

Capital Reporting Company
Public Hearing on Small Copyright Claims 11-15-2012

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In Re:

SMALL COPYRIGHT CLAIMS PUBLIC HEARING

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DATE: Thursday, November 15, 2012

TIME: 9:30 a.m.

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.

1 A P P E A R A N C E S

- 2 JACQUELINE CHARLESWORTH, US Copyright Office
3 CATHERINE ROWLAND, US Copyright Office
4 ANN CHAITOVITZ, US Patent & trademark Office
5 LISA SHAFTEL, Graphic Artists Guild
6 VICTOR PERLMAN, American Society of Media
7 Photographers
8 EUGENE MOPSIK, American Society of Media Photographers
9 MICKEY OSTERREICHER, Nat'l Press Photographers Assoc.
10 JAMES CANNINGS, Our Own Performance Society, Inc.
11 JAY ROSENTHAL, National Music Publishers Association
12 NANCY WOLFF, Picture Archive council of America
13 CHARLES SANDERS, Songwriters Guild of America
14 JOSEPH DIMONA, Broadcast Music, Inc.
15 DAVID LEICHTMAN, Volunteer Lawyers for the Arts, Inc.
16 RANDY TAYLOR, Copyright Defense League, LLC
17 LISA Willmer, Getty Images
18 CHRISTOS BADAVAS, The Harry Fox Agency, Inc.
19 BRAD HOLLAND, American Society of Illustrators
20 Partnership
21 BRUCE LEHMAN, Former Asst. Secretary of Commerce and
22 Commissioner of Patents & Trademarks 1993-1999
23 SUSAN DAVIS, National Writers Union
24 RACHEL FERTIG, Association of American Publishers
25 MARY FRAN LOFTUS, We Research Pictures, LLC

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

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

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

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

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

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

13 In light of these challenges, the chairman
14 of the House Judiciary Committee asked the US
15 Copyright Office to examine the obstacles facing
16 small copyright claims, and to consider potential
17 alternatives. In a letter dated October 11,
18 2011, chairman Lamar Smith requested that the
19 Office undertake a study for Congress to assess
20 the extent to which authors and other copyright
21 owners are effectively prevented from seeking
22 relief for infringement, and to make specific
23 recommendations as appropriate to improve the
24 adjudication of small copyright claims.

25 I am grateful to all of you who are

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

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

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

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2 recommendations to Congress.

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

10 MS. CHAITOVITZ: Thank you, Jacqueline.

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

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

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

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

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

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2 with and assisting the Copyright Office in its
3 efforts.

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

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

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

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

25 MS. CHARLESWORTH: Thank you very much, Ann.

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

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

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

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

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

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

11 Are there any questions before we begin?

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

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

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

7 Ann, you introduced yourself already.

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

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

19 MS. CHARLESWORTH: Please speak into the
20 microphone.

21 MS. SHAFTEL: Lisa Shaftel. Graphic Artists
22 Guild.

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

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2 7,000 visual journalists around the country.

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

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

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

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

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

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

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

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

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

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2 music publishers, and self-publishers.

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

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

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

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

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

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

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

18 MR. CANNING: There is no Internet
19 connection.

20 MR. MOPSIK: There is WiFi.

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

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

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

4 MR. PERLMAN: Thanks, Jackie.

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

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

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

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

25 MR. PERLMAN: We came to the awkward

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

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

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

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

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

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2 expensive to litigate.

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

7 MS. CHARLESWORTH: Excuse me.

8 (WHEREUPON, there was a short
9 interruption.)

10 MS. CHARLESWORTH: Sorry about that.

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

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

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

25 Are there other perspectives in terms of an

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

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

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

25 And I think that's part of the issue with

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

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

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

25 But I think so many of the costs are based

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

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

11 MS. SHAFTEL: Lisa Shaftel.

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

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

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

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

8 MS. CHARLESWORTH: Okay. Mr. Lehman?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 So Mr. Osterreicher, and then Ms. Willmer.

16 MR. OSTERREICHER: Mickey Osterreicher.

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

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

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

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

12 MS. Willmer: Lisa Willmer with Getty Images.

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

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

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

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

8 MS. CHARLESWORTH: Mr. Mopsik?

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

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

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

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

11 MR. LEICHTMAN: Thank you. David Leichtman.

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

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

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

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

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

25 So we think that maybe, depending on the

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

7 MS. CHARLESWORTH: Mr. Canning?

8 MR. CANNING: Thank you.

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

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

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

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

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

21 Mr. Sanders?

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. DIMONA: Thanks, Jacqueline.

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

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

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2 the claim would have an inverse relationship to
3 the defendant's willingness to submit. So if it
4 is a very low limit on the plaintiff's claim,
5 that might incentivize them to participate more
6 than say some of the suggestions that there were
7 30, 40, 50, \$60,000 cap, you know, I could see
8 defendants running away from that.

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

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

25 MS. SHAFTEL: We would like to see the

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

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

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

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

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

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

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

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

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

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

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

19 MS. CHARLESWORTH: Mr. Leichtman?

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

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

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

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

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

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

18 MS. CHARLESWORTH: Mr. Badavas?

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

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

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

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

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

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

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

5 MS. CHARLESWORTH: Mr. Sanders?

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

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

22 MS. CHARLESWORTH: Mr. Perlman?

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

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

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

12 MS. CHARLESWORTH: Mr. Lehman?

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

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

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

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

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

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

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

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

20 MS. CHARLESWORTH: Mr. Rosenthal. Welcome.

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

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

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

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

19 MS. CHARLESWORTH: Okay. Mr. Osterreicher?

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

25 I think the issue that a lot of us see is

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

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

13 MR. DIMONA: Thank you.

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

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2 get the bad actors.

