

# Copyright Reform Act

Prepared on behalf of



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## Copyright Abuse and Notice

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by

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This Report is one of a series related to the Copyright Reform Act, a project created on behalf of Public Knowledge as a client of the Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law and the Stanford Cyberlaw Clinic.<sup>†</sup>

Public Knowledge is a Washington, D.C., based public interest organization that works to protect the rights of citizens and consumers to communicate and innovate in the digital age. Ensuring these rights requires a copyright law that does not unduly restrain everyday communications or new sources of creativity, and one that can account for current and future changes in technology.

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## I. Introduction

This third installment of our Report series accompanying the Copyright Reform Act addresses two overarching issues: misleading and abusive informational practices that some copyright owners have adopted at the expense of consumers; and a procedural imbalance in copyright lawsuits that can negatively affect defendants who are targets of misrepresented copyright claims. We address two types of problematic informational practices: first, some copyright owners use misleading and deceptive warning notices to make overbroad claims regarding their rights; second, some copyright owners fail to provide adequate notice to consumers of technological restrictions on the products and services they offer. These practices create an informational deficit in the market, which can subject consumers to unexpected usage limitations, security risks, privacy risks, and other unforeseen harms. In addition, we address a current imbalance in the procedural framework of copyright litigation that leaves defendants without a meaningful process for quickly and inexpensively resolving litigation and creates an unfortunate incentive for unscrupulous or aggressive plaintiffs to use the threat of litigation to deter legitimate uses. We propose reforms to address each of these problems, while preserving the ability of all copyright owners to defend their exclusive rights.

Some copyright holders use unfair and deceptive warning notices on their products that mislead consumers by describing restrictions that have, at best, a tenuous relation to actual copyright law.<sup>1</sup> Based on the degree of care reasonable consumers take to read statements such

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<sup>1</sup> For example, some publishers place warning notices that effectively claim copyright ownership in public domain works. See, e.g., Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028 (2006) (describing a pocket version of the Constitution with a copyright notice on it (referring to TERRY L. JORDAN, *THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT* 2 (7th ed. 1999))); Public Domain Sherpa, <http://www.publicdomainsherpa.com/false-copyright-claims.html> (last visited Apr. 27, 2010) (describing Adamant Media Corporation's version of Adam Smith's *The Wealth of Nations*, which contains a copyright notice despite the fact that this work is clearly in the public domain). Other copyright owners place excessive notices of rights they purport to have under copyright law. See, e.g., Wendy.Seltzer.org: Legal Tags, The Blog, [http://wendy.seltzer.org/blog/archives/2007/02/08/my\\_first\\_youtube\\_super\\_bowl\\_highlights\\_or\\_lowlights.html](http://wendy.seltzer.org/blog/archives/2007/02/08/my_first_youtube_super_bowl_highlights_or_lowlights.html) (Feb. 8, 2007 10:04 EST) [hereinafter NFL Youtube] (describing the NFL's copyright warning notice on its telecasts); *THE INCREDIBLES* (Disney 2003) (containing a warning notice on the DVD packaging stating "This product is authorized for private use only. All other rights reserved. Unless expressly authorized in writing by the copyright owner, any copying, exhibition, export, distribution or other use of this product or any part of it is strictly prohibited.").

as these, they may be misled by these types of notices.<sup>2</sup> Some copyright holders also fail to disclose technological restrictions on their products, or bury them in dense end-user license agreements (“EULAs”) that do not provide meaningful notice.<sup>3</sup> As these restrictions generally exceed the limitations inherent in copyright law, this concealment results in numerous harms. Consumers are unable to make reasoned choices, they are placed in a position where they may accidentally violate anticircumvention laws, and they suffer in a market where misstated or hidden restrictions on the part of some producers effectively limit information about competing products.

Another problem is that frivolous claims of infringement that misrepresent exclusive rights as defined in 17 U.S.C. § 106, copyrightable subject matter as defined in 17 U.S.C. §§ 102-105, or copyright ownership can be so expensive to defend against that they prevent defendants from vindicating their rights, even if they are likely to prevail. Similarly, claims that are likely to have significant harmful effects on free expression or competition can chill socially beneficial activities simply because the defendant cannot afford to litigate the case, or cannot risk being subject to an injunction or statutory damages. Under the existing procedural structure of copyright litigation, the effect of such claims may be disproportionately powerful when compared to their substance. Defendants lack a practical way of responding when these misrepresented or otherwise abusive claims translate into threats or actual litigation, making such claims too coercive.

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<sup>2</sup> See *Aronberg v. Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942) (“[T]he buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.”).

<sup>3</sup> See, e.g., Class Action Complaint at 2-3, *Thomas v. Electronic Arts, Inc.*, No. C08-04421 (N.D. Cal. 2008) (describing SecuROM, an undisclosed DRM program bundled with the Spore computer game that is automatically installed and cannot be deleted); Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157 (2007) (describing the rootkit TPM concealed in Sony music CDs); Kirk Biglione, *Amazon’s Kindle Disclosure Policies Could Attract FTC Attention*, MEDIALOPER, Apr. 17, 2009, <http://medialoper.com/amazons-kindle-disclosure-policies-could-attract-ftc-attention/> (“... Amazon sells DRM-restricted ebooks side-by-side with DRM-free ebooks while making no distinction between the two formats. From the consumer’s perspective there’s no way to tell which Kindle books are locked down by DRM before purchase.”); John Kershaw, *Well Thanks. The PS3’s Hidden DRM Just Cost Me £20*, NEGATIVE GAMER, July 4th, 2009, <http://negativegamer.com/2009/07/04/well-thanks-the-ps3s-hidden-drm-just-cost-me-20/> (describing the PS3’s HDCP AV output TPM that is identified only on page 19 of the “safety and support” booklet and not on the box, nor in the quick reference guide).

In response to these abusive practices, we need stronger protections. First, accurate copyright notices and warnings should be required, and unfair and deceptive notices should be prohibited. Second, technological limitations on consumer usage rights should be clearly and prominently disclosed to the consumer prior to purchase.<sup>4</sup> Finally, copyright defendants should have robust procedural protections that allow them to easily dismiss frivolous copyright lawsuits. To meet these goals, we propose the following reforms:

- **Prohibition of Misleading Copyright Warning Notices:** Congress should direct the Federal Trade Commission (“FTC”) to promulgate and enforce rules that ensure copyright warning notices claim only exclusive rights that copyright owners have under copyright law. Copyright owners that continue to claim rights they do not have would be subject to penalties for unfair and deceptive acts under existing FTC regulations.
- **Required Disclosure of Technological Restrictions:** Congress should direct the FTC to promulgate and enforce rules requiring the full and conspicuous disclosure of technological restrictions on consumers’ ability to use products and services in ways that would otherwise be lawful under copyright law. Copyright owners failing to meet these requirements would lose their ability to hold consumers responsible for circumvention of undisclosed technological restrictions.
- **Motion to Strike for Copyright Misrepresentation:** The Copyright Act should be amended to provide for a new special motion to strike, which would act as an efficient and effective procedural response available to targets of abusive copyright infringement claims that are based on misrepresenting the rights of a copyright owner, or that are likely to cause significant harm to competition or free expression if upheld. The motion would suspend discovery, and provide for attorneys’ fees and costs if successful.

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<sup>4</sup> See Agreement Containing Consent Order, *In re Sony BMG Music Entm’t*, FTC File No. 062-3019 (decision and order), available at <http://www.ftc.gov/os/caselist/0623019/0623019do070629.pdf> [hereinafter Sony Rootkit Order] (ordering that Sony BMG “clearly and prominently disclose” any playback and copying limitations on packaging for products containing content protection software); J. Thomas Rosch, *A Different Perspective on DRM*, 22 BERKELEY TECH. L.J. 971, 972 (2007) (“The [FTC] has long insisted that consumers be given adequate notice of the terms on which goods or services are being made available to them, including any material limitations.”).

These proposed reforms place the notice activities of copyright owners under the same FTC scrutiny to which analogous practices—such as advertising and marketing statements and disclosures of warranty limitations—are subjected.<sup>5</sup> Consumers should be able to expect descriptions on products that accurately frame uses allowed under copyright law, and the FTC is well versed in determining what practices unfairly and deceptively defeat these expectations.<sup>6</sup> A motion to strike, in providing an efficient and effective procedural protection for targets of suits or threats built on misrepresented or otherwise abusive allegations of copyright infringement, would serve as a deterrent to such activity and give copyright defendants generally a procedural tool for quickly dismissing frivolous and harmful claims.

These reforms build on academic research and expert commentary,<sup>7</sup> proposed bills,<sup>8</sup> advocacy efforts,<sup>9</sup> and enacted legislation,<sup>10</sup> bringing balance back to the relationship between

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<sup>5</sup> See Federal Trade Commission: Consumer Protection, <http://www.ftc.gov/bcp/about.shtm> (last visited Apr. 26, 2010) (describing the seven divisions of the Bureau of Consumer Protection, including Advertising Practices, which protects consumers by enforcing “truth-in-advertising laws” and emphasizes, among other things, conduct related to high-tech products and the Internet such as spyware dissemination; and Marketing Practices, which addresses Internet, telecommunications, and direct-mail fraud and fraudulent business or investment schemes).

<sup>6</sup> See Commission letter on deception to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (October 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [hereinafter FTC Deception Policy].

<sup>7</sup> See, e.g., John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395 (1993); Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003); Mazzone, *supra* note 1; Deirdre K. Mulligan, John Han, & Aaron J. Burstein, *How DRM-Based Content Delivery Systems Disrupt Expectations of “Personal Use”*, Proceedings of the 3d ACM Workshop on DRM 77 (2003), *available at* <http://portal.acm.org/citation.cfm?id=947380.947391>; Rosch, *supra* note 4; Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?*, 6 J. TELECOMM. & HIGH TECH. L. 41 (2007); Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801 (2000).

<sup>8</sup> See Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (2009); Digital Media Consumers’ Rights Act of 2005, H.R. 1201, 109th Cong. (2005) [hereinafter DMCRA]; Digital Consumer Right to Know Act, S. 692, 108th Cong. (2003) [hereinafter DCRKA]; Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong. (2003) [hereinafter DRMAA].

<sup>9</sup> See, e.g., Request for Investigation and Complaint for Injunctive and Other Relief, *In re* Misrepresentation of Consumer Fair Use and Related Rights 6 (Fed. Trade Comm’n Aug. 1, 2007), *available at* <http://www.ftc.gov/os/070801CCIA.pdf> [hereinafter CCIA Complaint]; Letter from Prudence S. Adler, Associate Executive Director, Association of Research Libraries, to Deborah Platt Majoras, Chairman, Federal Trade Commission (Aug. 1, 2007), *available at* [http://www.arl.org/bm~doc/ftc\\_complaint\\_01aug07.pdf](http://www.arl.org/bm~doc/ftc_complaint_01aug07.pdf) (expressing the support of the Library Copyright Alliance for the CCIA’s FTC complaint regarding the harm of false and misleading copyright warnings); Letter from EDUCAUSE, The Electronic Frontier Foundation, FreeCulture.org, Knowledge Ecology International, Public Knowledge, The Scholarly Publishing and Academic Resources Coalition, & U.S. Public Interest Research Group, to Deborah Platt Majoras, Chairman, Federal Trade Commission (Aug. 3, 2007), *available at* <http://www.publicknowledge.org/pdf/ftc-letter-20070803.pdf> [hereinafter CCIA Complaint Support]

producers and consumers. These changes would relieve consumers of much of the harm they currently experience without diminishing the exclusive rights of copyright owners; they call only for accurate depictions, and not limitations, of copyright holders' rights and the restrictions they choose to impose on consumers.

## **II. Addressing Misleading Copyright Warning Notices and Failures to Disclose Technological Restrictions**

This Part provides an overview of the different ways in which copyright owners have used copyright warning notices unfairly or deceptively, or, relatedly, have failed to give upfront notice of important technological restrictions on use, resulting in a variety of harms to consumers. The FTC should enact and enforce rules that prevent copyright owners from using misleading copyright warning notices or concealing technological restrictions in their products and services, drawing from its wide-ranging experience in dealing with consumer protection and unfair, anti-competitive practices in commerce.<sup>11</sup> By prohibiting unfair and deceptive statements and omissions, such rules can restore the producer-consumer balance and ensure that consumers have accurate notice of their rights and responsibilities.

### **a. Some copyright owners have adopted unfair and deceptive informational practices at the expense of consumers**

Copyright owners have engaged in two modes of notice or disclosure-related copyright abuse. First, some copyright owners use warning notices that affirmatively and significantly overstate the rights they are entitled to under copyright law, which subverts the balance in the

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(expressing the support of the undersigned organizations for the CCIA's FTC complaint); California Anti-SLAPP Project, <http://www.casp.net/> (last visited Apr. 27).

