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In Re:

SMALL COPYRIGHT CLAIMS PUBLIC HEARING

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The following pages constitute the proceedings held in the above-captioned matter, held at Columbia Law School, Jerome Greene Annex, 410 West 117th Street, New York, New York, before Annette M. Montalvo, RMR, of Capital Reporting Company, and a Notary Public in and for the State of New York.

A P P E A R A N C E S

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CATHERINE ROWLAND, US Copyright Office
ANN CHAITOVITZ, US Patent & trademark Office
LISA SHAFTEL, Graphic Artists Guild
VICTOR PERLMAN, American Society of Media Photographers
EUGENE MOPSIK, American Society of Media Photographers
MICKEY OSTERREICHER, Nat'l Press Photographers Assoc.
JAMES CANNINGS, Our Own Performance Society, Inc.
JAY ROSENTHAL, National Music Publishers Association
NANCY WOLFF, Picture Archive council of America
CHARLES SANDERS, Songwriters Guild of America
JOSEPH DIMONA, Broadcast Music, Inc.
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RANDY TAYLOR, Copyright Defense League, LLC
LISA Willmer, Getty Images
CHRISTOS BADAVAS, The Harry Fox Agency, Inc.
BRAD HOLLAND, American Society of Illustrators Partnership
BRUCE LEHMAN, Former Asst. Secretary of Commerce and Commissioner of Patents & Trademarks 1993-1999
SUSAN DAVIS, National Writers Union
RACHEL FERTIG, Association of American Publishers
MARY FRAN LOFTUS, We Research Pictures, LLC

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MS. CHARLESWORTH: I am Jacqueline Charlesworth. I am Senior Counsel to the Register of Copyrights in the US Copyright Office, and this is Catie Rowland, my colleague in the Copyright Office. And we are very happy to have you here today to share your thoughts and views on the small claims process.

I want to thank Columbia Law School and particularly Professors Besek and Loengard for hosting us here today in this lovely room. It's a beautifully appointed room, and I know a lot of thought and preparation went into the mikes and so forth. So thank you for your help with that.

Maria Pallante, the Register of Copyrights, could not be here today, but she wanted me to share some remarks with you, so I am going to read a statement from her.

The Copyright Act protects a wide variety of works of authorship, ranging from individual photographs and illustrations of relatively modest commercial value, to motion pictures worth hundreds of millions of dollars. Copyright owners of all of these works may need to seek a legal remedy in case the work is infringed. Not

all copyright owners, however, have the same resources to bring a federal lawsuit, which can require substantial time, money and effort to pursue.

To the extent infringement results in a relatively small amount of economic damage, the copyright owner may be dissuaded from filing a lawsuit because the potential award may not justify the expense of litigation, or the copyright owner may have difficulty finding an attorney willing to handle the matter.

In light of these challenges, the chairman of the House Judiciary Committee asked the US Copyright Office to examine the obstacles facing small copyright claims, and to consider potential alternatives. In a letter dated October 11, 2011, chairman Lamar Smith requested that the Office undertake a study for Congress to assess the extent to which authors and other copyright owners are effectively prevented from seeking relief for infringement, and to make specific recommendations as appropriate to improve the adjudication of small copyright claims.

I am grateful to all of you who are

participating in the public discussion today, because the issues relating to potential small claims or a potential small claims process for copyrighted works are many, they are varied, and they require serious thought. Any small claims process needs to address the current inability of small copyright owners to protect their works, but at the same time must be workable, efficient, and fair to all who might encounter it.

The request from Congress shines a light on the segments of the copyright ecosystem that should not be overlooked. Independent creators and smaller copyright owners provide great value to our society, and it is important to ensure that they can effectively exercise their rights under the Copyright Act and the Constitution. At the same time, we must consider the public interest and legitimate uses of copyrighted works.

It is our hope that these hearings will allow you to offer your perspectives on the spectrum of issues involved in this undertaking, and will, in turn, provide the Copyright Office valuable insight to inform our studies and

recommendations to Congress.

And I want to add that the US Patent & Trademark Office, which also is examining small claim issues, has a representative here today, Ann Chaitovitz, who will now share some thoughts from David Kappos, the Undersecretary of Commerce for Intellectual Property and Director of the USPTO.

MS. CHAITOVITZ: Thank you, Jacqueline.

I would also like to thank Columbia Law School, the Copyright Office and Register of Copyrights Maria Pallante for calling this public meeting. And good morning everybody, and thank you for taking the time to attend this important meeting about adjudicating small copyright claims.

As most of you know, a lot of consideration has been given in recent years to small claims procedures for copyrights. You may not be aware that procedures for patent small claims have also been, and are currently being, examined as well.

We have heard from individual creators and innovators that federal litigation, including costly discovery, can be too expensive and ultimately unaffordable. As a result, SMEs say

they are unable to enforce their rights. So I hope we can all put our heads together to find a way to address what is an access to justice issue at its core, and ensure the vitality and accessibility of our IP system. As David Kappos, the Undersecretary of Commerce for Intellectual Property and Director of the USPTO, noted in February at UC Davis, his alma mater, "inventors must be able to concentrate on research and discovery, not on expensive disputes and litigation, and, therefore, the USPTO is considering a small claim solution that could settle patent disputes quickly and cheaply without litigation."

On October 1, the USPTO hosted a patent small claims roundtable to discuss the concept of a patent small claims mechanism, and will soon issue a notice of inquiry to seek comments from the public regarding a patent small claims proceeding. The USPTO is also concerned about the copyright side of the equation, and we are very pleased that the Copyright Office is examining this topic in the copyright environment. The USPTO looks forward to working

with and assisting the Copyright Office in its efforts.

Undersecretary Director Kappos sent me with some guiding philosophy for you today. First, IP rights encourage creativity and innovation. They generate jobs and expand markets.

Second, IP rights will not incentivize creativity and innovation if they are too expensive to enforce.

Third, any small claims procedure must be guided by the Constitutional limitations: Article III, the 7th Amendment, and due process.

So in conclusion, I would like to thank the Copyright Office once again for inviting the USPTO here today. But more than anything, I want to thank you all for attending. Your participation places you at the forefront of helping to shape an IP system that works for individual creators. This public meeting is just the beginning. So even after the meeting ends tomorrow, please keep collaborating and keep participating to help solve this challenging issue.

MS. CHARLESWORTH: Thank you very much, Ann.

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Obviously, our goal here today is to have a very productive discussion and to give everyone a chance to be heard.

There are mikes around the table, for those whose voices may not project as well as Ann's, and I think you probably know how to use it, but just hit the button and it turns green. You can speak into it, and it will be easier to hear you. Unfortunately, we have a limited number, but just pass them around as necessary.

Catie and I will be moderating the panels and guiding the discussion generally. And we will call on you and recognize you when it is your turn to speak. If we are overlooking you, please raise your hand or jump up and down or do something to get our attention. We really do want to hear everyone's views.

As you see, we have a reporter here today who's taking down what we say. The transcript we do expect to make public on our web site. So whatever you say will be in that transcript. It will be very helpful, because of the number of people here today, if you remember to identify yourself before you speak so that the record is

easier for the reporter to decipher when she turns it into a written transcript.

We have a presumptive schedule that calls for an hour and a half for each panel. We are obviously starting a little late. We're going to try and make up the time. We think that some panels may merit more discussion, some may merit less. So we may adjust panels and the timing a little bit as we go on and see what develops.

Are there any questions before we begin?

So now on to panel 1, which is forum, jurisdiction, and decision-makers. Many of the questions we'll be posing are really the same ones that appeared in the recent notice, and on which many of you supplied thoughtful comments. But I think as with much public discourse, it is helpful to trade views and air views in real time.

So we will be starting our discussion by asking you generally for those who support a small claim system, can you tell us how you envision it? Is it a court-like process arbitration, or mediation? That's the first question on the table.

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I forgot to mention, before we start, I think it might be helpful to go around the table and have people say their names and identify the organization they represent, if there is an organization.

Ann, you introduced yourself already.

MR. SANDERS: I am Charles Sanders, outside counsel for Songwriters Guild of America.

MR. LEICHTMAN: David Leichtman. I am a partner in New York at Robins Kaplan Miller & Ciresi. My practice focuses largely on representation of copyright owners, but I am here today in my capacity as chairman of the board of directors of Volunteer Lawyers for the Arts, and we represent artists who otherwise can't afford counsel. So I think we have an interesting perspective for the proceeding.

MS. CHARLESWORTH: Please speak into the microphone.

MS. SHAFTEL: Lisa Shaftel. Graphic Artists Guild.

MR. OSTERREICHER: Mickey Osterreicher. I am General Counsel with the National Press Photographers Association. We represent about

7,000 visual journalists around the country.

MS. WOLFF: I am Nancy Wolff. I am an attorney with Cowan DeBaets Abrahams & Sheppard. Today I am here on behalf the trade association. I represent Picture Archive Council of America, which are the entities that are in the businesses of licensing the visual content, whether it is still, motion, illustration, et cetera.

MS. Willmer: Lisa Willmer. I am in-house counsel for Getty Images, and we license digital content, and on behalf of numerous thousands of individual photographers and other copyright holders.

MR. MOPSIK: Eugene Mopsik, Executive Director of American Society of Media Photographers. We are a 7,000 plus member association of imaging professionals.

MR. PERLMAN: I'm Vic Perlman, General Counsel to ASMP.

MR. LEHMAN: Bruce Lehman, and I am here representing myself. And what I hope to contribute is my perspective on having been deeply involved in copyright policy and creating policy of this country for the last 40 years,

starting with the 1976 Copyright Act, and then in my service in government going through the WIPO copyright treaty and Copyright Act, and then my experience as a lawyer, representing and working with copyright interests over the course of the four decades.

MR. HOLLAND: I'm Brad Holland. I represent the American Society of Illustrators Partnership, which is a coalition of advertising, book, editorial illustrators, medical illustrators, architectural illustrators, general science illustrators, national cartoonist society, editorial cartoonists, and a number of societies of illustrators from various cities.

MR. DIMONA: I'm Joe DiMona, Vice President, Legal Affairs of Broadcast Music Inc. We represent 500,000 songwriters and publishers, and we license music rights and are keenly interested in enforcement of what can amount to small claims in a variety of circumstances.

MR. BADAVAS: Good morning. I am Christos Badavas. I am Deputy General Counsel of the Harry Fox Agency, which is a mechanical licensing agency representing large music publishers, small

music publishers, and self-publishers.

MR. CANNING: Good morning. My name is James Canning. I represent Our Own Performance Society.

Just a quick question. Do you have the comments, by chance, for this panel?

MS. CHARLESWORTH: I'm sorry, you asked whether --

MR. CANNING: Do you have a copy of the comments, per chance?

MS. CHARLESWORTH: I don't have all the comments with me.

MR. CANNING: But you have a copy, right?

MS. CHARLESWORTH: They are on our web site. If you -- actually, it looks like you have access to our web site. They are all on there.

MR. CANNING: There is no Internet connection.

MR. MOPSIK: There is WiFi.

MR. CANNING: Okay. Thanks. Sorry to interrupt.

MS. CHARLESWORTH: Okay. So back to the opening question: What do people generally envision when they think of a small claims

system? And maybe we will start with Mr. Perlman.

MR. PERLMAN: Thanks, Jackie.

Let me start out by saying that there are a number of photography and illustrator groups in this room and others similarly situated. We have all filed comments that are, at least to some extent, different from each other's. From ASMP's point of view, and I suspect from the point of view of just about everybody else on the rights owners side, the current situation for small copyright infringement is so bad that virtually anything that we do is going to be an improvement.

We have, obviously, taken the position that I will discuss. And, secondly, we would be happy to support and see enacted and put into place almost any kind of approach in the process that might be feasible.

Having looked at the various constraints, such as constitutional framework --

THE COURT REPORTER: Can you raise your voice, please. There's a leaf blower outside.

MR. PERLMAN: We came to the awkward

conclusion that the most workable approach would be to grant copyright jurisdiction, and not on an exclusive basis, but on a concurrent basis to both states and federal government, with the goal of being able to access the various small claims court systems in many areas around the country.

It is obviously not a happy solution, adjudicators are not necessarily going to be as trained in copyright and experienced in copyright as anybody -- there's a problem with getting jurisdiction over the defendants, there's the problem of them physically appearing before the forum.

THE COURT REPORTER: I'm sorry. I have to ask you to raise your voice.

MS. CHARLESWORTH: I assume the leaf blowing will end. Speak up. It is hard to hear.

MR. PERLMAN: The problem with the constraints of the current constitutional system is that almost every other approach would have to be on a voluntary basis. That would, in my mind, put photographers and other small creators in the same situation they are now, which is where the defendants know that it is going to be too

expensive to litigate.

So all the defendant would have to do would say, "No, I do not agree" to whatever the voluntary process is, and that would, again, put us back exactly right where we are.

MS. CHARLESWORTH: Excuse me.

(WHEREUPON, there was a short interruption.)

MS. CHARLESWORTH: Sorry about that.

MR. PERLMAN: It is also the only approach that would not require the creation of some kind of a new system that would in turn require a significant congressional involvement and approval and funding.

And those are the primary reasons that we would like to try to slide into this state court a small claims court system.

MS. CHARLESWORTH: Okay. And I think as people are probably aware, we have a separate panel, a separate discussion on that particular topic. So that's one point of view, is to try and change the jurisdiction under the Copyright Act to include state courts.

Are there other perspectives in terms of an

Article III based system and administrative system? I think there are. Other people want to speak up on that.

MS. WOLFF: I understand what Vic is saying, having been to -- I know we will talk about the state small claims court. Obviously, there's pros and cons of that. So we will talk about that later.

I guess if I could set the door off a little more ideal picture, I think one of the successful processes for handling issues is something that's similar to what happens with the domain name disputes, where if we could create a system where the -- it could be a central location for filing a claim, so you wouldn't worry about all the issues that we now have when you bring a claim in federal court where you have to find the federal court that's the proper jurisdiction for the defendant, and many -- not only is it too costly for a plaintiff to bring a claim, they certainly would have an even more difficult time trying to find an attorney to bring a claim in a federal court that's not the local jurisdiction.

And I think that's part of the issue with

the state small claim, is that it also has to be the jurisdiction of the defendant. And with infringement on the Internet, it is almost rare that you are always going to -- that you are going to find that your defendant and plaintiff will be sort of from the same community.

So having -- broadening the ability to bring a claim in perhaps a central area that can be done on paper, where the claims could be submitted without having to have personal appearances. And I guess if we are going to talk about an ideal world where it could be easy for a plaintiff to complete the forms so they would not necessarily have to bring a lawyer with them and really eliminate costs.

And I understand there's issues with whether it could be voluntarily or involuntary because of constitutional restraints, I know we will talk about that later. But my thought is perhaps it could be an incentive where someone said, no, there would be a risk of having to pay for attorneys' fees and costs, so it would be encouragement to bring claims that way.

But I think so many of the costs are based

on needing an attorney and geographic restrictions, as well as even the cost of a federal court finding fee. So I think even if you are in the federal court system, just the fact that you have to pay $300 for an index number, which many of the -- such as the imaging licensing disputes would never even end up there.

MS. CHARLESWORTH: Okay. Other general perspectives in terms of -- Lisa?

MS. SHAFTEL: Lisa Shaftel.

This was the -- I think the one item on notice of inquiry that I think the Graphic Artists Guild and the ASMP had a little different perspective on. And having had PACA's comment letter, I found that we were on the same train of thought. We looked towards the small claims track in England and Wales. It has been established under UK patents county court. And they have one location, and cases are handled by mail with video teleconferencing.

And certainly for visual works, we think that would work very well because, you know, there's the visual work that can be mailed in or e-mailed in, and documentation of creation or

copyright registration, and any documentation of infringement of the visual work would be easy enough to handle by mail or remotely.

And we think that teleconferencing or videoconferencing would work fine for testimony or any mediation discussions.

MS. CHARLESWORTH: Okay. Mr. Lehman?

MR. LEHMAN: It is kind of hard to fit my comments into the particular categories that you have them. But perhaps, for starters, I think the first topic, which really is the nature of the tribunal and process is probably closest thing to what we characterize, what I would like to start with.

First of all, I reviewed comments that were submitted in writing, and then you published them on your web site. And I think if you stand back and look at those comments, you can see that there are a lot of problems with this idea of a small claims court. Many, many problems. The problems tend to be really not so much a question, I would say, of policy, whether or not we should or should not have a small claims procedure, but how to do it. Which is extremely

difficult for a number of reasons, as have been supplied in your comments.

And I think that, you know, Mr. Perlman just talked about, you know, the advantages of having a stake in small claims court procedures, because apparently it wouldn't provide legislation. I don't quite understand how that can happen because I think that anything, given the constitutional preemption in this area that is going to be done to provide a new mechanism for the adjudication of copyright disputes is going to have to be something that is going to have to be enacted by Congress. I don't think there's any administrative way around it or anything like that.

Of course, individuals always retain the right to engage in private arbitration, mediation, and so on and so forth. But there isn't really anything that has been submitted in the comments that are going to be discussed here that really would not require federal legislation.

Secondly, I think that one of the most important set of comments that I reviewed were

the comments made by Professor Besek. And that is -- which I haven't really deeply thought about, and those were the 7th Amendment problems. Because any system in which a defendant has the opportunity to request a jury trial basically defeats the entire idea of a small claims system because immediately you are into a rather complex litigation and into attorneys and so on and so forth.

So as a practical matter, while I personally don't have a problem with setting up some kind of a small claims procedure, I think it is going to be extremely difficult to execute.

The next thing I would like to say sort of as an overview is that I thought also one of the excellent statements that was submitted in the written comments was that by Mr. Perlman. I don't necessarily agree with his solution that he just described, but I think his characterization of the problem that particularly visual artists face is a very, very excellent description of the situation.

I think, basically, any small scale creator, whether they're a writer or a visual artist,

whoever they are, faces the same problem. We have a copyright system which sadly is really broken, and I had hoped some years ago in my personal involvement in its evolution that I wouldn't be saying that today in 2012. I thought that when we worked in the 1990s and the project that I led, then having Mr. Kappos' position in the administration, I thought that we were going to create an effective system for copyright enforcement on the Internet. But it is just obviously been proven that that's not the case.

I think that there is a primary reason for that, and that is for two reasons, really. One, is that the people who could assist most with enforcement, and keep in mind that the small claims problem really is exacerbated and arises largely because of the Internet environment today and the opportunity to infringe works digitally in the Internet context.

The problem with the 1998 legislation, the Digital Millennium Copyright Act, is the so-called service provider of -- safe harbor for service providers. It's one thing that telecommunications companies have a safe harbor,

it is quite another to have companies that are hybrids of providing access to the Internet and also providing content themselves.

The fact is that these safe harbors exist. And as a result, those who are most in the position to address the problem of enforcement, are those people who control the pipeline through which digital content flows are completely unwilling, undesirous, hostile to cooperate, and indeed have generally become critical and taking this to the copyright system in general.

So what we have when we look back at the system is that we have a situation where we have individual creators, virtually every author is an individual. Now in our country, of course, we do have a unique exception to the global norm in that one can have, you know, a work made for hire in which the author is a corporate entity. But even within that context, it is actually the individual that creates the work.

And the problem that that creates is that you always have an individual with limited resources that an individual has in attempting to enforce their rights. And that is extremely

difficult, particularly when the infringer is themselves or is allied with or is assisted with a very large deep pocket entity.

And, in fact, it has been my observation and experience through work that I have done in the various rights holding entities, that actually the system works against the creator. Because when you go into federal court, not only is it a very daunting task, it is virtually impossible to have pro se representation, but oftentimes you are then subject to counterclaims and so on and so forth, and you can end up in a situation where there's a terrible injustice because the rights holders themselves actually end up having counterclaims against them being sued, they do not have adequate counsel, they do not have the sophistication. I see the situation frequently where a small scale rights holder in some community outside of the country goes through a general small firm, general practitioner, knows nothing about copyright, and then you get a situation where the defendant is a large entity and they are just absolutely creamed. So that is the problem that we have.

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MS. CHARLESWORTH: Okay. Thank you. And it sounds like you certainly understand the problem in a deep way. It seems like for you you are saying the solutions may be quite difficult; is that a fair characterization?

MR. LEHMAN: Well, I am going have other opportunities to talk about the solutions --

MS. CHARLESWORTH: Yes. We are going to speak more about that.

MR. LEHMAN: I am going to comment on those, but I thought it was important to put it in context at this point in time. And the bottom line is that I think that whereas the idea itself is not a bad idea, that as a practical matter, a small claims solution just is going to be extremely difficult to execute.

MS. CHARLESWORTH: And I think we all recognize that, which is actually why we are here today to see if there is a path forward for those who are supportive of the proposal. Happy to recognize that.

I want to move the discussion along and people can -- I know a lot of the topics are overlapping. But a big issue is the voluntary

versus mandatory participation. I think there's a big split of opinion on that in the comments, and many people believe if it is essentially a voluntary system, or a voluntary system for both parties in particular, that a lot of the so-called constitutional issues might be resolved.

So if people want to take a moment to comment or maybe amplify what they have written about voluntary versus mandatory participation, I think this is one of the key issues, and in terms of making recommendations to Congress, I think it will play a major role because it does impact, I believe, the constitutional concerns.

So Mr. Osterreicher, and then Ms. Willmer.

MR. OSTERREICHER: Mickey Osterreicher.

I think this is, of course, the devil is in the details. The problem here is that if we have a solution, that we have a difficult time implementing it, and if we resolve the implementation, then I think we are back in the situation where if it is voluntary, to get around some of the obvious problems that we would have constitutionally, implementing it, I think we are going to find that those same infringers are

going to certainly opt out and say we refuse to participate. And the creators are back in the same position they were in at the very outset.

So, again, if this was an easy solution, I think we would all be very happy. And I think we are going to be really struggling with this because you solve one thing, and you create another problem.

MS. CHARLESWORTH: I think Ms. Willmer and then Mr. Mopsik.

MS. Willmer: Lisa Willmer with Getty Images.

We do favor a voluntary system, and I think in large part to overcome some of the recognized constitutional obstacles. And I don't mean to minimize or downplay what the difficulties will be in terms of creating a voluntary system.

But I think we're better off served by focusing our efforts and our energies on figuring out the right set of incentives to create that voluntary system, whether it be capped damages, capped attorneys' fees, the ability to participate on a pro se basis without a lawyer.

There's actually significant cost savings for defendants as well. So I would like to see

us spend some time as we move through these panels focused on how can we set up the right system of incentives to a voluntary system that will avoid the constitutional issues and serve the greater good of making enforcement widely available.

MS. CHARLESWORTH: Mr. Mopsik?

MR. MOPSIK: First of all, I want to say in regard to the solutions that were offered by Lisa and Nancy earlier, that while we offered an alternate solution through state courts, we are by no means opposed to these solutions and would be happy to see either of those tracks taken.

In regard to this question, I guess I am on both sides of this, this issue. I agree with Mickey when he says that if it is not mandatory, then it is likely that, you know, people would just walk away. But at the same time, if, in fact, the incentives could be significant, and perhaps there needs to be a -- or if there were a dollar threshold established under which it was mandatory, over which it was voluntary, I know for us, for photographers, if you are not dealing with statutory damages or punitive, but, in fact,

just looking at what, in fact, would be the actual licensing fee for many of these infringements, at least for our members, I think a figure under $10,000 is probably most of the cases. I am sure some of them exceed that. But by and large, I think that's -- a $10,000 number would be more than accurate.

MS. CHARLESWORTH: Mr. Leichtman and then Mr. Canning.

MR. LEICHTMAN: Thank you. David Leichtman.

One of the things I think, and this may be a theme that is repeating, from our perspective with what we see with our clients with Volunteer Lawyers for the Arts, most of the time what artists want is they want the infringement to stop or they want to get some work back that has been taken from them.

