Foul Use?

FTC Declines to Take Action Against Allegedly Overbroad and Misleading Copyright Warnings

BY SCOTT L. WALKER AND MATTHEW SAVARE

Being avid fans of sports and entertainment and practicing attorneys in those fields, we can not help but take notice of the copyright warnings used by the various sports leagues, individual teams, studios, and publishers with respect to their intellectual properties. Whereas our involvement in this narrow area has usually involved impressing (or annoying) our friends and families with an occasional primer on copyright law, the Computer & Communications Industry Association ("CCIA")[1] took action regarding those warnings by filing a complaint with the Federal Trade Commission ("FTC"), alleging that the warnings constitute unfair and deceptive trade practices under section 5(a) of the Federal Trade Commission Act ("FTC Act").

As detailed more fully below, in an unusually swift response, the FTC staff decided on December 6, 2007, not to recommend that the Commission take any formal action against the companies named in the CCIA complaint at this time.[2] Despite the speedy resolution of this particular matter, the battle between content creators and distributors to define the bounds of copyright protection and fair use in the age of digital reproduction, distribution, and consumption is sure to continue for the foreseeable future.

DRAWING THE BATTLE LINES

The proliferation of digital technologies and the rise of the Internet economy have placed great strains on the copyright laws and jurisprudence of the United States. Seeking to address some of the novel issues created by perfect digital reproduction and the instantaneous and wide-spread distribution enabled by the Internet, Congress passed the Digital Millennium Copyright Act ("DMCA") in 1998. The DMCA, which amended the Copyright Act of 1976, contained two controversial provisions that have helped define fair use in the digital age and pitted the purveyors of "old media"[3] against the disrupting technologies of "new media"[4] companies. The first provision—codified at 17 U.S.C. § 1201—criminalizes the production and dissemination of devices used to circumvent technological measures intended to control access to copyrighted works. The second provision—codified at 17 U.S.C. § 512—creates a safe harbor for online and Internet service providers against liability for copyright infringement if they take appropriate measures to comply with proper notice and takedown letters demanding the prompt blocking or removal of allegedly infringing material posted on the Internet.

Since the passage of the DMCA—which arguably has enhanced the rights of copyright owners—debate has ensued regarding the continued viability of the fair use doctrine. In addition, content owners representing the old media have filed countless lawsuits against new media companies that have enabled the pervasive—and oftentimes illegal—reproduction and distribution of such content. This trend is best exemplified by the recording industry's high-profile and prolonged litigation against various file-sharing sites such as Napster and Grokster. The CCIA complaint with the FTC is one of the more recent examples of this ongoing struggle.

THE CCIA COMPLAINT

On August 1, 2007, the CCIA filed a Request for Investigation and Complaint for Injunctive and Other Relief (the "complaint") with the FTC, claiming that certain entertainment and sports corporations,[5] through their misleading and manifestly false copyright warnings,[6] systematically misrepresent the rights of consumers under U.S. copyright law. Specifically, the complaint alleged that these "copyright warnings" and "anti-piracy warnings" on copyrighted works—such as television broadcasts and DVDs—materially overstate the rights of the copyright holders and significantly understate or fail to mention uses permitted by the Copyright Act or the U.S. Constitution. The CCIA claimed that the copyright warnings of these old media companies are overbroad and misleading, thus constituting unfair and deceptive trade practices under the FTC Act. Although the action purported to seek relief only for such allegedly deceptive copyright warnings, it appears to be but one part of a larger strategy by the new media industry to resuscitate the fair use doctrine, which has arguably been eroded and marginalized since the passage of the DMCA.[7]

For example, as any football fan can probably recite from memory, the National Football League broadcasts the following statement during each game: "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited."[8] Similarly, Major League Baseball employs the following message for its television audience: "This copyrighted telecast is presented by authority of the Office of the Commissioner of Baseball. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated, without express written consent."[9]

In its complaint, the CCIA contended that such overbroad warnings are not restricted to sports properties, providing the following example from the Morgan Creek/Universal DVD, *The Good Shepherd*: "All material is protected by copyright laws of the United States and all countries throughout the world. All rights reserved. Any unauthorized exhibition, distribution, or copying of this film or any part thereof (including soundtrack) is an infringement of the relevant copyright and will subject the infringer to severe civil and criminal penalties."[10]