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

12 I don't know if that answers your question.

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

15 When somebody defaults, do you seek a
16 default judgment?

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

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

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

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

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

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

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

4 MS. CHARLESWORTH: Mr. Sanders?

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

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

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

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

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

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

25 So they're actually making pretty good use

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

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

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

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

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

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

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

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

9 MS. CHARLESWORTH: Okay. We started a
10 little late. We have about, I would say, 10 to
11 15 minutes left on this panel.

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

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

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

6 MS. CHARLESWORTH: I think they will revisit
7 it.

8 MS. ROWLAND: Somebody will revisit.

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

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

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

25 And then I think what's probably most going

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

13 MR. MOPSIK: I will keep my comments brief.

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

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

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

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

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

23 MS. CHARLESWORTH: Mr. Holland?

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

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

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

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2 due process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. CANNING: Thank you.

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

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

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

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

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

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2 consideration, including you, I think.

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

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

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

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

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

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

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

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

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

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

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

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

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

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2 (WHEREUPON, a recess was had.)

3 * * * * *

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

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

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

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

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

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

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

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

19 MR. ROSENTHAL: Not the photographs.

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

25 MR. ROSENTHAL: I think uniformly across the

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

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

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

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

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

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

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

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

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

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

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

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

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2 if it is necessary is the correct one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MS. CHARLESWORTH: I just want to --

9 MR. ROSENTHAL: Is that what you mean?

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

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

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

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

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

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

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

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

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

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2 comfortable place for the music community to be?

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

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

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

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

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

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

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

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

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

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

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

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

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2 samples in this based on the claims I get.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MS. ROWLAND: Mr. Rosenthal?

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

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

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

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

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

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

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

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

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

9 MS. ROWLAND: Mr. Lehman?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2 Does anyone else have anything? Ms. Wolff?

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

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

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

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

10 MS. ROWLAND: Mr. Mopsik?

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

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

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

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

15 MS. CHARLESWORTH: So is video on the table?

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

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

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

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

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

25 I wish there was someone here from a fine

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

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

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

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

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

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

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

24 MR. DIMONA: I can talk about that.

25 The type of claim that you make is really, I

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

13 And ownership is another issue. Like if
14 Beyonce has a hit song, and some unknown person,
15 the songwriter, wants to sue her to say "That
16 infringed my song. I actually wrote that song.
17 Beyonce, you put it out under your name." If you
18 can bring that kind of claim, how can you put a
19 \$10,000 cap on that. Because if you get ruled to
20 be the owner of that song, it can be worth untold
21 sums of money.

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

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

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

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

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

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

7 And that's an interesting distinction, to
8 me, based on what I am hearing. And what that
9 dovetails with probably in the discussion of what
10 type of works should be in here, all right, is
11 what type of claim am I talking about? Everybody
12 kind of blithely talks about a \$25,000 limit or a
13 \$10,000 limit, or if you are in New York small
14 claims court, \$5,000, \$3,000, depending on
15 whether you are inside the city or outside of the
16 city.

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

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

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

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

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

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2 be used.

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

5 MS. ROWLAND: Mr. Sanders?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. CHARLESWORTH: The contract issue came

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

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

13 MS. SHAFTEL: Yes. Lisa Shaftel.

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

25 Visual works, graphic art and illustration,

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

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

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

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

6 MS. ROWLAND: Any other views on this?

7 Mr. Rosenthal?

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

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

25 You would have to override those contractual

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

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

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2 is unique to a small claims issue.

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

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

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

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

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

4 I feel like with music we are going to be
5 narrowing it down so much after we go through
6 this process that we are going to have this at
7 the end, and then why do it for just this, for
8 this last little thing. I think that's answering
9 --

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

12 MS. ROWLAND: Mr. Sanders?

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

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

25 MS. ROWLAND: Before we move forward, I just

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

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

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

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

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

25 MR. BADAVAS: I think ownership claims

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

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

23 MS. ROWLAND: Mr. Perlman?

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

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

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

18 MS. ROWLAND: Anyone else?

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

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

6 MS. ROWLAND: Ms. Wolff?

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

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

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

10 MS. ROWLAND: Anyone else on this?

11 Ms. Shaftel?

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

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

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

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

6 MS. ROWLAND: Okay. Mr. Badavas?

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

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

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

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

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

10 MS. SHAFTEL: Yes.

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

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

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

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

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

19 MS. ROWLAND: Mr. Leichtman?

20 MR. LEICHTMAN: David Leichtman.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 (WHEREUPON, a recess was had.)

19 * * * * *

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

25 So how much money should a claim be worth to

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

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

8 Ms. Wolff?

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

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

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

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

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

19 MS. ROWLAND: Mr. Mopsik?

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

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

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

13 MS. ROWLAND: Mr. Lehman?

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

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

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

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

23 MS. ROWLAND: Mr. Taylor?

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

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

12 The statutory damages were increased back in
13 1988 from 250 to 500 at the low end, and 50,000
14 to 100,000 at the high end. Then they were
15 increased again in '99 from 500 to 750 at the low
16 end, and 50,000 to 100,000 at the high end -- I'm
17 sorry, 100,000 to 150,000 at the high end, 500 to
18 750 at the low end.

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

25 Framed with that concept, the idea that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. SHAFTEL: Lisa Shaftel.

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

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

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2 survey.

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

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

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

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

7 And then on to your next topic on the list,
8 which I will get to then, there were specific
9 real incidences of infringement where multiple
10 graphic artists would want to take action against
11 a single infringer who infringed multiple works
12 in the same act of infringement. And they would
13 want to take action as a group, and the total of
14 their damages would amount to possibly up to
15 \$30,000, even though individually it would be
16 much less.

17 MS. ROWLAND: Mr. Badavas?

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

25 So, in other words, the more informal the

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

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

22 MS. ROWLAND: Ms. Wolff?

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

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

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

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

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

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

4 MR. HOLLAND: No, I wasn't.

5 MS. ROWLAND: I am afraid -- okay.

6 Mr. Leichtman?

7 MR. LEICHTMAN: David Leichtman.

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

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

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

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

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

23 MS. ROWLAND: Mr. Lehman?

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

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

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

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

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

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

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

16 Mr. Mopsik?

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

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

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

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

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

25 MS. ROWLAND: Anyone else?

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2 MS. Willmer: Lisa Willmer. Getty Images.