<sup>10</sup> See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12(2006); CAL. CIV. PROC. CODE § 425.16 (West 2004); California Anti-SLAPP Project: Other States: Statutes and Cases, <http://www.casp.net/statutes/menstate.html> (last visited Apr. 27, 2010) (listing 27 states and territories that have enacted anti-SLAPP legislation, and 9 states with anti-SLAPP bills).

<sup>11</sup> The FTC handles a broad range of regulatory areas under the umbrellas of consumer protection and free competition, enforcing federal laws protecting consumers, providing consumers with information to help spot fraud and deception, and challenging anticompetitive conduct in the marketplace. See Federal Trade Commission: Consumer Protection, *supra* note 5; Federal Trade Commission: Competition, <http://www.ftc.gov/bc/about.shtm> (last visited Apr. 26, 2010).



copyright statute and can lead consumers to refrain from lawful uses.<sup>12</sup> Second, some copyright owners elide or conceal information regarding technological restrictions that materially alter the usage rights consumers enjoy under copyright law. This concealment can result in an information imbalance in the marketplace that fosters unfair competition in addition to causing a number of harms to the unwitting consumer who purchases a product or service encumbered with these hidden restrictions.<sup>13</sup>

### **1. Unfair and deceptive, misleading copyright warning notices are a significant problem for consumers**

Misleading copyright warning notices are so pervasive today<sup>14</sup> that the average consumer is likely to take them for granted.<sup>15</sup> Copyright notices appear on modern compilations of Shakespeare, Dickens, and other authors whose works have long since entered the public domain, and are thus not covered by copyright.<sup>16</sup> The National Football League (“NFL”) labels its telecasts with a copyright warning that states “[t]his 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 consent, is prohibited.”<sup>17</sup> This notice completely disregards copyright law by seeking to regulate the dissemination of factual material such as “any . . . descriptions or accounts of the game.”<sup>18</sup> By stating that “Any other use” is prohibited,

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<sup>12</sup> Copyright law includes a number of built-in safeguards tempering the exclusive rights of copyright owners, described *infra* in Part II.a.1. See also CCIA Complaint Support, *supra* note 9.

<sup>13</sup> See Rosch, *supra* note 4, at 974 (“[I]mposing [DRM] on consumers unilaterally without appropriate notice and consent, especially where it may have unintended effects, is problematic.”); Samuelson & Schultz, *supra* note 7, at 47 (describing six types of harms resulting from the failure to disclose technological limitations).

<sup>14</sup> Mazzone, *supra* note 1, at 1040 (“Browse any bookstore, buy a poster or a greeting card, open up sheet music for choir or orchestra practice, or flip through a high school history text: Copyfraud is everywhere.”).

<sup>15</sup> In this paper, “misleading copyright warning notices” refer primarily to detailed and explicit claims of rights in excess of rights granted under copyright law. Minimal, yet effective, notices of copyright that claim “© 2010, All Rights Reserved” and the like do not fall under the notion of copyright abuse as we have defined it. These notices are factually correct in reserving rights that copyright owners actually have under copyright law, and claim no rights in excess of the law.

<sup>16</sup> *Id.* at 1040-41.

<sup>17</sup> NFL Youtube, *supra* note 1.

<sup>18</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (holding that copyright does not protect facts).

the notice also attempts to restrict other lawful uses that consumers may make without consent, under the fair use doctrine or other copyright exemptions.<sup>19</sup>

Notices such as the ones described above overstate copyright owners' rights and subvert the intended balance of the copyright system by describing supposed usage limitations that are far in excess of the rights actually recognized in copyright law. These notices can chill lawful or fair uses of works and burden the public with extraneous clearance concerns, because members of the public may believe that the notices are an accurate representation of the law, despite the fact that the notices may ignore or even oppose built-in copyright balancing mechanisms and safeguards.<sup>20</sup> For example, when Professor Paul Heald was assembling materials for his paper on spurious copyrights, he found several examples of copyright claims on works that are clearly in the public domain, including an edition of Shakespeare's *Henry IV, Part II* that stated "ALL COPYING IS ILLEGAL" and sheet music by Bach claiming that "COPYING IS ILLEGAL." These misleading claims negatively affected the Professor's ability to use the works<sup>21</sup>—when his assistant took the sheet music to a copy shop, the staff refused to prepare copies because the assistant lacked written permission from the publisher.<sup>22</sup> Though Professor Heald notes that "sufficiently original arrangements" of these works could be copyrightable,<sup>23</sup> in these specific instances, the edits made by] Friedrich Smend to Bach's Cantatas were not sufficient to be

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<sup>19</sup> Under the fair use doctrine, a usage may not infringe copyright where it is used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," and determination is to be made based on factors including the purpose of the use, the nature of the copyrighted work, the amount of the copyrighted work used, and the effect of the use on the potential market for the copyrighted work. 17 U.S.C. § 107 (2006). Other explicit exemptions are described in Title 17, Chapter 1, including reproduction by libraries and archives, face to face teaching, and more. See 17 U.S.C. §§ 108-112, 117, 119, 121-22 (2006).

<sup>20</sup> See CCIA Complaint Support, *supra* note 9 ("By misstating the law, some parties are seeking, not to safeguard their rights, but to invent rights they do not have. By constant and conspicuous repetition, misleading copyright notices have led to a general and widespread misunderstanding of the scope and nature of copyright protection.").

<sup>21</sup> Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTEL. PROP. L. 259, 259, apps. A, C (1993).

<sup>22</sup> *Id.* at 261 n.10 ("I had assigned to my assistant the preparation of high quality, reduced copies [of examples of copyright claims made to public domain materials] for the appendixes. Shortly he returned, unsuccessful, having been denied by the copy shop for lack of written permission from the publisher."). Even though sheet music of public domain works could possibly contain some copyrightable elements such as annotations or music instrument fingering suggestions that have been added on top of the original composition, a "COPYING IS ILLEGAL" notice with no other qualifications would still be misleading in this context.

<sup>23</sup> *Id.* at 266-67 ("Given that the age of a Bach Cantata or a Shakespearean play, a colorable argument as to 'its' copyrightability would not be impossible to make. Of course, a sufficiently original arrangement of a Bach Cantata would be independently copyrightable.")

copyrightable.<sup>24</sup> The copy shop was thereby permitted to make legal copies of the music because the work was in the public domain.

A major feature of copyright disregarded by some of these notices is the requirement that copyright owners enjoy exclusive rights on a work for only “limited Times,”<sup>25</sup> after which the work enters the public domain. A rich public domain is important, and central to copyright policy, because it provides a foundation of freely accessible raw materials on which new works can be built, enhancing innovation.<sup>26</sup> Yet some copyright holders misleadingly imply or state outright that they own copyrights in public domain material. Because copyright law does not include explicit protections for the public domain, sellers are incentivized to claim ownership even of those works that have entered the public domain.<sup>27</sup> In addition to the sheet music example above, other instances of this misleading practice abound, such as a copyright claim on a pocket version of the Constitution, which provides that “[n]o part of [the] publication may be reproduced or transmitted in any form or by any means . . . without permission in writing from the publisher.”<sup>28</sup> School textbooks are another example, often claiming blanket copyright on all material included, even public domain documents such as the Declaration of Independence and Supreme Court cases.<sup>29</sup>

Another critical set of limitations sometimes elided by copyright owners is the set of “free speech safeguards” built in to copyright law.<sup>30</sup> The first of these is the idea-expression

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<sup>24</sup> *Id.* at 267 (“When the arrangement is not quite original enough, however, and the owner of the spurious copyright can make a colorable argument that the arrangement met the requisite degree of originality, the licensee’s purchase of the right not to be sued is arguable enforceable.”)

<sup>25</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>26</sup> See, e.g., R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 998 (2003) (stating also that “our intellectual advancement depends on the quantity of information from which we can build”).

<sup>27</sup> Mazzone, *supra* note 1, at 1029.

<sup>28</sup> *Id.* at 1028 (referring to TERRY L. JORDAN, *THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 2* (7th ed. 1999)). While “fascinating facts” may well be copyrightable material, the text of the Constitution itself is in the public domain and the warning notice on this work is misleading in claiming ownership over *all parts* of the publication.

<sup>29</sup> *Id.* at 1028.

<sup>30</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

distinction<sup>31</sup> described in 17 U.S.C. § 102(b), which allows for the free communication of any “idea, procedure, process, system, method of operation, concept, principle, or discovery” unencumbered by the risk of copyright infringement, but retains protection for original expression.<sup>32</sup> The second is the fair use defense, codified in 17 U.S.C. §107, that permits certain usages of the expression itself and “affords considerable latitude for scholarship and comment.”<sup>33</sup> The NFL warning described above is a clear example of an overstatement of rights that sidesteps these First Amendment safeguards. Not only does it seek to preclude people from using “descriptions, or accounts” of NFL games—based on factual information such as scores and plays made, and not on “original expression”—without permission, it also ignores possible fair uses that could be made, such as sports analysts commenting on NFL games, sports reporters describing NFL games, or coaches using NFL games as teaching material.<sup>34</sup>

Professor Wendy Seltzer’s experience dealing with the NFL is an example of the NFL actually acting on these exaggerated rights.<sup>35</sup> After Professor Seltzer posted on YouTube a snippet of the Super Bowl in order to highlight the overstatement in the NFL’s copyright warning statement claiming the right to withhold consent for any non-private uses of “this telecast or of any pictures, descriptions, or accounts of the game without the NFL’s consent,” she faced a long process of back-and-forth takedown notices and counter-notifications until her clip was finally restored.<sup>36</sup> A consumer with less knowledge of copyright law could easily have relented after receiving the first takedown notice, not realizing that the NFL warning was overstated.

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<sup>31</sup> An expression of an idea may be copyrighted, but use of the idea itself cannot be prevented through copyright. *See, e.g., Baker v. Selden*, 101 U.S. 99, 104 (1879) (“The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.”).

<sup>32</sup> 17 U.S.C. § 102(b) (2006); *see Eldred*, 537 U.S. at 190.

<sup>33</sup> 17 U.S.C. § 107 (2006); *see Eldred*, 537 U.S. at 190.

<sup>34</sup> *See* 17 U.S.C. § 107 (2006).

<sup>35</sup> Wendy.Seltzer.org: Legal Tags, The Blog, [http://wendy.seltzer.org/blog/archives/2007/04/05/nfl\\_second\\_down\\_and\\_goal.html](http://wendy.seltzer.org/blog/archives/2007/04/05/nfl_second_down_and_goal.html) (Apr. 5, 2007 08:24 EST) (describing the chronology of Professor Seltzer’s copyright interactions with the NFL).

<sup>36</sup> *See id.*; NFL Youtube, *supra* note 1.

Another tangible effect of these overbroad notices is the additional clearance burden they may place on those who wish to build on or reproduce copyrighted works.<sup>37</sup> Given examples of copyright clearance and related policies that have gained attention in the public eye,<sup>38</sup> consumers are likely to handle overbroad notices in a conservative manner and seek clearance even when they do not need to do so.<sup>39</sup> For example, an ordinary consumer trying to copy works in the public domain—perhaps an old family photo, sheet music for a Bach Cantata, or an edition of a Shakespeare play<sup>40</sup>—may face denial at a copy shop just as Professor Heald’s assistant did in the situation described earlier.<sup>41</sup> A copy shop is unlikely to question a notice’s claim of copyright protection, and without a sophisticated understanding of copyright law, the consumer is likely to accept the copy shop’s refusal to copy the public domain work. The consumer may be unable to convince the copy shop that the work, despite the notice’s claims of copyright protection, is in the public domain or she may believe the shop assistant knows more about copyright than she does. This extraneous burden could arise in any context where a consumer is relying on a gatekeeping service provider to do the copying—including, but not limited to, copy shops, photo services, and print shops.<sup>42</sup> With ever-increasing costs of obtaining permission from copyright

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<sup>37</sup> The problem is compounded for those who are using large numbers of works that face greater transaction costs locating copyright owners and higher clearance fees in the aggregate.

<sup>38</sup> See, e.g., Mazzone, *supra* note 1, at 1067 n.176 (describing a documentary producer that spent a quarter of her budget on clearance costs for music played during filming (citing Nancy Ramsey, *The Secret Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, §2, at 13, available at <http://www.nytimes.com/2005/10/16/movies/16rams.html>)); The N.Y. Times on the Web: Permissions: Rights and Permissions FAQ, <http://partners.nytimes.com/subscribe/help/permis.html> (stating that “[i]t is always best to submit the material for copyright clearance” when using a portion of a New York Times article); POETRY AND NEW MEDIA WORKING GROUP, HARRIET MONROE POETRY INSTITUTE, POETRY AND NEW MEDIA: A USER’S GUIDE 12 (2009) (describing university policies discouraging the use of handouts with whole poems and publishing policies requiring scholars to seek permission for every use of a poem, including minor ones).