The CCIA objected to these warnings, and others like them, on three primary grounds. First, according to the CCIA, the warnings purportedly overstate the rights of the copyright

holder by completely ignoring the public's statutory fair use rights. Second, the CCIA argued that claiming that the "descriptions" and "accounts" of games can not be disseminated is "manifestly false," because the Copyright Act does not protect facts or ideas. Finally, the CCIA claimed that threats of severe civil and criminal penalties for unauthorized uses are misleading in that federal law encourages many uses that do not require the copyright owner's permission. In sum, the CCIA alleged that these "warnings, through their explicit statement of prohibition, invocation of harsh civil and criminal penalties, and deliberate omission of consumers' rights, serve to mislead the public."[11]

On October 23, 2007, another new media trade association, the Home Recording Rights Coalition ("HRRC"),[12] filed a letter with the FTC to supplement the CCIA's complaint, alleging that the dissemination of the disputed copyright warnings is analogous to other conduct that the FTC has previously declared illegal.[13] Specifically, the HRRC argued that in both *In re: CTC Collections, Inc., et al.*[14] and *In re: State Credit Association, Inc., et al.*,[15] the FTC enjoined debt collection firms from sending debtors misleading letters regarding the debtors' recourse for unpaid debts. The HRRC letter emphasized that in those actions, the FTC found the practice illegal under the FTC Act because the letters were incomplete and inaccurate and were intended to intimidate the debtors rather than inform them of their legal rights.[16] Similarly, the HRRC letter cited *In re: Sears, Roebuck and Co.*[17] for the proposition that affirmatively misstating the legal rights of consumers causes substantial injury and is a deceptive practice.[18] According to the HRRC, the FTC recently found that misstating legal rights by omission violates the FTC Act in cases where others rely on such misstatements to their detriment.[19]

As an apparent adjunct to its petition to the FTC to take action regarding copyright warnings, on September 12, 2007 the CCIA released a study titled *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use.*[20] In the study, the CCIA argued that many industries—including those in the old media such as the motion picture industry—benefit from the "fair use economy." The authors of the study contended that the overbroad copyright regulations of the past 10 years have eroded the proper balance between copyright protection and fair use. According to the authors, these developments threaten to stifle innovation, economic growth, and global competitiveness. Thus, whereas the complaint with the FTC alleged that consumers are harmed by misleading copyright warnings, the study—citing various empirical analyses—claimed that the U.S. economy has become increasingly dependent on information technology industries. In the eyes of the CCIA, these unbalanced copyright laws endanger economic growth and millions of jobs. It appears, therefore, that the CCIA sought to expand the fair use doctrine on two fronts: first, by attacking—albeit unsuccessfully—the copyright warnings of the content providers in the name of consumers' rights,[21] and second, by criticizing the prevailing copyright laws for the greater good of the economy. Both are complementary strategies in the organization's professed goal to strengthen the fair use doctrine.

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LIMITS OF COPYRIGHT PROTECTION

In crafting this nation's copyright laws, Congress has enacted several statutory provisions and incorporated certain doctrinal concepts that limit the scope of copyright protection and safeguard the free speech principles guaranteed by the First Amendment. One of the most significant restrictions on the scope of copyright protection is the fair use doctrine, which permits certain uses of copyrighted material without securing authorization from the rights holders. This doctrine's purpose is to balance the rights of copyright owners with the free speech rights of the public. Section 107 of the Copyright Act codifies the fair use doctrine: "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright." Section 107 also articulates the four-part fair use test originally conceived by Justice Story in *Folsom v. Marsh*,[22] stating:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.[23]

The protections afforded by the fair use doctrine have been instrumental in fostering technological innovation, particularly the creation and expansion of the Internet. Without fair use, it is possible that consumers would not enjoy such technologies as the digital video recorder,[24] the iPod,[25] or search engines such as Google.[26]

In both the complaint and the study, the CCIA noted that in addition to this statutory fair use provision, the Copyright Act includes other important—yet often overlooked—limitations on copyright.[27] For example, section 102(a) affords copyright protection only to "original works of authorship," i.e., protection does not extend to mere facts;[28] section 102(b) expressly notes that ideas are not copyrightable; section 108 allows libraries and archives to make or distribute one copy of a work without securing the copyright owner's permission; and section 110(1) permits displays or performances of a work in a classroom setting without the rights holder's authorization.

