The Long Arm of the National Football League:
Is The NFL's Copyright Policy Violating the Rights of Its Fans and Franchises?

By Eric Gebert

I. Introduction

As the highest grossing sports league in the world, the National Football League (NFL) operates with expansive and unprecedented reach.[1] Each Super Bowl broadcast from 2010 to 2016 ranks as one of the seven most viewed programs in American television history and *Sunday Night Football* was the most watched weekly program in four of the past five years.[2] [3] Unsurprisingly, the NFL is intent on protecting their immensely popular product through aggressive intellectual property protections, though few are as pervasive as the telecast warning that accompanies every NFL game: "This telecast is copyrighted by NFL Productions 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." [4] Does the NFL's copyright warning truly preclude fans from talking about a game with coworkers or from posting about it on their social media pages? How far does it extend?

Given recent coverage by outlets such as ESPN in October 2016, there are indications that the NFL's aggressive copyright tactics extend to its franchise teams as well.[5] According to sourced league memoranda, the NFL has prohibited its Member Clubs from shooting or streaming video inside the stadium during a game and posting it on any form of social media, punishable by an initial fine of $25,000 and up to $100,000 for additional offenses.[6] Further, teams are prohibited from taking video from broadcasts and creating their own highlights or moving images, including Graphics Interchange Format images (popularly known as GIFs).[7]

Essentially, the NFL has severely limited a Member Club's ability to use media content its organization had an essential role in creating and, debatably, authoring.[8]

II. A Brief History of NFL Copyright: Strengthening Over Time

American sports leagues did not always exhibit the level of control over their intellectual property as seen today.[9] Modern copyright claims were born almost entirely out of the Copyright Act of 1976 (Act).[10] Prior to 1976, there was uncertainty that professional sporting events were copyrightable at all, but the Act made specific reference to simultaneously-recorded transmissions of live sporting events being "fixed" under the rules of 17 U.S.C. § 102(a), and thus designated as copyrightable material.[11] Albeit inconsistently, by the early 1980s, the NFL began registering their telecasts with the Copyright Office.[12] While registration is not required to maintain copyright ownership, registration is considered good practice to protect material deemed particularly important.[13] By comparison, in recent years, the NFL has registered every telecasted game, regardless of relative importance, in an attempt to assert NFL ownership over all game material.[14]

With a steady rise in popularity and revenue over the past few decades, the NFL has strengthened copyright protection through a series of substantial court victories, quashing plaintiffs' claims of the NFL overstepping copyright bounds.[15] In one such case, *Dryer v. NFL*, the court granted summary judgment to the NFL based on use of retired players' names and likenesses in repackaged documentaries and game footage.[16] The plaintiffs alleged that their performances in past NFL games were a component of their personal identities rather than the "fixed" works required to fulfill copyright protections.[17] The court did not accept these claims and instead focused on the simple conclusion that the NFL was allowed to use past game footage

and likeness for publicity because these claims were preempted by federal copyright law.[18] Simply, courts have affirmed that the NFL is the sole author of past broadcasts, which validates the league's bolstering of broadcast copyright rights throughout the years.[19]

Yet, the NFL's strength in copyright protection is seen less frequently in cases going to trial than in the proverbial flexing of its copyright muscle through threat and intimidation.[20] The Digital Millennium Copyright Act (DMCA), enacted in 1998 as an attempted compromise between copyright owners and digital content providers online, has provided an outlet for the NFL to send mass takedown notices to any party posting allegedly copyrighted material.[21] A search through the Lumen Database, an aggregation of legal complaints and takedown requests, lists thousands of DMCA notices targeted at users who post NFL-affiliated content on various online forums and social media venues.[22] This poses several concerns, the foremost of which is that these takedown notices are sent en masse and do not necessarily reflect an honest effort to determine which media forms truly violate copyright law and which fall under fair use purposes.[23] Further, DMCA takedowns, in the extreme, can be issued as a form of censorship to silence viewpoints or interpretations of opponents.[24]

While DMCA takedowns are firmly within the confines of contemporary copyright law, they may lead to public relations mishaps for an already image-conscious organization.[25] To prove a point on DMCA overreach, Brooklyn Law School professor Wendy Seltzer posted a YouTube clip of the NFL telecast warning from the 2007 Super Bowl and was promptly told she had violated the DMCA, causing national coverage from technology blogs and mainstream media alike.[26]

