

Capital Reporting Company
Public Hearing on Small Copyright Claims 11-26-2012

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PUBLIC HEARING

ON

SMALL COPYRIGHT CLAIMS

Monday, November 26, 2012

9:13 a.m.

Reported by: Troy Anthony Ray

Capital Reporting Company

The following pages constitute the public hearing held in the above-captioned matter before Troy Anthony Ray, of Capital Reporting Company, beginning at approximately 9:13 a.m.

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

2 JACQUELINE C. CHARLESWORTH, Senior Counsel to Register
of Copyrights

3 CATHERINE ROWLAND, Senior Counsel for Policy &
4 International Affairs

5 ANN CHAITOVITZ, US Patent and Trademark Office

6 CAROLYN WRIGHT, Law Offices of Carolyn E. Wright, LLC

7 LORIN BRENNAN, Linde Law Firm

8 ALICIA CALZADA, National Press Photographers
Association

9 KIM TOMMASELLI, Independent Film & Television Alliance

10 MICHAEL TRAYNOR, Cobalt, LLP

11 SUSAN CLEARY, Independent Film & Television Alliance

12 GEORGE CLINTON, Musician

13 TIMOTHY A. COHAN, General Counsel, Peermusic

14 COREY FIELD, Ballard Spahr, LLP

15 MICHAEL GRECCO, American Photographic Artists

16 EDWARD HASBROUCK, National Writers Union

17 MOLLY KNAPPEN, Designer and Developer

18 ERIN KUNZE, California Lawyers for the Arts

19 ALMA ROBINSON, California Lawyers for the Arts

20 ERICA BRISTOL, Mediator

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1 P R O C E E D I N G S

2 MS. CHARLESWORTH: Good morning, everyone.

3 (Pause.)

4 MS. CHARLESWORTH: Okay. Good morning
5 again. And welcome to the second public roundtable on
6 small copyright claims. For those of you who don't
7 know me, I'm Jacqueline Charlesworth. I'm senior
8 counsel to the Register of Copyrights in the U.S.
9 Copyright Office. To my left is Catherine Rowland, who
10 has communicated with many of you I think about being
11 here today. And she is also senior counsel, in the
12 Policy and International Affairs Division of our
13 office.

14 Thank you for coming to this hearing to
15 consider remedies for small copyright claims. We're
16 looking forward to hearing your comments and thoughts
17 and your experiences litigating copyright claims in
18 the current system as well as your views on potential
19 alternatives to the system we have today.

20 I also want to thank UCLA law school; in
21 particular, Professors Doug Lichtman and David Nimmer
22 as well as Lee Inagawa, who arranged for this room and

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1 have welcomed us here and provided water and light and
2 electricity, all those things that are critical to our
3 hearing. So thank you, UCLA.

4 This process was initiated by Congress a
5 little over a year ago. And I would like for the
6 record read a letter from the Honorable Lamar Smith of
7 the House Judiciary Committee to Register Maria
8 Pallante explaining why Congress asked the Copyright
9 Office to look into the issue of small claims; "Dear
10 Ms. Pallante." This letter is dated October 11th,
11 2011. "I enjoyed our meeting last month to exchange
12 views on copyright policy. Following our discussion,
13 I wanted to take a moment to raise an issue that has
14 needed to be addressed for some time. As we near the
15 introduction of legislation in the U.S. House of
16 Representatives that is designed to provide thoughtful
17 and effective new tools to authors and other copyright
18 owners who are victims of large-scale online copyright
19 infringement, I am reminded of the need to revisit and
20 address the opposite end of the spectrum.
21 Specifically, I am referring to our responsibility to
22 ensure that authors, photographers, and other

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1 copyright owners, many of whom rely upon the promise
2 of exclusive rights associated with the grant of a
3 copyright to earn a living and provide for their
4 families, have a realistic ability to enforce those
5 rights when they have a comparatively modest claim for
6 damages.

7 "As background, while serving as Chairman of
8 the former Subcommittee on Courts, the Internet, and
9 Intellectual Property in 2006, I conducted a hearing
10 to consider the need for new remedies to address small
11 copyright claims. At that hearing, several witnesses
12 testified that the cost of obtaining counsel and
13 maintaining an action on federal court effectively
14 precluded many authors whose works were clearly
15 infringed from being able to vindicate their rights
16 and deter continuing violations. On an individual
17 level, the inability to enforce one's rights
18 undermines the economic incentive to continue
19 investing in the creation of new works. On a
20 collective level, the inability to enforce rights
21 corrodes respect for the rule of law and deprives
22 society of the benefit of new and expressive works of

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1 authorship.

2 "Witnesses suggested that Congress should
3 consider providing new and more efficient processes to
4 enable the resolution of small claims. In testimony
5 submitted for the record, the office indicated a
6 willingness to undertake such a study and suggested
7 possible solutions that could include permitting state
8 court adjudication; providing for administrative
9 resolution; establishing streamlined procedures in
10 federal court; or facilitating alternative dispute
11 resolution procedures, such as arbitration and
12 mediation.

13 "Following the hearing, I included a
14 requirement that the office conduct a study in H.R.
15 5349, the Orphan Works Act of 2006. Similar language
16 was also included in H.R. 5889, a bill introduced in
17 the following Congress.

18 "Given the importance of this matter to many
19 individual copyright owners and the realization that
20 the costs of litigating in federal court have become
21 increasingly prohibitive over the past five years, I
22 request that the office evaluate this matter and

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1 undertake a study to assess: one, the extent to which
2 authors and other copyright owners are effectively
3 prevented from seeking relief from infringements due
4 to constraints in the current system; and, two,
5 furnish specific recommendations, as appropriate, for
6 changes in administrative, regulatory, and statutory
7 authority that will improve the adjudication of small
8 copyright claims and, thereby, enable all copyright
9 owners to more fully realize the promise of exclusive
10 rights enshrined in our Constitution.

11 "In undertaking this study, I request the
12 office solicit the input of an array of copyright
13 owners and stakeholders" -- you are part of that
14 array, obviously -- "and who might be interested and
15 be impacted by proposed improvements and that the
16 report be completed no later than September 30th,
17 2013. American authors and other copyright owners make
18 an immeasurable contribution to the strength of our
19 nation. I would appreciate your invaluable assistance
20 in committing to undertake the study.

21 "Sincerely, Lamar Smith, the House Judiciary
22 Committee."

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1 The Register of Copyrights couldn't be here
2 today but has also asked me to convey her thoughts on
3 this important initiative. So if you will bear with
4 me for a few more minutes. This is from Maria
5 Pallante. "The Copyright Act protects a wide variety
6 of works of authorship, ranging from individual
7 photographs and illustrations of relatively modest
8 commercial value to motion pictures worth hundreds of
9 millions of dollars. Copyright owners of all of these
10 works may need to seek a legal remedy in case a work
11 is infringed. Not all copyright owners, however, have
12 the same resources to bring a federal lawsuit, which
13 can require substantial time, money, and effort to
14 pursue. To the extent infringement results in a
15 relatively small amount of economic damage, the
16 copyright owner may be dissuaded from filing a lawsuit
17 because the potential award may not justify the
18 expense of litigation or the copyright owner may have
19 difficulty finding an attorney willing to handle the
20 matter. In light of these challenges, the Chairman of
21 the House Judiciary asked the U.S. Copyright Office to
22 examine the obstacles facing small copyright claimants

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1 and to consider potential alternatives.

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

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

20 "It is our hope that these hearings will
21 allow you to offer your perspectives on the spectrum
22 of issues involved in this undertaking and that you

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1 will, in turn, provide the Copyright Office valuable
2 insight to inform our study and recommendations to
3 Congress."

4 And we are very pleased to have a
5 representative also here today from the U.S. Patent
6 and Trademark Office, Ann Chaitovitz, who -- this will
7 be the last set of prepared remarks -- will read a
8 statement from David Kappos, who is the Under
9 Secretary of Commerce for IP. As you will hear, the
10 USPTO is also looking at small claims issues.

11 MS. CHAITOVITZ: Thank you, Jacqueline. I'd
12 like to thank the Copyright Office and the U.S.
13 Register of Copyrights, Maria Pallante, for calling
14 this public meeting.

15 And good morning, everybody. Thank you for
16 taking the time to attend this meeting about
17 adjudicating small copyright claims. As most of you
18 know, a lot of consideration has been given in recent
19 years to small claims procedures for copyrights. You
20 may not be aware that procedures for patent small
21 claims have also been, and are currently being, examined
22 as well. We have heard from individual creators and

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1 innovators that federal litigation, including costly
2 discovery, can be too expensive and ultimately
3 unaffordable for them. As a result, SMEs say they are
4 unable to enforce their rights. So I hope we can all
5 put our heads together to find a way to address what
6 is an access to justice issue at its core and ensure
7 the vitality and accessibility of our IP system.

8 As David Kappos, the Under Secretary of
9 Commerce for Intellectual Property and the Director of
10 the USPTO, recently noted in February when he was at
11 University of California, Davis, his alma mater,
12 "Inventors must be able to concentrate on research and
13 discovery, not on expensive disputes and litigation.
14 And, therefore, the USPTO is considering a small claim
15 solution that could settle patent disputes quickly
16 and cheaply without litigation."

17 On October 1st, the USPTO hosted a patent
18 small claims roundtable to discuss the concept of a
19 patent small claims mechanism and will soon issue a
20 notice of inquiry to seek comments from the public
21 regarding a patent small claims proceeding. The USPTO
22 is concerned about the copyright side of the equation

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1 as well. We are very pleased that the Copyright
2 Office is examining this topic in the copyright arena.
3 We look forward to working with the Copyright Office
4 in its efforts.

5 Under Secretary and Director Kappos has sent
6 some guiding philosophies for you today. First, IP
7 rights encourage creativity and innovation. As you in
8 Los Angeles well know, they create jobs and expand
9 markets. Second, IP rights will not incentivize
10 creativity and innovation if they are too expensive to
11 enforce. And, third, any small claims procedure must be
12 guided by our Constitutional limitations: Article III,
13 the Seventh Amendment, and due process.

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

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1 MS. CHARLESWORTH: Okay. So now, without
2 further ado, on to our discussion. Our goal is
3 obviously to have as productive a discussion as
4 possible. And we will, Catie and I will, be
5 alternately moderating the various panels. We will
6 recognize you when you wish to speak if you just want
7 to raise your hand.

8 We have a good number of mikes today.
9 They're mainly for the court reporter to pick up our
10 remarks. As you can see, all remarks are being
11 transcribed. And eventually there will be a public
12 transcript available. So all of this will be made
13 available to the public. It would be helpful if you
14 could, at least in the beginning, identify yourself
15 for the record before you begin making your remarks.
16 And that way the court reporter will have no doubt who
17 you are.

18 Our presumptive schedule calls for four
19 panels today of an hour and a half each. And what we
20 found in New York is some of the panels ran a little
21 longer, some were shorter. Obviously, it depends on
22 the number of participants. So we're trying to keep

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1 the schedule flexible. And we usually take a 10 or
2 15- minute break between the panels, but our goal
3 obviously is to make sure we're moving along and to
4 get you out of here at a good hour and certainly not
5 past the 5:30 mark but probably before that, I'm
6 hoping, today. And then tomorrow, I think we're
7 scheduled to go to 3:30, but we were able to shorten
8 that a little bit in New York. We consolidated a
9 couple of the panels where there were fewer
10 participants.

11 So, with that said, I think it would be very
12 helpful if we would go around the table and everyone
13 could introduce themselves and explain why they are
14 here, whom they represent, or what their interest in
15 the issue is. And then we'll get started with panel
16 I. Do you want to start over here? Ms. Wright?

17 MS. WRIGHT: I am Carolyn Wright. I have my
18 own firm that primarily concentrates on doing legal
19 work for photographers. And with the digital age, as
20 you well know, photographers have a special challenge
21 of fighting copyright infringement, primarily via the
22 internet. And our practice is pretty much nationwide,

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1 but my physical office is in Lake Tahoe, Nevada. But
2 I am happy to be here today to participate in this
3 because photographers are really struggling with small
4 copyright claims.

5 MS. CHARLESWORTH: Thank you.

6 Ms. Calzada?

7 MS. CALZADA: My name is Alicia Calzada, and
8 I represent the National Press Photographers
9 Association. We are here just to make sure that the
10 interests of our members and photojournalists in
11 general, who are very prolific targets of
12 infringement, are protected in this new process.

13 We are very excited and thankful that this
14 is going forward. And we are very hopeful that this
15 will create a good solution for photojournalists and
16 all photographers, really. And so we appreciate the
17 opportunity to be here.

18 MS. TOMMASELLI: My name is Kim Tommaselli.
19 I am from the Independent Film and Television
20 Alliance. And we represent about 150 small to medium-
21 sized enterprises in about 19 different countries.
22 And they are producers, distributors, sales agents,

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1 and institutions that are engaged in film finance.
2 And our members depend on the transfer of their
3 copyrights in order to keep their businesses afloat,
4 in order to license their films in territories all
5 over the world. So while, you know, we have very, very
6 small companies and quite large companies, the
7 majority are small to medium-sized companies that
8 really are prohibited from enforcing copyrights
9 because of the time and the cost of federal
10 litigation.

11 MS. CHARLESWORTH: Mr. Field?

12 MR. FIELD: I am observing. I am Corey
13 Field, of counsel with Ballard Spahr. I just finished
14 a two-year term as the President of the Copyright
15 Society of the U.S.A. I am not actually testifying,
16 so to speak, today, but I am honored to be here. And
17 thank you for allowing me to be here.

