April 2008

Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection

Tyler McCormick Love
University of Georgia School of Law

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl

Part of the Commercial Law Commons, Intellectual Property Law Commons, and the Sports Management Commons

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol15/iss2/5

This Notes is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
THROWING THE FLAG ON COPYRIGHT WARNINGS: HOW PROFESSIONAL SPORTS ORGANIZATIONS SYSTEMATICALLY OVERSTATE COPYRIGHT PROTECTION

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 370

II. BACKGROUND ............................................ 371
  A. RELEVANT STATUTORY LAW ............................... 371
     1. Copyright Law as Protection for “Authors and Inventors” 371
     2. Copyright Law as Protection for Consumer or User 372
     3. Law Concerning Copyright Notices and Warnings 374
  B. METHODS OF ENFORCEMENT PRIOR TO LITIGATION ............. 375
  C. PREVIOUS SIMILAR COPYRIGHT LITIGATION BY SPORTS LEAGUES 376
  D. THE COPYRIGHT WARNINGS IN QUESTION ..................... 379
     1. NFL and MLB Copyright Warnings 379
     2. Professor Seltzer’s NFL Warning Experience 380
     3. Prince and the Dancing Baby 381
     4. Examples of More Appropriate Warnings 382
  E. THE EMERGENCE OF COPYRIGHT MISUSE ...................... 383
  F. THE FEDERAL TRADE COMMISSION AND UNFAIR AND DECEPTIVE TRADE PRACTICES 385

III. ANALYSIS ............................................. 387
  A. PROBLEMS WITH THE COPYRIGHT WARNINGS IN USE ............ 387
  B. PROBLEMS WITH THE CURRENT COPYRIGHT WARNING SYSTEM .......... 389
  C. COPYRIGHT MISUSE AS POTENTIAL SOLUTION ................... 390
  D. FTC: IS THIS THE CORRECT FORUM TO ADDRESS THE PROBLEM? ... 391
  E. A POTENTIAL STATUTORY FIX ................................ 395

IV. CONCLUSION ............................................. 396
Every sports fan that watches television has encountered a copyright notice and warning. During most sports broadcasts, the announcer will read off a boilerplate warning after a commercial break or during a timeout. Although most fans ignore the legal technicalities of the copyright notices and warnings, choosing instead to get a cold beer from the fridge or talk to friends, the statements contained therein have great legal significance: They purport to establish the property rights that the copyright holder exclusively controls in the product being offered to the public.

Most professional sports leagues utilize substantially similar copyright notices and warnings, and there is no dispute that sports broadcasts are a copyrightable product. While copyright does establish something analogous to a property interest, it is an interest limited by the fair use doctrine and First Amendment considerations. The leagues do "own" the broadcasts of their games, but are there any serious problems when these sports leagues, or any copyright holder for that matter, misrepresent the extent to which the law actually protects their copyrighted material? When copyright holders represent protection of copyrighted material to be greater than what the law provides, such misrepresentation adversely affects both the average individual and businesses who can benefit from legitimate uses of copyrighted products. This is especially true in light of the multitude of uses made possible by the Internet.

On August 1, 2007, the Computer & Communications Industry Association (CCIA), a nonprofit organization representing the interests of a number of Internet and software companies including Google, Yahoo, and Microsoft, filed a complaint with the Federal Trade Commission alleging systematic overrepresentation of copyright protection by several professional sports leagues, publishers, and movie production studios. The complaint asserts that such overrepresentations discourage innovation, threaten competition, confuse consumers, and undermine the public welfare that the spirit of copyright law

1 See, e.g., Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 (7th Cir. 1986) (stating that simultaneously recorded live broadcasts are copyrightable); Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (discussing exclusive right to play-by-play descriptions of the games played by the Pirates).
2 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) ("Any individual may reproduce a copyrighted work for a 'fair use;' the copyright owner does not possess the exclusive right to such a use."); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (stating that "copyright law contains built-in First Amendment accommodations").
THROWING THE FLAG ON COPYRIGHT WARNINGS

seeks to protect. In order to avoid the ills created by deceptive, overstated, and intimidating copyright notices, this Note argues that one or more of the following steps needs to be taken:

(1) The copyright misuse doctrine must be strengthened so that a successful application of that defense, in the copyright warning context, will result in an overall reduction in misrepresentation of copyright protection;
(2) The Federal Trade Commission should take the opportunity presented by the CCIA complaint to order an injunction against the use of misleading warnings;
(3) Congress should create a statutory framework for copyright warnings that must be followed if a copyright holder chooses to use one.

II. BACKGROUND

A. RELEVANT STATUTORY LAW

1. Copyright Law as Protection for “Authors and Inventors.” Congressional power to create copyright protections stems from Article 1, Section 8 of the Constitution: “[t]he Congress shall have Power ... [t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Courts have interpreted the primary purpose of this grant of power to be creating the motivation for creativity to benefit the public generally, and any private benefit conferred on the copyright holder is of secondary consideration.

Sections 101 to 803 of the Copyright Act of 1976 have codified copyright protection for “original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced, or otherwise communicated.” Broadcasts of sporting events fall under the category “motion pictures and other audiovisual works” included in the text of the statute. Live broadcasts of things like sporting events also satisfy the fixation requirement (that the work be “fixed in any tangible medium of expression”) as long as they are

---

4 Id. ¶ 4.
6 Sony Corp. of Am., 464 U.S. at 429 (citing United States v. Paramount Pictures, 334 U.S. 131, 158 (1948), which discusses the rationale for copyright law).
8 Id. § 102(a)(6).
9 Id. § 102(a).
Copyright law exists to protect certain exclusive interests that the owner holds in his or her products, including (1) reproduction, (2) preparation of derivative works, (3) distribution, (4) public performance, (5) public display, and (6) public audio transmission. These exclusive rights represent a statutorily constructed limited monopoly for the copyright holder. Congress’s ultimate objective in defining these rights and, subsequently, for the courts interpreting them, is to balance the benefit to the public derived from the incentive to produce with the harm done to the public by creating a temporary monopoly.

2. Copyright Law as Protection for Consumer or User. The Copyright Act, in order to ensure the proper balance of private rights and public benefit and to codify a judicially-created doctrine, includes a fair use exemption for uses of copyrighted works that do not constitute infringement. The statute presents a non-exhaustive list of potential purposes that courts could consider fair uses as well as a list of factors to assist in that determination. Potential purposes include “criticism, comment, news reporting, teaching ... scholarship, or research.” The factors for assessing whether the use should be considered a fair use are as follows:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.\[17\]

Courts have not treated the codified fair use doctrine as a rigid rule but rather employ it as a helpful guide in applying a concept that has no set definition and requires a case-by-case factual analysis.\[18\] The codified language merely expresses the "equitable rule of reason" that a court must apply, when necessary, in a copyright dispute.\[19\] In some respects, the flexible nature of fair use is preferable because it avoids the inevitable injustices that would occur under a rigid doctrine, but the flexibility also leads to less predictability in the law and inconsistencies in different courts' decisions.\[20\] In any case, the fair use doctrine has developed into one of the main tools that a court will use when it feels that rigidly enforcing a copyright holder's protection will run contrary to the purposes of copyright law and the First Amendment.\[21\] Fair use is important beyond its abstract role in protecting constitutional priorities; it also plays a pivotal role in the economy because a large number of industries rely on or benefit from fair use.\[22\]