FTC ELECTS TO TAKE NO ACTION

Given these express statutory limita-

tions on copyright protections, the copyright warnings complained of in the complaint appear to be overbroad on their face. For example, the NFL's warning purports to prohibit all but the private use of the telecast or any "pictures, descriptions, or accounts of the game without the NFL's consent." Such a warning makes no allowance for—and appears on its face to be contradicted by—the fair use doctrine and the principle that facts are not copyrightable.[29]

Notwithstanding the apparent overbreadth of the copyright warnings, the FTC staff declined to take action at this time. The FTC cited two main reasons for this decision. First, the FTC staff claimed that it did not have a "sufficient basis to conclude that consumers would view those brief warnings as complete statements of their rights with respect to the works."[30] Instead, the FTC staff concluded that "consumers would likely interpret the statements as representations that the material at issue is copyrighted and that there can be significant penalties for infringing that copyright."[31] Second, the FTC staff stated that it did not have a "sufficient basis to conclude that consumers would be likely to refrain from engaging in lawful activities as a consequence of reading those warnings."[32] Rather, the FTC staff claimed that even without the warnings, the fair use doctrine is sufficiently unclear and undefined, so the "safest course is always to get permission from the copyright owner before using copyrighted material."[33]

Each justification articulated by the FTC staff is open to scrutiny. For example, section 401 of the Copyright Act delineates the proper form of copyright notices, although it expressly notes that "these specifications shall not be considered exhaustive." Thus, copyright owners are not precluded from crafting their own form of copyright notices, including detailed statements such as the ones at issue here. Notwithstanding this freedom to craft notices, copyright warnings can still be overbroad or misleading under the FTC Act. In its letter, the FTC staff acknowledged that the disputed warnings "may overstate particular aspects of limitations on consumers' rights . . ."[34] Despite this acknowledgment and without any analysis, the FTC staff summarily dismissed any causal relationship between consumers' confusion of their rights and the copyright warnings, claiming instead that any confusion "may well be a function of the inherent complexities of copyright law, in particular the fair use doctrine . . ."[35] Although the ambiguities of the fair use doctrine and the inconsistent and often contradictory judicial opinions regarding the issue do contribute to consumer confusion, it is reasonable to assume that overbroad or misleading copyright warnings only exacerbate the problem. Indeed, the FTC staff seemingly conceded this when it wrote: "Widespread use of inaccurate copyright warnings could contribute to consumers' misunderstanding of the statutory protections available to them under the Copyright Act."[36]

WIDESPREAD USE OF INACCURATE COPYRIGHT WARNINGS COULD CONTRIBUTE TO CONSUMERS' MISUNDERSTANDING OF THE STATUTORY PROTECTIONS AVAILABLE TO THEM UNDER THE COPYRIGHT ACT.

Similarly, although the FTC staff is correct in noting that it was not provided sufficient information to conclude that consumers detrimentally rely on these warnings,[37] such information could be obtained through an FTC investigation or through a discovery process. Dismissing the action without providing the complainant the opportunity to gather such evidence appears premature, although the FTC letter does not foreclose the possibility of investigating the matter at a future date on a more complete record. Indeed, an HRRC representative believes that another complaint with more evidence might gain more traction with the FTC—although the HRRC emphasized that it currently has no plans to take such action.[38]

But even if the CCIA, HRRC, or another entity files a new complaint and supplements the record, there are still several hurdles to overcome to achieve their apparent objective of restoring balance between the rights of copyright owners and the consuming public. For instance, it is unclear if—and if so, to what extent—content providers are required to affirmatively set forth the fair use rights of consumers. As noted by Patrick Ross, executive director of the Copyright Alliance,[39] "[i]f CCIA were to succeed in requiring copyright owners to affirmatively delineate a fair use legal strategy with every warning—in essence act as the user's defense attorney—wouldn't many owners simply forgo the caution and instead move straight into legal action?"[40] Thus, if the CCIA, HRRC or any other group were able to secure an FTC order deeming these warnings misleading and deceptive, it is probable that the parties named in the complaint would simply stop issuing the warnings in favor of pursuing more frequent and systematic copyright infringement suits.

Moreover, although many of the principles embodied in the FTC actions cited in the HRRC letter appear relevant, those cases are of somewhat limited persuasive value given the different factual context in which they arose.[41] Specifically, the HRRC letter emphasized two 1975 actions in which the FTC enjoined misleading debt collection practices.[42] In the course of resolving those matters, the FTC did—as the HRRC pointed out—find that the offending debt collection letters were "incomplete, inaccurate and vague and [we]re stated to intimidate the debtor rather than to inform him of the creditor's legal rights."[43] Thus, these enforcement actions stand for the rather unremarkable principle that the FTC has, in the past, ordered companies to refrain from engaging in misleading conduct.