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

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

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

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

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

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

11 But I can tell you from our experience, when
12 we're looking at damages in the dollar range of
13 20, 30, \$40,000, we would have less of a problem
14 pursuing those in regular federal district court
15 because we would obviously spend more to do that.
16 But the damages would likewise be increased.

17 MS. ROWLAND: Mr. Leichtman?

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

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

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

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

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

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

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

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

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

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

8 At the low end, the demand letters are about
9 \$7,000 to \$9,000 for a single infringement, a
10 single image. At the high end, they are about
11 \$15,000 to \$18,000 for a single image in a demand
12 letter. But there are cases where one rights
13 holder has 300 plus images that have been used by
14 a single infringer.

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

21 MS. ROWLAND: Thank you, Mr. Taylor.

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

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

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

12 Mr. Leichtman?

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

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

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

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

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

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

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

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

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

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

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2 MR. LEICHTMAN: Conceivably you could, yes.

3 MS. CHARLESWORTH: You could.

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

8 MS. ROWLAND: Ms. Wolff?

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

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

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

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

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

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

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

18 MS. WOLFF: Right.

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

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2 thoughts in terms of how the system would handle
3 that?

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

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

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2 helpful.

3 MS. ROWLAND: Ms. Shaftel?

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

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

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2 into this, they think their use is fair use.

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

13 MS. ROWLAND: Mr. Mopsik?

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

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

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

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

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

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

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

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

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

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

6 MS. ROWLAND: Mr. Taylor?

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

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

19 MS. ROWLAND: Mr. Sanders?

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

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

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

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

21 MS. ROWLAND: Mr. Leichtman?

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

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

6 So if the monetary threshold is low enough,
7 if there's availability to, you know, review a
8 grant of injunctive relief in the federal courts,
9 where you could raise your fair use defense, if
10 it was really that important to you, and we're
11 talking about claims that are small enough,
12 10,000, 15,000, you know, 20,000, the concern from
13 a systemic point of view, which I would think is
14 where, you know, what the Copyright Office should
15 be concerned about, what we're concerned about at
16 Volunteer Lawyers for the Arts is, if in the
17 margins you have an occasional error where the
18 tribunal decides a fair use question the wrong
19 way, from a systemic standpoint, we don't think
20 that that's something really to be concerned
21 about because courts make mistakes on fair use
22 also.

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

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

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

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

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

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

20 MS. ROWLAND: Mr. Lehman?

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

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

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

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

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

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

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2 Ms. Shaftel?

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

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

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

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

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

25 So we would come back in about 10 minutes,

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

7 So is that workable for people? Okay.

8 (WHEREUPON, a recess was had.)

9 * * * * *

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

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

23 Mr. Lehman, and then Mr. Perlman.

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

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

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

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

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

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

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

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

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

22 MS. CHARLESWORTH: Mr. Perlman?

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

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

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

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

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

25 MR. PERLMAN: That is a good question, one

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2 for which I don't have a happy answer.

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

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

17 Ms. Wolff?

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

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

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

18 MS. CHARLESWORTH: Mr. Osterreicher?

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

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

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

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

17 MR. LEHMAN: Can I respond?

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

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

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

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

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

20 MS. CHARLESWORTH: Ms. Shaftel?

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

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

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

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

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

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

13 MS. CHARLESWORTH: Mr. Rosenthal?

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

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

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

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

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

20 MS. CHARLESWORTH: Mr. Perlman?

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

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

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

13 MS. CHARLESWORTH: Any further thoughts on
14 registration?

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

22 Ms. Wolff?

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

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

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

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

17 MS. WOLFF: Yes.

18 MS. CHARLESWORTH: Mr. Osterreicher?

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

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2 limit on this court.

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

6 MS. CHARLESWORTH: Ms. Fertig?

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

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

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

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

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

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

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

22 MS. CHARLESWORTH: Further thoughts on
23 filing fees?

24 MR. LEICHTMAN: Just quickly.

25 I think most of the clients of Voluntary

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

13 MS. CHARLESWORTH: Yes?

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

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

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

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

5 Okay. Anything else on filing fees?

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

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

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

21 MS. Willmer: Lisa Willmer.

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

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

12 MS. CHARLESWORTH: Yes, Ms. Fertig?

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

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

5 MS. CHARLESWORTH: Any disagreement with
6 that?

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

12 Yes, Mr. Perlman?

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

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

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

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2 DiMona?

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

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

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

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

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

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

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

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

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

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

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

9 Mr. Rosenthal?

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

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

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

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

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

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

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

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2 required to litigate a claim in this court? Yes?

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

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

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

14 Yes, Mr. Badavas?

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

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

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

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

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

20 Mr. Lehman?

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

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

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

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

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

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

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

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

15 MS. SHAFTEL: Yes.

16 MS. CHARLESWORTH: Okay.

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

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2 not allowing any discovery.

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

10 MS. CHARLESWORTH: Yes?

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

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

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

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

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

15 MS. CHARLESWORTH: Ms. Wolff?

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

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

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

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

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

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2 frame it should take place in.

3 Yes, Mr. Leichtman?

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

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

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

25 But certainly some limited amount of

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

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

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

16 MS. CHARLESWORTH: Other thoughts on
17 discovery?

18 Mr. DiMona?

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

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2 discovery.

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. FERTIG: And I think, actually, in

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

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

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

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

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

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2 matter in a more full or comprehensive way.

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

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

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

21 If you had that kind of situation where you
22 had special masters, you know, I'm not sure that
23 the special masters would be altogether the
24 people would who do that. That's where, again,
25 the Copyright Office might perform that function.