In addition, works deemed to be "transformative" in nature can fall within the protections of the fair use doctrine even if the transformed work is commercial.\[23\]

\[17\] Id.
\[18\] Sony Corp. of Am., 464 U.S. at 448 & n.31.
\[20\] See, e.g., Cecilia Ogbu, Note, I Put Up a Website About My Favorite Show and All I Got Was This Louy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners, 12 S. CAL. INTERDIsC. L.J. 279, 297 (2003). Ogbu discusses two cases involving the posting of documents of the Church of Scientology. Id. While the facts were quite similar, the cases came out differently in two different district courts, one finding fair use and the other rejecting that argument. Id. In Religious Tech. Cir. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519 (D. Colo. 1995), the court determined that posting the Church's works was a fair use because it was a non-commercial activity, part of a commentary on the ongoing controversy surrounding the Church, and it did not affect the market. Id. at 1525–26. In doing so, the court gave great weight to the first and fourth factors in § 107. Id. In Religious Tech. Cir. v. Netcom On-line Commc'ns, Inc., 923 F. Supp. 1231 (N.D. Cal. 1995) the court found the postings of Church works were not a fair use because they used copyrighted materials and added little of their own creative input. Id. at 1249. This approach gave great weight to the third factor in § 107. Id.
\[21\] See Symposium, Panel III: Fair Use: Its Application, Limitations and Futures, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1022 (2007) (stating view of panelist Paul Aiken that "[f]air use . . . has traditionally helped define the boundary between . . . the commercial incentives secured by copyright and the right to free expression protected by the First Amendment").
\[22\] See THOMAS ROGERS & ANDREW SZAMOSSZE ZEGI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 6–7 (2007), http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf [hereinafter ROGERS & SZAMOSSZE ZEGI STUDY]. This study found that fair use industries contributed $2.2 trillion to the U.S. economy in 2006, a figure that makes up 16.6% of the total U.S. dollar GDP. Id.
Most notably, parodies of copyrighted works can borrow elements from those works as 2 Live Crew did when it parodied Roy Orbison’s “Pretty Woman.”

Even though 2 Live Crew’s song was commercial and borrowed the most recognizable portion of Orbison’s song, the use did not fail the four-factor balancing test of the fair use doctrine.

Another limitation on a copyright holder’s protection is that facts and ideas are not copyrightable. This distinction is embodied in the idea/expression dichotomy adopted in Feist Publications, Inc. v. Rural Telephone Co., Inc. According to the Supreme Court, “[a]ll facts-scientific, historical, biographical, and news of the day” are not, in themselves, copyrightable as they are “part of the public domain available to every person.” As a result of these limiting doctrines, copyright holders do not have exclusive monopoly rights to ideas, facts or uses deemed to be fair under the tests set forth in the fair use doctrine embodied in § 107 of the Copyright Act.

3. Law Concerning Copyright Notices and Warnings. The 1988 amendments to the Copyright Act altered the requirements for copyright notices on published works. Title 17, Section 401 of the United States Code sets forth the general requirements for a copyright notice, which consists of three elements:

1. the symbol © (the letter C in a circle), or the word “Copyright”, or abbreviation “Copr.”; and
2. the year of first publication of the work; [. . .] and
3. the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Importantly, the 1988 amendments removed the requirement that a notice be affixed to a published work in order for it to retain copyright protection. There

24 See id. (remaining for a determination whether the parody copied excessively from the original).
25 See id. (concluding it was error to presume unfairness of a commercial parody).
27 See id. at 348 (discussing how facts are not copyrightable and compilations are only copyrightable if they possess the requisite level of originality, but the facts contained therein do not become copyrightable by association); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) (discussing how a copyright owner’s rights exclude facts, ideas, and fair use).
29 See id. § 401 (substituting the heading “General Provisions” for “General Requirements” and the text “may be placed on” for “shall be placed on all”); see also Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs., Inc., 871 F. Supp. 709, 720 (S.D.N.Y. 1995) (finding that a copyright notice is no longer required after the Berne Convention Implementation Act of 1988,
is still an incentive for authors or owners to include copyright notices, however, because a valid copyright notice precludes a claim of innocent infringement.\(^{30}\)

The use of copyright warnings is similarly not required under any provision of the Copyright Act, and the Act makes no mention of warnings and gives no guidance as to their scope or content.\(^{31}\) One exception is the requirement that a standardized warning of copyright be used by certain libraries and archives.\(^{32}\) Copyright warnings serve practical purposes for the owner: a warning on a product makes it easier to establish willful infringement,\(^{33}\) and descriptions of punishments can deter infringement.

B. METHODS OF ENFORCEMENT PRIOR TO LITIGATION

Copyright holders have used two popular approaches to stop copyright infringement before resorting to litigation. Both of these approaches are relevant to the discussion of copyright warnings commonly used by sports leagues during broadcasts. First, a copyright holder can send a cease-and-desist letter directly to the alleged infringer notifying him or her of the use of copyright infringing content.\(^{34}\) This has been an effective method of asserting protection\(^{35}\) even if the claimed infringement may fall under fair use or another exception. This method is particularly effective when dealing with individuals who know little about the law and are hesitant to run head first into a legal battle with a major corporation like the National Football League or Major League Baseball.\(^{36}\) In fact, Fox Broadcasting Company nearly eliminated all fan sites that contained allegedly infringing material through a cease-and-desist letter campaign.\(^{37}\)

which "eliminated the notice requirement completely"\(^{38}\).


\(^{31}\) Id. §§ 101–803.

\(^{32}\) See 37 C.F.R. § 201.14(b) (2006) (providing a standard copyright warning that must be reproduced verbatim for certain library/archive works).

\(^{33}\) See 17 U.S.C. § 504(c)(2) (2000) (providing for enhanced damages if a copyright owner sustains the burden of proving willful infringement). A clear and visible warning can be helpful evidence in showing that infringement was willful.

\(^{34}\) See, e.g., Ogbu, supra note 20, at 303–04 (describing Fox Broadcasting Company's cease-and-desist letter campaign).

\(^{35}\) Id.

\(^{36}\) See id. Ogbu discusses the deterrent effect of Fox Broadcasting Company's cease-and-desist letter campaign. Id. It seem logical that similarly large corporations like the NFL and MLB with deep pockets and large teams of attorneys would also find success with cease-and-desist letters.