And so our concept on this question of mandatory versus voluntary, and also on the nature of the tribunal, is we would like to see some kind of administrative procedure, under the auspices of the Copyright Act. It could be established in regional hubs if necessary with lawyers familiar with copyright law who might

volunteer their time or do the adjudications at a reduced rate from their normal rates.

And because the availability of injunctive relief is critical to artists, I think we have essentially heard that theme several times already, we don't think there's a 7th Amendment problem necessarily in making it mandatory with respect to injunctive relief.

And so when we talk about remedies later, our concept is that there might be, depending upon the dollar amount threshold, there might be an election of remedies that the plaintiff might have to make in order to make a mandatory process constitutional. Because as long as you have, you know, minimal due process protections, a limited right to appeal to a federal court, for example, on the question of the scope of an injunction or, you know, under the federal arbitration act, standards, we think the due process thresholds can be met without having to have additional legislation, and at least with respect to injunctive relief there's not a 7th Amendment problem.

So we think that maybe, depending on the

remedy that's elected, that you could have it be mandatory for some kind of claims and voluntary with incentives for other kinds of claims, and that the remedy election might drive that decision.

MS. CHARLESWORTH: Mr. Canning?

MR. CANNING: Thank you.

As far as jurisdiction, I didn't get a chance to mention that I think that the intent of the constitutional -- the constitutional intent of the copyright law is federal. So I don't think that state courts rise to that level of jurisdiction. And I think that if you address it from that perspective or that focus, then we can move forward with the intent -- from the point of view of the intent of the copyright law and of course the copyright constitutional right.

In terms of voluntary versus -- I think voluntary versus mandatory, I think approaching it from the point of view of just having the choice in all aspects would be the best approach. I think, you know, if it is voluntary and someone refuses to be cooperative, or, you know, refuses to be cooperative or frustrates the effort on a

voluntary level, then, obviously, there is recourse. But if you just fine tune it into one category, I think then it excludes the other possibility, and then, obviously, the person has to walk away, spend a lot of money chasing the voluntary option, which might never result in any conclusion.

MS. CHARLESWORTH: I am interested in -- a couple people mentioned incentives. And I think it might be very helpful to further discuss people's idea, assuming this were some sort of voluntary system. What do people think would be a sufficient incentive to reluctant defendants to stay in a small claims process?

I know one idea that was mentioned was the damages cap, but, you know, any thoughts on this I think would be extremely helpful. There were some scattered throughout the comments. But let's try to flesh out some of those ideas.

Mr. Sanders?

MR. SANDERS: Just a brief preamble, taking up where Bruce left off. I think it is very important to emphasize the individuality of creation, that key component of what the founders

intended, and all the philosophy that underlies copyright law is based upon the fact that we want to protect creators through the good of society and the natural right of ownership of what you create.

I think that the comment that the copyright law is broken in this regard has probably been true since the very beginning. An individual -- it is pretty much always in a society that affords the rights of the corporations that this one does, is always going to be at a disadvantage.

So I think that most of the people in this room agree that if we could come up with a solution that addressed all of those things, and got into the heart of addressing not the parade of horribles that have been listed as the negative fallout from what might occur from the system, I think we are pretty much all in agreement that we do want to move forward. We are trying to figure out whether or not there is a possibility of getting this done.

Lisa, I believe, is correct, that the voluntary nature of the system is I think the

only way to go because the constitutional issues are going to thwart us at every turn if we try to make this mandatory. Therefore, as you just suggested in your question, the question becomes how do we adequately incentivize the defendant to submit to this situation.

And the largest thing on the table I believe is statutory damages. We have the issue of certainly we want to protect the sanctity of statutory damages, on the one hand, in federal, full-blown copyright litigation, but we also had somebody talk about counterclaims and the danger of going into court and having that hanging over your head as a plaintiff.

I think that if we take a look at the refusal of the defendant to submit to a small claims jurisdiction resulting in perhaps limited or elimination of their ability to get statutory damages in a counterclaim, that's going to be a very good incentive.

I think that if we talk about the inability to get attorneys' fees, and I haven't really thought through the constitutionality of that, but the inability to get attorneys' fees, if you

refuse to submit to the jurisdiction of a small claims court has got to incentivize most defendants to say, you know, on balance, it makes sense, except in extremely egregious fraudulent situations, to submit.

So those really are the two areas I would look at immediately, is removing the benefits that the Copyright Act bestows on plaintiffs and counterclaimants from the statutory damages aspect because proving actual damages is really, really expensive.

MS. CHARLESWORTH: Other thoughts on incentives? Mr. DiMona?

MR. DIMONA: Thanks, Jacqueline.

I am Joe DiMona of BMI. We are here mainly, I think, to listen the idea of others, because our first thought is we haven't seen a record created that at least from the music industry, it needs this as much as perhaps the photographers who have created a very good record of problems that they face. But in terms of the incentives, I have a couple thoughts, which I would like to share, if this is going forward.

One is that, to me, the lower the limit on

the claim would have an inverse relationship to the defendant's willingness to submit. So if it is a very low limit on the plaintiff's claim, that might incentivize them to participate more than say some of the suggestions that there were 30, 40, 50, $60,000 cap, you know, I could see defendants running away from that.

Also, if there were no possibility of injunctive relief, that might incentivize defendants to participate. And the thought I had was that perhaps if the defendant refused to participate in that very capped inexpensive proceeding, that that might be some evidence of showing willfulness, if the plaintiff had to then bring, you know, a federal lawsuit. And there's a question of what evidence of willful infringement is, maybe the statute could say the court could take that refusal into consideration, and that would raise the stakes, I think, for the defendant if they ever had to be pursued. Just a thought, for whatever it is worth.

MS. CHARLESWORTH: Whatever order you prefer. Ms. Shaftel?

MS. SHAFTEL: We would like to see the

rights holder or plaintiff have the option to choose the alternate system or federal court; however, we would like the infringer defendant, infringing defendant to comply with the rights holder's choice of court system.

The incentive for the rights holder to choose the alternative court is obvious. It would be less costly, faster, hopefully a court action against the infringer for damages too low for a full scale action in federal district court, and by agreeing to participate in this alternate system, both the plaintiff and defendant would have to agree to waive their 7th Amendment rights to a jury trial.

As for incentives, if the rights holder or plaintiff chooses the alternate system, the infringer defendant, and they object to doing this, to using that system, the infringer or the defendant would be required to pay a monetary penalty and the rights holder's or plaintiff's court costs and legal fees in federal district court, we're concerned that a defendant, especially a larger business with deeper pockets, shouldn't be able to just say no and kick the

case upstairs to federal court, knowing that the rights holder would not be able to pursue the case in federal court.

So we want to prevent that happening. If the defendant doesn't appear or participate after both parties have agreed to the alternate court system, the defendant should lose the case for a streamlined process through default judgment. And we hope to the extent we lower costs of an alternative system would be incentive enough for participation. And perhaps in the future, if the system proves to be popular and successful, it could also be an available resource to authors or creators who haven't registered their work prior to infringement, but that's way down the line.

MS. WOLFF: I think when it comes to incentives, there may need to be a combination of different kind of incentives. And it's hard to talk about some of these issues without looking at how many of these issues are intertwined together. I think part of the reason the visual artists are always in a different position than perhaps songwriters and other types of authors is the difficulty in which the Act requires

registration. When you have large amounts of images, it is difficult to register, particularly when you have the published versus unpublished. I know the photo libraries have tried to do registrations when images are made available for distribution, and federal judges have just been, you know, attacking the validity of registration. So even when you do go to court, you spend so much money just, you know, fighting over whether your registrations are valid or not.

So the federal system is really very frustrating right now, and so I think when you talk about trying to make a system that's more just and go outside to look at trying to make registrations that are efficient and less costly, because often the reason that an individual creator cannot afford to go to federal court is because they can't afford to register all their work as they create them.

So that's some of the underlying problems. So if you put that aside and you are faced with now you have had an infringement and you need to try to enforce it, I think we're looking -- the reason I was focusing on a voluntary system is

that I don't want to have to wait five or ten years to get, you know, a complete, revised Copyright Act. And perhaps if we could start with some of the voluntary and see that there's some success, then there would be ways of tweaking the Copyright Act over time to make maybe certain levels mandatory to go along.

If you look at trying to make something voluntary, a combination of incentives where there would be a cap on damages, and that refusing to cooperate would have some authority to have enhanced damages, and an ability to recover fees and costs if you need -- if you're required then to hire a lawyer. Now, I know that that brings out issues of the registration before and after the infringement started. So all those things have to be looked at together.

MS. CHARLESWORTH: Mr. Leichtman?

MR. LEICHTMAN: We have two thoughts on this. One is we think it would be important to incentivize defendants to participate in this process for the proceeding to be nonprecedential so that, you know, you are not establishing some principle or something like that, you are really

just trying to resolve the dispute between the two parties that's at hand.

And one thing that I wanted to mention is that Volunteer Lawyers for the Arts, we do see a lot of these in the nondigital context. So it is not -- our issues are not just in the digital context. It is disputes between two artists or disputes between a playwright and a theater company, or things like that. So we are not, from our perspective, really principally focused on the digital, although the digital issues are also there.

One thing that does prevent indigent artists from bringing claims often is the availability of attorneys' fees for defendants. And the reason for that is we see a lot of close cases. We see cases where we think the case has strong merits, but if you had to quantify the case, you might say oh, it is 80/20, 70/30, 60/40. And even though our clients have free counsel because they are coming to Volunteer Lawyers for the Arts to get pro bono representation, so it is not a question of their own fees, you know, they have expensive hard costs if they have to go to

federal court because many law firms that will provide pro bono representation will not pay hard costs for things like filing fees, deposition transcripts, and the like.

So the hard costs are an issue. And you can design incentives around that if a defendant didn't agree. But most importantly it is the risk in a close case that the defendant can obtain attorneys' fees. And so even though the plaintiff, the artist, doesn't have to pay their own lawyers, they have to pay the defendant's lawyers. And so one incentive that we think would be important if we went to an incentive based voluntary system would be to make attorneys' fees unavailable to a defendant that didn't agree to participate in the process.

MS. CHARLESWORTH: Mr. Badavas?

MR. BADAVAS: I have comments to Joe, we are here to listen, from Harry Fox Agency, and we aren't sure that the record indicates that music is a good place to start developing a small claims court for a variety of reasons that may be better discussed in the subject matter piece of this.

But one of the thoughts that has come to mind as I have read through the comments is that there might be a role in the voluntary mandatory discussion for a traditional offer of judgment to be clarified with respect to copyright claims. Depending on where the comma is placed, there are different interpretations of that in the law at the moment, and an offer of judgment tied to an offer to enter into a voluntary process which sets not only the limit on damages, but actually the amount that the plaintiff thinks they deserve, and, therefore, has the impact of shifting various fees and other aspects of the litigation might be an appropriate way to start, and there's precedent for it.

MS. CHARLESWORTH: Can you flesh that out a little bit in terms of how that would work, in your mind.

MR. BADAVAS: Well, the offer of judgment, depending on which statute you are dealing with, can have the impact of either just shifting the burden of costs of litigation, which may or may not include attorneys' fees under statutes. So one might make a reasonable offer of judgment

that if not accepted by the defendant, might therefore shift the attorneys' fees and make it so that the defendant would have to pay the attorneys' fees of plaintiff, if they ended up someplace else, or you might even change it such that the offer of judgment could include an offer of binding arbitration or something like that that you have to go through.

So while I am hesitant to lay out every possible aspect of what that offer might include, I think there are enough people around here who thought about the issue more that the -- you could combine those two aspects of an offer, which means that the plaintiff is saying "I will take $7,000, right now, case is gone, it has no precedential impact. If you don't take that offer, you are going to end up paying my attorneys' fees." "If I win," you could go further, you could say, "I will take $7,000, and if you want to pay me less, I am willing to go into binding voluntary arbitration for an amount that's $7,000 or less. If you don't do that, you have to pay my attorneys' fees," and, you know, move forward. And you could combine it with

those proceedings, and it is something that is done currently and can be used very effectively by trial lawyers.

MS. CHARLESWORTH: Mr. Sanders?

MR. SANDERS: I find that idea very interesting. I was going to head there, but I think we have discussed this before. I wanted to just take off on something that David said about increasing downside risk for defendants.

Increasing the ceiling for statutory damages for defendants who refuse to engage in the voluntary small claims process is another approach that I don't think we discussed. And I haven't thought it through, but the concept of treble damages for those who refused, which is used in other contexts, including the antitrust area, might also provide enough to think about in terms of downside risk for defendants to find it much more palatable to enter into the voluntary small claim system.

MS. CHARLESWORTH: Mr. Perlman?

MR. PERLMAN: I think it all comes down to your basic view of human nature. And being incredibly cynical, my feeling is that as a

practical matter, when you have a defendant who can look at a situation and think, "if I don't do anything, chances are this whole thing is just going to go away," that's what they are going to opt for.

And, by the way, if I in my earlier comments if I led anybody to believe that I thought that any of these changes could be accomplished without legislation, then I apologize. That's certainly not my position or opinion.

MS. CHARLESWORTH: Mr. Lehman?

MR. LEHMAN: I think that there's been some useful comments, and I learned something myself. Part of the problem I think lies in the nature of who the defendants are. First of all, starting out with the classic infringement, the predigital infringement kind of a case, I think in that sort of a situation where you've got to two relatively deep -- you know, small pocket parties, then small claims procedure makes a great deal of sense.

I think the problem lies, and I think you have heard that, where there's an imbalance between the resources available to the plaintiff

and those available to the defendant. And, actually, you know another area of law that I have been very much involved with is patent law. And, of course, there are very large dollar patent cases every day that are brought by small plaintiffs against extremely large deep pocket entities.

And it has been my experience when I have been involved in those cases that there's usually a dollar figure that the deep pocket defendant is willing to settle for, if there's any kind of case at all, which basically is the judgment based on cost of defense or cost of litigation.

As a result, there are oftentimes license agreements and settlements that are made that actually in terms of the total dollars can be quite large, but they are still a bargain for the defendant. To sort of apply that idea to this context, I think that the series of comments that was started by Mr. DiMona really then begins to sort of maybe pave the way a little bit, and, that is, that if there is an assuredness of a relatively low cap, I personally think 10,000 is a bit too low, but when one thinks about what it

costs to hire lawyers for defendants and so on, the defendant usually, if they are deep pocket defendants, is not going to be defending pro se, they are going to be hiring lawyers.

And then I also think this issue of disincentives or incentives, rather, to the defendants to agree to the process, things like assumption of willfulness, if this is not -- if they don't agree to the jurisdiction of the small claims court, treble damage and damages and that sort of thing.

I think if you had that type of system, even with regard to the deep pocket defendants, you might be able to, I don't know, but you might be able to approximate something more like what I see in the patent area, where small scale plaintiffs, very little difficulty in asserting their rights against deep pocket defendants.

MS. CHARLESWORTH: Mr. Rosenthal. Welcome.

MR. ROSENTHAL: Sorry for showing up late. I think I was behind the president's motorcade driving up here this morning.

Just on the point of the incentive to the plaintiff going pro se. One concern we have

that's been raised on a number of times throughout this session here is that basically the complexity of music. And focusing just on the issue of music, we are concerned that music attorneys don't really understand the complexities of music, much less given the incentive for content owners to go forward and file pro se, and then dealing with these amazingly complex issues and unintended consequence that brings to the table.

So while I understand that pro se is an incentive, we should just keep in mind the unintended consequence of that, at the end of the day, and we will go through that more on the panels. Just for music is where I am kind of focusing my comments on, and we will flesh this out later.

MS. CHARLESWORTH: Okay. Mr. Osterreicher?

MR. OSTERREICHER: I just have a question for Mr. DiMona. I understand what you are saying in terms of, obviously, if the claim is for a small amount, certainly there would be an incentive.

I think the issue that a lot of us see is

that we have bad actors out there that really could care less how much the claim is, and in our case, many of our members, we are talking a few hundred dollars, but for our members a few hundred dollars multiplied times lots of infringements means a significant loss of income.

What kind of incentive are you trying to create there where it really doesn't matter because these are bad actors who really just are looking at profiting off the works of our creators?

MR. DIMONA: Thank you.

You know, the situation of bad actors is quite real, and I think in my own business, my own personal view here is that it looks like we are kind of in the world of some system that has to be voluntary in nature to overcome the constitutional hurdles. I thought it was very interesting in the Getty Images comments, which I was looking at, that they said to -- you know, even a voluntary system, you are going to be able to get people to the table who are actually legitimate people who are going to feel like they need to respond and pay, and you are not going to

get the bad actors.

I mean, I have cases under the current federal court system with all statutory damages, attorneys' fees, every remedy that I could want, that they just default. They don't show up. And, you know, those people are going to be problematic. And I don't know whether this proceeding, this kind of a thing is going to entice them in to deal with you. I don't know what the solution is for that.

I don't know if that answers your question.

MS. CHARLESWORTH: I just want to follow up on one thing, and then we will go to Christos.

When somebody defaults, do you seek a default judgment?

MR. DIMONA: Yes. We get a default judgment. And that's the other thing. Try to collect on a judgment. Whatever system you get here, where you get a small claims award of $557, you know, try to collect it. That costs money, and it is not always the easiest thing to do either, but, again, the smaller the size of it, the more cooperation you are going to get, I think, from people.

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MR. BADAVAS: I think the discussion of bad actors actually raises a distinction between many of the people speaking at this roundtable today and the representatives of music. Our way of dealing with bad actors has now been established for at least 11 years, and our trade organizations, and our PROs, and our mechanical licensing agencies all sponsor class action infringement lawsuits. We hire attorneys. I am not saying it is a remedy that's a substitute for what you are talking about, but we bring lawsuits on behalf of thousands of music publishers and songwriters on a regular basis against companies like LimeWire, and we get judgments, and occasionally we find somebody who actually owns the company and has money, and many times you don't. Similar actions are brought by the RIAA, Mr. Rosenthal is here from the NMPA. Our company is involved in, as are all PROs, the Songwriters Guild.

We all do this on a regular basis all the time, and it is extremely difficult. And I think you are not -- you know, many times they default and don't show up. It's a remedy we have been

using. It is access for our members. It is not broad access for everybody else to those courts. And I am not sure that anything we do here would have any more of an effect in that since we know that, we have brought to bear pretty much every resource you can in those instances.

MS. CHARLESWORTH: Just to clarify though, I mean, are you saying that you bring actions on behalf of, say, an individual small publisher who finds a use of a song on the Internet on someone's small site, or are you talking about actions against large corporate defendants where you have many infringements?

MR. BADAVAS: We purposely target large corporate defendants to the extent they are a corporation in the United States. They might be outside the United States. I know you are familiar with these things. Many people around the table are. I am pointing out it is a different enforcement from what we are generally talking about here, which is if you are going to get into a small claims court, it is going to be someone who probably is more of a major statement, maybe made bad judgment, but they are

here, they are available, they have to have money or it doesn't matter.

MS. CHARLESWORTH: Mr. Sanders?

MR. SANDERS: Yes. This is more in the form of a question to Bruce because I think this is where you were going, and I think David may have some information on this, too. Are we talking about more incentivizing the plaintiff's bar? In terms of the issue of why patent law, plaintiffs seem to be in a better position to do that?

MR. LEHMAN: Well, I don't know -- in my view, actually, yes, but the problem I am having with the way this whole thing is organized is that we have now these individual subjects we are supposed to slot everything into, and it is very difficult to do that, as we have already seen. We have really, you know, morphed from one thing to another that's here on the agenda. I am saying when should I wait to raise such-and-such a point.

But I do think that you are 100 percent correct that the best way of getting, if you really want effective justice for a shallow pocket defendant -- I mean, plaintiff against the

deep pocket defendant, that they only way that you are going to get it is through incentivizing counsel to represent that person. And I think that our system of contingent fee lawsuits in the United States works very effectively to do that, and it also relates to the issue of class actions because frequently those are class action lawsuits as well.

And, you know, I think that sort of the nature of the problem, and possibly the solutions is demonstrated by the fact that, you know, of what we hear from the music people. Number one, I think what we are hearing is we really don't have a problem, and we really don't need small claims court, and we should be out of it.

Why is that? That's because, basically, they have a very good system right now. It may still have a lot of issues, I am not saying they don't. But they have a very effective system, everyone except the possible exception of the RA people, is doing pretty well right now, the revenues of the collective sites, and so on and so forth.

So they're actually making pretty good use

of the system. The way -- the reason they are able to do that is because they have collective representation. Individuals are part of the collective.

And in other areas, even though you have organizations that presumably represent collectives here at the table with regard to visual arts and so on, as a practical matter, none of those organizations even remotely have the membership or the revenue necessary to support the kind of activity that you have here with the music societies.

And so I really think that one of the solutions that has to be looked at, and I think very much -- and that can be standing alone, by the way, to make it easier to get contingent fee representation. But I think one of the solutions is to incentivize in one way or another collective administration of certain kinds of copyrights.

And, you know, I wanted to talk about that, but I think maybe I would like to hold off on that until later on. But I do think that if you are going to have that sort of system, since it

has not arisen organically with regard to certain categories of rights holders, is that you might need to have some kind of a statutory system, even a statutory license for certain kind of activities.

And this does go to the point of location of the tribunal. Actually, I think that the Copyright Royalty Board, obviously, it has gone through several iterations, the statutory licenses that go back to, you know, the 1976 copyright law, Section 111 and so on, and it has now been expanded to include other categories. The statutory licenses, I think, are working quite well. And I also think that the system of dispute resolution with regard to statutory licenses in the form of a Copyright Royalty Board is doing quite well and is quite well respected. And I think most people feel that they are getting rough justice, and those that don't obviously go back to Congress and try to redefine the terms of the statutory license.

But if you had a system where there was some kind of -- here, again, I am really talking about the infringements in the digital context, which

is particularly held in force, if you had some kind of statutory license, which you are going to pay the license fee, and then you had as a result of that money flowing into a pot, that then could support effective collective rights management organizations, then I think you could provide justice to small individual creators.

MS. CHARLESWORTH: Okay. We started a little late. We have about, I would say, 10 to 15 minutes left on this panel.

There are a few other topics, including the state court alternative, location of tribunals, and who the adjudicators would be. So after Ms. Willmer I think has something she wants to say, Mr. Mopsik, but then I want to open the floor on the remaining issues, in particular, the state court issue. I know Mr. Perlman spoke about that. The comments reflected a lot of a fairly negative views of that alternative. And so I wanted to see if people had further thoughts on that or things to say about that.

MS. ROWLAND: I was going to say, in the next panel we are going to be discussing the types of claims. So if that would be a good

place to talk about the music versus photographs versus whatever types of works. So we will definitely revisit it. But I think that we may move on.

MS. CHARLESWORTH: I think they will revisit it.

MS. ROWLAND: Somebody will revisit.

MS. CHARLESWORTH: It will be revisited. But, anyway, Ms. Willmer, Mr. Mopsik. And then comments on state court, where the courts are, who should be adjudicating these claims.

MS. Willmer: I just want to bring this back to the topic of incentives, and just give a quick summary of kind of what I have heard.

I think where we're best focused is highlighting the convenience that a small claims court would offer to a defendant as well as to a plaintiff. And that could be in the form of being able to participate pro se. They don't have to go to the difficulty or trouble of trying to find a lawyer. Ideally it would be able to file papers electronically so there would be no need to appear in person.

And then I think what's probably most going

to drive behavior in terms of getting people to agree to a voluntary process is that financial benefit. So if we can offer financial benefits in the form of capped damages, or a limitation on attorneys' fees, or something like that, I think that's where we need to head. And then we may also be able to couple that with financial risks or penalties for not agreeing to participate in the voluntarily process, such as with an offer of judgment or enhanced judgments or something like that.

MR. MOPSIK: I will keep my comments brief.

I just wanted to support some of what Mr. Lehman said about collective licensing and collective action. ASMP tried on multiple occasions to gain guild status, and we never got it, and we've never been able to engage in collective action. But I think that there is a need for some type of collective licensing, either supported by the ISPs or supported by users that would pay for certain classes of smaller uses of works.