<sup>39</sup> See Mazzone, *supra* note 1, at 1067-68 (“Filmmakers face pressures to obtain authorization with respect to everything they used—whether authorization is required under the law or not.”);

<sup>40</sup> These examples are in the public domain so long as they lack sufficiently original changes made by an editor or publisher. See Heald, *supra* note 23.

<sup>41</sup> See Heald, *supra* note 21, at 261 n.10.

<sup>42</sup> For instance, Wal-Mart’s photo centers operate under the following conservative copyright policy: “[W]e will not copy a photograph that appears to have been taken by a professional photographer or studio, even if it is not marked with any sort of copyright, unless we are presented with a signed Copyright Release from the photographer or studio.” Wal-Mart Photo: Obtain a Release for Copyright-Protected Images, <http://photos.walmart.com/copyrightpolicy> (last visited Apr. 28, 2010). This policy has blocked individuals from having their own photos printed at Wal-Mart when the photos were deemed “too good” to have not been taken by a licensed professional. See, e.g., Posting of Elizabeth Stroud to NSLog(), Wal-Mart Photo Copyright Policy, [http://nslog.com/2008/11/17/wal-mart\\_photo\\_copyright\\_policy](http://nslog.com/2008/11/17/wal-mart_photo_copyright_policy) (Jan. 12, 2009 16:59 EST).

owners,<sup>43</sup> every unnecessary clearance hurdle contributes to a total cost of clearance that may prove prohibitive, further incentivizing service providers to refuse. In addition, such refusal by conservative gatekeepers, who may suffer from the same misleading influences as consumers, serve to exacerbate consumer's misconceptions regarding the reach of copyright law.

As such, information costs, including those borne by gatekeepers, may act as effective clearance burdens even when consumers have serious doubts about the accuracy of a misleading copyright warning. Provided that the information costs of determining whether clearance is necessary exceed the value that consumers can derive from their intended uses, consumers may very well suffer from a notice's chilling effect. This effect is exacerbated when the potential cost of litigation is factored into the equation, in the event that the copyright warning notices turn out to be legitimate.

Finally, these notices fail to consider the numerous explicitly defined exemptions in copyright law, which range from performance and display allowances for face-to-face teaching in the classroom<sup>44</sup> to compulsory licensing requirements for making covers of nondramatic musical works.<sup>45</sup> For example, blanket copyright warning notices such as the ones used on

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<sup>43</sup> See Genevieve P. Rosloff, "Some Rights Reserved": *Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37, 46 (2009) ("Studies conducted on the process of locating copyright owners and securing the owners' permission reveal that clearance costs are extremely high and have been steadily increasing over the past twenty years." (citing PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), available at [http://www.centerforsocialmedia.org/rock/backgrounddocs/printable\\_rightsreport.pdf](http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf))); POETRY AND NEW MEDIA WORKING GROUP, *supra* note 38, at 12-13 (describing permission fees as high as \$45 per line of poetry for uses as small as three lines from a poet's entire body of work, and an initial outright denial of use for thirty-five Yeats poems in a book by critic Helen Vendler, replaced by permission fees of \$13,500).

<sup>44</sup> 17 U.S.C. § 110(1) (2006) (exempting the "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution" where the display is given by means of a lawfully acquired copy or the person responsible for the performance believes it was lawfully made).

<sup>45</sup> 17 U.S.C. § 115 (2006) (permitting any person to obtain a license to make and distribute phonorecords of a nondramatic musical work, without consent of the copyright owner, provided notice and payment conditions are met). Other exemptions include § 108, reproduction by libraries for archival; § 109, the first sale doctrine; § 117, copying of computer programs as essential steps or for archival; § 121, reproduction in formats for the blind or disabled; and various forms of transmissions in §§ 111, 112, 114(d)(1), 119, and 112. The useful article limitations of pictorial, graphic, and sculptural works and the merger doctrine are other limitations that may be ignored by these notices. See 17 U.S.C. § 101 (2006) ("[T]he design of a useful article . . . shall be considered a [protectable] pictorial, graphic, or sculptural work only if . . . such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that "facts themselves do not become original through association," meaning the expression merges with the idea in such cases and cannot be copyrighted).

DVDs from Universal that indicate “[a]ny 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” leave no room for explicitly defined copyright exemptions.<sup>46</sup> Further, this warning notice suggests that film professors showing DVDs to their classes will be subject to severe penalties, though such usage clearly falls under the teaching exemption. Ultimately, such false representations made by copyright owners in affirmative notices of copyright may give consumers a false impression of limitations on their usage rights that are, in fact, nonexistent.

## **2. Some copyright owners fail to provide clear and conspicuous notice of technological restrictions**

In addition to the problems that occur when copyright owners affirmatively use misleading copyright warning notices, harms can also arise when copyright owners do not provide sufficient notice of technological restrictions on products and services they offer. The widespread failure of copyright owners to disclose technological restrictions that limit consumers’ usage rights or cause products to behave in unexpected ways causes numerous harms, such as a lack of expected functionality or interoperability, discontinued services, security vulnerabilities, or privacy intrusions.<sup>47</sup> The fact that technological restrictions are unpopular with consumers incentivizes copyright owners not to disclose their use in advance, or to disclose them only in an inconspicuous or unclear manner—such as in a lengthy and dense EULA—compounding the problem.<sup>48</sup> As argued by Professors Samuelson and Schultz, this failure to disclose “exacerbates the tension because the marketplace is operating on imperfect information.”<sup>49</sup>

These harms have been amplified by the growth of consumer expectations that have accompanied the development of new digital media technologies—time-shifting, space-shifting, platform-shifting, annotating, and more.<sup>50</sup> Some of the basic uses enabled by new technology

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<sup>46</sup> CCIA Complaint, *supra* note 9 (emphasis added).

<sup>47</sup> See Samuelson & Schultz, *supra* note 7, at 47.

<sup>48</sup> *Id.* at 47.

<sup>49</sup> *Id.* at 47.

<sup>50</sup> See *id.* at 44-46.

that have become social norms include backing up, translating formats, and time-, space-, and platform-shifting.<sup>51</sup> For instance, when in 2003 Intuit required users to register its TurboTax software with a particular computer, consumers were blocked from using another computer to print or file their tax returns without purchasing an additional license or re-activating the software, causing “severe frustration for consumers who were not aware of the feature when they purchased the software product.”<sup>52</sup> As noted by FTC Commissioner Rosch in a 2007 speech, “consumers have the right to expect that their CDs come without copying limitations, and to expect that the music on those CDs will play on any device.”<sup>53</sup> Importantly, consumers attempting to make any of these expected uses may find their efforts impeded by technological restrictions,<sup>54</sup> or may discover that they have accidentally become liable for § 1201 circumvention.<sup>55</sup>

Undisclosed technological restrictions may also subject consumers to other unexpected results when services or products undergo changes or even cease to operate, diminishing or nullifying the value of their purchases. When the online music service provider MSN Music shut down its “PlaysForSure” DRM servers, this prevented users from playing their music on any devices that did not already contain the newly-defunct PlaysForSure DRM software.<sup>56</sup> Similarly, when Yahoo’s Music Unlimited Store was shut down, users who wished to maintain access to their downloaded music were required to migrate to another service called Rhapsody.<sup>57</sup> Had consumers been more aware of this technological restriction, they might have elected instead to

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<sup>51</sup> See The Consumer Technology Bill of Rights, H.R.J. RES. 116, 107th Cong. § 3 (2002) (enumerating the usage rights that should belong to consumers who have legally acquired works).

<sup>52</sup> *Id.* at 58.

<sup>53</sup> Rosch, *supra* note 4, at 972-73.

<sup>54</sup> See Mulligan, Han, & Burstein, *supra* note 7, at 77 (examining a body of representative DRM applications and discovering that none of them “support the range of personal uses of copyrighted works that individuals expect”).

<sup>55</sup> Samuelson & Schultz, *supra* note 7, at 54 (“Some customers and competitors have been surprised to find themselves charged with Section 1201 violations, in part because the copyright owner did not give adequate or effective notice that it was using a TPM that was subject to Section 1201 scriptures.”).

<sup>56</sup> Travis Hudson, *DRM Disaster: Microsoft to Close MSN Music License Servers*, PCWORLD, Apr. 23, 2008, <http://blogs.pcmag.com/staffblog/archives/006844.html>. Even Microsoft’s own Zune mp3 player cannot play PlaysForSure music. Todd Bishop, *Software Notebook: Microsoft Zune Doesn’t Do ‘PlaysForSure’*, SEATTLE PI, Sept. 18, 2006, [http://www.seattlepi.com/business/285407\\_software18.html](http://www.seattlepi.com/business/285407_software18.html).

<sup>57</sup> Staci D. Kramer, *Yahoo Not Only Shutting Music Stores, But Orphaning DRM Buyers*, WASHINGTON POST, July 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/27/AR2008072701435.html>.



purchase other items free of those limitations, or might not have been willing to pay as high a price for the encumbered product.<sup>58</sup> As characterized by Professors Samuelson and Schultz, “[c]onsumers suffer harm when TPMs are used to lock-out competitive products and services, especially when they were given no notice of the existence of the lockout system before purchasing the product or service.”

Copyright holders who fail to disclose these types of technological restrictions are potentially engaging in two forms of unfair competition. First, this practice effectively allows rights-holders to pass off restricted products as unencumbered products, stymieing consumers’ ability to effectively compare competing products. Second, where technological restrictions lock out competing products or services or otherwise prevent interoperability,<sup>59</sup> this can create inefficiencies in the market and raise switching costs for consumers.<sup>60</sup> Both practices are detrimental to robust and fair competition, and can result in consumers being “stuck with inadequate or debilitating purchases.”<sup>61</sup> For an example of a product that might appear comparable to its peers, yet bears a debilitating limitation, consider a computer game with an undisclosed technological restriction limiting usage to a single computer.<sup>62</sup> In such a case, consumers would be unable to enjoy their purchase after a simple upgrade to a newer computer.

In addition to harming marketplace competition, some undisclosed technological restrictions have created security vulnerabilities that are completely hidden and are not discovered through

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<sup>58</sup> See Mulligan, Han, & Burstein, *supra* note 7, at 79 (“Less restricted products are more valuable to the customers who purchase them. This means that less restricted products should attract more customers and justify higher prices than otherwise.”).

<sup>59</sup> See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) (describing Lexmark’s use of technological restrictions on its printers and toner cartridges to lock out competitors); *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (describing Chamberlain’s attempted usage of technological restrictions to bar its competitor from offering interoperable garage door openers); David Kravets, *Apple v. EFF: The iPhone Jailbreaking Showdown*, WIRED, May 2, 2009, available at <http://www.wired.com/threatlevel/2009/05/apple-v-eff-the-iphone-jailbreaking-showdown/> (discussing arguments about “jailbreaking” the Apple iPhone’s OS to allow consumers to run applications that have not been authorized by Apple). See also Aaron K. Perzanowski, *Rethinking Anticircumvention’s Interoperability Policy*, 42 U.C. DAVIS. L. REV. 1549, 1600 (describing Apple’s FairPlay DRM which suppresses interoperability of media sold in iTunes with competing devices). Apple has made its music store DRM-free, but movies and TV shows still retain the FairPlay DRM. See Peter Cohen, *iTunes Store goes DRM-free*, MACWORLD, Jan. 6, 2009, available at <http://www.macworld.com/article/137946/2009/01/itunestore.html>.

<sup>60</sup> See Samuelson & Schultz, *supra* note 7, at 53.

<sup>61</sup> *Id.* at 53.

<sup>62</sup> See *id.* at 54 n.55.

normal use. For example, consumers who used their computers to listen to lawfully purchased music from Sony BMG Music Entertainment in late 2005 unknowingly installed copy protection software that acted as spyware and opened their computers to attacks from hackers.<sup>63</sup> Ironically, the series of tools that Sony BMG later offered to uninstall the software created further security problems for consumers.<sup>64</sup> According to Professors Mulligan and Perzanowski, the inadequate disclosure of these technological restrictions failed to give potential consumers a “fair warning of the security and privacy threats created by these DRM schemes or the scope of the limitations that they imposed on the use of the media.”<sup>65</sup>

Technological restrictions may also create privacy risks by enabling copyright owners to monitor usage habits, often secretly. For example, some online movie services send “registration” information to services servers “each time films are played for the first time, paused and resumed, or rewound and resumed, . . . [which] allows [them] to maintain meticulous records concerning how movie files are used by individual customers.”<sup>66</sup> Digital rights management (“DRM”) technologies that collect information about users—and especially those that do so without clear notice of the information being collected or even of the collection process itself—invade user privacy by creating records of “intellectual exploration, one of the most personal and private of activities . . . [in] spaces within which one might reasonably expect that one’s behavior is not subject to observation.”<sup>67</sup>

Even when technological restrictions are disclosed in EULAs, the extent of limitations they impose may not be fully apparent, either because the restrictions are buried in dense language or because users do not always inspect agreements carefully.<sup>68</sup> Sometimes technological restrictions may only be mentioned in a cursory manner on the packaging of a product, hidden in

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<sup>63</sup> Mulligan & Perzanowski, *supra* note 3, at 1158-59. This type of software is also known as a “rootkit.”