\(^{37}\) Id. Fox's letter campaign resulted in twenty-six of forty-three fan websites dedicated to The Simpsons shutting down and seventeen others removing all requested material. Id. at 303–04. While most fan websites went without a fight, some fan site owners complained that Fox was merely attacking "teenage webmasters who are simply appreciating a work of brilliance." Id. at 304. Others argued that the webmasters were exercising free speech and not profiting from the fan sites they had
A second method, the takedown notice, has emerged to deal with content posted by users on websites like YouTube that host user-created content. This method would be applicable if an individual posted video from a sport's broadcast on a hosting website. The Digital Millennium Copyright Act contains provisions limiting the liability of host websites and provides a detailed process for addressing infringing content posted on those sites. A simplified description of the process is as follows: the copyright holder first serves notice to the hosting website and the website receives safe harbor if it "expeditiously" removes the content. Upon notification of removal, the user who posted the content may then elect to serve a counter-notification to the host website if he or she believes the content does not constitute infringement. Then the host website provides the party who claimed infringement with a copy of the counter notification and informs him or her that the material will again be made available within ten business days. At this point, the party alleging infringement could file suit, and the alleged infringement would be handled by the courts. Some scholars have questioned whether this process adequately protects subscribers from wrongful takedowns. In any case, this procedure is currently used by copyright holders seeking to have content removed from websites that host subscriber-posted content.

C. PREVIOUS SIMILAR COPYRIGHT LITIGATION BY SPORTS LEAGUES

Both the National Football League (NFL) and Major League Baseball (MLB) are notoriously protective of the use of their product and overall corporate image. The NFL has extremely restrictive guidelines for use of its video and audio for

---

40 Id. § 512(g).
41 Id.
42 Id.
43 Urban & Quilter, supra note 38, at 628–34. The authors note that most service providers avoid liability for wrongful takedown through their terms of service. Id. at 629. As a result, despite statutory encouragement to replace content through the safe harbor provisions, there is little legal or financial incentive for them to do so. Id. The authors also point out that the extra-judicial nature of the § 512 procedures could present some due process problems, but the Senate Committee felt that the limitations imposed by the service contracts removed users’ due process claims. Id. at 634 (citing S. REP. NO. 105-190, at 20 (1998)).
media and personal use alike.\footnote{Eric Bangeman, NFL Stiff-Arms Internet Video, ARS TECHNICA, May 21, 2007, http://arstechnica.com/news.ars/post/20070521-nfl-stiff-arms-internet-video.html. Under NFL rules, game footage is completely exclusive to NFL.com, while forty-five seconds of footage from practice or news conferences can be used as long as no permanent archive is made and the content is removed within twenty-four hours. \textit{Id}.} MLB also maintains tight reigns over video content to benefit its MLB.TV feature, a service that includes Internet commercials and charges around $100.00 to watch non-hometown teams’ games for a season.\footnote{Eric Bangeman, MLB Swings for Revenue Fences with Webcast Advertising, ARS TECHNICA, Apr. 3, 2007, http://arstechnica.com/news.ars/post/20070403-mlb-swings-for-revenue-fences-with-webcast-advertising.html.} These leagues have litigated several different issues that implicate the scope of copyright protection. An early case established that a radio station could not place observers outside the stadium to relay play-by-play news to the radio station for broadcast.\footnote{Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 494 (W.D. Pa. 1938).}

As technologies have advanced, the means and opportunities of third parties to obtain broadcasts and information from sporting events have increased. The National Football League has been vigorous and mostly successful in its attempts to limit infringement. The NFL obtained an injunction against several St. Louis bar-restaurants that were using their satellite dishes to intercept clean feeds in a “blacked out” area to show to customers.\footnote{Nat’l Football League v. McBee & Bruno’s, Inc., 792 F.2d 726, 729 (8th Cir. 1986).}

In 1986 Major League Baseball won a dispute with its own players over ownership of broadcast rights.\footnote{Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986).} Players were contending that the League did not exclusively own the broadcast rights because their right of publicity entitled the individual players to rights in their names, pictures and performances.\footnote{\textit{Id}. at 666.} The court held that the players’ state law right of publicity was preempted by the federal Copyright Act and thus the individual Clubs have exclusive ownership in the copyright of broadcasts.\footnote{See id. at 673–74 (holding that copyrights in works made for hire are presumptively owned only by the employer, and the players failed to establish a genuine issue of material fact that there was an express agreement that would defeat that presumption).}

Recently, the Internet and other technologies capable of disseminating information in real time have been at the center of litigation by sports leagues. This technology has implicated the idea/expression dichotomy discussed in \textit{Feist Publications}.\footnote{See \textit{Feist Publ’ns, Inc. v. Rural Tele. Serv. Co., Inc., 499 U.S. 340, 350 (1991) (stating that while an original expression is copyrightable, the ideas of facts stated therein are not); see also supra notes 27–28 and accompanying text.} The National Basketball Association lost in a suit to restrict a
Motorola service that allowed customers to receive real-time scores and other basic game information on their pagers. The Professional Golf Association (PGA) had better success in protecting real time scores. A district court in Florida decided that a company could not free-ride on the PGA Tour's Real-Time Scoring System (RTSS) by syndicating scores and statistics generated by that system before they were released into the public domain.

Another recent controversy involving the idea/expression dichotomy has developed out of Major League Baseball's attempts to limit third parties from using compiled players' statistics for online fantasy sports. Currently, fantasy sports leagues have been successful in arguing that players' statistics do not warrant copyright protection and that licenses should not have to be obtained to use those statistics. It appears that the statistics in question are ultimately not copyrightable because they constitute facts which do not warrant protection.

One recent copyright spat that did not make its way to court created bad press for the NFL. In 2006, the NFL discovered that a Baptist church in Indianapolis was planning to have a Super Bowl party for the congregation and community members. The black letter of the copyright law supported the NFL's position that it would constitute infringement to show the game on a screen larger than fifty-five inches. The church backed down and cancelled the party, but following the incident the media pointed out a double standard in the NFL's enforcement of its rights: exempting bars and restaurants while prohibiting broadcast at other social gatherings. The NFL contends that it prohibits

53 Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 854 (2d Cir. 1997).
54 Morris Commc'ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1279–82 (M.D. Fla. 2002). The court distinguished this case from Motorola because the information gathered by the RTSS was not yet in the public domain and the realities of golf scoring preclude the kind of score reporting that is possible in basketball. Id. at 1279. The court reasoned that once the scores were released to the public, the property right in the scores vanished, but Morris could not syndicate those scores for its own use during the RTSS process. Id. at 1281. In this way the court was not saying that the PGA Tour had a property right in facts (scores), but rather that it had a property right based on restrictions it could place on access people had to the event before the facts entered the public domain. Id.
56 See id. at 1101 (explaining the lack of originality in player statistics).
58 Id. (indicating the church planned to use a projection screen much larger than fifty-five inches); see also 17 U.S.C. § 110(5)(B)(ii)(II) (describing exemption for screens smaller than fifty-five inches).
59 Id. The NFL further argued that the church could not use the words “Super Bowl” in its fliers for the event. Id. The NFL also claimed that the church could not use the event, even if it
broadcasts at such gatherings because they skew Nielson ratings, which measure audience size and help determine advertising rates and revenue.  

The foregoing cases did not discuss or involve any aspect of the validity of the various leagues' copyright warnings. A search of case law did not turn up any previous cases similar to the present suit brought by the CCIA that exclusively question the valid scope of copyright warnings. In the context of this Note, the foregoing decisions are important, however, because they represent the current legal boundaries of copyright protection that courts have established for sports leagues. Understanding those court-interpreted boundaries and the scope of the underlying copyright law is important in order to comprehend the extent to which the leagues are attempting to expand their protections through misleading copyright warnings.

