WARNING:

THE NFL CLAIMS COPYRIGHT OWNERSHIP OF …. EVERYTHING?

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I. INTRODUCTION

Anyone who has watched even a small amount of the NFL will likely recognize the following message, typically accompanied by lofty music, a booming voice, and hazy shots of football legends:

> This broadcast is copyrighted by NFL productions for the private use of our audience. Any other use of this broadcast or any pictures, descriptions, or accounts of the game without the consent of NFL productions is prohibited.[1]

The National Football League ("NFL") is one of many professional sports leagues to utilize a copyright warning before or during each broadcast.[2] And there is no dispute that the games they broadcast are copyrightable products.[3] But the warning used at the beginning of each game is not actually enforceable by law… it's legally bunk.

On the one hand, the NFL's warning is so broad and inclusive that it is clearly unenforceable. The warning asserts that any use or descriptions of the game without consent is prohibited. Does that mean the New York Times cannot report which team won and how? Or that you can't post about the Chief's big win on Facebook? Of course not. And generally, the American public knows this. But at the same time, asserting an unenforceable copyright warning filled with legal jargon and claims of "ownership" and "consent" is doing harm. The NFL's copyright warning can potentially confuse the American public about copyright ownership/infringement. And the statements contained therein carry legal significance. Misrepresentation of copyright adversely affects the average individual. It especially harms

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[1] *See* NFL, *Copyright Warning (2021)*, YOUTUBE (Aug 13, 2021), https://www.youtube.com/watch?v=hM0GC6_A1P8.

[2] *See* MLB, *Copyright Warning*, YOUTUBE (Mar. 29, 2020), https://www.youtube.com/watch?v=rEdLCLvebq4; NCAA, *Copyright Warning*, YOUTUBE (Mar. 15, 2022), https://www.youtube.com/watch?v=od5_AMyjYws; NBA, *Copyright Warning*, YOUTUBE (Oct. 25, 2021), https://www.youtube.com/watch?v=fNpzl1yqXyU.

[3] *See e.g.,* Baltimore Orioles, Inc. v. Major League Baseball Ass'n, 805 F.2d 663, 668 (7th Cir. 1986) (stating live broadcasts are copyrightable); Pittsburgh Athletic Co. v. KVQ Broad. Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (discussing exclusive copyright ownership for play-by-play broadcasts of the games played by the Pirates).

businesses that benefit from legitimate uses of copyrighted products, like parody artists or bloggers.

Over-reaching warnings have become standard on many forms of copyright-protected content—the NFL is not the only one. Today other professional and collegiate sports leagues, including the MLB, NCAA, NHL, and others, have similarly broad copyright warnings.[4] Like the NFL, these leagues do not have all the rights they claim. But that does not stop them from trying to scare fans with unenforceable threats. The cumulative impact of these warnings distorts the careful balance of rights associated with copyright ownership. Copyright law is complicated enough without sports leagues misleading the public.

This Note focuses specifically on the NFL's copyright warning due to the NFL's leading role in American sports[5] and the overall entertainment industry.[6] Part II addresses what intellectual property the NFL owns/does not own. Part III looks at what rights are *actually* given to copyright owners and how those rights are protected. And Part IV presents a few solutions to remedy the ills created by overreaching copyright warnings, namely:

A. The fair use doctrine should be acknowledged in copyright warnings to clarify that copyright protection is not absolute;

B. The copyright misuse doctrine should be strengthened, so those accused of infringement have an affirmative defense;

C. Legislative and regulatory bodies should create guidelines for copyright warnings.

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[4] *See* MLB, NCAA, NBA *supra* note 2.

[5] *See* Michael J. Haupert, *The Economic History of Major League Baseball,* EH.NET (Feb. 1, 2010, 6:21 pm), https://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/ ("In 1966 MLB followed the lead of the NFL and sold its first national television package, netting $300,000 per team.").

[6] *See e.g.,* Craig R. Coenen, *From Sandlots to the Super Bowl: The National Football League 1920-1967*, 2 (2005) (NFL ranks fourth among all companies worldwide in licensing revenue, behind Disney, Warner Brothers, and Bonjour); Austin Carp, *Sports' TV dominance at new heights in 2021*, SPORTS BUSINESS JOURNAL (Jan. 1, 2022), https://www.sportsbusinessjournal.com/Journal/Issues/2022/01/10/Upfront/Ratings.aspx (in 2021, 23 of the top 25 most-watched telecasts in the US were NFL games… the only two events able to squeeze into the top 25 alongside the NFL were President Joe Biden's inauguration (No. 7) and an episode of CBS's *The Equalizer* (No. 24) – due to its coveted post-Super Bowl airtime).