<sup>64</sup> *See id.* at 1164.

<sup>65</sup> *Id.* at 1168.

<sup>66</sup> Mulligan, Han, & Burstein, *supra* note 54, at 83 (describing MovieLink and CinemaNow services).

<sup>67</sup> Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 585 (2003); *see* Samuelson & Schultz, *supra* note 7, at 46.

<sup>68</sup> *See* Good, et al., *User Choices and Regret: Understanding User’s Decision Process about Consensually Acquired Spyware*, 2 I/S: J.L. & POL’Y 283, 289 (2006) (stating, for example, that it is doubtful “all users who clicked through the KaZaA EULA would have a genuine ‘meeting of the minds’” (emphasis in original)).

plain sight, or buried in one of the numerous clauses of a dense EULA.<sup>69</sup> The Sony rootkit scenario provides an example of cursory, ineffective disclosure:

Sony BMG also failed to disclose adequately the security failures of its DRM. Components of these measures were installed—sometimes permanently—before customers were confronted with the EULA terms. The CD packaging, which was the only means of pre-installation notice, contained precious few indicia of the DRM contained within. The CD jewel cases featured the International Federation of the Phonographic Industry (IFPI) ‘Content Protected’ logo on their spines and a small nondescript ‘content protection grid’ that provided general information and system requirements on their back covers.<sup>70</sup>

It is unsurprising that consumers did not understand the restrictions. Recent research has confirmed what seems clear to anyone who tries to read and understand a standard boilerplate EULA: in many cases, they do not provide meaningful notice. As the authors of a study of end users’ decision processes when reading EULAs found, “[E]ven those that do read EULAs often find the documents indecipherable because of their length, the format in which they are displayed, and the use of specialized technical and legal language.”<sup>71</sup> Further calling EULA disclosure practices into question, sometimes the terms disclosed within are not factually accurate. Again looking to the Sony rootkit situation, the EULA there was not only “rife with overreaching terms[,] . . . some of the EULA terms were simply untrue.”<sup>72</sup>

When consumers lack sufficient notice of the potential risks that come with technological restrictions on products and services, this can shatter consumer expectations regarding the uses they can make of a particular work. Furthermore, copyright owners may be able to pass off products burdened with technological restrictions as unencumbered products, thus preventing consumers from making informed choices and causing them to purchase products that differ significantly from their expectations. To mitigate the discrepancies between expectations and

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<sup>69</sup> See *id.* at 320 t.5 (finding that over 50% of users did not even look at standard EULA notices and almost 40% of users only skimmed them during software installation).

<sup>70</sup> Mulligan & Perzanowski, *supra* note 3, at 1168.

<sup>71</sup> Good, et al., *supra* note 68, at 289.

<sup>72</sup> Mulligan & Perzanowski, *supra* note 3, at 1162. The EULA claimed that no user information would be collected, yet data was indeed collected and sent to Sony BMG each time a user listened to a protected CD.<sup>72</sup> One anti-copying component of the technological restriction software was permanently installed onto the user’s machine even if the user declined the EULA. *Id.* at 1163.

the realities of restricted works, and to address the interoperability, security, and privacy problems that can arise from these discrepancies, more accurate notice is required.

### **3. These practices depart from other areas of commerce, where there are specific requirements of fair dealing and other protections**

Fairness and honesty requirements should apply to all areas of commercial dealing, including the distribution of copyrighted works. As stated by FTC Commissioner Rosch, “[r]egardless of how [DRM] is delivered, consumers must know what they are getting before they buy.”<sup>73</sup> Yet the legally complex world of copyrighted works marketed to consumers unfortunately lacks explicit sector-based protections for those consumers. As a result, misleading notices and hidden restrictions abound, and the marketplace competition that benefits consumers suffers from lack of full and fair information. This stands out from other areas of commerce, which have specific consumer protection requirements.

For example, states have enacted specific statutes to control consumer abuse in widely varying businesses, including automobile rentals, debt collection practices, mail order sales, fitness clubs, and travel promoters, and more.<sup>74</sup> In the related area of patents, protections are already in place. To protect consumers from deceptive practices related to claimed patent rights, a federal statute expressly prohibits the false suggestion that unpatented articles are patented.<sup>75</sup> More generally, consumer abuse is also addressed on a federal level by the FTC, which is empowered to prevent “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”<sup>76</sup> and which actively regulates, for

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<sup>73</sup> See Rosch, *supra* note 4, at 973. The “default ethical vision of copyright” is “an ideal frame of mutual respect, fair dealing, and commercial exchange.” James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 *FORDHAM L. REV.* 2005, 2025 (2009).

<sup>74</sup> See generally Albert Norman Shelden, Stephen Gardner, & Alan S. Hirsch, *A Truncated Overview of State Consumer Protection Laws*, C998 ALI-ABA 523 (1995).

<sup>75</sup> 35 U.S.C. § 292(a) (2006); see *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352-53 (Fed. Cir. 2005) (describing that a party should be subject to a fine under the patent marking statute where an unpatented article is marked as patented without “a reasonable belief that the articles were properly marked”). This is similar to intent requirements within the FTC’s administrative penalty provisions for unfair or deceptive acts. See 15 U.S.C. § 45(m)(1)(A) (2006).

<sup>76</sup> 15 U.S.C. § 45(a)(2) (2006).

example, advertising, financial services, and marketing.<sup>77</sup> These consumer protection statutes and the FTC uphold, among other values, the consumer’s right to be informed, “including the right to be protected against fraudulent, deceitful or misleading information, advertising, labeling and other such practices and the right to be given the facts necessary to make informed choices.”<sup>78</sup> This right should apply no less to the consumer markets for products that involve copyrighted works; it would be a natural development to create explicit consumer protections in this area of commerce to bring it in line with other areas.

**b. The problems of misleading copyright notices and inaccurate or inadequate notice of technological restrictions should be addressed through deliberate reform**

In this Part, we describe the type of reform that would most effectively address the consumer harms discussed above: requiring the Federal Trade Commission to establish rules to govern notice and disclosure in copyrighted works marketed to consumers, and arming it with strong and appropriate mechanisms for enforcing those rules. Our reform builds on proposed bills and enacted legislation that have, in targeting some of the same harms addressed by the reform, also sought to deal with the problem by appointing the FTC as the regulatory body responsible for protecting consumers.

Regulatory action is needed in part because courts are unable to sufficiently address the issues. First, existing provisions governing fraudulent copyright notices provide only for criminal action,<sup>79</sup> preventing individuals from bringing suit for such notices on their own.<sup>80</sup> Because the government has had a sparse record of enforcement under this provision, very few relevant opportunities for adjudication arise.<sup>81</sup> Second, existing provisions in copyright law to

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<sup>77</sup> See Federal Trade Commission: Consumer Protection, *supra* note 5.

<sup>78</sup> Sheldon, Gardner, & Hirsch, *supra* note 74, at 527 (citing President Kennedy’s landmark speech, *On Protecting the Consumer Interest*, 1962 Cong. Q. 890-93 (1962)).

<sup>79</sup> See 15 U.S.C. § 506(c), (e) (2006) (criminalizing fraudulent placement of copyright notices, distribution of articles bearing such notices, and making false representations of material facts in copyright registration applications).

<sup>80</sup> Mazzone, *supra* note 1, at 1036 (citing *Evans v. Cont’l Homes, Inc.* 785 F.2d 897, 912-13 (11th Cir. 1986)). Furthermore, courts may only make decisions regarding disputes that come before them.

<sup>81</sup> See *id.* at 1036 (“Left to the government, these provisions are almost never enforced.”). From 1994 to 2008, only 4 defendants faced 17 U.S.C. § 506(c) allegations of fraudulent copyright notice. Federal Justice Statistics Resource Center, Bureau of Justice Statistics, Defendants in Criminal Cases Filed in U.S. District Court, Fiscal Years 1994-

prohibit fraudulent uses of copyright notices are “all bark and no bite”<sup>82</sup> and fail to serve as effective deterrents to the copyright abuse in question. Due to the lack of civil redress, the insufficient penalties,<sup>83</sup> and the high level of proof imposed by the existing provisions’ intent requirement, rights-holders are able to misrepresent the extent of their exclusive rights with near impunity and benefit from these misrepresentations.<sup>84</sup>

### **1. Congress should direct the FTC to regulate these practices**

Following related practices in other sectors of commerce, Congress should direct the FTC to formulate rules and regulations for copyright notices and for adequate disclosure of technological restrictions, and should establish appropriate tools for the FTC to use in enforcing these rules. The FTC’s history of protecting consumers against similar unfair practices across a wide variety of industries gives it the experience and expertise required to successfully address the problems identified above.

Appropriately, the FTC has “dual missions focused on assuring consumer protection and open competition.”<sup>85</sup> As such, the FTC is ideally suited to regulate the accuracy of notices to prevent both the consumer harms caused by overstated rights and those caused by failures to disclose restrictions on lawful uses. Additionally, failure to disclose restrictions on lawful use may give copyright owners unfair competitive advantages in the market, which further indicates that the task of regulating these disclosures fits well within the scope of the FTC’s regulatory powers. Because the problems of misleading copyright warning notices and undisclosed

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2008, <http://fjsrc.urban.org/tsec.cfm> (select “Number of defendants in cases filed,” select years 1994-2008, choose “title and section within U.S.C.” and “17 506 C”) (last visited Apr. 12, 2010).

<sup>82</sup> Mazzone, *supra* note 1, at 1036 (referring to penalties for “improper assertions of ownership” in § 506(c), (e)).

<sup>83</sup> The penalty for a person who “with fraudulent intent, places on any article a notice of copyright . . . that such person knows to be false” is not more than \$2,500 and requires a prosecutor to choose to bring a criminal charge. *See* 17 U.S.C. § 506(c) (2006) (describing the criminal offense of fraudulent copyright notice).

<sup>84</sup> Professor Heald argues that four existing causes of action, outside of copyright law, could be used to deter this practice: (1) breach of warranty, (2) unjust enrichment, (3) common-law fraud, and (4) consumer protection statutes incorporating FTC false advertising principles. *See* Heald, *supra* note 21, at 262. These other causes of action are potentially applicable, but we believe that it is more likely for consumers to find protection in regulatory action; filing lawsuits is expensive, uncertain, and burdensome, and jurisdictions may differ in their approaches to each individual case.

<sup>85</sup> *See* Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 71 (2002).

technological restrictions are compatible with the FTC's goals, Congress should entrust the FTC with the task of regulating copyright notices and disclosures for copyrighted works marketed to consumers.

The FTC's history of adopting longstanding, well-developed rules in determining what acts or practices are unfair and deceptive further indicates its suitability as a regulator for this market. By statute, an act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>86</sup> The FTC considers deceptiveness a subset of unfairness,<sup>87</sup> and describes an act or practice as deceptive if "first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."<sup>88</sup> Congress may safely delegate the determination of unfairness or deception to the FTC, relying on the certainty added to the process by the FTC's existing standard of determination.

Finally, the FTC has an extensive body of regulation protecting consumers from similar abuses in other areas of commerce.<sup>89</sup> For example, the FTC protects consumers from deceptive warranties by requiring the full and conspicuous disclosure of warranty terms and conditions.<sup>90</sup> The FTC also protects consumers from the deceptive or unfair practices of financial service providers, requiring, for instance, that consumers have accurate and complete information about key terms before they enter into financial transactions, enabling them to make informed decisions.<sup>91</sup> Comparing these examples to the Sony Rootkit situation, it seems likely that, if

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<sup>86</sup> 15 U.S.C. § 45(n) (2006).

<sup>87</sup> See FTC Deception Policy, *supra* note 6.

<sup>88</sup> *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 104 (1984).

<sup>89</sup> The FTC has acted to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce ever since passage of the Federal Trade Act of 1914, codified in 15 U.S.C. §§ 41-58.

<sup>90</sup> Magnuson-Moss, *supra* note 10. Consumers harmed by breaches of warranty or noncompliance with the Act or relevant FTC regulations may sue for legal relief. See Andreas Maurer, *Consumer Protection and Social Models of Continental and Anglo-American Contract Law and the Transnational Outlook*, 14 IND. J. GLOBAL LEGAL STUD. 353, 365 (2007); 15 U.S.C. §§ 2308, 2310 (2006) (describing implied warranties and remedies in consumer disputes).