D. THE COPYRIGHT WARNINGS IN QUESTION

1. NFL and MLB Copyright Warnings. Different sports leagues employ varying but substantially similar types of copyright warnings in their sports broadcasts. For example, during NFL games, the following warning is read or displayed: "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited." The warning presented by Major League Baseball is similar in many respects: "This copyrighted telecast is presented by the authority of the Office of the Commissioner of Baseball. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated, without express written consent." These two examples paint a picture of the typical copyright warnings used by sports leagues. Certainly some of the claims made therein are supported by the Copyright Act and case law; some are not.

conformed to the screen size requirement, to promote a "message" by highlighting the coaches' professed faith in God. Id.

60 Id.

61 See generally Nat'l Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986), Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986), Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); Morris Commc'ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269 (M.D. Fla. 2002), and C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006). None of these cases address the validity of the copyright warnings used by a major sports league.


63 See, e.g., MLB Baseball: Arizona Diamondbacks v. Colorado Rockies (TBS television broadcast Oct. 14, 2007). This is typical of the warning given by Major League Baseball during all its games.
2. Professor Seltzer's NFL Warning Experience. One interesting and ironic example exists of a situation that involves an NFL warning, a fair use defense, and the notice-and-takedown procedure described earlier in this Note. Law professor Wendy Seltzer posted a thirty-three second clip on YouTube taken from the 2007 Super Bowl that included a reading of the copyright warning dubbed over a video montage ending in a picture of the NFL logo (the video also includes several seconds of game footage). She ostensibly made this posting to educate people about exaggerated copyright warnings and to test whether the post would elicit a takedown response. Five days later, YouTube gave her notice that the NFL had sent them a takedown notice and that the video had been removed. Following the DMCA statutory procedure, Seltzer then sent a counter-notification, and the video was replaced. The NFL then, according to Seltzer, may have violated the procedure outlined under DMCA section 512. The NFL sent another takedown notice to YouTube, even though the statute provides that the content be reposted unless the service provider receives notification "that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system." Not only does the NFL's action seemingly ignore the proper takedown procedure, Seltzer argues that the action represents a material misrepresentation for which the NFL can be held liable. As of the writing of this Note, the video is once again available on YouTube although it is unclear whether the saga has completely played out.

---

65 Id.
67 See supra notes 38–42 and accompanying text.
71 Id.
73 Legal Tags, supra note 70 ("Sending a second notification that fails to acknowledge the fair use claims instead puts NFL into the 512(f)(1) category of 'knowingly materially misrepresent[ing] ... that material or activity is infringing.' "). On the other hand, the NFL argues that nothing in § 512 prohibits sending a second takedown notice if the copyright holder, in good faith, still believes the content is infringing. See infra note 77 and accompanying text.
74 See supra notes 16–17 and accompanying text.
Beyond the interesting spat over the legal technicalities of DMCA procedures, the original YouTube posting by Seltzer is also important as an example of a use that is permissible under copyright laws but clearly prohibited by the copyright warning. Under the fair use balancing test, it is clear that at least three of the four fair use factors to consider would weigh heavily in Seltzer’s favor, and any court would likely classify the post as fair use. First, the use of the material was not commercial in nature and was for educational purposes. Second, only thirty-three seconds out of the entire Super Bowl telecast were used in the clip, and only a small and inconsequential portion of the actual game footage appeared at the end of the clip. Third, it is difficult to think of any possible argument that posting a clip of the NFL’s copyright warning could possibly affect the potential market for or value of the Super Bowl.

While the whole situation might seem like an academic exercise with little real world relevance, Seltzer has arguably proven both points she set out to prove. First, the NFL’s copyright warning misstates the law and does not recognize legitimate uses. Second, current law leans heavily against the user of legitimate content because less persistent and legally-informed people would have likely surrendered their legitimate free speech rights early in the convoluted back-and-forth between copyright holder, content poster, and website.

3. Prince and the Dancing Baby. In the fall of 2007, Universal Music Publishing Group sent a takedown notice to YouTube regarding a twenty-nine second video of a baby dancing while a Prince song, “Let’s Go Crazy,” plays faintly in the background. The mother of the baby, Stephanie Lenz, first reacted with fear to the takedown notice, but later got angry and filed a counter-notice and had the video reinstated on YouTube. With the help of the Electronic Frontier Foundation, a cyber rights organization, she is now suing the record company for

---

75 See supra notes 16–17 and accompanying text.
76 YouTube-Super Bowl Highlights, http://www.youtube.com/watch?v=a4uC2H10ulo (last visited May 18, 2008). The video contains the approximately eleven second copyright warning that is shown coming out of a commercial followed by twenty-two seconds of footage of the Indianapolis Colts preparing to kickoff.
79 Jim Avila et al., The Home Video Prince Doesn’t Want You to See, ABC NEWS, Oct. 26, 2007, http://abcnews.go.com/TheLaw/Story?id=3777651&page=1. Universal stated that the whole saga was initiated by Prince himself, who according to sources in the story “scours” the Internet finding Prince-related content and demanding that it be taken down. Id.
abusive practices under the DMCA. Under a fair use analysis, Lenz would seem safe in any infringement litigation, although it is unclear if she can win a suit alleging abusive practices without any tangible damages. The use was not commercial in nature; the amount and substantiality of the use was small because only thirty seconds of the song were used and the words and music are hardly discernable; the use will have no impact on the marketability of the work since the sound quality and small amount of the song used would not lead anyone to forgo purchasing the actual CD. Universal has recently dismissed its infringement complaint. The great irony of the story is that the video, before being attacked by Universal’s legal team, had only received twenty-eight “hits” from family and friends of Ms. Lenz. As a result of Universal’s action and the story’s publicity, the video has now been viewed well over 400,000 times.

4. Examples of More Appropriate Warnings. The CCIA complaint presents examples of several copyright warnings used by copyright holders that do a much better job of expressing the true reach of their protections than the current warnings issued by the NFL and MLB. These warnings acknowledge the existence of fair use and avoid making the materially false and misleading statements that the NFL and MLB currently employ.