II. NFL INTELLECTUAL PROPERTY OWNERSHIP

The NFL's business model is said to be "the envy of all other professional sports leagues."[7] The NFL has long pushed the law to make it more advantageous to their business model, with some massive legal victories.[8] At the heart of this business model is an aggressive intellectual property strategy.[9] The NFL makes sweeping claims of intellectual property ownership. Their copyright warning is just one example.

A. PAST: LEGITIMATE CLAIMS OF OWNERSHIP

The NFL's IP strategy started in the 1960s with Ed Sabol—a sports filmmaker hired to make highlight films for every team in the League.[10] At the time, there were just 13 teams. Sabol's documentarian ingenuity led to the creation of NFL Films, the League's own motion picture company.[11] And the creation of NFL Films meant the League was in the business of producing and owning copyrighted works. The NFL registered various copyrights for highlight reels and documentaries with and immediately after Sabol,[12] but the idea of controlling footage of NFL games themselves did not take root until more than two decades later, shortly after Congress amended federal copyright law in 1976.

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[7] Mark Yost, *Tailgating, Sacks, And Salary Caps: How the NFL Became the Most Successful Sports League in History,* 243 *(*2006) (consisting of massive TV deals, merchandising, and licensing deals, ticket sales, and corporate sponsorships).

[8] Some landmark cases pursued by the NFL include American Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214 (2010) (dealing a 9-0 defeat to the NFL's attempt to gain antitrust immunity for its policy of collective negotiation of merchandizing rights for all teams); Brown v. Pro Football, Inc., 518 U.S. 231, 231 (1996) (holding that federal labor laws provide antitrust immunity to NFL owners' agreement to implement contract terms after rejection by players); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1377-78 (2d Cir. 1988) (holding that large damages were unwarranted in a successful antitrust action brought by a rival league and affirming a jury award of one dollar).

[9] Yost, *supra* note 7.

[10] Rebecca Leung, *NFL Films, Inc.: Father-Son Team Establishes Gold Standard for Sports Photography*, 60 MINUTES (Jan. 26, 2004), https://www.cbsnews.com/news/nfl-films-inc-26-01-2004/.

[11] *Id. See also* Eric Johnson, *The NFL, Intellectual Property and the Conquest of a Sports Media*, N. DAKOTA L.R. 86, 766 (2010) (discussing the creation of NFL Films).

[12] *See e.g.,* Copyright Numbers PA0000112813-18, PA0000112823-33; Steve Sabol et al., *NFL Game of the Week*, NFL FILMS, (1978) (example of a copyright registration under Sabol's NFL Films).

In the early 1980s, the NFL sought protection of games and other related products, such as statistics and scores.[13] Their desire for copyright ownership exploded. In 1981, the NFL filed twenty-one registrations with the Copyright Office.[14] In 1982, this number doubled to fifty-three registered copyrights under the NFL's name.[15] And in 1983, it doubled again to 107 registrations.[16] The NFL realized substantial revenue and brand protection could come from copyright ownership.

Today the NFL registers every game telecast with the Copyright Office.[17] All text, images, videos, audio, and graphics are tightly controlled. An in-house group licensing program manages the marketing of all 1,800 players, as both entertainment personalities and professional athletes.[18] And any use of the NFL's players, trademarks, or copyrights must comply with the NFL's Terms and Conditions Agreement.[19] The NFL is carefully watching to ensure fans, coaches, clubs, and players comply with their IP rights. If they get even a whiff of infringement, the NFL is quick to report the violation.[20] They have a reputation for being bullishly protective of their brand.[21] With such a large organization built on branding, this is unsurprising. But their policing has gone beyond what is allowed under the law.

B. PRESENT: ILLEGITIMATE CLAIMS OF OWNERSHIP

Today, the NFL makes breathtaking claims about how far their copyright ownership goes. Few things better illustrate this than the copyright warning itself. The warning claims

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[13] *See* UNITED STATES COPYRIGHT OFFICE, COPYRIGHT CATALOG (1978 to present) (registering documentaries, huddles for each team, magazines, mascots, random comedy shorts, how-to series, trading cards, and more from 1978 to 1983).
[14] *See id.* (searching "NFL" and filtering to 1981).
[15] *See id.* (filtering to 1982).
[16] *See id.* (filtering to 1983).
[17] *See id.* (searching "NFL" registrations in recent years).
[18] The licensing program is known as the 'National Football League Players Association' ('NFLPA') and does more than just manage marketing. *See* https://nflpa.com/, https://nflpa.com/marketing-reps.
[19] NFL.COM – TERMS AND CONDITIONS, https://www.nfl.com/legal/terms (last visited Mar. 2, 2022).
[20] *See* Connor Oniki, *Whose Song is it Anyway? Professional Sports and the DMCA*, HARVARD J.S.E.L. (Mar. 26, 2021) (stating the NFL issued hundreds of DMCA takedown notices in 2021 alone).
[21] *Intellectual Property and the NFL,* EX LIBRIS JURIS [a publication of the Harris County Robert W. Hainsworth Law Library] (Feb. 1, 2019), https://www.harriscountylawlibrary.org/ex-libris-juris/2019/2/1/h7d4ueilh9o52act7xhgc8lkwbhoyh.