<sup>91</sup> Federal Trade Commission: Consumer Protection: Division of Financial Practices, <http://www.ftc.gov/bcp/bcpfp.shtm> (last visited Apr. 12, 2010).

consumers had been given accurate and complete information about the technological restrictions on their music discs prior to purchase and installation, they would have been much less likely to fall victim to the harms created by the rootkit within the Sony TPM. Through the proposed reform, accuracy of copyright notices would become just another one of the many areas where the FTC protects the rights of consumers.

## **2. Earlier proposed legislation has targeted these issues and analogous harms and dealt with them through a consumer protection approach**

In proposing this reform, we follow other well-considered proposals. Earlier proposed bills have also recognized the problem of copyright notice abuse and failure to disclose, and have also put forth possible solutions based on principles of consumer protection. Our proposed reform builds on these proposals, including the Digital Media Consumers' Rights Act of 2005 (DMCRA),<sup>92</sup> the Digital Consumer Right to Know Act (DCRKA),<sup>93</sup> and the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 (DRMAA).<sup>94</sup>

The DMCRA would establish that the “[advertising or sale] of a prerecorded digital music disc product which is mislabeled . . . shall be deemed an unfair method of competition and an unfair and deceptive act or practice,” where “mislabeled” discs are those that fail to “provide adequate notice to consumers about restrictions on the playability and recordability of ‘copy-protected compact discs.’”<sup>95</sup> Similarly, the DCRKA seeks to “ensure that consumers of digital information and entertainment content are informed in advance of technological features that may restrict the uses and manipulation of such content,” in order to allow consumers to make informed decisions and promote competition.<sup>96</sup> Along the same lines, the DRMAA would prohibit the offering of digital media products lacking “clear and conspicuous notice . . . [that] identifies any restrictions the access control technology or redistribution control technology used

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<sup>92</sup> DMCRA, *supra* note 8 (referred to the Subcommittee on Commerce, Trade and Consumer Protection).

<sup>93</sup> DCRKA, *supra* note 8 (read twice and referred to the Committee on Commerce, Science, and Transportation).

<sup>94</sup> DRMAA, *supra* note 8 (read twice and referred to the Committee on Commerce, Science, and Transportation).

<sup>95</sup> DMCRA, *supra* note 8, at §§ 2, 3(b)(1).

<sup>96</sup> DCRKA, *supra* note 8, at § 2(b).



in or with that digital media product is intended or reasonably could be foreseen to have on the consumers' . . . use of the product."<sup>97</sup>

All three of these bills would direct the FTC to take on the role of rulemaking and enforcement to meet these ends.<sup>98</sup> Our proposed reform follows naturally from the legislative proposals described above, and would similarly focus the FTC's attention on remedying these harms. Rather than targeting only digital music discs or other digital media piecemeal, this reform would consolidate these suggested changes under the umbrella of copyright notice for the purpose of allowing the FTC to address all of these analogous harms in a uniform manner.

### **c. Details of the proposed reform**

Our proposed reform addresses the problems of misleading copyright warning notices and failure to disclose technological restrictions by directing the FTC to promulgate and enforce rules<sup>99</sup> targeting these practices. As noted, the reform builds on the well-established consumer protection framework of the FTC, draws from the analogous issues and proposed solutions described earlier, and seeks to improve the accuracy and type of information available to consumers when they are considering the purchase of products or services.

At its heart, this reform would simply subject those who market copyrighted works to consumers to an existing, well-developed, and broadly applied standard for determining which practices are harmful to consumers. In areas currently regulated by the FTC, the agency characterizes as "deceptive" those acts, omissions, or practices that are likely to mislead consumers acting reasonably under the circumstances and are material to the uses that a consumer may wish to make of the works.<sup>100</sup> A reasonable consumer is likely to believe the limitations described in a misleading copyright warning notice on a product,<sup>101</sup> which can

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<sup>97</sup> DRMAA, *supra* note 8, at § 4(c)(1).

<sup>98</sup> See DMCRA, *supra* note 8, at § 3(b), (d); DCRKA, *supra* note 8, at § 3; DRMAA, *supra* note 8, at § 4(a), (c).

<sup>100</sup> See FTC Deception Policy, *supra* note 6.

<sup>101</sup> See *Aronberg v. Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942) ("The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." (citing *Florence Mfg. Co. v. Dowd*, 178 F. 73, 75 (2d Cir. 1910))).

materially affect the uses that the consumer may make of the product. Similarly, a failure to disclose technological restrictions on a product or service is an omission that is likely to color consumers' impressions of a product, affect their purchasing decisions, and prevent them from using products as they expect. Thus, both misleading copyright warning notices and the failure to disclose restrictions comport with the definition of "unfair" and "deceptive" already used by the FTC, which can consequently extend its coverage into this area with seasoned familiarity.

### **1. Address misleading copyright warning notices**

In order to address misleading copyright warning notices, Section 4 of the Copyright Reform Act would require that the FTC promulgate rules "to prohibit, as an unfair and deceptive act or practice, any person from issuing warning notices that unfairly or deceptively overstate a person's rights with respect to a work protected under copyright law."<sup>102</sup> It is important to note that this reform would not target more general, and factually correct, notices such as those merely indicating copyright ownership (e.g., the familiar "© 2010 Jane Doe") and stating "All Rights Reserved."<sup>103</sup> However, this reform *would* prohibit such notices where they claim rights that do not exist at all; for example, the reform could target a claim of copyright ownership applied to a public domain work, such as the public domain sheet music described by Professor Heald.<sup>104</sup> Public domain works aside, the reform is primarily directed towards notices that actively mislead the public and exceed the standard notice by presenting an incorrect, overstated picture of the rights retained by a copyright owner without justification as to why these additionally claimed "rights" are necessary. For example, the NFL warning prohibiting "any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's consent"<sup>105</sup> fits readily into the category of notices that would be prohibited by the

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<sup>102</sup> "Person" in this reform includes "an individual, partnership, corporation, association, or public or private organization other than an agency." See 5 U.S.C. § 551(2) (2006).

<sup>103</sup> It would benefit the public if the FTC encouraged copyright owners to include some general recognition of copyright exemptions and limitations established by 17 U.S.C. §§ 107-122 in their warning notices. However, because an unembellished warning notice such as "All Rights Reserved" is factually correct for copyrightable works, this general acknowledgement of copyright scope would be optional.

<sup>104</sup> See Heald, *supra* note 21, at app. A. Again, it is possible for sheet music of public domain works to contain copyrightable elements, such as illustrations or other annotations, that have been added on top of the original composition. In such a case, "All Rights Reserved" could be factually correct, though such a notice would still benefit from a clarification that no rights are claimed over the public domain portion of the sheet music.

<sup>105</sup> NFL Youtube, *supra* note 1.

reform, because it falsely suggests that the NFL has a copyright in the factual content of a game, and that the NFL must consent to any use of the telecast, including fair use and exempted uses.<sup>106</sup>

## 2. Require notice of technological restrictions

Similarly, Section 5 of the Copyright Reform Act, “Chapter 50A —Notice of Restrictions on Consumer Products and Services,” would require the full and conspicuous disclosure of technological restrictions on consumers’ ability to make uses of their products or services that would otherwise be lawful under the Copyright Act. This provision is drawn from and mirrors Chapter 50 of Title 15, describing consumer product warranties.<sup>107</sup> Just as the warranties chapter was added through the Magnuson-Moss Warranty Act to direct the FTC’s capabilities towards protecting consumers against unclear or deceptive warranties,<sup>108</sup> we seek to direct the FTC to require adequate disclosure of technological measures, and to give it needed tools for enforcement. As noted by FTC Commissioner Rosch, the FTC “has the tools to handle many of the emerging consumer protection issues raised by DRM under its existing statutory authority . . . [but] [t]his is not to say . . . that the Commission has all the remedial tools it needs to deal with . . . harm attributable to defective DRM.”<sup>109</sup> The importance of clear notice was also highlighted by FTC Acting Deputy Director Mary Engle in a 2009 speech, when she stated that “sellers who use DRM technology to enforce the terms of bargains with consumers need to be particularly careful to disclose in advance [those terms].”<sup>110</sup>

Under the new section 5, notice of TPMs would be required, and the notice must be “full and conspicuous disclosure of restrictions in simple and readily understood language,” where the restrictions are “technological restrictions on consumers’ ability to make uses of their products or services that would otherwise be lawful under copyright law,” and must be made available to

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<sup>106</sup> Part II.a.1, *supra*.

<sup>107</sup> This chapter, consisting of §§ 2301-12, was added in the Magnuson-Moss Warranty Act.

<sup>108</sup> See H.R. REP. NO. 93-1107, at 7707 (1974) (“A constant source of misunderstanding between the consumer and businessman is the question of warranties. Guarantees and warranties are often found to be unclear or deceptive. . . . This proposal would increase the authority of the Federal Trade Commission to require that guarantees and warranties on consumer goods convey adequate information in simple and readily understood terms. It would further seek to prevent deceptive warranties . . .”).

<sup>109</sup> Rosch, *supra* note 4, at 975.

<sup>110</sup> Nate Anderson, *FTC: We’ll “Come Calling” About Deceptive DRM*, ARS TECHNICA, Mar. 25, 2009, <http://arstechnica.com/tech-policy/news/2009/03/ftc-well-come-calling-about-deceptive-drm.ars>.

consumers prior to the sale of products or services. This reform again draws upon the FTC’s experience in similar areas and asks it to promulgate rules establishing the actual requirements for compliance. For example, an appropriate notice of restrictions for an online music service provider might include a list stating any limits on the number of devices authorized to play the music, the number of times music may be played, and the types of devices that will be able to play the music, along with disclosures of potential termination of service related to DRM server shutdowns or discontinuation. The FTC may further prescribe rules determining the “manner and form” in which these notices are to be made in “advertising, labeling, point-of-sale material, or other representations in writing”<sup>111</sup> in order to guarantee that the notices are sufficiently clear and conspicuous.

### **3. Penalties and remedies for violations**

In both of the areas targeted by this reform—misleading copyright warning notices and the failure to disclose technological restrictions—the FTC would enforce violations as it does other instances of unfairness and deception in commerce.<sup>112</sup> This process is initiated by a complaint and hearing process,<sup>113</sup> followed by potential rehearing in a circuit court of appeals, which is then subject to review by the Supreme Court upon certiorari.<sup>114</sup> A person, partnership, or corporation violating an order of the Commission with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” after it has become final is liable for a civil penalty of not more than \$16,000 for each violation.<sup>115</sup>

In addition to these penalties, copyright owners failing to make the required disclosure of technological restrictions would be subject to a remedy acting specifically to counter this behavior. Section 5(b) of the Copyright Reform Act, “DMCA Defense,” follows a proposal by Professors Samuelson and Schultz. Under this section, if a firm fails to provide notice of a

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<sup>111</sup> The CRA borrows the language for this specific list from 15 U.S.C. § 2302(b)(1)(B), describing the way in which warranties are to be disclosed in a clear and conspicuous manner.

<sup>112</sup> See 15 U.S.C. § 45 (2006).

<sup>113</sup> See 15 U.S.C. § 45(b) (2006).

<sup>114</sup> See 15 U.S.C. § 45(c) (2006).

<sup>115</sup> See 15 U.S.C. § 45(l), (m)(1)(A) (2006); 74 Fed. Reg. 858 (2009) (amending 16 C.F.R. § 1.98(d)). Continuing failure to comply with a rule compounds civil penalties by treating each day of continuance as a separate violation. See § 45(m)(1)(C).

technological restriction limiting a consumer’s ability to make noninfringing uses of protected works, a user who has circumvented an undisclosed technological restriction limiting his or her ability to make noninfringing uses of a protected work would have a defense to claims under § 1201 of the DMCA.<sup>116</sup> To the extent that copyright owners seek to enhance their exclusive rights with additional limitations in the form of these technological restrictions, these remedies would encourage them to inform consumers through the full and conspicuous disclosure required by the reform, lest their restrictions be rendered moot.

#### **4. These reforms follow existing, well-established processes**

The rules governing notice and disclosure would be developed using the same established process that the FTC already uses to prescribe rules in other areas,<sup>117</sup> in order to “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”<sup>118</sup> A rulemaking proceeding is a venue particularly well suited to developing such requirements—it is a type of proceeding that can develop a comprehensive factual record and undertake the detailed consideration of many points of view. Such proceedings “permit[] affected parties to test aggregate data in an open way, with ample opportunity for rebuttal . . . produc[ing] superior policy.”<sup>119</sup> A ruling regarding copyright notices and disclosures of limitations could affect a wide range of consumers, from ordinary users to follow-on creators, as well as a diverse group of copyright owners, from individuals to large corporations. The provisions creating a forum for comments at each step of the process, as an integral part of the rulemaking proceeding,<sup>120</sup> permit the FTC to engage in the considered deliberation required to

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<sup>116</sup> Samuelson & Schultz, *supra* note 7, at 71 (“One option for encouraging firms to take on the obligation to provide meaningful notice in a serious way would be to condition standing to sue under Section 1201 on the requirement that the party intending to sue ‘provide reasonable and effective notice of all access and/or copy limitations implemented by the technical measure protected under this title.’”).