And then finally, until it is easier for at least in the photography space, for people to

license rather than steal, they are going to steal. Because by and large, you know, people just don't even think of it as stealing when they use these images. I speak before photography classes in Philadelphia at University of the Arts. I have senior students going out into work. And when I look at them around the room, and I say, "How many of you routinely steal music?" And just about every hand in the class, sorry to say, goes up.

And then I ask them to substitute photography for music and how would they feel about that. And all of the sudden they start looking around at each other and a kind of light bulb goes on, and they figure out that maybe they shouldn't be doing this.

But these are not thieves, these are, you know, college students. So we need to come up with ways to make it easier for them to license. And that burden, I guess, is more ours than yours.

MS. CHARLESWORTH: Mr. Holland?

MR. HOLLAND: First of all, I would like to say that Bruce Lehman has been advising our

twelve organizations on a pro bono basis for the last decade. And there's a broad support among graphic artists, illustrators, of all kinds for the kind of solutions that Bruce is prepared to present today. So since I am not going to be on any further panels, I wanted to put that behind anything Bruce says. It is very strong support. Bruce has been a fantastic resource for illustrators over the last decades. And we owe him a lot, and we support very much the kind of things he's going to propose.

We are concerned about a couple of the unintended consequences of this proposal. The first is probably jurisdictional. Because the problem of trying to administer to have federal law on a local level is going to require an expertise in copyright law that you might not be able to get, and will probably lead to inconsistency and probably in various cases unjust decisions that would either set bad precedents, or if we waive -- if we limit the scope of decisions to each individual case, then you simply make certain victims of bad decisions, you give them no further recourse to any kind of

due process.

The other problem is the lack of discovery that you would have in a copyright small claims court. We have talked to a number of artists who have sued, and most of them have said that unless the infringer has a Perry Mason moment and confesses to being an infringer, you require considerable discovery, expert witnesses, and so on, to flesh out false claims, doctored evidence, and things like that.

The other problem is that this whole proposal was initially linked to the orphan works legislation. And I don't think it's an accident it is coming around again at the same time as the Copyright Office has asked for more papers on orphan works.

And we know that if the orphan works law were to pass, artists would be required to register everything they did with commercial registries to be created in the private sector. And we also know that in the last legislative section, we had 85 groups that came together to oppose the orphan works legislation, and the only time we had a chance to express those clearly was

in a small business administration panel at the very last minute.

We know now that there was an effort to lobby for the copyright clearing center to become a registry where infringers could register the copyrights. And what we are afraid of is the unintended consequence of a system of registration like that, where to avoid guilty problems, jurisdictional problems, and problems of discovery, we might find each court simply adopting a default position, similar to what's happened in patent law with the first to file of the American Invents Act, in which case the decisions in small claims court would probably almost always fall in favor of infringers.

Because artists would have to register everything they have ever done, infringers would only have to register the works they want to infringe. And under a system like that, you could certainly streamline the litigation process by saying who filed first. Well, in that case it would be the infringer. That's what we're afraid of, is that a system like this might, to get around all the other problems, ultimately in real

life settle on a default position similar to the first to file. That's all I have to say for the moment.

MS. CHARLESWORTH: I just want to clarify that one of the topics we will be discussing is the registration requirement. And I think there are some different views about whether you actually would have to have your work registered in order to proceed, or whether an application would suffice. So I think that's a question that's out there in terms of how to make the system workable.

Any -- yes. Mr. Leichtman, and then --

MR. LEICHTMAN: On the topic of state courts, I think we really have two concerns with that. First, with respect to the availability and amenability of state court, the existing state court small claims courts to handle these types of cases, the monetary threshold is very, very low. It is lower than I think most of the proposals being made with respect to what the copyright tribunal threshold would be.

So that's one issue. But, secondly, really the unavailability of injunctive relief is a big

problem for artists. So we don't favor a state court solution for that reason.

And then the second reason really is the question of expertise. And, again, we would much rather see experienced copyright attorneys handling these cases, again, as long as -- and I think the whole premise is these are nonprecedential proceedings designed to adjudicate a particular dispute, and not to make a principle, and not to make a point, as long as it is done that way, you know, experienced copyright practitioners, we think, you know, would be better suited to adjudicate these matters than state court judges with no training in copyright law.

MS. CHARLESWORTH: Mr. Canning, and then Ms. Willmer.

MR. CANNING: Thank you.

As far as state court is concerned, I think it opens up Pandora's box to appeals because then there might be a conflict between federal law and state court law on the federal issue. So it becomes more, in my opinion, more exacerbated. I don't think state courts will consider it.

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I think this gentleman, Mr. Bruce Lehman's suggestion, he brought up an issue, a thought that I have brought up in my comments, and that's a fact, that at least for certain voluntary -- statutory license, the CRB works perfectly, maybe improving upon it, but using that as a basis. But is that excluded from this particular discussion? I mean, I know that this in terms of the comments, a request for comments, but is it excluded completely from the point of -- from consideration in regards to what is being discussed as far as small claims?

MS. CHARLESWORTH: Just to clarify -- the CRB administers the rates for statutory licenses, but doesn't currently adjudicate individual infringements, or any infringements.

MR. CANNING: Well, it does adjudicate -- well, I am just saying that based upon what the framework that is there, just put into that infringement, I think, we have framework already improving upon it.

MS. CHARLESWORTH: I think some people suggested that that might be in terms of a body to take on this task, that that's one

consideration, including you, I think.

Ms. Willmer, and then I think we will probably -- did you have something? We will probably wrap up.

MS. Willmer: I just wanted to echo some of the comments that we have just heard recently about why we don't believe that state court is an adequate solution here. I think largely due to the expertise, the fact that it is an issue of federal law.

It also doesn't offer any of the incentives that we believe could be realized through a centralized process where filings would be available electronically. It would still require if we had to go through state courts, going to where the defendant is to ensure jurisdiction. And we think, frankly, we can do better.

The second thing I wanted to say is just in terms of who the adjudicators should be, we would favor experienced copyright attorneys, and we would also favor a path or resolution model where the claims are actually adjudicated, not arbitrated or not mediated, but actually adjudicated.

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MS. CHARLESWORTH: Okay. Well, did anyone have anything further? Mr. Perlman, Mr. Rosenthal, and then I think we have to conclude this panel.

I will say, as has been pointed out, many of these topics are overlapping. So if you have something further you want to say, I am sure it will somehow come up in another panel. But we want to get you to a little break and then start with panel 2. So last two comments.

MR. PERLMAN: As one of the only groups that advocated for a state court system, I want to say that we are not advocating for it because we think it's a great idea. Kind of like the cowboy in the old western town who keeps going to the same crooked card game. He knows that it is crooked, and when asked why, he says because it is the only game in town.

As to the lack of copyright expertise, I have to take a look at some of the federal decisions I have seen recently, including from the other coast, and wonder whether the gap between the two systems is really there. And as far as setting bad precedents, in the typical state

court system, these cases are not precedential, and they are also typically appealable under trial de novo basis.

MR. ROSENTHAL: The idea of going to the small claims court in some jurisdictions is kind of surprising to me. I had a lot of experience in small claims court in law school at the clinic. I was working in the small claims court in the District of Columbia, and they are nothing more than, really, a glorified mediation service. I don't think they are equipped at all to handle these kind of matters.

Basically, you go in, you have a claim, the judge says go out in the hall and settle. And if you don't settle, you might get thrown in the room with a mediator, and that's about it.

There's no real in depth analysis of anything. These are commercial claims. So I don't think small claims court, even outside of the District or Maryland, which I have seen as well, are equipped to deal with these kinds of matters.

MS. CHARLESWORTH: Okay. Well, that concludes panel 1.

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(WHEREUPON, a recess was had.)

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MS. ROWLAND: So this panel is about subject matter claims and defenses. And as Jacqueline was saying earlier, there's a lot of overlap in some of these issues. And I think the first issue we wanted to discuss was the type of eligible works, which is something that we talked about a little bit in the last panel.

So it seems to be a good place to start here. So the question is: Are there some sorts of works that are more amenable to a new small claims proceeding than others, and, if so, why? And I guess I could start with photographers, if you guys have any thoughts about photographs. I assume you think they are amenable to this.

MR. PERLMAN: As I said this morning, and in my filed comments, photographs seem to be the poster child for works that are proper subjects for a small claims alternative.

There are lots and lots of them, and they are easy to steal, particularly on the Internet. Sadly, the value of an individual image for most uses tends to be on the low side, and you kind of

put that perfect storm together, and that makes it a quite likely candidate for this kind of an approach.

The pricing of uses and, therefore, the calculation of damages is also relatively easy to calculate in most cases because of pricing approaches of simply dominant players in the stock licensing space, and also because of the availability of software programs that are used by many photographers in calculating their own pricing.

MS. ROWLAND: Does anyone else have any thoughts on the photographs? Or is no one against it, I assume? Let us know if you have any views, any other views on photographs? No?

Okay. Then one of the other -- I'm sorry. Mr. Rosenthal?

MR. ROSENTHAL: Not the photographs.

MS. ROWLAND: I was going to turn to music next, which is the issue we talked about in the earlier sessions. So why don't you, Mr. Rosenthal, let us know what you have to say about that.

MR. ROSENTHAL: I think uniformly across the

board, in talking to our publishers, in talking to litigators who work for publishers and who work for songwriters, I understand there are some songwriters who are in favor in general with the idea. We are in favor of the idea certainly for photography. For music, we have requested that music be exempt for a number of reasons. We would like to see how it works, but I think that the complexity of music is really the reason why. There are so many different types of legal issues, and I spoke about it, we were very concerned about the idea that a plaintiff in pro se represent themselves, as well as a defendant going pro se, not really understanding the complexities of the compulsory license or the complexities of the consent decree with BMI or ASCAP or authorship claims against each other, fair use, first use, rights of termination, on and on and on.

I think small claims are generally a place where you deal with commercial disputes. Here we are talking about complex issues at the end of the day that are really going to be tough for anybody. And I meant it when I said there are

many music attorneys that are struggling with the complexity of what's going on out there.

So our position is that we would really like to see this to be effectively exempt for a while. We are also concerned about frivolous claims. I know that there's a consensus against that, and there's been good discussion about that. But, you know, I think in music in particular there's quite a bit of claiming of authorship that's not true. And this is something, if you talk to the PROs, if you talk to those at Harry Fox, they are also very concerned about the frivolous claim issue relating to the music.

And I always remember when I worked at the Copyright Office a gazillion years ago as an examiner, the one thing that struck me, I never saw a frivolous claim before. But the first one that came across my desk was a record. It was the Beatles single of "Let It Be." And the guy crossed out "Let It Be, McCartney," and wrote in his own name, and filed that as the deposit. And I am like, we live in a crazy world.

So that's -- we're fearful. I am not going to say it is going to happen, but you know what I

mean. The point is that frivolous claims do concern us a lot, and certainly small claims is not the place to work that kind of issue out.

So as a general matter, we would, you know, really believe that we should be exempt in music this round. Certainly would be willing to take a look at it, and certainly support the idea of dealing with photography and visual arts. That's a different type of subject matter, and we would certainly support that.

So that's pretty much where our organization is, and I believe some others in the music industry stand as well.

MS. CHARLESWORTH: Mr. Sanders, do you want to respond?

MR. SANDERS: Sure. I did take that picture of Iwo Jima.

This is a discussion that I have had with many of my colleagues, and the points that Jay raises are important ones, and this is not in any way to denigrate that, but we feel that -- and this is how the Guild feels, that an exemption to see what happens is the wrong approach, and seeing what happens and then seeking an exemption

if it is necessary is the correct one.

Section 203 of the Copyright Act is about to kick in on January 1, 2013. It will be many, many authors beginning the process of recovering their works and becoming the sole owners and administrators of their copyrights. And in a world without a system of small claims, there is much more of an impetus to say to recovering -- those who are recovering their rights and there are areas that they need corporate assistance in seeking redress of any kind that might come up.

And that is really not the intent of the copyright law. The copyright law is to give the individual creator the ability -- the right, first of all, and then the ability to enforce those rights against infringers. And I think it would be grossly premature to remove music from this potential solution at the threshold rather than waiting to see what happens and reacting to any problems that need to be fixed down the road.

MS. ROWLAND: Okay. Quick question, first, to you guys over there.

It is about publishing contracts. And in the typical publishing context, how does it work

with the enforcement? Is it kind of assigned to the agencies, or the bureau, or do the artists themselves have any rights? Is it concurrent? How does that work?

MR. BADAVAS: The typical songwriters agreement is an assignment, so in effect ownership passes to the publisher and they enforce the rights. Termination is a different issue. And that is the way it happens. The agency I work for does not have enforcement rights, and we seek publishers and songwriters who volunteer when we bring the class actions on behalf of the class of music publishers and song owners. It is different for PROs and other folks.

MR. DIMONA: I will speak a little bit about the PRO perspective. And I agree with everything Jay said, but we represent songwriters and publishers together, so we kind of occupy an interesting position.

We think that there are a lot of reasons to distinguish music from the situation with photography. And, you know, one of -- I have been thinking a lot about it. I think one of the

reasons why we are victimized by frivolous suits, and I have had a lot of experience, both at the CRB and its predecessors, as well as in federal and state court of claims of people who say they wrote songs. Songs can be extremely popular and well known, and because of the radio, and so people know about popular songs. They can be lucrative because they're getting played. But every single individual play is not worth much money.

So you get people who get it in their minds they actually wrote these very popular successful songs. They see dollar signs, and add to that, a little bit of the sense of sort of the cultural impact of the value of songs that gets into people's hearts and souls, and they really start to believe that they, you know, they wrote it. And I have seen the courts literally bend over backwards to cater to pro se claimants. You know, every single procedure safeguard rule just gets chucked, and the case goes on and things get dragged out.

So that, I think, I don't know if the same is true for photographs. I mean, there can be

very iconic photographs, but I don't know if most of the instances where the photograph piracy occurs, in reading about it, is a case where the man in the street would claim to know that photo and claim it themselves.

So I think that's different, and also we do have business organizations. We just think there's publishers that handle enforcement of their aspect, and PROs which license and bring infringement cases and sometimes federal cases on behalf of the thousands and thousands, hundreds of thousands of songwriters. So there's less of a need for it, you know, this kind of thing.

And I do think it is something that is as difficult to do as a small claims type of tribunal, all the constitutional issues and incentive issues. And there are a lot of people who brought claims that said, let's take, you know, let's take -- let's do an experiment to see if it can work. And if the experiment was with photography, and there was a tribunal, and there were like 40,000, you know, claims filed the second week, you know, how would they deal with it? Would they have the manpower to deal with

it? Would it be smooth? Would everybody snub their nose at it? I don't know.

But we just felt that the time is not right, really, for music to be a part it. I am not standing -- we are not saying never, that songwriters couldn't benefit from this. Just seems at the present time not in the best interest with our groups.

MR. ROSENTHAL: When you raise the issue of contracts and the Songwriters Guild, obviously there are two issues going on there, the issue of songwriters and claims against the publisher, on the one hand, or against third parties. And I think Christos is absolutely right. Both songwriters grant the right to go after third parties to the publishing company, and they can, you know, either sue or not sue.

But I think it raises an even more important point. The idea that it becomes amazingly hard to deal with, whether or not you are dealing with a contractual claim or whether you are dealing with a copyright claim. Just focusing on some of the big issues, say, in an artist deal, you have the controlled comp clause. The controlled comp

clause is affected by the copyright law. Because of certain rights that you cannot, you know, reduce royalties on certain digital, you know, phonorecords after 1995, and on and on.

So I think that people are going to be thinking that they have a claim against somebody that might be for money, and they are going to the copyright small claims because they think it is a copyright, but it is really a contractual claim, and on and on. And then when you add to it all the different coauthors that might be involved, the producer, the remixer that has some kind of an interest, the guest artist that has some kind of an interest in the public performance. All of these raise such major questions that it gets back to, I think, our point, is that it is just too soon to have the music part of this. There's so many issues to flesh out at the end of the day as it relates to the contracts themselves. I don't know, is that what you are asking about, in terms of the contracts?

MS. ROWLAND: You basically said that they assigned the rights to enforcement, so that they

-- you guys will be doing it versus the individual songwriters most of the time, is that what you are saying?

MR. ROSENTHAL: Unless the songwriter moves forward in one way or another and through rights of termination gets their rights back.

MS. CHARLESWORTH: I just want to --

MR. ROSENTHAL: Is that what you mean?

MS. CHARLESWORTH: I just want to chime in here because -- couple of things.

First of all, a question is whether the publisher, if the songwriter complains that their song has been used, infringed on the Internet, whether the publisher will always pursue that, even if it is a small value. And the second issue I just want put on the table is the beneficial owner, in other words, the songwriters who collects royalties has standing to bring a claim on their -- in their own right.

So if we carve out music from this system, the songwriter who, you know, might independently be able to bring an action on their musical work, regardless of the publisher's choice, would not be able to do that. And is that something that

is a comfortable -- is comfortable to the music community.

MR. ROSENTHAL: I think in that situation, for a publisher who's unwilling to move forward in some kind of a claim, you are talking about a contractual claim between songwriters and the publisher?

MS. CHARLESWORTH: No. Talking about infringement -- I'm sorry.

MR. ROSENTHAL: Maybe I'm missing the point.

MS. CHARLESWORTH: I'm talking about infringement claims that the songwriters might want to bring. It's a very simple question. So a third party infringement, the songwriter wants to pursue it, for whatever reason the publisher chooses -- doesn't want to. May not be contractually obligated do it. The songwriter would not be able to, under your scenario, carving out that whole class of works, the songwriter would not be able to pursue that infringement in a small claims context.

And the question is, is that a comfortable -- if we were going to start choosing some works to be in and some to be out, is that a

comfortable place for the music community to be?

MR. ROSENTHAL: I think that it gets back to the issue of the relationship between the songwriter and the publisher and the contractual issues that are there, as well as copyright issue.

If there's a publisher out there who's not willing to move forward with the copyright claim, the songwriter might have a claim of waste against the publisher, because they are basically devaluing the copyright at that point. And that's a claim that's very rarely raised, but certainly in the law you can do that. You can claim that you are not going after infringement, you have an obligation to, that way raise all sorts of remedies like recission of the contract, reversion of rights back to the songwriters. It is complex. And I understand that.

But the idea that we would go forward with a small claims court because there are certain instances of publishers not willing to go forward with the claim is, I think, you know, very minuscule. It is the way in the balancing of the equities here as to who's right or wrong and

whether we are asking for too much problems certainly falls on the side of to open up the doors for songwriters to go to a small claims court and a publisher doesn't want to go to the small claims court is very rare. I very rarely see that.

And I think that if there is a problem, it is generally worked out between the publisher and songwriter at the end of the day. So if you are asking if am I concerned about that, my answer is, not really. No. I don't have concern about the songwriter's position in that particular situation.

MS. ROWLAND: I was going to say, Christos had a comment, and Mr. Leichtman and Mr. Sanders and Mr. Lehman. We will start with Mr. Badavas.

MR. BADAVAS: I'm going to apologize for going a little beyond purely a work issue because the subject matter kind of mixes a little bit, but I think of a couple examples of what we are thinking about might help the office analyze this problem.

I identify it as two problems. And when I first started working I would have called it the

"Hey, Jude" problem. Thanks, Jay. And the reason it's a "Hey, Jude" problem is that "Hey, Jude" was written by Paul McCartney on his way to visit Julian Lennon shortly after the divorce of his father and his mother.

And based on the number of letters and claims I received in my years of working at EMI, which was a Beatles distributor and now Harry Fox, related to, hey, who owns "Hey, Jude," there must have been several hundred people riding in that car with Paul McCartney. That's a problem.

We are worried about frivolous claims. HFA, as an agency, gets in the middle of those. We get people who are actually songwriters and might have written other songs. You get people who are publishers claiming against each other. And I happen to know that those aren't true, but there are places where I don't.

A more modern or more recent version of that might be "Good Life," which was a big hit in 2007 for Kanye West. And "Good Life" has one sample that I can identify, "PYT" by Michael Jackson, Pretty Young Thing. You know, there are at least, apparently, a least a hundred other

samples in this based on the claims I get.

The only way for someone to figure out whether those claims are valid or not is to listen to the song, have musical expertise to identify whether the piece that the person is claiming was taken from their work, A, is qualitatively or quantitatively important to the original work. I have a music degree, and sometimes I can't tell, and I am a copyright lawyer.

And then the second thing is, okay, was it written beforehand or not? Did they have access to it, and you start going through all of that process. And then you find out, well, actually, the person really doesn't have any idea what they are talking about. You have listened to it, you've finally gotten recordings, you can do it. I am not convinced -- and that's an infringement case. I am not convinced that there is anyone who can do that without expert help. We do jury trials, we hire experts.

So the issue of infringement of a musical work is a complicated thing. It raises the issue of who the adjudicators are. I understand that.

And that brings us into this funny idea because, also, if those samples are found incorrectly by a smaller claims court, it actually acts as an injunction if the small claims court has preclusive effect afterwards, from the wider distribution of Kanye West's song "Good Life" because, all right, now he has to go get a license or go and do this even if it is wrong or wrongly adjudicated.

I am not convinced that even expert copyright lawyers can do this. And that makes me afraid of the unintended consequences of the small claims court where I see in my role as just a regular old in-house lawyer who has to deal with lots of claims that come in, as causing me to have to hire more people to show up and argue those cases, and be better at arguing it. And, you know, are we really going to have experts in a small claims court? I think if you think about those examples, those are the issues that come to mind among people who deal with music.

MS. ROWLAND: I want to give Mr. Sanders and Mr. Leichtman a chance to respond to that. And I was also curious if you had any insight into how,

I guess, comfortable, songwriters and musicians are allowing, you know, a small claims process to be done away with or not to be brought, if they are comfortable with the way things are going now.

MR. SANDERS: Well, as I said, I am not seeking to denigrate the opinions that we are hearing from my colleagues.

I think that many good points have been raised, and that we carve out exceptions constantly. I mean, the PROs have pioneered this process. If there are certain categories of issues that we do not want subject to the small claims process, we can sit around and debate that at length and figure out recommendations in that regard.

A blanket exclusion of music from the small claims process would be grossly unfair to the creators of musical works and would serve the interests of the corporations, all of which are vertically integrated, who seek to make it impossible for individual creators to represent themselves. And Section 203 and the termination rights that were bestowed on creators to give

them back the ability to control a hundred percent of their work would be thwarted by excluding these songwriters and composers and other music creators from this process rather than taking a scalpel to exempt certain issues that we may not want to make subject to that.

But, again, I am reminded of you don't remove a fly from the face of a friend with an ax. If you are our friends, you will work with us to carve out exceptions without, some mixed metaphors, drowning the baby for the songwriters and music creators.

MR. DIMONA: I would like to throw a few thoughts on top of Charlie.

I think this is a family here, and we are all basically agreeing in large measure, but maybe the timing is not -- maybe the timing is really the issue. On the performing rights side, I really do think there's two issues involved. There's the ability to monitor and enforce performances that are ubiquitously occurring all over the country. That was the primary reason for the creation of the performing rights organizations decades ago. I suspect that even

if there were a small claims court, a modestly cheaper way to do it, that songwriters would not have the wherewithal and really wouldn't want to have to spend their time bringing 10,000 small claims proceedings, even if they were cheap. That's not what songwriters want to do. They want to create, perform, and that's why they have turned to publishers, and in some cases record labels and PROs to manage the business side.

Could they theoretically do it? Yes, they could, but I don't know whether they really have the time to monitor and go after all these things. So I wouldn't be uncomfortable excluding songwriters in the first instance of something that's not intended for the performance rights side.

MS. ROWLAND: Mr. Leichtman also has something to say.

