



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Division of Advertising Practices

Mary K. Engle  
Associate Director

December 6, 2007

Mr. Edward J. Black and Mr. Matthew Schruers  
Computer & Communications Industry Association  
900 Seventh Street, N.W., Eleventh Floor  
Washington, DC 20006

**Re: Complaint Regarding Alleged Misrepresentations of Consumer Fair Use and Related Rights by Certain Copyright-Holding Corporations**

Dear Mr. Black and Mr. Schruers:

On August 1, 2007, the Computer & Communications Industry Association (“CCIA”) filed a letter and attached complaint asking the Federal Trade Commission (“FTC” or “Commission”) to investigate certain companies that routinely issue copyright warnings regarding their media entertainment products. The CCIA believes that certain of these warnings violate Section 5 of the FTC Act (15 U.S.C. § 45) by misrepresenting consumers’ rights to use copyrighted works and by threatening sanctions for lawful uses of those copyrighted works. The CCIA expressed the concern that these alleged misrepresentations “affect the information and communications technology industry, including CCIA members, by reducing demand for new and innovative products and services that involve digital media” and may also be contributing to consumers’ confusion over their rights to use digitally acquired media, causing consumers to forgo the legitimate uses of products or services. The complaint requests that the Commission issue orders prohibiting the alleged misrepresentations, requiring the alleged violators to engage in corrective advertising, and requiring the alleged violators to provide consumer education programs.

For the reasons set forth below, the FTC staff has determined not to recommend that the Commission take any formal action against the companies named in the CCIA’s complaint at this time.

I. Background

As the Commission and the Department of Justice stated earlier this year, “[i]ntellectual property laws create exclusive rights that provide incentives for innovation by ‘establishing enforceable property rights for the creators of new and useful products, more efficient processes,

and original works of expression.”<sup>1</sup> These laws have the “fundamental goals of enhancing consumer welfare and promoting innovation.” *Id.* They promote innovation “by allowing intellectual property owners to prevent others from appropriating much of the value derived from their inventions or original expressions. These rights also can facilitate the commercialization of these inventions or expressions and encourage public disclosure, thereby enabling others to learn from the protected property.” *Id.*

The Copyright Act confers on the owner of copyright in a creative work, such as an original literary work or motion picture, “the exclusive rights to do and to authorize” any of certain enumerated activities, “[s]ubject to sections 107 through 122” of that Act. 17 U.S.C. § 106. Those exclusive rights include the rights to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public, and to perform and to display the copyrighted work publicly. *Id.* Copyright infringers can be held liable in civil actions for monetary damages. *Id.* § 504. Any person who willfully infringes a copyright can be subject to criminal penalties if the infringement was committed “for purposes of commercial advantage or private financial gain[,]” or in other specified circumstances. *Id.* § 506(a)(1).

The Copyright Act also limits the exclusive rights of copyright owners. Most notably, Section 107 of the Copyright Act provides, in pertinent part:

Notwithstanding the provisions of section[] 106 . . . , the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

*Id.* § 107. Section 107 goes on to list certain nonexclusive factors to be considered in determining whether any specific use of a work is a fair use. *Id.* Other limitations on the exclusive rights of copyright owners are detailed in Sections 108 through 122 of the Copyright Act.<sup>2</sup> Nor does copyright protection extend to “any idea, procedure, process, system, method of

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<sup>1</sup>U.S. Dep’t of Justice and Federal Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 1 (April 2007), <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (quoting U.S. Dep’t of Justice & Federal Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132, *available at* <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>).

<sup>2</sup>For example, Section 108 limits those rights in the contexts of some uses by certain libraries and archives. It is “not an infringement of copyright” for a library or archive to reproduce and distribute a limited number of copies of works under certain conditions specified in the details of that section. 17 U.S.C. § 108. Nothing in that section, however, “in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at

operation, concept, principle, or discovery.” 17 U.S.C. § 102(b). Thus, “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citation omitted).<sup>3</sup>

## II. Discussion

An act or practice is deceptive under Section 5 of the FTC Act if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers. FTC Deception Policy Statement, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 (1984) (“Deception Policy Statement”); *see, e.g., FTC v. Tashman*, 318 F.3d 1273, 1277 (11<sup>th</sup> Cir. 2003) (false claims about potential amounts customers could earn from telephone card dispensing machines held deceptive); *FTC v. Gill*, 265 F.3d 944, 950 (9<sup>th</sup> Cir. 2001) (false claims that defendant could remove negative information from consumers’ credit reports, even if the information was accurate, complete, and not obsolete, held deceptive); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7<sup>th</sup> Cir. 1988) (travel agency’s misrepresentations about cost of vacation packages held deceptive). A representation or omission is material if it is “likely to affect [consumers’] choice of, or conduct regarding a product.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7<sup>th</sup> Cir. 1992) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). Misrepresentations relating to consumers’ use of a product after purchasing can be deceptive under Section 5. Deception Policy Statement, 103 F.T.C. at 182 n.45 (“Material information may affect conduct other than the decision to purchase a product.”). The Commission presumes certain categories

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any time by the library or archives when it obtained a copy . . . of a work in its collections.” *Id.* § 108(f)(4). Section 110 limits copyright owners’ exclusive rights in the context of certain instructional activities by nonprofit educational institutions. *Id.* § 110(1) (certain performances and displays of copyrighted works not an infringement in specified face-to-face teaching activities of nonprofit educational institutions).