First, the CCIA complaint excerpts the warning from the book Hotel California: The True-Life Adventures of Crosby, Stills, Nash, Young, Mitchell, Taylor, Brown, Ronstadt, Geffen, the Eagles, and Their Many Friends by Barney Hoskyns, which reads: “No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means . . . except as permitted under Section 107 or 108 of the United States Copyright Act . . .” While this copyright warning begins with strong, expansive language similar to the NFL and MLB warnings, it explicitly refers to the portion of the Copyright Act that allows a user to make certain uses of a copyrighted work without any authorization from the copyright holder. The warning not only gives the reader the knowledge that

---

81 Avila et al., supra note 79; see also supra notes 16–17 and accompanying text.
82 Id.
85 CCLA Complaint, supra note 3, at 8–9.
86 Id.
87 Id. at 8.
88 Id.
some uses may be permissible but also makes explicit reference to the Copyright Act.\textsuperscript{89}

The CCIA also presents a copyright warning on its own fair use study.\textsuperscript{90} The warning takes great care to acknowledge that the CCIA does not have an absolute monopoly over the use of the contents of the study and that exceptions such as fair use exist.\textsuperscript{91} The warning states: "We recognize that copyright law guarantees that you, as a member of the public, have certain legal rights. You may copy, distribute, prepare derivative works, reproduce, introduce into an electronic retrieval system, perform, and transmit portions of this publication \textit{provided that} such use constitutes 'fair' use under copyright law."\textsuperscript{92} The warning goes on to explain how to receive permission for uses that go beyond fair use.\textsuperscript{93} As the CCIA is one of the leading organizations promoting open markets and fair use,\textsuperscript{94} it makes sense that it would emphasize an expansive reading of the fair use doctrine in its own copyright warnings. Interestingly, the CCIA makes it clear that the fair use doctrine applies to each of the exclusive rights in \textsuperscript{106} by listing them all.\textsuperscript{95} The warning is also framed in the affirmative language of "You may . . . provided that" instead of "may not."\textsuperscript{96}

E. THE EMERGENCE OF COPYRIGHT MISUSE

The doctrine of copyright misuse has grown out of the doctrine of patent misuse that developed over the second half of the last century.\textsuperscript{97} The patent misuse doctrine developed to discourage patent holders from intentionally claiming exclusive rights to things not included in the patent grant.\textsuperscript{98} Public policy supports such a doctrine because "the public in general suffers if an individual claims exclusive rights over something he did not create, because that individual removes from the public that which does not belong to him."\textsuperscript{99} This kind of activity thwarts the purposes of intellectual property protections and stifles innovation.\textsuperscript{100}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{89} Id.
\item \textsuperscript{90} ROGERS & SZAMOSSZEGI STUDY, supra note 22, at 2.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id. at 4–5.
\item \textsuperscript{95} Id. at 2.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Davis Scher, The Viability of the Copyright Misuse Defense, 20 FORDHAM URB. L.J. 89, 90–94 (1992).
\item \textsuperscript{98} Id. at 94 (citing Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 493–94 (1942)).
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id. at 90–91.
\end{enumerate}
\end{footnotesize}
More recently, a variation of this doctrine has been applied to copyright law in limited circumstances. In 1990, the Fourth Circuit held that a misuse of copyright defense was a valid defense against a claim of infringement. In that case, the court agreed with the defendant that the copyright holder’s use of anticompetitive clauses in its licensing agreements violated public policy, misused the copyright, and barred the plaintiff’s ability to recover damages for infringement.

In its relatively short history, copyright misuse has mainly been asserted “in cases that involve (1) blanket licensing of copyrighted works; (2) licensing agreements with anticompetitive clauses; (4) [sic] a refusal to license content; and (4) tying practices, in which the sale of copyrighted material is conditioned on the purchase of other commodities.” The only case involving a sports league and a copyright misuse defense did not involve the warning but rather involved licensing of blacked out games. In that case, a bar played locally blacked out NFL games using a special antenna to pick up distant signals, and the court found that the NFL had not misused its copyright by arranging a licensing agreement that blacked out local games if the team had not sold out all the available tickets seventy-two hours prior to kickoff.

Currently, no uniform application of copyright misuse exists, and the doctrine is at various levels of development in different jurisdictions. Clearly, for copyright misuse to have any meaningful application to copyright warnings, the doctrine would need to be clarified and solidified. One case that incorporates a misleading copyright warning into its copyright misuse analysis is *Vogue Ring Creations, Inc. v. Hardman.* The plaintiff, while the litigation was in progress, published a warning in a Rhode Island paper claiming that certain statutory penalties for infringement were mandatory, that Vogue would invoke those penalties, and that the infringer would be liable for court and attorney fees. These statements misrepresented the law because the application of these penalties was within the discretion of the judge. The court declined to go so far as to say that such misrepresentations in a copyright warning could alone sustain

---

101 Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990).
102 Id. at 979.
105 Id. at 1168.
107 Id. at 91.
109 Id. at 611 & n.31.
110 Id. at 616.
a defense. Instead the court stated, “Such a misstatement standing alone, may not be sufficient to support a complaint of unclean hands. However, it may be considered in conjunction with the other allegations I have discussed.” It is unclear from the court’s opinion if the fact that the copyright warning was posted subsequent to the commencement of litigation had any meaningful effect on the court’s decision. Because sports leagues post their copyright warnings prior to any infringement action, this distinction could make a difference.

Some scholars have specifically identified copyright misuse as a potential vehicle for combating exaggerations by copyright holders. Describing misleading copyright warnings as “abuse of process,” Kathryn Judge explains that warnings can be misused by attempting to expand substantive rights, remedial rights, or both. Judge Richard Posner and William Patry argue that such action can be used to “extract a licensing fee or other profit” and that when the warning “grossly and intentionally exaggerates the copyright holder’s substantive or remedial rights, to the prejudice of publishers of public-domain works, the case for invoking the doctrine of copyright misuse seems to us compelling.” However, they warn against using copyright misuse too aggressively as it would result in “leading [copyright holders] out of an abundance of caution to underenforce their legitimate rights.”

F. THE FEDERAL TRADE COMMISSION AND UNFAIR AND DECEPTIVE TRADE PRACTICES

The CCIA decided to attack the misleading copyright warnings by filing its complaint with the Federal Trade Commission alleging unfair and deceptive trade practices. The Commission’s power to regulate unfair and deceptive practices is codified in 15 U.S.C. § 45 and in relevant part states:

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair

---

111 Id.
112 Id.
113 Kathryn Judge, Note, Rethinking Copyright Misuse, 57 STAN. L. REV. 901, 929 (2004).
115 Id. at 1659.
116 CCIA Complaint, supra note 3.
methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.\textsuperscript{117}

An important jurisdictional aspect of the FTC's ability to issue complaints involves a finding that the situation is in the "interest of the public."\textsuperscript{118} The courts are available to adjudicate claims involving purely private disputes.\textsuperscript{119} Facts that give rise to a private dispute may also affect the public interest sufficiently so that the dispute would fall within the jurisdiction of the Commission.\textsuperscript{120}

The general elements of a deceptive acts claim include a "showing that the defendant committed a deceptive act or practice, that the deception occurred in the course of conduct involving trade or commerce, that the plaintiff suffered actual damage, and that the damage was proximately caused by the deception."\textsuperscript{121} A great deal of the Commission's deceptive acts cases under 15 U.S.C. § 45 have involved false or deceptive representations in advertising. For example, in a case in which the FTC was examining whether an advertisement was misrepresenting the moistness of competitors' shaving foam, the reviewing court agreed with the Commission's findings that using a "simulated lather" to represent competitors' products was a violation of the Federal Trade Act where the "simulated lather" had "none of the characteristics of a shaving cream except the property of foaming."\textsuperscript{122}

