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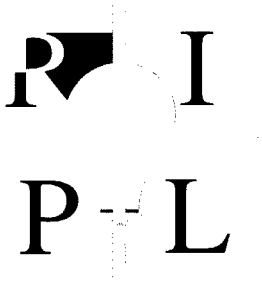

COPYRIGHT MISUSES, FAIR USE, AND ABUSE: HOW SPORTS AND MEDIA COMPANIES ARE OVERREACHING THEIR COPYRIGHT PROTECTIONS

CORY TADLOCK

ABSTRACT

A recent FTC complaint has generated questions about the legality and effects of blanket copyright warnings issued by large sports and media companies. Copyright warnings from the NFL, MLB, and major motion picture studios often assert that no use whatsoever of their materials can be made without express permission, contrary to several provisions of U.S. copyright law. This comment proposes limiting the content and language of such warnings so consumers have a clearer view of what copyright law allows, and are not intimidated into foregoing their rights to use protected works. Exceptions like fair use and the idea-expression dichotomy prevent copyright holders from completely prohibiting all uses of their copyrighted materials. Companies making these claims may be guilty of copyright misuse, a doctrine that offers courts the opportunity to scale back aggressive copyright warnings.

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COPYRIGHT MISUSES, FAIR USE, AND ABUSE: HOW SPORTS AND MEDIA COMPANIES ARE OVERREACHING THEIR COPYRIGHT PROTECTIONS

CORY TADLOCK*

INTRODUCTION: THE CHALLENGE OF COPYRIGHT WARNINGS

> We made it son!" said Homer Simpson, as he sailed Mr. Burns' yacht across the United States boundary line. "International waters—the land that law forgot!"
>
> Homer peered through his binoculars at the nearby ships. He saw cowboys having a Wild West gunfight next to a boat full of bikini-clad party girls. A bullfight took place atop a cabin cruiser, while a sea captain married a man and a cow.
>
> "Wow, you can do anything out here!" exclaimed Bart.
>
> "That's right," said Homer. "See that ship over there? They're rebroadcasting Major League Baseball with implied oral consent, *not express written consent*—or so the legend goes."[1]

Even before *The Simpsons* poked fun at big media companies' ominous copyright warnings, consumers had already shrugged their shoulders at them.[2] Many people can probably recite the Major League Baseball ("MLB") warnings from memory, as well as those of the National Football League ("NFL") and the ubiquitous FBI warnings on DVDs.[3]

If companies employing these notices seek to stem copyright violations, then the notices have proven ineffective, considering the record losses these companies claim to have suffered from piracy lately.[4] What they truly seek to accomplish is no secret: to convince the public, through pervasive and ominous warnings, that the smallest degree of unauthorized use of their material violates copyright laws, and that any such violation will be met with swift punishment.

Recently, the Computer & Communications Industry Association ("CCIA") challenged these warnings as unfair, confusing, and misrepresentative of copyright

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** Available at www.jmripl.com.

[1] *The Simpsons: The Mansion Family* (FOX television broadcast Jan. 23, 2000), *available at* http://watchthesimpsonsonline.com/movie/33-The_Simpsons_1112_The_Mansion_Family.html.

[2] John Eggerton, *NBC U: Copyright Warning Complaint is Frivolous,* BROADCASTING & CABLE, Aug. 1, 2007, http://www.broadcastingcable.com/article/CA6464843.html ("[T]he current FBI warnings are generally either ignored, overlooked, or made fun of, in part because of the hardline they effect—which consumers do not recognize as applying to them.").

[3] Maura Corbett, *Separating fact from fiction on digital copyrights*, CNET, Aug. 27, 2007, http://www.news.com/Separating-fact-from-fiction-on-digital-copyrights/2010-1030_3-6204450.html.

[4] Sarah McBride & Geoffrey A. Fowler, *Studios See Big Rise in Estimates of Losses to Movie Piracy*, WALL ST. J., May 3, 2006, at B1 (noting movie studios lose $6.1 billion globally per year, about 75% more than the prior estimate).

law.[5] The CCIA asked the Federal Trade Commission ("FTC") to reconfigure such notices to better reflect consumers' ability to make legal, unauthorized use of copyrighted material.[6] For example, there is considerable leeway for individuals to use such material in educational settings, and some parts of it may not actually be subject to copyright protection in the first place (e.g. plain facts, like unedited MLB player statistics).

The CCIA[7] filed its complaint against six sports, entertainment, and publishing companies alleging deceptive trade practices and unfair trade practices in violation of section 5(a) of the FTC Act, 15 U.S.C. § 45(a).[8] The complaint states that copyright warnings or anti-piracy warnings used by those companies "materially misrepresent U.S. copyright law" to the detriment of consumers.[9] According to the CCIA, the misrepresentation arises because (1) U.S. copyright law actively encourages "the unauthorized use of copyrighted works," and (2) "facts or ideas" are not copyrighted properties of those companies as falsely claimed.[10] The named companies have promulgated copyright warnings giving an impression no one may use their copyrighted materials for any purpose without their permission, and that this is the case for copyrighted material in general.[11] In particular, the complaint alleges that telecasts of the NFL[12] and MLB[13] falsely assert that no accounts or descriptions of

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[5] Request for Investigation and Complaint for Injunctive and Other Relief, *In re* Misrepresentation of Consumer Fair Use and Related Rights, No. _____ (Fed. Trade Comm'n Aug. 1, 2007), *as attached to* Letter from Matthew Schruers, Senior Counsel for Litig. & Legislative Affairs, Computer & Commc'ns Indus. Assoc., to Donald S. Clark, Sec'y of the Comm'n, Office of the Sec'y, Fed. Trade Comm'n (Aug. 1, 2007), *available at* http://www.ftc.gov/os/070801CCIA.pdf [hereinafter CCIA Complaint] (complaining against six copyright-holding corporations: the National Football League, Major League Baseball, NBC Universal, DreamWorks Animation SKG, Harcourt Inc., and Penguin Group (USA)). As a matter of policy, the FTC does not confirm or deny the existence of a non-public investigation, and therefore has not assigned a docket number or other identification to the CCIA's complaint. Letter from Matthew Schruers, Senior Counsel for Litigation & Legislative Affairs, Computer & Communications Industry Association to Cory Tadlock (Oct. 30, 2007, 12:53:00 CST) (on file with The John Marshall REVIEW OF INTELLECTUAL PROPERTY LAW).

[6] CCIA Complaint, *supra* note 5, para. 67.

[7] Computer & Communications Industry Association, http://www.ccianet.org/about.html (last visited April 17, 2008). The CCIA represents at least twenty-five major technology and computer companies, including Google, Microsoft, Oracle, Sun Microsystems, and Yahoo!. *Id.*; *see also* Letter from Prudence S. Adler, Associate Executive Director, Library Copyright Alliance, *available at* http://www.librarycopyrightalliance.org/FTC_ complaint_01aug07.pdf (describing a letter to the FTC Chairman to "support strongly the request for investigation and complaint for injunctive relief filed by the Computer & Communications Industry Association."). The Library Copyright Alliance collectively represents over 80,000 information professionals and thousands of libraries of all kinds. Library Copyright Alliance, Welcome, http://www.librarycopyrightalliance.org/ (last visited May 22,, 2008).

[8] CCIA Complaint, *supra* note 5, paras. 5–10, 52–61; *see also* Sarah McBride & Adam Thompson, *Google, Others Contest Copyright Warnings*, WALL ST. J., Aug. 1, 2007, at B3.

[9] CCIA Complaint, *supra* note 5, para. 18.

[10] *Id.*

[11] CCIA Complaint, *supra* note 5, para. 17.

[12] Eric Bangeman, *FTC Complaint Flags NFL, MLB, Studios for Overstating Copyright Claims*, ARSTECHNICA, Aug. 1, 2007, http://arstechnica.com/news.ars/post/20070801-ftc-complaint-flags-nfl-mlb-studios-for-overstating-copyright-claims.html. The NFL warns throughout its broadcast games, "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's

the games can be disseminated without written consent.[14] The complaint also cites misleading warnings[15] by motion picture companies on DVDs[16] and home video failing to acknowledge legitimate but unauthorized uses of their work for educational or critical purposes.[17] The CCIA argues that print media contains similar misrepresentations, warning "no part of this publication may be reproduced or transmitted in any form or by any means" without written permission.[18]

As a remedy to the misrepresentation problem, the CCIA seeks revised copyright notices that would call attention to companies' lawful protection of their intellectual property, while simultaneously highlighting the interests and rights of consumers to make reasonable use of protected material.[19] For instance, the CCIA approves of copyright notices that affirmatively acknowledge consumers' rights to make unauthorized use of the works.[20] This remedy, though, presents legal obstacles of its own.

This comment examines the capacity for government and consumers to reduce the hyperbole present in copyright warnings in order to achieve a more equitable

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consent is prohibited." *Id.*; *see also* NFL v. Primetime 24, 131 F. Supp. 2d 458, 464 n.4 (S.D.N.Y. 2001) (noting the NFL verbal copyright warning given in each and every game broadcast).

[13] McBride & Thompson, *supra* note 8, at B3. Major League Baseball presents the following warning during its broadcast games: "This copyrighted telecast is presented by 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." *Id.* The league has previously attempted (and failed) to enforce a copyright on its players' names and statistics as used by fantasy baseball games. C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006). Recently, MLB has moved to watermark its broadcasts so that it can monitor how they are used and distributed by television, cable and satellite stations around the world. Michael Hiestand, *Ripken Will Get to Take Swings at Actual Playoff Pitches as TBS Analyst*, USA TODAY, Oct. 3, 2007, at 2C.

[14] CCIA Complaint, *supra* note 5, para. 22.