<sup>3</sup>The distinction between ideas and expression and the fair use doctrine codified in Section 107 are “traditional First Amendment safeguards” built into the Copyright Act. *Eldred*, 537 U.S. at 220. *See also C.B.C. Distribution and Marketing, Inc., v. Major League Baseball Advanced Media, L.P.*, 2007 U.S. App. LEXIS 24192 (8<sup>th</sup> Cir. Oct. 16, 2007) (First Amendment protects use of names, performance statistics, and biographical data of actual professional sports league players in for-profit fantasy sports league despite violation of state right of publicity statute by such use).

of claims to be material, including express claims and claims the seller intends to make. *Kraft*, 970 F.2d at 322; *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 816-17 (1984).<sup>4</sup>

Copyright warnings can serve the valuable purpose of notifying consumers in a succinct fashion that infringement has potentially serious legal consequences. “FBI copyright warnings” on DVD and VHS tape cases, as well as in the motion pictures embodied in the DVDs and tapes therein, can be evidence in criminal piracy cases that defendants’ copyright infringement was willful. *See, e.g., United States v. Beltrán*, 2007 U.S. App. LEXIS 22054, at \*3 (1<sup>st</sup> Cir. Sept. 14, 2007) (criminal prosecution of large scale operation for copying and distributing motion pictures). Copyright owners are not, however, entitled to engage in deceptive and unfair practices to protect their copyrighted works against infringement.<sup>5</sup>

After reviewing the various warnings cited in the CCIA’s complaint, the FTC staff concludes 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. We do 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. Nor do we 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. Indeed, even absent any warning, it can be difficult to distinguish lawful uses of a copyrighted work from infringing uses.

We are mindful, in this regard, of the views the U.S. Copyright Office expresses in information it provides to the public. “The distinction between ‘fair use’ and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken [from a copyrighted work] without permission.”<sup>6</sup> Thus, it advises that “[t]he safest course is always to get permission from the copyright owner before using copyrighted material . . . . The Copyright Office can neither determine if a certain use may be considered ‘fair’ nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.” *Id.*<sup>7</sup> Accordingly, even though some of the warnings cited in the CCIA complaint

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<sup>4</sup>This presumption can be rebutted with sufficient evidence that the claim is not material. Deception Policy Statement, 103 F.T.C. at 182 n.47.

<sup>5</sup>*See, e.g., Sony BMG Music Entertainment*, FTC Docket No. C-4195 (June 28, 2007) (consent order) (complaint alleged deceptive failure to disclose adequately digital rights management software installed via music CDs onto computers; software materially affected consumers’ use by limiting the number of disc-to-disc copies that consumers could make, and by restricting consumers’ ability to transfer to and play music on digital playback devices).

<sup>6</sup>U.S. Copyright Office, Fact Sheet FL-102, *Fair Use*, available at <http://www.copyright.gov/fls/fl102.html>.

<sup>7</sup>We also note the Copyright Office’s significant role in amplifying and implementing many of the specific statutory provisions limiting copyright owners’ exclusive rights. *See, e.g.,*

may overstate particular aspects of limitations on consumers' rights, consumer confusion regarding lawful uses of copyrighted works may well be a function of the inherent complexities of copyright law, in particular the fair use doctrine,<sup>8</sup> rather than the specific language in these warnings.

Although the staff does not recommend any formal action at this time, we do note that the general issue of representations to consumers about the scope of their rights to use copies of works they purchase is of growing importance in light of the widespread and expanding distribution of copyrighted materials in digital form. We believe that changes in content delivery mechanisms, business models, and the nature of consumers' interactions with copyrighted works will likely result in this issue taking on added significance, particularly given the increasing number of lawsuits being brought against consumers for copyright infringement. The FTC staff encourages copyright owners to be accurate in their characterizations of their rights and any limitations on consumers' rights to use copyrighted works. Widespread use of inaccurate copyright warnings could contribute to consumers' misunderstanding of the statutory protections available to them under the Copyright Act. Further, if consumers routinely confront exaggerated and inaccurate copyright warnings they may tend to disregard them altogether, to the detriment of consumers and copyright owners alike.<sup>9</sup> We would therefore further encourage all parties concerned with this issue to educate consumers about their legal rights and responsibilities in connection with their uses of copyrighted content.

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37 C.F.R. § 201.14 (to qualify for protections of 17 U.S.C. §§ 108(d)(2) and (e)(2) libraries and archives must, where orders for copies are accepted, display prominently and print on copy order forms warnings in specified wording about potential infringement liability for use of copies of copyrighted materials beyond fair use purposes).

<sup>8</sup>Fair use enquiries cannot be "simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citations omitted) (holding that rap group's musical parody of Roy Orbison's "Oh, Pretty Woman" may be fair use).

<sup>9</sup>*See, e.g.,* Richard A. Posner, *Eldred and Fair Use*, 1 *The Economists' Voice* 1, 4-5 (2004) (systematic overclaiming of copyright, including overly broad copyright warnings, result in misunderstanding of copyright's breadth; copyright overclaiming may be a form of copyright misuse that could result in forfeiture of copyright).

Mr. Edward J. Black and Mr. Matthew Schruers

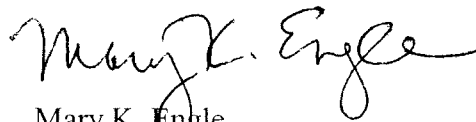
December 6, 2007

Page 6 of 6

III. Conclusion

In conclusion, the FTC staff does not recommend Commission action at this time. We appreciate your bringing this matter to our attention. Complaints from groups like the CCIA are a helpful means of reviewing possible unfair or deceptive practices, and we hope you will continue to bring to our attention any practices that you believe may violate the FTC Act. We emphasize that the decision not to recommend formal action in this matter should not be construed as a formal Commission determination of whether the actions challenged in the CCIA submission comply with Section 5.

Very truly yours,

A handwritten signature in black ink that reads "Mary K. Engle". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Mary K. Engle

Associate Director for Advertising Practices

cc: Public Knowledge, Library Copyright Alliance, and Home Recording Rights Coalition  
(commenters of record)