18 MS. CHARLESWORTH: You will be a presence.
19 Duly noted.

20 Mr. Hasbrouck?

21 MR. HASBROUCK: Hi. My name is Edward
22 Hasbrouck. I am here representing the National

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1 Writers Union. We are a labor union, UAW local 1981.
2 Our membership includes writers from every state in
3 the country, writers in all genres and media and at
4 all levels of commercial success or lack thereof. And
5 we are involved both in policy advocacy, such as this,
6 but also drawing a body of experience from our
7 Grievance and Contract Division, trained volunteer
8 non-lawyer members of the union who work as informal
9 advocates on behalf of our members attempting to
10 pursue grievances for all of the reasons that we are
11 going to be talking about today, unable to pursue them
12 currently in most cases through the courts. So we
13 draw on that experience in trying to figure out how to
14 move forward.

15 MS. CHARLESWORTH: Okay. Ms. Knappen?

16 MS. KNAPPEN: Hi. My name is Molly Knappen.
17 I am a designer and developer. I am working on
18 copyright issues as a volunteer throughout 15 years.
19 And I am here because I think this is crucial to
20 driving our economics for the next century.

21 MS. CHARLESWORTH: Who is next? You are
22 observing.

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1 MS. KUNZE: Also observing.

2 MS. CHARLESWORTH: Okay. Yes. You are on a
3 subsequent panel. So if you want to go ahead and
4 introduce yourself now, that's fine.

5 MS. ROBINSON: Okay. Thank you. Alma
6 Robinson, California Lawyers for the Arts. We
7 represent the interests of artists and arts
8 organizations and small arts businesses throughout
9 California. We have been involved in alternative
10 dispute resolution since 1980. And so I am here
11 particularly to speak about that, but I am also very
12 interested in the small claims discussion because I
13 think it has been a huge barrier for people to enforce
14 rights and for all of the reasons you already said.

15 This is my colleague, Erin Kunze, who is
16 Associate Director of our office here in Southern
17 California.

18 MS. CHARLESWORTH: Thank you.

19 MS. ROBINSON: Thank you.

20 MS. CHARLESWORTH: Mr. Cohan?

21 MR. COHAN: I'm Tim Cohan. I'm the General
22 Counsel for Peermusic, which is an independent music

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1 publisher, one of the largest. We represents
2 hundreds, not thousands, of authors, composers, and
3 heirs and the catalogue of over 300,000 musical works.

4 I am attending to sort of try to give the
5 perspective of an independent music publisher that has
6 relationships with composers. And we often bring
7 lawsuits on behalf of the composers or we will assert
8 their rights in various ways. So we're very
9 interested in this as a potential alternative. I have
10 some concerns I would like to express as well, too.

11 MS. CHARLESWORTH: Very good. And we met
12 you, Ms. Chaitovitz. So I think we are ready to go.

13 MS. CHARLESWORTH: The first panel is
14 "Forum, Jurisdiction and Decisionmakers." And
15 basically what we found was a useful way to frame the
16 discussion was to kind of follow the questions that
17 were presented in the most recent notice and for
18 people to amplify and further discuss their comments.
19 In some cases, you have already submitted written
20 comments, but we're also interested in hearing your
21 further thoughts, as your colleagues will be.

22 So for the first question, we just had a

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1 general one, which was, how do you envision? What is
2 your general thinking about a small claims process?
3 Do you envision a court-like process? Would it be
4 more informal, along the lines of arbitration or
5 mediation? If you could open the discussion by letting
6 us know your thoughts in terms of the basic structure
7 of a small claims process that you think would be
8 useful, I would be grateful.

9 I am just going to take the prerogative of
10 the Chair and call on someone. Ms. Wright, since you
11 were the first one to sit down, you have the short
12 straw. If you want to tell us your thoughts on how
13 you might envision a small claims process for
14 copyright claims?

15 MS. WRIGHT: I think for our clients, our
16 first clients -- and the copyright litigation
17 experience we have had, most federal courts now push
18 the parties at an early stage to mediation. And it's
19 been quite successful for us as long as we have a good
20 mediator. And we sometimes have not. But I think the
21 mediation process is good.

22 I don't know how it would necessarily work

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1 in practice when -- I guess I also envision a small
2 claims court because in my early days as an attorney,
3 I was in small claims court a lot litigating claims
4 that were usually less than \$5,000 or so. And I think
5 for our clients, that is what we are thinking of.

6 So it would be easy to present to a judge in
7 a small claims court-type manner, "Here is the use.
8 And there is no license. Therefore, let's talk about
9 damages." Our cases are usually quite simple.
10 Sometimes fair use is an issue, which is a whole other
11 ball of wax, but I think for our clients, either a
12 mediation process or a small claims-type process would
13 work.

14 MS. CHARLESWORTH: Okay. Other thoughts on
15 the basic structure of a small claims process? Yes,
16 Ms. Tommaselli?

17 MS. TOMMASELLI: We actually administer an
18 arbitration tribunal at the Independent Film and
19 Television Alliance. And the one issue with
20 arbitration and mediation is that -- we're obviously
21 not opposed to it, but usually it requires consent of
22 the parties. And in a case like this, it might be

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1 difficult to get the respondent or defendant to agree
2 to submit to the jurisdiction of this tribunal. So we
3 envision more of a court process. And also because
4 copyright claims are more complex, I think that the
5 parties should be entitled to attorney representation
6 and that the trier of fact should have more
7 qualifications to meet in order to be an expert in
8 this area.

9 MS. CHARLESWORTH: Okay. So you would favor
10 not so much a voluntary arbitration or mediation
11 process but something a little more mandatory or --

12 MS. TOMMASELLI: Yes, more like a court
13 system also, you know, the availability of limited
14 discovery. And obviously discovery is very expensive
15 but the availability of limited discovery and also a
16 court order, some sort of binding -- an arbitration
17 award and mediation could be binding so that it can be
18 enforceable.

19 So while we wouldn't be opposed, I think, to
20 arbitration or mediation as maybe a part of a court
21 system, similar to the courts as they either require
22 or allow for mediation if the other party were to

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1 agree, but I think as the tribunal as a whole, I think
2 it's just our opinion that it wouldn't necessarily
3 work if both parties have to consent.

4 MS. CHARLESWORTH: Okay. Other thoughts?
5 Mr. Cohan?

6 MR. COHAN: Without taking a position on
7 whether it is voluntary or mandatory, which I think is
8 --

9 MS. CHARLESWORTH: The next question. Many
10 of these questions overlap.

11 MR. COHAN: Pretty complex. And I am not
12 sure we have an official position on that, actually.
13 But I just would want to underline our agreement with
14 a couple of Ms. Tommaselli's points. One is expertise
15 of a mediator or a judge or arbitrator or whoever it
16 would be. That would be critical in our view,
17 copyright expertise and also the ability to be
18 represented by counsel as these issues can often get
19 very, very complex and can quickly get beyond the
20 everyday knowledge of even the plaintiff to know what
21 rights they may or may not have.

22 MS. CHARLESWORTH: Okay. Ms. Knappen?

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1 MS. KNAPPEN: A concern of having counsel
2 there is that it makes the small claims process less
3 accessible to the average creator, which is I think
4 part of the appeal of the idea of a small claims
5 court.

6 MR. COHAN: I wouldn't recommend that it be
7 mandatory; an option.

8 MS. KNAPPEN: As an option, as soon as one
9 party steps it up, the other party really needs to.

10 MS. CHARLESWORTH: Okay. I think that
11 whether counsel participates is a very important
12 question. And not to be overly rigid about -- really,
13 many of the questions do overlap. And I don't want to
14 discourage debate when it comes up, but we do have a
15 section on that. I think that requires a fair amount
16 of discussion. So I want to hear more from you guys.

17 Mr. Hasbrouck?

18 MR. HASBROUCK: Writers we represent
19 sometimes end up in small claims court. When we
20 talked about this issue within our organization, the
21 only objection to giving states' small claims courts
22 jurisdiction over these cases was not the process but

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1 the potential lack of specialized expertise. So I
2 think the kind of process that would be beneficial to
3 our members and other writers would be something with,
4 as much as possible in common, learned from and drawn
5 from the existing largely successful experience of
6 states' small claims courts but with a different class
7 of adjudicators with the necessary specialized
8 expertise in copyright law.

9 Mediation or arbitration for the typical
10 claims, which a large and growing percentage of which
11 are against publisher infringers, who typically have
12 much deeper pockets than the victim, and in any case
13 the ones of which are the most difficult to pursue
14 through the existing system are those against a deep-
15 pocketed infringer. The deep-pocketed defendant is
16 never going to consent to anything less than a full-on
17 process if they have a choice because they know that
18 they can bankrupt the plaintiff through dragging out
19 the process and expensive procedural measures and
20 legal fees. So a system that is voluntary or that
21 makes it easy for the defendants to opt out will be of
22 virtually no use to our members. It just won't help.

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1 MS. CHARLESWORTH: Okay. Yes, Ms. Calzada?

2 MS. CALZADA: Yes. I just wanted to concur
3 and echo what Ms. Hasbrouck said. And also when we
4 were contemplating this question, we initially sort of
5 in our ideal world were thinking it would be so great
6 if we could create a whole new court system, but we
7 realize that that is sort of impractical. And so what
8 we advocated for was to create an administrative
9 agency that would be connected to and could rely on
10 the resources of the Copyright Office.

11 We did not want to advocate turning the
12 Copyright Office into an administrative agency, but we
13 feel like creating an administrative agency court
14 system with Article III review would be a very
15 successful process. And part of the reason we wanted
16 to advocate for that was our concern about the
17 mandatory versus voluntary. We wanted to create
18 something that you could really hold someone to and,
19 you know, sort of force this process. And if they
20 don't like the outcome, then, absolutely, they can
21 appeal it to an Article III court.

22 MS. CHARLESWORTH: Okay. Other thoughts on

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1 voluntary versus mandatory? If it were a voluntary
2 system, what kinds of incentives do you think might
3 encourage people to participate? If it were
4 mandatory, we have heard one suggestion that it should
5 be appealable to an Article III court. I assume that
6 in your view, that would address some of the
7 constitutional issues. But I would be interested in
8 hearing additional thoughts on that particular
9 question because that is obviously perhaps the most
10 fundamental question we are addressing here.

11 Ms. Wright?

12 MS. WRIGHT: For the clients we see, we
13 actually already engage -- and I would think it's
14 possible that others do -- already engage in a
15 voluntary process of trying to resolve copyright
16 infringement claims. We rarely file a lawsuit without
17 trying to resolve the matter on our own. And we have
18 even entered into a formal mediation process with an
19 alleged infringer, trying to resolve the matter
20 without filing a formal lawsuit.

21 Most of our clients are freelancers. And
22 they can't afford a lot of expense, litigation

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1 expense, for the most part. So we do everything we
2 can in a voluntary process to resolve copyright
3 infringement claims.

4 So I don't think a system is necessary at
5 this point that we will talk about here to establish
6 another voluntary system. I think that the market
7 already has one. But what we need is a mandatory
8 system where a copyright owner can take an alleged
9 infringer to court, so to speak, to an action to give
10 a final disposition of the claim.

11 MS. CHARLESWORTH: Okay. Other thoughts?

12 (No response.)

13 MS. CHARLESWORTH: Okay. Turning to the
14 next page of my outline, I do want to flesh out a
15 little bit whether -- I hear what you're saying. You
16 don't believe in or you wouldn't be particularly
17 supportive of a voluntary system, but if the system
18 were -- if it were determined it had to be voluntary
19 due to constitutional constraints or, at least from a
20 legislative standpoint, it had to be voluntary, I
21 think an important question is what incentives might
22 exist to encourage plaintiffs to participate or even,

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1 probably more importantly, defendants, especially
2 defendants who may have more resources than an
3 individual copyright owner.

4 Any further thoughts on that question? Yes,
5 Ms. Calzada?

6 MS. CALZADA: Sorry. I did have another
7 thought on that. You know, if opting out led to a
8 requirement to pay attorneys' fees for a victorious
9 plaintiff, prevailing plaintiff, I think that would be
10 a very good incentive to stay in the system for the
11 defendant.

12 MS. CHARLESWORTH: Okay. Fee shifting might
13 be a possibility. Any other thoughts? Mr. Cohan?

14 MR. COHAN: I think the cap on damages would
15 be, it would seem to me would be, the greatest
16 incentive for a defendant to participate. And, of
17 course, if removal would get rid of that cap, as I
18 think the current incenter suggested in his comments,
19 that might be one backstop to keep defendants from
20 taking the -- removing to federal court.

21 MS. CHARLESWORTH: Okay. So the damages cap
22 as well. Assuming there is some sort of facility,

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1 where should it be located? Do people have views on
2 that? Should it be centralized? Should it be -- Mr.
3 Cohan, do you have a view on that?

4 MR. COHAN: That seems to be the trickiest
5 issue because if it is centralized, we're talking
6 about plaintiffs that have limited resources at the
7 start. I'm not the first person to bring this up, I
8 don't think. But it seems that if it were certainly in
9 one place in Washington, that would be very
10 prohibitive. And it would probably defeat the purpose.
11 It would have to be some sort of accessible areas or,
12 as a lot of people have suggested, some sort of
13 electronic means to conduct these hearings. That
14 seems probably the most promising since you're sort of
15 using new technology and teleconferencing and perhaps
16 even telephone.

17 MS. CHARLESWORTH: Okay. Ms. Tommaselli and
18 then Mr. Hasbrouck?

19 MS. TOMMASELLI: We propose that it would be
20 a centralized location with all of the evidence based
21 on written submissions. And in the event an oral
22 hearing was required, a telephonic or videoconference

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1 would be permitted.

2 MS. CHARLESWORTH: Mr. Hasbrouck?

3 MR. HASBROUCK: Yes. We would also support
4 the imperative to provide for some form of virtual
5 participation, telephonic, videoconferencing, or
6 whatever, for people, regardless of whether there's
7 more than one hearing site.

8 And I want to make a particular point here
9 on behalf of victims of infringement in the U.S. who
10 are located around the world. Large volumes of
11 material are published in the U.S, especially online
12 given the overwhelming dominance of the web hosting
13 industry in the U.S. People all over the world
14 publish in the U.S. There are vast numbers of people
15 whose rights are being infringed here who have no
16 chance because they can't get here. They probably
17 couldn't even get a visa to appear in a U.S. court.