In the false advertising context, the FTC has the authority to issue cease-and-desist orders and injunctions as well as require corrective advertising and disclosures.\textsuperscript{123} While the FTC has broad discretion to regulate many forms of unfair trade policies, the Commission has not addressed an issue like the one presented concerning the scope and misuse of copyright warnings. Under the Sherman Anti-Trust Act, any "attempt indirectly to extend the scope of a lawful monopoly: e.g., a patent or a copyright, beyond the terms of the grant" is unlawful.\textsuperscript{124} While that language looks promising in the situation of overly
expansive copyright warnings, the doctrine has only been exercised in more traditional antitrust situations such as when a copyright or patent holder expands its limited monopoly through the use of unfair licensing, price fixing or tying arrangements.\textsuperscript{125}

III. ANALYSIS

A. PROBLEMS WITH THE COPYRIGHT WARNINGS IN USE

The NFL’s copyright warning is incredibly expansive, and it is difficult to conceive of any use without consent, aside from watching the game on one’s home television, that would not violate the terms of the warning.\textsuperscript{126} The warning does not acknowledge the fact that the copyright holder, in this case the NFL, has no authority to prohibit use of facts or uses protected by the fair use doctrine and that no consent is necessary for those uses.\textsuperscript{127} Certainly uses exist that would be perfectly legal, but the overreaching scope of this warning would make them seem entirely prohibited.

The copyright warning raises the question of which fair uses the NFL would claim to be infringement. These possible uses can only be addressed as hypotheticals since no highly publicized cases exist aside from Seltzer’s YouTube saga.\textsuperscript{128} The following are some possible examples. If a high school football coach showed a short clip from an NFL game to his team in order to illustrate formations or techniques and educate the team on a particular play, would this be a fair use? It would certainly be prohibited by the terms of the NFL’s copyright warning.\textsuperscript{129} It would, however, be an educational use of a very limited portion of a copyrighted work that would have no adverse effect on the value of the work.

The NFL provides no explanation for what is included in the phrase “descriptions, or accounts,” which it supposedly prohibits.\textsuperscript{130} Would a blogger violate the NFL’s copyright by including a short description of a touchdown pass

\textsuperscript{125} See Straus v. Am. Publisher’s Ass’n, 231 U.S. 222, 236 (1913) (holding that agreement between parties to protect prices and trade of books violated the Sherman Anti-Trust Act and that the court of appeals erred in holding the agreement was nevertheless justified by the Copyright Act); see also Interstate Circuit, Inc. v. United States, 306 U.S. 208, 232 (1939) (holding that conspiracy by distributors of copyrighted motion pictures restraining the subsequent distribution of the movies in the open market violated antitrust law).

\textsuperscript{126} See supra note 62 and accompanying text.

\textsuperscript{127} See supra note 62 and accompanying text.

\textsuperscript{128} See supra notes 64–76 and accompanying text.

\textsuperscript{129} See supra note 62 and accompanying text. This use would fall under “any other use” which is prohibited.

\textsuperscript{130} See supra note 62.
or punt return on his or her website? Can the blogger not quote a comment made by one of the play-by-play announcers in his description of an occurrence during the game? For that matter, could the same blogger describe anything more specific than the final score of the game or a player’s statistics? A literal reading of the warning would suggest that even discussing the game with a group of friends might fall within the prohibitions.  

It is theoretically possible that a person might forgo watching a game because he or she intends to be informed on the happenings of the game the next day in casual conversation with friends. Although it is difficult to see any means or motivation for the NFL to attempt enforcement at that level, the warning would still suggest such prohibitions exist. Whatever the case, these uses, even if they included limited reproductions, could certainly fall under any or all of the fair use exemptions for “criticism, comment, news reporting, [or] teaching.” Any attempt to discern the boundaries of the NFL’s warning clearly illustrates the absurdity of the scope of “forbidden” uses.  

Likewise, the MLB’s copyright warning not only ignores 17 U.S.C. § 107 like the NFL warning but also flatly contradicts those provisions. As with nearly any copyrighted work, there are forms of reproducing portions of a baseball telecast that would fall squarely within the definition of fair use as determined by weighing the factors set forth in § 107. The MLB, like the NFL, purports to prohibit the dissemination of “accounts and descriptions” of the game, which presents the same problems explained above for the NFL warning. As explained in the CCIA complaint, among other things, “[c]opyright serves to promote the dissemination of information by ensuring that ‘every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.’ ” If the FTC and courts follow the overarching purpose of copyright protection, rather than merely solidifying an expansive monopoly interest on the terms dictated by the MLB, the broad warning cannot stand.  

According to the terms of the MLB warning, a third party “reproducing” or “retransmitting” all or a substantial portion of the telecast would constitute a copyright infringement. That contention is supported by the holding in *McBee & Bruno’s, Inc.*, as well as 17 U.S.C. § 106, which protects the exclusive right to

---

131 See supra note 62 and accompanying text.  
132 See supra note 62 and accompanying text.  
134 See supra note 63 and accompanying text.  
135 See supra note 63 and accompanying text.  
137 See supra note 63 and accompanying text.  
138 Nat’l Football League v. McBee & Bruno’s, Inc., 792 F.2d 726 (8th Cir. 1986) (holding that
reproduce and create derivative works. In addition, such use of reproduced telecasts could conceivably adversely affect the market for the copyrighted work by either reducing ticket sales for games or skewing television ratings for the original broadcasts. The MLB warning claims that these reproductions cannot be made "in any form." It is not true, however, that any form of reproduction would violate copyright law.

B. PROBLEMS WITH THE CURRENT COPYRIGHT WARNING SYSTEM

The current law leaves it to the copyright holders and their lawyers to determine how they express the exclusive rights that they hold in their product. By allowing the copyright holder, through the copyright warning, to define the range of activities that it deems an infringement on its work, the incentive exists for copyright holders to avoid acknowledgement of uses that are allowed under the law and to exaggerate the prohibited uses in order to tightly control the use of the product.

This leeway for copyright holders to determine their own warnings allows them to take advantage of a general public that has very limited understanding of the contours of the complex laws that exist. Particularly in forums like the Internet, very few people understand what is and is not permissible. This state of confusion has led to countervailing forces. First, ignorance and apathy among individuals has led to strong "social norms" that result in "indiscriminate copying" and clear infringement. Napster and its progeny are great examples of how copyright holders have been negatively affected by unclear law, ignorance, and technology capable of exploiting both. The abundance of exaggerated warnings may even have the unintended consequence of causing much of the public to ignore warnings altogether. On the other hand, the uncertainty has also given birth to many of the tactics used by copyright holders. Uncertainty makes

a simultaneously recorded live broadcast of a football game is protected under the Copyright Act).