[15] *Id.* para. 28. Warnings on DVDs produced by Universal and Morgan Creek, among other companies, assert, "Any unauthorized exhibition, distribution, or copying of this film or any part thereof (including soundtrack) is an infringement of the relevant copyright and will subject the infringer to severe civil and criminal penalties." *Id.*

[16] *Id.* The DVDs and their packaging include such statements as "WARNING: For private use only. Federal law provides severe civil and criminal penalties for the unauthorized reproduction, distribution or exhibition of copyrighted motion pictures and video formats." *Id.* para. 30. Some DVDs also give notice of penalties, noting, "Criminal copyright infringement is investigated by the FBI and may constitute a Felony with a maximum penalty of up to five years in prison and or a $20,000.00 fine." *Id.* para. 34.

[17] *Id.* paras. 31–32, 37. Such uses might include the reproduction, performance, or display of the materials in an academic environment. *Id.* para. 32. The FBI says its anti-piracy warning is "just getting started" and will soon appear "on a lot of different kinds of goods." F.B.I., The Anti-Piracy Warning Seal, http://www.fbi.gov/ipr/ (last visited May 22, 2008). In the meantime, the FBI is allowing anyone to use a non-specific warning for copyrighted material. *Id.* The current warning omits any reference to exhibiting copyrighted material, and specifically includes non-commercial infringement: "Warning: The unauthorized reproduction or distribution of this copyrighted work is illegal. Criminal copyright infringement, including infringement without monetary gain, is investigated by the FBI and is punishable by up to 5 years in federal prison and a fine of $250,000." *Id.*

[18] CCIA Complaint, *supra* note 5, paras. 39–42.

[19] *Id.* para. 67.

[20] *Id.* paras. 46–49 (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1 (2007)) (noting that Nimmer's text not only references applicable fair use statutes in its copyright statement, but also explicitly endorses a balance between copyright protection and public use).

balance of fair use rights and copyright protection. Presently, corporate copyright warnings have left consumers uninformed about the outer limits of infringing use. One of the byproducts of the mass uncertainty has been the spread of "copyright myths," such as the idea that nonprofit use does not require permission, or that playing less than thirty seconds of music is acceptable fair use.[21]

Section I of this comment provides some background regarding the complaints levied against the professional sports league, motion picture, and publishing businesses, and outlines three relevant areas of copyright law: fair use, the idea/expression dichotomy, and copyright misuse. Section II provides an analysis of the effectiveness of these legal approaches to the problem and focuses on the doctrine of copyright misuse as a solution. Finally, section III addresses whether a substantial problem even exists, and proposes ways for users and the Government to scale back overly aggressive copyright warnings, while ensuring copyright holders receive the full legal protection to which they are entitled.

I. BACKGROUND: THE USES AND LIMITS OF COPYRIGHT PROTECTION

This section introduces the complex legal and social problems associated with misleading copyright warnings. Part A sets forth the procedural framework for U.S. copyright law and the CCIA's complaint to the FTC. Part B explains the fair use doctrine. Part C addresses public confusion over copyright law in general, with emphasis on the fair use doctrine in particular. Part D reviews the idea/expression dichotomy in copyright law. Lastly, Part E considers the concept of copyright misuse.

A. CCIA Uses Defense for Offense

At the core of the argument between the challenged media companies and critics like the CCIA is a question of copyright "balance." The copyright clause in the U.S. Constitution sets a fair balance by flatly securing authors' exclusive rights in their works in return for disseminating their works to the public.[22] However, the current crop of copyright warnings tilts that balance in favor of copyright holders over copyright users.

Procedurally, once an author receives a federal certificate of registration, the author's copyright is presumptively valid.[23] Should the author then sue an accused infringer and demonstrate unauthorized copying of the author's protected work, the burden shifts to the accused.[24] The accused then bears the responsibility of persuading a court why an exception should be made to the author's copyright

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[21] *E.g.*, Ruth Okediji, *Givers, Takers, and Other Kinds of Users: a Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 168 (2001); Dennis M. Kennedy, *Key Legal Concerns in E-Commerce: The Law Comes to the New Frontier*, 18 T.M. COOLEY L. REV. 17, 32 (2001); *see also* Jessica Litman, *Essay: Copyright As Myth*, 53 U. PITT. L. REV. 235, 238–39 (1991).

[22] U.S. Const. art. I, § 8, cl. 8.

[23] 17 U.S.C. § 410(c) (2006).

[24] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159 (9th Cir. 2007); BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1142 (11th Cir. 2007).

protection, or why the author never had protection as to the aspects of his or her work that the infringer took.

In this sense, the CCIA has created a copyright defense while taking the offense via FTC regulations against deceptive and unfair trade practices.[25] As discussed below, there are at least three significant legal doctrines an accused infringer can invoke against the problem of copyright misrepresentation and overprotection: fair use, idea/expression, and copyright misuse. Common to all these doctrines is that they are a defense to copyright infringement. Once a copyright holder has put forward a case of prima facie infringement, in other words, the infringer may be able to rely on one of these three defenses and be excused by the courts.

The CCIA's complaint to the FTC is grounded in such defenses. The complaint alleges the six named companies have engaged in deceptive and unfair trade practices, violating Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).[26] These companies' copyright warnings are deceptive because they are "likely to mislead consumers" into believing copyright defenses do not exist or do not apply, and so consumers are persuaded to forego uses of the protected works that may be entirely permitted under federal law.[27] For example, the fair use defense has been explicitly incorporated into the copyright law as a non-infringing use.[28] Hence, it is deceptive for movie studios to assert that "*any*" unauthorized use constitutes infringement punishable by civil and criminal penalties.[29] Similarly, the copyright warnings are unfair because they intimidate consumers into forgoing such legally permitted uses, and because they attempt to withdraw consumers' rights to make such uses, contrary to the Constitution, Congress and public policy.[30] Taken at face value, these warnings seem to extinguish many longstanding and statutorily-enshrined defenses to copyright infringement.

As in other areas of civil litigation, a potential defendant to a copyright infringement action may take the offense by seeking a declaratory judgment that its actions constitute fair use or fall under another affirmative defense.[31] In a similar way, the CCIA has taken the offense by asking the FTC to rule against the onerous copyright warnings. In essence, the CCIA seeks a judgment that consumers can still legally make certain unauthorized uses of the companies' protected works, and that the companies' warnings do not overcome consumers' statutory and equitable defenses to copyright infringement.

Copyright law already favors the copyright holder over the consumer through its grant of exclusive rights to the holder, and because procedurally the consumer must prove his or her "innocence" as to infringement. The complained of copyright warnings threaten to tip over this balance by misleading and intimidating consumers into thinking they have no rights at all, except for those limited allowances the companies deign to grant them.

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[25] 15 U.S.C. § 45(a).

[26] *Id.*; CCIA Complaint, *supra* note 5, paras. 56, 61.

[27] CCIA Complaint, *supra* note 5, paras. 52–56.

[28] 17 U.S.C. § 107.

[29] CCIA Complaint, *supra* note 5, para. 28.

[30] *Id.* paras. 57–61.

[31] 28 U.S.C. § 2201; Buddyusa, Inc. v. Recording Indus. Ass'n of Am., Inc., 21 Fed. Appx. 52, 54 (2d Cir. 2001); Shloss v. Sweeney, 515 F. Supp. 2d 1083, 1085 (N.D. Cal. 2007).

B. The Fair Use Doctrine

The CCIA's complaint accuses sports and media companies of trying to expunge consumers' fair use rights.[32] As its name implies, the fair use doctrine lets consumers bypass copyright protection for certain socially useful purposes.

United States copyright law balances exclusive rights and the advancement of human intellect.[33] Authors deserve compensation for their efforts.[34] In return, the American public is allowed to reap the benefits of creative and hardworking constituents.[35] The various exemptions limiting the protections afforded to copyright holders are central to this balance.[36] The doctrine of "fair use" represents a longstanding and significant restriction on copyright holders' unrestrained control over their copyrighted materials.[37] However, at the same time, the extent of the doctrine's effect and magnitude is imprecise, thus resulting in lingering confusion over its application.[38]

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[32] CCIA Complaint, *supra* note 5, para. 24.

[33] David L. Clark, *Digital Millennium Copyright Act: Can It Take Down Internet Infringers?*, 6 COMP. L. REV. & TECH. J. 193, 1967 (2002); *see also* Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL'Y 61, 64–65 (2000) (describing copyright law "in reality" as a balance between content owners and distribution industries, not creators and public interest). *See generally* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1781–84 (2006) (outlining four major readings of the Copyright Clause, and relative contributions of the clause's two principles); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem in copyright law.").

[34] Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003). The Eldred court described the economic philosophy embodied by the Copyright Clause as "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Id.* Thus, "copyright law celebrates the profit motive" and recognizes that "the incentive to profit from the exploitation of copyrights will redound to the public benefit" through the proliferation of knowledge. *Id.* In this way the two goals are not mutually exclusive: "copyright law serves public ends by providing individuals with an incentive to pursue private ones." *Id.*

[35] *Id.* at 211–12 (describing the Copyright Clause as "both a grant of power and a limitation" (quoting Graham v. John Deere Co., 383 U.S. 1, 5 (1966))); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (stating copyright's primary objective is to promote scientific progress, not reward authors' labor).

[36] 17 U.S.C. § 108 (2006) (allowing libraries to copy materials without permission for archival and other scholarly purposes, as long as it is on a noncommercial basis); 17 U.S.C. § 109 (codifying the first sale doctrine, allowing people to borrow or sell copyrighted materials they own, highlighting music in particular); *see* Nicola Lucchi, *Intellectual Property Rights in Digital Media*, 53 BUFFALO L. REV. 1111, 1120-28 (2005); William Patry, *La La and Section 109*, Mar. 8, 2006, http://williampatry.blogspot.com/2006/03/la-la-and-section-109.html; *see also* 17 U.S.C. § 110 (allowing performances and displays for face to face teaching purposes, distance learning, religious services, and certain nonprofit performances).