<sup>117</sup> See 15 U.S.C. § 57(a) (2006). Several required steps in this rulemaking ensure that the resultant rules are purposeful and appropriate. First, the FTC must publish a notice of the proposed rulemaking that states the text of the rule with particularity, and the reason for the proposed rule. See § 57a(b)(1)(A). People must be allowed to submit data and arguments in response, which are to be made publicly available. See § 57a(b)(1)(B). This is followed by an opportunity for an informal hearing, and then a final ruling by the FTC. See § 57a(b)(1)(C)-(D).

<sup>118</sup> 16 C.F.R. § 1.8 (2009).

<sup>119</sup> C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 679-80 (2009).

<sup>120</sup> See § 57a(b)(1)(B)-(C) (2006).

produce a well-balanced rule that addresses varied consumer harms while incorporating the viewpoints of diverse copyright owners.

Based on the established rulemaking procedure, current framework for penalties, and existing definitions of unfair and deceptive acts or practices, the FTC would be able to act quickly on our proposed reforms, using its existing procedures and longstanding experience. As such, this reform gains strength from a high degree of consistency with existing practices, and would leverage the existing capacity of the FTC to address consumer abuses that result from copyright abuse through misleading copyright warning notices and the failure to disclose restrictions.

**d. The proposed reforms would benefit consumers and reduce unfair competition by improving marketplace information, without harming or unduly burdening copyright owners**

By improving the accuracy and type of information that is available to consumers when they are considering the purchase or use of copyrighted works, this reform would benefit consumers and the market in general. It would alleviate consumer confusion regarding the uses they can make of products, and allow companies to compete on the merits of their products and services—those that are saddled with limitations could no longer masquerade as equals to their unencumbered counterparts. Importantly, this reform would achieve these positive results without weakening the rights of copyright owners or diminishing their ability to implement restrictions on their products.

**1. Requiring accurate notices of rights would improve information for consumers at little cost to copyright owners**

The primary benefit of accurate notices on products would be the improved quality of information available to consumers, ensuring that they are aware of their actual usage rights under copyright law and the extent and limitation of exclusive rights claimed by copyright owners. This would enable consumers to make informed purchases and encourage them to make uses that could otherwise have been chilled by a misleading copyright warning notice. It would align warning notices with the fact that consumers likely expect these notices to be accurate, especially given the analogous requirements of accuracy in other domains of commerce

involving notice and disclosure.<sup>121</sup> At the same time, requiring accuracy would not in any way diminish copyright owners' exclusive rights or prevent them from enforcing their rights against infringers; rather, it would only preclude them from asserting rights beyond what is granted by copyright law.

Nor would copyright owners face undue burdens in complying with the proposed reform; not only is it no more than is required in other marketplace sectors, but the FTC's pre-existing test for unfairness and deception has a relatively high bar.<sup>122</sup> The test is based on context, and the question to ask in each particular case is whether the representation or omission would actually mislead a reasonable consumer.<sup>123</sup> As such, good faith attempts to provide accurate representations of rights generally would not expose a copyright holder to liability.<sup>124</sup> For example, as noted above, the simple notice “© 2010 Jane Doe. All Rights Reserved.” should be adequate in most circumstances.<sup>125</sup> With regard to the more elaborate “warning” notices such as the NFL notices discussed earlier, the reform does not call for an exhaustive list of every copyright exception—what it *does* require is the avoidance of affirmative misstatements and,

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<sup>121</sup> An analogous requirement holds for warranties, the terms and conditions of which must be fully and conspicuously disclosed in simple and readily understood language. *See* 15 U.S.C. § 2302 (2006). “Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate comparisons.” *See* 15 U.S.C. § 1451 (2006). Certain types of equipment must bear accurate labels of their energy efficiency. *See* 15 U.S.C. § 6315(b), (i) (2006).

<sup>122</sup> This high bar is designed to stratify potential offenders and target only those actors that have made misleading and affirmatively incorrect claims overstating their rights, such as the misleading NFL warning notice or public domain materials bearing warning notices alleging copyright ownership.

<sup>123</sup> *See In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 104 (1984).

<sup>124</sup> This is based on the FTC's administrative penalty provisions, which apply only when a violation is “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive.” 15 U.S.C. § 45(m)(1)(A) (2006). Note though, that copyright holders should not be able to claim that misleading copyright warning notices are justified merely based on the complexity of copyright law; misrepresentation based on mistakes of law should not be excused. *See, e.g., Jerman v. Carlisle*, No. 08-1200, 2010 WL 1558977, at \*1 (U.S. Apr. 21, 2010) (describing that a mistaken interpretation of the legal requirements of the Fair Debt Collection Practices Act (“FDCPA”) is not a valid defense to a violation, even under the “bona fide error” provision available in 15 U.S.C. § 1692k(c) that relieves FDCPA liability for non-intentional violations, though the separate FTC penalties are reserved for situations “reflect[ing] ‘knowledge fairly implied on the basis of objective circumstances’ that the conduct was prohibited”). However, unlike the FDCPA, the proposed reform does not call for actual damages, statutory damages, costs, or fees specific to sections 4 and 5 of the CRA, and copyright holders would only face FTC penalties for activities meeting the § 45(m)(1)(A) intent standard.

<sup>125</sup> This reform does not ask copyright owners to provide a detailed analysis of copyright law in notices, nor does it require them to make fine distinctions on the boundaries of fair use or other limitations. The main intent is to require that copyright owners avoid active misstatements and provide reasonable clarity when using copyright notices and warnings. To the extent that it is useful, industry (or the FTC) can develop best practices for these notices that provide guidance.

where appropriate, some sense of limitations to asserted rights. Though the NFL would not be permitted to claim rights to the factual portions of its telecast through the ban on all “descriptions or accounts,” it could mitigate the potential overstatement of required consent for “any use” of the material by generally acknowledging the existence of limitations on its exclusive rights. A valid notice in this vein might read “© 2010 Jane Doe. All Rights Reserved. Reproduction or transmission of any portion of this work is prohibited unless authorized by the rights-holder or by copyright law.” If rights-holders wish to elaborate further, they are certainly entitled to do so. Consider, for example, the following notice on a recent report by the Computer & Communications Industry Association:

© 2010 Computer & Communications Industry Association

*Just Rights™ Statement*

We recognize that copyright law guarantees that you, as a member of the public, have certain legal rights. You may copy, distribute, prepare derivative works, reproduce, introduce into an electronic retrieval system, perform, and transmit portions of this publication provided that such use constitutes “fair use” under copyright law, or is otherwise permitted by applicable law.

Permission to use this work in a manner that exceeds fair use or other uses permitted by law may be obtained or licensed from the Computer & Communications Industry Association, 900 Seventeenth Street NW, Suite 1100, Washington DC, 20006.

No copyright is claimed as to any part of any original work of the United States Government or its employees.<sup>126</sup>

This notice accurately and thoroughly captures the extent of exemptions and limitations on a copyright owner’s exclusive rights under copyright law, and could serve a valuable educational purpose for members of the public. However, we reiterate that a notice meeting this level of detail is not mandated by the reform, in light of minimizing the burden on copyright owners.

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<sup>126</sup> THOMAS ROGERS & ANDREW SZAMOSSZEGI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 2 (CCIA 2010), *available at* <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf>.



## **2. Requiring disclosure of technological restrictions would inform consumers of limitations without harming copyright owners**

Under the proposed reform, rights-holders would only be required to disclose restrictions; they would retain the ability to place usage restrictions on their products and services, and would not face the excessive burden of relinquishing these uses to the consumer. Thus informed, however, consumers may then elect to accept these restrictions by purchasing a product or service or to reject them by choosing a competing product or service.

## **3. The FTC is the appropriate body to oversee these reforms**

The FTC already acts to protect consumers from confusion and harms related to misleading information in the areas of advertising and marketing, which are closely related to the issues that our reform is intended to resolve.<sup>127</sup> For instance, it stepped in to handle the Sony rootkit situation, ordering Sony to “clearly and prominently disclose . . . important consumer information regarding limits on copying and use” as well as numerous other technological limitations on its packaging for products containing content protection software.<sup>128</sup> This particular FTC order was limited to coverage of “audio compact disc[s] . . . intended for commercial release for which Sony BMG controls the master files.”<sup>129</sup> However, the requirements it set in place are very similar to the requirements that the proposed reform would set forth for the consumer market in copyrighted works bearing technological restrictions.

In addition, requirements similar to those required by our proposed reform exist in other fields of business with thriving market players, and are overseen by the FTC.<sup>130</sup> For example,

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<sup>127</sup> See Federal Trade Commission: Consumer Protection, *supra* note 5 (describing the Advertising Practices and Marketing Practices divisions, specifically emphasizing “truth-in-advertising” and fraudulent business schemes).

<sup>128</sup> Sony Rootkit Order, *supra* note 4, at 4-5.

<sup>129</sup> *Id.* at 3.

<sup>130</sup> Any area of business involving warranties, such as the appliance business, must comply with requirements of disclosure that prevent consumer deception. See 15 U.S.C. § 2302 (2006). The cigarette industry must comply with labeling requirements that disclose the health risks of smoking to consumers. See 15 U.S.C. § 1333 (2006). The advertising industry may not disseminate false advertisements “in or having an effect upon commerce,” where a “false advertisement” is one that is “misleading in a material aspect.” See 15 U.S.C. §§ 52, 55 (2006). In the debt collection business, abusive debt collection practices in violation of the Federal Debt Collection Practices Act constitute unfair or deceptive acts or practices. See 15 U.S.C. §§ 1692, 1692i (2006). More generally, the FTC can enforce regulations against and penalize entities that engage in unfair or deceptive acts or practices “in or affecting commerce.” See 15 U.S.C. § 45 (2006).

the Magnuson-Moss Warranty Act targets unclear or deceptive warranties, a “constant source of misunderstanding between the consumer and businessman.”<sup>131</sup> The FTC has adopted three rules under the Act: the “Disclosure Rule,” requiring disclosure of consumer product warranty terms and conditions; the “Pre-Sale Availability Rule,” requiring such disclosure to be available pre-sale; and the “Dispute Resolution Rule,” clarifying informal dispute settlement procedures.<sup>132</sup> Of these, the former two rules are very similar to the rules called for by the proposed reform that mandate clear and conspicuous, pre-sale disclosure of usage limitations.

In its response to the CCIA’s 2007 complaint that certain companies routinely misrepresented consumers’ rights to use copyrighted works, the FTC acknowledged that misleading consumers was a serious threat, and that changing technology could easily make this issue more important over time.<sup>133</sup> At the same time, the FTC explicitly declined to make a “formal Commission determination of whether the actions challenged in the CCIA submission comply with section 5,” leaving the door open for further decision-making at an opportune moment, and declining to take action at that time.<sup>134</sup> In abstaining from a formal response to CCIA, the FTC argued that consumers would not necessarily consider notices as complete statements of their rights, and that consumer confusion could be a result of copyright law’s inherent complexity and not misleading copyright warning notices.<sup>135</sup> But for many consumers, copyright notices are their only glimpse of copyright law, and actively misleading copyright notices would serve only to fuel the fire—the average consumer is more likely to abide by an incorrect copyright notice than to stumble through the intricacies of copyright statutes in an effort to discover the true extent of his or her rights. As consumer harm has continued since CCIA filed its complaint, Congress should now make clear that actions such as those challenged

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<sup>131</sup> H.R. REP. NO.93-1107, at 7707 (1974).

<sup>132</sup> Federal Trade Commission: A Businessperson’s Guide to Federal Warranty Law, <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus01.shtm> (last visited Apr. 27, 2010).

<sup>133</sup> Letter from Mary K. Engle, Associate Director, Federal Trade Commission, to Edward J. Black and Matthew Schruers, Computer & Communications Industry Association (Dec. 6, 2007), *available at* [www.ftc.gov/os/closings/staff/071206ccia.pdf](http://www.ftc.gov/os/closings/staff/071206ccia.pdf).

<sup>134</sup> *See id.*

<sup>135</sup> Letter from Mary K. Engle, *supra* note 133.

by the CCIA fail to comply with section 5, and require regulation.<sup>136</sup> Based on the FTC’s established rulemaking process and long history of regulation on analogous matters, the agency would contribute much-needed certainty to the regulatory process around these notices.