140 See id. § 107. This use would not only violate the exclusive rights of the copyright holder under 17 U.S.C. § 106, but would also likely fail the fair use balancing test of § 107 because the fourth factor, effect on market for or value of the work, would weigh heavily against the alleged infringer.
141 See supra note 63 and accompanying text.
143 Ogbu, supra note 20, at 283–85 (quoting STUART BIEGEL, BEYOND OUR CONTROL?: CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 74 (2001)).
144 See ALEJANDRO ZENTNER, MEASURING THE EFFECTS OF MUSIC DOWNLOADS ON MUSIC PURCHASES 2 (2005), http://som.utdallas.edu/capri/effect_music_download.pdf. This study finds that drop in CD sales coincide with the approximate date that Napster and other peer-to-peer programs came into existence. Id.
it easier for copyright holders and the media to portray a "more stringent regime than actually exists."145 With takedown notices and cease-and-desist letters, copyright holders can successfully intimidate individuals who have no knowledge of copyright law and, as a result, users acting in a legal manner often cede to the demands without a fight.146

C. COPYRIGHT MISUSE AS POTENTIAL SOLUTION

*Vogue Ring Creations, Inc.* suggests that copyright misuse can play a constructive role in addressing the problems of exaggerated copyright warnings.147 Under the limited framework discussed in *Vogue*,148 it seems that a false copyright warning, while not determinative, can supplement and strengthen other affirmative defenses.149 Accordingly, in a hypothetical situation concerning alleged infringement of a sports league’s material, a court following *Vogue* might allow evidence of false and misleading copyright warnings to be used to strengthen a borderline fair use claim.

There are several problems with relying on the copyright doctrine to impact the current copyright warning situation. First, the doctrine is developing slowly and has not been applied evenly or consistently in all the circuits. Significant expansion of the doctrine in all circuits would be necessary to give a holding like the one in *Vogue* teeth. Since the holding in that case did not rest solely on the court finding a misuse in the plaintiff’s warning, *Vogue* may not present a strong enough doctrine on its own to make a substantial difference.150

Second, it is not clear what exactly the remedy would be for a finding of copyright misuse. If copyright misuse maintains its parallels to patent misuse doctrine, the answer would be to withhold a remedy for a copyright holder from any infringer, at least until the misuse is “purged.”151 As Paltrow and Posner warn, such a penalty may go too far and cause copyright holders to under-represent their legitimate interests out of fear of losing all of their copyright rights due to

---

146 *Id.* at 284–85.
148 *See supra* notes 108–12 and accompanying text.
149 *See id.* at 614–16.
150 *Id.* at 616.
151 *See Judge, supra* note 113, at 909 (explaining that purging in patent misuse means that the holder abandons "the abusive practice and dissipation of any harmful consequences" (quoting 6 DONALD S. CHISUM, CHISUM ON PATENTS § 19.04 (2003))). Judge also explains, however, that differences in the process of obtaining a patent and in the protections afforded by a patent make it likely that the proper scope of a copyright misuse will take a different path from its patent law kin. *Id.* at 910.
small ambiguities in the law. Any smaller penalty, however, might present little deterrence for a powerful copyright holder. Under a strong copyright misuse doctrine, it may be possible that a party could blatantly infringe a company's sports broadcast, perhaps reproducing or displaying the entire game without authorization for commercial gain. If the court agreed with the defendant's assertion that the warning constitutes misuse, the copyright holder's rights would be unenforceable until the misuse ceased.

At first glance, this would seem like an extremely harsh penalty for the sports leagues. If a successful misuse defense played out, however, it would probably have relatively little impact on the leagues aside from forcing them to quickly edit their copyright warnings to conform to actual copyright law. Upon doing so, the copyright holding league could once again enforce its rights against infringement. Since the league would have a new, proper warning, subsequent infringers could no longer successfully invoke a copyright misuse defense on the grounds that the warning was a misrepresentation.

There is another potential problem with relying on the copyright misuse doctrine to quickly resolve the copyright warning issue even if the doctrine is sufficiently strengthened. Solidifying the doctrine will require litigation to make it through the inevitable appeals and ultimately reach the proposed conclusion. Since copyright misuse is an equitable defense, any remedy would be purely responsive and would require an alleged infringer, often an individual or small business with far fewer resources than a professional sports league, to engage in costly and uncertain litigation. The intimidating and one-sided nature of the current cease-and-desist and takedown notice regimes would likely cause the average infringer or fair user to back down before the stage where a copyright misuse claim would become relevant. Also, absent assurance that the misusing copyright holder would have to pay the defendant's legal fees, even a fair user or infringer that would be vindicated under the doctrine would have powerful financial disincentives in pursuing a protracted legal battle with a major corporation.

D. FTC: IS THIS THE CORRECT FORUM TO ADDRESS THE PROBLEM?

A search of case law showed no previous case heard by the Federal Trade Commission about the use of copyright warnings as an unfair and deceptive trade
practice. For that matter, copyright warning cases have not shown up in federal courts with the exception of *Vogue*, which addresses a related but substantially different use of a copyright warning. Technological developments have increased the importance of fair use interpretation, and potential fair uses increasingly expand or constrict commerce with respect to the Internet. The impact of the Internet on commerce and copyright is in its infancy, so it is understandable that FTC challenges involving copyright fair use have not been fully addressed.

The question that the FTC, and in all likelihood courts, will have to decide is whether these copyright warnings fall into the category of unfair and deceptive acts. While the Commission is not solely empowered to enforce antitrust laws, it does have jurisdiction over acts that run afoul of those laws as well as acts that fall short of antitrust violations but are nevertheless deemed unfair or deceptive. Any ruling prohibiting misleading copyright warnings would likely be a hybrid of the reasoning behind false advertising rulings and antitrust rulings. To the extent that a copyright holder is making false claims through its warning about the product it is placing in the marketplace, the ruling would have the flavor of a false advertising claim. These misrepresentations are materially different from a standard false advertising claim, however, in that they do not falsely represent the quality of the copyright holder's product or the products of any competitors. The misrepresentations in copyright warnings are an attempt to expand a legally granted limited monopoly, which is more closely analogous to antitrust actions.

Under the powers delegated to the Commission, this is an issue that can and should be addressed. The delegation of power to the Commission is broad and loosely defined, allowing it to address any unfair or deceptive acts affecting commerce. As established by the Rogers and Szamosszegi Study, an enormous amount of the economy relies on or benefits from fair uses of copyrighted materials. As argued by the CCIA in its complaint and by this Note, the copyright warnings commonly used by sports leagues and other copyright holders are deceptive in that they confuse consumers by misrepresenting the extent the

---

157 *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609 (D.R.I. 1976) (involving misrepresentations of the penalties a court would enforce against an infringer). In contrast, the warnings used by sports leagues misrepresent the copyright holder's exclusive control over a product.

158 See *Sarah McBride & Adam Thompson, Google, Others Contest Copyright Warnings*, WALL ST. J., Aug. 1, 2007, at B3 (discussing Google's project to digitize books and make portions available for viewing). Google has been sued and no decision has been made, *id.*, but this is a potential application of fair use that did not exist prior to the development of the Internet.


161 See *supra* note 3 and accompanying text.
law protects copyrighted material. It logically follows, then, that this is a situation that falls squarely within the Commission's authority to address deceptive acts that affect commerce. In addition, this is an issue that sufficiently implicates the public interest and is not merely a private dispute between two parties. First, the CCIA is made up of a large number of corporations that claim to be affected by the deceptive acts. Second, copyright warnings are addressed to the entire viewing public, and as such they affect how all interested consumers of the copyrighted products understand their rights.