18 So, without that, without the possibility
19 for virtual participation, we would be denying access
20 to the courthouse door to many victims of infringement
21 around the world and potentially running afoul of the
22 Berne Convention. So it's important throughout this

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1 process to keep in mind how this stuff is actually
2 going to work for foreign creators.

3 MS. CHARLESWORTH: Okay. Ms. Knappen?

4 MS. KNAPPEN: I am curious if anyone here
5 has been following how this has been playing out in
6 the U.K, particularly with the virtual option. I know
7 it's so new, but I didn't know.

8 MS. CHARLESWORTH: Does anyone have any
9 information? Are you talking about the copyright
10 small claims track in the U.K? Because I think it
11 only went into effect in October.

12 MS. KNAPPEN: Yes.

13 MS. CHARLESWORTH: But that is something
14 that we will hopefully have -- you know, since our
15 report isn't due for almost a year, we'll have some
16 ability to look at that and see how that is going.

17 For those of you who aren't aware, in the
18 U.K, there was recent legislation to join their
19 existing small claims or to leverage their existing
20 small claims system with their existing IP court and
21 create a small claims court for copyright disputes.
22 And it's brand new, but it seems to have a very

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1 streamlined process and obviously is something that we
2 will be taking a look at as we go down this path.

3 What about the adjudicator? A couple of you
4 mentioned expertise. Do people think attorneys could
5 do this? Should it be ALJs, administrative law
6 judges? Do people have further thoughts in terms of
7 who might serve as an adjudicator in a small claims
8 system? Ms. Calzada?

9 MS. CALZADA: Well, I think they should
10 certainly be -- since this is a specialized court,
11 they should be well-versed in copyright law and, by
12 virtue of that, be an attorney, someone educated in
13 the copyright laws with some experience practicing in
14 the industry.

15 You know, initially it may be a central
16 location. If it becomes very successful and spreads
17 and somehow every city in America has a copyright
18 small claims tribunal, then there may be a chance, an
19 opportunity, to look at the ALJ issue, but I think
20 since one of our concerns that's keeping us from going
21 to state court is the expertise, we certainly want
22 expertise.

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1 MS. CHARLESWORTH: Okay. Everyone agrees
2 that the adjudicators, whoever they are, should have
3 expertise in copyright law.

4 You mentioned state court. There were a
5 fair number of -- I think there was one comment that
6 came in that perhaps favored state courts, but there
7 were many comments that suggested state court, the
8 state court small claims process, was not perhaps the
9 best alternative. And, just to back up, it would
10 require a statutory change, obviously, to permit state
11 courts to hear copyright claims. So the idea would be
12 to change the Copyright Act to allow perhaps small
13 claims within a certain limit to be heard by state
14 courts. We received a number of comments about that.
15 As I said, most of them did not favor that.

16 I was wondering if anyone had anything
17 further to say on that because from a constitutional
18 perspective, there were some who have argued that it
19 might be the simplest solution just because all it
20 would require is a statutory change in theory.

21 Any thoughts on what it would be like to
22 litigate copyright claims in state court? Ms. Wright?

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1 MS. WRIGHT: I think that that generally
2 just goes against the thought that you would have
3 someone who was familiar with copyright law
4 adjudicating the matter. And while a state court
5 claims, small claims state court process, seems like a
6 good way to litigate these claims, I don't know how in
7 the world we're going to get state court judges to
8 understand copyright law. It is such a specialized
9 area.

10 And, if I may, I would like to -- I have a
11 blog following. And my readers overwhelmingly
12 requested that a small claims copyright court process
13 would be the copyright owner's option to a federal
14 court lawsuit. They overwhelmingly want it to be an
15 option that they want to still have the option of
16 filing a regular lawsuit in a federal court, in
17 addition to this. So I just wanted to put that in.

18 MS. CHARLESWORTH: Okay. So this goes back,
19 really, --

20 MS. WRIGHT: Yes.

21 MS. CHARLESWORTH: -- to the mandatory
22 versus voluntary question.

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1 MS. WRIGHT: Yes. I apologize.

2 MS. CHARLESWORTH: No, no, no. It is an
3 important issue. In other words, if the claim fell
4 within whatever jurisdictional limit were imposed,
5 could you as the plaintiff, even it were a small
6 claim, still have the option of filing in federal
7 court? And, if I understand you correctly, you would
8 want the plaintiff to have that option? They could
9 choose the small claims track or the regular district
10 court track?

11 MS. WRIGHT: Yes. It was my blog readers
12 overwhelmingly wanted that option available to them in
13 this process.

14 MS. CHARLESWORTH: Okay. So some anecdotal
15 evidence.

16 Mr. Cohan?

17 MR. COHAN: I think this may have been noted
18 before. I agree with that point. I think that is a
19 good issue. With music copyrights, you have a lot of
20 co-owners as well, too. So that raises the issue of
21 whether or not -- you know, if one co-owner brings an
22 infringement claim in the small claims court, does

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1 that preclude the other co-owner from bringing a
2 federal claim? And you wouldn't want to have them
3 prejudice options that other people of independent
4 rights have in that case.

5 MS. CHARLESWORTH: So just to expand that,
6 just to make sure I understand your point, you're
7 saying if two people own a musical work, it's
8 infringed, one of them wants to pursue in small claims
9 --

10 MR. COHAN: Right. You have two separate
11 claims, essentially, for each copyright interest. And
12 you wouldn't want to have one copyright owner of the
13 work compel the other one to waive any rights they
14 might otherwise have or remedies.

15 MS. CHARLESWORTH: Okay. That is an
16 interesting point.

17 Any further thoughts on this issue in terms
18 of -- Mr. Field?

19 MR. FIELD: I know I said I wouldn't.

20 MS. CHARLESWORTH: Well, you are entitled
21 because you are actually signed up --

22 MR. FIELD: Oh, thank you.

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1 MS. CHARLESWORTH: -- to be here. So you
2 can speak.

3 MR. FIELD: I just wanted to point out that
4 in federal courts, they have an often-used magistrate
5 judge system. And many times cases are assigned to a
6 magistrate, who handles mediation and settlement. And
7 that seems like a more sort of existing and built-in
8 path, rather than a rather dramatic move of going to
9 state court.

10 MS. CHARLESWORTH: So do you have experience
11 with that where parties stipulate to a magistrate and
12 whether that moves things along more quickly?

13 MR. FIELD: Well, they may not be able to
14 stipulate if the presiding judge said, "You are going
15 to. Here is my magistrate. And you will now have the
16 mediation session" or whatever.

17 But I am just saying there is actually a
18 level of adjudication in federal court below the
19 presiding judge, which might be useful, as opposed to
20 moving to state court, which presents issues that
21 people have commented on.

22 MS. CHARLESWORTH: Okay. So perhaps looking

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1 at existing federal court resources as a way to
2 streamline cases within the Article III system might
3 be something else to look at; in other words, by
4 turning to a magistrate or --

5 MR. FIELD: It has less constitutional
6 issues to go that route.

7 MS. CHARLESWORTH: Yes. One would hope.
8 Any further thoughts? Okay. Ms. Calzada?

9 MS. CALZADA: One concern I have with that
10 is presumably the statutory change would say under a
11 certain amount, you can bring this claim in state
12 court, but through the discovery process, the
13 plaintiff might find out that the infringement, the
14 level of infringement, is much higher than they
15 expected. And a plaintiff can't remove to federal
16 court. And so they may be limited once they figure
17 out that this is bigger than they ever expected to
18 changing their options and getting a complete remedy.

19 MS. CHARLESWORTH: So do you think -- is
20 your suggestion that if discovery shows that the claim
21 is much greater, they should be permitted to remove at
22 that point or that they should be stuck with their

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1 initial choice?

2 MS. CALZADA: No, I don't think they should
3 be stuck.

4 MS. CHARLESWORTH: No, no. I'm not --

5 MS. CALZADA: My concern is that if you
6 somehow figure out that this was way bigger than you
7 ever expected, that you have the option of either
8 continuing the system that you have chosen because it
9 will get your problem solved quicker or if you really
10 feel like this is worth pursuing in the traditional
11 federal court role, we want to make sure that people
12 have that option. And I fear that if you are in state
13 court, you know, as the plaintiff, then you really
14 wouldn't have an option to change your mind. You are
15 kind of stuck there --

16 MS. CHARLESWORTH: Okay.

17 MS. CALZADA: -- because it's the
18 plaintiff's decision and then they're stuck with it.

19 MS. CHARLESWORTH: Does anyone in the room
20 have experience? Maybe you have experience. I mean,
21 how common is it to start out with an infringement
22 claim that you think is small and then learn that it

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1 is much larger?

2 MS. CALZADA: I think Carolyn has an answer.

3 MS. CHARLESWORTH: Ms. Wright?

4 MS. WRIGHT: I think it does happen. I
5 think that it somewhat can be handled with the
6 complaint and that the actual claim that's pled in the
7 complaint could be adjudicated. And then if you find
8 additional infringements, those claims survive because
9 you haven't pled them. They're not going to be
10 litigated.

11 So usually what happens in our cases, we
12 either amend the complaint to add additional claims,
13 which that happens quite often, or we try to resolve
14 the claim outside of the lawsuit to say, "Okay. Well,
15 this is bigger than we thought. We got this as well."
16 Either we can litigate it -- sometimes we can't even
17 litigate it in the case that we have in front of this
18 defendant for some reasons. But I don't see that as a
19 huge problem, at least in our experience.

20 MS. CHARLESWORTH: But I guess one other
21 question, just sort of anecdotally, is it a frequent
22 occurrence where you think "Okay. They have infringed

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1 one work in one particular way" and then as the facts
2 are developed, you find out they have infringed ten
3 works in many particular ways.

4 MS. WRIGHT: Correct.

5 MS. CHARLESWORTH: So if you are looking at
6 a damages cap of, say, let's say, for \$10,000,
7 suddenly you are at a \$50,000 claim. I mean, do you
8 find that that is in your experience something that is
9 pretty atypical or is actually pretty common?

10 MS. WRIGHT: I think it doesn't happen that
11 often, no. I think it's atypical. Anecdotally I
12 would say one out of ten times that we usually know
13 the extent of the infringement prior to filing the
14 suit generally.

15 MS. CHARLESWORTH: Mr. Hasbrouck?

16 MR. HASBROUCK: I think it's important to
17 keep in mind that the overwhelming majority of
18 infringements never get near a lawyer's office. So
19 the experience of lawyers and litigators has almost no
20 bearing on the overall pattern below the radar of
21 actual infringements, whether or not discovery might
22 reveal additional infringement.

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1 And I would say, particularly where the
2 infringer is a publisher, usually writers started out
3 with some basis of trust in their publisher. And
4 there is a gradual process of disillusionment of
5 discovering just how badly they have been betrayed by
6 the publisher and how far they have exceeded the scope
7 of the license or how far they have shorted the writer
8 on paying the payments, which makes the copies for
9 which the contractual payments were not made, copies
10 that were not made in accordance with the license --
11 infringing copies. There is a gradual process of
12 coming to terms with that. And almost all of the
13 evidence of the extent of the infringement is almost
14 always in the possession and control of the infringer.
15 That's the norm.

16 But it doesn't matter how large the damages
17 turn out to be. The ordinary victim cannot afford the
18 threshold of a federal lawsuit. So the option of
19 removing to a regular federal court process is really
20 illusory and shouldn't be relied on. Basically this
21 process we're talking about is going to be the only
22 option realistically available to most victims of

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1 copyright infringement. And we need to recognize that
2 and not pin too much hope or put too much worry about
3 those tiny majority of very large cases where there
4 might actually be some prospect for removal or
5 pursuing the existing remedies.

6 MS. CHARLESWORTH: Other thoughts on this
7 particular issue? Mr. Cohan?

8 MR. COHAN: I think it is important to draw
9 a distinction between actions that are really properly
10 infringement actions and actions which sound to me
11 more like contract, breach of contract, claims that
12 are accommodated in the state court or, for better or
13 for worse, that is where they are litigated.

14 I think I would be a little concerned that
15 what ought to be a contract claim and resolved
16 according to contract law be bumped into the
17 infringement category because the scope of the license
18 was exceeded. You see that often already, but I'm not
19 sure. I would sort of want to avoid shoehorning a lot
20 of disputes that would be otherwise settled as
21 contract issues into this court. I think it might
22 overwhelm it.

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1 MS. CHARLESWORTH: Okay. That is a very
2 significant issue, too. And I am going to ask you
3 more questions about that when we get to it a little
4 later on because of the relationship between contract
5 claims and infringement claims and how to handle, how
6 you would handle an infringement claim that basically
7 exists because the licensee exceeded the scope.

8 Any other thoughts in terms of the forum,
9 jurisdiction, or the general issues of how the court
10 would be set up, where it would be -- I think we have
11 had some helpful comments.

12 (No response.)

13 MS. CHARLESWORTH: I would suggest, then, if
14 we want to take a few minutes, a break for a few
15 minutes. I'm getting nodding heads. That's good.

16 I am told that there is a vending area
17 nearby for those of you who don't know off the main
18 hall. Is there coffee there? Did anyone succeed in
19 getting it? People are nodding again. There's coffee
20 there.

21 There's also a cafeteria, Lu Valle
22 cafeteria, if you go through the courtyard. I can't

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1 give you good directions. I promise you that you
2 would get lost. But if you ask someone knowledgeable,
3 I think you can cut through the courtyard and go to
4 the Lu Valle cafeteria. And there is food there, if
5 not now, later on for lunch. I just wanted you to be
6 aware.

7 So how about -- my watch is off. A quarter
8 to you want to come back? And we'll start with panel
9 II.

10 (Off the record.)

11 (On the record.)

12 MS. ROWLAND: I think we are going to get
13 started on panel II. So if people could take their
14 seats, that would be great.