In sum, the FTC’s capacity to regulate in this area is well proven by its track record in other, related areas of commerce. The proposed reform would improve market competition, allow consumers to make informed purchases, and protect them from hidden harms. Importantly, it would accomplish all of these goals without diminishing any of the rights copyright owners are entitled to under copyright law, and without requiring unreasonable or expensive changes to business practices. Rather, copyright owners that make good faith efforts to provide accurate copyright notices and clear disclosures will continue being able to enforce their rights and technological restrictions.

### **III. Deterring Copyright Abuse through a New Motion to Strike**

Copyright claims are notoriously expensive to defend against<sup>137</sup> and can, as a consequence, be used in a coercive manner. Where these claims misrepresent copyright law in asserting rights over alleged infringers, their intimidation factor grants them effectiveness in disproportionate excess to their validity under the law. Targets of frivolous litigation founded on misrepresented copyright claims presently lack a targeted, efficient procedural response that can resolve the litigation process at an early stage. Because they must anticipate a long, expensive fight, defendants are thus too likely to succumb to a misleading threat, ceasing the allegedly infringing activity or settling—even when the threatened suit lacks merit. Further, some copyright claims may threaten competition and free expression enough to require a similar early disposition.<sup>138</sup>

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<sup>136</sup> This type of general regulation requires legislative action, according to FTC Assistant Director Richard A. Quaresima, who stated that “it’s unlikely the FTC will regulate specific rules regarding DRM lacking an act of Congress” at the FTC Town Hall meeting on DRM in 2009. Kirk Biglione, *The FTC On DRM: Fighting For Consumers or Making Toothless Threats?*, MEDIALOPER, Mar. 26, 2009, <http://medialoper.com/the-ftc-on-drm-fighting-for-consumers-or-making-toothless-threats/>.

<sup>137</sup> Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 390 (2002) (stating that “copyright cases are exceedingly complicated, often protracted, and invariably expensive” and that “[c]opyright law is considered a ‘specialty’ among large law firms”).

<sup>138</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (describing copyright’s close relationship with free expression, stating that “[t]he Framers intended copyright itself to be the engine of free expression” (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985))); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d

The reform would create a special motion to strike, backed up by attorneys' fees if it prevails. The special motion to strike would be available in cases in which the plaintiff misrepresents basic information required to make out a prima facie case—exclusive rights as defined in 17 U.S.C. § 106, copyrightable subject matter as defined in 17 U.S.C. §§ 102-105, or copyright ownership—or in cases where the plaintiff's claim would have a significant negative effect on free expression or competition. By allowing defendants to challenge misrepresented or abusive claims at an early stage of litigation, such a motion to strike would protect defendants who are sued and would deter frivolous or harassing claims, while preserving valid, meritorious claims.

As stated by the Supreme Court in *Fogerty v. Fantasy, Inc.*, “[b]ecause 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. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.”<sup>139</sup>

#### **a. Copyright's procedural framework is imbalanced**

The procedural framework of copyright litigation favors large rights-holders with abundant resources to spend on enforcement and defense. Individuals and smaller entities that become involved in copyright litigation, particularly as defendants, face the threat of powerful remedies and prohibitively expensive damages,<sup>140</sup> as well as costs imposed by the complexity of copyright litigation. Therefore, threats of infringement are very intimidating, even when the claims may not find support in copyright law. As such, targets of copyright infringement claims need an efficient and economical means of responding to these claims.

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970, 977-78 (4th Cir. 1990) (describing attempts to use copyrights in an anticompetitive manner as “adverse to the public policy embodied in copyright law”).

<sup>139</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

<sup>140</sup> “Copyright law offers an aggrieved copyright owner powerful remedies against an infringer, including recovery of actual or statutory damages, injunctive relief, impounding and destruction of infringing copies, and the potential for the recovery of attorney’s fees.” Benjamin A. Goldberger, *How the “Summer of the Spinoff” Came to be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 361 (2003).

There is a dearth of adequate procedural protections within copyright law for defendants facing abusive claims of copyright infringement. Existing copyright-specific responses are limited to very specific situations.<sup>141</sup> For example, as one of the few copyright provisions dealing with misrepresentation, § 512(f) assigns damages, including costs and attorneys’ fees, to “[a]ny person who knowingly materially misrepresents under this section . . . that material or activity is infringing, or that material or activity was removed or disabled by mistake or misidentification.”<sup>142</sup> However, as this protection applies only to situations where the injured party suffered from the removal of or disabled access to online material claimed to be infringing, or in replacing the material,<sup>143</sup> it is simply too narrow to act as an adequate safeguard. Even in the few situations where it may be applicable, it may only allow a portion of attorneys’ fees to be recovered.<sup>144</sup>

Further, standard procedural responses to a lawsuit, such as motions to dismiss, motions to strike, judgments on the pleadings, or summary judgments, have characteristics that make them ineffective as rapid response mechanisms to abusive copyright infringement allegations. For example, traditional procedural tools such as motions to dismiss or motions to strike are designed to “eliminate sham or facially meritless allegations[] at the pleading stage.”<sup>145</sup> However, it is important to have a procedural tool that can “pierce[] the pleadings and require[] an evidentiary showing[,] . . . similar to that of a motion for summary judgment . . . .”<sup>146</sup> Without such a tool, it could be possible for a rights-holder to conceal the weaknesses of a prima facie claim through artful pleading. Further, other important concerns in the interest of the public, such as fair

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<sup>141</sup> See John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 DRAKE L. REV. 427, 430 (2008) (“[The] growing market power of copyright owners . . . has tempted [them] to use their exclusive rights beyond what is permissible under the grant or beyond what is in the public interest. To reduce abuse and to maintain the appropriate balance in the copyright system, courts and litigants . . . increasingly have turned to legal doctrines that are external to the copyright system.”).

<sup>142</sup> 17 U.S.C. § 512(f) (2006). Additionally, this provision contains some intent-related defects that reduce its efficacy, which we will address in a subsequent Report.

<sup>143</sup> 17 U.S.C. § 512(f) (2006).

<sup>144</sup> See, e.g., *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466, at \*10-11 (N.D. Cal. Feb. 25, 2010) (finding that “Congress did not intend to allow plaintiffs to establish the damage element under § 512(f) simply by hiring an attorney and filing suit[,]” and that § 512(f) permitted only recovery of “fees incurred for work . . . prior to the institution of suit”).

<sup>145</sup> *Simmons v. Allstate Ins. Co.*, 112 Cal. Rptr. 2d 397, 400 (Cal. Ct. App. 2001).

<sup>146</sup> *Id.*

competition or free expression, may not be apparent from the complaint alone. Moving for summary judgment can solve this problem, but it still cannot halt discovery, which can prove burdensome or unnecessarily invasive of privacy, especially when based on abusive claims.

#### **b. Strategic Lawsuits Against Public Participation are an analogous problem**

Our proposed reform draws from existing resolutions that address the weaknesses of procedural responses to legal intimidation. In light of meritless legal actions strategically brought against individuals or groups, known as strategic lawsuits against public participation (“SLAPPs”), many states have enacted legislation to combat these tactics. At their core, SLAPPs are “meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so,”<sup>147</sup> with the intention of “silencing [the] opponents, or at least . . . diverting their resources.”<sup>148</sup> In this manner, SLAPP suits are closely related to lawsuits brought by rights-owners brandishing misrepresented claims of copyright infringement or brought in order to chill free expression or marketplace competition. In either case, the goal of bringing such legal action is intimidation. Like SLAPP suits, the filer of these claims “expects to lose and is willing to write off litigation expenses (and even the defendant’s attorneys’ fees where necessary) as the cost of doing business.”<sup>149</sup>

One example of abusive copyright litigation, highlighting the potential cost to free expression, can be found in the *Maxtone-Graham v. Burtchaell* case.<sup>150</sup> Maxtone-Graham, the author of a book, claimed that Burtchaell, the author of a second book, had infringed on Maxtone-Graham’s copyright by reproducing interviews from her book (though with attribution).<sup>151</sup> However, the court found that Maxtone-Graham’s objection was brought “solely in an effort to limit further scholarship using her own scholarly investigation as a base or starting point,” and “simply because the views or opinions of the later work do not coincide with her own

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<sup>147</sup> *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 450 (Cal. Ct. App. 1994).

<sup>148</sup> *Barker*, *supra* note 7, at 396.

<sup>149</sup> *Tate*, *supra* note 7, at 805.

<sup>150</sup> *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432 (S.D.N.Y. 1986).

<sup>151</sup> *Id.* at 1433-34.

or those of her interviewees,” holding that Maxtone-Graham could not “properly claim a right to stifle further discourse.”<sup>152</sup>

For an example of harms to innovation, consider the *Veoh* case, where Universal Music Group (“UMG”) filed a copyright infringement suit against Veoh that the court ultimately found invalid.<sup>153</sup> In this case, UMG argued that Veoh, an online video hosting service, failed to remove infringing material from its website after notification of its infringement, rendering the § 512(c) safe harbor inapplicable.<sup>154</sup> However, UMG’s assertions were flawed and based on a lower level of knowledge than that required by the safe harbor provision.<sup>155</sup> Despite Veoh’s win in court, the cost of dealing with the UMG litigation proved too much for the startup to bear, and it filed for bankruptcy after enduring this “relentless war of attrition.”<sup>156</sup>

As for an instance of copyright infringement claims brought to limit competition, consider *Lexmark Int’l, Inc. v. Static Control Components, Inc.*<sup>157</sup> In that case, Lexmark brought, among other claims, a claim of copyright infringement against Static Control, a company that was making toner cartridges that could interoperate with Lexmark printers.<sup>158</sup> The Sixth Circuit ultimately held that Lexmark failed to show a likelihood of success on any of its claims.<sup>159</sup> Though Lexmark did not prevail in this case, its allegations have been regarded as a threat to competition.<sup>160</sup>

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<sup>152</sup> *Id.* at 1438.

<sup>153</sup> *See* UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

<sup>154</sup> *Veoh*, 665 F. Supp. 2d at 1108.

<sup>155</sup> *See Veoh*, 665 F. Supp. 2d at 1108-11 (describing UMG’s faulty arguments that the mere hosting of material capable of copyright protection imputed knowledge of infringement to a service provider; that an automatic process tagging videos as “music videos” signified knowledge; that Veoh could not purchase search terms for videos controlled by UMG, though it turned out that Veoh owned valid licenses to those videos from Sony BMG; that Veoh failed to respond appropriately to takedown notices, which were themselves insufficient under § 512; and falsely implying that Veoh was somehow obligated under the DMCA to implement filtering technology).

<sup>156</sup> Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, <http://www.wired.com/epicenter/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/>.

<sup>157</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

<sup>158</sup> *Id.* at 529.

<sup>159</sup> *Id.* at 551.

<sup>160</sup> CONGRESSIONAL BUDGET OFFICE, COPYRIGHT ISSUES IN DIGITAL MEDIA 17 (2004), *available at* <http://www.cbo.gov/ftpdocs/57xx/doc5738/08-09-Copyright.pdf>.

In other areas of the law, legislators have addressed similar lawsuits brought to chill socially valuable activities through procedural reform. Among the most extensive legislation enacted to prevent such frivolous strategic lawsuits is the California anti-SLAPP statute. This law is a prominent example of a reform that has successfully addressed an analogous problem of improperly coercive litigation. Prior to the anti-SLAPP statute, large entities could respond to unfavorable, but constitutionally valid speech, such as biting criticism of a movie, with a defamation lawsuit. These types of lawsuits, though frivolous and “not brought to win,” but instead to delay,<sup>161</sup> would intimidate individuals who could not afford to go through litigation and would opt to settle. Often times the settlement agreement would include a gag order.

**c. Anti-SLAPP reform has been very effective**

Because plaintiffs that bring SLAPPs benefit from delay and intimidation, normal remedies that prevent their claims from winning are insufficient deterrents.<sup>162</sup> To counter this, state procedural law was reformed to “accelerat[e] judicial review of a potential SLAPP’s merits [to] provide a real disincentive”<sup>163</sup> and safeguard against meritless lawsuits through early judicial review. To this end, the legislation implemented a special motion to strike procedure, which suspends discovery and “shifts the moment for judicial intervention back from the summary judgment stage to the motion to dismiss stage, thus removing the overall time involvement.”<sup>164</sup> It requires the plaintiff to demonstrate a prima facie case against the defendant, and allows the defendant to rebut the plaintiff’s case in a manner similar to a summary judgment motion.<sup>165</sup> Attorneys’ fees and costs are awarded to the defendant in the event of dismissal.<sup>166</sup> Thus, the anti-SLAPP solution provides a rapid and easy mechanism to enable targeted, smaller entities to hire a lawyer on contingency to protect their free speech rights.

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<sup>161</sup> Barker, *supra* note 7, at 448.