[37] Michael B. Weitman, *Fair Use in Trademark in the Post-*KP Permanent *World*, 71 BROOK. L. REV. 1665, 1694 (2006). *See generally* Marshall A. Leaffer, UNDERSTANDING COPYRIGHT LAW 469–70 (4th ed. 2005) (describing fair use as "by far the most important defense to an action for copyright infringement").

[38] *E.g.*, Hofheinz v. AMC Prods. Inc., 147 F. Supp. 2d 127, 141 (E.D.N.Y. 2001) ("[P]otential infringers of plaintiff's copyrighted works . . . are likely to seek a license to avoid entering the murky realm of fair use law during the course of litigation."). The "Frequently Asked Questions" page of the U.S. Copyright Office website contains this succinct statement: "The distinction between 'fair

Fair use allows for certain unauthorized uses of copyrighted material without the liability associated with infringement.[39] The concept of fair use was judicially created[40] before its codification in the Copyright Act of 1976.[41] As a result, its contours and limits remain unsettled.[42]

When determining whether a given use of material infringes a copyright or could instead be considered legally acceptable fair use, 17 U.S.C. § 107 lists four factors to consider: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) effect on the value of the copyrighted work.[43] Generally, the most important aspect of the purpose factor is whether the new use is "transformative."[44] The more transformative the new use, the less weight is given to the remaining factors.[45] Among the four factors, the last one (effect on market value) has proven particularly contentious.[46] Courts must consider not only the current effect of an infringing use, but also its potential impact on later demand for the copyrighted work.[47] At the same time, the importance of the four factors can be overstated.[48]

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use' and infringement may be unclear and not easily defined." U.S. Copyright Office—Fair Use, http://www.copyright.gov/fls/fl102.html (last visited April 17, 2008).

[39] 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.").

[40] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); *see also* Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIAMI L. REV. 769, 779–85 (1984) (arguing that courts have interpreted common law as the most capable institution for updating fair use and copyright protection in the face of new technologies).

[41] 17 U.S.C. § 107; Neela Kartha, *Digital Sampling and Copyright Law in a Social Context*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 231 (1997).

[42] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–07 (1990).

[43] 17 U.S.C. § 107.

[44] L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 938 (9th Cir. 2002); Kartha, *supra* note 41, at 231. A transformative work "does not 'merely supersede the objects of the original creation' but rather 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1164 (9th Cir. 2007) (quoting Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994)).

[45] *L.A. News*, 305 F.3d at 938. *Sony Corp. of America v. Universal City Studios* is an exception that does not necessarily prove the rule, wherein the Supreme Court held that private, in-home taping of television programs constituted a fair use. 464 U.S. 417, 421 (1984). *See also* Sheila Zoe Lofgren Collins, *Sharing Television Through the Internet: Why the Courts Should Find Fair Use and Why It May Be a Moot Point*, 7 TEX. REV. ENT. & SPORTS L. 79, 103 (2006) (arguing that unlike music-sharing, downloading and uploading television programming through the Internet should be considered fair use). *But see* Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 699-705 (1995) (presenting an overview and criticism of the transformative use element).

[46] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-68 (1985); Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 267, 290–91 (2007).

[47] Campbell v. Acuff-Rose Music, 510 U.S. 569, 590 (1994). In particular, courts must evaluate "whether unrestricted and widespread conduct" of the use in question "would result in a substantially adverse impact" for the original work. *Id.*

[48] David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROB. 264, 280–82 (2000). Nimmer's comprehensive analysis of copyright cases since 1994 indicates there is little correspondence between valuations of the four categories (at least as espoused by Congress) and courts' decisions on fair use cases. *Id.* "Basically," Nimmer comments, "had Congress legislated a dartboard rather than the particular four fair use factors embodied in the

NFL telecasts warn that "any other use" of its product, including "descriptions, or accounts of the game" are prohibited.[49] MLB likewise asserts that "accounts and descriptions of this game may not be disseminated without express written consent."[50] As the CCIA argues,[51] such blanket statements are legally inaccurate.[52] First, the "bundle" of rights granted to copyright holders is discrete and limited.[53] Second, 17 U.S.C. § 107 explicitly provides for numerous uses that do not constitute copyright infringement, including "criticism, comment, news reporting, teaching" and scholarly work.[54] At the very least, "water cooler" discussion of the latest game is permissible, as are the journalistic endeavors that have sustained sports columnists for years.[55]

Motion picture DVDs frequently contain similarly broad claims[56] and thus, also run afoul of the specific exemptions embodied in U.S. copyright law.[57] Movie reviews, for example, routinely use verbatim clips of the associated subject matter.[58] Such uses are plainly "transformative" under § 107 because they inject new meaning into the movies in question.[59]

Despite these seemingly obvious examples of copyright overreach, fair use can be precarious grounds for consumers. Fair use is an affirmative defense, meaning it only comes into play once a copyright holder has established a prima facie case of

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Copyright Act, it appears that the upshot would be the same." *Id.* at 280. *See also* Barton Beebe, AN EMPIRICAL STUDY OF THE U.S. COPYRIGHT FAIR USE CASES, 1978–2005 (2007), http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Beebe.pdf (confirming Nimmer's hypothesis that judges conform the four factors to the outcome of the test).

[49] CCIA Complaint, *supra* note 5, para. 29.

[50] *Id.* para. 22.

[51] *Id.* para. 18 (claiming such representations "materially misrepresent U.S. copyright law").

[52] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (stating copyright protection "has never accorded the copyright owner complete control over all possible uses of his work").

[53] 17 U.S.C. § 106 (2006). Copyright owners have the exclusive rights to: (1) reproduce their work; (2) prepare derivative works based upon their copyrighted work; (3) distribute copies of the work to the public by sale, rental, lease or lending; (4) perform the work in public; (5) display it publicly; (6) perform it publicly by means of digital audio transmission. *Id.*; N.Y. Times Co. v. Tasini, 533 U.S. 483, 495–96 (2001); *see also Sony Corp.*, 464 U.S. at 433 (holding that a copyright grants exclusive rights in "five qualified ways").

[54] 17 U.S.C. § 107; *see also* Leval, *supra* note 42, at 1110 (stating four statutory factors "'do not represent a score card that promises victory to the winner of the majority.' Rather, each factor is 'to be explored, and the results weighed together, in light of the purposes of copyright.'" (citing Campbell v. Acuff-Rose Music, 510 U.S. 569, 578 (1994)). Thus the Court should mind its purpose to encourage "creative activity" for the public good. *Sony Corp.*, 464 U.S. at 429.

[55] *Patrick Ross Blogs on CCIA complaint*, IPCENTRAL, Aug. 1, 2007, http://weblog.ipcentral.info/archives/2007/08/patrick_ross_bl.html.

[56] CCIA Complaint, *supra* note 5, para. 28.

[57] 17 U.S.C. § 107.

[58] Video Pipeline, Inc. v. Buena Vista Home Entm"t, Inc., 342 F.3d 191, 200 (3d Cir. 2003). ("The movie reviewer does not simply display a scene from the movie under review but as well provides his or her own commentary and criticism."); *see, e.g., At the Movies with Ebert & Roeper*, http://bventertainment.go.com/tv/buenavista/ebertandroeper/.

[59] *Sony Corp.*, 464 U.S. at 455 n.40; *see also* Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006) ("If the secondary use adds value to the original . . . [if it is used as raw material, and] transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.").

infringement.[60] Thus, only after being haled into court can a user learn whether his or her use of copyrighted material was legally acceptable.

Judge Richard Posner and others support the notion of this judicially constructed fair use exception.[61] They argue that the contours of fair use should be left intentionally vague in order to accommodate change, particularly in new technologies.[62] The new technology concern is legitimate.[63] Nevertheless, vagueness and uncertainty can create trepidation among users uncertain of their rights. For example, an educator may justifiably be confused about the amount of copyrighted material he or she may permissibly include in his or her daily lessons.[64] A rational response would be to avoid the entire question altogether and simply remove any questionable material.[65]

There are clear virtues to such an exception-based copyright regime.[66] Among other benefits, it allows consumers themselves to determine what may constitute "fair use" rather than leaving the decision to the judges or Congress. At the same time, it fosters a "permission culture," in which users do not know whether their approach is legally permissible until a court rules on it—potentially a lengthy and expensive process.[67]

C. Layperson Confusion About Copyright and Fair Use

One of the main aspects of the CCIA's complaint lies in public perception of fair use.[68] Underlying its complaint is a worry that overzealous and misleading copyright warnings, combined with the cumulative effect of countless viewings, may leave the public confused about the balance of legitimate rights and uses under copyright

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[60] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

[61] William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CALIF. L. REV. 1639, 1645 (2004) ("[L]ike most judge-made doctrines, the fair use defense is flexible. Judges made it and judges can adapt it to changed conditions.").

[62] *Id.*

[63] *See generally* Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 429–32 (discussing the Supreme Court's recognition of public benefit rationale for copyright protection).

[64] Cathy Newsome, *A Teacher's Guide to Fair Use and Copyright*, http://home.earthlink.net/~cnew/research.htm (last visited May 22, 2008) ("It is no wonder that in this environment teachers often do not understand just how much leeway they have in using other people's work. The law may seem confusing, ambiguous, and unclear.").

[65] John Eggerton, *NBC U: Copyright Warning Complaint is Frivolous*, BROADCASTING & CABLE, Aug. 1, 2007, http://www.broadcastingcable.com/article/CA6464843.html.