MR. LEICHTMAN: Sure. And these should be taken as comments on behalf of the Volunteer Lawyers for the Arts, because at my day job I do represent one of the large PROs, and they may have different views on this. But at VLA, I would say about 20 percent of our clients that

come through who we then refer out are in the music area, musicians, composers, songwriters, and the like. And most of them are not signed up with a publisher. Most of them are not signed up with a PRO. And so what we found is there really isn't anybody representing their interests.

And we have a great, you know, democratization in the sense of the songwriter's craft at the moment because any songwriter can record a song. It has been much easier to record a song now. You can put it up on iTunes, I guess you have to pay your 30 percent, but you don't need a music publisher anymore. You don't need a record label any more. So to exclude music as a category completely we don't think makes any sense.

To the extent that we do see some artists that do have a publisher or do have a PRO, oftentimes, they have will have contacted the publisher or the PRO before they come to VLA, and the publisher or the PRO either has ignored them, not gotten back to them, or said to them, "This claim is too small for us to use resources. We have much bigger fish to fry." And so, again,

we would not be in favor of an outright exclusion for music.

That's not to say that you couldn't work out some mechanisms. And one of the -- I know one of the other topics we are going to talk about today is should there be some kind of prima facie threshold for being able to bring a claim before you can actually wind up in front of a tribunal. And one of the things we have been thinking about is, you know, to take the "Hey, Jude" example or some of these frivolous claims, because we see those also on both sides, you know, is perhaps we ought to be thinking about making access, you know, real proof of access, not just hypothetical, like, you know, "Hey, I showed this song to a cousin, and my cousin has a friend who works at, you know, this company, or, you know, the agent for the defendants," or something like that, you know. But real proof of access. Because we -- that's typically what we see is, you know, claims that are really, really legitimate claims where the client has clear proof of access, you know, clear proof of substantial similarity because it is the whole song, it is not just a sample.

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So I think you could start to talk about gradations where you say, okay, if it is a sampling claim, maybe that's more than this tribunal can handle. If it is a claim where the songwriter does have an established publisher or established PRO, if the defendant is a big enough entity, that that ought to be an entity that the PRO, the publisher should be interested in.

So you might talk about some gradations of eligibility for claims, but to knock these claims out outright we don't think would be the right thing to do.

MS. ROWLAND: Mr. Rosenthal?

MR. ROSENTHAL: Yes. Just in response to Charlie's point about rights of termination.

Certainly your point is that through rights of termination, recording artists are getting their right back if they want. They don't have to be getting them back, but if they want. And for songwriters that's been happening for a long time.

I think that the real problem there is not the fact that we can't -- those artists or songwriters can't go to small claims court, it is

that the DMCA is broken. We are not here dealing with the issue of are we going to change the whole idea that the DMCA, so that the ISPs police the Internet as opposed to content owners. That's not on the table.

So the issue is, is this a good way to deal with that particular problem, and our position is, no. It is just going to add to the complexity of that particular problem.

There were some comments talking about that this could be used as some kind of a substitute for the DMCA instead of going after the ISPs, you are going after a particular web site, and there you have a direct connection between the copyright owner and that particular web site, one way or another. Perhaps that's something to be said. But the whole idea going after the ISPs is because you go after everything that they do and everybody who uses them.

The idea of putting the songwriter in a position of having to track down every use directly to the web site owner is really unrealistic in so many ways. So, again, there's plenty of problems that artists and songwriters

have. This isn't the forum to deal with it. When we talk about, you know, reforming the DMCA, I am right with you, and we will fight for that.

At the end of the day, we feel this causes more problems for songwriters and recording artists, even though they're getting their rights back at the end of the day.

MS. ROWLAND: Mr. Lehman?

MR. LEHMAN: First, I have a question about procedure, and then, you know, comment, and Mr. Rosenthal's immediately preceding comments sort of led into that.

I have been doing a lot of study in recent times of the Copyright Office as handling royalties. And that was a situation where the issue at hand was should there be a resale royalty. But if you read the copyright's office final report in 1992, which is now under review in a separate inquiry, basically, the Copyright Office said, "Well, we think artists have a big problem, but we think there are other things they should try first."

And so my question is, I mean, is that something that might be in your report as well,

in other words, or is this just going to be a report that says, well, in any kind of small claims situation, we should have -- you know, the tribunal should be a three-person tribunal and Copyright Office, or it should have a minimum claim threshold of "X" dollars, or a maximum? In other words, are you -- as part of what you are doing, observing the fact that, in fact, there might be other remedies to this problem?

MS. CHARLESWORTH: I will respond. I mean, it is a broad inquiry from Congress. It doesn't have a lot of specifics. We are supposed to make recommendations on potential changes to the law. Obviously, the report is going to reflect the written comments and the input of these hearings.

I think one of the questions is, are people coalescing around certain ideas. One issue that's come up that we are discussing right now is whether certain works should be excluded. That seems to be a significant issue, where that's something that we would comment on. But the Copyright Office is really in a position of presenting Congress with the information, maybe some recommendations, and then it really will be

up to Congress to take that report and look at it and decide whether something should happen legislatively.

MR. LEHMAN: In other words, you can say these are other issues that came up?

MS. CHARLESWORTH: We have, I think, broad discretion to discuss anything that we think is relevant to Congress' questions to us.

MR. LEHMAN: Having said that, maybe I can make a comment.

First of all, I am going to make it now because the other choice would have been making another representation.

I think that what you have in mind in representation is you don't -- lawyers or nonlawyers or so on. You could also look at representation as being how the particular class of creator is represented. And that is what we have done in the music situation where we heard a little bit of discussion of how that occurred.

I think, again, take the initial notice of fact that even though there may be songwriters who are not represented collectively by performing rights organizations and music

publisher, who -- certainly there are more of them who aren't represented by Harry Fox and so on and so forth, that there are very robust institutions which indeed do represent them. And certainly in the case of authors of music, there are two and maybe three, depending on how you count it, organizations that represent thousands and hundreds of thousands, and collect, you know, well over $2 billion of royalties a year. And most really professional composers are happy with the situation, and that's why you don't see them here. And that's why you see a strong desire, based upon some part of the PROs, that, really, this is not our issue and we don't need to be involved in it.

Now, we talked earlier about the visual artists and other rights holders. We do have a collective licensing organization in the print field, nonmusic field. In fact, we have a very big one. The Copyright Clearance Center. And I have in my hand here the document from the web site, the Copyright Clearance Center, which talks about their annual copyright license and what you get if you purchased one of these licenses.

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And, by the way, this is a blanket license, just exactly the same way as the music field is. It is paid on an annual basis. And it basically permits you with a payment of a single license fee to kind of take works off the Internet and send them around the company and photocopy and so on and so forth. It says one license usage rights to million of content sources, coverage provided by the annual license. Photocopy articles and portions of other works for employee's own internal business use and sharing with coworkers, download and print portions of work, scan paper copies of works, distribute electronic copies of work, international via Internet posting e-mail or collaboration to distribute paper copies, internally attached copies to internal company communications, set up storage files, and select government agencies, et cetera.

Now, if you read that, and let's say I am the University of Wisconsin and I purchased one of these licenses or I am Dow Chemical Company or I am, you know, the Mayo Clinic and I purchased this because I need medical publications, you

think that you basically have something pretty much the equivalent of what a bar or restaurant does when they purchased from ASCAP or BMI a license to have a discotheque or music in their system.

The fact of the matter is, and this organization is collecting about $300 million a year in revenue. The fact of the matter is that unlike, let us say, ASCAP, which is half publishers, half composers or authors, and BMI basically tracks that. Unlike that, in the case of the CCC, it is entirely publishers whose rights are being offered in this collective licensing, yet that is not clear and the user does not know it.

And I would assert that that goes to the very foundation of this problem that we're discussing here today. And that is because of subsidiary rights holders whose works are included in print publications. In fact, not only do you not have an effective collective mechanism of asserting their rights, and, therefore, they're on their own and that's why we need something like a small claims court, but,

furthermore, they are actually limited in their ability. They actually have a colossus out there which makes it even harder because that colossus suggests to the world that they indeed already have permission to use their works when they may not.

Now, ASCAP and BMI are both subject to antitrust consent decrees. Under that consent decree, you normally think of the consent decree as covering the licensees. In other words, I am a radio station and I don't like the way that ASCAP is charging, so I go to the rate court which supervises this in the Southern District of New York.

But, also, I believe under that consent decree that if I am a composer and I don't like my treatment, I don't like the terms and conditions, I can also go there because you have a tremendous amount of power that is invested in those collecting societies. So they are regulated organizations.

CCC is not a regulated organization, and, basically, it is run for the publishers only. And I think this goes to the core of what this

problem is. Because if the CCC actually functions the way music societies do, then you might have all of the freelance writers and photographers and visual artists also coming and saying we don't need to be covered because we already are taken care of collectively.

And so I think that in your consideration of this matter, that is something that you should think about. The Judiciary Committees, which this board is going to go to, not only have jurisdiction, of course, over copyright law, and, by the way, of the judicial system as well, but they also have antitrust jurisdiction.

And I think just as the topic that we have been discussing is a combination of both, you know, judicial system organizations and structures and system of adjudicating federal courts, also copyright law, so it also cannot be separated from the discussion of monopoly power on the part of print publishers and how they treat subsidiary rights holders who are on their own.

MS. ROWLAND: Okay. I think we have some information on music.

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Does anyone else have anything? Ms. Wolff?

MS. WOLFF: I want to make a comment that I might be concerned if there were very carte blanche exceptions for certain classes of goods because so many creators now create in multimedia and how that would affect someone who is doing something with motion clips that might include some motion and sound. So just where -- it is very hard not to put things into extreme buckets, and as this is only something visual, only something that has sound.

MS. CHARLESWORTH: I have a follow-up question. I think we talked a lot about photographs and we talked about music.

A couple of questions that to the extent people want to comment on them, what other kinds of -- I mean, it is not just photographs, as you just pointed out. There are other types of visual works. Do people have additional thoughts, if there were going to be a line drawn here, I would be interested in additional thoughts in which types of works fell on what side of the line. And also just a more general question is, philosophically, does it makes sense

if it were to go forward, how do people feel about a copyright enforcement system that allowed certain kinds of works to be enforced and not others, and whether that's, as a general policy matter, whether that's something that, again, is comfortable, not comfortable, is there a precedent that we can look at. What are people's thoughts on that?

MS. ROWLAND: Mr. Mopsik?

MR. MOPSIK: Just quickly, one comment back to what Jay said earlier about the onerous nature of music rights holders having to pursue individual claims against infringers and how onerous that was. That's what photographers have had to struggle with forever, and we are stuck with that.

Going forward about the inclusion of other materials, you know, our business being the business of imaging photography is evolving from a business of predominantly stills and images that were intended for print reproduction to a digitally based primarily web and digitally based imaging that more and more is going to include motion resources because the medium wants motion,

it likes motion. And so our photographers who have been primarily still for years with the changes in capability of DSLR cameras that allow them to shoot high def video with what looks like a 35 millimeter camera, are now moving freely into the motion world because their clients are asking for it, and there's a synergy along with the still shots and motion shots.

So I would think that there will be more and more of these short clips or short motion resources that will be copyrightable, and along with that, there will be a commensurate number of infringements.

MS. CHARLESWORTH: So is video on the table?

MR. MOPSIK: I would encourage, yes, the inclusion of video.

MR. PERLMAN: And as a corollary to that, as those videos are being -- going through post production, there is likely to be music added. And that then raises a conundrum, if there's a consideration being given to carving music out of the ambit of this kind of approach.

MS. ROWLAND: Ms. Shaftel, do you have any thoughts on this?

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MS. SHAFTEL: I think illustration and graphic art certainly would be very easy to adjudicate, especially through a mail-in process or by video conferencing. Pretty easy to, you know, look at it, there it is. I think it is noteworthy to point out that there are a lot of illustrators and cartoonists who still work in traditional media, and not everybody works in digital media. There are still people who work on paper and with paint and fabric and three-dimensional materials. Although, for reproduction at some point, those visual works need to be digitized and end up in a digital file. If there's an issue of independent creation or data creation, the original work may have been created quite some time before it was digitized.

I wish there was some -- animation is subject to similar problems with photography and motion pictures. And visual works that start out perhaps as a cartoon or still work can then have a second life later on, becoming animation or incorporated in a moving picture.

I wish there was someone here from a fine

arts organizations to speak to two-dimensional visual works and three-dimensional structural or plastic works, because I know that they do have -- those works are often later used for commercial purposes and reproduced and repurposed, and I know that those folks often have disputes over who owns the copyright, or collaborative, people who are collaborative on larger pieces, and they have disputes over ownership. We haven't been able to get any input from any folks from fine arts organizations as to their feelings about this.

MS. ROWLAND: I wonder if Mr. Leichtman might have some thought on representations.

MR. LEICHTMAN: We do frequently see ownership disputes, although I am not sure we have given a lot of thought to whether or not ownership disputes ought to be the kinds of claims brought in this small claims environment as opposed to being sort of limited to copyright infringement disputes.

So we haven't really given that a lot of thought, but we certainly do see, you know, sculptors and other fine artists who have

copyright infringement claims that we think ought to be subject to this.

So our position really is anything that is eligible for copyright ought to be in this, and if there are certain areas where because the contractual arrangements are so complex, like the music, if you want to just start thinking about ways to say certain kinds of claims, like a termination right claim or something like that also is not really within the core of what this tribunal is meant to be about, you know, I think that would be something we could be open to considering. But I don't think that we ought to be excluding any category of works that are eligible for copyright, you know, full stop.

MS. ROWLAND: A few people, I would like to recognize them, but we also should move onto the next topic. I think there's a very short amount of time to make some comment on this, and then I think it actually parlays into the next topic, the type of claim, infringement ownership, that type of thing. So I guess --

MR. DIMONA: I can talk about that.

The type of claim that you make is really, I

think, germane to the whole question. Because ownership and injunction are sort of two issues that I keep thinking about. If I can get an injunction against you from ever using my work in the future, I don't know how you put a dollar value on that. How do you -- let's say the cap is you can't bring a claim more than $10,000. But if I can get an injunction, that could be worth untold sums of money because you just don't know how lucrative that product could be in the future.

And ownership is another issue. Like if Beyonce has a hit song, and some unknown person, the songwriter, wants to sue her to say "That infringed my song. I actually wrote that song. Beyonce, you put it out under your name." If you can bring that kind of claim, how can you put a $10,000 cap on that. Because if you get ruled to be the owner of that song, it can be worth untold sums of money.

And I just don't know how those issues fit in within the context of what should be commercial disputes. So certain types of infringements are very clear. It is your song,

they used it without getting -- bothering to get a license, and there's really no issue of this type. But I don't know. That bothers me a little bit.

MR. ROSENTHAL: I have one quick point. You asked a question as to the precedent for exempting certain types of works. Copyright law treats musical composition as compulsory license, and the court said that they are not. Right there is probably the perfect example that under certain circumstances, the copyright law treats different works even within music differently.

Here, we are talking about the much more general music versus other types of works. I understand the derivative work issue and the visual rights, and maybe that can be discussed further. But I think there's plenty of precedent that you can exempt a certain category of works.

MR. BADAVAS: Picking up on Joe's comments and not specifically about music, I wonder if what people are most comfortable in small claims court is what I would have called a traditional bootleg claim, which is the claim of someone passing off a product of yours, making it look

like yours, and selling it when you are not and getting your money. And that's an infringement claim in the copyright world, but that isn't an infringement claim like my sample claim that I described.

And that's an interesting distinction, to me, based on what I am hearing. And what that dovetails with probably in the discussion of what type of works should be in here, all right, is what type of claim am I talking about? Everybody kind of blithely talks about a $25,000 limit or a $10,000 limit, or if you are in New York small claims court, $5,000, $3,000, depending on whether you are inside the city or outside of the city.

What you are really talking about is, is my work traditionally sold on a buyout basis, where the licensee pays one fee and it gets used for whatever it gets used for? Or is my work paid for on a royalty basis where I have no idea how many units of my work are going to be distributed to the world, and am I supposed to get a micro penny? We collect micro pennies. HFA processes royalties that result in .00004 cents per play,

all right, but they add up for some people. They don't add up for other people.

And this is a real -- I think it's a real distinction, not based on the nature of the work, whether it is a song, whether it is a picture, or whatever it is a video, but actually about the commercial circumstances that surround that work. And I think it is hard to envision a small claims court without accounting for that.

And to some extent, I go, if it is usually a buyout and therefore a dollar value can be assigned to the buyout because you have examples of the traditional buyout that I always grant, it is not too hard to picture that going before a relatively experienced copyright practitioner from the industry and saying, yes, that's what it is.

But if it's a royalty agreement that's normally there, I don't know what the damages cap is. I don't know what the claim's worth on that day, and, in essence, the plaintiff I guess is choosing to cap their damages if they come in, which is interesting, but if you add injunctive relief to that, it is not a cap. My song can't

be used.

So I think some of the discussion misses that point, and it is all sort of mixed together.

MS. ROWLAND: Mr. Sanders?

MR. SANDERS: Yeah. I have two quick points. One, again, in reference to everything that's been said, a scalpel, not an ax. The second point I want to make is that as is so often the case, there's no one sitting at this table specifically representing recording artists.

And I think it is extremely important to put in the record that recording artists especially have taken on a new role in the music businesses as it is evolving. So many more recording artists are not represented by labels of any kind and are on their own in terms of having to enforce their rights.

And I think we would be remiss in talking about music not mentioning that. There are two specific categories of creators, one, they bring rights, and one actual copyright, or one circle P or one actual circle C copyright, and that is songwriters and recording artist, and that we

need to be circumspect about making sure we realize that when we frame how we want to approach this as well.

MS. CHARLESWORTH: I had a quick follow-up, I'm sorry, but you keep talking about the scalpel. Can you elaborate in terms of how you might take your scalpel to this plan?

MR. SANDERS: Sure. I think there have been some very good points brought up in terms of categories of causes of actions that may not be appropriate for small claims.

And I think if we take an approach where we go one by one and discuss how can we best approach that and start with the general premise that every copyright creator deserves a small -- a crack at a small claims forum to adjudicate whatever it is that they want, and then work backwards from that, saying there are problems associated with this, here are the categories we have problems with, let's talk about, you know, carving out certain causes of action that are not appropriate.

I think that if we sit down long enough and think hard enough, we will be able to frame a

proposal to the Copyright Office that accommodates everybody's needs without, again, taking an approach that blanket throws out the ability of certain causes of action to be adjudicated in this forum. And I think that's a better approach.

MR. LEICHTMAN: One thing that just sort of occurs to me, sitting here, if you were a songwriter, for example, you could have a claim form which we said, do you have a music publisher associated with this work, do you have a PRO associated with this work. If the answer to those two questions is no, maybe it is an eligible claim. And if the answer to those two questions is yes, maybe there have to be additional questions asked like, you know, have you asked your publisher to bring a claim on your behalf. Have you asked the PRO to bring this claim on your behalf. If the answer to those questions is yes, but they refused or something like that, then maybe you can bring the claim.

So maybe there's a stepping process that can be used, you know, through the vehicle of the claim form that would allow certain claims to be

brought and others not brought. And maybe that would be something that the music industry could get together on, you know, have some discussion about it, and then bring a package to the Office. You know, if that would be something that might be useful for everybody.

MS. ROWLAND: I guess at this point it would be good to focus on the types of claims, not the types of works. So everyone thinking about is it just infringement, ownership out the window, or is it in, any sort of similar Lanham Act claims. What should the extent of the claims be.

Does anyone have any views? I know you have views. Does anyone want to say anything about those views now?

MR. TAYLOR: By extent, are we talking about amount yet?

MS. ROWLAND: Not talking about amount. We're talking about should you be able to bring your Lanham Act claim and kind of append it to your copyright claim, your small claims court, or should you be able to bring your contract claim along with your copyright claim.

MS. CHARLESWORTH: The contract issue came

up in a lot of the comments because, obviously, I think in many cases you are dealing with alleged infringement because whoever used the work exceeded the scope of the contract. So in order to -- typically, a court would need to look at both the contract and then the activity to get to a determination on infringement. So that was -- the question is whether that's appropriate for the small claims process.

MS. ROWLAND: Ms. Shaftel, I think you were about to say something?

MS. SHAFTEL: Yes. Lisa Shaftel.

Just sort of a general point, this isn't going to work for every type of claim and every type of work. There are going to be some claims that are more complicated, the legal issues are more complicated, the story of what happened is too complicated to be applicable in a situation like this. This might be for really kind of straightforward, cut and dry sort of claims. And it would be impossible to find a one size fits all solution for all the different categories of works.

Visual works, graphic art and illustration,

we think that claims that arise together out of the same factual situation that include copyright infringement must be brought together in the same court action, including related claims of trademark infringement, infringement claim, try to tie it to a contractual issue, especially violation of a license, and that ties into injunctive relief, claims of copyright ownership, and material misrepresentation claims in violation of the DMCA.

And sometimes creators are in the defensive position of a takedown notice. Somebody else claims to have usage rights of that work and wants the creator to take the work down. If there's an assignment of rights, or the client or whatever may claim that the creator doesn't have the right to show their work on a web site.

Especially the licensing issue, some types of infringement are going to, in effect, violate an exclusive licensing agreement between the creator and the client. And injunctive relief has to be allowed in those situations, even if there's no monetary damages, because allowing that to continue damages the licensee's rights,

and it is also a huge problem going forward in that the rights holder then loses exclusive licensing rights because their work is out there in the world.

MS. ROWLAND: Any other views on this?

Mr. Rosenthal?

MR. ROSENTHAL: The two issues that pop into my mind when you talk about other claims that are problematic are contractual claims, number one, and the second one is DMCA as it relates to music.

I don't know how this would work with DMCA. The idea that this could be a small claims court where a party would file an action against an ISP? You know, basically overriding the provisions of the safe harbors that have already been granted to the ISPs, I just don't know how that would work. But as far as the contracts go, every contract that I have ever negotiated with recording artists and with songwriters has dispute resolution provisions in it. And it has very specific points about when something is a breach and when something is not a breach.

You would have to override those contractual

terms within whatever legislation we are talking about here. And I only know of one instance in the copyright law, maybe there's more, but I only know of one, where there is a point where you can override a contractual clause. That's with the post '95 full stat rate payment to songwriters. Otherwise, you know, the idea of overriding these contracts that have dispute resolutions built into it is really problematic, in my mind. I would think that we are dealing with much more narrow issues, and, obviously, you don't want to lose again, but even for the rest, you have to deal with this issue, how does your contract conflict with what we're trying to do here, and are you overriding the terms of those contracts.

MS. CHARLESWORTH: I had a follow-up. How is that different, though -- I mean, today, someone can bring an action against a music -- a songwriter can sue a music publisher, or a recording artist can sue. In other words, we are not creating -- at least we are not right now discussing a new cause of action or negating contractual rights. So I guess I am having a little trouble following why what you're saying

is unique to a small claims issue.

MR. ROSENTHAL: I think that there would be much thinking out there in most recording artists, and I do represent some recording artists, I always have in my career, that it would be very fuzzy as to what this small claims court is actually there for.

Is it there for me going against a third party infringer, or is it there for an easy way for me to go over my label because I don't think they paid me enough during the last statement that was paid, or they didn't do what they were supposed do, on and on and on.

I'm not sure whether I -- I think you're -- the basic thing here is it would be against third party infringers, but we can't put aside the idea that many people would be looking at this court as a means to rectify their contractual and commercial complaints they have against companies that they have a contract with.

Unless you want to exempt all of that, and maybe that is the case. Maybe if you are a songwriter or, you know, recording artist, you can't bring an action against the company that

you are in a contractual agreement with. You know, maybe that's kind of narrowing it down.

I feel like with music we are going to be narrowing it down so much after we go through this process that we are going to have this at the end, and then why do it for just this, for this last little thing. I think that's answering --

MS. CHARLESWORTH: I think that helped clarify the nature of your concern. Yes.

MS. ROWLAND: Mr. Sanders?