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2 If it was an extension of the activities of
3 the Copyright Royalty Board, for example, in a
4 different function for that group of people or
5 similar group of ALJs, for example, in the
6 Copyright Office, then they could also perform
7 that rule making guidelines function, et cetera,
8 which could be adjusted, sort of like federal
9 judges write the rules.

10 I think this would go a little further and
11 be a little more substantive, which would be
12 authorized by statute, of course, then the
13 discretion of the federal judges. So it is in
14 the federal rules.

15 MS. CHARLESWORTH: Mr. Perlman?

16 MR. PERLMAN: I just wanted to mention that
17 the reason I have been kind of
18 uncharacteristically quiet on the subject of the
19 procedure and more specific questions is that
20 having espoused the use of state small claims
21 courts, all of these issues are resolved by the
22 specific rules of each local jurisdiction. I
23 didn't want you to think I was bored.

24 MS. CHARLESWORTH: We always count on you to
25 speak up when you have something to say.

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2 This issue, motion practice, and this ties
3 into discovery in a sense -- I saw several
4 suggestions that there should not be motion
5 practice except to perhaps resolve discovery
6 disputes.

7 Do people disagree with having motion
8 practice in the small claims copyright court? Is
9 there some sort of limited motion practice that
10 should be allowed? How do you resolve discovery
11 disputes? Any thoughts on that?

12 Ms. Wolff?

13 MS. WOLFF: Depending again on how we figure
14 out who the decider is, that if you have
15 something, and maybe it is similar to what
16 happens if you pick a mediator, is that if there
17 is an issue that comes up, you can write a simple
18 letter and maybe how we pick the decider can
19 resolve something. Because I think once you get
20 into formal motions and paper and affidavits and
21 declarations, you've sort of blown up this little
22 budget we have here. And if it is something
23 that's going to be that complicated, maybe it
24 doesn't really belong in small claims.

25 But I think for the type of issues here

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2 where you are having blatant rip offs of a work,
3 for example, work of visual artists, I don't see
4 lots of relevant motions that are going to come
5 up other than those just trying to detract from
6 the ability to bring a claim.

7 MS. CHARLESWORTH: Further thoughts?

8 Okay. Moving on to the record of
9 proceedings. Many of the comments suggested that
10 there should be a written decision, even if it is
11 abbreviated. Although many people suggested that
12 the decisions be nonprecedential, at the same
13 time many thought that the decisions should be
14 public. I was curious about that, and sort of
15 not necessarily the discrepancy, but the
16 reasoning behind that. If they are
17 nonprecedential, would it be important for third
18 parties to be able to access them?

19 Ms. Willmer?

20 MS. Willmer: I can speak to that only
21 because we're currently experiencing issues where
22 the public perception is that we don't take as
23 aggressive of enforcement action, and, therefore,
24 infringers are free to ignore our settlement
25 demands. And having a public record of the fact

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2 that we are actively engaged in enforcing
3 copyrights would be very important to us.

4 MS. CHARLESWORTH: Mr. Perlman?

5 MR. PERLMAN: The other edge of that sword
6 is that by definition we are talking about small
7 claims. And there's a potential for a depressing
8 effect on the valuation of, in our case, images,
9 in other courts and in the minds of the public
10 just because of the awards that in this case by
11 definition are going to be rather small.

12 MS. CHARLESWORTH: One question that came to
13 mind is does anyone think it might have a
14 negative impact on defendant's willingness to
15 participate if the decisions were publically
16 available? Any thoughts on that? That wasn't
17 something that was necessarily raised in the
18 comments.

19 Ms. Wolff?

20 MS. WOLFF: When we are talking about
21 incentives, I think it could potentially be a
22 negative incentive if all this was public.
23 Because one way of perhaps encouraging defendants
24 to participate would be that you don't have the
25 public record. Because I know that's one

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2 advantage of why people prefer arbitration.

3 So if someone's infringed a work and there's
4 a way to resolve it through this copyright small
5 claims, that may be part of the carrot that gets
6 them to do this instead of just blowing you off
7 and not responding at all and saying, "Go sue us
8 in federal court. We will see if you really have
9 the money."

10 There's always going to be pros and cons. We
11 may not then have the deterrent effect of letting
12 people know that you are aggressively pursuing
13 copyright, but maybe there's other ways of doing
14 that. By doing it without naming people, we
15 brought 15 different small claims, and we worked
16 with our photographers in recovering money.
17 There may be ways they can solve it both ways.

18 MS. CHARLESWORTH: Mr. Osterreicher?

19 MR. OSTERREICHER: I think on the other
20 hand, if you had to participate, it might be
21 incentive to settle, and say let's settle this
22 and the settlement will be private. And you
23 might be able to do that right from the outset.

24 I think these days just getting somebody to
25 come to the table or be cognizant of the fact

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2 that there's an infringement and we are taking it
3 seriously, I think is an important factor here.
4 And having the framework for doing that, I think
5 is an important start. And I think sometimes as
6 we have seen in any kind of type of litigation,
7 once you get the parties together, you might
8 realize that whereas they weren't talking at all
9 before, they start to talk at the beginning and
10 realize they might be able to settle this in
11 short order without going further in the process.

12 MS. CHARLESWORTH: Yes. Mr. Leichtman?

13 MR. LEICHTMAN: I think there will be great
14 public interest if this goes forward, and
15 certainly in understanding in the aggregate
16 what's happening in these proceedings, and what
17 the results are.

18 So one thing that I have seen when I was
19 here at law school, we had something called the
20 Unemployment Action Center where the law students
21 represented pro bono unemployment insurance
22 claimants. And we had a set of case law that you
23 could go look at at the unemployment insurance
24 office, which were basically summarized on index
25 cards, and then you could look at the decisions.

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2 But the names of the parties were redacted. So
3 you couldn't really know who the particular
4 parties were, but at least you would kind of look
5 and get a sense of what was going on in these --
6 what was going on in these tribunals, which I
7 think the public would have some interest in.