[66] *See, e.g., The Copyright Term Extension Act: Hearing on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 42 (1997) (prepared statement of Jack Valenti). Valenti argued, "Whatever work is not owned is a work that no one protects and preserves" and no one will "invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale." *Id.* In short, "a public domain work is an orphan . . . everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues." *Id.* Such a decline in film quality would hardly benefit consumers, Valenti concluded. *Id.*

[67] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 162 (Penguin Press 2004).

[68] CCIA Complaint, *supra* note 5, para. 4.

law.[69] Rigorous public opinion data is sparse, but anecdotal evidence suggests many people—including academics, artists and other creators of content—misperceive the doctrine of fair use.[70] In a recent survey,[71] over half of respondents said they do not understand what constitutes permissible use of copyrighted materials.[72] The survey administrators further suggested that a false sense of self-confidence likely inflated even this figure, noting a significant gap between what respondents thought they knew about copyright and the actual law.[73]

In a larger survey performed by the Brennan Center for Justice, almost all respondents had at least heard of fair use as a defense to copyright infringement.[74] The vast majority said they relied on fair use when deciding to borrow, reproduce, or quote another's work.[75] However, even among this apparently informed and active pool of respondents, many admittedly possessed only "a vague sense" of what fair use actually means or mistakenly thought the law placed a numerical limit on the amount of copyrighted material falling within the ambit of the doctrine.[76] Moreover, such surveys only include individuals who have already attempted to work around obstacles posed by copyright law.[77] The surveys do not account for those whose confusion or doubt about fair use convinces them that their own copyright problems are insurmountable, and who instead choose to forego such projects entirely.[78]

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[69] Kirk Biglione, *Warning: Those Copyright Warnings May Not Be Entirely Accurate*, Aug. 2, 2007, http://www.medialoper.com/hot-topics/copyright/warning-those-copyright-warnings-may-not-be-entirely-accurate/.

[70] Brian P. Heneghan, *The NET Act, Fair Use, and Willfulness—Is Congress Making a Scarecrow of the Law?*, 1 J. HIGH TECH. L. 27, 44 (2002); Pat Aufderheide & Peter Jaszi, *The Good, the Bad, and the Confusing: User Generated Video Creators on Copyright*, CTR. FOR SOCIAL MEDIA, Apr. 3, 2007, http://www.centerforsocialmedia.org/files/pdf/good_bad_confusing.pdf.

[71] Aufderheide, *supra* note 70, at 6. The non-random survey included fifty-one participants. *Id.* at 2.

[72] *Id.*

[73] *Id.*

[74] Marjorie Heins & Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, 46 (2006), http://www.brennancenter.org/dynamic/subpages/download_file_9056.pdf.

[75] *Id.* at 54.

[76] *Id.*

[77] *Id.* at 21–25.

[78] Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, CTR. FOR SOCIAL MEDIA, 20 (2004), http://www.centerforsocialmedia.org/files/pdf/untoldstories_report.pdf ("[P]erhaps the greatest area of loss is unknown . . . [filmmakers] do not even attempt films that pose large rights hurdles."); Renee Hobbs, Peter Jaszi & Pat Aufderheide, *The Cost of Copyright Confusion for Media Literacy*, CTR. FOR SOCIAL MEDIA, 16-20 (2007), http://www.centerforsocialmedia.org/files/pdf/final_CSM_copyright_report.pdf; *cf.* Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy*, CAPITAL TRADE, 8 (2007), http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf ("[A]bout one out of every eight workers in the United States is employed in an industry that benefits from the protection afforded by fair use.").

D. The Idea/Expression Dichotomy

The CCIA also challenges attempts by sports and media companies to prevent the public from meaningfully discussing the basic facts and ideas in their products.[79] Whereas fair use allows for the unauthorized use of copyrighted material in certain circumstances, some original works or authorship remain completely outside the reach of copyright protection.[80] For example, ideas, facts, and universal truths (e.g. mathematical proofs) normally lie outside the realm of copyright.[81] Hence, under a principle called the idea/expression or fact/expression dichotomy, although copyright law protects an author's original expression, it "encourages others to build freely upon the ideas and information conveyed by a work."[82]

The determinative issue under this doctrine is often one of facts. "Facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."[83] Thus, all facts, whether scientific, historical, or derived from another source, are "part of the public domain available to every person."[84] For example, reporting the score of a baseball game is not copyrightable.[85] Likewise, as MLB learned in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P.*,[86] professional baseball players' names and their statistics as used in fantasy games "are factual information which is otherwise available in the public domain . . . ."[87] However, the particular format and description of a baseball game, or a unique compilation of player data—involving statistical averages, graphical representations, and so forth—could be copyrighted.[88]

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[79] CCIA Complaint, *supra* note 5, para. 25.

[80] *E.g.*, 17 U.S.C. § 102(b) (2006).

[81] *Id.* ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.") *But see* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 409–10 (1989). For example, although the idea-expression dichotomy might be relevant to weighing the infringement of a non-literal copy, it "would not be particularly helpful in the case of an exact copy—by definition an exact copy is copied literally, and thus clearly includes expression as well as idea." *Id.* at 375.

[82] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556–57 (1985)); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). Because of this idea/ expression distinction, "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication." *Id.* at 219.

[83] *Feist*, 499 U.S. at 347–48; N.Y. Mercantile Exch., Inc. v. Intercontinental Exchange, Inc., 497 F.3d 109, 114 (2d Cir. 2007).

[84] *Feist*, 499 U.S. at 348.

[85] C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1102 (E.D. Mo. 2006), *aff'd on other grounds*, 505 F.3d 818 (8th Cir. 2007) (not addressing the copyright preemption issue because of its finding that CBC's First Amendment rights superseded the players' state law rights of publicity).

[86] *Id.*

[87] *Id.* at 1102. Such use involves only "historical facts about the baseball players," such as batting averages and home runs. *Id.* at 1190–91.

[88] *See also* NBA v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997) (holding game broadcasts copyrightable because of "authorship" of cameramen and directors, but not scores and other facts obtainable from broadcasts or game arena itself).

Thus, the idea/expression doctrine does not permit one to freely reproduce another's original work of authorship if that work contains expressive elements, such as context or format, regardless of the unprotectable facts or ideas that are contained therein.[89] Accordingly, making or distributing an unauthorized complete reproduction also falls outside this defense if the work contains expressive elements.[90]

The warnings embodied in the CCIA's complaint stretch beyond mere facts or ideas.[91] For example, insofar as copyright law prohibits *any* accounts, descriptions, reproductions, retransmissions, pictures or dissemination,[92] the protection is dependent on original compilation, context, and layout (i.e., expressions) rather than facts and ideas.[93] The exact reproduction of a game, movie, or book might be prohibited, but an account or story about it, told from one fan to another, is safely outside the realm of copyright protection.[94] By sweepingly prohibiting descriptions or accounts of their games, the NFL and MLB's copyright warnings plainly contradict this principle of the fact/expression dichotomy.[95]

The idea/expression dichotomy supports the notion that copyright law is compatible with First Amendment principles of free speech.[96] The dichotomy strikes a balance between the First Amendment and the Copyright Act "by permitting free communication of facts while still protecting an author's expression."[97] Consequently, the "built-in First Amendment accommodations" of copyright law protects free speech by ensuring that copyright holders do not gain monopolies over entire concepts and thoughts.[98] Nevertheless, defining legally explicit boundaries between such Platonic ideals and practical reality can be quite difficult.[99]

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[89] *See* Pazienza v. St. Barnabas Med. Ctr., 921 F. Supp. 1274, 1275–77 (D.N.J. 1995). *But cf.* Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1075-76 (2d Cir. 1992) (discussing instances of "inevitable," mechanical, or natural ordering of facts that are devoid of creativity, and therefore non-copyrightable).

[90] *See, e.g.*, NFL v. Primetime 24, 211 F.3d 10, 11–12 (2d Cir. 2000); *see also* Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 96 Civ. 4126 (RWS), 2000 U.S. Dist. LEXIS 10394, at *36–41 (S.D.N.Y. Jul. 21, 2000) (rejecting a fact-based defense where defendants copied verbatim an entire 488-page workbook and complete sections of another book).

[91] CCIA Complaint, *supra* note 5, para 25.

[92] *Id.* para. 20, 22.

[93] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1101 (E.D. Mo. 2006).

[94] Samuels, *supra* note 81, at 375 and accompanying text.

[95] CCIA Complaint, *supra* note 5, paras. 20, 22.

[96] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). The Copyright Clause and the First Amendment were adopted close in time, which, like the idea/expression dichotomy, provides strong support that they are compatible. *Id.*

[97] *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).

[98] *Id.*

[99] Robert Kasunic, *Constitutional Challenges to Copyright: Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397, 401–04 (2007). Although the idea/expression dichotomy seems straightforward enough, there is often "no reliable way to distinguish between a work's ideas and the expression of those ideas." *Id.* at 401. This uncertainty may lead to infringement claims that are difficult to disprove. *Id.* Moreover, such uncertainty can have a chilling effect on speech that is "not necessarily limited to risk-averse users of copyrighted works." *Id.*; *see also* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("Nobody has ever been able to fix that boundary, and nobody ever can.").

