companies that are only trying to produce the family-friendly entertainment that the studios already provide to broadcast television might be perceived as hypocritical and would likely make the studios a target for political attack.

Given the policy implications, is there a political solution? A compulsory licensing system has been suggested but would be cumbersome and require creation of new bureaucracies by content owners. It would also require a blanket mandatory license that would dramatically undercut the rights of copyright owners and seems disproportionate to the problem it is intended to solve.

Is there a business solution? Licensing agreements would solve the problem, but neither the directors nor studios appear likely to provide them. The studios could make more money and blunt public criticism by simply marketing the television versions of the motion pictures. They could, for example, license their television cuts for use on a specialized cable or satellite channel or sell VHS versions of the television cuts through specialized marketing channels without significantly affecting the market for their original versions. They could provide their television cuts on DVDs, either alone or with the the-

atrical version and/or a director's cut of the film. Such alternative cuts would not detract from the market for the original motion picture, since it would be packaged with it as a value-added feature. This method would satisfy most of those frustrated by the unavailability of that product in edited form. Indeed, combining a television cut with a director's cut would create an additional creative outlet for directors who lack final cut authority.

Whether the studios will take advantage of this opportunity is uncertain. In the meantime, control of entertainment content faces an unpredictable fate with effects that will be coming soon to your local video stores. ■

¹ *Huntsman v. Soderbergh*, No. 02-CV-1662 (D. Colo. 2002).

² RUTH A. INGLIS, *FREEDOM OF THE MOVIES* 25 (1947); RICHARD S. RANDALL, *CENSORSHIP OF THE MOVIES* 10 (1968).

³ RANDALL, *supra* note 2, at 11, 14, 67.

⁴ *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244-45 (1915); *United States v. Paramount Pictures, Inc.*, 34 U.S. 131, 166 (1948); *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

⁵ See, e.g., *An Uncensored Look at How Censorship Came to the American Film*, at <http://www.eonline.com/Features/Specials/Ratings/Two/index.html>; Chia Evers, *Self-Censorship in the History of Hollywood*, available at <http://www.artsandthelaw.com/html/>.

⁶ See *The Motion Picture Production Code of 1930*, available at <http://www.artsreformation.com/a001/hays-code.html>.

⁷ See <http://www.afi.com/tv/movies.asp>.

⁸ PETER BISKIND, *EASY RIDERS, RAGING BULLS* 20-22 (1998).

⁹ See *An Uncensored Look at How Censorship Came to the American Film*, *supra* note 5.

¹⁰ See *id.*; see also <http://www.mpa.org/movieratings>.

¹¹ See 47 U.S.C. §326.

¹² See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (approving federal regulation of broadcast programming); *FCC v. Pacific Found.*, 438 U.S. 726, 728 (1978) (Intrusiveness of broadcasting justified ban on offensive speech.).

¹³ 17 U.S.C. §106. To maintain some semblance of artistic integrity, the Directors Guild Basic Agreement calls for the studios to permit directors to make those cuts where possible, at no charge to the studios. See Directors Guild of America, Basic Agreement of 1999, §7-509, available at <http://www.dga.org>.

¹⁴ The Supreme Court has affirmed the legality of video recorder copying as a fair use under copyright law. *Sony v. Universal*, 464 U.S. 417 (1984).

¹⁵ See, e.g., MICHAEL MEDVED, *HOLLYWOOD V. AMERICA: POPULAR CULTURE AND THE WAR ON TRADITIONAL VALUES* (1992). In fact, 23 of the 25 most financially successful films of all time (*The Exorcist* and *The Godfather* being the exceptions), and the great majority of the top 100, are rated G, PG, or PG-13. See *Top Grossing Films Ever*, at <http://www.the-movie-times.com/thrsdir/alltime.mv?domestic+ByDG>.

¹⁶ For example, Martin Scorsese recently stated that when he directed films for Roger Corman, he was required to include actual or apparent nudity every 15 minutes in the final cut. *Inside the Actors Studio: Martin Scorsese* (Arts & Entertainment Network broadcast, Dec. 15, 2002).

¹⁷ See *DGA to Battle Two Types of Third-Party Editors*, HOLLYWOOD REPORTER, Oct. 30, 2002; Second Amended Complaint (Oct. 31, 2002) and Clearplay, Inc.'s Reply

and Counterclaim (Dec. 13, 2002), *Huntsman v. Soderbergh*, No. 02-CV-1662 (D. Colo. 2002).