MR. SANDERS: Just briefly, I mean, Jay, I don't disagree with anything that you just said, except going like this (indicating) and saying it may not be worthwhile.

Even if we were to exclude major categories and all contractually based, you know, causes of action, the ability to give the little guy a chance to go up against a third party infringer might end up being a very important right for small independent recording artists and songwriters, and they may end up being able to make a living off it.

MS. ROWLAND: Before we move forward, I just

want to give you a point of, I guess, the timing. We reached the time, and we are going to keep going. We started late. I think we'll probably go to about 1:15 or so, and maybe push the other panels a little bit. We will see how that goes. Just keep going for now.

There were a bunch of hands over here. Ms. Willmer and Ms. Wolff, one of you had your hand up.

MS. Willmer: I just wanted to add that what you had characterized as this slight being against the third party infringers is the vast majority of the unauthorized use that we see.

So even if we got to the point where we narrowed it down to just a straight infringement case, with no contractual issue, no Lanham Act issues, no trademark issues, we would be thrilled.

MS. ROWLAND: And I am going ask Mr. Badavas, but before I do, I want to say for the record, they are indicating with their fingers a small amount, when we keep talking about -- so it's a hand gesture.

MR. BADAVAS: I think ownership claims

should be excluded. I don't think ownership claims can be valued at this moment in time, or at any point in time given the life of copyright and the length of copyright, to call an ownership claim a small claim is somewhat disturbing to me for a number of reasons we don't look at them all in the US very much, but, in general, I actually feel that way about any work that's created or composed.

And I think that if someone's going to fight about ownership of a work, they should have the benefit of all of the protection and procedures of a real federal judge. And I think unfortunately, there are a certain number of infringement claims that actually are ownership claims. So it is a little bit difficult to distinguish them, maybe we can figure that out. But I think as a general matter ownership claims are not easily amenable in many instances, at least in my world, to adjudication quickly without a very full factual record.

MS. ROWLAND: Mr. Perlman?

MR. PERLMAN: At least in the photography world, where the alleged infringement is by the

client, the distinction between what is a copyright infringement claim and what is a breach of contract claim often turns on very fine print in the agreement.

Because of that, I have a hard time seeing how you could separate the two, particularly since if it started as an infringement claim and then you had the contractual defense, how you then not adjudicate that defense. And as a practical matter, at least for those photographers who use ASMP's recommended language, the photographer has the discretion to decide where and how to pursue the claim, including through an alternative dispute resolution system or state and small claims court.

MS. ROWLAND: Anyone else?

MR. SANDERS: In regards to raising the issue of ownership as a defense, we can probably address that by saying that it must be a bona fides claim of ownership. Because we certainly don't want to be put in the position of getting everything thrown out in small claims by simply raising the defense of "I own that."

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So we can probably fashion a recommendation in that regard as well. I mean, nothing that's been raised so far leads me to believe we can't carve out problematic instances.

MS. ROWLAND: Ms. Wolff?

MS. WOLFF: And this goes with trying to make a blanket exception if there is some kind of contract. And I think, again, with a lot of the either visual arts, if someone really exceeded a license, a third party infringer, I think the courts are pretty clear that that really isn't an infringement, and I would hate to have an easy way out of trying to have an inexpensive way to resolve a claim because someone said there was a license agreement. If the license agreement called for arbitration, that might be different, but if it called -- if it just said your had typical just, you know, particular state law applies or federal law applies, just raising the flag of a license that was ignored, it shouldn't be a too easy way out of getting -- if there is this alternate system.

And I think it might be problematic to bring Lanham Act claims together with a Copyright Act

claim. I think often when those claims are brought, they are probably usually inappropriate, in my opinion, in most cases. But I think if we're looking really at trying to resolve copyright infringement, we shouldn't try to make it so broad and complex that when you come up with the right tribunal, that it really wouldn't be handled very well.

MS. ROWLAND: Anyone else on this?

Ms. Shaftel?

MS. SHAFTEL: I just wanted to clarify what we were thinking of in terms of trademark claims.

For example, graphic designer will design a logo for a company, and it is not unusual for the designer to keep the copyright to the logo they design, and then grant the exclusive license to the client, and then the client will register the trademark of that logo, which is, as you know, separate rights.

And a third party makes infringing use of that logo, whether it's on counterfeit goods or what have you, you've got two different people there whose rights have been infringed by the same action of infringement of the same work. And

it may even be a very small infringement, but it is two different people that have different IP rights of the same work that would be infringed in the same act.

MS. ROWLAND: Okay. Mr. Badavas?

MR. BADAVAS: I noticed in the notice that you asked about whether affirmative claims for providing -- for presenting a misrepresentation in a takedown notice under the DMCA would be the proper subject for a small claims court.

My concern about that, because I represent copyright owners, is that there are clinics all over the country, owned by some relatively famous law schools, designed to assist people in challenging takedown notices. It is more or less a factory to do it, and they are entitled to under the law. That's not a problem.

I think if you were to open that claim and allow that into a small claims court for copyright infringement or something that's described later, you wouldn't have a small claims court for copyright infringement. What you would have is a small claims court for defeating takedown notices under the DMCA.

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And I, quite frankly, even if I were on the side of everyone over there saying my work should be in here and every songwriter should have a claim everywhere, if that claim were in this, I would fight tooth and nail to have no court.

MS. ROWLAND: I think somebody over here earlier had mentioned something about the DMCA. Is that Ms. Shaftel?

MS. SHAFTEL: Yes.

MS. ROWLAND: You had had issues where you had people claim that your organization represents that are involved in this and --

MS. SHAFTEL: Yes. Perfect example is under fair use, an artist is permitted to show their work in their portfolio, even if they don't own the rights any more.

Most artists, certainly graphic artists, illustrators, now have web sites, they have online portfolios, and there have been a number of instances where the rights holder who bought out the copyright or assigned the copyright has sent DMCA a takedown notice or threatened a lawsuit against an illustrator or graphic artist who's showing their own work on their web site on

their portfolio web site. And I am not an attorney, so help me out if I have this right, Dorling Kindersley, Grateful Dead, and the publisher, right, is that the right one?

One of my most memorable was a graphic designer who lives in LA, he designs movie posters for big studios, all the major feature films. And he was sued by Warner Brothers for having his movie posters, their films, on his web site. He said, "This is what I do for a living, I design movie posters for all the major studios. How can I not show my movie posters on my web site?" And he gave proper credit on his web site, but that's an example of where a rights holder might be on the receiving side of a DMCA takedown notice that would not be correct. They would have to defend.

MS. ROWLAND: Mr. Leichtman?

MR. LEICHTMAN: David Leichtman.

You know, I think one of the questions is, it is clear that this -- whatever this tribunal is, it is not going to be able to handle all claims for all people. So you have to start thinking about limiting it. So I don't think we

would necessarily be in favor of affirmative contractual claims being brought, but I think you have to have all defenses available to you.

So if a defense is I have a contractual right to do this, or whether it's in the DMCA context or some other context, I will think that the kinds of people that were saying, well, the adjudicator is here, that it's within their tent to decide whether or not there's an adequate contractual defense, to say, you know if what you are seeking is a contractual remedy, this is not the tribunal for that. But if what you are doing is using the contract as a defense, that's within our tent to decide.

So I think there's a distinction, really, between affirmative claims and defenses to claims. And if it is merely a defense to a claim, that's something that we think this tribunal can handle. If it is an affirmative claim, there are lots of other venues, contractual claim, for example, you can go to state court. You don't have to go to federal court to handle contractual claims. You have a contractual claim. You don't have the risk if

you are an indigent artist of the other side getting their attorneys' fees because it is just a contract claim, it is not a copyright claim where there's a statutory attorneys' fees for the defense.

So I guess from our standpoint, we are looking at this really as straight copyright infringement claims. If the plaintiff has other claims they want to bring, they can bring those in another venue. They don't have to bring them here, but this would be a narrow, limited proceeding.

MS. ROWLAND: And I'll let Mr. Sanders speak, but before he does, I wanted to ask -- we are going to ask -- do a poll.

We still have a lot of really important issues in this panel to go through, which I think we only have about ten more minutes to talk about. I don't think we can probably squeeze permissible claim amounts, defenses and counterclaims, all of that stuff into such a short period of time.

So we were wondering if it's an idea to maybe stop the session now, break for lunch, and

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then we come back, take up the remaining issues of this panel. So the other panels I think are less likely to have so much discussion going on. And is everyone okay with that?

MS. CHARLESWORTH: Before we adjourn, Mr. Sanders --

MR. SANDERS: Just following up on what David said, I might want to discuss further at length the result where if you as a defense raise an issue that's excluded from consideration, that the result is dismiss it without prejudice, as opposed to letting the tribunal actually rule on it. But, again, these are issues we can work out.

MS. ROWLAND: All right. So we will adjourn until 2:00.

(WHEREUPON, a recess was had.)

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MS. ROWLAND: We are going to go ahead and get started. And we will start panel 2. We had some good conversations before the lunch break. Now we are going to turn to new a topic, which is the permissible claim amount.

So how much money should a claim be worth to

be in this procedure. So the comments were all over the board. There were some that are very low and some that were very high.

So I wanted to hear some input on that. Does anyone have anything to say about the claim amount?

Ms. Wolff?

MS. WOLFF: Well, I mean, it is hard to pick a magic number. Part of this has to do with the inaccessibility of many creators to go to federal court. And in addition to representing PACA and the ABA committee on copyright legislation, and the ABA IP section did put together a little sort of task force group to look at this, and we even did a survey, at what point can you -- is a claim too small that a lawyer won't represent you.

And it seems that even for small businesses and lawyers, the number is a lot higher than I and many people even expected. It seems like lawyers, unless the amount seems to be -- and it did vary, like almost over 60,000 it is very hard in that middle range even to get a lawyer.

And my initial reaction when I was thinking of copyright small claims, I was thinking more in

the 10,000 range. But it really seemed that there are so many people deprived from realistic enforcement that if there really were trained or, you know, arbitrators that really understood copyright, that you would really fill the gap if you maybe looked at the maximum statutory damage amount of 30,000 and could have a tribunal that could address those kind of issues.

Because I think even if you do a low cutoff, which helped many of the small photo claims, that there are so many types of works and so many types of infringement, and so many people really cut off from federal court because of the expense. And we did do a little survey and asked lawyers what the amount would be. And it did come up to be sort of higher than my gut reaction was.

MS. ROWLAND: Mr. Mopsik?

MR. MOPSIK: I think we moved on from the state court option, but when we were thinking in terms of state courts and their small claims, the amount would be determined then by whatever the maximum was in that jurisdiction. But I think again from a practical standpoint, if the

question you had asked was, you know, what's the average license or what's a number under which that would cover most licenses issued by I guess the vast majority of photographers, I really don't think it would exceed $15,000, and that might even be on the high end.

So, you know, in regard to the $30,000 threshold that Nancy mentioned, it certainly would cover I think the vast majority of licenses that on average would come under these kinds of cases.

MS. ROWLAND: Mr. Lehman?

MR. LEHMAN: I would argue that the fee, I am not sure exactly what it should be, but I think 10,000 maybe is too low. Just strikes me that maybe 50,000 would be better, and this is the reason why.

I thought among all of the comments that were submitted to you in writing which you published, that one of the best, although very brief, was from Megan Gray. And, basically, she says this, that the underlying premises being that it is not often possible for a copyright owner to hire a contingency fee lawyer.

Now, she was thinking in the context of making certain changes in the law that would go to US district courts and get a contingency fee lawyer. However, I still think you could have contingency fee representation in a small claims context. Just think of those ads you see on television for the people that handle Social Security disability claims, you know. Those are claims that are ten times smaller than this, but there are law firms, whatever you think about it, that there are people that make a business model, an effective business model, lawyers, of actually protecting the rights of that class of rights holders, in effect, in that case, rights to disability claims.

And I think I could easily see, if you had, you know, sufficiently reasonable amount of damages, that you could have some small firms that sort of specialize in this and make a reasonable living and then provide effective representation in this context to rights holders.

MS. ROWLAND: Mr. Taylor?

MR. TAYLOR: First, thank you for having these meetings.

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I would like to speak about copyright and photography, and specifically photographs on the Internet. And I am going to start with sort of the conclusion so that I can kind of frame some of the information that I would like to convey. And the conclusion is that the statutory damages are an essential and major element in getting the other side to actually talk to you. And it might even be the single element at all that gets them to settle and talk to you.

The statutory damages were increased back in 1988 from 250 to 500 at the low end, and 50,000 to 100,000 at the high end. Then they were increased again in '99 from 500 to 750 at the low end, and 50,000 to 100,000 at the high end -- I'm sorry, 100,000 to 150,000 at the high end, 500 to 750 at the low end.

So it has been 13 years since the statutory damages were increased the last time. And I would like to suggest that that might be part of what needs to be suggested is that statutory damages should be increased. And I will explain why in just one moment.

Framed with that concept, the idea that

being a small claims court I think might be a misnomer and that perhaps it should be considered an alternative court or some other name so that there's no limitation set in the name of what is being described from the word go, that being the smalls claims court.

In what we have found online, of every hundred images on line, we have discovered 75 unauthorized uses. Separately, an internal study of one of the file sharing sites revealed that 12 percent of the files at this major file sharing site were copies of images that were at the same site. So by their very default, they had to be unauthorized copies.

So in these two figures, we kind of feel that there's a range of the minimum of 12 percent of images online that are unauthorized uses, and at the high end a maximum of probably 75 percent of the images online that are unauthorized uses.

If there are two trillion images on line, this works out to be that there could be 850 billion unauthorized uses at the high end, or 240 billion unauthorized uses at the low end. And I bring up this point because the current federal

system potentially could be rather overwhelmed by cases if every one of the rights holders in photography begins to actually enforce their copyright. And there have been some very practical reasons why that hasn't happened thus far, one of which is it is very hard to find attorneys to take it on a contingency basis.

And what we have done in our process, we found many thousands of unauthorized uses. And we put them through a series of tests, and 66 percent, two-thirds of them, are eliminated by these initial tests. And this set of tests includes a great many factors that are being considered. But, basically, about two-thirds of the unauthorized uses are getting knocked out right off the bat by some criteria. And to phrase it, in essence, it is eliminating, by and large, the proverbial 14-year-old water.

About 15 percent of the unauthorized uses use a private registration system, which means that they are going out of their way to make it very difficult to find who the infringer actually is. The vast majority of the infringers ignore the demand letters that are sent by the

attorneys. And this is the key point that comes back to this idea that the statutory damage is the primary tool by which the infringer is likely settled.

So if statutory damages are limited or removed from any type of alternative core process, the effectiveness is going to be dramatically reduced. Anecdotally, about 90 percent of the letters that are sent by the attorneys that we work with, which are well known copyright attorneys who have lawsuits on file that they filed and would normally be respected by the persons who would receive the demand letters get ignored. And what this tells us is that there's been a kind of a paradigm shift in the perception out there that most of the people that are using the pictures kind of had the feeling that, look, we will just ignore the demand, and if they get serious about it, they will file a complaint and then we will deal with it. So the only reason they deal with it is really the statutory damages.

MS. ROWLAND: Mr. Taylor, just to get back to the amount, the discussion of the amounts, are

you saying it should be tied to statutory damages or a specific amount?

MR. TAYLOR: I am actually saying that there should be no limit and that the statutory damages should, in essence, be the range that would be established in the court system, regardless of which court system it is, and that to have a small claims court would dramatically reduce the effectiveness because the defendants, the opposing counsel, would basically just ignore it or put a minimum amount of effort into it because the damages that then would be rewarded would be so small and inconsequential that it really wouldn't be worth their time.

MS. ROWLAND: So you are not for -- you are not for the idea of a small claims court at all, you think it should just be the same --

MR. TAYLOR: I believe very strongly there needs to be an alternative court system because I think that the federal court system is going to become quickly overwhelmed with the John Doe cases, the subpoenas, the copyright cases, and all these things. And the federal court system I believe is better designed to handle cases of

racketeering and things that have a much greater significance, perhaps, than the fact that a photograph was stolen online.

So a separate court system would probably be effective. And I am predicting that there's going to be a dramatic increase in the quantity of cases that would make a separate court system very, very worthwhile, but that the amount should not be capped.

MS. CHARLESWORTH: Okay. Other thoughts on this issue?

MS. SHAFTEL: Lisa Shaftel.

Prior to our comment letter, the Graphic Artists Guild conducted a survey online of creators in all classes, based on the questions in the notice of inquiry. And this was one of the questions we asked.

We had a reasonable turnout of about 1,200 respondents to our survey, and the PDF of our survey results is in our comment letter, attached to our comment letter. The overwhelming majority of the rights holders who responded are graphic artists, illustrators, and photographers, mostly that's how we got the message out about the

survey.

Equal number of -- equal 50/50 photographers and graphic artists. And referencing the $30,000 as the cap for statutory damages in a single infringement, because we know that legislators and the Copyright Office likes to use numbers that already exist in the law when they are adding things on, we asked what rights holders would like to be the ceiling in the maximum amount of damages. And we asked up to 30,000, up to 20,000, and up to 10,000, because we thought that $10,000 would probably be enough.

And we were very surprised to see that 48 percent of the people who responded wanted the ceiling to be 30,000. And then we got an equal split of 26 percent up to $10,000, and 24 percent said up to $20,000.

So even though it seemed that a lot of visual creators figured that from their personal experience their ceiling might be $10,000, they could see where there would be potential situations where they would need a damage award of higher, and from their personal experience that also seemed to be the threshold dollar

amount by which they could find an attorney to either take the case on a contingency basis or sort of even be willing to write a couple of nasty C&D letters before saying, okay, now it is not worth it to go to federal court.

And then on to your next topic on the list, which I will get to then, there were specific real incidences of infringement where multiple graphic artists would want to take action against a single infringer who infringed multiple works in the same act of infringement. And they would want to take action as a group, and the total of their damages would amount to possibly up to $30,000, even though individually it would be much less.

MS. ROWLAND: Mr. Badavas?

MR. BADAVAS: I had an observation about it, which doesn't relate to a specific number, but it seems to me that the level of the award that the court could grant is inversely related to the extent of the procedures the court chooses to implement to protect defendants and/or plaintiffs through the process.

So, in other words, the more informal the

process, the lower the damage award I would want to see, and the more formal the process, the more comfortable I would be as a litigator with a higher damages award. So it strikes me that the choice of the number, whatever the number is, is inversely related to the procedures such as the small claims court office. So the more informal the process, I think the more comfortable people would be, in general, and maybe Congress, with a lower threshold, and the more procedural protections that existed in the process, a higher number might be acceptable. And it seems to be that's the policy consideration around these numbers, as much as a consideration of exactly what level we need to get to to cover the average type of buy deal or something like that within the industry.

And it is difficult for me to judge any of them without knowing what those procedural protections would be.

MS. ROWLAND: Ms. Wolff?

MS. WOLFF: I think when looking at the number, I think the rationale for the number, I wouldn't want to focus on an amount that would

make a contingency lawyer comfortable bringing a claim. I am really trying to think of it as an amount, and, of course, we have to look at the procedures available, that would really allow someone with the right instructions and with the right kind of system to be able to bring a claim without a lawyer.

Because from my experience, that once the attorneys' fees have to get factored in the amount, that there's always going to be a lot of work, and then the settlement amount and demands become much higher. And you start veering away from what the amount is for a fee versus how much a lawyer would want to be paid for the services.

So I think where we are looking at in copyright small claims, I think one of the elements was -- or a priority would be to try to have a system that a creator could really do on their own for certain types of claims.

We may want to look at the types of claims that can be allowed, but I think if we are going to start focusing on the number as being an amount that you could have a contingency lawyer, we are going to get off course.

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MS. ROWLAND: I know Mr. Holland you raised your hand, but you didn't sign up for this.

MR. HOLLAND: No, I wasn't.

MS. ROWLAND: I am afraid -- okay.

Mr. Leichtman?

MR. LEICHTMAN: David Leichtman.

We had some discussion about this at our board of directors level of Volunteer Lawyers for the Arts, and there was pretty much consensus that we actually started out with a proposal that it should be $75,000 on the basis that that's the threshold by which we keep state court claims out of federal court, that we think belong in a different venue, and maybe that was the right number, if that's what Congress thought was the right number for removal jurisdiction.

And there were people on the board that thought about that number $75,000 and said, well, but at $75,000, we know some of our corporate clients would do everything they could to stay out of this tribunal.

So if the purpose of it is to -- of the damages cap was to make sure that enough people are participating in this on both sides, whether

it is a voluntary proceeding or a mandatory proceeding, you know, as we had discussions amongst the board, the numbers of 25,000, 50,000, were numbers that people thought would sufficiently be able to compensate artists for most of the kind of claims that we see while still making sense financially from the standpoint of defense side of -- "Yeah, I am willing to take a risk in going into this proceeding because the risk to me of being in a tribunal where I might lose 25,000 or 50,000, again, on a nonprecedential basis with no willfulness claim, no statutory damages claim, I might be willing to forego some of my other rights that I might have in federal court. If the number was really that small, I would be more willing to participate."

So our thinking was somewhere in that range of 25,000 to 50,000, but it would be on the condition of no willfulness, no attorneys' fees, and no statutory damages.

MS. ROWLAND: Mr. Lehman?

MR. LEHMAN: Very quickly, I just wanted to follow up on comments made by Mr. Taylor.

Because, really, what he was saying, we were trying to elicit that, really what he is talking about is a specialized court as opposed to a small claims court. I just wanted to say that, I don't know, since you aren't particularly restricted in what your comments to the Congress might be, you might talk about that because, in fact, you know, many countries do have specialized IP courts, and not only that, but it is generally the policy of the United States government in trade negotiations for many countries to push them to do exactly that.

And, you know, I have a not-for-profit institute and we sponsor national conferences. When we talked about this last year with people from 27 different countries around the world, all which had specialized IP courts, and I am including our own, in the sense that we have the Court of Appeals for the Federal Circuit, which is indeed a specialized court.

But here we would be talking about a specialized trial court system. So I don't think it is unthinkable that you could have specialized, you know, copyright court, which

would basically take that jurisdiction. That's all I wanted to point out. That would be his suggestion.

MS. ROWLAND: I have a question I guess about the frequency of the cases that you guys are aware of that are smaller in economic size. And you mentioned a 30,000 number, which kind of has been bounced around a little bit today about the amount of money that would be worth it for a lawyer to become involved.

But are you familiar with how many cases or how frequent the infringements are that are kind of less as a smaller one that's like 15,000 or lower, more frequent?

Mr. Mopsik?

MR. MOPSIK: I field lots of phone calls from members around the country, and they call me up and they usually, you know, start out with a sad tale of infringement and how their image has been used and it has been on this web site or used in an advertisement or appearing in a store, a poster somewhere. And invariably, they haven't registered their image, and, you know, we have a nice discussion, but it generally goes no where

because I simply -- I mean, no one's going to take their case at this point.

But the amount of money, the question I always say to them is, what would you have asked for this use? If the client came to you in advance and said, "I want to license these images for use," and, again, in the kinds of uses that I'm talking about, anything from local to regional ads, to use on a web site, to use maybe for trade show materials, and I am not talking about images of a unique nature that are used in national advertising campaigns. I am talking about these smaller more localized or regional uses.

I don't hear numbers of $25,000, $30,000. I mean, I hear numbers under $10,000, or maybe, you know, at the most, maybe $15,000. Or the kind of term. And I am talking about generally these are one or two-year terms for, again, a specific round of uses.

But those are the kinds of numbers that I hear. And that -- with few exceptions. Again, I'm not hearing about $50,000 licenses.

MS. ROWLAND: Anyone else?

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MS. Willmer: Lisa Willmer. Getty Images.

I would echo those comments and say that the vast majority of the claims that we would look to be bringing fall into that smaller category. Probably 95 percent would be under $15,000 in value.