E. Copyright Misuse

Taken as a whole, the CCIA's complaint expresses the nascent idea of copyright misuse, in that the media companies should not be allowed to sue infringers when the companies themselves are making overbroad or legally insupportable copyright claims.[100] Derived from the analogous defense in patent law, copyright misuse offers a defense in the form of a plaintiff's "unclean hands."[101] The maxim of unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."[102] In patent law, the term has been interpreted as an unlawful expansion of patent rights and is closely related to antitrust issues.[103] As applied to copyright law, the doctrine has similarly developed along antitrust lines,[104] but has also spawned a parallel course of analysis pertaining to the public policy underlying copyright law.[105]

Particularly since the seminal case of *Lasercomb America, Inc. v. Reynolds*,[106] many courts have begun to recognize copyright misuse as a safe harbor alternative to otherwise infringing acts.[107] Despite this increased judicial acceptance, the misuse defense remains in the minority.[108] Although *Lasercomb* may no longer be construed as the "exceptional case,"[109] most courts evaluating copyright misuse have interpreted *Lasercomb* narrowly, primarily focusing on the antitrust aspects of the defense.[110] Copyright misuse also remains only a defense to infringement, rather than a "free-standing offense" itself.[111]

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[100] CCIA Complaint, *supra* note 5, para. 57.

[101] Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 494 (1942).

[102] Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814–15 (1945).

[103] Ben Sheffner, *Berkeley Technology Law Journal Annual Review of Law and Technology*, 15 BERKELEY TECH. L.J. 25, 32–33, 42–43 (2000); 4 NIMMER, *supra* note 20, § 13.09(A)(2)(a).

[104] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 24–25 (1979).

[105] Sean Michael Aylward, *The Fourth Circuit's Extension of the Misuse Doctrine to the Area of Copyright: A Misuse of the Misuse Doctrine?*, 17 DAYTON L. REV. 661, 675 (1992).

[106] 911 F.2d 970 (4th Cir. 1990). The *Lasercomb* court separated copyright misuse from violations of antitrust law. *Lasercomb*, 911 F.2d at 978. Setting aside antitrust issues, the court specifically focused on a newly determinative question: "whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright?" *Id.*

[107] *E.g.*, *id.* at 978–79; Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 520 (9th Cir. 1997); DSC Commc'ns. Corp. v. DGI Techs., 81 F.3d 597, 601 (5th Cir. 1996); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 846 (Fed. Cir. 1992); *see also* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1170 (1st Cir. 1994) (supporting strongly the reasoning behind a copyright misuse defense based on public policy, but concluding "this case does not require us to decide whether the federal copyright law permits a misuse defense").

[108] Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37, 87 (2007) (reporting nine federal circuits have not adopted copyright misuse, nor has the Supreme Court approved its extension beyond antitrust policy).

[109] 4 NIMMER, *supra* note 20, § 13.09[A] (2003)).

[110] Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L. & POL'Y 565, 586–87 (2006).

[111] 4 NIMMER, *supra* note 20, § 13.09(A)(2)(b) ("It has been held that there is no such free-standing offense, apart from stating a cognizable claim under the antitrust laws.").

The CCIA explicitly incorporates principles of fair use and the idea/expression dichotomy into its complaint.[112] As a non-codified and infrequently tested doctrine, copyright misuse represents a much weaker basis for FTC action. However, it is an important element to consider because of its potential impact in the courts. Fair use and idea/expression can offer a robust defense, but basically only to one defendant at a time, on a case-by-case basis. Copyright misuse, on the other hand, could have far more sweeping effects. If the sports, media, and publishing companies named in the CCIA's complaint proved unable to enforce their copyrights because of misuse, the effects could carry over to all their suits against infringers. Since the companies would surely move swiftly to redress the warnings that give rise to determinations of misuse, this doctrine may prove especially well-suited to upsetting decades of overly aggressive copyright warnings.

II. ANALYSIS: COPYRIGHT WARNINGS AS COPYRIGHT MISUSE

A successful outcome to the CCIA's legal initiative could herald a significant shift in the respective burdens of copyright holders and the public. This section weighs the potential for judicial legal doctrines to affect copyright warnings, as well as the potential ramifications of a shift in copyright balance. Part A considers copyright misuse as a strong avenue for success. Part B addresses the possible results of that success.

A. Copyright Misuse: A Judicial Rebalancing Option

The doctrine of copyright misuse may offer an opportunity for limiting the dire warnings set forth by the CCIA.[113] This defense prevents a culpable copyright holder from successfully suing for infringement of a misused copyright.[114] If the sports and entertainment companies persist in overstating their rights, their legal options against infringers could be drastically reduced.[115]

Attacking the copyright warnings on grounds of a copyright misuse defense necessarily means standing on fair use and idea/expression grounds.[116] As the CCIA argues, the warnings are overbroad[117] because, in addition to warning against infringing uses of the material, they warn against permissible uses, such as a fair use

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[112] *See* CCIA Complaint, *supra* note 5, paras. 24–25.

[113] *See generally* Patry & Posner, *supra* note 61, at 1658–59 (arguing that where copyright warning "grossly and intentionally exaggerates" copyright holder's rights to the detriment of public-domain publishers, the case for invoking doctrine of copyright misuse "seems to us compelling").

[114] Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990); *cf.* Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609, 616 (D.R.I. 1976) (determining false and misleading copyright warning alone may not be sufficient for copyright misuse, but should be considered in conjunction with other factors).

[115] *But see also Lasercomb*, 911 F.2d at 979 n.22 (noting the court's holding does not invalidate Lasercomb's copyright, and Lasercomb is free to bring suit for infringement "once it has purged itself of the misuse").

[116] 17 U.S.C. § 107 (2006); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[117] *E.g.*, CCIA Complaint, *supra* note 5, para. 1. The NFL explicitly prohibits "*any* other use" of its telecast, except its audience's "private use." (emphasis added). *Id.* para. 20.

of the material, or using only those portions of the material that receive no copyright protection, i.e., non-expressive aspects.[118] The warnings encompass so many potential uses of the companies' material that they hinder the public's ability to make any meaningful use of the material, contrary to the purposes of copyright law.[119] Consequently, this overbroad restriction constitutes misuse.[120]

In practice, courts have applied the copyright misuse doctrine sparingly and with mixed results.[121] In particular, federal courts have been somewhat reluctant to acknowledge a copyright misuse defense that does not rely upon anticompetitive formulations.[122] Nevertheless, a few notable decisions support the direction of the CCIA's complaint.[123]

In *QAD, Inc. v. ALN Associates, Inc.*,[124] the U.S. District Court for the Northern District of Illinois found copyright misuse where a software maker sought enforcement of its copyright on material that exceeded the scope of the company's actual copyright.[125] Plaintiff QAD had "updated" or derived its product from earlier Hewlett-Packard software, in which it did not hold a copyright.[126] This was an "improper extension and overstatement of QAD's copyrights."[127] Due to this misuse, the court prevented QAD from enforcing its copyright on that derived product against the defendant.[128] The court rooted its decision not in antitrust issues, but rather in the "public purpose behind the granting of the copyright," which it defined as promoting progress in the software field.[129]

In *Video Pipeline, Inc. v. Buena Vista Home Entertainment*,[130] the U.S. Court of Appeals for the Third Circuit ruled against a distributor's effort to prove copyright misuse.[131] Video Pipeline had a license agreement with The Walt Disney Company ("Disney") to compile movie trailers for home video retailers.[132] Video Pipeline subsequently put its trailers online, a use that Disney said violated the license agreement.[133] Video Pipeline argued it had made fair use of Disney's copyrighted

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[118] *Id.* para. 25.

[119] *See Eldred*, 537 U.S. at 219.

[120] *See, e.g.*, QAD, Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1265 (N.D. Ill. 1991) (observing copyright protection must be perceived in terms of public purpose behind granting copyright, i.e. "promoting progress").

[121] Ekstrand, *supra* note 110, at 578–86. Ekstrand discusses thirty-two cases since *Lasercomb*, in which few defendants successfully asserted copyright misuse. *Id.*

[122] *See generally* 4 NIMMER, *supra* note 20, § 13.09(B) (2007) (noting that courts only rarely recognize the copyright misuse defense, such as when plaintiff's transgression is particularly serious).

[123] Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 793–94 (5th Cir. 1999); Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 521 (9th Cir. 1997).

[124] 770 F. Supp. 1261.

[125] *Id.* at 1267.

[126] *Id.* at 1263–64.

[127] *Id.* at 1266.

[128] *Id.* at 1266–67. The court found plaintiff QAD's misuse especially egregious: "It used its copyright to sue ALN and to restrain it from the use of material over which QAD itself had no rights. That is a misuse of both the judicial process and the copyright laws." *Id.*

[129] *Id.* at 1265.

[130] 342 F.3d 191 (3d Cir. 2003).

[131] *Id.* at 206.

[132] *Id.* at 194–95.