15 In this panel we are going to be talking
16 about subject matter, claims, and defenses, which is
17 actually a really interesting panel for our small
18 claims process because there seems to be a lot of
19 discussion amongst the comments about different types
20 of things that should be brought into a small claims
21 process. So we are going to go ahead and do something
22 similar to the last session, going through the topics

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1 that were listed in our Federal Register notice from
2 August to see if people have comments and thoughts
3 they wanted to explore. And the first thing we talked
4 about in our notice was eligible works. We talked
5 about this a little bit in our last session. The
6 question is, should it be limited to just photographs
7 and illustrations or should it be music or should it
8 be a specific type of work or should it be a specific
9 type of claim like, you know, for a contract or
10 whatnot?

11 So does anyone have any thoughts about -- I
12 guess the first issue is the type of work. Does
13 anyone have any thoughts pro or con, including a
14 specific type of work in the small claims process?
15 Mr. Cohan?

16 MR. COHAN: I would say that's the threshold
17 issue for music publishers as generally we support,
18 fully support, the location that is core for
19 photographers. We have looked through their
20 submissions. And it seems like there is a real need
21 there for photographers, visual artists. For a number
22 of reasons, we don't think it is a good idea for music

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1 copyrights. There are time sound recordings or
2 underlying copyrights for the musical works as well.

3 MS. ROWLAND: Can you explain?

4 MR. COHAN: Sure. We think that the
5 uncertainty as to possible unintended consequences is
6 quite large in terms of a lot of issues that affect
7 music publishers. I mentioned issues of co-ownership
8 just being one. I mean, essentially we don't
9 necessarily see a need for it, at least from the
10 publishers' perspective.

11 Now, generally these sorts of claims for
12 songwriters that are represented come to the publisher
13 if it's an independent publisher like Peermusic
14 directly. There is a dialogue with the songwriters.
15 And if they discover something that appears to the
16 songwriter to be an infringement or we discover it, we
17 start a dialogue with them as to possible remedies,
18 whether or not it is actually licensed. There's a
19 long history of a relationship there and how these are
20 handled.

21 And generally in our contracts, the right to
22 pursue these infringements is assigned exclusively to

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1 us. So there would have to be some sort of carve-out
2 from these contracts, which will be quite complicated
3 in itself. But generally the way the system works --
4 and, you know, it's not perfect, but the way that it
5 has worked for publishers to date is we serve sort of
6 as the agent for the songwriter that faces what he or
7 she feels is an infringement. And we handle it
8 generally at the publishers' expense. It is a
9 different case if the songwriter is being accused of
10 infringement, but if the songwriter feels that in a
11 website or another songwriter is using the copyright
12 in an infringing way, those are fairly
13 straightforward. And we handle that for them. If it's
14 a viable claim, if it's something that's really worth
15 pursuing, then we will pursue it.

16 MS. ROWLAND: Even the small ones? So I
17 guess the question is, at the hearings in New York, we
18 heard some discussion about this. And one of the
19 questions is how often does the publisher actually do
20 this? So is there kind of a minimum amount of money
21 that would have to be involved or --

22 MR. COHAN: Yes. It would have to warrant

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1 the resources of, you know, mind resources to focus on
2 it. It would have to be a legitimate claim. That's my
3 threshold issue, too, is I am not really sure what a
4 small claim is. As BMI and ASCAP mentioned, most of
5 the infringement actions that they have brought would
6 objectively these as small amounts. It would be, you
7 know, a few particular works being infringed at a few
8 particular times. And, thanks to the structure of the
9 statutory damages and how the federal system works
10 right now, that's enough leverage to bring an action
11 against what could be an institutional problem, an
12 institutional, you know, infringement situation.

13 So, again, I'm not really sure what a small
14 claim is. And that's sort of a separate issue that
15 I'm sure we'll address. But I'm not sure necessarily
16 how to quantify those. If, for example, if it was a
17 new, a novel infringement on a website, it may only be
18 one or two infringements.

19 There's a new, say, tech model built upon
20 what we would say an infringing model. The license
21 that they would have gotten for that may be, you know,
22 small amounts, under \$500, but it would be very

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1 important to establish early on that that's not a
2 legitimate -- that that's infringing news. That's not
3 a legitimate business model. So, again, the amounts
4 in controversy would vary widely in terms of whether
5 or not I would pursue that on behalf of Peermusic.

6 MS. ROWLAND: I'm sorry. I was just going
7 to follow up and ask what happens if you do not, if
8 the publisher does not, decide to move forward on a
9 claim. So does anything happen or --

10 MR. COHAN: Generally we come to agreement
11 with the songwriter. I'm wondering if they might
12 already be licensed. You know, songwriters will
13 sometimes come to us and say, "I saw this user-
14 generated content on YouTube. Sue them. You know,
15 let's go after them with guns blazing." And they may,
16 you know, visions of enormous recoveries and a
17 windfall. And we'll explain that we have an agreement
18 in place with YouTube, user-generated content that's
19 monetized for you in this way. And this is when you
20 will see that income if you see income generated from
21 that. Generally we come to agreements with them.

22 MS. CHARLESWORTH: But, Mr. Cohan, I think

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1 the question is let's assume it's actually
2 infringement, there's no license, and it's for a small
3 amount. Let's say it is an individual use on an
4 individual website. And let's assume the license value
5 would be fairly minimal and the expectation of damages
6 would be fairly minimal, maybe a few thousand dollars.
7 If a songwriter comes to you, even if they have a
8 contractual relationship with you, and you decide
9 that's not -- I think you've acknowledged that it may
10 not be economic or you might choose not to pursue
11 that, is your suggestion that the songwriter, even as
12 a beneficial owner of the song, with independent
13 standing to sue, that that songwriter should be
14 foreclosed from pursuing the matter on their own
15 behalf in a small claims process because if you take
16 musical works out, that's what you're saying.

17 MR. COHAN: Right. You know, I wouldn't say
18 that they ought to be precluded, but I think that that
19 would open the door to -- we would have to have some
20 sort of carve-out from our exclusive rights of
21 administration in that case. And I'm not sure what
22 that might open the door to in terms of our

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1 relationships with eh songwriter. Other exclusive
2 rights of administration that they might want to
3 reassert and exercise I think could be disruptive
4 generally to the contractual relationship with the
5 songwriter if that were the case.

6 And, again, anecdotally, I would say that it
7 is extremely rare, the case where we don't come to an
8 agreement. It's very easy for me or my assistant to
9 write a letter to -- regardless of how small the claim
10 is, if the songwriter were to come to us with a
11 definite infringement that's for a small amount on a
12 small website, I would be happy to write a letter and
13 send it to that website and let them know. In those
14 cases, I have the benefit of invoking the statutory
15 damages under the Copyright Act and the full panoply
16 of remedies. So generally that takes care of it. And
17 if it doesn't, then we caucus with the songwriter
18 again and say, "Well, look, it may or may not be worth
19 pursuing this claim. We may pursue DMCA routes as
20 well, too. So" --

21 MS. CHARLESWORTH: What about a songwriter
22 that doesn't have a relationship with a publisher, a

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1 self-published songwriter who is of limited means?

2 MR. COHAN: That's a good point. I think
3 maybe that might be where the Songwriters Guild of
4 America is concerned. They're, as you know, in favor
5 of the proposal.

6 I'm not sure. I would say that they
7 probably should not be precluded from using the
8 claims, but I think that the case is much more clear
9 for photographers and illustrators at this point. I
10 think you might make the argument that the copyright
11 claims are less complex, you have less potential
12 issues of co- ownership, you don't generally have a
13 publisher-songwriter relationship in the photographic
14 community. So there isn't really someone who can stand
15 and represent that person.

16 So I think the arguments in favor of
17 starting, testing the waters with photographers are
18 stronger than going ahead and saying anyone with a
19 claim of X or Y ought to be able to use the process.

20 MS. CHARLESWORTH: I'm sorry. I just want
21 to continue on. Now, you mentioned in your contracts,
22 often the songwriter assigns you the right to pursue

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1 infringement.

2 MR. COHAN: Right.

3 MS. CHARLESWORTH: But isn't it the case
4 that you sometimes just have an administrative
5 contract where that wouldn't be the case or -- in
6 other words, is that universally true that you would
7 be responsible for pursuing an infringement claim or
8 does that vary by contract?

9 MR. COHAN: It varies by contract, but I
10 think generally our administration agreements include
11 that as well. It is simply that is part of what you
12 are looking for when you are looking for a publisher,
13 someone to handle these sorts of issues. It's not
14 like something we grab for in a contract. It's
15 something we offer.

16 You know, when we pursue infringements on
17 behalf of the songwriter, they're not hiring
18 attorneys. They're not on the hook for anything. It's
19 just part of the services that we provide for our 20
20 percent, 25 percent, or whatever it is.

21 MS. CHARLESWORTH: But does the contract
22 actually mandate that you pursue any infringement that

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1 the songwriter brings to you?

2 MR. COHAN: No. That would be impractical.

3 MS. CHARLESWORTH: Okay. Other questions
4 from Ms. Rowland or --

5 MS. ROWLAND: I guess just -- great. So do
6 other people have any thoughts on whether or not music
7 should be included in a small claims --

8 MS. CLEARY: Oh, music.

9 MS. ROWLAND: Ms. Cleary?

10 MS. CLEARY: If you want to keep going on
11 music, I was just going to talk about AV.

12 MS. ROWLAND: I was going to open up the
13 floor for any people with questions about music.

14 MR. CLINTON: I would like to say something.

15 MS. ROWLAND: Mr. Clinton?

16 MR. CLINTON: What about if a publisher
17 grants somebody royalty-free usage of your copyrights,
18 your publisher grants full-scale royalty-free usage to
19 a company? What can you do about that? How do that
20 work?

21 MR. COHAN: I am not sure in what case that
22 would happen. Why would they do that?

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1 MR. CLINTON: I don't know where they would
2 want to do it, but it seemed to be some relationship
3 between a publisher, Bridgeport Music -- I think you
4 know them -- and Universal. They have some kind of
5 agreement where there is a royalty-free usage, and the
6 writers don't participate in it. For some reason, I
7 don't understand how -- I never heard of that. That's
8 why I am asking now.

9 MR. COHAN: I would say I am not --

10 MR. CLINTON: Mechanicals, mechanical-free
11 usage of something with Universal.

12 MR. COHAN: It seems to me that any
13 relationship that a publisher has who would be
14 licensing your works would have to involve some sort
15 of compensation to make it worth --

16 MR. CLINTON: I think it do with them, but I
17 don't think it do with the writers.

18 MR. COHAN: I think that would be a
19 contractual issue between yourself and the publisher
20 to say, "Look, there are usages to my compositions.
21 And under our contract, you are required to, you know,
22 pay me" --

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1 MR. CLINTON: They have an agreement. I'm
2 seeing an agreement between them, but there's not one
3 between --

4 MR. COHAN: Again, this is a point I made in
5 an earlier panel. I think that's a contract question
6 at that point and not necessarily a question of
7 infringement that would be covered by the small claims
8 court. And, again, this is another case where I think
9 it is possible that the many, many, many possible
10 disputes that can come up arising out of a contract
11 between a songwriter and his or her own publisher
12 could be pulled into these small claims courts without
13 being able to sort them out.

14 And, again, I think that's just one case.
15 There are hundreds of other points that could be
16 brought up that might be on the line of, you know --

17 MR. CLINTON: Does Cobalt still work and
18 play sports or --

19 MS. CHARLESWORTH: We are just going to
20 break in here. I think, Mr. Clinton, it sounds like
21 you have a bunch of questions that are very specific
22 to your situation, but we're sort of looking at this

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1 in broad outlines in terms of general questions, not
2 specific to entities or --

3 MR. CLINTON: It's about 50 writers taking
4 part in this. So it's not just me. It's like 50
5 writers and a whole industry of music called hip hop.
6 So it's not just myself, but I was just asking because
7 I know I have deals with both of them.

8 MS. CHARLESWORTH: Well, Mr. Clinton, let me
9 ask you this since you are a musician. Do you think
10 if we have a small claims court system that music
11 owners be included in it? In other words, should
12 songwriters or recording artists should be able to use
13 the small claims system to assert their rights under
14 copyright law?

15 MR. CLINTON: Yes, I do.

16 MS. CHARLESWORTH: Okay. Because that is
17 one of the questions on the table because the music
18 publishers, as you have heard, or some of them at
19 least -- I don't want to over-generalize -- have
20 suggested that maybe music should be left outside of
21 this scheme, rather than included. And so it is
22 helpful to have your view on that.

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1 MR. CLINTON: I think it should be.

2 MS. CHARLESWORTH: Anyone else?

3 MS. ROWLAND: I think Ms. Robinson had
4 something to say.

5 MS. ROBINSON: Thank you. I would hate to
6 exclude any class of artists from something which is
7 so important for access to justice. As you mentioned
8 earlier, if a certain group of artists is represented
9 by publishers, whether they are writers, musicians, or
10 songwriters, it seems to me that they might have some
11 sort of agreement about how any representation goes
12 forward if something proceeds to litigation or any
13 alternatives. So it wouldn't be competitive with that
14 relationship, but hopefully they would have a way of
15 being represented in that forum, whatever it is.

16 MS. ROWLAND: Okay. Anyone else? Mr.
17 Hasbrouck?

18 MR. HASBROUCK: The National Writers Union
19 obviously represents writers. And we are not going to
20 take any position as to whether this should apply to
21 any other class of work than written work. But I do
22 think there are a couple of points here. Whatever the

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1 truth of Mr. Cohan's suggestion that, at least with
2 respect to music publishers, the publishers are doing
3 an adequate job of litigating or asserting on behalf
4 of creators their rights, that certainly isn't
5 happening with publishers of written work with respect
6 to those rights. It is a common complaint we get from
7 our members that they have brought the attention of a
8 publisher of their work to what they believe to be
9 infringement and that the publisher has done nothing.
10 So I think this is needed for written work.