¹⁸ Louis Aguilar, *Legal Battles Divide Film "Sanitizers,"* DENVER POST, Nov. 20, 2002.

¹⁹ Joal Ryan, *Dirty Little War over "Clean" Movies*, E! ONLINE NEWS, at <http://www.eonline.com/News/Items/0,1,10578,00.html>; *DGA to Battle Two Types of Third-Party Editors*, THE HOLLYWOOD REPORTER, Oct. 30, 2002; Gary Gentile, *Content Cleaning Software Angers Some*, available at <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/5094390.htm>.

²⁰ Vince Horiuchi, *Clean Flicks Boss Wants No Part of Suit*, SALT LAKE TRIBUNE, Aug. 31, 2002; Brian McTavish, *Movie Cleansing Takes Off in Utah*, KANSAS CITY STAR, Sept. 30, 2002.

²¹ See 17 U.S.C. §106A.

²² See Second Amended Complaint (Oct. 31, 2002) and Clearplay, Inc.'s Reply and Counterclaim (Dec. 13, 2002), *Huntsman v. Soderbergh*, No. 02-CV-1662 (D. Colo. 2002).

²³ *Gilliam v. American Broad. Co.*, 538 F. 2d 14 (2d Cir. 1976).

²⁴ *Id.* at 26.

²⁵ *Choe v. Fordham U. Sch. of L.*, 920 F. Supp. 44, 48 (S.D. N.Y. 1995).

²⁶ *Playboy Enters., Inc. v. Dumas*, 831 F. Supp. 295, 316 (S.D. N.Y. 1993), *modified on other grounds on rehearing*, 840 F. Supp. 256 (S.D. N.Y. 1993), *remanded*, 53 F. 3d 549 (2d Cir. 1995), *cert. denied*, 116 Sup. Ct. 567 (1995).

²⁷ *Cf. Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924); *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947); *Rolex Watch U.S.A., Inc. v. Michel Co.*, 179 F. 3d 704 (9th Cir. 1999).

²⁸ 15 U.S.C. §1125(c).

²⁹ *Chamberlain v. Columbia Pictures Corp.*, 186 F. 2d 923, 925 (9th Cir. 1951).

³⁰ *Lord Simon Caerns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013 (C.D. Cal. 1998).

³¹ *Nabisco, Inc. v. P.F. Brands, Inc.*, 191 F. 3d 208 (2d Cir. 1999); *New York Stock Exch., Inc. v. New York, N.Y. Hotel, LLC*, 62 U.S.P.Q. 2d 1260 (2d Cir. 2002).

³² See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§13:2, 3, 6 *et seq.*

³³ *Mosely v. V. Secret Catalogue, Inc.*, Slip Op., 2003 U.S. LEXIS 1945 (Mar. 4, 2003).

³⁴ See 15 U.S.C. §1125(a), (c).

³⁵ See 17 U.S.C. §107.

³⁶ *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

³⁷ *Sony v. Universal*, 464 U.S. 417 (1984).

³⁸ See *Sony v. Connectix*, 203 F. 3d 596 (9th Cir. 2000) (interim copying of video game software that was necessary to obtain unprotectable elements of fair use under copyright law); *Sega v. Accolade*, 977 F. 2d 1510 (9th Cir. 1992) (same).

³⁹ 17 U.S.C. §1201(a); *Universal v. Corley*, 273 F. 3d 429 (2d Cir. 2001).

⁴⁰ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99 (2d Cir. 1951).

⁴¹ *Maljack Prods. v. UAV Corp.*, 964 F. Supp 1416, 1426-28 (C.D. Cal. 1997).

⁴² *Louis Galoob Toys v. Nintendo of Am.*, 964 F. 2d 965 (9th Cir. 1992).

⁴³ *Id.* at 970.

⁴⁴ See *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F. 2d 278 (9th Cir. 1989) (hotel's rental of video discs not a public performance because hotel not a public place); see also *Columbia Pictures Indus., Inc. v. Redd Horne*, 749 F. 2d 154 (3d Cir. 1984) (The plaintiffs conceded that in-home use of video cassettes is not a public performance, but the court held that a video cassette shop that rented tapes and provided private screening rooms that permitted no more than four related people violated the "public performance" rights of the motion picture studios.).

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