But unlike the challenged copyright warnings—which are broadcast to anyone watching—the challenged

debt collection practices involved misleading statements made in personalized letters sent directly to individual consumers. Moreover, both the debt collectors and Sears—which the FTC also enjoined from misleading consumers who had filed for personal bankruptcy—used these devices with the intention of prompting consumers to make payments that, in some cases, they were not obligated to make.[44] This is in stark contrast to the disputed copyright warnings, which are not designed to secure payments from—or prompt any affirmative action by—particular individuals.[45]

As a practical matter, it seems very unlikely that the FTC will ever take the extraordinary step of ordering the copyright owners to submit to a third-party entity for guidance on crafting proper warnings—which the CCIA had asked the FTC to do.[46] Indeed, the FTC did not mandate such action in its consent orders either in the aforementioned debt collection matters or in *Sears*. The FTC did, however, require the debt collectors to cease making certain types of misleading statements in their collection letters. If the FTC ever elects to investigate this matter and evidence is presented of consumers forgoing their fair use rights as a result of the challenged warnings, the FTC may deem such narrow relief appropriate. In fact, even in refusing to investigate, the FTC staff urged "copyright owners to be accurate in their characterizations of their rights and any limitations on consumers' rights to use copyrighted works," and for "all parties concerned with this issue to educate consumers about their legal rights and responsibilities . . ."[47]

As new media companies such as Google begin to create their own content and as old media companies acquire or merge with new media companies (such as News Corporation's acquisition of MySpace), the lines between content creator, aggregator, and distributor will become increasingly blurred. This confluence of media consolidation and diversification, the old combining with the new, and the introduction of innovative technologies will further complicate the economic, legal, and public policy[48] landscape of copyright. The dispute concerning copyright warnings is just one small piece of this much broader discussion, and although the dispute is resolved for the time being, the debate regarding the proper balance between copyright protection for content creators and fair use for the consuming public will certainly continue. ❖

Scott L. Walker practices antitrust, intellectual property, and complex commercial litigation with Lowenstein Sandler PC. His e-mail is swalker@lowenstein.com.

Matthew Savare practices intellectual property, media, and entertainment law with Lowenstein Sandler PC. His e-mail is msavare@lowenstein.com.

1. According to the complaint (*see* http://www.ftc.gov/os/070801CCIA.pdf), the CCIA is an "international, nonprofit association of computer, information, and communications technology firms. CCIA is dedicated to preserving full, fair and open competition throughout [its] industry." Complaint at 2. The CCIA's members include Google, Microsoft and Yahoo. *See* http://www.ccianet.org/members.html; *see also* Jacqueline Palank, *Content Makers Are Accused of Exaggerating Copyright*, N.Y. Times, (Aug. 2, 2007), available at http://www.nytimes com/2007/08/02/business/media/02copyright.html?_r=1&oref=slogin.

2. Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC to Edward J. Black and Matthew Schruers, CCIA (Dec. 6, 2007) (the "FTC letter").

3. For the purposes of this article, we use the term "old media" as a reference to companies and technologies that focus on the means of communication that existed since before the advent of the Internet, such as newspapers, books, broadcast and cable television, film, and music.

4. For the purposes of this article, we use the term "new media" as a reference to companies and technologies that are focused on digital communication and expression, such as the Internet, computers, and video games.

5. The complaint named the following entities: National Football League, NFL Properties, Inc., NFL Enterprises LLC, Major League Baseball, Major League Baseball Properties, Inc., Major League Baseball Advanced Media, LP, NBC Universal, Inc., Universal Studios, Inc., Morgan Creek Productions, Inc., DreamWorks Animation SKG, Inc., DreamWorks LLC, Harcourt, Inc., and Penguin Group (USA), Inc.

6. The CCIA differentiated between "copyright warnings," which are the target of the complaint and "copyright notices," which are governed by 37 C.F.R. § 202.2 and not implicated by the complaint. *See* complaint at 3.