11 The second thing I would say is that
12 whatever classes of work this covers and while there
13 is a need for common procedures, it is important to
14 realize, as this discussion is bringing out, that the
15 typical patterns of infringement, the nature of the
16 kinds of claims, and the way they present themselves,
17 and their relationships between the parties may be
18 very different for different classes of works.

19 And so what we would appeal to the Copyright
20 Office to do in framing this is to look at any
21 proposal you are putting forward and apply each of the
22 typical user cases, as a programmer would say, or fact

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1 patterns, as a lawyer would say, of, how is this going
2 to work for music? How is this going to work for
3 photography and graphics? How is this going to work
4 for text in the typical cases that arise in those
5 different contexts and make sure that you're not
6 leaving out some class of work that is going to be
7 swept up but where these procedures are not going to
8 work well, for whatever the situation is for that
9 particular category of work?

10 MS. ROWLAND: Ms. Cleary, you had something
11 to say as well?

12 MS. CLEARY: Yes. Hi. You know, looking at
13 two things, who would be the actual primary users of
14 the small claims procedures that were established, if
15 any, they would probably not be audiovisual producers,
16 certainly not commercial audiovisual producers. As
17 you know, IFTA represents independent producers and
18 distributors. However, independent doesn't
19 encapsulate a genre or budget level, small budget
20 level. Hunger Games is an independent film, and so is
21 Lord of the Rings.

22 So when you are dealing with audiovisual

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1 producers on a commercial level and certainly our
2 constituency at IFTA, our membership, we probably
3 would not be the primary users for small claims
4 procedures in that we would want obviously the option
5 to go to federal court because, you know, when you
6 have a \$200 million budget film, you want that option
7 and you don't want anything to slow that up. So you
8 don't want a procedure at the small claims level to
9 interfere with your rights, your exploitation of your
10 larger rights. And you also have to have it as quickly
11 as possible.

12 And federal court, you know, means
13 injunctive relief. And we are after discussing that
14 issue and hearing more what people have to say, we
15 would probably feel that injunctive relief is left to
16 the federal courts and to a federal judge, instead of
17 in a small claims process, also declaratory relief.
18 So while I think you can find users in every category,
19 you could find a user potentially in music, I know
20 plenty of artists who are self-admin, self-published,
21 and might benefit, there are audiovisual producers of
22 documentaries or student films that may want to

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1 protect their works in a small claims process and
2 certainly other small rights holders.

3 But do I think that audiovisual producers
4 are going to be the bulk of the user? No. I think
5 it's just because of the subject matter, the nature of
6 the budgets involved, and the nature of the product
7 and having to get it out to commercial exploitation.
8 And this is pure infringement.

9 Also, audiovisual producers and
10 distributors, our rights holders, small and large, are
11 finding other ways to address small infringement vis-
12 a-vis the copyright alert program that should be
13 starting soon. That is a way that we marry technology
14 and we lower the costs of rights enforcement by, you
15 know, having these voluntary programs, which we hope
16 will be successful in addressing the smaller issues.

17 And then if there are larger issues, they
18 will most likely want to be in federal court with all
19 of their legal remedies and options. So you get that
20 middle ground.

21 And, you know, would a tribunal such as this
22 be the option of audiovisual producers? Probably not

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1 in most cases. As I said for commercial exploitation
2 of your film, would we want to preclude smaller A/V
3 producers, copyright owners from having a system? No.
4 We have no interest in that. We just want to make
5 sure that what's set up doesn't wind up, you know,
6 benefitting small rights holders to the extent of
7 other rights holders that aren't characterized as
8 small or you can't characterize their work in one
9 budget level or the other.

10 So I would say it's an interesting thought
11 about carving out certain things because you might get
12 a benefit out of having a highly specialized tribunal
13 at first dealing with highly specialized claims
14 vis-a-vis photography or something else.

15 So that is an interesting issue. I am just
16 trying to air the general concerns of what audiovisual
17 producers would have because they might be users, but
18 they also might be somebody whose rights might be
19 impeded in certain ways by the process. And, of
20 course, we're here to vet all of that out.

21 MS. ROWLAND: This seems like that it's more
22 of an issue of how would a small claims process

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1 interact with the existing federal court structure.
2 In the last panel, we discussed mandatory versus
3 voluntary. And I think that it was Ms. Calzada who
4 was talking about it a little bit, but you don't want
5 to -- if you learn that something is bigger during the
6 course of your discovery, maybe it was a smaller claim
7 originally and it kind of got larger once you figured
8 out the extent of the issue, that you wouldn't want to
9 be precluded. So it seems like a similar issue of
10 making sure that you still had access to the same
11 avenues without making someone go to small claims
12 court. Is that right, not really the subject, not
13 that you are saying that films should not be in small
14 claims but more --

15 MS. CLEARY: Right.

16 MS. ROWLAND: -- you don't want to exclude
17 people from --

18 MS. CLEARY: Yes. And, you know, the
19 claims, I think we said in our filing, we would say
20 that \$75,000 would be small claims. But, really, when
21 you are in federal court, if your subject matter is
22 copyright and you are that high of a threshold, so

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1 anything under might be advantageous and might be the
2 actual -- it's hard. It's always hard to set a claims
3 limit for what small claims is. But I think we have
4 to do that because, really, you know, maybe we think
5 about -- maybe we think about making sure that they do
6 overlap -- you see what I'm saying? -- so that you do
7 have the right, so that we don't have federal subject
8 matter jurisdiction at this level in our small claims
9 and then the people caught in the middle don't really
10 have a choice.

11 MS. CHARLESWORTH: So, just to clarify, I
12 just want to understand. Are you suggesting that
13 someone who had a relatively small claim should have
14 the option of either pursuing it in small claims or
15 federal court?

16 MR. CLINTON: Yes.

17 MS. CLEARY: Well, if they meet the federal
18 subject matter jurisdiction, yes.

19 MS. CHARLESWORTH: Okay. So would that
20 satisfy your concern, in other words, as the plaintiff
21 had the option, even if it were a relatively small
22 claim but, for some reason, wanted to go to federal

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1 district court, they wouldn't be forced into the small
2 claims system?

3 MS. CLEARY: Yes. I think everybody should
4 always have as many legal options and legal pathways.
5 And I think what we're trying to say is, how do we
6 make a system that's fair that works with the system
7 we already have? Because I don't think anybody is
8 talking about getting, you know, limiting anybody's
9 rights that they already have. How do we add a small
10 claims procedure and have it work for the people that
11 are the targeted users of it? And I think what we're
12 trying to do now is define where that line is.

13 So I can only say for audiovisual producers,
14 due to the nature of the product once again and the
15 budget amounts, it's very hard to even say, you know,
16 that they would be primary users at anything less than
17 75 because they're going to be meeting that
18 infringement level when they go to federal court. And
19 it would be highly unlikely that if you have that type
20 of -- that -- even that level of claim, that your U.S.
21 licensee or the copyright owner would choose or select
22 something, a small claims procedure.

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1 When you are up close to that federal limit,
2 you know, Lionsgate, one of our member companies, is
3 going to choose to go to federal court most likely
4 because of the damages amount. I mean, you want to
5 have all of your options.

6 However, we do represent smaller production
7 companies. They might have five employees. They
8 might do two films a year. They might be in the
9 ballpark of being a user here if there is
10 infringement. But, like I said, anything that is
11 infringement on that level, I don't know what would be
12 the persuasive factors that they would opt into an
13 arbitration small claims procedure versus go to
14 federal court. It's very hard to say because it just
15 depends on where the product is, what the claim is,
16 where it is in its release, when it's infringed. If
17 it's infringed prior to release, you're not going to
18 be in a small claims procedure. You're going to be in
19 federal court trying to get an injunction right away.
20 And that's something -- you know, that's properly
21 where you should be proving irreparable harm.

22 MS. ROWLAND: Ms. Calzada?

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1 MS. CALZADA: Yes. So the National Press
2 Photographers Association obviously represents still
3 photographers, but we also represent people who create
4 audiovisual works and audio works. And it is our
5 belief that all of those should be at least eligible
6 for the system. You know, whether they choose to use
7 it or not is sort of a strategy question, but we do
8 believe that it is important that all copyright
9 holders have access to this system because it just
10 seems to fit the mission of the system. We have
11 certainly people who produce audiovisual works that
12 are not. And obviously films are huge creations, but
13 there are much smaller works that are out there that
14 also need protection and need access to justice like
15 we were discussing earlier.

16 MS. ROWLAND: Ms. Knappen?

17 MS. KNAPPEN: I am worried about creating
18 any carve-out space on a class of material because we
19 are always having new technological advances. Digital
20 typography is exploding right now, but it's so
21 difficult to go after when somebody is infringing on
22 typography. And if you create those cutouts, something

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1 new could come along, too, that then the person would
2 be excluded from the process of small claims.

3 MS. ROWLAND: Mr. Cohan?

4 MR. COHAN: I understand that the -- I
5 think, rather than a permanent exclusion, what we're
6 arguing for is sort of what I believe the current
7 consenter suggested, which is some sort of a pilot
8 program, to see how it works, to work out the -- there
9 are so many fields. If you look at the number of
10 questions that the register asked in the notice of
11 inquiry, there are hundreds, more than in the section
12 115 set of questions, where I think there are 8, you
13 know.

14 So, just to be clear, we're not saying that
15 it should be excluded for all time but until some of
16 these potential unintended consequences could be, you
17 know, spotted and maybe some solutions worked out, we
18 suggest taking the class of copyright owners that are
19 clearly in need of this and trying it out with them.

20 Again, if we don't start right away with
21 music, there were I think both -- you know, very often
22 we're not on the same, publishers are not on the same,

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1 side as, you know, content users, such as the big
2 ones, the tech companies, Google, you know, Amazon,
3 Apple, but we all seem to be on the same page with
4 this right now that we're -- for both of our
5 perspectives, we're concerned about the possible
6 unintended consequences. So I think, you know, it's
7 mostly in the idea of trying to get a pilot program
8 and also seeing how some of these potential
9 consequences might be headed off.

10 MS. ROWLAND: Ms. Robinson?

11 MS. ROBINSON: Again, on behalf of
12 California Lawyers for the Arts, I just want to share
13 the observation that many songwriters and musicians
14 are now self-publishing and distributing their own
15 work and subject to the hazards of the internet. And
16 I think that it would really be important to allow
17 those folks access --

18 MR. COHAN: May I ask --

19 MS. ROBINSON: -- to whatever potential
20 system we're saying we're thinking about.

21 MR. COHAN: That's a very good point. And
22 that makes me ask, what sort of claims are they most

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1 concerned about, these independent self-publishing
2 songwriters? I think many of them are people putting
3 up their songs without permission or having them on
4 websites or distributing them without their
5 permission, very real problems and not a lot of
6 recourse in my opinion, but the content owners, the
7 websites, say this is covered already under the DMCA.

8 We have a notice and takedown regime in
9 place. You notify us. You're the content owner. And
10 we'll take it down. I'm not saying that that's --

11 MS. ROBINSON: But what do they do about the
12 infringer? The medium is one aspect of the
13 distribution, but the end user, who may be selling
14 bootlegged copies, is another problem.

15 MR. COHAN: I agree that is problematic.
16 Practically, I'm not sure how you possibly could find
17 that person to name them to bring them in to small
18 claims court.

19 MS. ROBINSON: It's another issue.

20 MS. CHARLESWORTH: Well, I mean, just for
21 the record, I want to, first of all, point out that,
22 unfortunately, SGA, the Songwriters Guild, was

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1 scheduled to be here today. And they are not in the
2 room to address some of these questions raised by Mr.
3 Cohan.

4 But I just want to clarify that in some
5 situations, I assume you agree, Mr. Cohan, that the
6 DMCA wouldn't apply because you would have perhaps a
7 direct infringement by a website that posted --

8 MR. COHAN: Absolutely, in which case --

9 MS. CHARLESWORTH: -- something --

10 MR. COHAN: Yes.

11 MS. CHARLESWORTH: So I think, to Ms.
12 Robinson's point, I mean, those people under your
13 suggestion would be precluded. You would be
14 comfortable precluding them from this process, at
15 least initially. Is that your position?

16 MR. COHAN: I would say, at least initially,
17 I mean, they -- what they will want is for it to be
18 taken down. They will want some sort of injunctive
19 relief. They are not looking for money for that. They
20 want their songs to stop being distributed. And
21 already most people have said, as far as I can tell,
22 that injunctive relief should not be available through

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1 the small claims court.

2 MS. CHARLESWORTH: Well, we had a lively
3 discussion. We haven't even gotten to injunctive
4 relief. So I don't think it's fair to characterize the
5 record in that way. I don't want to jump ahead.

6 Ms. Robinson, did you have -- you started to
7 say something.

8 MS. ROBINSON: I was just going to point out
9 that the injunctive relief is one issue, but the
10 damages were actual profits someone may have realized
11 from selling work that was not authorized to be copied
12 and sold. It's what we're talking about here, I
13 think. It's actual damages. And if that could be
14 discovered, then why wouldn't you want that artist to
15 have it adjudicated in small claims court? Because
16 otherwise we have the expense of going to federal
17 court, which is what we're trying to alleviate here.

18 MR. COHAN: Right. I guess I'm not sure in
19 practice -- I'm not sure who the defendant is and how,
20 who the defendant is that you're talking about in this
21 case. If it's not, say, you know, a Pirate Bay
22 website, it's by the DMCA. It's not clear to me -- I

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1 don't have a lot of experience with the direct
2 infringement that you're talking about. I just wonder
3 in practice who would the defendant be.

4 MS. ROBINSON: We are speaking
5 hypothetically of people who may have been infringed
6 in the marketplace, in a bootleg marketplace. You see
7 copies of movies and CDs on the street, for example.
8 How did they get there? Who is behind that industry?
9 It may be defendants that somebody would want to
10 approach in small claims court because that would be
11 more affordable for them. So I would hate to preclude
12 them, even from a pilot project.