[133] *Id.* at 195.

films, and further, that Disney's online licenses misused copyright law to suppress criticism.[134] The court rejected the copyright misuse defense, determining the public could still find criticism of Disney online apart from the licensed websites.[135] Still, the court unambiguously extended the patent misuse doctrine to copyright and prospectively opened the door to future litigation.[136] The court speculated that a copyright holder could misuse its copyright to restrain another's "creative expression" independent of antitrust, fair use, or idea/expression issues.[137]

In *Assessment Technologies of WI, LLC v. WIREdata, Inc.*,[138] Judge Richard Posner incorporated an idea/expression balance into copyright misuse.[139] In that case, the defendant WIREdata sought raw data that was collected by Wisconsin municipalities, but compiled and sorted by the plaintiff Assessment Technologies.[140] Judge Posner justified extending copyright misuse beyond antitrust in instances where copyright owners use infringement suits "to obtain property protection . . . that copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively."[141] Thus, he construed such tactics to be an abuse of process.[142]

A concern for fairness lies at the heart of the copyright clause. Exclusive rights are not granted to the copyright holder simply as a gold star for originality, or to lock out everyone but the first author of an idea. Copyright exists specifically to further the "useful Arts" and encourage their development.[143] It would therefore be unfair, and a misuse, to allow copyright to "be asserted improperly to inhibit other persons' freedom of expression."[144]

Potential infringers of the CCIA's alleged misusers might justly claim similar protections as these cases. The "raw data" allowed in *Assessment Technologies*[145] is analogous to the raw statistics of professional athletes and sports teams, which are not normally copyrightable.[146] Similar to *QAD*, creative artists and educators frequently seek to use copyrighted books and DVDs, sometimes indirectly, to enlarge their fields of endeavor.[147] For example, creators of "fan fiction" often use copyrighted characters and media to create remarkably new and imaginative artistic

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[134] *Id.* at 203.
[135] *Id.* at 206.
[136] *Id.*
[137] *Id.* at 205.
[138] 350 F.3d 640 (7th Cir. 2003).
[139] *Id.* at 647.
[140] *Id.* at 643.
[141] *Id.* at 647.
[142] *Id.*
[143] U.S. Const. art. I, § 8, cl. 8.
[144] QAD Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1265 (N.D. Ill. 1991).
[145] *Assessment Techs.*, 350 F.3d at 647.
[146] C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1101 (E.D. Mo. 2006). The *C.B.C.* court held baseball statistics that are facts, even if part of a compilation, are not copyrightable as they are not original, only reportable. *Id.*
[147] *See, e.g.*, Posting of Judge Richard Posner to Lessig Copyright Blog, *Fair Use and Misuse*, http://lessig.org/blog/2004/08/fair_use_and_misuse.html (August 24, 2004) (citing Jeffrey Rosen, *Mouse Trap*, THE NEW REPUBLIC, October 28, 2002, at 12) (recounting story of a filmmaker accidentally capturing three seconds of a television program and finding copyright restrictions prohibitive).

works.[148] Courts might find such creations outside the boundaries of fair use, strictly speaking, but still see an interest in acknowledging their development of a genre or fictional form.[149]

As suggested by *Video Pipeline*, artists, critics and parodists could do much with multimedia samples proscribed by NBC, Dreamworks, and other companies' warnings.[150] In the YouTube era, for instance, video "mashups" and internet remixes frequently combine copyrighted materials from different sources in new and unexpected ways.[151] Such user-generated content not only adds new meaning to the existing material, but can represent entirely new media for creative expression.[152] Declaring all such works off-limits flies in the face of copyright law's explicit goals and might be considered a misuse.

The antitrust rationale for misuse does not readily apply to the copyright warnings at issue here. After *Lasercomb*, the misuse defense has typically been invoked when one company uses its copyright to force purchasers or receivers to use only that company's product instead of a competitor's. In this instance, the pattern is reversed. The sports and entertainment companies generally do not seek inclusion or exclusion of competitors' products unless it enhances the usefulness of their own products, such as in a satellite rebroadcast of an NFL game.[153] Instead, the companies seek to exclude all other possible uses for their own product, thereby giving it the narrowest functionality. In such instances, copyright misuse must rely on the public policy justification for the "unclean hands" rule.[154] That is to say, courts should only enforce copyright protections for companies whose hands are not "dirtied" by attempts to extend their copyrights beyond what the law and equity permit.

Finally, it is worth noting that copyright misuse, like fair use, is a defense to copyright infringement rather than an affirmative claim itself.[155] Even if successful, it is a tool available only to defendants who find themselves defending an infringement claim.[156] Courts have not recognized it as an independent cause of action, and have not based damages or injunctions on its assertion.[157]

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[148] Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 450–63 (2003).

[149] *Id.* at 445. A fan's story drawing directly on material from a movie or book, such as characters, plot, or locations, would likely be open to infringement charges. *Id.* at 451.

[150] *Cf.* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 200 (3d Cir. 2003) (comparing a mere copy of a two-minute movie segment to a reviewer clip, complete with added commentary and criticism).

[151] Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 658 (2007).

[152] *See* Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116671.

[153] NFL v. Primetime 24, 211 F.3d 10, 11 (2d Cir. 2000).

[154] *See generally* Dallon, *supra* note 63, at 426–36 (outlining how the U.S. Constitution, courts, and Congress historically embraced public benefit rationale for copyright protection).

[155] Open Source Yoga Unity v. Choudhury, No. C 03-3182 PJH, 2005 U.S. Dist. LEXIS 10440, at *24–25 (N.D. Cal. Apr. 1, 2005); Ass'n of Am. Med. Colls. v. Princeton Review, Inc., 332 F. Supp. 2d 11, 19–20 (D.D.C. 2004).

[156] *See also* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990) ("[T]he defense of copyright misuse is available even if the defendants themselves have not been injured by the misuse.").

[157] *See Open Source Yoga Unity*, 2005 U.S. Dist. LEXIS 10440, at *25–27.

B. Amplifying Copyright Misuse Via Collateral Estoppel

The injunctive effects of copyright misuse make it a stronger method for scaling back overbroad copyright warnings than other affirmative defenses. First, copyright misuse does not require the case-by-case analysis needed for defenses like fair use. Second, through collateral estoppel, defendants to infringement actions can raise the protection of copyright misuse without depending on the merits of their own various uses and circumstances.

The open-ended nature of copyright defenses like fair use means they are inappropriate as blanket protections against infringement suits.[158] Fair use, idea/expression, and other affirmative defenses involve a comparison of a potential infringer's work to the copyrighted material at issue. The question for a court is often whether a user has unfairly borrowed from a copyright holder or taken advantage of its exclusive market rights.[159] Such determinations obviously vary depending on the purposes, implementation and context that different users make of protected material.[160] For example, the same material that would be infringing when used for commercial purposes might be fair use for someone without profit-making motives.[161] Because the focus of judicial inquiry is on the potential infringer, the results of one case cannot be readily overlaid onto the circumstances of a different defendant.

By contrast, the copyright misuse doctrine focuses on the unacceptable behavior of a copyright holder itself.[162] If a copyright holder is found to be misusing its copyright protection, it will be unable to enforce its copyright regardless of a potential infringer's particular use. Since the fault attaches to the copyright holder, res judicata suggests the misuse should carryover to all other infringement suits by that holder on the same copyright.

For example, if a media company's copyright warnings make it guilty of misuse in a suit against one potential infringer, the facts of its suit against a different infringer should make no difference so long as the company's copyright warning remains the same. The copyright warnings themselves are the source of misuse, not the potential infringers' activities. The companies named by the CCIA commonly issue one universal copyright warning for all products of the same type (DVDs, books, sports broadcasts, etc.); hence, a single finding of misuse for that warning could spell defeat for a company on all its other infringement suits involving those products. Such a prospect gives the companies strong incentive to alter their copyright warnings, or risk their copyright protections becoming meaningless and unenforceable.

Following this logic, courts can broadly apply the effects of copyright misuse through the doctrine of non-mutual defensive collateral estoppel, or "issue preclusion."[163] Collateral estoppel serves essentially the same goals as res judicata—

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[158] Patry & Posner, *supra* note 61, at 1645.

[159] 17 U.S.C. §§ 106, 107 (2006).

[160] Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1255 (2d Cir. 1986).

[161] *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152–53 (9th Cir. 1986).

[162] Home Design Servs. v. Hibiscus Homes of Fla., Inc., 6:03-cv-1860-Orl-19KRS, 2005 U.S. Dist. LEXIS 32788, at *39 (M.D. Fla. Dec. 13, 2005).

[163] Acevedo-Garcia v. Monroig, 351 F.3d 547, 574 (1st Cir. 2003). "Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff

preventing the same claim from being litigated over and over again, in the interest of fairness and judicial efficiency.[164] Due process nominally prohibits binding a litigant to the results of a case in which the litigant was not a party or privy.[165] However, federal courts have long permitted defendants to estop a plaintiff from relitigating an issue that was already decided against that plaintiff in a prior case.[166] The term "non-mutual" means a new defendant can invoke collateral estoppel against a plaintiff even though the defendant was unconnected to the earlier case.[167] In other words, after losing its case, a plaintiff should not be allowed "two bites from the same apple" by turning around and suing another defendant for the same issue on which it just lost.[168]

Collateral estoppel is particularly suited to the problem of overreaching copyright warnings, because the issue would be identical in each case, and the particulars of a defendant's use are mostly irrelevant.[169] As outlined in part A, the copyright misuse defense applies to companies promulgating misleading copyright warnings. Each infringement suit by one of the CCIA's named companies would involve the same warning, so the resulting issue of copyright misuse would likewise be identical in each suit. Since the misuse in question is entirely on the companies/plaintiffs' side, the facts of potential infringement have no bearing on the outcome.[170] Once a court has found misuse by a company, defendants to infringement suits by that company can simply assert a defense of collateral estoppel. No further pleadings or defense are theoretically necessary. The company would be as unable to pursue suits against other infringers as against the defendant who originally raised the misuse defense.

Collateral estoppel thus stands as an effective means of broadening copyright misuse for a wide swath of consumers, even though it is only an affirmative defense.[171] Like fair use or copyright misuse, collateral estoppel requires legal pleading and answering infringement charges. Such affirmative defenses do not directly redress the copyright imbalance between large media copyright holders and consumers. After all, the assurance of a successful legal strategy does not necessarily

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has previously litigated unsuccessfully in another action against the same or a different party." United States v. Mendoza, 464 U.S. 154, 159 (1984).

[164] Avins v. Moll, 610 F. Supp. 308, 316 (E.D. Pa. 1984).

[165] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979).

[166] Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950); Walker v. Vaughan, 216 F. Supp. 2d 290, 298 (S.D.N.Y. 2002).

[167] Jasper v. Sony Music Entm't, Inc., 378 F. Supp. 2d 334, 343 (S.D.N.Y. 2005).