<sup>162</sup> *Id.* at 448-49.

<sup>163</sup> *Id.* at 449.

<sup>164</sup> Tate, *supra* note 7, at 811.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*



Results were effective and positive, and effectively lowered the case load in courts by removing cases lacking valid claims. For example, in *Coltrain v. Shewalter*, an apartment complex owner brought suit against defendants for defamation, libel, and intentional infliction of emotional distress.<sup>167</sup> This was in response to a nuisance abatement suit filed by the defendants, who claimed that the apartment complex was a center for drug dealing and other crimes.<sup>168</sup> The defendants in the case filed a special motion to strike, and after plaintiffs voluntarily dismissed their complaint, filed for and received attorneys' fees.<sup>169</sup>

At the same time, the anti-SLAPP special motion to strike does not intrude on the ability of rights-holders with meritorious claims to protect the full scope of their rights. For example, in *Condit v. National Enquirer*, a defendant sought to use the anti-SLAPP provision to defend against accusations of libel.<sup>170</sup> However, based on the facts, the district court found that this lawsuit was “not the type of meritless case . . . which California’s anti-SLAPP statute is designed to discourage,” and that the defendant sought “to utilize the anti-SLAPP law to gain immunity from alleged defamation, not to be free of a wrongfully intimidating meritless lawsuit.”<sup>171</sup> The district court denied the motion to strike on these grounds, proving that those with legitimate claims could successfully defend themselves against anti-SLAPP motions to strike.<sup>172</sup>

This state law mechanism maps very well to the copyright misrepresentation problem addressed by our proposed reform. There are parallel issues of entities threatening those who are engaging in lawful behaviors using lawsuits built on claims that misrepresent the scope of their rights. If a special motion to strike had been available in the *Veoh* case, Veoh may have been able to end the lawsuit before incurring insurmountable litigation costs by asking the court to examine the validity of UMG’s claims. Numerous other cases exist where a motion to strike could have assisted in responding to claims misrepresenting copyright, saving targets of abuse from accruing excessive costs and reducing the load on the courts. For example, in the *Bond v.*

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<sup>167</sup> *Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 96 (Cal. App. 4th Dist. 1998).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 100.

<sup>170</sup> *Condit v. Nat’l Enquirer Inc.*, 248 F. Supp. 2d 945 (E.D. Cal. 2002).

<sup>171</sup> *Id.* at 954.

<sup>172</sup> *Id.*

*Blum* case, a man sued his ex-wife for copyright infringement when, in a proceeding to determine custody of their children, she introduced into evidence a copy of a manuscript he had written as factual (and not expressive) material suggestive of his character—an attempt to reach beyond the extent of his rights.<sup>173</sup> In *Savage v. CAIR*, talk show host Michael Savage brought suit against the Council on American-Islamic Relations (“CAIR”) when CAIR posted excerpts from Savage’s show for the purposes of criticism, a use very likely to be protected as fair.<sup>174</sup>

Another parallel to the anti-SLAPP provisions is the constitutional importance of the need to protect freedom of expression. This purpose is integral to copyright law, which is promulgated “to *promote* the creation and publication of free expression.”<sup>175</sup> Since copyright’s safeguards accommodate constitutionally required protections of free expression, powerful speech interests are at stake.<sup>176</sup> This reform seeks to protect the important creative, and critical, speech that copyright owners may try to suppress with lawsuits.

#### **d. Details of the proposed reform**

This reform draws from the successful anti-SLAPP model to create a new motion to strike. Though a lesser solution, such as a broadening of § 512(f), might give pause to some abusive rights-holders, it would still not directly address the need for a procedural tool to short-circuit expensive litigations. It would also not put a stop to discovery, which is often the mechanism by which SLAPPs assail defendants’ privacy and impose expenses on them. A special motion to strike, however, addresses both of these issues.

The proposed motion to strike is intended to respond to two situations: (1) where a plaintiff’s claims misrepresent exclusive rights as defined in 17 U.S.C. § 106, copyrightable subject matter as defined in 17 U.S.C. §§ 102-105, or copyright ownership; or (2) where a plaintiff’s claims, if upheld, would have significant harmful effects on free expression or competition. Like a standard motion to strike, a target of such a claim could file it within 60 days of service of

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<sup>173</sup> *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003).

<sup>174</sup> Matt Zimmerman, *Savage v. CAIR: Another Year, Another Attempt to Misuse Copyright Law to Silence a Critic*, EFF DEEPLINKS, Jan. 31, 2008, <http://www.eff.org/deeplinks/2008/01/another-year-another-attempt-misuse-copyright-law-silence-critic>.

<sup>175</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (emphasis in original).

<sup>176</sup> *Id.* at 221.

complaint, and the clerk would schedule the motion for a hearing not more than 30 days after service of the motion. This motion would be treated as a summary judgment motion in terms of time periods and the right to expedited appeal for the moving party.

The responding party (in this case the rights-holder) would have the burden of proof, and must show that there is a probability it could prevail in the suit to overturn the motion to strike. Though discovery would be suspended pending decision on the motion and appeals, the court can order specified discovery if the rights-holder shows good cause, in order to more narrowly target discovery on certain claims that may require more substantial factual inquiry. The defendant is entitled to attorneys' fees and costs if the motion is granted. However, to prevent over-zealous use of this new motion to strike, the court would be able to award costs and reasonable attorneys' fees to a prevailing plaintiff in cases where it determines that the motion "is frivolous or is solely intended to cause unnecessary delay."<sup>177</sup>

Consider, as one example of how this reform would work, a situation where a defendant is targeted by an abusive copyright infringement claim that is likely to cause significant harm to competition or free expression if upheld—for instance, resulting in a court order requiring the defendant to halt distribution of critical reviews or to stop production of interoperable devices that compete in the plaintiff's market. With a special motion to strike, a defendant in one of these situations would be able to bring the motion very early in the litigation process. Not only would this protect the defendant from the burden of facing abusive discovery requests, it would also shift the burden of proof to the plaintiff, who would need to show a certain probability of prevailing on the claim in order for the litigation to continue. If the plaintiff is unable to make a successful showing, then the plaintiff would be responsible for the attorneys' fees and costs of the defendant. This example shows how the motion to strike would be a helpful procedural tool to allow defendants to respond to, and deter rights-holders from bringing, meritless and abusive claims of copyright infringement.

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<sup>177</sup> This CRA language is borrowed from the California Anti-SLAPP rule. *See* CAL. CIV. PROC. CODE § 425.16(c) (West 2004). This clause has been effective in curbing abusive anti-SLAPP motions. *See, e.g.,* San Jacinto Z, L.L.C. v. Grantham, No. E046461, 2009 WL 2480916 (Cal. Ct. App. Aug. 14, 2009) (finding that the anti-SLAPP motion was frivolous or solely intended to cause delay, awarding attorney's fees to the plaintiff).

**e. This reform would deter frivolous lawsuits and increase procedural efficiency without diminishing copyright owners' exclusive rights**

This reform would work towards restoring balance by providing wrongfully targeted parties with a procedural device to end a lawsuit at an early stage before they spend too much time and resources on litigation. At the same time, it would not limit the ability of copyright holders to protect the exclusive rights actually granted to them by copyright law.

As described earlier, targets of such lawsuits potentially face large costs in mustering a legal defense. Not only does this potential cost have a chilling effect pre-litigation, if brought to bear on a target as in *Veoh*, it can even result in bankruptcy.<sup>178</sup> Allowing targets to bring a motion to strike as a method to short-circuit litigation before excessive costs are incurred solves both the problem of perceived financial risk and the harm of actual financial burden.

The reform also preserves the ability of copyright owners to pursue legitimate claims of infringement. Because a rights-holder in this position would be able to produce evidence that it has not overstated its rights under copyright law, it could easily nullify the motion to strike for copyright misrepresentation. This ensures that the proposed motion to strike could not be used abusively to legitimize actual copyright infringement.

#### **IV. Conclusion**

Prohibiting false warnings, enhancing disclosure obligations, and providing enhanced procedural remedies all serve to restore balance in the copyright system. Without change, the public will continue to suffer from chilling effects and market imbalance. Applying existing frameworks—the consumer protection framework overseen by the FTC and the procedural protections aimed at SLAPPs—to these issues, however, will go far to alleviate these harms. Congress should enact the reforms proposed in this report.

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<sup>178</sup> See Van Buskirk, *supra* note 156.

## Appendix

### **SEC. 4. PROHIBITION OF UNFAIR AND DECEPTIVE WARNING NOTICES.**

- (a) **CONDUCT PROHIBITED.** —Not later than 180 days after the date of enactment of this Act, the Federal Trade Commission shall promulgate rules to prohibit, as an unfair and deceptive act or practice, any person from issuing warning notices that unfairly or deceptively overstate a person’s rights with respect to a work protected under copyright law.
- (b) **DEFINITION.** —For purposes of this section—
- (1) the term “person” has the meaning given such term in section 551(2) of title 5, United States Code.
- (c) **ENFORCEMENT.** —A violation of the rules required under subsection (a) constitutes an unfair method of competition and an unfair or deceptive act or practice under section 45(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)). The Commission shall enforce such rules in the same manner and by the same means, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act.

### **SEC. 5. NOTICE OF TECHNOLOGICAL RESTRICTIONS.**

- (a) **NOTICE OF RESTRICTIONS ON CONSUMER PRODUCTS AND SERVICES.** —Title 15, United States Code, is amended by adding after Chapter 50: “CHAPTER 50A —NOTICE OF RESTRICTIONS ON CONSUMER PRODUCTS AND SERVICES

§ 2321. RULES GOVERNING NOTICE OF RESTRICTIONS

(a) **NOTICE REQUIREMENT.** —In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketplace, copyright holders and those acting under their authorization shall provide notice of any technological restrictions on consumers’ ability to make uses of their products or services that would otherwise be lawful under copyright law.

(1) **FULL AND CONSPICUOUS DISCLOSURE.** —The term ‘notice’ means full and conspicuous disclosure of restrictions in simple and readily understood language.

(2) **AVAILABILITY OF NOTICE TO CONSUMER.** —The Federal Trade Commission (‘Commission’) shall prescribe rules requiring that such notice of restrictions be made available to the consumer (or prospective consumer) prior to the sale of the product or service to him.

(3) MANNER AND FORM FOR PRESENTATION AND DISPLAY OF INFORMATION. —The Commission may prescribe rules for determining the manner and form in which information with respect to any notice of restrictions on a consumer product or service shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

§ 2322. REMEDIES.

(a) UNFAIR AND DECEPTIVE TRADE PRACTICE. —It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by section 2321 (or a rule thereunder).

(b) DMCA DEFENSE. —Section 1201 of title 17, United States Code, is amended by adding at the end the following:

(1) NOTICE REQUIREMENT. —Notice of the implementation of technological measures that effectively control access to a work protected under this title must be made in accordance with the requirements of section 2321 of title 15 of the United States Code and any rules prescribed thereunder. Failure to provide such notice shall be a defense against a claim of circumvention under section 1201(a), provided such technological control measures limit the ability of consumers to make noninfringing uses of said protected work.”

**SEC. 6. PROTECTION AGAINST COPYRIGHT ABUSE.**

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(h) COPYRIGHT ABUSE. —Title 17, United States Code, is amended by adding after Chapter 5:  
“CHAPTER 5A. COPYRIGHT ABUSE AND REMEDIES

§ 514. ABUSE OF COPYRIGHT: MOTION TO STRIKE.

(a) IN GENERAL. —In any civil action for infringement under this title, the respondent shall have the right to file a motion to strike on the grounds that the claim misrepresents exclusive rights as defined in section 106 of this title, copyrightable subject matter as defined in sections 102 through 105 of this title, or copyright ownership; or that the claim, if upheld, would have a significant harmful effect on competition or free expression.

(b) PROCEDURES. —

(1) The motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(2) The motion shall be treated as one for summary judgment:

(A) the trial court shall use a time period appropriate to preferred or expedited motions; and,

(B) the moving party shall have a right of expedited appeal from a trial court order denying such a motion or from a trial court failure to rule on such a motion in expedited fashion;

(3) Discovery shall be suspended, pending decision on the motion and appeals, though the court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision;

(4) The responding party shall have the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(5) The court shall make its determination based upon the facts contained in the pleadings and affidavits filed;

(6) The court shall grant the motion and dismiss the judicial claim, unless the court determines that the responding party has established a probability of prevailing on the claim;

(7) Any government body to which the moving party's acts were directed or the Attorney General of the United States or of any state may intervene to defend or otherwise support the moving party in the action;

(c) REMEDIES—

(1) A prevailing moving party on a motion to strike shall be entitled to recover his or her attorneys' fees and costs from the person or persons responsible. If the court finds that a motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorneys' fees to a responding party prevailing on the motion.