13 MS. ROWLAND: Ms. Calzada?

14 MS. CALZADA: Ms. Robinson raised my point,
15 which is that the DMCA is useful for some things but
16 doesn't address the issue of damages and profits.

17 MS. ROWLAND: This kind of dovetails into
18 our next topic, which is the type of claim, so not the
19 type of work but the type of claim. And I think this
20 is what Mr. Cohan was talking about in the last panel
21 that we promised we would get to, which is should a
22 small claims procedure just be copyright law, just

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1 copyright infringement cases? Should it include
2 contract disputes? Should it cover ancillary random
3 access, trademark issues? How do people envision this
4 working? Is there a cap that you want to set on the
5 types of claims or is everything fair game? Who has a
6 thought on that? Ms. Calzada?

7 MS. CALZADA: Yes. I would just say that in
8 many cases, contractual agreements are inherently
9 connected to the question of whether there's an
10 infringement. And so to cut them out would really
11 limit the scope of cases that would be available to
12 use this tribunal.

13 And on the same level, we think that DMCA
14 should also be something that can be used in this
15 tribunal. It also falls under copyright.

16 Lanham Act, I'm not as passionate about
17 including that, but I do feel like DMCA claims any
18 claims that would be sort of connected to the nexus of
19 the claim should be allowed because that's really the
20 most useful way to completely adjudicate the issue and
21 without leaving things hanging. And if we are going
22 to have an expert tribunal, they should be very keenly

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1 prepared to deal with these types of claims.

2 MS. ROWLAND: What about ownership issues?

3 So there's a dispute over who actually took the
4 photograph.

5 MS. CALZADA: Sure.

6 MS. ROWLAND: You think that should be good
7 to do or --

8 MS. CALZADA: Absolutely, if there is a
9 dispute, yes.

10 MS. ROWLAND: Okay. Mr. Traynor?

11 MR. TRAYNOR: The core claim will be, of
12 course, jurisdictional nexus of copyright
13 infringement, but there will be many related claims,
14 contract claims when the license has been violated,
15 ownership where there might be a need for some sort of
16 declaration, maybe affiliated trademark issues. So I
17 would encourage you to consider including related
18 claims.

19 There is a test in the supplemental
20 jurisdiction statute for federal court claims which
21 requires them to be part of the same case or
22 controversy. And there are limits in that statute

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1 that you might think about which would allow you to
2 reject a parallel claim or associated claim if it's
3 unduly complex or too demanding or it becomes a
4 predominant claim in the case. So that if you retain
5 discretion to turn away some claims that are brought
6 initially, you would have the power to construct the
7 case to resolve the entire controversy as well as not
8 unduly burden yourself with too complex claims or
9 claims where the predominant issue is not copyright
10 infringement.

11 MS. ROWLAND: Does anyone else have any
12 thoughts on that? Mr. Hasbrouck?

13 MR. HASBROUCK: We would very strongly
14 endorse the comments that Ms. Calzada made about the
15 difficulty separating contract, breach of contract,
16 claims from copyright infringement claims. If the
17 claim is that the copyright was infringed because the
18 copies were not made in accordance with the terms of
19 the license but there was some sort of license for
20 some copying of the work between the parties, where is
21 that going to be adjudicated if not in this process?
22 You can't adjudicate that in state court. They are

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1 going to bounce it because this is a copyright case.
2 Are you going to try and make people bring
3 simultaneous parallel cases about the copyright
4 contract issues in state court or refer those to a
5 state small claims court to decide according to state
6 law the contract issues before you can adjudicate the
7 copyright issues in the copyright small claims
8 proceedings? It just doesn't make any sense. Those
9 claims have to be considered together somewhere. And
10 at present that can't be state court. And the only
11 way these cases are going to get adjudicated at all is
12 if you give this new small claims process at the very
13 least the authority over cases where the defense is
14 this was authorized by a contract. And where there is
15 some kind of contract, some kind of license, the
16 defendant is almost always, no matter how spurious the
17 claim, the defendant is always going to claim, "Oh,
18 this was within my license." No matter how far you
19 have to stretch that license to get that, they are
20 always going to counterclaim that.

21 So, at the very least, if you say that, in
22 any case where a contract defense is asserted, this

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1 gets bounced to a regular federal court, what you
2 will, in effect, be saying is that anyone who has even
3 the slightest license has impunity to infringe at will
4 because you won't have access to this process to
5 adjudicate the infringement claim against them.
6 That's what you'll be saying, is retaining the
7 impunity of licensees to exceed their licenses, which
8 is what is going on now systematically and across the
9 board. So, at the very least, it has to be allowed as
10 a defense or a counterclaim without resulting in the
11 ability of the defendant to get the case removed.
12 Whether or not it is initially pled as contract
13 violation or it's pled as copyright infringement
14 because the terms of the license were not conformed to
15 in the copying, you can't allow that counterclaim or
16 defense to bounce this out or it will completely
17 defeat the usefulness of the process.

18 MS. ROWLAND: Mr. Traynor?

19 MR. TRAYNOR: You will be discussing
20 equitable relief tomorrow when I can't be here. And
21 that will be mainly on the issue of injunctions, but
22 there's an aspect of what claimants want in this

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1 context. It's a reasonable amount of compensation for
2 their creative work that's been infringed or their
3 contract that has been denied, but it's also credit
4 and attribution. And so we would recommend that you
5 include the procedure where again on a discretionary
6 basis a claimant can get appropriate credit and
7 attribution. That's a major feature of the licenses
8 under the Creative Commons license.

9 Millions of people are using that system.
10 And there are a number of guidelines on that website
11 about how simply you can give attribution to somebody.
12 So some elements of relief vary so different and not
13 as intrusive as an injunction, would include a
14 declaration, is it the ownership or a right, or a
15 declaration or part of the remedial relief would be
16 due credit and attribution to the creator if the
17 creator prevails in the lawsuit.

18 MS. ROWLAND: Anyone else? Mr. Cohan? I
19 know you mentioned earlier about --

20 MR. COHAN: Yes. I take Mr. Hasbrouck's
21 points on one end of the spectrum seeing that any
22 distinction drawn between a contract claim and

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1 infringement claim might give the publisher in your
2 case sort of an easy way to bump this to avoid the
3 jurisdiction here.

4 I would be just mindful of the other extent,
5 which is the case, the other end of the spectrum, in
6 which case any departure from the terms of the license
7 is treated as an infringement, which I don't think is
8 always the case. In some cases, it is material
9 departure, complete lack of payment, but I think, you
10 know, the -- I think the long -- it is fairly clear as
11 to when it would seem to be pretextual on the part of
12 invoking a contract.

13 I'm not necessarily saying I think contract
14 claims shouldn't be brought in. I think that idea of
15 having some sort of required nexus and then ponying in
16 sort of pendant claims -- it might be contract claims
17 but recognizing what Mr. Traynor noted is when these
18 claims become too complex for the small claims court
19 to handle, that it would be a good idea to then allow
20 for removal when these thornier issues come up.

21 And I do think, perhaps not in photography
22 but co-authorship issues, disputes in music are so

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1 complicated because what qualifies you as an author,
2 that's long determined through case law. And there
3 are statutory elements as well, too. It's a very
4 complex issue to say when do two people working
5 together become co-authors of something. And I'm not
6 sure that that's something a small claims court can
7 handle, that analysis.

8 Similarly, many people mentioned the fair
9 use analysis, very complex and, you know, other legal
10 issues like that I think would be very difficult to
11 handle.

12 So the idea of -- I think it's an
13 interesting idea, but some form of nexus could -- this
14 is the sort of claim that the small claims court is
15 best suited to handle, but, then, if any of these more
16 complex issues came up, to allow for removal.

17 MS. ROWLAND: And I think -- I'm sorry. Ms.
18 Tommaselli, did you have something to say?

19 MS. TOMMASELLI: Just one issue. When
20 parties have a contract -- and I don't know that I
21 have the answer to this, but when parties have a
22 contract, they usually have a dispute resolution

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1 clause in there. And how would that come into play
2 with this new court system or tribunal. Automatically
3 trump the parties' agreement to bring that into it?
4 Because I think we would probably take the position
5 that the parties have already negotiated and agreed
6 upon a way to resolve disputes arising out of that
7 contract. So breaching the contract would be
8 resolved as they have already agreed.

9 MS. CHARLESWORTH: Yes. I don't think there
10 is any proposal on the table to have whatever this
11 process would be override contractual rights. In
12 other words, just like today, with respect to federal
13 court, you have a contract. And then you have your
14 rights under the Copyright Act. And the way those
15 intersect is governed by the contract.

16 So there's no suggestion that this would
17 override a contractual clause, at least currently
18 before us.

19 MS. ROWLAND: Mr. Clinton?

20 MR. CLINTON: Yes. As long as it don't get
21 kicked out of the small claims court into the higher
22 court without being able to afford that because that's

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1 what seems to happen most of the time. Like you said,
2 it can easily get kicked out and you have
3 jurisdiction. You know what I'm saying? It's a
4 federal case, and you don't have the money to fight
5 that. As long as that don't infringe upon the rights
6 of the small claimers to stay in the same with all
7 these different laws of there's federal, there's
8 state. You know, music is like that.

9 You have so many different ways to throw it
10 out, you know. If the small claims court would allow
11 the small claimers to stay in the game, then that's
12 what's needed.

13 MS. ROWLAND: Okay. Anyone else? Ms.
14 Calzada?

15 MS. CALZADA: I don't think there's any
16 reason to presume that the adjudicators in the small
17 claims court wouldn't be able to handle complex
18 issues. In this case, you were talking about, you
19 know, questions of co-authorship and contract issues.
20 I know they are hypothetical people, but I think we
21 are not giving them enough credit. You know, if we do
22 the right groundwork in terms of creating a good

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1 system, then we will have people who are absolutely
2 qualified to address these more complicated issues.

3 And then we can really just say, "Okay.
4 This court is for copyright cases." And that would
5 include any issues that are connected to the nexus of
6 the case. And that way you're not spending months and
7 months questioning, "Can we kick this out? Can we
8 keep it?" You know, that just -- to me, once you start
9 adding exceptions. And, you know, you can kick it out
10 for this but not for that. Then we're going to spend
11 all of our time arguing over, does this really belong
12 here. Let's just say it's a copyright issue and the
13 other claims are, you know, inherently connected to
14 the copyright issue. So let's do it here and be done
15 with it because otherwise we're just going to be
16 arguing for months about whether we even belong here.

17 MR. COHAN: I see the risk of that. I'm
18 curious, though. If they are resolving these complex
19 issues, would you say that that ought to be
20 precedential so that later courts, even within the
21 same small claims system, would have to look and try
22 to be consistent or do you have the risk of just

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1 multiple inconsistent rulings on what makes someone an
2 author or not depending on who was adjudicating it if
3 there is no precedential effect, if there is no -- how
4 do you keep it from just becoming fragmented and
5 inconsistent? I think --

6 MS. CALZADA: Well, I know that's another --
7 do you want to --

8 MS. CHARLESWORTH: I don't want to impose
9 artificial constraints, but if you want to respond?
10 Then we can have a longer conversation.

11 MS. CALZADA: You kind of caught me on the
12 spot.

13 MR. COHAN: I'm sorry.

14 MS. CALZADA: It's okay.

15 MS. CHARLESWORTH: No. You are not
16 obligated to respond.

17 MS. CALZADA: It's just, you know, I think
18 there is definitely an argument for making it
19 precedential, but, you know, we have great precedent
20 in federal court. And I think that we should rely on
21 that, first and foremost. And I think the question,
22 the answer to that question, would depend on what kind

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1 of tribunal it becomes. You know, if there are 100
2 different little tribunals all over the country, then
3 maybe not precedential.

4 But if there's one expert system, yes. I
5 think that what they determine should have some
6 weight, just like other administrative agencies have
7 weight with their decisions.

8 MS. ROWLAND: And we will get into that in
9 much more detail a little bit later, I think.

10 Does anyone else have thoughts about
11 different types of claims? For example, I think both
12 Mr. Cohan and Ms. Robinson talked about DMCA. And
13 yes, Ms. Robinson?

14 MS. ROBINSON: I just wanted to mention. I
15 know we are going to talk about alternative dispute
16 resolution in more detail later, but I do think that
17 if we have a robust program that is alongside the
18 small claims court, the possibilities of resolving
19 many layers of relationship issues, credit, contracts,
20 as well as copyright can be worked out through
21 mediation particularly much more efficiently than
22 trying to adjudicate all of those problems in any

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1 court. So I just think that's another reason to think
2 about how ADR connected to this process.

3 MS. ROWLAND: Ms. Wright?

4 MS. WRIGHT: It is very important to include
5 the DMCA claims, specifically the removal or false
6 assertion of copyright management information. Given
7 the internet and digital technology, it is so easy to
8 remove copyright management information, strip it
9 either from the meta data of the file or crop it out
10 of a photograph or even clone it out. Our clients
11 have had watermarks cloned out, cropped out. And then
12 at some extent, they falsify copyright management
13 information. And this type of act I think extremely
14 violates our clients' rights because they want the
15 attribution.

16 And when you have an act of the intentional
17 removal of copyright management information, we need
18 to have copyright owners have a good tribunal to be
19 able to assert their claims, specifically under the
20 1201, 1202, or 1203 of the Copyright Act.

21 MS. ROWLAND: And I guess the flip of that
22 question is, what about people who received a DMCA

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1 claim that is not right, that is not supported by
2 facts, it's frivolous?

3 MS. WRIGHT: Well, you are talking about the
4 take-down provisions?

5 MS. ROWLAND: Yes.

6 MS. WRIGHT: Yes. I was really specifically
7 talking about the removal of copyright management
8 information. The take-down provisions, that is a good
9 question as to whether if you have a notice and a
10 counter notice as to a take-down, whether that should
11 be part of this tribunal, sure, because then you've
12 got to decide who is the copyright owner and whether
13 the take-down notice was appropriate.