7. Indeed, the HRRC acknowledged that it viewed the CCIA complaint—which, as detailed in this article, the HRRC publicly supported—as an opportunity to bring to the public's attention the erosion of consumers' fair use rights via devices like these allegedly overbroad copyright warnings. Telephone Interview with Mitchell L. Stoltz, Associate Counsel for HRRC (Jan. 4, 2008). The HRRC also emphasized that the CCIA complaint presented an opportunity to argue that copyright infringement penalties are grossly disproportionate in relation to the actual harm caused by alleged infringers. *Id*.

8. Complaint at 4.

9. Complaint at 5.

10. Complaint at 6.

11. Complaint at 7.

12. Like the CCIA, the HRRC is comprised of consumer electronics manufacturing companies that produce technologies used to copy, store, share, and disseminate digital content.

13. Letter from Robert S. Schwartz, HRRC General Counsel, to The Honorable Deborah Platt Majoras, Chairman, FTC (Oct. 23, 2007) (the "HRRC letter").

14. 86 F.T.C. 109 (1975).

15. 86 F.T.C. 502 (1975).

16. Letter at 2.

17. Docket No. C-3786 (1998).

18. Letter at 2.

19. *Id., citing In re: Rambus, Inc.*, Docket No. 9302 (2006) and *In re: Union Oil Company of California*, Docket No. 9305 (2006).

20. Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (CCIA: Sept. 2007) (hereinafter the "study").

21. Recently, others have criticized copyright owners for their notices to consumers, albeit on different grounds. *See* Pamela Samuelson and Jason Schultz, *Should Copyright Owners Have to Give Notice About Their Use of Technical Protection Measures?* (Nov. 19, 2007), *available at* http://ssrn.com/abstract=1058561 (recommending that the FTC investigate the deployment of digital rights management ("DRM") technologies in digital content and require notice be given to consumers regarding

any technical restrictions imposed by the DRM software).

22. 9 F. Cas. 342 (Cir. Ct. Mass. 1841).

23. 24.17 U.S.C. § 107.

24. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

25. *Recording Industry Association of America v. Diamond Multimedia System, Inc.*, 180 F.3d 1072 (9th Cir. 1999).

26. *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

27. Study at 16; Complaint at p. 5, 7, and 9.

28. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347-48 (1991) ("[Facts] may not be copyrighted and are part of the public domain available to every person.") (internal citation omitted).

29. This restriction of the dissemination of facts means that copyright owners may not stop the consuming public from reporting facts shown in a televised game. Nevertheless, a copyright owner may permissibly restrict access to a live sporting event if an individual fails to comply with the owner's rules. For example, the National Collegiate Athletic Association recently issued new rules restricting the number of times credentialed reporters can post live blogs during the course of particular sporting events. If a reporter exceeds the limit for a given sport, he or she will be ejected from the event. Heather Havenstein, *N.C.A.A. to Bloggers: Too Many Posts and You're Out!* N.Y. Times, Dec. 20, 2007.

30. FTC Letter at 4.

31. *Id.*

32. *Id.* It is not surprising that the FTC staff cited this deficiency, because—with respect to media disclosures to the public—the FTC has declined to intervene when the complainant fails to demonstrate the likelihood of consumer injury. *See, e.g.*, Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Executive Director, Commercial Alert, (February 10, 2005), available at http://www.commercialalert.org/FTCletter2.10.05.pdf (denying Commercial Alert's request that the FTC require the clear and conspicuous disclosure of product placements in entertainment programming, because, inter alia, Commercial Alert failed to show the likelihood of consumer injury).

33. FTC letter at 4. *quoting* U.S. Copyright Office, Fact Sheet FL-102, *Fair Use*, available at http://www.copyright.gov/fls/fl102.html.

34. *Id.* at 5.

35. *Id.*

36. *Id.*

37. Telephone Interview with Mitchell L. Stoltz, Associate Counsel for HRRC (January 4, 2008). It is also noteworthy that—even though the challenged warnings have been widely used for years—both the CCIA complaint and the HRRC letter merely alleged consumer harm in a conclusory manner. Indeed, neither entity provided evidence—even anecdotal—of consumers relying upon the warnings, that the warnings themselves have dissuaded consumers from exercising their fair use rights, or any actual harm to the public. Although the CCIA complaint did cite to a study by the Center for Social Media as evidence "that consumers are confused about their rights to use legally acquired media and forgo the use of legitimate products and services out of confusion or fear," the CCIA did not cite to any evidence to support its conclusion that the disputed warnings "contribute to that confusion." Complaint at 2, ¶ 4 & n.1.