"any use of the broadcast, or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited." [22] But nothing in copyright law allows the NFL to police this? One can freely talk about the Super Bowl to friends or co-workers without infringing on the NFL's copyrights. The NFL could never prohibit fans from talking about last night's game. So why does the NFL attempt to exert ownership over this?

The NFL's website terms and conditions are also questionable. The NFL declares the following about their copyright ownership:

> We own or license all copyright rights in the text, images, photographs, video, audio, graphics, user interface, and other content provided on the Services, and the selection, coordination, and arrangement of such content (whether by us or **by you**), to the full extent provided under the copyright laws of the United States and other countries. Except as expressly provided in this Agreement, **you are prohibited from copying, reproducing, modifying, distributing, displaying, performing, or transmitting** any of the contents of the Services for any purposes, and nothing otherwise stated or implied in the Services confers on you any license or right to do so.
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> You may use the Services and the contents contained in the Services solely for your own individual non-commercial and informational purposes only. Any other use, including for **any commercial purposes**, is strictly prohibited without our express prior written consent. Systematic retrieval of data or other content from the Services, whether to **create or compile, directly or indirectly, a collection, compilation, database, or directory**, is prohibited absent our express prior written consent.[23]

This terms and condition agreement ignores many things. First, they claim to own content made **by you**. Think about this—the NFL is attempting to own your selfies from the game. Or the texts you sent while in line for nachos. Putting the massive privacy violation aside for now, this claim is simply not allowed under copyright law. In *Time Inc. v. Bernard Geis Assoc.*, the court found Abraham Zapruder, author of the Kennedy assassination film, the

[22] NFL, *supra* note 1.
[23] NFL.COM – TERMS AND CONDITIONS (updated Jun. 20, 2017), https://www.nfl.com/legal/terms (last visited Mar. 30, 2022) (emphasis added).

owner of the film since he created it.[24] Copyright law generally recognizes the principle that the creator of something is the copyright owner, unless there is an agreement otherwise. [25]

The terms and conditions also completely ignore the doctrine of fair use. It is not illegal to collect or modify data for criticism, comment, news reporting, or teaching.[26] It is not illegal to use content for **commercial purposes**. The Copyright Act explicitly allows certain commercial uses, in fact.[27] The NFL cannot completely prohibit you from **copying, reproducing, modifying, distributing, displaying, performing, or transmitting their** broadcast. Plus, the part of the terms where it says no "**copying or reproducing**"? It has been undeniably legal since 1984 to record a broadcast and watch it later.[28] The NFL cannot assert such a thing.

And finally, the NFL states you cannot "**create or compile, directly or indirectly, a collection, compilation, database, or directory**…" This is true, in part. But facts are not copyrightable.[29] In Feist Publications Inc. v. Rural Telephone Co., Inc, the Supreme Court held "[a]ll facts – scientific, historical, biographical, and news of the day" are not copyrightable, as they are "part of the public domain available to every person."[30] That means scores, game times, schedules, and other public information are not copyrightable. In NBA v. Motorola, Inc., the Second Circuit ruled that data collected by the defendant was not infringing material since they were facts – the defendant reproduced statistics from the broadcast, not any expressions

[24] 293 F. Supp. 130, 131 (S.D.N.Y. 1968).
[25] Id. *But see* Lindsay v. R.M.S. Titanic, 1999 U.S. Dist. LEXIS 15837, at *2021 (S.D.N.Y. Oct. 13, 1999) (holding that underwater footage of the Titanic was authored by the film director, not the camera operator). *See also* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography,* 65 U. PITT. L. REV. 385, 448 (2004) (stating other factors in the case weighed against the camera operator).
[26] 17 U.S.C. §107 (2000).
[27] *See e.g.* 17 U.S.C. § 110(5) (stating small restaurants and bars are exempt from paying public performance fees for commercial use of copyrighted material, they are free to broadcast copyrighted material).
[28] *See* Sony Corp. Of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (holding recording copyrighted works via a Betamax recorder is fair use and not infringing).
[29] Feist Publ. Inc. v. Rural Telephone Co., 499 U.S. 340, 348 (1991). *See also* Harper & Row, Publishers Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) (discussing how a copyright owner's rights exclude facts, ideas, and fair use).
[30] Id.