14 Then you are going to get sometimes into
15 fair use issues. And I guess that is going to be
16 discussed later as to the defenses that can be
17 included in this format, but I would say yes.

18 But yes, I think everything related to
19 copyright if it's a small claim, it should be in this
20 tribunal.

21 MS. ROWLAND: Anyone else? Thoughts about
22 the DMCA, the take-down? What about declaratory

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1 judgment-type claims, where there is a defendant,
2 there is an alleged infringer, and the alleged
3 infringer says, "I'm not an infringer at all. This is
4 a shakedown suit" and wants to bring a declaratory
5 judgment action in a small claims proceeding? What do
6 people think about that? Ms. Wright?

7 MS. WRIGHT: Yes. We have actually had that
8 in several instances. Primarily it's a jurisdictional
9 tactic, I guess, where we assert a copyright
10 infringement claim and --

11 MS. ROWLAND: Excuse me. Hold on one
12 second.

13 (Pause.)

14 MS. ROWLAND: Continue.

15 MS. WRIGHT: -- where we assert a copyright
16 infringement claim and the infringer, alleged
17 infringer, wants to make sure that the infringer gets
18 to choose the jurisdiction where the claim is
19 litigated. And that's happened several times. Then
20 we, of course, counterclaim for copyright infringement
21 because it's a related matter.

22 So essentially it's an issue of who owns the

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1 copyright and whether this was a fair use of the
2 copyrighted work. And so it makes sense, at least for
3 the work that we do, for it to be in a small copyright
4 court, claims court.

5 MS. ROWLAND: Anyone else, any thoughts on
6 that?

7 (No response.)

8 MS. ROWLAND: Okay. The next topic we
9 wanted to cover is the claim amount. So what is a
10 small claim?

11 Oh, I'm sorry. Ms. Charlesworth?

12 MS. CHARLESWORTH: Can we back up a minute?
13 I wanted to make sure. There were a couple mentions
14 of the fair use defense. At least in New York, there
15 was a lot of discussion about that because if it's
16 permitted in the system, some people viewed it as
17 something that might not be effectively adjudicated or
18 might be. If it's excluded, since many defendants
19 almost routinely assert a fair use defense, the
20 concern would be that the claims, you know, would not
21 survive and they would be automatically removed to
22 federal court or not litigated.

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1 And so the question is, how do people feel
2 about fair use and whether a small claims court could
3 adjudicate fair use defenses fairly?

4 MS. ROWLAND: Ms. Wright?

5 MS. WRIGHT: We see this a lot in our
6 litigation. There is an assertion of fair use. And I
7 think you are almost always going to see that
8 asserted, especially if it's a defense that will get
9 you kicked out of the small copyright claims tribunal.
10 If it is, then every big defendant is going to assert
11 fair use. And then you basically have invalidated this
12 whole process because if the defendant wants to get
13 out of the small claims tribunal, it will be asserted.
14 And then you get into regular litigation and you might
15 as well just go to federal court in the first place.

16 MS. ROWLAND: Anyone else? Mr. Hasbrouck?

17 MR. HASBROUCK: Yes. To lawyers who
18 litigate in a specialized field, any field has
19 complications and depth. We don't really see any
20 reason why fair use is going to be any more beyond the
21 expertise of these specialized adjudicators than any
22 other aspect of copyright law. It's a central part of

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1 copyright law. And we would agree totally that if you
2 say asserting fair use gets you a free pass into a
3 court where the price of admission is hundreds of
4 thousands of dollars in legal fees, that gives you de
5 facto impunity. And everybody is going to assert
6 those claims. And they're never going to be
7 litigated. And they're just going to get away with
8 continuing their infringement. So I don't think the
9 process works at all if you don't allow a fair use
10 defense to be adjudicated within this process.

11 MS. ROWLAND: Mr. Traynor?

12 MR. TRAYNOR: Earlier this morning, you
13 raised a question of what are the incentives for
14 defendants to come into a system. And if you approach
15 this question of defenses from the incentive point of
16 view, I would think it would be a greater incentive
17 for defendants to come into the system if they have an
18 ability to present the full defense, including fair
19 use and that, just as I would favor a fairly
20 permissive scope on the plaintiff or claimant side, so
21 I would envision a relatively broad scope for the
22 defendant as one of the incentives to make the system

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1 work, in addition to having a damage limit on the
2 amount of compensation they have to pay and probably
3 little or no chance of heavy relief, like an
4 injunction.

5 So if you look at it from the incentive
6 point of view, giving the defendants an opportunity to
7 raise fair use, it seems to me, would be entirely
8 appropriate. And people do say that that is
9 complicated, but scholars of fair use, including
10 particularly Pam Samuelson, who has written about it,
11 have done very careful analysis. And the Copyright
12 Office could perform a terrific function of beginning
13 to develop appropriate criteria for fair use. And out
14 of, say, three or four years of determinations, you
15 might get a pattern developed in what has been
16 determined to be fair use or not.

17 And it also might be relevant to -- you
18 usually think of declaratory relief as something a
19 plaintiff might want as to the elements of a claim or
20 ownership or registration and so forth, but it might
21 also be something a defendant might seek, a
22 declaration that the use made in the particular case

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1 was not an infringement and was fair use.

2 MS. ROWLAND: Anyone else have thoughts on
3 the availability of fair use in a small claims
4 proceeding? Ms. Calzada?

5 MS. CALZADA: I would just echo what has
6 been said. We believe that it is absolutely essential
7 that it's available.

8 MS. ROWLAND: Okay. And Mr. Cohan?

9 MR. COHAN: I would be concerned that, you
10 know, again maybe fair use seems more complicated to
11 me than it does to other people. I find it very
12 confusing. I find the defenses to be quite complex
13 and the law to be quite complex as it has developed to
14 date. Maybe this would simplify it going forward, and
15 maybe that would be a good thing. I am not really
16 sure.

17 The way that the scope of the small claims
18 court seems to expand to include contract claims and
19 fair use defenses, to include substantive legal
20 issues, I'm just wondering how is this -- this seems
21 to be sort of moving on a slope toward becoming the
22 current system without statutory damages.

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1 I am not sure where you draw the line and
2 say, "Okay. The subject matter is contained to the
3 small claims court. And there is a body of claims
4 that are still best represented in federal court." I
5 don't know any answer to that, but it seems to me that
6 that is an issue.

7 MS. ROWLAND: Anyone else? Ms. Knappen?

8 MS. KNAPPEN: The process will be narrowed
9 by the people using it. I mean, this is primarily for
10 independent or very small creators. So I think it is
11 important to include all of this, as much as we can,
12 in it to make it a system for these smaller cases.

13 MS. CALZADA: I just wanted to add that to
14 the defendant who feels like they didn't get a fair
15 shake on their fair use defense, they should have the
16 right to appeal to an Article III court. And so that
17 would really be no different than just removing to the
18 Article III court in the first place.

19 So, I mean, I think that your concerns would
20 be allayed by the fact that they can always take that
21 step if they really do feel like their needs were not
22 met.

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1 MS. ROWLAND: Anyone else on fair use?

2 While we're on the topic of defenses --

3 MS. CHARLESWORTH: Actually, I'm sorry.

4 This was another question -- I'm sorry -- going
5 backward that we touched on, the DMCA, but we didn't
6 really talk about material misrepresentation claims.
7 That came up in a couple of the comments.

8 In other words, there is a cause of action
9 under the DMCA. If you are served a take-down notice
10 that is improper, you can currently go to federal
11 court, which is obviously very expensive, and
12 challenge that and actually recover, potentially
13 recover, damages.

14 There are some who suggested that if we had
15 the small claims process, that that type of action
16 should be included. And I was just curious to know if
17 people had thoughts on that.

18 MS. ROWLAND: I think Ms. Wright had said
19 something about thinking that it should be included
20 earlier.

21 MS. WRIGHT: I think that when that issue
22 arises, whether it is a false assertion, you have got

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1 copyright ownership claims and infringement claims and
2 fair use claims. It just seems like it's all bundled
3 as part of the package as to what the claims are going
4 to be and the defenses are going to be in such a
5 matter of 512. So it just seems to make sense for it
6 to be in the same tribunal.

7 MS. ROWLAND: Anyone else? Ms. Knappen?

8 MS. KNAPPEN: I agree because it hinges on
9 fair use a lot of times.

10 MS. ROWLAND: And anyone else?

11 (No response.)

12 MS. ROWLAND: Okay. So another issue, I
13 guess, another defense that could be raised is this
14 co- ownership issue, which I think kind of just goes
15 into the question of what kind of claim you could
16 bring and also talks about counterclaims. So say
17 somebody brings an infringement claim. Should the
18 defendant be able to counterclaim? Oh, no. I'm
19 actually the owner of this or you're the infringer and
20 can't use that.

21 Anyone have thoughts of the extent of
22 counterclaims? I know in typical federal court

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1 litigation, you have to do it. In certain situations,
2 there is a preclusive effect if you don't bring a
3 counterclaim. The question is, how do you guys see
4 that working in a small claims context? Anyone have
5 any thoughts on that? Mr. Cohan?

6 MR. COHAN: I am not sure I have a solution,
7 but I would underscore that that is definitely a
8 concern. I would say very often you will see -- if
9 this were open to songwriters, you would see a lot of
10 co-authors claiming authorship or a lot of even people
11 that weren't co-authors or weren't involved at all in
12 the initial process. You get a lot of spurious
13 claims, frivolous claims of ownership. It happens
14 very frequently.

15 So I think this court would see a lot of
16 songwriters pitted against each other as to who
17 actually authored a work. And the defense would be "I
18 wrote that. I've never met you." So I think it would
19 be important to allow for those sort of defenses,
20 absolutely.

21 MS. ROWLAND: Anyone else? Okay.

22 MS. CLEARY: Would that be -- I mean, that

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1 would be a standing issue, wouldn't it, I mean, if a
2 co-owner is the co-copyright owner or the co-exclusive
3 rights holder?

4 MR. COHAN: I am talking about cases in
5 which, just to give you an example, it turned out a
6 record company said, "I was passing my demo around.
7 And your son infringes my song. You took a whole
8 chunk from it." And that's something usually we would
9 instantly hire a musicologist for and then start
10 looking at questions of access, very fact-specific.
11 But those are the cases I'm talking about, where one
12 person says, "No. I'm the entire author of this" and
13 someone else says, "No. You stole my song."

14 MS. ROWLAND: Anyone else on that point?

15 (No response.)

16 MS. ROWLAND: No? Okay. So we can go back
17 to I guess the amount of the claim and what actually
18 is a small claim. And the comments, they were kind of
19 all over the board. There were arguments that it
20 should be low, like 10,000. And I think there was
21 even a comment that it should go up to like \$150,000.
22 So it was a very large span of what is a small claim.

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1 And I'm wondering what do you think about that? What
2 are the limits that you think should be set or would
3 be appropriate for a small claim? Does anyone have
4 any thoughts? Ms. Caldaza?

5 MS. CALZADA: Well, regardless of the
6 specific number, we think it would be appropriate to
7 have the

8 Copyright Office have the ability to
9 reexamine the number on a regular basis and adjust it
10 as needed based on factors like, you know, the
11 intellectual property loss section of the ABA did a
12 survey. And I'm just going to read to you: 27
13 respondents. Sixteen said that litigation of an
14 uncomplicated copyright claim was justifiable if it's
15 above \$40,000.

16 So, you know, the threshold might be at what
17 point is it no longer worth it to go to federal court
18 or your threshold might be what do we think is small,
19 but, you know, whatever threshold elements we pick, I
20 don't want to see us go through this wonderful process
21 and then have a number and then five years later, that
22 number is completely useless and we have this huge gap

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1 of people that again have no access.

2 So we really support sort of a rolling or a
3 number that is evaluated on a regular basis.

4 MS. ROWLAND: Anyone else have thoughts on
5 it? Ms. Robinson?

6 MS. ROBINSON: I have heard attorneys say
7 you don't want to walk into federal court unless your
8 claim is at least \$50,000. And I think that might
9 vary depending on the geography because the value of
10 anything is different in California and New York than
11 it is in the rest of the country.

12 However, maybe that is a threshold number to
13 think about, that if it's less than \$50,000, if you
14 could represent yourself in the small claims court
15 procedure -- and we haven't talked about
16 representation either, which is another interesting
17 question. But somehow that seems to me to be a
18 feasible number.

19 MS. ROWLAND: Okay. Anyone else? Mr.
20 Traynor?

21 MR. TRAYNOR: In our letter in January, we
22 had suggested in the area of 25 to 30 thousand, with

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1 50,000 being at the upper end. Since then, in a
2 number of the comments you had, higher ranges have
3 been suggested, including from the IP section of the
4 ABA. And surveys have been done. And so I think, you
5 know, my colleagues would be comfortable with even a
6 higher level but not much higher than 50-60 thousand.
7 It's an arbitrary point, but you want to get people
8 that have the incentives to make it work for them and
9 not have too scary a number for the defendants so that
10 they will be encouraged to come in and not be threatened
11 by it.

12 MS. ROWLAND: Anyone else? Ms. Knappen, did
13 you have something to say?

14 MS. KNAPPEN: I think also if we can even
15 tie it to inflation or something so they will
16 automatically reset as we got through time.

17 MS. ROWLAND: Okay. And then the question
18 is, should it be something that is based on the
19 pleadings. So say the copyright owner wants to go into
20 a small claims procedure and they say, "Okay. My
21 claim is worth \$20,000." Is that something that
22 should be taken at face value or should there be any

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1 sort of independent review by the tribunal, whatever
2 it might be, before it moves forward or is it
3 something that because the plaintiff says, "Okay.
4 It's \$20,000"? You're kind of held to that. And so
5 you're never going to go above it.