8 The one exception, I think, would be if you
9 are in the situation where the defendant doesn't
10 pay the judgment, or if the -- or doesn't abide
11 by an injunction that's issued, or there's an
12 appeal from an injunctive ruling, if that is the
13 way it is structured, you know, you may have to,
14 obviously, have a public document attached to
15 your complaint for nonpayment, or to take your
16 appeal from the injunctive relief. So there
17 ought to be some exceptions. But I think the
18 award should be made public, but the parties
19 names don't necessarily need to be on it.

20 MS. CHARLESWORTH: Okay. Now the topic we
21 have all been waiting for, frivolous claims. We
22 have had a fair amount of discussion about this,
23 but this is obviously -- the music people are
24 sitting up.

25 This is, obviously, of concern to users,

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2 significant and justifiable concern. We have
3 heard some thoughts earlier today about how they
4 might be deferred, but I really would like to
5 tease out, to the extent we can, any sort of good
6 thinking about how to make the system workable
7 from the user perspective in terms of weeding out
8 people who have no business filing a claim.

9 So I don't know who wants to take the lead
10 on this, but we would be interested to hear more
11 about it.

12 Mr. Rosenthal?

13 MR. ROSENTHAL: Yes.

14 My favorite recommendation in the filings of
15 everybody is that we institute a rule 11 against
16 a frivolous claim. I'm not quite sure if you can
17 do that against a nonlawyer, but I don't know
18 what else can really stop it, other than
19 something that's real draconian.

20 I am also not sure, you know, whether you
21 have to litigate whether it is a frivolous claim
22 or not. Sometimes it takes a while to figure it
23 out, that this person who said that they wrote
24 this song, or this person that really has a beef
25 with their label and they are suing their label

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2 under this process here is really kind of
3 crossing a line.

4 So I have a problem with the whole idea
5 again of where's that line, and then what are you
6 going to do about it. But if you are going to
7 make a line, if you are going to have some kind
8 of threshold, there's got to be something real
9 that the plaintiff has to, you know, really
10 endure, whether it is some kind of money for the
11 cost to the defendant, you know, whatever that
12 defendant had to do, a loss of time, whatever.
13 Something has to be hanging over them to make
14 sure that they don't engage in frivolous claims.

15 But it is a serious concern. Every
16 publisher that I talked to, it is the first thing
17 that they really -- it just rose to the top of
18 the level of concerns, that this is going to be
19 opening the door to people who would contact them
20 anyway with frivolous claims, but now there's a
21 process to do it that's easy.

22 And instead of having to get an attorney,
23 because many times attorneys when they go to
24 attorneys, they will -- nine out of ten attorneys
25 will say, "You don't have a claim." Maybe that

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2 last one will say, "Okay, if you pay me \$10,000,
3 I will file it for you." But it is that kind of
4 a fear out there in the music side that makes us
5 really wary of the whole process.

6 MS. CHARLESWORTH: I think you mentioned
7 maybe shifting of costs and attorneys' fees. Do
8 you think that would go some way to alleviating
9 the concern, or do you think that's --

10 MR. ROSENTHAL: Somewhat. Any sanction,
11 obviously, would help, if we're going down this
12 road.

13 Again, you know, we feel like it is such a
14 major problem that we might -- we should be wary
15 about that going down the road, at least for
16 music at this point.

17 I just don't see the same -- maybe I am
18 wrong. I don't see the same concern on the
19 visual artists, photographer side in terms of
20 frivolous claims that we do in music. But
21 sanctions, really, certainly are an issue.

22 MS. CHARLESWORTH: Mr. DiMona?

23 MR. DIMONA: I will add to that.

24 We did a few things in the context of the
25 compulsory license proceedings. We were getting

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2 lots of individual claims, claims were way, way
3 more money than really they had any entitlement
4 to. We got a filing fee. A filing fee was very
5 important. And for it to be more than just a
6 token amount, I think is a good idea. I don't
7 know whether 300 is probably adequate for
8 something like this. Just something as a
9 deterrent.

10 We got a situation where if you had to state
11 your claim, if you were the individual, and if
12 you received an award of less than your claim,
13 the trier of fact could sanction you, levy a fine
14 on you for an amount -- so, for example, you
15 asked for \$20,000 and you got something very much
16 less, there was a penalty power, a financial
17 penalty.

18 MS. CHARLESWORTH: What's the context you
19 are speaking of?

20 MR. DIMONA: I think it's the compulsory
21 license statutes now.

22 MR. BADAVAS: This is the Audio Home
23 Recording Act proceedings, where individuals were
24 putting in an application for a share of the
25 tariff on --

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2 MS. CHARLESWORTH: Distribution proceedings?

3 Okay.

4 MR. BADAVAS: We had repeat claimants who
5 had frivolous claims.

6 MS. CHARLESWORTH: And so some measures were
7 instituted that you think helped address that
8 situation?

9 MR. DIMONA: Yes. I do think they did.

10 There was that, and there was a paper
11 proceeding, mandatory paper proceeding. So they
12 couldn't hold you up for an expensive trial just
13 to extract a settlement from you that you didn't
14 think was fair. That was important.

15 And another thought I had was perhaps if a
16 certain plaintiff used this small claim thing and
17 demonstrably in a frivolous manner for two or
18 three or four times, perhaps that person would
19 not be allowed to use it again, or something like
20 that. I just throw this out as an idea. I don't
21 know what would rise to the level of abuse of the
22 process that would lead to, you know, you can't
23 use it for the next three years or something like
24 that.

25 I know there have been frivolous plaintiffs

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2 in courts who have brought cases in state and
3 federal court so without any foundation that some
4 judges have issued rulings against them saying
5 you can never bring a case in federal court again
6 for "X" number of years. This is happening out
7 there. And so I think a few measures like that
8 would go a long way to help right now.