[168] EEOC v. Sidley Austin LLP, 437 F.3d 695, 696 (7th Cir. 2006).

[169] *See* Robin Singh Educ. Servs. v. Excel Test Prep. Inc., No. 06-20951, 2008 U.S. App. LEXIS 8178, at *14–19 (5th Cir. Apr. 16, 2008); Innovad, Inc. v. Microsoft Corp., 260 F.3d 1326, 1334 (Fed. Cir. 2001). Collateral estoppel is permitted where: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated there; (3) resolution of the issue was essential to a final judgment; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action. *In re* Trans Tex. Holdings Corp., 498 F.3d 1290, 1297 (Fed. Cir. 2007).

[170] *See, e.g.*, *Robin Singh*, 2008 U.S. App. LEXIS 8178, at *13–15 (applying non-mutual defensive collateral estoppel despite minor factual differences, because the parties in new suit represent similar interests and are in the same positions vis-à-vis the same issues in previous litigation).

[171] Rivet v. Regions Bank, 522 U.S. 470, 476 (1998).

make a user less apprehensive about making questionable use of protected material. The time and expense involved in defending a copyright case could still be a powerful incentive to not risk stepping over the infringement line. For this reason, a bright-line agency or statutory solution remains optimal.

Nevertheless, collateral estoppel could have a potent, indirect influence on the relative copyright balance. Once misuse is deemed to exist for a given sports, media or publishing company, that company would face the hard choice of either adjusting its copyright warnings, or enduring a long string of dismissed infringement suits. Although reconfiguring warnings would thus not be mandatory, it is doubtful any prominent copyright holder would choose to give up enforcement of its copyright protections in this manner.

III. PROPOSALS: THREE BRANCHES FOR REBALANCING COPYRIGHT INTERESTS

Large sports and media companies are routinely disregarding copyright distinctions, thereby contributing to widespread public misunderstanding of copyright law and its purposes.[172] This circumstance is reversible. This section first evaluates the merits of revising copyright warnings. Next, it offers three scenarios by which the FTC, Congress, and the courts can reconfigure copyright warnings to better reflect the public interest.

A. A Need for Copyright Warnings?

Copyright warnings in their present form might prove both appropriate and necessary. Given Americans' reportedly lax attitudes toward copyright today,[173] such dire and incessant warnings could actually deter some potential viewers from truly infringing activity.[174] Indeed, the well-documented public uncertainty about fair use, when combined with the notorious, purportedly well-defined rules promulgated by copyright holders, may plausibly deter would-be infringers.[175]

Furthermore, copyright warnings such as those soundly condemned by the CCIA have factored into several courts' determinations of infringement.[176] 17 U.S.C.

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[172] Jason Mazzone, *Too Quick to Copyright*, LEGAL TIMES, Nov. 17, 2003, at 33, *available at* http://www.brooklaw.edu/faculty/news/mazzone_legtimes_2003-11-17.pdf [hereinafter Mazzone, *Too Quick to Copyright*]; Posting of Judge Richard Posner to Lessig Copyright Blog, *supra* note 147.

[173] *E.g.*, James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 231 (citing surveys showing almost two-thirds of Americans place diminished or no priority on copyright protection).

[174] Patry & Posner, *supra* note 61, at 1647. Patry and Posner argue that rampant file-sharing indicates many consumers do not take copyright seriously, and "may therefore be prone to interpret fair use in extravagant terms if given any excuse to do so". *Id.*

[175] Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1578 (2005).

[176] United States v. Beltran, No. 06-2220, No. 06-2221, 2007 U.S. App. LEXIS 22054, at *3–4 (1st Cir. Sept. 14, 2007); *cf.* United States v. Hernandez, 952 F.2d 1110, 1114 (9th Cir. 1991) (finding it "not unreasonable" to assume defendant read copyright labels on tapes used with duplicating machines, and therefore knew he was involved in an illegal operation). *But cf.* United States v. Moran, 757 F. Supp. 1046, 1052 (D. Neb. 1991) (finding defendant not guilty of infringement, despite

§ 401(d) explicitly provides that a copyright notice obviates a "defense based on innocent infringement."[177] In particular, the presence of copyright warnings may contribute to a finding of "willful" infringement as specified by 17 U.S.C. § 506(a).[178]

Finally, insofar as CCIA's complaint and envisioned solution addresses "consumer rights," it may be initiating a legally insupportable claim.[179] At least one critic has pointed out that "fair use is not a consumer right," but is rather an affirmative defense.[180]

Establishing fair use as an affirmative right, as impliedly proposed in the CCIA complaint, would fundamentally alter the copyright landscape.[181] For example, if fair use were an affirmative right, then users should be allowed to take positive actions to exercise it, such as by circumventing copy protections.[182] For this reason alone, perhaps, courts have overwhelmingly viewed fair use as an affirmative defense instead of a "right" per se.[183] As such, it is applied and evaluated on a case-by-case basis.[184] Applied to our discussion's context, even if millions of downloaders were sued by MLB for copyright infringement, and even if they all successfully defended using the fair use doctrine, MLB (and other companies) would still have no particular duty to rewrite its copyright warnings. The dispersed and particularized impact of this defense thus suggests the need for a broader statutory solution, as described in the following section.

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the fact he saw FBI copyright warnings on videotapes and even affixed such warning labels to copies he made, because he mistakenly thought the warning applied to renting public, but not vendors like himself).

[177] 17 U.S.C. § 401(d) (2006). If a copyright notice appears on the published copy to which defendant had access, then "no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages." *Id.*; *see also* Columbia Pictures Indus. v. Richardson, 95-C-0868-C, 1996 U.S. Dist. LEXIS 22117, at *10–11 (W.D. Wis. June 6, 1996) (rejecting defendant's "innocent infringement" defense, because all seized videotapes at issue bore labels with copyright notices and warnings, or gave copyright warning statements when played).

[178] 17 U.S.C. § 506(a)(1); *Beltran*, 2007 U.S. App. LEXIS 22054, at *3–4. Any person "who willfully infringes a copyright" faces punishment, including fines and imprisonment. 17 U.S.C. § 506(a)(1).

[179] CCIA Complaint, *supra* note 5, para. 1.

[180] Patrick Ross, *Fair Use Is Not a Consumer Right*, CNET, Sept. 6, 2007, http://www.news.com/Fair-use-is-not-a-consumer-right/2010-1030_3-6205977.html.

[181] Kevin J. Harrang, *Distinguished Lecture on Innovation & Communication Policy: Challenges in the Global IT Market*, 49 ARIZ. L. REV. 29, 41–42 (2007).

[182] COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS IN THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 5 (2000).

[183] Campbell v. Acuff-Rose Music, 510 U.S. 569, 590 (1994). *See also* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 (11th Cir. 2001) and Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 (11th Cir. 1996) (disagreeing, in dicta, with a traditional approach and Supreme Court precedent declaring fair use as an affirmative defense). Courts may also hesitate to find misuse because of the idea that misuse renders copyrights temporarily unenforceable, which might seem excessive punishment for a small infraction. Judge, *supra* note 103, at 904.

[184] Patry & Posner, *supra* note 61, at 1569.

B. FTC Rewards for Reworded Copyright Warnings

The most straightforward solution is FTC action, as the CCIA demands.[185] According to the CCIA complaint, copyright warnings are "unfair or deceptive acts or practices" under the Federal Trade Commission Act.[186] The warnings mislead users about their ability to make fair use of copyrighted materials and misrepresent the law.[187]

Critics argue the utility of such warnings outweigh any problems—the warnings remind people that infringement is a crime,[188] prevent illegal activities, and help stave off copyright lawsuits.[189] In short, companies place these warnings on their materials to combat piracy.

Notwithstanding the companies' efforts, the tactic appears remarkably unsuccessful. For example, the Motion Picture Association of America claimed a loss of $6.1 billion to piracy in 2005, and sees it as a growing threat.[190] Insofar as the warnings intimidate and confuse law-abiding users more than dissuade copyright infringers, the FTC could adjust the warnings to better serve its underlying policy.[191]

Achieving a balance of rights and fair use and providing notice to pirates should be at the heart of any copyright notice. The FTC should mandate changes in the language of copyright warnings to correct unsupportable claims—particularly those involving copyright of facts and ideas—and to better inform users of their rights.[192] The rewording need not be as extensive or as fervent as the copyright notices proposed by the CCIA.[193] For example, appending a simple fair use statement to the existing notice could prove effective: "This warning does not abridge your rights to fair use under 17 U.S.C. § 107, including for such purposes as education, commentary and reporting." Such a note would hardly encourage the wide-scale piracy feared by sports and entertainment companies, nor would it give rise to an affirmative

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[185] CCIA Complaint, *supra* note 5, para. 2.

[186] *Id.* para. 1.

[187] 15 U.S.C. § 45(a) (2006) (empowering the FTC to prevent "unfair methods of competition in or affecting commerce," as well as "unfair or deceptive acts or practices" affecting commerce).

[188] 17 U.S.C. § 506(a) (2006) (imposing fines or imprisonment on "any person who willfully infringes a copyright . . . for purposes of commercial advantage or private financial gain," among other offenses).

[189] Ross, *supra* note 180.

[190] MOTION PICTURE ASSOCIATION OF AMERICA, 2005 U.S. PIRACY FACT SHEET (2005), http://www.mpaa.org/USPiracyFactSheet.pdf; *see also* Lauren McBrayer, *The* DirecTV *Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603, 603 (2005) (noting that advancing digital technology enables people to easily copy and redistribute theatrical quality films, and that problem continues to grow); Anna E. Engelman & Dale A. Scott, *Arrgh! Hollywood Targets Internet Piracy*, 11 RICH. J.L. & TECH. 3, 21–27 (2004) (noting that seventy-seven percent of illegal copies originated within movie industry, such as from screener DVDs).