And I think picking this number is important because we need to balance opening up the access to the court for copyright holders, and also incentivizing the voluntary participation by defendants. So I think the point that was raised earlier is the higher the threshold goes, the less likely it is that a defendant is incentivized to participate. So we are trying to strike that balance. I think that's about it.

MS. CHARLESWORTH: I was going to raise a question, how do people react to an idea where we would start with a number, and maybe it would be adjustable for regulatory process or some other process as necessary or over time to be reviewed. What is the reaction to that concept?

MS. Willmer: I think, personally, that that approach makes a lot of sense. I mean, it would be nice in an ideal world if we can do some sort

of survey of infringers at this stage of the game to find what would motivate them to participate in a small claims.

But I think what will happen is that if we set a number, we will get that survey by default because we will figure out is it working, are defendants voluntarily participating or not. Does the number need to come down, do we have too many claims, does the number need to go up.

But I can tell you from our experience, when we're looking at damages in the dollar range of 20, 30, $40,000, we would have less of a problem pursuing those in regular federal district court because we would obviously spend more to do that. But the damages would likewise be increased.

MS. ROWLAND: Mr. Leichtman?

MR. LEICHTMAN: In response to the question about what level are attorneys going to be willing to participate, I thought it might be useful for the record to think about, Volunteer Lawyers for the Arts, in order to qualify for pro bono legal referral services to a law firm, for an individual, our income threshold, their adjusted gross income on their prior year's tax

return has to be less than 30,000. If they are in a household with a family, then it is 50,000, and then if there are -- depending on the number of dependents, there are small incremental adjustments up.

And so if this was a procedure where -- particularly if it was located in New York or DC, in the cities where there are lots of large law firms, I don't see there being any issue with -- to the extent that -- obviously, lawyers wouldn't be required, but to the extent that indigent artists wanted counsel, I don't see there being a problem finding pro bono counsel in most of these kinds of cases if the income threshold was low enough.

But what we also do is if somebody doesn't qualify, we have a list of smaller law firms, solo practitioners, who have much lower rates who are willing to take on arts related matters where somebody doesn't meet our income threshold. So I don't think it is necessarily the right way to think about it at what point a lawyer would be willing to take a case like this on a contingency basis, but maybe at what point is a lawyer

qualified enough in the area of copyright law at a rate low enough where a market would develop for small claims, you know, to the extent that the artist couldn't find pro bono representation.

So I wouldn't look at it as a contingency fee issue because I think most of the contingent fee litigation that's done, Mr. Lehman talked about contingent fee litigation on the patent side. Most of those cases we're talking about damages right away in excess of anything we'd be talking about here.

I think the right way to look at it is, is the threshold at a point where somebody could get pro bono legal services or an affordable lawyer willing to work on either a fixed fee basis or at an reduced hourly rate, such that they could still get competent representation given the limited scope of the proceeding.

MS. ROWLAND: Mr. Taylor, and then after Mr. Taylor's comments, I think we can move on to the different topic of defenses and counterclaims. That's an important issue as well.

MR. TAYLOR: The single biggest variable is the quantity of images that are infringed. Less

than half of the demand letters relate to a single image that's been infringed by a single user. Most of the demand letters are for multiple infringements by one rights holder -- that are owned by one rights holder of a single infringer.

At the low end, the demand letters are about $7,000 to $9,000 for a single infringement, a single image. At the high end, they are about $15,000 to $18,000 for a single image in a demand letter. But there are cases where one rights holder has 300 plus images that have been used by a single infringer.

So in cases where the quantity of the images infringed has grown dramatically, you know, what ceiling do you put on it. In those cases, the demand letters tend to go toward the low end of the statutory damages, as the standard for an amount to ask.

MS. ROWLAND: Thank you, Mr. Taylor.

Another issue we wanted to discuss was types of defenses and counterclaims that can be raised in a small claims procedure because there have been comments on all sorts of different defenses.

Most often it would be fair use. A lot of people were saying the more complex a claim, the less likely it should be in a small claims procedure because of the lack of the same safeguards you have in federal district court. And often people said, oh, if it is fair use, it should be kicked out to the normal federal district court litigation.

So views on that issue and how frequently fair use is raised as a defense.

Mr. Leichtman?

MR. LEICHTMAN: I think my review of the comments, I think most of those fair use comments came from the big tech industry folks, you know, who want to take as many shots as they can in terms of their defenses.

So in our view, it is far too easy to raise a frivolous defense of fair use or even a serious defense of fair use that would automatically take these claims out. And, again, I think if the monetary threshold is low enough, and with respect to injunctions, there is some right to appeal at least the scope of the injunction to a federal court, so that we are not dealing with

runaway injunctions, as Mr. DiMona mentioned earlier, where there would be a holdup value to the injunction. But it is really a legitimate dispute about I am an artist and you are using my work wrongfully, and I want you to take it down or I want it returned.

As long as we're in that ballpark, in our view, every defense that's available in federal court, the contract defenses, fair use defenses and so on, ought to be subject to this proceeding. And we think that the kinds of people that would be adjudicating it would be within their abilities to handle those kinds of defenses.

We talked a lot about counterclaims, and I think where we came out is that if the counterclaim legitimately falls above whatever the damages cap is, so let's say the damages cap was $25,000, if the counterclaim fell above that amount, then you couldn't bring it in this court. You could, of course, bring your counterclaim as an affirmative claim against the other party in federal court, the same way you always can. So it wouldn't be a compulsory counterclaim, you

would still have a venue to bring it. If it was a counterclaim that was going to more than double the ceiling on what was at stake in the small claims proceeding, you ought not be able to bring that as a counterclaim.

So we would use the same cap for the counterclaim as we have for the affirmative claim, and then, in essence, you are essentially doubling the value of the proceeding going both directions, but you are not putting the proceeding in a place where suddenly the counterclaim is for something that's magnitudes of order greater than what the original claim that could be brought was.

MS. CHARLESWORTH: I just want to clarify. So you are saying if someone pleaded a counterclaim that was above the limit, that that would only be cognizable in regular federal court. But doesn't that --

MR. LEICHTMAN: Or they would have to agree to cap the counterclaim at the same amount as the monetary threshold for affirmative ones.

MS. CHARLESWORTH: So you would end up with two litigations --

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MR. LEICHTMAN: Conceivably you could, yes.

MS. CHARLESWORTH: You could.

MR. LEICHTMAN: Right. But, again, the point is, you shouldn't be able to use the counterclaim as a way to drag the whole dispute out of the small claims realm.

MS. ROWLAND: Ms. Wolff?

MS. WOLFF: Whenever you bring any copyright claim, every single defense will be asserted because you can't miss a defense. So I don't think I have ever had a case where someone hasn't at least put in a defense of fair use, whether it could be legitimate or not. So I think that that should not be sort of a threshold to avoid an alternative resolution procedure that could be in place.

I think what would be helpful is, you know, whatever alternative dispute system is put up is that there really is some good descriptions of what they are so when people bring these words up, they know what they mean. So often with images, if someone thinks that they are writing about something that's newsworthy, they can use any picture they want because the preamble has --

the fair use has the word "news reporting" in it.

So there's so much misconception on fair use, I think it would be unfair to strip a creator from having this source of enforcement just because someone raised that as a defense.

MS. CHARLESWORTH: Just to follow up on what you are saying a little bit.

But if you envision that a lot of fair use defenses could be summarily disposed of, or would you end up -- I mean, for a full-fledged fair use defense, you often end up with evidentiary issues, particularly market harm, if you're really fully litigating the defense and so on.

I hear what you are saying. You are suggesting that many people just assert fair use as a matter of course.

MS. WOLFF: Right.

MS. CHARLESWORTH: So I think the question is, if you are in a small claims context with a very streamlined procedure, how would you envision disposing of fair use defenses, some of which may be legitimate, some of which may require some amount of evidentiary development, some of which may be specious. Do you have any

thoughts in terms of how the system would handle that?

MS. WOLFF: We haven't gone into, you know, how much discovery could be used or not. But, I mean, federal judges dismiss fair use on summary judgment very often. It isn't always that it's always a surprise at trial. And I think there might be some tough cases, but I think there are a lot of ones that are really easy. I think the cases you see in court and in trial are usually the tough ones because they can't resolve.

But just the example of news. That happens all the time. And I do a lot of copyright education training, I sort of have my "ten this." Oh, I changed it, the image 10 percent, so I can use it, or there wasn't a name on it. But there's so many misconceptions about copyright that I think part of a way to avoid what everyone's concerned about with frivolous actions or having tough cases resolved here is maybe having a little bit of some of that education that as part of the process of bringing a claim, that there be some instructions on copyright claims and defenses and things like that would be

helpful.

MS. ROWLAND: Ms. Shaftel?

MS. SHAFTEL: We had a lot of discussion about fair use. And at first we thought that fair use should be exempt because it is too complicated. And the more we talked about it, you know, there's this huge variety of what can happen in real life that can fall under fair use and what people misunderstand and think is fair use and it is not.

And Americans don't understand copyright, both people who create copyrighted work and people who use copyrighted work, including businesses. And there's a lot of infringement, infringing use that happens by educational institutions, schools, grade schools and universities, charities, charitable organizations, religious organization, and nonprofit organizations because the people who work there think, "Oh, we are a nonprofit, therefore, we don't have to pay for it." "Oh, we are a school, we don't have to pay for it." And they would claim fair use, and what it really is is unauthorized use. But in their eyes going

into this, they think their use is fair use.

And after a lot of discussions of all the stories that we have heard from artists, we realize that we don't think the defenses should be limited because otherwise the defendants would be able to opt out of the alternative copyright court in a substantial number of cases, and that would just weaken the effectiveness of the alternative court. They could find the magic, you know, trapped door, "Oh, we just use this defense, and we're out."

MS. ROWLAND: Mr. Mopsik?

MR. MOPSIK: Fair use has to be the single biggest defense that we hear people make. And, again, I would just echo everything that's been said, that it is extraordinarily misunderstood.

And at the same time there's another issue. As a nonlawyer here, I guess I am concerned that whatever solution we come up with, if it is going to be in any way meaningful, it cannot be overly encumbered by extraordinary levels of discovery and expert witnesses, and all kinds of, I guess, things that ultimately are going to drive the cost up. And I understand that there are

constitutional issues involved, and ultimately we're hung to certain courses of action to remain within the law. But if it is going to be at all meaningful, I am telling you, it has to be one of these "keep it simple, stupid" kind of things or else it is useless. It will be a piece of legislation or a change to the copyright law that ultimately doesn't benefit the people that it was intended to benefit.

MS. CHARLESWORTH: Following up on that, I have another sort of question. Is it possible that in a situation like this, with a small claims court, when people file, and somehow it turns out to something bigger, let's say there is a legitimate fair use defense, which does require sometimes an expert or a really developed record, that I think in Great Britain in their recent small claims court, there's actually some discretion on the part of the judge to send the case to a different court if it is very complex, for example.

I am curious to know about people's reaction to that, where there would be judicial discretion in rare -- maybe rare cases, maybe common, I

don't know, but in some cases, to say this really is too complex for this court, it requires not a streamlined process, but a fully developed process, and you should refile. What are people's reactions to that?

MR. MOPSIK: I guess, if, in fact, we had a knowledgeable -- copyright knowledgeable copyright tribunal, I guess I am -- my sense is there have to be some tradeoffs here. So there has to be some give and get out of this whole process.

And that's certainly one thing that I would be willing to, I think, agree to, to allow that discretion, if, in fact, it would reveal the issue was significantly more complicated than was originally portrayed, and you maybe move it to the other court.

But, again, I am willing to, I guess, give up some of I guess what might be considered normally acceptable, I don't know how to phrase this right, but legal practices or what might be normally considered due process within the court, in order to have a simplified system. And I don't know if you could go into that with both

parties agreeing to that, to, you know, again, giving up some of their freedoms, as it were, for the basis of expediting the disposition of a claim.

MS. ROWLAND: Mr. Taylor?

MR. TAYLOR: The initial response that we have seen always includes fair use. And it doesn't matter who they are, they always say it is a fair use, including sites that we would consider commercial. They might be selling handbags and have advertising on the site and there's a picture of a celebrity carrying that handbag on the site, and they will say, "Well, look. This was a fair use."

Without touching the whole fair use provision, it might be an interesting approach to define what is a commercial use.

MS. ROWLAND: Mr. Sanders?

MR. SANDERS: You know, Section 107 gives loose guidelines that are interpreted by the courts all over the map. And I am not sure we're talking about the necessary -- the same necessary level of expertise in terms of making the fair use determination using the four prongs and the

guidelines that Congress has already set forth. And we are talking about knowledge of the arcane contractual issues and some of the other copyright causes of action we've talked about excluding.

So I am kind of not as concerned over a trier of fact being able to apply the four prongs of fair use, especially if we are going to limit the precedential nature of what the decision being rendered is going to carry, and the fact that stare decisis is clearly going to be part of the determination of what a fair use is.

So I am not sure that if you have a judge who's given four factors and a few cases that the Supreme Court has rendered to look at, that they are not going to come up with a reasonable determination or a less reasonable determination that a federal judge sitting, you know, in any other circumstance would.

MS. ROWLAND: Mr. Leichtman?

MR. LEICHTMAN: Again, I think what we need to look at on the fair use question is what is driving the concern of the folks that don't want fair use defenses to be adjudicated in this. And

part of it is they don't want that to be precedential because a lot of them have built their businesses on arguing that, you know, certain categories of use are fair uses.

So if the monetary threshold is low enough, if there's availability to, you know, review a grant of injunctive relief in the federal courts, where you could raise your fair use defense, if it was really that important to you, and we're talking about claims that are small enough, 10,000, 15,000, you know, 20,000, the concern from a systemic point of view, which I would think is where, you know, what the Copyright Office should be concerned about, what we're concerned about at Volunteer Lawyers for the Arts is, if in the margins you have an occasional error where the tribunal decides a fair use question the wrong way, from a systemic standpoint, we don't think that that's something really to be concerned about because courts make mistakes on fair use also.

And so because the dollar amounts we're talking about are small enough, and because this would be nonprecedential and somebody couldn't

say, you know, hey, Google lost six $10,000 judgments, and, therefore, in my Google Books litigation, they can't raise fair use. Nobody's talking about that.

So because it would be nonprecedential, because there would be a right of appeal for injunctive relief, we don't think if there's an occasional error by the tribunal in deciding a particular case the wrong way, that ought to be a concern from a systemic standpoint in terms of saying whenever fair use it raised, let's take it out of this tribunal.

Now, with respect to your question, we hadn't really given that a lot of thought about could the judge of this tribunal say, gee, this particular question of fair use is really thorny, we ought to just send this one back to federal court. I don't know that that would be the solution necessarily. But what we could do is, we haven't gotten to the question of how much discovery and when and so forth. But what you could do is give them discretion to say in an ordinary case, we are not allowing discovery, or we are not saying that you would bring experts,

but you would have the discretion if it was a serious fair use defense and it required the use of more resources, you know, give you some discretion to allow some discovery, to allow some expert discovery. Maybe there's some -- a pool of resources to allow the artist to respond to that in some way, a pool of pro bono lawyers just like there are in federal courts, where there are lawyers that sign up to do occasional pro se criminal cases, for example, to be there to advise or something like this. And you might have some experts that might sign up to do that on a reduced rate basis or something like that.

But I don't think taking it out of this tribunal is necessarily the right solution, but there might be other things you could do, give judges discretion to do in a discovery area to address some of the concerns about fair use.

MS. ROWLAND: Mr. Lehman?

MR. LEHMAN: I wanted to come back to a comment by Ms. Charlesworth. You said in the context of damages, you were talking about a regulatory role, I think it was, and I have to say, my observations, as I mentioned this in the

statutory licensing context, I have become a big fan over the years of the Copyright Office's rule making capabilities. And one reason is this meeting is a very good example, because the Copyright Office has the capacity to issue notices and Federal Register, and sift through all kinds of comments and so on and so forth, even have public forums like this, and internalize what, basically, the civil societies or the constituencies, concerns are, and then just synthesize that into something kind of reasonable in the form of a sort of regulatory structure.

And I certainly think, by the way, that's true of damages. But it also might be true even in this area of fair use, particularly if the participation in the tribunal is not mandatory on either side. I was thinking of incentives for the defendant to stay in the case. But the Copyright Office might be able to make fair use determinations easier if it had a process for providing more guidance as to what fair use is.

Now, you know, I think Mr. Sanders referred to Section 107 of the statutory guidelines. I

mean, the legislative history, whenever Congress does something, it inherently has to be a little fuzzy because it's just impossible for Congress to get very specific. They have a legislative history, an executive staff, and they write it up, committee members can agree. You can carry that one step further, and that is how a regulatory entity that could even simplify, because that's what we're talking about, for this class of cases that might make a fair use situation easier. And it might even be that this entity that this rule making would develop sufficient credibility that federal courts might start looking into it in its own decisions as well.

MS. ROWLAND: I think we are running a little bit long here, but there was one more topic in this panel. I didn't know how much interest people have in the question of group registration -- not group registration, I'm sorry, bringing groups of claims at once. So all against one defendant or one plaintiff against many. Does anyone have anything to say about that?

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Ms. Shaftel?

MS. SHAFTEL: We do think that multiple copyright owners should be allowed to act together to pursue multiple infringement claims if their work was infringed by the same user for the same use. An example of something that happened last year was an online logo mill, as we call it, which is an online business that sells logos to, you know, users, to businesses, "Oh, I started a business. I want a logo. I will go on this web site and buy what appears to be stock logos."

And this individual copied logos from various designers from design books and those designers' web sites, and he had his in-house people make very, very slight changes to those logos and then posted them on the logo mill web site for sale as stock logos. And the people involved knew exactly who he had done it to, which books he had copied from, which web sites he had copied from. Very well known designers. In one case one graphic designer had 200 of his works stolen, and another graphic designer had 47 of his works stolen.

So this is a perfect example of multiple rights holders who would want to take action against one particular infringer, who infringed in the same way and the infringing use ended up in the same place. And if you would count the actual damages for each of those individual infringements, they might be relatively small, but, again, if you add up all of them together, that could easily come to $30,000, rather than each of them going at it alone and repeating the same steps and the same process against the same infringer through the same infringement.

MS. ROWLAND: Anyone else have any comments on that? I think we are going to call the panel and end it. And we were talking about the other panels we were going to have today.

MS. CHARLESWORTH: I think -- well, what we were considering doing, given where we are at this moment, taking another quick break, but then perhaps combining the last two panels into one. Because I don't think that the -- we didn't get a lot of comments on mediation or arbitration, and we think they can be addressed within one panel.

So we would come back in about 10 minutes,

and then go to the end of the day on what had been separate panels 3 and 4 rolled into one, if people are amenable, because we do want to get you out of here on time. And we have more to come tomorrow.

So is that workable for people? Okay.

(WHEREUPON, a recess was had.)

* * * * *

MS. CHARLESWORTH: Okay. Welcome to panel 3 and 4, which, as we discussed, we're combining in the interest of time and efficiency.

Panel 3 is on practice and procedure, and panel 4 is on litigation alternatives. So without further ado, I think the first issue up, which is an important one and was discussed in many of the comments, is the question of registration and whether registration should be required to use the system, if it is required. If you haven't registered your work yet when and how you do that, and to open the floor to those who would like to comment on that.

Mr. Lehman, and then Mr. Perlman.

MR. LEHMAN: Well, of all of the topics on the table, I think this is the one in which I

personally have the strongest feelings, and also a lot of the people that I work with do in the area of visual arts, and particularly the fine arts.

And that is, I realize this is a little bit of a binding kind of statement, but I don't think we should have registration for those categories of works at all. Indeed, most of the rest of the world doesn't, and even in our own system we have -- in our own country, we have a two-tiered system between the way of foreigners are treated and Americans.

And the reason I think that registration, if there is a value to it at all in those kinds of formalities, that are not necessarily found in the rest of the world, not required, in fact specifically prohibited by the Berne convention. I think to the extent there is a value, the relationship of registrations, historically the deposit requirement in the Library of Congress, and the fact that it is something more appropriate to works that are, you know, produced in multiple copies, many, many, many copies, like, you know, books, periodicals, and so forth,

of which, for example, it is, you know, very appropriate for the Library of Congress to have a deposit.

But when you are dealing with a painting, for example, or let's say a fine art print, for which there are, you know, 20 signed copies, at that point I think registration and the deposit requirement really aren't appropriate. However, copyright protection is still appropriate, including the right to prevent unauthorized reproduction. Using that example, the 20 authorized copies of print, obviously, the value very much depends on the small number. The single painting especially. If somebody can reproduce it, make unauthorized copies, that obviously increases the value.

But I don't think for works of visual art and works of fine art, registration is needed at all. Now, I realize that would be a very big leap legislatively. However, in this context, where you are talking about a very abbreviated procedure for small claims, then it seems to me to be a very good tradeoff to not have to have the registration requirement, and you get a lot

of people who would be more inclined to use the system, a lot of rights holders. And you would also, by the way, reduce the burden and backlog of the Copyright Office, which is having a very difficult time right now keeping up with the large number of registrations that it has.

In fact, recently I called the Office about submitting comments in one of your studies that you are doing, and there's a deadline. And the procedures called for online submission. And I called up, well, what if you want to submit the comments, and you can't do it on line. And I was told by the Copyright Office, well, here's the fax number, but don't send it in the mail since our mail room has a six-week backlog. Well, if that's the problem with the Copyright Office and registration system, then I think we might work out simply taking actions to reduce the number of items and number of types of works that might be registered.

MS. CHARLESWORTH: Mr. Perlman?

MR. PERLMAN: I am going to assume that registration is here to stay, although I sometimes wish it weren't. I also see -- there

is a need to be able to prove to a defendant, to the trier, to the world, that the claimant is indeed the owner of the copyright. So how you cut that Gordian Knot, is to do what some of the federal circuits currently do, which is to accept as the equivalent of a registration, proof of the filing of a petition for registration. And that seems, to me, to be a reasonable compromise.

MS. CHARLESWORTH: The question on that -- is the assumption that you would have your registration in hand before a judgment was entered under that scenario? So, in other words, earlier talking about there's a split of authority on this in the circuits, the rule you are talking about is you can initiate a case based on a completed application, but before the case concludes, you would need to have a certificate?

MR. PERLMAN: No. You would need to have an application and proof that it had been filed.

MS. CHARLESWORTH: So I guess the question then arises, what if for some reason the registration was rejected?

MR. PERLMAN: That is a good question, one

for which I don't have a happy answer.

I think, ultimately, I would hope that the procedure for small claims court would have moved fast enough that perhaps it would have outstripped the processing of the application. On the other hand, despite mailroom backlogs, the processing of the overwhelming majority of applications at the Copyright Office are done -- is done online and seems to be moving rather rapidly, so that perhaps the question would be academic.

MS. CHARLESWORTH: I mean, just so people know, I think the current statistic is about four months for online registrations without any complicating factors.

Ms. Wolff?

MS. WOLFF: I know that in thinking about how this process would work, ideally registration has -- we can spend a whole day on how to work on registration. So let's assume that registration has validity and you need it before a claim is brought and it helps to establish ownership. But perhaps a way of looking at this to encourage use of this process, if you had an application that

was suited for the online process, and it was earmarked for this small claims or expedited procedure, that they could be processed in an expedited time without -- within a week or two, maybe a little more than your true expedited, but without the burden of the extra fee.

And so that the process could run smoothly and you would not have the risk that you would go through this whole procedure, and then have an invalidated copyright. And you would serve two functions, incentivizing people to register, you incentivize use of the system, and you could have a resolution on whether the work was actually subject to copyright or not, you know, before people expended a lot of energy even on doing the small claim.

MS. CHARLESWORTH: Mr. Osterreicher?

MR. OSTERREICHER: Well, I know that in a number of the meetings that we have had, that it has been noted that photographers are probably the worst at registering their works. And I would extend that to say that news photographers are probably the worst of all the photographers just because the nature of their business in

terms of they barely have time to bill in terms of operating the small business.