9 MS. ROWLAND: I was going say, that that was
10 the case with TTAB. There are some notorious
11 people there that have been not really banned,
12 per se, maybe one of them. But one of them was
13 banned unless they got the permission to file
14 more things. And so it required more staff, and,
15 of course, they were not getting permission
16 because their business model was basically to go
17 after trademarks. So that's something that's
18 happened in the TTAB.

19 MS. FERTIG: Yeah. A couple other good
20 procedures that TTAB also incorporates that may
21 stave off some frivolous claims are requiring
22 verification of good faith filing and of legal
23 merit to whatever submissions are electronically
24 filed. And coupling that with a monetary
25 sanction if it is found that the person shouldn't

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2 have verified that information.

3 MS. CHARLESWORTH: Can you elaborate a
4 little, when you say verification? You mean
5 basically a declaration under penalty of perjury,
6 is that what you are referring to?

7 MS. FERTIG: Right. There's that, and then
8 there's also in the discovery context itself,
9 there's also the duty of -- sorry. Duty to
10 cooperate, and that also has another
11 certification that you're not bringing -- you
12 know, asking for anything onerous through
13 discovery, and certifying that anything you do
14 ask for is related to the case, things like that,
15 to make sure that there's no harassing frivolous
16 suits that are also brought. I think the
17 publishers have also thought about filing fees as
18 a very important measure, as I alluded to
19 earlier.

20 But on the topic of attorneys' fees as a
21 potential mechanism, we don't support, and I know
22 we are going to talk about this later, damages,
23 attorneys' fees or statutory damages, because we
24 agree with many of the photography agencies, that
25 an application could be a prerequisite instead of

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2 actual registration at the time. And we believe
3 that not having statutory damages or attorneys'
4 fees available sort of mitigates that -- makes it
5 easier for us not to have registration required
6 at the time of bringing the claim.

7 So instead of doing attorneys' fees, we
8 would advocate for a monetary sanction that's
9 based on a percentage of the claimed amount. And
10 that would serve as the equivalent of assessing
11 attorneys' fees against a plaintiff that brings a
12 frivolous claim.

13 MS. CHARLESWORTH: Ms. Wolff, and then Ms.
14 Shaftel.

15 MS. WOLFF: I think there is what -- I have
16 had discussions about copyright small claims with
17 various organizations. The issue of frivolous
18 claims does tend to be a concern, particularly
19 with companies. And I think there's really a
20 difference between malicious frivolous claims by
21 bad actors who are going to see this as a
22 business, and those frivolous claims just based
23 because you are going to have plaintiffs without
24 an attorney who will not really understand
25 copyright.

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2 And that's why in our comments we thought if
3 there was really helpful guidelines of what
4 constitutes a claim. Because I know, I mean, so
5 many times people will come to me and they will
6 really think someone took my idea. And they will
7 show me two different pictures, and it's very
8 clear to me that they don't really understand
9 that copyright isn't about the idea of something,
10 you know. The photographer thought you can't --
11 she is the only one who can do babies against a
12 white background.

13 You are going to have some people who just
14 don't really understand some basics, and then you
15 are going to have probably some people look at
16 this as a business that they can go into.

17 So I think there could be deterrence based
18 on preventing someone like that from bringing
19 multiple claims, one entity from bringing claims
20 against maybe by many, many different
21 organizations, or there could be some monetary
22 sanctions. But I think a lot of sort of the
23 claims based on ignorance, you could work on,
24 having some maybe good examples and things like
25 that.

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2 And maybe you even have to go through a
3 checklist. Before you can file something pro se,
4 you have to agree you watched this video, and you
5 read these guidelines or instructions, and you
6 really actually understood a little bit more
7 about what you needed to bring a claim. And that
8 might help, you know, sort of weed out those
9 claims, frivolous claims, that are really based
10 on trying to, you know, figure you can always get
11 a few thousand dollars out of someone by
12 harassing them versus those people who just don't
13 really understand whether they have a copyright
14 claim.

15 MS. CHARLESWORTH: Ms. Shaftel?

16 MS. SHAFTEL: We felt that a record of
17 proceedings is necessary in a large part not only
18 to prevent bad actors, but also to make a public
19 record of copyright or frivolous claims or the
20 bad actors, and any phone or video conference
21 should be recorded, and the public should have
22 access to unpublished decisions that are
23 nonprecedential and noncitable.

24 To speak to what you said, Jay, I have no
25 doubt that the music industry has more than your

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2 fair share of nut cases and frivolous claims. No
3 question.

4 An extraordinary situation of what I called
5 extortion in infringement happened a number of
6 years ago. And there are people who concoct a
7 business scheme to come up with some way to make
8 money out of ripping off other people's
9 copyrighted work and selling it in some way.

10 And even if it's a very small business, and
11 we all know the deal of the unauthorized rock
12 concert T-shirts. But believe it or not, there
13 are attorneys who are bad actors in this, too. A
14 number of years ago, we were notified by two
15 members, there was a woman in Florida who owned a
16 store that was children's clothing. She sold
17 children's clothing, and the name of her store
18 was Sweet Pea. She had a friend or relative who
19 was a real estate attorney who came up with this
20 idea that they could shakedown illustrators
21 around the country who had made illustrations of
22 sweet peas including the words "sweet pea."

23 So he did a Google search and found 21
24 hapless souls on the Internet who had
25 illustration web sites or were selling through

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2 Zazzle or what have you, illustrations -- a lot
3 of it was on children's clothing and related
4 children's products of an illustration of a
5 peapod and words "sweet pea." And he sent them a
6 cease and desist and demand letter, claiming that
7 they had to pay him \$6,000 to go away.

8 And, of course, these artists were all
9 terrified. Two of them happened to be Guild
10 members, which is how we heard about it, and we
11 managed to organize them to find everybody else,
12 and we were able to stop this guy. I think he
13 should have been disbarred. But on his client's,
14 the plaintiff's, web site, she also had a lot of
15 infringing photographs and some infringing of
16 music, which I took care of.