or descriptions of the game.[31] Statistics are simply facts, making them uncopyrightable. Copyright ownership is limited to expressions that show originality.[32] The NFL directly challenged this idea in NFL v. Governor of the State of Delaware. They sought to enjoin the Delaware state football lottery from unauthorized use of its game schedule and scores, but the court found no misappropriation of the League's property.[33] "The only tangible product of plaintiff's labor which defendants utilize in the Delaware lottery are the schedule of NFL games and the scores," the Court said,[34] "These are obtained from public sources and are utilized only after plaintiffs have disseminated them at large and no longer have any expectation of generating revenue from further dissemination."[35] Factual material such as scores and game times are not copyrightable.[36] This is just one area where the NFL is overreaching.

C. FUTURE: AN OVERREACHING IP STRATEGY CREATES HARM

The NFL's overreaching IP strategy is causing harm for multiple reasons. First, the copyright warning is confusing to the American public. The average citizen cannot decipher what is or is not copyright infringement because of the NFL's deceptive statements. And for small business owners who benefit from legitimate uses of copyrighted products, this is even more detrimental. For example, look at the career of an influencer. Sports influencers make money commenting on and critiquing NFL games, coaching choices, and draft decisions. Playing game footage is common, albeit necessary, in their videos. And although this game footage is copyrighted by the NFL, an influencer's use of game footage is not infringement. It's protected by fair use. It is not illegal to comment on or critique copyrighted works, despite

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[31] 105 F. 3d 841 (2d. Cir. 1997).
[32] *See Feist*, at 348 (creating a two-part originality requirement to qualify for copyright protection in the United States: A work must have "at least a modicum" of creativity, and it must be the independent creation of its author).
[33] 435 F. Supp. 1372 – 74 (D. Del. 1977)
[34] *Id.* at 1375.
[35] *Id.*
[36] Feist Pub'l, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

what the NFL says. How are sports influencers, or average citizens for that matter, supposed to know their rights without extensive research into the complex world of copyright law?

Second, the NFL's IP strategy is causing harm because it's misrepresentation. Our society has decided misrepresentation is a violation of the law – consumers must rely on the assertions of others. They do not want to be misled. The NFL's IP strategy is borderline fraudulent due to its false and misleading. We cannot have such a large organization making blatant misrepresentations.

Third and finally, the NFL's IP strategy is causing harm because it's creating a broader issue. The NFL impacts other sports. Due to the NFL's leading role in American sports, other leagues and organizations look to the NFL in planning their own business and IP strategies.[37] Thus, whatever the NFL gets away with likely forms a blueprint for other sports leagues and organizations to follow. If the NFL isn't held accountable, no one will be.

One cannot just claim they have a legal right to something when that right does not exist. But that is what the NFL is doing. And the NFL is large enough to simply overpower the fact that their claims have no legal backing. Thus, the NFL may successfully enforce false claims through sheer force of will.

> Undoubtedly, that is a prospect not lost on the NFL. Apparently, the acquisition of legal rights through bluster and shovery is what the NFL is banking on in making its sweeping claims. It is difficult to believe the NFL has made its claims out of a mistaken understanding of the law.[38]

The NFL has reached far beyond the rights given to them by law. It's time we examine what rights are *actually* given to copyright owners and call the NFL out for some unfounded claims of ownership.

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[37] Haupert, *supra* note 5.
[38] Johnson, *supra* note 11, at 770.

III. RIGHTS GIVEN TO OWNERS & HOW TO EXERCISE

A. GIVEN VIA THE COPYRIGHT ACT OF 1976

Copyright law gives various rights and protections to a copyright owner.[39] It was last revised by the Copyright Act of 1976, codified in Title 17 of the United States Code.[40] The Copyright Act of 1976 granted copyright protection for "original works of authorship fixed in any tangible medium of expression."[41] So broadcasts, like NFL games, receive protection under this Act.[42]

The Act grants copyright owners the exclusive right to use and authorize others to use the copyrighted work in five statutorily defined ways, including the right to copy or duplicate a broadcast.[43] The Act states anyone who violates any of these exclusive rights engages in copyright infringement.[44] The copyright owner has a variety of available remedies for infringement, including injunctive relief and damages.[45]

General requirements for copyright notices were added to the Copyright Act in 1988.[46] Notices encompass copyrighting warnings and more. They inform users of an underlying claim to copyright. Title 17, Section 401 of the United States code lists three requirements for every copyright notice:

1) The symbol (C) (letter C in a circle), or the word "Copyright," or the abbreviation "Copr.";
2) The year of first publication; and
3) The name of the copyright owner in the work, or an abbreviation by which the name can be recognized.[47]

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[39] U.S. Const. Art. 1, § 8.
[40] Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012) (before the passage of the 1976 Copyright Act, Congress enacted a series of nine acts that protected copyrighted works)
[41] 17 U.S.C. §102(a).
[42] *Id.* at §102(a)(6) ("motion pictures and other audio-visual works").
[43] 17 U.S.C. §106.
[44] *Id.* at §501(a).
[45] *Id.* at §502-505.
[46] *Id.* at §401(b).
[47] *Id.*

While it can be assumed copyright warnings fall under the notice requirement, The 1988 amendments make no mention of copyright warnings for TV broadcasting and give no guidance on their scope or content. That area has thus far been left open to copyright owner interpretation.

B. EXERCISED THROUGH CEASE-AND-DESIST LETTERS AND DMCA TAKEDOWN NOTICES

Copyright protection is used to stop infringement. There are two popular approaches copyright owners use to stop alleged infringement before litigation: (1) send a cease-and-desist letter or (2) send a DMCA takedown notice. Both are relevant to the discussion of copyright warnings and are commonly used by sports leagues like the NFL.

First, a copyright owner can send a cease-and-desist letter directly to an alleged infringer, telling them they are using protected content.[48] This has been historically an effective copyright protection method, especially when dealing with those who know little about the law or are hesitant to start a legal battle with a major corporation. Cease-and-desist letters deter even those who are fairly using protected content.[49] Fox Broadcasting, for example, eliminated nearly all fan sites containing allegedly infringing materials via a cease-and-desist letter campaign.[50] More likely than not, some websites that were not actually infringing were deleted through this campaign.

The NFL sent a notorious cease-and-desist letter to an Indiana church in 2006.[51] The League somehow found out the church was planning a Super Bowl party for its congregation.[52] The black letter law supported the NFL's position that this was copyright infringement, since

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[48] Tyler McCormick Love, *Throwing the Flag on Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection* 16 J. INTELL. PROP. L. 369, 390 (2008).
[49] *Id.*
[50] *Id.*, citing Cecilia Ogbu Note, *I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-And-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners*, 12 S.CAL. INTERDISC. L.J. 279, 303–04 (describing Fox's cease-and-desist letter campaign).
[51] Marcus Baram, *NFL Sacks Church Super Bowl Parties,* ABC NEWS, https://abcnews.go.com/US/story?id=4229536&page=1 (Apr. 14, 2009, 7:22 am).
[52] *Id.*

the game was to be played on a screen larger than fifty-five inches (a hilarious and arbitrary standard, in my opinion).[53] So the NFL had a right to send the letter. But the media caught a whiff of this and ran with it. Newspapers everywhere wrote about the double standard in the NFL's enforcement of rights—exempting bars and restaurants while prohibiting broadcasts at other social gatherings, like church groups?[54] Bad publicity. Not many receive this church's level of attention, but the NFL sends hundreds of cease-and-desist letters each year.[55]

The second way to utilize copyright protection before litigation is sending DMCA takedown notices. This method emerged to deal with content posted online.[56] The NFL is also notorious for issuing DMCA takedown notices.[57] In one case, the NFL sent a takedown notice to a Brooklyn Law School professor who posted a clip on YouTube criticizing the NFL's copyright warning, just as I'm doing here.[58] Professor Wendy Seltzer quoted the NFL's copyright warning, accusing the NFL of blatantly disregarding fair use and copyright overreach.[59] True. Instead of addressing the potential flaws in their copyright warning, the NFL responded with a DMCA takedown notice, saying Seltzer herself was infringing by quoting the warning.[60] YouTube promptly removed Seltzer's video.[61] Seltzer responded with a counternotification affirming the clip did not infringe and she reuploaded the clip.[62] Instead of