The abuse of notice against the everyday American citizen has also been covered by media sources in recent years.[27] In 2007, the NFL sent Fall Creek Baptist Church a notice demanding the cancellation of a Super Bowl watch party because the church planned to charge admission to the event (to recoup food costs), broadcast the game on a television larger than 55 inches, and advertise using the protected phrase "Super Bowl" without the NFL's consent.[28] A similar case spurred then-Pennsylvania Senator Arlen Specter to propose a bill exempting nonprofit organizations from exclusive copyrights for live football games, though it was never enacted.[29]

A final example of quelled goodwill was seen in the NFL's handling of a man who was in possession of the only broadcast tapes of the first Super Bowl.[30] When the owner, Tony Haupt, offered to sell the tapes to the NFL for $1 million, the NFL offered just $30,000.[31] Instead of a counter-offer, the NFL warned that if the owner tried to sell to a third party, the league would litigate based on intentional exploitation of copyrighted material owned by the NFL.[32]

III. Discussion of Legality

The tactics used by the NFL's legal representation are effective, but are they overstepping the bounds of legality? The league's frequent use of DMCA takedown notices seems to contradict notions of fair use put forth by statute 17 U.S.C. § 107 of the Copyright Act of 1976.[33] Users like Professor Selzer who intend the repurposing of NFL film for educational purposes are unfairly given the same treatment as users who may be directly profiting off the retransmission of the NFL's broadcasts for personal gain.[34] In attempting to rectify the tensions between copyright law and First Amendment rights of free speech, fair use seems to be ignored in the tactics used by the NFL and other organizations in sending mass notices through DMCA.[35]

While some of the NFL's other legal notices can sometimes seem petty, they may be detrimental in spreading improper beliefs of what is allowed under copyright doctrine.[36] For example, the simple threat of litigation against opponents like Troy Haupt is a wise tactic for the NFL.[37] But, it might be wrong, in the both legality and morality.[38] Under 17 U.S.C. § 109, an owner of a copy, like Haupt, is able to sell or dispose of the copy without permission from the original copyright holder.[39] Moreover, fair use under *Sony Corp. of Am. v. Universal City Studios*, allowed recording of broadcasts for later viewing allowable in the United States Supreme Court.[40] But the NFL's stoic threats seem to prevent suits altogether, so these defenses are rarely litigated and the NFL's copyright policy goes mostly unchallenged.[41]

There is also case law supporting the overreach in the NFL's own telecast warning played during each NFL broadcast, as seen in *NBA v. Motorola*.[42] When the NFL claims that use of any pictures, descriptions, or accounts of the game without its consent is prohibited, *Motorola* holds this as inaccurate because the sporting event itself and the data resulting from it are not "authored" content that is copyrightable.[43] Instead, a fan's description or account of a game is more likely to be an embodiment of the content of what happened within the course of the game—the scores, the statistics, and the winner are all non-copyrightable facts—than about what happened as a direct result of the broadcast itself.[44] Of course, there may be exceptions when the NFL's authorship of the broadcast might lead to situations where the conversation leans more toward what happened in the broadcast itself than what happened in the game.[45] However, even despite these rare exceptions, fair use may be a valid defense for most fan interactions in both interpersonal communication and social media engagement.[46] Given that most of these circumstances will not be used for a commercial nature, as laid out in 17 U.S.C. § 107(1) or have

a significant influence on the market or value of the copyrighted work per 17 U.S.C. § 107(4), it is likely that there is safe haven within the fair use statute.[47] As such, the NFL telecast warning seems misleading, at minimum, and fraudulently misrepresentative, at most.[48]

The NFL's Member Clubs have a similarly strong argument that their interests are overridden by the league's authoritative copyright enforcement.[49] Franchise teams posting their own video footage from sideline or game action satisfies the concept of authorship within copyright law.[50] Even the repurposing of NFL telecast footage onto social media seems acceptable in that it does not violate subsections 3 or 4 of fair use doctrine, 17 U.S.C. §107.[51] Highlight clips or GIFs are unlikely to meet the substantiality required to dismiss fair use as a claim under subsection 3.[52] Further, under subsection 4, the effect of these videos is unlikely to change the market or value of the NFL's overall telecast.[53] It is dubious to believe that a short clip on Facebook or a GIF on Twitter will influence the NFL's ability to attract millions of viewers for each game.[54] In fact, it may even help in the form of additional advertisement.[55] Even under the rationale that social media feeds are influencing advertising dollars or ticket sales, the burden would be taken by the teams themselves because they all share broadcast profits throughout the league.[56]