17 But, I mean, this happens. This is
18 craziness that happens. To think of the time
19 involved for him and none of the artists that he
20 sent the shakedown letters to were in the state
21 of Florida where he was. He made sure that these
22 were people who were out of state, who looked at
23 the \$6,000 and said, "My, God. It is going to
24 cost me at least this much to hire an attorney to
25 deal with this guy." And one artist actually did

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2 pay him before we contacted them.

3 MS. CHARLESWORTH: Mr. Rosenthal?

4 MR. ROSENTHAL: I want to add something to
5 what Nancy said.

6 We certainly do have to be careful about
7 willful frivolous suits and nonwillful. I am
8 thinking in terms of we will have people coming
9 forward and filing what would be a contract case,
10 thinking that this is the place to do it.

11 And, you know, the defendant might say,
12 "Come on. What are you doing sitting here filing
13 a contract case against me. It's a copyright
14 court." It might be a legitimate mistake. So I
15 do think if we are going to go down the road of
16 dealing with filing fees or sanctions or
17 whatever, that there are different levels that we
18 think about in terms of that -- those abuses are
19 one thing, and an innocent mistake abuse is
20 something else.

21 MS. CHARLESWORTH: Does anyone think that
22 there's any sort of screening procedure, or
23 intake procedure, at the tribunal that might be
24 helpful in screening out things that are truly
25 not copyright infringement claims? I saw some

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2 nodding heads.

3 MS. WOLFF: I mean, all those activities
4 would be great, but I guess the idea is I don't
5 know who the trier would be or if the Copyright
6 Office is involved. And I know how busy everyone
7 is there. Hate to make suggestions that would
8 put too much burden on --

9 MS. CHARLESWORTH: Slow up the process.

10 MS. WOLFF: Slow up the process. But, I
11 mean, if there was some just real blatant easy
12 ones that could be kicked out easily, that would
13 be terrific.

14 MS. CHARLESWORTH: Mr. Leichtman?

15 MR. LEICHTMAN: Again, I think we are going
16 back to the discussion we had earlier about what
17 claims would be eligible and what claims would
18 not. So, for example, if you had contract claims
19 and we determined that ownership disputes or
20 termination rights cases were not part of that,
21 then I would think that part of the -- part of
22 the individual judges mandate would be if it
23 determines that this tribunal does not have
24 jurisdiction, it would -- after reviewing the
25 case filed, decline jurisdiction and say this is

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2 not within the scope of our mandate. So I think
3 it would be part of, you know, what we're doing
4 anyway.

5 MS. CHARLESWORTH: So intrinsic to the
6 process.

7 MR. LEICHTMAN: Yes.

8 MS. CHARLESWORTH: Mr. Rosenthal?

9 MR. ROSENTHAL: Last point is, I think this
10 gets back to the instructions as well. You know,
11 if you have instructions that are clear, if you
12 start talking about frivolous claims, it is in
13 bold, or something that really kind of scares
14 somebody a little bit who is about to file a
15 claim that they have to be careful, that may
16 solve a lot of this problem. So, again, that
17 would take out if somebody is mistaken, if it is
18 very clearly in the materials. I think the
19 materials are very important. When you are
20 walking into this kind of a court, to get the
21 right instructions, to get the right wording.
22 And, you know, that may be where a lot of these
23 problems can be solved.

24 MS. CHARLESWORTH: Okay. Anything further
25 on frivolous claims?

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2 Okay. Last, but not least, this was to be
3 panel 4. We didn't get a huge amount of
4 commentary on this subject, which is litigation
5 alternatives.

6 We had suggested that some people might
7 think an arbitration system would work in this
8 context. Some might favor mediation, a mediation
9 service. Would people would like to comment on
10 that. I think a lot of the comments on
11 arbitration were fairly negative, although not, I
12 don't think, universally so.

13 On mediation, some people I think were a
14 little more divided, to the extent they commented
15 on it, maybe some saw it as an adjunct to the
16 court process. So I welcome your thoughts on
17 that before we leave for the day, as well as the
18 question of how to and whether we should, by the
19 time someone comes into this process, be
20 encouraging settlement.

21 I will open the floor.

22 Mr. Lehman?

23 MR. LEHMAN: Well, it seems like there is
24 some degree of cost problem, because a
25 professional arbitrator or mediator, et cetera,

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2 somebody has to pay. I am not a federal court
3 litigator so I am not exactly sure how it works,
4 but, of course, it is not uncommon in federal
5 litigation for people to have, you know, some
6 kind of mediation in some part of the process.
7 But I think when they do that, and they hire an
8 expert mediator, basically the parties have to
9 pay the cost of that. And that's quite a
10 significant cost.

11 So if you are really talking about a small -
12 - an inexpensive small claims dispute resolution
13 procedure, that's kind of a big problem. I think
14 the problem of cost hangs over this whole thing
15 because the more complicated that you make the
16 adjudicatory process, it is in all those
17 questions that we talked about, either if it is
18 in the federal courts, either the federal
19 administrative office, I guess, of US courts or
20 whatever picks it up, or if it is in the
21 Copyright Office, the Copyright Office picks it
22 up. Fees don't cover it, and you have taxpayer
23 issues, and we have big problems with the
24 Congress not giving you enough money.

25 So, you know, costs cannot be overlooked in

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2 this. And I think to the extent that the cost
3 for the individual litigants have to be minimal,
4 that's the whole point. And so any kind of
5 procedure which places costs on them, seems to me
6 mediation, arbitration might do that, unless it
7 is extremely informal, would be a problem.

8 MS. CHARLESWORTH: Further thoughts?

9 Should the parties be required to trade
10 settlement offers before the case moves forward?
11 Do people have views on that? That sometimes is
12 a process today in federal court, some judges
13 require a written settlement offer and response.
14 Would that be a good thing? Would it slow things
15 down? Would it be fruitful?