38. Telephone Interview with Mitchell L. Stoltz, Associate Counsel for HRRC (Jan. 4, 2008).

39. The Copyright Alliance is a nonprofit organization "dedicated to the value of copyright as an agent for creativity, jobs and growth." Its members include MLB, the NFL, and other entities named in the CCIA complaint. *See* http://www.copyrightalliance.org/aboutus (last visited Dec. 28, 2007).

40. Copyright Alliance Press Release: *Statement From Executive Director Patrick Ross Re: Today's CCIA Filing with the FTC*, Aug. 1, 2007, *available at* http://www.copyrightalliance.org/newsroom/0912fairusestudy. Regarding this statement, HRRC Associate Counsel, Mitch Stoltz, noted that the entities named in the CCIA complaint do not truly face a binary choice between the challenged warnings and increased litigation activity. Stoltz suggested that those companies could, instead, amend their warnings to cure the alleged overbreadth. He cited as an example the copyright notice used in the treatise *Nimmer on Copyright*, which the CCIA cited in the complaint. Telephone Interview with Mitchell L. Stoltz, Associate Counsel for HRRC (Jan. 4, 2008).

41. The *Rambus* and *Union Oil* decisions cited by the HRRC are also distinguishable. In those actions, the FTC assessed the disputed conduct under the Sherman Act—which is not an analysis that the CCIA requested, nor does it seem that such an analysis would be appropriate given the circumstances. *See*, *e.g.*, *In re: Rambus, Inc.*, Docket No. 9302 (2006), at 30, n. 141 ("Whatever the potential breadth of Section 5 of the FTC Act in these circumstances, our analysis in this opinion rests on the traditional criteria for evaluating allegations of monopolization under Section 2 of the Sherman Act."), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf. Although one commissioner did state in a concurring opinion that the conduct of Rambus constituted an "'unfair method of competition' in violation of Section 5 of the FTC Act," the opinion focused largely on Rambus' anticompetitive conduct. *See* Opinion of Commissioner Jon Leibowitz, *In re: Rambus, Inc.*, Docket No. 9302 (2006), at 1-2 (characterizing the complained-of conduct as an "unfair method of competition" and urging the complete body of the FTC to "fully exercise" its powers under the broad mandate of section 5 of the FTC Act), and 10 (stating that section 5 of the FTC Act "is a flexible and powerful Congressional mandate to protect competition from unreasonable restraints, whether long-since recognized or newly discovered, that violate the antitrust laws, constitute incipient violations of those laws, or contravene those laws' fundamental policies"), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

42. HRRC letter at 1-3.

43. In re: CTC Collections at 115 ¶¶ 9, 11.

44. For example, in the FTC complaint issued in connection with the *Sears* matter, the FTC indicated that certain Sears consumers paid debts that had been discharged in bankruptcy. *In re: Sears, Roebuck & Co.*, Docket No. C-3786 (1998), at ¶ 11, *available at* http://www.ftc.gov/os/1998/02/9723187.cmp.htm

45. HRRC representative, Mitch Stoltz, downplayed this distinction, arguing that the copyright warnings likely cause consumers to forgo engaging in fair use activities out of fear of being assessed stutory damages, which could be as high as $150,000 per infringed work, if such infringement is deemed to be "willful" under section 504(c)(2) of the Copyright Act. Telephone Interview with Mitchell L. Stoltz, Associate Counsel for HRRC (Jan.4, 2008). Stoltz also stressed that even if the debt collection context is in some ways factually distinct, the "social cost is analogous." *Id*. On this point, Stoltz referred to the CCIA

fair use study discussed above and alluded to the substantial economic cost that results when individuals refrain from engaging in fair use activity for fear of being assessed substantial statutory damages. *Id*.

46. Complaint at 12.

47. FTC letter at 5.

48. Indeed, as a testament to the importance of the fair use issue, Congress, in several of its latest sessions, included bills aimed at strengthening the rights of consumers of digital media. *See, e.g.*, Digital Media Consumers' Rights Act, H.R. 107, 108th Congress (2003); Digital Media Consumers' Rights Act of 2005, H.R. 1201, 109th Congress (2005); and Freedom and Innovation Revitalizing U.S. Entrepreneurship (FAIR USE) Act of 2007, H.R. 1201, 110th Congress (2007).