Arguably, however, the Member Clubs of the NFL do not stand on as strong of ground in infringement cases because there is some precedent in these actions as far back as 2009.[57] Via league-wide memoranda, the NFL limited players, coaches, and team personnel from posting on any social media website from 90 minutes before kickoff until after NFL-sponsored post-game interviews were completed.[58] Given the implied consent in following these rules (and the accepted punishments of violating them), it is apparent that franchise teams and their staffs are in

an employment relationship in the NFL that may somewhat diminish their protection from the league's copyright overreach.[59] An applicable example is seen in the "work for hire" doctrine in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n,* where the affiliate players were found to be agents of the franchise and thus the franchise owned copyright to their performance via telecast.[60] If the NFL's Member Clubs are considered agents of the league, it is possible that the "work for hire" doctrine might apply to broader control over each team's ability to author its own content within the confines of the NFL's strict rules.[61] Even so, there is an argument that the NFL's franchises are less agents of the league than independently-owned partners within a larger framework.[62]

Lastly, applying to both fans and franchises, the NFL's main objective of controlling all forms of broadcasted content brings up general concerns of antitrust violations.[63] The NFL, unlike Major League Baseball, is unique in that it controls all copyrighted broadcasting under its own name.[64] This is allowable under the Sports Broadcasting Act of 1961, which provided an antitrust exemption to professional sports league in that they were allowed to pool broadcast rights as a package.[65] However, the expansive reach of trying to control how all product is consumed on social media may overstep this exception and bring up a different avenue for antitrust allegations in monopolizing online presence.[66] Despite the NFL's built-in protection from antitrust violations, it is arguable that their social media policies are in conflict with Section 1 of the Sherman Antitrust Act, intended to prevent collusion or interference in a product's creation and output.[67] Cornering the market on media output prevents franchise creativity and control over the presentation of their own team's product.[68]

IV. Recommendations

The National Football League has built impressively strong intellectual property through successful litigation and frequent notice to suspected copyright offenders.[69] However, successful strategy differs from maintaining admirable legal standards. First, a more selective litigation strategy would accomplish two purposes. For one, it would decrease what seems to be an overly aggressive approach to addressing copyright violations.[70] This might save money in minimizing the number of lawsuits filed and notices served, but it would serve a second purpose of creating goodwill for an organization that has been under fire by the media for much of the past few years.[71] Further, a Computer & Communications Industry Association complaint to the Federal Trade Commission in 2007, though quashed, raised similar points about the authoritarian regime put forth by the NFL's (and MLB's) telecast warning.[72] Further transparency in messaging could help change the public perception of the NFL while concurrently scaling down litigation requirements.[73] While the National Football League is likely to continue its aggressive strategy to copyright defense, the issue turns from "if" to "how far?"

[1] Chris Isidore, *NFL Revenue: Here Comes Another Record Season*, CNN MONEY (Sept. 10, 2015, 7:25 PM), http://money.cnn.com/2015/09/10/news/companies/nfl-revenue-profits.