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[53] 17 U.S.C. § 110 (2000) (laying out twelve exemptions to copyright restrictions, one being "no such audio-visual device has a diagonal screen greater than 55 inches).
[54] *See e.g,* Baram, *supra* note 51; Michael Foust, *Fans' passion turns against NFL over 'anti-church' policy*, BAPTIST PRESS, http://m.bpnews.net/24880/fans-passion-turns-against-nfl-over-antichurch-policy (Feb. 2, 2007); Associated Press, *NFL Thwarts Church's Plan to Show Super Bowl,* FOX NEWS, https://www.foxnews.com/story/nfl-thwarts-churchs-plan-to-show-super-bowl (Jan. 13, 2015, 2:47 pm).
[55] Oniki, *supra* note 20.
[56] 17 U.S.C. § 512 (1998). This legislation resulted from a compromise between copyright owners and online service providers.
[57] Oniki, *supra* note 20.
[58] *See* Jacque Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, ARS TECHNICA, (Mar. 20, 2007), https://arstechnica.com/information-technology/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions/ (saying it's hard to imagine that a court would do anything but decide in Seltzer's favor); Peter Lattman, *Law Professor Wendy Seltzer Takes on the NFL*, WALL ST. J.: L. BLOG (Mar. 21, 2007) https://www.wsj.com/articles/BL-LB-3513 (interviewing Seltzer about her battle with the NFL).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

following the DMCA's provisions, which mandate the person claiming infringement respond to DMCA counterclaims in court, the NFL issued a second takedown notice for Seltzer's reupload, ignoring the counterclaim completely.[63] YouTube again removed the video.[64] And Seltzer again countered and reuploaded.[65] This forced the NFL into a stalemate. They were left with two options – take Seltzer to court or walk away. They chose to walk away. The video remains on YouTube today,[66] "enduring evidence of a rare loss for the NFL in the legal sphere."[67]

Seltzer's case was rare. The NFL can take down a lot of content via DMCA takedown notices and cease-and-desist letters. And some of this content is infringing. But the NFL's claims of ownership are overly broad. Many of the rights they assert are not actually given to copyright owners.

IV. SOLUTIONS TO AVOID THE HARM

This section looks at potential ways to avoid the ills created by the NFL's copyright overreach. I propose three potential ways to stop the NFL's abuse: (A) copyright warnings should acknowledge the fair use doctrine, (B) the copyright misuse doctrine should be strengthened, and (C) legislative and regulatory bodies should get involved.

A. COPYRIGHT WARNINGS SHOULD ACKNOWLEDGE FAIR USE

Congress should make it a requirement to acknowledge fair use as an exception to the exclusive rights of a copyright owner. Something as simple as "All copyrighted works are subject to the fair use exception" could be enough. Including a provision like this would place a very little burden on copyright owners but greatly aid consumers. It would help with antitrust concerns and show people that copyright ownership is not an absolute right.

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *See* NFL, Super Bowl Highlights, YOUTUBE (Feb. 8, 2007), https://www.youtube.com/watch?v=a4uC2H10uIo.
[67] Johnson, *supra* note 11.

Congress's ultimate objective in defining copyrights was to balance the public's incentive to produce and reproduce with the harm inflicted on the owner[68] – a fair use exemption was included in the Copyright Act of 1976 to ensure this balance. Fair use is crucial to copyright law. In its most general sense, fair use is copyright of copyright material for a limited and "transformative purpose, such as commentary, criticism, or parody,"[69] like the sports influencer.[70] The factors a court considers while assessing fair use are:

1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2) The nature of copyrighted work;
3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) The effect of the use upon the potential market for or value of the copyrighted work.[71]

The fair use doctrine is not a rigid rule. It contains a non-exhaustive list of potential purposes that courts could consider fair use, with a list of factors.[72] Finding one of these purposes requires a case-by-case factual analysis.[73] The codified language simply states that the courts must apply an "equitable rule of reason" when presented with potential copyright infringement.[74]The fair use doctrine has become one of the main tools a court will use when it feels a copyright owner's claimed protection reaches too far.[75] Fair use is a crucial defense for limiting the monopolies that inherently come with copyright ownership. Fair use should be

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[68] *See* Sony Corp., *supra* note 28 (stating the limited grant of copyright privileges involves a different balance between the interests of authors with society's competing interest in the free flow of ideas, information, and commerce).
[69] 17 U.S.C. §107 (2000).
[70] *See* Section II.C.
[71] *Id.*
[72] *See id.* (including commentary, criticism, parody, research, and teaching).
[73] *See* Sony Corp. Of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
[74] 17 U.S.C. §107 (2000).
[75] *See* Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* 6–7 (2007), http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf. This study found that fair use industries contributed $2.2 trillion to the U.S. economy in 2006, making up 16.6% of the total U.S. dollar GDP.
[75] 17 U.S.C § 401(b) (2000).

acknowledged in standard copyright warnings because the defense is one way an alleged infringer can defend themselves in a copyright dispute.