In order to address copyright warnings in an antitrust framework, the FTC will have to transplant the copyright misuse doctrine onto its own proceedings. Any cease-and-desist order, injunction, or corrective order would have to be based on a finding that utilizes copyright misuse to forbid the use of copyrights to obtain monopoly powers in conflict with the public policy considerations embodied in copyright laws. One immediate problem for a copyright based antitrust claim is that the nature of the copyright is in many ways inherently anti-competitive. It is usually within the copyright owner's rights to decide the number of copies of a work to distribute at a chosen price and "...[thus], as the First Circuit pointed out, 'at least in a particular market and for a particular period of time, the Copyright Act tolerates behavior that may harm both consumers and competitors.' " Intellectual property rights do not, however, give the rights' holder the power to violate antitrust laws, so a delicate balancing of two somewhat contradictory legal frameworks is required to discern the point where lawful use of copyrights end. So, while a copyright, by definition, harms competition in some ways, it is the attempted overextension of the granted limited monopoly that gives the copyright warning situation an antitrust dimension.

In effect, by going through the FTC, something akin to copyright misuse can be used offensively rather than just as an affirmative defense. A finding by the Commission that the copyright warnings are deceptive acts could result in copyright holders changing their warnings without the need for a defendant in an infringement case to assert an affirmative defense. However, the end result of

162 CCLA Complaint, supra note 3.
163 See supra note 119 and accompanying text.
164 See supra note 3 and accompanying text.
165 See Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976 (4th Cir. 1990) (discussing the parallel policy considerations supporting patent and copyright protection that also support acknowledging a misuse defense for both situations when an action runs contrary to the constitutional purposes of the protections).
167 See id. (stating that courts are responsible for balancing the two statutory schemes, which results in inconsistent decisions)
either an affirmative or defensive approach would be similar. While a copyright holder would have to purge the misuse, i.e., change the warning, in order to reestablish its rights in a successful misuse defense, the Commission could directly order a change in the warning. If the CCIA is successful, this change would force the recognition of fair use exemptions and would end the absolute, exclusionary language currently employed in typical warnings.

Finally, in order to substantiate a deceptive acts complaint, the Commission would have to accept that the harms to be prevented encompass the prospective and inherently uncertain harms that misleading copyright warnings present to competition, the market, and innovation. In other words, the most difficult elements to establish in this claim will probably be the actual harm suffered and the proximate cause of that harm by the deceptive acts. This is a far more complicated situation than when the deceptive act involves false advertising or confusion of trademarks. In those cases, the harm is more tangible. Making false claims about a company's own products or the products of other companies can cause harm to both competitors and consumers. Likewise, in some cases, a company using a name confusingly similar to a preexisting company can create similar harms.

In contrast, the effect a copyright warning has on average consumers or other competitors and innovators is unclear. Warnings may have no effect on a large number of consumers as evidenced by the explosion of illegal downloading that has impacted the music and entertainment industries. In a very real sense, however, the misleading copyright warnings add increased confusion to an aspect of the law that very few people understand. The warnings arguably do a disservice beyond the confusion of individual consumers. While this Note specifically addresses the warnings employed by sports leagues, the issue extends to multiple areas of the copyright industry like DVDs, books, and computer software. As such, the harm extends well beyond couch potato sports fan to many forms of education, entertainment, and technology.

It is unclear how the Commission will proceed and whether it will file its own complaint against the industries listed by the CCIA. As this Note argues, the misleading warnings are deceptive acts that harm commerce. As such, the best solution would be a cease-and-desist order or injunction by the FTC that would prohibit using the warnings unless they are modified to more accurately represent the scope of protections afforded by the law.

---

168 See supra note 121 and accompanying text.
169 See supra note 122 and accompanying text.
170 See Am. Airlines v. N. Am. Airlines, 351 U.S. 79 (1956) (holding that airline's use of name "North American" could potentially result in "unfair or deceptive practice and unfair method of competition").
E. A POTENTIAL STATUTORY FIX

Another possible solution is a statutory fix in which mandatory guidelines are fashioned for copyright warnings. The vague state of copyright law is the source of much confusion. Many aspects of copyright law do not lend themselves to clear cut doctrine. Fair use is an example of a doctrine that requires a balancing test rather than black and white rules because no legislature could ever anticipate the range of uses in order to formulate definite rules.\(^\text{171}\) On the other end of the spectrum, other copyright laws are found in very lengthy, specialized statutes, like the DMCA, which very few lay people could or would take the time to understand.\(^\text{172}\) Fortunately, a statutory framework for copyright warnings would be fairly straightforward and easy to enforce because it would only place minimal additional burdens on copyright holders.

The law should present a specific set of guidelines to be followed if a copyright holder chooses to display a warning along with a product. As a parallel example, copyright notices are no longer necessary to secure a copyright, but there is still a statutory framework requiring certain elements for a valid copyright notice.\(^\text{173}\) The framework for a warning should take a similar form: it should not be mandatory to use a warning, but, if the choice is made to use such warning, the guidelines set forth must be followed.

These guidelines should not necessarily require the use of the fair use-friendly language of the copyright warning in CCIA’s study.\(^\text{174}\) At the same time, the guidelines must prohibit language that provides for no exceptions at all and presents a copyright as a limitless protection of all rights in a product. If necessary, the statutory provision could require that the warning be a verbatim reproduction of language provided for in the statute. This type of framework would follow the Code of Federal Regulations, which requires a verbatim reproduction of warning language for use by certain libraries and archives.\(^\text{175}\)

Because copyrighted works exist in so many forms, it may be more advisable to have flexible guidelines instead of a single warning with language that might only apply to works in another medium. In any case, the ultimate requirement must be an acknowledgment of fair use as an exception to the exclusive rights of a copyright holder. The following is proposed text that could be added to any copyright warning: “All copyrighted works are subject to the fair use exception embodied in 17 U.S.C. § 107. Any uses in excess of fair use, without permission,
may constitute copyright infringement.” The preceding example could comfortably fit into the text of a copyright warning for any type of copyrightable item. Its inclusion could be required with little burden on copyright holders.

IV. CONCLUSION

Three viable options exist to ensure that copyright warnings will actually be used to present accurate law to consumers and not to stifle all competition. First, a strengthened copyright misuse doctrine could provide alleged infringers with a valuable weapon. A successful defense would force copyright holders to adjust their warnings in order to receive any copyright protections. Second, the CCIA’s attempt to have the FTC address the problem could be successful. The FTC could order an injunction on the use of misleading warnings that would force copyright holders to abandon current warnings or adjust them to accurately represent the law. Third, Congress could set up guidelines for warnings that are mandatory for those who choose to use copyright warnings.

As sports leagues and other major copyright holders continue to misrepresent the extent of their legal rights through warnings, public confusion over copyright law is exacerbated and potential innovation is stifled. Copyright warnings are just a small piece of the problem, but it is important to take every step possible to create a clearer, more accessible copyright law. Because of the additional complications and opportunities presented by the Internet, all efforts need to be made to streamline copyright law and prevent misrepresentations from confusing the public and confounding the constitutional objectives of copyright protection.

Tyler McCormick Love