[2] Jason Lynch, *With 111.9 Million Viewers, Super Bowl 50 Was the No. 3 Most-Watched of All Time*, ADWEEK (Feb. 8, 2016, 3:18 PM), http://www.adweek.com/news/ television/1119-million-viewers-super-bowl-50-was-no-3-most-watched-all-time-169507.
[3] Daniel Holloway, *How 'Sunday Night Football' Became TV's Ratings King*, VARIETY, http://variety.com/ 2016/tv/news/sunday-night-football-tv-ratings-1201855511.
[4] Paul Nguyen, *NFL Copyright 2016-Present Warning*, YOUTUBE (Feb. 7, 2016), https://www.youtube. com /watch?v=4KZrsx9ZNjM (Contains video from NFL Productions).
[5] Darren Rovell, *NFL Teams Can Be Fined For Posting Video Under New Social Media Policy*, ESPN (Oct. 9, 2016), http://www.espn.com/nfl/story/_/id/17750196/nfl-starts-new-social-media-policy-teams-fined-posting-video.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *NBA v. Motorola Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).
[10] *Id*.
[11] 17 U.S.C. § 102(a) notes in relevant part:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 102(a) (2016).
[12] Eric E. Johnson, *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 N.D. L. REV. 759, 764-65 (2010).
[13] *Id.* at 765.
[14] *Id.*
[15] *Dryer v. NFL*, 814 F.3d 938, 940-45 (8th Cir. 2016).
[16] *Id.* at 945.
[17] *Id.* at 942.
[18] The Copyright Act Section 301(a) states that copyright law preempts:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright […] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright. […] [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

17 U.S.C. § 301(a) (2016); *id.* at 942-45.

[19] *Id.*
[20] Jacqueline L. Salmon, *NFL Pulls Plug On Big-Screen Church Parties For Super Bowl*, WASH. POST (Feb. 1, 2008), http://www.washingtonpost.com/wpdyn

/content/article/2008/01/31/AR2008013103958. html; *See also* Daniel Victor, *Twitter Removes Accounts Over Sharing of Sports Videos*, N.Y. TIMES (Oct. 13, 2015) http://www. nytimes.com/2015/10/13/business/media/twitter-removes-accounts-over-sharing-of-sports-videos.html.

[21] Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States*, 21 EUR. INTELL. PROP. REV. 236. 237 (1999).

[22] The Lumen Database was founded to bring transparency to the "chilling effect" and questionable legality of mass cease-and-desist notices allowed by the Digital Millennium Copyright Act.
LUMEN DATABASE, https://lumendatabase.org (Type "NFL + DMCA" in search bar).

[23] Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. L. SCI. & TECH 387, 392, 399-400 (2009).

[24] Alex Hern, *Revealed: How Copyright Law Is Being Misused To Removed Material From the Internet*, THE GUARDIAN (May 23, 2016), https://www.theguardian.com/ technology/2016/may/23/copyright-law-internet-mumsnet.

[25] Jacqui Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, ARS TECHNICA (Mar. 20, 2007, 12:35 PM), http://arstechnica.com/business/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions.

[26] Peter Lattman, *Law Professor Wendy Seltzer Takes on the NFL*, WALL ST. J.: L. BLOG (Mar. 21, 2007, 12:27 PM) http://blogs.wsj.com/law/2007/03/21/law-professor-wendy-seltzer-takes-on-the-nfl.

[27] Salmon, *supra* note 20.

[28] *Id.*

[29] Jacqueline L. Salmon, *Bill Would End Separation of Church and Super Bowl*, WASH. POST (Feb. 7, 2008), http://www.washingtonpost.com/wp-dyn/content/article/ 2008/02/06/AR2008020604305.

[30] Richard Sandomir, *Out of a Rare Super Bowl I Record, a Clash With the N.F.L. Unspools*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/sports/ football/super-bowl-i-recording-broadcast-nfl-troy-haupt.html.

[31] *Id.*

[32] *Id.*

[33] 17 U.S.C. § 107 states, in part:

> [T]he fair use of a copyrighted work […] for purposes such as criticism, comment, news reporting, teaching […], scholarship, or research, is not an infringement of copyright. 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 […]; (2) the nature of the copyrighted work; (3) the amount and substantiality […] used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market or value of the copyrighted work.

17 U.S.C. § 107 (2016).

[34] *Id.*; *see also* Lattman, *supra* note 26.
[35] Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV.. 1, 20-23 (1970) (discussing wider connections between copyright and the First Amendment, particularly in fair use).
[36] Salmon, *supra* note 20.
[37] *Id.*
[38] David Post, *Are You Ready For Some Football? (Copyright Department)*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 3, 2016), https://www.washingtonpost.com/news/ volokh-conspiracy/wp/2016/02/03/ are-you-ready-for-some-football-copyright-department.
[39] The Copyright Act § 109(a) quotes in relevant part:

> [T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 109 (2016).
[40] *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984); *see also* Post, *supra* note 37.
[41] Post, *supra* note 37.
[42] *Motorola*, 105 F.3d at 845-57.
[43] *Id.* at 846.
[44] *See Id.* at 846-47.
[45] *CBS Corp v. FCC*, 663 F.3d 122, 123 (3d Cir. 2011) (Janet Jackson's wardrobe malfunction at the Super Bowl comes to mind as an example of where the broadcast itself was the main topic of discussion and could be argued as covered under copyright doctrine within Motorola).
[46] 17 U.S.C. § 107.
[47] *Id.*
[48] Eric Bangeman, *FTC Complaint Flags NFL, MLB, Studios For Overstating Copyright Claims*, ARS TECHNICA (Aug. 1, 2007, 9:00 AM), http://arstechnica.com/tech-policy/2007/08/ftc-complaint-flags-nfl-mlb-studios-for-overstating-copyright-claims.
[49] *Id.*
[50] *Time Inc. v. Bernard Geis Assoc*., 293 F Supp. 130, 142-43 (S.D.N.Y. 1968) (a man has authorship over his footage of the John F. Kennedy assassination because he selected particular locations and camera angles to create a narrative).
[51] 17 U.S.C. § 107.
[52] *Id. See also* 17 U.S.C. §107(3) (requires examination into "the amount and substantiality of the portion used in relation to the copyrighted work as a whole").
[53] *Id. See also* 17 U.S.C. §107(4) further analyzes the media's "effect of the use upon the potential market for or value of the copyrighted work."
[54] *See* Mike Masnick, *Just About Everything About Twitter Suspending Deadspin and SBNation Accounts Is Ridiculous*, TECHDIRT (Oct. 13, 2015 4:21 AM), http://www. techdirt.com/articles/20151012/22104032520/just-about-everything-about-twitter-suspending-deadspin-sbnation-accounts-is-ridiculous.html.

[55] *Id.*
[56] *Id.*
[57] Associated Press, *League Announces Policy on Social Media For Before and After Games*, NFL.COM (Aug. 31, 2009, 6:53 PM), http://www.nfl.com/news/story/09000d5 d8124976d/article/league-announces-policy-on-social-media-for-before-and-after-games.
[58] *Id.*
[59] *Id.*
[60] *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 678 (7th Cir. 1986).
[61] *Id.*
[62] *Id.*; *see also* Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 186 (2011).
[63] Edelman, *supra* note 61.
[64] Johnson, *supra* note 12.
[65] Directorate For Financial and Enterprise Affairs, *Roundtable on Competition and Sports*, FED. TRADE. COMM'N 1, 8. (Jun. 8, 2010), https://www.ftc.gov/sites/default/files/ attachments/us-submissions-oecd-and-other-international-competition-fora/ussportscompetition.pdf.
[66] *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 744 (7th Cir. 2008) (Garment manufacturer wins case against NFL for violation of Sherman Antitrust Act as a single source of economic power in that industry).
[67] The Sherman Act, states, in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine

15 U.S.C. § 1 (1890).
[68] *Id.*
[69] *Dryer*, 814 F.3d at 940-4; *see also* Cobia, *supra* note 23, at 399-400.
[70] Hern, *supra* note 24.
[71] Arthur R. Miller, *Blocking the NFL Concussion Settlement*, WALL ST. J.: OPINION (May 3, 2016, 6:17 PM), http://www.wsj.com/articles/blocking-the-nfl-concussion-settlement-1462313860 (NFL aggressively combatting retired player concussion settlements); *see also* Ken Belson, Richard Sandomir, & Rory Smith, *TV Viewership Falls in N.F.L. and Premier League: A Blip, or Something Worse?*, N.Y. TIMES (Oct. 26, 2016), http://www.nytimes.com/2016/10/27/sports/football/tv-viewership-falls-in-nfl-and-epl-a-blip-or-something-worse.html (Recent NFL ratings decrease).
[72] Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, Fed. Trade Comm'n, to Edward J. Black & Matthew Schruers, Comput. & Commc'ns Indus. Assoc. (Dec. 6, 2007), https://www.ftc.gov/system/files /documents/advisory_opinions/letter-responding-complaint-

computer-communications-industry-association-regarding-alleged/071206ccia.pdf; Bangeman; *see also supra* note 47.

[73] *Id*.