I, too, recognize the fact that the registration is, you know, barring an act of God, is going to be here to stay, and we have to work within that system. The question that you posed before is, what happens if you have made the application, and for whatever reason it turns out that you are denied the registration.

I think that that might be grounds for a motion for reconsideration or grounds for an appeal of some sort. But I don't think for the most part that it is likely that somebody -- at least from our members that would bring this claim, would do it if they didn't own the work.

MR. LEHMAN: Can I respond?

MS. CHARLESWORTH: Yes, and then Ms. Shaftel.

MR. LEHMAN: There seems to be a part of some of my colleagues that have the view that it is unthinkable registration be done quickly. You know, I have been around, as I mentioned, four decades. I was counsel to the House Committee for nine years. I don't think that it is

unthinkable at all. I have seen enormous changes in the copyright law during that period of time, particularly in the context of the sort of quid pro quo that we are talking about here.

Keep in mind, I think really the reason we are here is ultimately because of the online problems and the pressure on things like orphan works issue, pressure from trying to balance off the interests of rights holders with the concerns of users in the modern world. So we are talking about creating a less onerous system for everybody.

And it seems to me, if you are going to create a less onerous system, one way to make it less onerous, by which in return for substantially reducing maybe the potential damage award, et cetera, is to think of not requiring registration.

MS. CHARLESWORTH: Ms. Shaftel?

MS. SHAFTEL: We realize that this study about how an alternate dispute resolution would work, the purpose is not to reinvent copyright registration in the United States or to revisit that.

So we feel that work should be registered. According to what the law says now, working within our existing system, that the works do need to be registered before this process begins, but that the rights holder can't start the process and file a claim at the time that they file for registration application. They don't have to wait until they get their certificate.

And when we surveyed rights holders, we asked why you don't register your work. That's a whole other conversation. And this is mostly photographers and visual artists. It was kind of equally split in three parts. One, I know I should, but I don't get around to it. Really, okay. Two, I don't know how. Three, it costs too much money. And within that was the presumption that they needed to pay an attorney to register their work, which is why they thought it cost too much money.

So having said that, when going through the survey when we proposed this alternate copyright court, and that the work -- that you would have to register your work before you use the alternate copyright court, we asked rights

holders, would you be more likely to register your work with the US Copyright Office if the court system was established. And 65 percent said yes, 29 percent said maybe, and only 5 percent said no.

So that was a big surprise to us because we expected a big "No, I don't want to," you know. "I don't have to, my work is automatically protected the moment I create it." It seems that if people think that they can get a fair shot at legal recourse, that they will play along.

MS. CHARLESWORTH: Mr. Rosenthal?

MR. ROSENTHAL: The main reason that people register certainly within a certain amount of time after publication is to get attorneys' fees and statutory damages. Obviously, that is not as important here.

It would be nice, I hear you on the issue of nonregistration, but I think of all the people who used tell me at the Library of Congress, what a great deal we have. We get those two deposits, and one goes to the library, the biggest library in the world without -- not paying for anything. I am not saying that's a reason to do away with

registration. But just as a general matter, the uncertainty of group registration really should be addressed in one way or another anyway, no matter how we go down this road.

The idea that group registration, especially of unpublished music or photographs, that one now doesn't quite know whether they are getting protection for the single works or as a compilation. It is very troubling.

So I am not sure of how we resolve this issue without also resolving that issue, and if we are doing this to help copyright owners who need to save money and don't want to register every work, I think we need some kind of resolution of that issue, whether it is legislatively, maybe that's the only way to do it. But that seems to be an overhanging problem with this whole issue.

MS. CHARLESWORTH: Mr. Perlman?

MR. PERLMAN: To a great extent with photographers, there is the potential to render this whole discussion moot. For a couple of years we have been having discussions with the Copyright Office to implement technology in which

an API would be used so that when the photographer takes the image and then processes through with his work flow, can just by push of a button be sent directly to the Copyright Office as an online registration.

We can -- with a little bit of assist -- but if we can move that forward, that could render this question academic, and it could at the same time the images could be sent to a work registry rendering a whole separate conversation somewhat academic.

MS. CHARLESWORTH: Any further thoughts on registration?

Okay. Moving on to filing fee. We have had some discussion of that. The comments on this ranged from I think very modest fees to somewhat more substantial fees. Some people saw the filing fee as a deterrent to frivolous suits. Thoughts and comments on what's the appropriate filing fee and the rationale for it.

Ms. Wolff?

MS. WOLFF: Well, I think there has to be some relationship between the damages being sought and the fee. So, for example, I think

federal courts, a few hundred dollars, and there's some licenses that are less than that. So it makes no sense off the bat.

Maybe depending on what the maximum amount is in the small claims court, that, obviously, you can choose whatever amount you would want even within that maximum, maybe there could be a sliding scale, so that someone who literally wants to be paid their $100 to $200 fee that they should be getting per use would have some kind of recourse and procedure, versus someone -- if it was something like the 25 to 30,000, would pay a little more.

MS. CHARLESWORTH: So a sliding scale approach is what you are suggesting?

MS. WOLFF: Yes.

MS. CHARLESWORTH: Mr. Osterreicher?

MR. OSTERREICHER: Yes. We agree. We proposed the same thing, that I guess the number has been put at 350. And, again, determining what level of the jurisdiction is going to be added in terms of the court, we would think that maybe $100 for anything below 10,000, sliding up to 350 for anything, if, say, 25,000 might be the

limit on this court.

So we certainly would agree that depending on the nature of the infringement and the value there, that the fee should be set accordingly.

MS. CHARLESWORTH: Ms. Fertig?

MS. FERTIG: Yes. Thank you again. I just want to introduce myself. I'm Rachel Fertig with the Association of American Publishers. Thank you for having us on this panel. And before I go into exactly our views on the filing fee, which we think are important, I just want to express that we don't yet support any specific alternative dispute or court system for resolving small claims, but we are here to provide our views, if the Copyright Office does find that it is feasible and should be created, that these views are provided in that context.

And we think the filing fee is very important for staving off some of the meritless suits that would potentially be brought if this is a very streamlined time and cost efficient and easier process for bringing these small claims.

And while we think that the proposals by PACA for having a sliding scale approach makes

sense, we also would suggest as an alternative to have a filing fee based on the number of claims that are bought as opposed to the amount of the claim, so that people who may file 15 suits would have to take into account a filing fee for each one of those claims. And so that was one of the suggestions that we made in our filing. And I just reiterate that for consideration.

MS. CHARLESWORTH: I'm sorry, did you say the amount that you -- I think you had an amount in your comments.

MS. FERTIG: We did. We suggested, because we viewed the TTAB as a possible model for creating the forum. We went off of their suggested $300 filing fee.

But I think that our members do believe that having a fee, if it is not $300, that having a fee associated with each additional claim may be more important than the actual overall fee that's charged.

MS. CHARLESWORTH: Further thoughts on filing fees?

MR. LEICHTMAN: Just quickly.

I think most of the clients of Voluntary

Lawyers for the Arts see $300 as a lot. So I think there have been some suggestions that something more modest like under $100, particularly if the artist is indigent and can demonstrate that, might be something that might be, you know, more doable. Because I think the filing fee for federal court now is $300. So it certainly should be under that. I think we would support some kind of sliding scale, but maybe there ought to be the ability to apply for a waiver if you are an indigent individual.

MS. CHARLESWORTH: Yes?

MS. SHAFTEL: We came up with $150 fee at random only because it is half of what the federal court fee is, and we thought that amount would be enough to deter frivolous claims. However, we came up with the idea that the prevailing plaintiff should recover the filing fee and court costs from the defendant.

So it might seem a lot at the front end, but once they prevail, the defendant would then have to reimburse that for that filing fee.

MS. CHARLESWORTH: Okay. And that's something I think that -- that's another very

important discussion to have in terms of recovery of attorneys' fees and costs, but we will be getting to that.

Okay. Anything else on filing fees?

All right. Initiation of proceeding. Here, I think one of the questions that -- well, I think there are two sort of related questions that came out in the comments. And one is whether there should be a prima facie showing before a defendant appears, is required to appear. And, also, a related question, how do you notify the defendant of the action and when.

So I am curious to hear people's further thoughts on what's required to file a claim, is there a showing that you have to make other than just filling out a quick form, and, if so, what should that showing be.

Okay. Yes. I know the hour is growing late. I appreciate your patience.

MS. Willmer: Lisa Willmer.

I heard a lot concerns around the table about frivolous claims being filed. And I think one of the ways we might think about addressing that is to really require the plaintiff, who's

going to file the claim electronically, I hope, I just want to put that plug in there, but to really require them to prove up their case from the outset, subject only to information that might be in the hands of the defendant that they still need. But, basically, to provide proof of ownership, preliminary proof of infringement, and then depending on how we're going to go on damages, some sort of statement of the damages that would be claimed.

MS. CHARLESWORTH: Yes, Ms. Fertig?

MS. FERTIG: Yes. AAP does have that same feeling, that having a prima facie burden would be a substantial way of making sure that the cases that are brought do have merit. And so I think that the three elements that Ms. Willmer just laid out, having the ownership, and a basic statement of the proof of infringement, and damages that they will be asking for would be what we would look for in showing the prima facie burden. I think that any claim that would properly be in the small claims court should be able to make that showing without it being too much of a burden because these should be simple

claims, ideally, so we don't think that this puts too onerous a task on the claimant that's bringing this.

MS. CHARLESWORTH: Any disagreement with that?

So to initiate a claim, you would need to make an initial showing. Is that something that we all -- does that address some of the issues relating to frivolous claims that were raised earlier?

Yes, Mr. Perlman?

MR. PERLMAN: I am not sure why the small claims context makes a huge difference here. In most cases what you need to do is to be able to allege facts that if believed and proven would support the claim being made.

And if there were concerns, you could have a rule under which before the case proceeded, the adjudicator would review the documents and see if there were, in effect, for this court a standing motion to dismiss should the claim go forward.

MS. CHARLESWORTH: Seems like there's a lot of or fair amount of agreement on this point. So I am going to -- unless someone has -- Mr.

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DiMona?

MR. DIMONA: I am thinking that as Victor was just saying, you file your basic description of what you think that the defendant did, and I would think you would have to state the claim amount up front. At some point the defendant needs to be notified, otherwise you can have a tough time getting some money out of him.

But if you notify him, I think he's going to then have a decision to make whether he wants to voluntarily opt into this. And I imagine he will have the option of saying, no, I don't want to do this, or default.

I don't know whether you want to make the plaintiff submit their entire documentation of their claim before you know whether the guy's going to show up. Because then you have the trier of fact just receiving like tens of thousands of files and only half of them turn into cases. It is just a thought I had.

There could be like some process where like I file a claim, I state it is $3,500, and this is what I think he did. And you notify him, and then he decides whether he's going to opt in or

not. And once he does, they set a schedule for, you know, you submit your documents, you submit your documents, I will render a verdict on paper. Unless there's some discovery need that is a burning desire to find out something, I don't know, which I imagine there would be some limited discovery.

MS. CHARLESWORTH: So I think the distinction you are drawing is between, say, describing or basically a short complaint maybe, you know, where you allege the elements, versus actually submitting documentary evidence at the outset. Is that --

MR. DiMONA: That's basically the issue, I think.

MS. CHARLESWORTH: Okay. So, Mr. Perlman, you were suggesting I think you were on the side of a complaint, more of a complaint style or short form. I am trying to get a feel for where we are on this and whether you think it makes sense for people to put their cases up front, pretty much, or just describe the case.

MR. PERLMAN: I was thinking of a much more simplified general approach to the complaint.

Sort of along the lines that I think Joe was just talking about.

MS. CHARLESWORTH: What about notifying the defendant? Any thoughts on that or experience from small claims experiences, certified mail? Mail and -- what do you do on the door? -- nail and mail.

Mr. Rosenthal?

MR. ROSENTHAL: My experience, at least with the District of Columbia, the court notifies the defendant. You file with the court, they send it out. So an officer of the court does that on your behalf. Then it is all done uniformly, everyone is done in the same way, if they don't respond and they can't find them, well, that's the case. If you can't find them, you might get a default judgment, or you don't show up or whatever as a plaintiff. That's my experience, and maybe that's something that should be thought about instead of having the plaintiff go through the process of trying to serve them.

MS. CHARLESWORTH: I think there are some interesting issues here, because if we have a specialized tribunal and you are trying to engage

a defendant who lives in Hawaii, but you are in Kansas, how that would work, and whether a mail service, I mean, would work, or what kind of due process, I guess, safeguards would you have in place.

MR. DIMONA: I have an idea. Serve their DMCA designated agent, which they have as an addressee. And I think the Copyright Office web site if they are a corporation. That would be satisfactory to get their attention, if they are a corporation.

MS. CHARLESWORTH: I think this is something that, obviously, doesn't have to be worked out today, but if further thoughts come to mind and you have -- there's another opportunity to comment. I think it is a logistical detail that could become somewhat significant in the system if it, again, is a centralized tribunal.

Most people seem to think that this should all be conducted electronically and by remote conference. I think there was almost unanimity on that point.

Did anyone disagree with the idea that personal appearance would not necessarily be

required to litigate a claim in this court? Yes?

MR. LEICHTMAN: Our view, Volunteer Lawyers for the Arts, is that while it shouldn't be required, it should be available. So if parties wanted to do that, it should be available to them, but that they should also be able to participate remotely.

MS. CHARLESWORTH: Any other thoughts on that question? We are moving very quickly.

How about witnesses? I mean, first of all, should third party witnesses be allowed into this procedure, say by remote conference?

Yes, Mr. Badavas?

MR. BADAVAS: For better or worse, I spent a good portion of my early years litigating in small claims court in New York because corporations aren't allowed to appear pro se. So it was one of the ways we got, quote, training on our feet.

And in New York City small claims court, you actually can request a subpoena from the presiding judge. It will be served by the marshal, and you can compel a third party witness to show up. And very rarely was it needed or

justified. And clearly there was a fairly significant vetting process by the judge. At the time it was only $3,600, now it is under $5,000 for such a claim.

But there were instances, because the contracts at issue there sometimes were oral, and occasionally there was a person that was needed to verify that the words were spoken. You know, here there are certain -- there's a different set of rules around copyrights, but I guess I can imagine in some instances you might need a witness, and maybe it should be available upon special request.

MS. CHARLESWORTH: Do people agree with the notion that perhaps the court would have some discretion about whether witnesses or even expert witnesses would be allowed? Or should they just be excluded?

Mr. Lehman?

MR. LEHMAN: I think this sort of thing, by the way, you know, the circumstances under which witnesses could appear like we just heard in New York small claims court, would be a perfect thing as I was discussing before, the suggestion about

authority of the Copyright Office, for the Copyright Office to set up rules for that sort of a situation. If you are going to use this procedure, you get one witness or under such and such circumstances, and then you could, you know, precede that, and during the course of that rule making you could hear lots of input from people and so on and so forth, and then make that determination.

Obviously, the whole idea is you are not going to repeat the full scale trial in a US district court, but there's probably something, you know, less than that that's still more than just not having any kind of, you know, testimony by individuals.

MS. CHARLESWORTH: Mr. Badavas and Ms. Shaftel, in either order.

MS. SHAFTEL: Visual creators would absolutely want to have witnesses. A lot of visual artists still work on oral agreements, despite our best efforts. They are not written agreements, there's e-mails back and forth, and they're discussing their jobs with their friends and colleagues and family. So in a lot of

instances, they would need a witness to validate what the job was, what the agreement was.

Certainly, if there's a dispute about date of creation or independent creation, there would be a colleague or a coworker, or a family member who could witness when they saw that work created. And certainly an expert witness or professional colleague to validate or substantiate what the licensing fee would be or other customary fee is in the business.

MS. CHARLESWORTH: So you agree with sometimes witnesses might be important to the proceedings?

MS. SHAFTEL: Yes.

MS. CHARLESWORTH: Okay.

MR. BADAVAS: I would be remiss in not adding that the other interesting part of procedure in New York is you don't have discovery of your -- of the parties. You have to show up with your own documents, the other side shows up with their own document, and they tell their own story, which is interesting. Because you do have the ability to compel third parties to come out, but the way they streamlined the process is by

not allowing any discovery.

So you have to register your own copyright, you have to show how it was used as best you can. The other side shows up, the damages are low, the stakes aren't high. But it is a very streamlined process from the perspective of the two parties, which is somewhat different from what we're used to in federal court.

MS. CHARLESWORTH: Yes?

MR. OSTERREICHER: I am just wondering how it would deal, let's just say a photograph, that you are -- the defense was there's a licensing agreement, but yet they are the ones that had that agreement. How would you expect that to be produced? I mean, if there was no discovery, I mean, one might assume it obviously would be in their interest to show it.

MR. BADAVAS: I mean, these are usually contract cases in New York, right, and so there's a contract that's the equivalent of a license. And the defendant says, "I had a contract. Here it is." If you don't have it, you've streamlined the process, the stakes aren't high. They haven't met their evidentiary burden. You

testify, "I entered into it. I lost it because of Sandy. It was in my basement. And I was flooded because I lived down in Battery Park."

I mean, it is -- I mentioned it before, sort of as a policy matter, it is the trade off between how much are you really going to require the court to look at to adjudicate what in some people's eyes might be relatively low numbers or higher numbers to get up there.

I am not -- it may not be appropriate to not allow discovery if you have a $60,000 case. It may be absolutely appropriate to say there's no discovery if it is a $5,000 case.

MS. CHARLESWORTH: Ms. Wolff?

MS. WOLFF: I think where you would need some of the limited discovery is if when you are -- often when you are the visual artist or someone who's work has been infringed online, you might see the one use online. But I think it would be appropriate when the use of someone's work is only within the knowledge of the defendant, they couldn't resolve the case unless you really did know what those uses were. And I think it would be fair to have -- particularly if

the amount was limited, that you would not be -- you would either have to have representation that that was the only use, or that the limited amount you agreed on would only apply to that use.

I think when all the knowledge of use of someone else's work is with the other party, there should be some requirement that they have to disclose what the uses are, if you are going to try to resolve it in a way that is going to eliminate a lot of discovery or at least narrow your damages.

MS. CHARLESWORTH: This is a good transition to the next set of questions which have to do with discovery and whether it should be allowed, and, if so, what limitations there might be. So I think we just heard from you.

I think a number of the comments basically proposed limited discovery. Often the suggestion was written discovery, no depositions. So I am interested in hearing people's views on that based on their experience and whether that's a feasible goal, and, if so, outline what recommendation you might have about what would be appropriate forms of discovery and what time

frame it should take place in.

Yes, Mr. Leichtman?

MR. LEICHTMAN: So when we look at this from a due process standpoint, we think that one of the minimal due process elements one of these proceedings is the right to cross examine.

So our view is that at a minimum, the parties ought to have to produce to the other side documents that they intend to use at the hearing affirmatively, whether it is on a defense or on their affirmative claims. So I think in the arbitration parlance, those are called reliance documents. So any document that you are going to put into evidence you need to disclose, and that allows the other side to at least have that information in advance so that they can prepare and conduct cross examination.

To the extent that additional discovery is necessary, I think that ought to be something within the discretion in the context of a particular case of the judge. We don't think except in maybe very rare circumstances that depositions would be appropriate.

But certainly some limited amount of

document requests, interrogatories, requests for admissions, could be made part of the procedure. You might start with a very low number that would be permitted as of right, and then give the judges some discretion to increase that if a particular case warranted it.

MS. CHARLESWORTH: And do you have a view on whether the court should have subpoena power?

MR. LEICHTMAN: I think it could have some limited subpoena power. Again, I think it would -- I don't necessarily know that it would need to be as of right, but it could be within discretion of the court, you know, upon a certain threshold showing of necessity.

MS. CHARLESWORTH: Other thoughts on discovery?

Mr. DiMona?

MR. DIMONA: I am almost hearing a tale of two cities here, because it sounds like there's one type of proceeding, which is truly a pro se proceeding where the person's going to go in, bring their paperwork, get the thing down on the papers and accept whatever small amount of money they are willing to abide by, bearing no

discovery.

And then there's another kind of proceeding where the parties are represented by counsel, there's going to be a judge, possibly going to be an appeal, they might want to serve some document requests. Those are two different kinds of proceedings in my mind because each one of them has a whole bunch of different considerations, and maybe both could be okay.

Maybe the plaintiff could say, "I opt for a pro se, no discovery, one-day hearing. I will take whatever he gives me" outcome, and the defendant knows there's no discovery, they will come in like Christos was saying, they'll bring whatever license they found in their flooded basement and say "I had it." And maybe there's another where you are claiming a little bit more, so you say, "Well, I want the right to have that limited discovery, and I am willing to cover the cost of appeal once I win." I don't know.

MR. BADAVAS: There's a corollary issue, will a defendant show up if there's more discovery allowed, because that's generally where we experience the costs, if you are in the middle

of one of these -- the agency I represent ends up in the middle of dispute between two copyright owners all the time, and the biggest line item in our, quote, litigation budget is dealing with third party subpoenas.

So it is kind of that I could see as being a big deterrent to voluntary participation in a small claims court.

MS. CHARLESWORTH: Mr. Rosenthal and Ms. Fertig.

MR. ROSENTHAL: I think one of the ways the small claims court I worked in tried to solve this problem was to make the instructions up front as clean and clear as possible. The idea that these litigants understand what discovery is and what is the normal process of the court is just wrong to think -- to assume anything, that they have any knowledge.

So if we are going to do this in one way or another, probably hopefully without music, whatever. If we are going to do this, instructing them that, okay, if you are going to do a complaint, here's what the complaint is about. If you need documents from the other

side, you have to list them. If there's questions that have to be asked of the other side, same thing. And in an answer, once the complaint is given to the defendant, they, too, have instructions, as to how they are supposed to respond.

That, to me, is probably what you really need to focus on to make sure we have due process and everybody is under the same rules and everybody knows how to -- otherwise, they are going to get to court and they're going to say, "Oh, I didn't know that, or I didn't know that, or I left it at home," you know.

MS. CHARLESWORTH: Just one comment in response. In looking through some of the state small claims procedures, a lot of states have very evolved consumer information for lay people on how to utilize the system. Some of them do allow experts, you know.

So I think there's some fairly good models out there, along the lines that you are suggesting, at least at the state court small claims level.

MS. FERTIG: And I think, actually, in

PACA's comment they brought up that a guidance document would be a good idea. And I think that the AAP would also support that as well because we think that would also prevent frivolous claims or just claims that really, you know, if they had known the information that was necessary to bring a proper case, and they could read through the guidance document, and know that that wasn't something they actually were able to bring, those claims would not end up there.

But back to the discovery issues, we took again the TTAB as our model and specifically within that a new accelerated case resolution process, which they're beginning to develop more. And as it stands there right now, the parties get to set the terms of their limited discovery and then allow -- they can agree to allow the adjudicator to settle all of the material issues. And so we think that instead of potentially allowing the parties to set the limited parameters of their discovery, because there would be pro se representatives in these proceedings, that using the ACR framework, which is usually very limited, such as, you know, 20

interrogatories, 10 requests for admission, 10 document requests, setting those out in a very formal guidance document, and making -- not letting it be up to the parties to set that framework, but instead setting it out beforehand, that that would strike the balance between allowing this to be an efficient process for a pro se person to be able to use effectively without needing the experience of an attorney for discovery, but would also be a short and streamlined process that can usually wrap up discovery in about 90 days.

MS. CHARLESWORTH: Ms. Willmer and then Mr. Lehman.

MS. Willmer: One idea, I think that the point that Mr. DiMona raised about two different visions of this, one way we might be able to harmonize that is to start with the presumption that it is submissions on the papers. And you set out that very simple very streamlined process, and then allow the -- whoever is going to be the decision maker, the discretion to request more information from either party if they feel it is necessary to adjudicate the

matter in a more full or comprehensive way.

So it would be starting out very narrow with the discretion to expand the information that they would require to make that decision.