B. STRENGTHENING THE COPYRIGHT MISUSE DOCTRINE

Another way to potentially avoid the ills created by overreaching copyright warnings is to strengthen the copyright misuse doctrine. Copyright misuse is an affirmative defense that has grown out of the patent misuse doctrine.[76] The patent misuse doctrine was developed to discourage patent owners from claiming exclusive rights to things not included in the patent grant.[77] And in 1990, the doctrine of patent misuse was applied to copyright law.[78] With respect to the misuse defense, one can analogize patents and copyrights.[79] But unlike patent misuse, copyright misuse is underdeveloped.

The initial application of the copyright misuse defense was in the 1990 case *Lasercomb v. Reynolds*.[80] The Fourth Circuit held that misuse of copyright was a valid defense against a claim of infringement.[81] As a result, the infringement charges against the defendant were dropped, and a temporary pause was placed on the owner's copyright protections.[82] The Fourth Circuit said the copyright owner could not bring any infringement suits until they stopped the misuse and remedied the effects.[83]

The copyright misuse doctrine grew from there, but at various speeds in different jurisdictions. Currently, no uniform application of copyright misuse exists. The Fifth and Ninth

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[76] *See* David Scher, *The Viability of the Copyright Misuse Defense*, 20 FORDHAM URB. L.J. 89, 94 (1992) (citing Morton Salt Co. v. G.S. Suppinger Co., 314 U.S. 488, 493–94 (1942)).
[77] *Id.* Public policy supports the doctrine because "the public in general suffers if an individual claims exclusive rights over something he did not create, because that individual removes from the public that which does not belong to him." This goes against the purposes of intellectual property protections and stifles creativity.
[78] Lasercomb v. Reynolds, 911 F.2D 970 (4th Cir. 1990).
[79] 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.09[A] (2022). The leading copyright treatise gives "tacit approval of the analogy between patents and copyrights, with respect to a misuse defense."
[80] *Lasercomb*, 911 F.2D 970.
[81] *Id* at 971.
[82] *Id.* at 971.
[83] *See* McCormick Love, *supra* note 48.

Circuits have accepted copyright misuse as an affirmative defense, like *Lasercomb*.[84] The Seventh has also recognized the doctrine's validity.[85] The Eleventh Circuit has rejected this idea completely, though,[86] and other courts—without denying that overreaching conduct could lead to a misuse defense—have quickly denied the existence of conduct that may lead to the defense.[87] "*Lasercomb* remains an exceptional case. Other courts tend to deny the existence of conduct [that could lead to misuse]." Nimmer on Copyright said.[88] The mixed reception courts have given to the doctrine has led to confusion for consumers and copyright owners. The copyright misuse defense is incomplete and a tough defense to win in its current form. It must be clarified and strengthened. Copyright misuse is a doctrine that has the potential to play an important role in protecting the public policy underlying copyright.

C. CONGRESSIONAL OR REGULATORY INTERVENTION

Congress or an appropriate regulatory body (likely the FTC) must get involved and make guidelines for copyright warnings. The current law leaves it to the copyright owners and their lawyers to draft a copyright warning, determining how they express the exclusive rights tied to their ownership. The copyright owner gets to choose whether they acknowledge fair use. Copyright owners are incentivized to exaggerate prohibited uses to keep tight control on their products because, put simply, more claimed "protected rights" means more control and more money.

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[84] *See* Alcatel USA, Inc. v. DGI Techs., Inc., 166 F. 3d 772 (5th Cir. 1999); Practice Mgmt. Info Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997).
[85] *See* Assessment Techs of Wis., L.L.C. v. WIREdata, Inc., 350 F.3d 640, 647 (7th Cir. 2003) (Posner, J.) (stating the copyright misuse doctrine has been "cut free from antitrust").
[86] *See* Bateman v. Mnemonics, Inc., 79 F.3d 1532 (11th Cir. 1996) (stating they will not recognize copyright misuse as an affirmative defense whilst rejecting the claim on the merits of the doctrine).
[87] *See* Video Pipeline, Inc. v. Buena Vista Home Entm't Inc., 342 F.3d 191 203-06 (3d Cir. 2003) (rejecting misuse as applied and noting the Third Circuit or Supreme Court has not affirmatively recognized it); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1169 (1st Cir. 1994) (stating "this case does not require us to decide whether federal copyright law permits a misuse defense"); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 846 (Fed. Cir. 1992) (stating that "[i]n the absence of any statutory entitlement to a copyright misuse defense… the defense is solely an equitable doctrine."); Microsoft Corp. v. Compusource Distribs., Inc., 115 F. Supp. 2d 800, 810 (E.D. Mich. 2000) (rejecting the copyright misuse defense and noting the "Sixth Circuit has neither accepted or rejected the copyright misuse defense").
[88] *Id.*

The leeway given to copyright owners to determine their own warnings allows them to take advantage of the public when most people have very limited understanding of copyright law as is. Especially on the Internet, a layer of confusion exists about what is and is not allowed. Congress or the FTC can make the law easier by creating a standard form copyright warning to be used by all copyright owners.