[191] *See, e.g.*, Matthew Greensmith, Sept. 11, 2007, http://businessgeek.org/index.php?/archives/24-Why-would-I-steal-from-myself.html.

[192] CCIA Complaint, *supra* note 5, paras. 63–68.

[193] *Id.* paras. 43–50. For example, the fact a publisher "fully supports educational awareness programs designed to increase the public's recognition of its fair use rights" is welcome, but unnecessary. *Id.* para. 49.

consumer right to unauthorized use.[194] Moreover, it specifically highlights some of the more common practices of fair use.

This approach creates at least two additional advantages. First, it does not disturb the existing copyright scheme, since the new warnings only incorporate the codified law. Second, it is minimally disruptive to copyright holders, who must simply adjust their warnings to implement the new standards. Nevertheless, the affected companies are apt to challenge this proposition, likely concluding in a judgment by a federal court.[195] For this reason, it may be more efficient to pursue an alternative judicial or legislative solution from the outset.

C. Congressional Action to Allow Claims of Copyright Abuse

Enacting new federal legislation offers an alternative and more potent solution to the problem of copyright warnings. Congress could generally restrict such warnings or require them to include language affirming users' fair use rights. However, a more effective solution would be for Congress to amend the Copyright Act to create significant penalties for systematic over-claiming of copyright protection.[196]

The new law would impose liability on copyright holders who assert unfounded protection in public domain, government-produced, or otherwise non-copyrightable works.[197] The legislation should also allow individuals to collect damages.[198] For example, students purchasing course packs containing materials covered by fair use would be able to sue to recover their costs.[199] Congress might also tack on an additional penalty for willful fraud.[200]

A statutory scheme is particularly appropriate in this instance, because the damage suffered by any individual user is insubstantial.[201] For buyers who mistakenly pay copyright fees for non-copyrightable materials—such as course packs,

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[194] Ross, *supra* note 180 (arguing that promoting "consumer rights" could dupe "otherwise well-meaning individuals" into copyright infringement).

[195] Patry & Posner, *supra* note 61, at 1660 (speculating that copyright holders would oppose any attempts to dilute copyright protection, fearing a "slippery slope").

[196] Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1071–78 (2006) [hereinafter Mazzone, *Copyfraud*].

[197] 17 U.S.C. § 403 (2006); Mazzone, *Copyfraud*, *supra* note 196, at 1072; *see also* Mazzone, *Too Quick to Copyright*, *supra* note 172, at 34 (arguing for an amendment allowing consumers to sue for a false copyright just as they can sue for false advertising).

[198] Mazzone, *Copyfraud*, *supra* note 196, at 1072.

[199] *Id.* at 1086; Stephana I. Colbert & Oren R. Griffin, *The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?*, 62 ALB. L. REV. 437, 454 (1998). Colbert and Griffin suggest that "although the Congress that passed the Copyright Act in 1976 would pretty clearly have thought it unfair" to copy one-third of a copyrighted work without compensation, changes in technology and teaching practices over the last two decades "might conceivably make Congress more sympathetic" to the copier today. *Id.* *Contra* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1389–90 (6th Cir. 1996) (holding that a copy shop infringed by reproducing five to thirty percent of copyrighted materials for course packs, thereby rejecting a fair use defense); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1545 (S.D.N.Y. 1991) (holding a commercial copier liable for infringement for reproducing copyrighted material in course packs, and assessing $510,000 in damages to deter future conduct).

[200] Mazzone, *Copyfraud*, *supra* note 196, at 1073.

[201] *See* Patry & Posner, *supra* note 61, at 1659.

sheet music, or pocket Constitutions—the cost of hiring an attorney would vastly outweigh any actual damages.[202] Thus, allowing buyers to recover attorney's fees or additional penalties for willful fraud would provide tremendous disincentive to copyright warning abuse.

Additionally, Congress must ensure standing for those who do not suffer monetary injury, but are nonetheless affected by copyright over-claiming.[203] For instance, a filmmaker may refrain from using a copyrighted video clip she really wants to use, because she accepts an overbroad copyright warning on its face and knows permission is too costly to obtain, even though it may constitute a fair use.[204] To remedy this situation, Congress could give state and federal agencies standing to pursue these claims on the public's behalf.[205] In the absence of such legislation, consumers will have to rely on courts to address the problem. However, the courts have yet to directly address the issue.[206]

D. Courts Should Extend the Copyright Misuse Doctrine

Just as courts have extended the misuse doctrine from patent law to antitrust and copyright issues, they should now extend it to deter overaggressive copyright warnings and protections.[207] The foundation for this transferred application is copyright's "built-in First Amendment accommodations": fair use and the idea/expression dichotomy.[208] Copyright misuse is an appropriate response when copyright holders attempt to encroach upon either of these protected user areas.[209]

Public policy favors diminution of the copyright warnings. With the "Progress of Science"[210] as an instrumental goal, the existing framework is inadequate. "YouTube" users contributing clips that likely constitute fair use are instead receiving takedown notices.[211] Merely commenting on the NFL's copyright policy can be enough to draw threats of legal action.[212]

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[202] Mazzone, *Copyfraud*, *supra* note 196, at 1078.

[203] *Id.* at 1078–79 (suggesting that standing be extended to private attorneys as one possible solution, as well as class action litigation).

[204] *E.g.*, AUFDERHEIDE & JASZI, *supra* note 78, at 10–14; Patry & Posner, *supra* note 61, at 1655.

[205] Mazzone, *Copyfraud*, *supra* note 196, at 1084–85.

[206] *See* Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609, 616 (D.R.I. 1976). In the sole federal case to weigh "copyright warnings," the court addressed a false and misleading copyright warning published by the plaintiff in a daily newspaper. *Id.* The court determined the misleading warning was insufficient in itself to support an unclean hands complaint, but it added to other allegations. *Id.*

[207] Mazzone, *Copyfraud*, *supra* note 196, at 1087–89; *see* Ekstrand, *supra* note 110, at 577–78; *cf.* Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 646–47 (7th Cir. 2003) (hypothesizing attempts to prevent use of non-copyrightable data "by contract or otherwise . . . might constitute copyright misuse").

[208] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[209] *See* Judge, *supra* note 103, at 931.

[210] U.S. Const. art. I, § 8, cl. 8.

[211] Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 200–01 (2007); Catherine Rampell, *Standing Up To Takedown Notices; Web Users Turn the Tables on Copyright Holders*, WASH. POST, Oct. 19, 2007, at D01. A recent study of such takedown notices revealed

In some respects, the courts serve as the best venue for solving copyright warning problems. As with fair use, copyright misuse is a judge-made doctrine, making it relatively flexible and easy to adapt to copyright warnings.[213] Moreover, the judiciary has traditionally played a central role in shaping copyright law, with Congress simply codifying common law doctrines.[214] Judges should once again take the lead in shaping copyright law by expanding the doctrine of misuse beyond its conventional boundaries.

In the copyright context, courts have been historically reluctant to expand misuse beyond its traditional role as an equitable defense.[215] Since the defense applies on a case-by-case basis, its impact on copyright warning cases may be less effectual than a statutory or agency solution.[216] Still, the potential loss to a copyright holder is significant—being unable to pursue an infringement claim[217]—and the cost of changing copyright warnings is very small. Consequently, the sports and entertainment companies at the heart of the matter are likely to swiftly recalibrate their warnings to fit the new judicial doctrine.

CONCLUSION

Overbroad copyright warnings pose an indirect but significant challenge to the public's use and enjoyment of copyrighted materials. By leaving a misleading impression that practically any unauthorized use is an infringement, such warnings reduce innovative uses of the material and contribute to an undemocratic "culture of permission."[218] Their sweeping, threatening language promotes confusion and uncertainty among both educators and legitimate users alike, and undermines the constitutional imperative that copyright protection advance "the Progress of

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thirty percent presented questionable, or at least arguable, legal claims. Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects?" Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf (last visited May 22, 2008). *See also, generally*, 17 U.S.C. § 512(c) (2006).

[212] Wendy Seltzer, *My First DMCA Takedown*, http://wendy.seltzer.org/blog/archives/2007/02/13/my_first_dmca_takedown.html (last visited May 22, 2008).

[213] *See* Patry & Posner, *supra* note 61, at 1645.

[214] Judge, *supra* note 103, at 912.

[215] Mazzone, *supra* note 196, at 1089. By the time the defense is raised, "the defendant has already been brought into court and is asking [it] . . . to excuse a demonstrated infringement." *Id.*

[216] *Id.* ("The success of the copyright misuse defense in any single case is uncertain, and even if courts are very generous in recognizing the defense, the degree to which it will alter general publishing practices remains unclear.").

[217] Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990).

[218] LESSIG, *supra* note 67, at 192–93; *see also* Frank Pasquale, *Cyberpersons, Propertization, and Contract in the Information Culture*, 54 CLEV. ST. L. REV. 115, 127 n.57 (citing numerous ways that permission culture has "crippled innovation" in the music and film industries).

Science."[219] Intended or not, such undesirable results defeat the very purpose of copyright law—to broadly disseminate new ideas and knowledge.[220]

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[219] U.S. Const. art. I, § 8, cl. 8; Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.").

[220] *See, e.g.*, Lydia Pallas Loren, *The Purpose of Copyright*, OPEN SPACES QUARTERLY, May 31, 2002, http://www.open-spaces.com/article-v2n1-loren.php (addressing the "dark side" of copyright law, including "stern FBI warnings at the beginning of video tapes" and lack of public discourse about balance required in copyright law to promote knowledge and learning).