MR. LEHMAN: I think all of this is very much linked towards -- to the nature of the tribunal who is going to constitute the adjudicator. Because if you have one model -- would be to have, you know, a situation where you need to assist the court, for example, the chief judge might appoint a special master or something like that in copyright who would hear these cases.

When you look at a lot of these fine points of procedure, and maybe they are not so fine, it's the sort of thing that in federal judicial context might normally be decided by the judicial conference and embodied in the rules of civil procedure, et cetera.

If you had that kind of situation where you had special masters, you know, I'm not sure that the special masters would be altogether the people would who do that. That's where, again, the Copyright Office might perform that function.

If it was an extension of the activities of the Copyright Royalty Board, for example, in a different function for that group of people or similar group of ALJs, for example, in the Copyright Office, then they could also perform that rule making guidelines function, et cetera, which could be adjusted, sort of like federal judges write the rules.

I think this would go a little further and be a little more substantive, which would be authorized by statute, of course, then the discretion of the federal judges. So it is in the federal rules.

MS. CHARLESWORTH: Mr. Perlman?

MR. PERLMAN: I just wanted to mention that the reason I have been kind of uncharacteristically quiet on the subject of the procedure and more specific questions is that having espoused the use of state small claims courts, all of these issues are resolved by the specific rules of each local jurisdiction. I didn't want you to think I was bored.

MS. CHARLESWORTH: We always count on you to speak up when you have something to say.

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This issue, motion practice, and this ties into discovery in a sense -- I saw several suggestions that there should not be motion practice except to perhaps resolve discovery disputes.

Do people disagree with having motion practice in the small claims copyright court? Is there some sort of limited motion practice that should be allowed? How do you resolve discovery disputes? Any thoughts on that?

Ms. Wolff?

MS. WOLFF: Depending again on how we figure out who the decider is, that if you have something, and maybe it is similar to what happens if you pick a mediator, is that if there is an issue that comes up, you can write a simple letter and maybe how we pick the decider can resolve something. Because I think once you get into formal motions and paper and affidavits and declarations, you've sort of blown up this little budget we have here. And if it is something that's going to be that complicated, maybe it doesn't really belong in small claims.

But I think for the type of issues here

where you are having blatant rip offs of a work, for example, work of visual artists, I don't see lots of relevant motions that are going to come up other than those just trying to detract from the ability to bring a claim.

MS. CHARLESWORTH: Further thoughts?

Okay. Moving on to the record of proceedings. Many of the comments suggested that there should be a written decision, even if it is abbreviated. Although many people suggested that the decisions be nonprecedential, at the same time many thought that the decisions should be public. I was curious about that, and sort of not necessarily the discrepancy, but the reasoning behind that. If they are nonprecedential, would it be important for third parties to be able to access them?

Ms. Willmer?

MS. Willmer: I can speak to that only because we're currently experiencing issues where the public perception is that we don't take as aggressive of enforcement action, and, therefore, infringers are free to ignore our settlement demands. And having a public record of the fact

that we are actively engaged in enforcing copyrights would be very important to us.

MS. CHARLESWORTH: Mr. Perlman?

MR. PERLMAN: The other edge of that sword is that by definition we are talking about small claims. And there's a potential for a depressing effect on the valuation of, in our case, images, in other courts and in the minds of the public just because of the awards that in this case by definition are going to be rather small.

MS. CHARLESWORTH: One question that came to mind is does anyone think it might have a negative impact on defendant's willingness to participate if the decisions were publically available? Any thoughts on that? That wasn't something that was necessarily raised in the comments.

Ms. Wolff?

MS. WOLFF: When we are talking about incentives, I think it could potentially be a negative incentive if all this was public. Because one way of perhaps encouraging defendants to participate would be that you don't have the public record. Because I know that's one

advantage of why people prefer arbitration.

So if someone's infringed a work and there's a way to resolve it through this copyright small claims, that may be part of the carrot that gets them to do this instead of just blowing you off and not responding at all and saying, "Go sue us in federal court. We will see if you really have the money."

There's always going to be pros and cons. We may not then have the deterrent effect of letting people know that you are aggressively pursuing copyright, but maybe there's other ways of doing that. By doing it without naming people, we brought 15 different small claims, and we worked with our photographers in recovering money. There may be ways they can solve it both ways.

MS. CHARLESWORTH: Mr. Osterreicher?

MR. OSTERREICHER: I think on the other hand, if you had to participate, it might be incentive to settle, and say let's settle this and the settlement will be private. And you might be able to do that right from the outset.

I think these days just getting somebody to come to the table or be cognizant of the fact

that there's an infringement and we are taking it seriously, I think is an important factor here. And having the framework for doing that, I think is an important start. And I think sometimes as we have seen in any kind of type of litigation, once you get the parties together, you might realize that whereas they weren't talking at all before, they start to talk at the beginning and realize they might be able to settle this in short order without going further in the process.

MS. CHARLESWORTH: Yes. Mr. Leichtman?

MR. LEICHTMAN: I think there will be great public interest if this goes forward, and certainly in understanding in the aggregate what's happening in these proceedings, and what the results are.

So one thing that I have seen when I was here at law school, we had something called the Unemployment Action Center where the law students represented pro bono unemployment insurance claimants. And we had a set of case law that you could go look at at the unemployment insurance office, which were basically summarized on index cards, and then you could look at the decisions.

But the names of the parties were redacted. So you couldn't really know who the particular parties were, but at least you would kind of look and get a sense of what was going on in these -- what was going on in these tribunals, which I think the public would have some interest in.

The one exception, I think, would be if you are in the situation where the defendant doesn't pay the judgment, or if the -- or doesn't abide by an injunction that's issued, or there's an appeal from an injunctive ruling, if that is the way it is structured, you know, you may have to, obviously, have a public document attached to your complaint for nonpayment, or to take your appeal from the injunctive relief. So there ought to be some exceptions. But I think the award should be made public, but the parties names don't necessarily need to be on it.

MS. CHARLESWORTH: Okay. Now the topic we have all been waiting for, frivolous claims. We have had a fair amount of discussion about this, but this is obviously -- the music people are sitting up.

This is, obviously, of concern to users,

significant and justifiable concern. We have heard some thoughts earlier today about how they might be deferred, but I really would like to tease out, to the extent we can, any sort of good thinking about how to make the system workable from the user perspective in terms of weeding out people who have no business filing a claim.

So I don't know who wants to take the lead on this, but we would be interested to hear more about it.

Mr. Rosenthal?

MR. ROSENTHAL: Yes.

My favorite recommendation in the filings of everybody is that we institute a rule 11 against a frivolous claim. I'm not quite sure if you can do that against a nonlawyer, but I don't know what else can really stop it, other than something that's real draconian.

I am also not sure, you know, whether you have to litigate whether it is a frivolous claim or not. Sometimes it takes a while to figure it out, that this person who said that they wrote this song, or this person that really has a beef with their label and they are suing their label

under this process here is really kind of crossing a line.

So I have a problem with the whole idea again of where's that line, and then what are you going to do about it. But if you are going to make a line, if you are going to have some kind of threshold, there's got to be something real that the plaintiff has to, you know, really endure, whether it is some kind of money for the cost to the defendant, you know, whatever that defendant had to do, a loss of time, whatever. Something has to be hanging over them to make sure that they don't engage in frivolous claims.

But it is a serious concern. Every publisher that I talked to, it is the first thing that they really -- it just rose to the top of the level of concerns, that this is going to be opening the door to people who would contact them anyway with frivolous claims, but now there's a process to do it that's easy.

And instead of having to get an attorney, because many times attorneys when they go to attorneys, they will -- nine out of ten attorneys will say, "You don't have a claim." Maybe that

last one will say, "Okay, if you pay me $10,000, I will file it for you." But it is that kind of a fear out there in the music side that makes us really wary of the whole process.

MS. CHARLESWORTH: I think you mentioned maybe shifting of costs and attorneys' fees. Do you think that would go some way to alleviating the concern, or do you think that's --

MR. ROSENTHAL: Somewhat. Any sanction, obviously, would help, if we're going down this road.

Again, you know, we feel like it is such a major problem that we might -- we should be wary about that going down the road, at least for music at this point.

I just don't see the same -- maybe I am wrong. I don't see the same concern on the visual artists, photographer side in terms of frivolous claims that we do in music. But sanctions, really, certainly are an issue.

MS. CHARLESWORTH: Mr. DiMona?

MR. DIMONA: I will add to that.

We did a few things in the context of the compulsory license proceedings. We were getting

lots of individual claims, claims were way, way more money than really they had any entitlement to. We got a filing fee. A filing fee was very important. And for it to be more than just a token amount, I think is a good idea. I don't know whether 300 is probably adequate for something like this. Just something as a deterrent.

We got a situation where if you had to state your claim, if you were the individual, and if you received an award of less than your claim, the trier of fact could sanction you, levy a fine on you for an amount -- so, for example, you asked for $20,000 and you got something very much less, there was a penalty power, a financial penalty.

MS. CHARLESWORTH: What's the context you are speaking of?

MR. DIMONA: I think it's the compulsory license statutes now.

MR. BADAVAS: This is the Audio Home Recording Act proceedings, where individuals were putting in an application for a share of the tariff on --

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MS. CHARLESWORTH: Distribution proceedings? Okay.

MR. BADAVAS: We had repeat claimants who had frivolous claims.

MS. CHARLESWORTH: And so some measures were instituted that you think helped address that situation?

MR. DIMONA: Yes. I do think they did.

There was that, and there was a paper proceeding, mandatory paper proceeding. So they couldn't hold you up for an expensive trial just to extract a settlement from you that you didn't think was fair. That was important.

And another thought I had was perhaps if a certain plaintiff used this small claim thing and demonstrably in a frivolous manner for two or three or four times, perhaps that person would not be allowed to use it again, or something like that. I just throw this out as an idea. I don't know what would rise to the level of abuse of the process that would lead to, you know, you can't use it for the next three years or something like that.

I know there have been frivolous plaintiffs

in courts who have brought cases in state and federal court so without any foundation that some judges have issued rulings against them saying you can never bring a case in federal court again for "X" number of years. This is happening out there. And so I think a few measures like that would go a long way to help right now.

MS. ROWLAND: I was going say, that that was the case with TTAB. There are some notorious people there that have been not really banned, per se, maybe one of them. But one of them was banned unless they got the permission to file more things. And so it required more staff, and, of course, they were not getting permission because their business model was basically to go after trademarks. So that's something that's happened in the TTAB.

MS. FERTIG: Yeah. A couple other good procedures that TTAB also incorporates that may stave off some frivolous claims are requiring verification of good faith filing and of legal merit to whatever submissions are electronically filed. And coupling that with a monetary sanction if it is found that the person shouldn't

have verified that information.

MS. CHARLESWORTH: Can you elaborate a little, when you say verification? You mean basically a declaration under penalty of perjury, is that what you are referring to?

MS. FERTIG: Right. There's that, and then there's also in the discovery context itself, there's also the duty of -- sorry. Duty to cooperate, and that also has another certification that you're not bringing -- you know, asking for anything onerous through discovery, and certifying that anything you do ask for is related to the case, things like that, to make sure that there's no harassing frivolous suits that are also brought. I think the publishers have also thought about filing fees as a very important measure, as I alluded to earlier.

But on the topic of attorneys' fees as a potential mechanism, we don't support, and I know we are going to talk about this later, damages, attorneys' fees or statutory damages, because we agree with many of the photography agencies, that an application could be a prerequisite instead of

actual registration at the time. And we believe that not having statutory damages or attorneys' fees available sort of mitigates that -- makes it easier for us not to have registration required at the time of bringing the claim.

So instead of doing attorneys' fees, we would advocate for a monetary sanction that's based on a percentage of the claimed amount. And that would serve as the equivalent of assessing attorneys' fees against a plaintiff that brings a frivolous claim.

MS. CHARLESWORTH: Ms. Wolff, and then Ms. Shaftel.

MS. WOLFF: I think there is what -- I have had discussions about copyright small claims with various organizations. The issue of frivolous claims does tend to be a concern, particularly with companies. And I think there's really a difference between malicious frivolous claims by bad actors who are going to see this as a business, and those frivolous claims just based because you are going to have plaintiffs without an attorney who will not really understand copyright.

And that's why in our comments we thought if there was really helpful guidelines of what constitutes a claim. Because I know, I mean, so many times people will come to me and they will really think someone took my idea. And they will show me two different pictures, and it's very clear to me that they don't really understand that copyright isn't about the idea of something, you know. The photographer thought you can't -- she is the only one who can do babies against a white background.

You are going to have some people who just don't really understand some basics, and then you are going to have probably some people look at this as a business that they can go into.

So I think there could be deterrence based on preventing someone like that from bringing multiple claims, one entity from bringing claims against maybe by many, many different organizations, or there could be some monetary sanctions. But I think a lot of sort of the claims based on ignorance, you could work on, having some maybe good examples and things like that.

And maybe you even have to go through a checklist. Before you can file something pro se, you have to agree you watched this video, and you read these guidelines or instructions, and you really actually understood a little bit more about what you needed to bring a claim. And that might help, you know, sort of weed out those claims, frivolous claims, that are really based on trying to, you know, figure you can always get a few thousand dollars out of someone by harassing them versus those people who just don't really understand whether they have a copyright claim.

MS. CHARLESWORTH: Ms. Shaftel?

MS. SHAFTEL: We felt that a record of proceedings is necessary in a large part not only to prevent bad actors, but also to make a public record of copyright or frivolous claims or the bad actors, and any phone or video conference should be recorded, and the public should have access to unpublished decisions that are nonprecedential and noncitable.

To speak to what you said, Jay, I have no doubt that the music industry has more than your

fair share of nut cases and frivolous claims. No question.

An extraordinary situation of what I called extortion in infringement happened a number of years ago. And there are people who concoct a business scheme to come up with some way to make money out of ripping off other people's copyrighted work and selling it in some way.

And even if it's a very small business, and we all know the deal of the unauthorized rock concert T-shirts. But believe it or not, there are attorneys who are bad actors in this, too. A number of years ago, we were notified by two members, there was a woman in Florida who owned a store that was children's clothing. She sold children's clothing, and the name of her store was Sweet Pea. She had a friend or relative who was a real estate attorney who came up with this idea that they could shakedown illustrators around the country who had made illustrations of sweet peas including the words "sweet pea."

So he did a Google search and found 21 hapless souls on the Internet who had illustration web sites or were selling through

Zazzle or what have you, illustrations -- a lot of it was on children's clothing and related children's products of an illustration of a peapod and words "sweet pea." And he sent them a cease and desist and demand letter, claiming that they had to pay him $6,000 to go away.

And, of course, these artists were all terrified. Two of them happened to be Guild members, which is how we heard about it, and we managed to organize them to find everybody else, and we were able to stop this guy. I think he should have been disbarred. But on his client's, the plaintiff's, web site, she also had a lot of infringing photographs and some infringing of music, which I took care of.

But, I mean, this happens. This is craziness that happens. To think of the time involved for him and none of the artists that he sent the shakedown letters to were in the state of Florida where he was. He made sure that these were people who were out of state, who looked at the $6,000 and said, "My, God. It is going to cost me at least this much to hire an attorney to deal with this guy." And one artist actually did

pay him before we contacted them.

MS. CHARLESWORTH: Mr. Rosenthal?

MR. ROSENTHAL: I want to add something to what Nancy said.

We certainly do have to be careful about willful frivolous suits and nonwillful. I am thinking in terms of we will have people coming forward and filing what would be a contract case, thinking that this is the place to do it.

And, you know, the defendant might say, "Come on. What are you doing sitting here filing a contract case against me. It's a copyright court." It might be a legitimate mistake. So I do think if we are going to go down the road of dealing with filing fees or sanctions or whatever, that there are different levels that we think about in terms of that -- those abuses are one thing, and an innocent mistake abuse is something else.

MS. CHARLESWORTH: Does anyone think that there's any sort of screening procedure, or intake procedure, at the tribunal that might be helpful in screening out things that are truly not copyright infringement claims? I saw some

nodding heads.

MS. WOLFF: I mean, all those activities would be great, but I guess the idea is I don't know who the trier would be or if the Copyright Office is involved. And I know how busy everyone is there. Hate to make suggestions that would put too much burden on --

MS. CHARLESWORTH: Slow up the process.

MS. WOLFF: Slow up the process. But, I mean, if there was some just real blatant easy ones that could be kicked out easily, that would be terrific.

MS. CHARLESWORTH: Mr. Leichtman?

MR. LEICHTMAN: Again, I think we are going back to the discussion we had earlier about what claims would be eligible and what claims would not. So, for example, if you had contract claims and we determined that ownership disputes or termination rights cases were not part of that, then I would think that part of the -- part of the individual judges mandate would be if it determines that this tribunal does not have jurisdiction, it would -- after reviewing the case filed, decline jurisdiction and say this is

not within the scope of our mandate. So I think it would be part of, you know, what we're doing anyway.

MS. CHARLESWORTH: So intrinsic to the process.

MR. LEICHTMAN: Yes.

MS. CHARLESWORTH: Mr. Rosenthal?

MR. ROSENTHAL: Last point is, I think this gets back to the instructions as well. You know, if you have instructions that are clear, if you start talking about frivolous claims, it is in bold, or something that really kind of scares somebody a little bit who is about to file a claim that they have to be careful, that may solve a lot of this problem. So, again, that would take out if somebody is mistaken, if it is very clearly in the materials. I think the materials are very important. When you are walking into this kind of a court, to get the right instructions, to get the right wording. And, you know, that may be where a lot of these problems can be solved.

MS. CHARLESWORTH: Okay. Anything further on frivolous claims?

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Okay. Last, but not least, this was to be panel 4. We didn't get a huge amount of commentary on this subject, which is litigation alternatives.

We had suggested that some people might think an arbitration system would work in this context. Some might favor mediation, a mediation service. Would people would like to comment on that. I think a lot of the comments on arbitration were fairly negative, although not, I don't think, universally so.

On mediation, some people I think were a little more divided, to the extent they commented on it, maybe some saw it as an adjunct to the court process. So I welcome your thoughts on that before we leave for the day, as well as the question of how to and whether we should, by the time someone comes into this process, be encouraging settlement.

I will open the floor.

Mr. Lehman?

MR. LEHMAN: Well, it seems like there is some degree of cost problem, because a professional arbitrator or mediator, et cetera,

somebody has to pay. I am not a federal court litigator so I am not exactly sure how it works, but, of course, it is not uncommon in federal litigation for people to have, you know, some kind of mediation in some part of the process. But I think when they do that, and they hire an expert mediator, basically the parties have to pay the cost of that. And that's quite a significant cost.

So if you are really talking about a small -- an inexpensive small claims dispute resolution procedure, that's kind of a big problem. I think the problem of cost hangs over this whole thing because the more complicated that you make the adjudicatory process, it is in all those questions that we talked about, either if it is in the federal courts, either the federal administrative office, I guess, of US courts or whatever picks it up, or if it is in the Copyright Office, the Copyright Office picks it up. Fees don't cover it, and you have taxpayer issues, and we have big problems with the Congress not giving you enough money.

So, you know, costs cannot be overlooked in

this. And I think to the extent that the cost for the individual litigants have to be minimal, that's the whole point. And so any kind of procedure which places costs on them, seems to me mediation, arbitration might do that, unless it is extremely informal, would be a problem.

MS. CHARLESWORTH: Further thoughts?

Should the parties be required to trade settlement offers before the case moves forward? Do people have views on that? That sometimes is a process today in federal court, some judges require a written settlement offer and response. Would that be a good thing? Would it slow things down? Would it be fruitful?

Ms. Shaftel?

MS. SHAFTEL: The creators that responded to our survey, two-thirds of them said that when they discovered infringement, they tried to contact or they did contact the infringer themselves directly. And another 20 percent of them said they had a lawyer contact the infringer on their behalf.

So the visual creators are trying at the onset to work it out themselves in a business

like manner. If they get to this point that there's court involved, it is probably because they haven't been able to work out some sort of settlement.

We would encourage voluntary settlements, especially through mediation. Our suggestion would be that mediation can be conducted by teleconference or video conferencing to keep time and travel costs down for both parties.

Mediators would have to be well versed in copyright law. We suggested an example of Volunteer Lawyers for the Arts organizations, and they train mediators and have been planning to do ADR mediation as volunteers. But we also feel that going through mediation or an initial settlement offer or response shouldn't be the threshold requirement to participate in the alternate court. And the plaintiffs should not be required to reduce the value of their claim by making a settlement offer before they can utilize the court.

MS. CHARLESWORTH: Mr. Badavas?

MR. BADAVAS: I realize this is something that already exists, but this is an instance

where an offer of judgment, a binding offer of judgment, which is really a settlement offer, might be worthwhile, because it requires someone to place an actual real dollar value on the claim. And if you might imagine a situation where they have to get it right, and if the award is below the offer, the plaintiff loses a certain amount and maybe has to make up some of the difference on a sliding scale, not so different from the issue we were talking about of a frivolous claim. And if the defendant doesn't settle for that number and the award comes in at that number or above, maybe they have to pay an additional percentage on top of that, which might encourage settlement or reduce some of the costs of the proceeding.

MS. CHARLESWORTH: Thoughts or reactions to that?

Mr. Leichtman?

MR. LEICHTMAN: I want to address the mediation service and mention that Voluntary Lawyers for the Arts does have a mediation service, we are open for business, and we are happy to take referrals from the tribunal.

But there are -- also California Lawyers for the Arts also has a mediation service. So there are mediation services that these tribunals could take advantage of that do exist that are very cost sensitive solutions.

But you wouldn't want that to slow down the process. So if it is already a very fast process, and then people say, well, I can't do it on this day, I can't do it on that day, and you get into a situation where you have slowed the proceeding to a halt because you are waiting for the parties to mediate, and I don't think that would be a good -- that wouldn't be a good solution.

MS. CHARLESWORTH: I mean, as you are describing this, also another issue a question is, if you have parties who are in different locations, how it affects the mediation, it might or might not be a remote conference. Mediation usually typically assumes both people are in a room together with a third party.

So some of the proposals -- or many of them really envision electronic proceedings. So that might be another consideration.

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MR. LEICHTMAN: Well, I think again, Congress -- in my private practice, where typically matters are at dollar values that are much higher than what we are talking about here, you are probably not going to have an effective mediation if you do it by telephone and the principals aren't in the room and so on.

But since we are already talking about it, a process where you have a cap on the amount of the claim, which is $25,000 or less, whatever that number is, the delta between the settlement offers ought to be something that a good mediator could reach, I would think, by telephone or video conference without having to have the parties present, given the relatively narrow band which is going to be within the plaintiff's offer and defendant's counteroffer, if we are already in the context of a small claims proceeding.

MS. CHARLESWORTH: I think maybe we have a sign here that we should be wrapping up.

Does anyone have anything further to say on this last group of topics at this point? Arbitration, mediation, settlement?

Well, I want to thank you all very much for

your participation and thoughtful remarks today. It was a long day. I think it was very productive. I learned a lot, and I think we had a good dialogue and fleshed out some of the key issues.

We are continuing tomorrow with some very important topics, including remedies and attorneys' fees, which are essential to this process in terms of figuring out how those would work, as well as sort of a more open-ended discussion at the very end of the session tomorrow in case you have other thoughts.

Tomorrow should be a shorter day. I hope to see many of you here. Have a good evening, and we will reconvene at 9:30.

Thank you again.

(WHEREUPON, at 5:00 p.m., the proceedings were adjourned and scheduled to resume on November 16, 2012, at 9:30 a.m.)

C E R T I F I C A T E

STATE OF NEW YORK)
COUNTY OF NEW YORK)

I, ANNETTE M. MONTALVO, Registered Merit Reporter and Notary Public, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

I further certify that I am not a relative or employee of counsel/attorney for any of the parties, nor a relative or employee of such parties, nor am I financially interested in the outcome of the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of December, 2012.

_____
Annette M. Montalvo, RMR

My commission expires: January 31, 2015

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