Per 15 U.S.C. § 45, the FTC has the authority to regulate unfair and deceptive trade practices. The statute in the relevant part states:

> 1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
> 2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[89]

The general elements of a deceptive claim include:

> 1) Showing that the defendant committed a deceptive act or practice;
> 2) That the deception occurred during conduct involving trade or commerce;
> 3) That the plaintiff suffered actual damage; and
> 4) That the deception proximately caused the damage.[90]

Misleading copyright warnings are deceptive. When copyright owners make false claims via their warnings, they make a claim somewhat analogous to a false advertising claim.[91] The FTC owes it to consumers to monitor this type of deception.

Admittedly, it would be unprecedented for the FTC to make a ruling about an overreaching copyright warning as an unfair and deceptive trade practice. The FTC has not yet heard cases on this subject, but they should address the issue anyway because an enormous percentage of the economy relies on or benefits from the fair use of copyrighted materials.[92]

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[89] 15 U.S.C. § 45 (2000).
[90] *Id.* at § 43(a).
[91] NIMMER ON COPYRIGHT, *supra* note 79.
[92] Rogers & Szamosszegi, *supra* note 75.

And the public has pushed for FTC involvement on this topic – in 2007, a complaint was filed by a non-profit organization called the Computer & Communications Industry Association (CCIA), alleging systematic overrepresentation of copyright protection by several sports leagues, publishers, and movie production studios.[93] The complaint asserted that overrepresentation threatens competition, discourages innovation, confuses consumers, and undermines the public welfare that the spirit of copyright law seeks to protect.[94] The complaint is correct. It's deceptive. On Dec. 6, 2007, FTC staff responded to the complaint, saying they would not "take any formal action against the companies… at this time."[95] The FTC should revisit this decision. The FTC has the power to send cease-or-desist letters or injunctions to organizations like the NFL.[96] And they should.

A finding by the FTC or Congress that misleading copyright warnings are deceptive is crucial. It's proactive. It would *prevent* a dispute, unlike fair use or copyright misuse. There would be no need for a defendant or costly litigation if guidelines were issued. The FTC should prohibit using misleading warnings

V. CONCLUSION

The issue of overreaching copyright warnings is not one to be ignored. This Note suggests three potential ways to prevent the issue. First, all copyright warnings should acknowledge the doctrine of fair use. Fair use is essential to copyright law – to business, to progress, to innovation. Second, we must strengthen the copyright misuse doctrine. The NFL is one of potentially many copyright owners flying under the radar due to this underdeveloped,

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[93] Request for Investigation and Complaint for Injunctive and Other Relief, *In re* Misrepresentation of Consumer Fair Use and Related Rights (Fed. Trade Comm'n, Aug. 1, 2007), *available at* http://www.ilrweb.com/viewIRLPDF.asp?filename=ccia_nfl_complaint.

[94] *Id.*

[95] Mary Engle, *Complaint Regarding Alleged Misrepresentations of Consumer Fair Use and Related Rights by Certain Copyright-Holding Corporations*, Federal Trade Commission Division of Advertising Practices https://www.ftc.gov/system/files/documents/advisory_opinions/letter-responding-complaint-computer-communications-industry-association-regarding-alleged/071206ccia.pdf (Dec. 6, 2007).

[96] *What The FTC Does,* FEDERAL TRADE COMMISSION MEDIA RESOURCES, https://www.ftc.gov/news-events/media-resources/what-ftc-does (last accessed Apr. 25).

incomplete defense. Copyright misuse is a doctrine that has the potential to play an important role in protecting the public policy underlying copyright law, plus it is uniquely positioned to prevent copyright owners from over assertion of rights. Third and finally, Congress or the FTC should take a stance on the issue. Legislative and regulatory bodies have the power to attack deceptive warnings proactively, and they should utilize this power. Third and finally, Congress should create guidelines for copyright warnings that are mandatory for all who choose to use them. An acknowledgment of fair use should be required in all copyright warnings, and at the very least, these warnings must declare ownership over only what the law allows.

As sports leagues continue to grow and dominate the entertainment industry, they cannot continue to misrepresent their legal rights. Overassertion of rights, particularly intangible rights like copyright, causes public confusion. It stifles innovation. It leads to unwanted monopolies. Copyright warnings are just a small piece of the problem but fixing this issue may create a clearer legal boundary for all owners and potential infringers. We must actively prevent copyright overreach and misleading copyright warnings from the NFL and others.