16 Ms. Shaftel?

17 MS. SHAFTEL: The creators that responded to
18 our survey, two-thirds of them said that when
19 they discovered infringement, they tried to
20 contact or they did contact the infringer
21 themselves directly. And another 20 percent of
22 them said they had a lawyer contact the infringer
23 on their behalf.

24 So the visual creators are trying at the
25 onset to work it out themselves in a business

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2 like manner. If they get to this point that
3 there's court involved, it is probably because
4 they haven't been able to work out some sort of
5 settlement.

6 We would encourage voluntary settlements,
7 especially through mediation. Our suggestion
8 would be that mediation can be conducted by
9 teleconference or video conferencing to keep time
10 and travel costs down for both parties.

11 Mediators would have to be well versed in
12 copyright law. We suggested an example of
13 Volunteer Lawyers for the Arts organizations, and
14 they train mediators and have been planning to do
15 ADR mediation as volunteers. But we also feel
16 that going through mediation or an initial
17 settlement offer or response shouldn't be the
18 threshold requirement to participate in the
19 alternate court. And the plaintiffs should not
20 be required to reduce the value of their claim by
21 making a settlement offer before they can utilize
22 the court.

23 MS. CHARLESWORTH: Mr. Badavas?

24 MR. BADAVAS: I realize this is something
25 that already exists, but this is an instance

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2 where an offer of judgment, a binding offer of
3 judgment, which is really a settlement offer,
4 might be worthwhile, because it requires someone
5 to place an actual real dollar value on the
6 claim. And if you might imagine a situation
7 where they have to get it right, and if the award
8 is below the offer, the plaintiff loses a certain
9 amount and maybe has to make up some of the
10 difference on a sliding scale, not so different
11 from the issue we were talking about of a
12 frivolous claim. And if the defendant doesn't
13 settle for that number and the award comes in at
14 that number or above, maybe they have to pay an
15 additional percentage on top of that, which might
16 encourage settlement or reduce some of the costs
17 of the proceeding.

18 MS. CHARLESWORTH: Thoughts or reactions to
19 that?

20 Mr. Leichtman?

21 MR. LEICHTMAN: I want to address the
22 mediation service and mention that Voluntary
23 Lawyers for the Arts does have a mediation
24 service, we are open for business, and we are
25 happy to take referrals from the tribunal.

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2 But there are -- also California Lawyers for
3 the Arts also has a mediation service. So
4 there are mediation services that these tribunals
5 could take advantage of that do exist that are
6 very cost sensitive solutions.

7 But you wouldn't want that to slow down the
8 process. So if it is already a very fast
9 process, and then people say, well, I can't do it
10 on this day, I can't do it on that day, and you
11 get into a situation where you have slowed the
12 proceeding to a halt because you are waiting for
13 the parties to mediate, and I don't think that
14 would be a good -- that wouldn't be a good
15 solution.

16 MS. CHARLESWORTH: I mean, as you are
17 describing this, also another issue a question
18 is, if you have parties who are in different
19 locations, how it affects the mediation, it might
20 or might not be a remote conference. Mediation
21 usually typically assumes both people are in a
22 room together with a third party.

23 So some of the proposals -- or many of them
24 really envision electronic proceedings. So that
25 might be another consideration.

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2 MR. LEICHTMAN: Well, I think again,
3 Congress -- in my private practice, where
4 typically matters are at dollar values that are
5 much higher than what we are talking about here,
6 you are probably not going to have an effective
7 mediation if you do it by telephone and the
8 principals aren't in the room and so on.

9 But since we are already talking about it, a
10 process where you have a cap on the amount of the
11 claim, which is \$25,000 or less, whatever that
12 number is, the delta between the settlement
13 offers ought to be something that a good mediator
14 could reach, I would think, by telephone or video
15 conference without having to have the parties
16 present, given the relatively narrow band which
17 is going to be within the plaintiff's offer and
18 defendant's counteroffer, if we are already in
19 the context of a small claims proceeding.

20 MS. CHARLESWORTH: I think maybe we have a
21 sign here that we should be wrapping up.

22 Does anyone have anything further to say on
23 this last group of topics at this point?

24 Arbitration, mediation, settlement?

25 Well, I want to thank you all very much for

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2 your participation and thoughtful remarks today.

3 It was a long day. I think it was very

4 productive. I learned a lot, and I think we had

5 a good dialogue and fleshed out some of the key

6 issues.

7 We are continuing tomorrow with some very

8 important topics, including remedies and

9 attorneys' fees, which are essential to this

10 process in terms of figuring out how those would

11 work, as well as sort of a more open-ended

12 discussion at the very end of the session

13 tomorrow in case you have other thoughts.

14 Tomorrow should be a shorter day. I hope to

15 see many of you here. Have a good evening, and

16 we will reconvene at 9:30.

17 Thank you again.

18 (WHEREUPON, at 5:00 p.m., the

19 proceedings were adjourned and

20 scheduled to resume on

21 November 16, 2012, at 9:30 a.m.)

22

23

24

25

1 C E R T I F I C A T E

2

3 STATE OF NEW YORK)

4 COUNTY OF NEW YORK)

5

6 I, ANNETTE M. MONTALVO, Registered Merit Reporter
7 and Notary Public, do hereby certify that I reported in
8 shorthand the proceedings had at the hearing aforesaid,
9 and that the foregoing is a true, complete and correct
10 transcript of the proceedings of said hearing as
11 appears from my stenographic notes so taken and
12 transcribed under my personal direction.

13 I further certify that I am not a relative or
14 employee of counsel/attorney for any of the parties,
15 nor a relative or employee of such parties, nor am I
16 financially interested in the outcome of the action.

17 IN WITNESS WHEREOF, I have hereunto set my
18 hand this 4th day of December, 2012.

19

20

21

Annette M. Montalvo, RMR

22

23

24 My commission expires: January 31, 2015

25

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