6 Ms. Wright?

7 MS. WRIGHT: It seems like the state court
8 system would work here, the small claims in a state
9 court, where you might have a claim that in your mind
10 is worth \$100,000. However, because you don't want to
11 risk the attorneys' fees and the costs of litigating,
12 that you would be willing to accept a maximum amount
13 of 20 or 30 thousand dollars. So it's really a cap of
14 what the damages might be, rather than what you would
15 believe your claim is necessarily worth.

16 MS. ROWLAND: And how do people feel about
17 that?

18 (No response.)

19 MS. ROWLAND: Your silence is --

20 MS. CHARLESWORTH: We see nodding heads.

21 MS. ROWLAND: Nodding, yes.

22 MS. CHARLESWORTH: We need you to say

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1 something.

2 MS. KNAPPEN: Yes.

3 MS. CHARLESWORTH: That was Ms. Knappen.

4 MS. KNAPPEN: It sounds good.

5 MS. ROWLAND: And Ms. Calzada I think was
6 going to agree.

7 MS. CALZADA: Yes. I agree.

8 MS. CHARLESWORTH: I have a related
9 question, which is someone mentioned -- I believe it
10 was Ms. Robinson -- the role of attorneys, but I think
11 related to this cap question is, do people -- some of
12 the comments had anecdotal or even survey evidence
13 regarding the ability to retain an attorney if you
14 want one below a certain amount or the inability, I
15 should say. I'm wondering if people have thoughts to
16 share in terms of their own experiences or experiences
17 as attorneys concerning what amount of damages makes
18 it worthwhile for a copyright owner to retain an
19 attorney today and go to federal court. Is there some
20 sense in the room of what that might be?

21 MS. ROWLAND: Mr. Hasbrouck?

22 MR. HASBROUCK: I think that may be a

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1 somewhat mistaken formulation because that assumes
2 that if there is enough money at stake, somebody will
3 be able to afford to hire an attorney, which does not
4 follow. There can be somebody against whom there has
5 been an infringement with very, very high damages who
6 still doesn't have the money to front to hire a
7 lawyer. So it's not a question of damages create money
8 in your pocket.

9 Maybe theoretically there is an idea of
10 contingency fee lawyers that might satisfy that, but
11 the experience of our members suggests that in
12 general, there are not contingency fee lawyers who are
13 eager to take on most of these cases.

14 So I think the question is, can most victims
15 afford to hire a lawyer? And the answer is no, no
16 matter what the damage is. That is why the present
17 system is completely useless.

18 MS. ROWLAND: Ms. Cleary?

19 MS. CLEARY: Yes, but you would be the
20 plaintiff. Assuming you would be bringing the action.
21 So you would need to assess that if your defendant
22 would have the right to representation, especially

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1 since the subject matter is copyright, I would think
2 that most people and most people in our entertainment-
3 oriented arbitration tribunal lawyer up. It doesn't
4 matter what the claim, what amount of the claim is
5 asserted in the arbitration itself. And usually that
6 is a general assessment of what their damages are
7 backed up by something when they first filed the
8 claim. So it could be a \$5,000 breach of contract
9 claim. And they're going to have an attorney because
10 the process might be depending on how it gets set up,
11 formalized, you still need to brief with arbitration
12 and mediation.

13 You still need to brief. And your
14 arbitrator is on your dime. The parties are paying
15 for the arbitrator. So when you have a lot of parties
16 that are not represented, the arbitrator winds up
17 doing much more work to understand what the legal
18 issues are.

19 So some of this will be pat. It will be,
20 you know, a format, a template for certain causes of
21 action that are copyright infringement. And they
22 would have substantial similarity and access. But it

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1 has to be briefed. So I would think that -- and you
2 don't want to -- certainly with somebody who is going to
3 assert a fair use defense, you don't want to limit --
4 I mean, those are factor-driven. That defense in
5 itself is case law. And it's factor and fact-driven.
6 So you need to have somebody who has actually weighed
7 the application of facts to law before throwing
8 something up at a tribunal. So I would say that you
9 would not want to ever limit either party's ability to
10 have counsel.

11 I know in some small claims courts you're not
12 allowed to have legal representation, but that's both
13 sides. And there's an administrator there is that
14 specialized in that. I'm not sure that you can take
15 that away. And arbitration tribunals and mediation
16 tribunals, by and large -- as I said, there are very
17 few parties that come.

18 We roll out about 110 arbitrations a year in
19 the entertainment field. And I would say five percent
20 of them might have parties that are not represented.
21 I'm sure there are a lot of defaults where people
22 don't show up. And they're not represented. But the

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1 fact is that when you are entering a legal process,
2 you want legal representation to the extent that you
3 can afford it. And I'd bet if there is a huge system,
4 there might be attorneys out there that are willing to
5 take these types of cases, especially if the damages,
6 the caps, are very high, on a contingency basis,
7 because, you know, the legal services spring up around
8 the different causes of action and the damage levels.
9 So I would think that there would be attorneys
10 servicing that at some point.

11 MS. ROWLAND: Anyone else? Ms. Knappen?

12 MS. KNAPPEN: If that's the question,
13 whether if we keep a higher cap to build a place for
14 attorneys to fit in, or if we keep it low to keep
15 attorneys out, I think we need to keep it low because
16 independent creators -- if you're saying, "Oh, I've
17 got \$10,000 to hire a lawyer to go after money that I
18 know is mine or I am going to work," I am just going
19 to work because that is the sure thing. So once we
20 pop it to the next level up where you need
21 representation, it invalidates the small claims
22 process.

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1 MS. ROWLAND: Ms. Robinson I think had her
2 hand up.

3 MS. ROBINSON: Well, I just wanted to
4 mention something about our legal services because we
5 do work with a number of organizations around the
6 country that are set up like ours to provide pro bono
7 services for people who cannot afford attorneys. And
8 we started a new modest means panel for people who are
9 in between the ability to pay full fare and needing
10 absolutely pro bono services. So for appealing cases
11 where somebody feels that the plaintiff has really
12 been aggrieved, we often do match them with pro bono
13 legal services.

14 Sometimes the pro bono lawyer is helpful in
15 advising claimants how to use small claims court
16 because in California, although I want to talk to you
17 more about what you said earlier about representing
18 people in small claims court, I believe that most of
19 our small claims courts do not allow attorneys to
20 represent parties. Is that correct, Carolyn?

21 MS. WRIGHT: My small claims practice was on
22 the East Coast.

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1 MS. ROBINSON: Oh, okay. Thank you. Great.
2 I just wanted clarification.

3 So I think that there are legal services
4 available, that people would not be completely shut
5 out either way, you know, if they need providers. We
6 do have a system that makes that available at some
7 income levels.

8 MS. ROWLAND: Mr. Cohan?

9 MR. COHAN: I think it would be interesting
10 if the California Lawyers for the Arts would be able
11 to provide the services to the extent that Ms. Cleary
12 suggests would be necessary when it gets to the more
13 complicated issues that have to be briefed. I think
14 that is an interesting solution. I think keeping --
15 but I would just reiterate that we agree with points
16 that you brought up as to really how problematic it
17 would be to exclude advocates or to exclude attorneys
18 from the process.

19 MS. ROWLAND: Ms. Wright?

20 MS. WRIGHT: Again, most of our clients in
21 the feedback that we got from our blog readers said
22 that they would prefer to be represented by an

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1 attorney in this process. A lot of artists feel
2 uncomfortable with representing themselves in these
3 types of claims. And, also, our firm does provide
4 representation to clients on a contingency basis. It
5 limits the types of claims that we can take, but,
6 fortunately, because we do often have statutory
7 damages available, including attorneys' fees
8 available, to our clients' claims, especially for
9 copyright infringement and for the DMCA removal of
10 copyright management information -- attorneys' fees
11 are available there as well -- then we are able to
12 take the vast majority of our cases on a contingency
13 basis for copyright infringement.

14 Our firm model is very different than the
15 standard firm model, which is why we were able to do
16 this. And so it is possible to do, but I can tell you
17 that we are overwhelmed with the number of
18 photographers needing assistance. And, unfortunately,
19 we can't take all cases, but we do handle a
20 significant number on a contingency basis and with a
21 very minimal amount of cost for our clients.

22 MS. CLEARY: And I actually don't believe

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1 for one second that the pro bono clinics that are
2 around the country -- and I just sat on a panel that
3 discussed small claims and small rights holders at
4 Michigan the other week. And we actually did a little
5 survey and had one of our associate counsels pull all
6 of the clinics that work in intellectual property in
7 the United States. And we really could only come up
8 with six very active clinics and nonprofit
9 organizations. And they're based in New York and Los
10 Angeles, you know, for the most part. And they
11 actually have very limited causes of action that they
12 help with. And breach of contract is one of them, but
13 copyright infringement actually is not included in
14 some of the pro bono law clinics.

15 So what I would say is that you really need
16 a commercial solution. You need to be able to hire a
17 lawyer that -- like I said, lawyers will -- you know,
18 that's why they have managing partners and partner
19 meetings, to decide whether they are going to take
20 clients on contingency or not. And they will take a
21 lot of stuff on contingency depending on what the
22 damages are and what the case looks like.

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1 So I think we should leave to the
2 marketplace, you know, how they will find their
3 representation, but I think that everybody should be
4 able to be represented.

5 MS. ROWLAND: Ms. Wright?

6 MS. WRIGHT: I can add that if we were able
7 to represent our clients in a small claims court,
8 rather than federal court, we would be able to take a
9 tremendous number of cases more because when we take a
10 case, we don't know if it's going to be in litigation
11 for several years. We don't know the extent of the
12 number of depositions, motions, things like that.
13 And, therefore, our firm as a small firm, we have to
14 be very careful about the obligations, the cases, that
15 we take because in federal court, we might be there
16 many hours and high expenditures.

17 If we were able to represent our clients in
18 a small claims tribunal knowing that there would be
19 limited discovery, maybe be in court for one day,
20 maybe no depositions whatsoever, which is part of the
21 major cost that our clients have, we would be able to
22 represent many, many more clients.

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1 So, again, I think most of our clients seem
2 much more comfortable being represented by an attorney
3 and have so indicated in the feedback that we have
4 requested.

5 MS. ROWLAND: Ms. Knappen?

6 MS. KNAPPEN: It is wonderful to be
7 represented by somebody who knows what they are doing
8 and has done this before, but that is often not the
9 option. The option is do nothing and continue on your
10 professional way because you don't have the money to
11 go there.

12 And even if the price came down -- and I
13 don't think that people going into small claims court
14 want to go in to get walloped. They're going to do
15 their research. They're going to seek out resources
16 in their area.

17 If you're thinking about bringing a case,
18 you're going to prepare. So --

19 MS. WRIGHT: I think our clients like the
20 fact that we take care of the preparation for them and
21 we know the law and they don't have to prepare and
22 they can continue creating and we take care of the

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1 legal issues.

2 MS. KNAPPEN: And that is wonderful if that
3 is where you are at financially, but a lot of small
4 creators aren't in a financial position to consider
5 that.

6 MS. WRIGHT: As are 99 percent of my
7 clients. I'm sorry.

8 MS. KNAPPEN: Okay.

9 MS. WRIGHT: Ninety percent of our clients,
10 they don't have any money. And we understand that.

11 MS. CHARLESWORTH: Just a quick thought.
12 You do think the two could co-exist --

13 MS. WRIGHT: Sure.

14 MS. CHARLESWORTH: -- in other words? Ms.
15 Wright, do you think you could have the option of
16 representation or not? Would that satisfy your point
17 of view or --

18 MS. WRIGHT: Absolutely.

19 MS. CHARLESWORTH: And Ms. Knappen?

20 MS. KNAPPEN: I disagree because then it
21 creates asymmetry, but I think that there is a place
22 for such as IP education classes, research, or document

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1 preparation that can help prepare the individual creator
2 to go into a small claims situation, absolutely. This
3 way somebody can get their documents and arguments laid
4 out with the help of a professional, but I don't want
5 asymmetry built into the process.

6 MS. WRIGHT: Some states' small claims
7 courts allow for representation as an option. And
8 even in federal court, you could be pro se. So that
9 is an option, but I understand that you are just
10 saying that you would feel overwhelmed by going
11 against an attorney.

12 MS. KNAPPEN: It's not a legitimate option
13 when you're talking to somebody who is in a profession
14 that you don't have personal background in. I mean,
15 it would be like saying, "Come over to my work space.
16 And we're going to compete on who can create the best
17 illustration for this magazine article." That is an
18 unfair situation. So I would want to avoid that kind
19 of asymmetry in small claims court situation. I think
20 that's the benefit of small claims court. That's what
21 makes it accessible.

22 MS. ROWLAND: Mr. Traynor had one.

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1 MR. TRAYNOR: It is frequently the case in
2 arbitrations and in agency dispute resolution that
3 people can be represented by lawyers or by non-
4 lawyers. So the choice here is not an all or nothing
5 thing between lawyers and non-lawyers.

6 In our January letter, we pointed out that
7 there might emerge some non-lawyer people who are
8 expert in this area. And there is a 1995 ABA study on
9 non-lawyer representation, for example, in agencies
10 and arbitrations. And one of the great failures of
11 the legal profession has been the failure to serve
12 needs like this. So I wouldn't put out of the question
13 the possibility of an emerging group of non-lawyer
14 paralegal-type people who become expert in this kind
15 of a process in helping people so that a person could
16 go in not necessarily with a lawyer but could be
17 represented by a non-lawyer.

18 MS. ROWLAND: Mr. Hasbrouck?

19 MR. HASBROUCK: Since we seem to have moved
20 into this question, the National Writers Union very
21 strongly supports the idea that, whether or not
22 representation by lawyers is allowed, people should be

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1 allowed to be represented by an advocate of their
2 choice, whether or not that advocate is a lawyer. And
3 we have a strong fact record outside of the courts but
4 in informal mediation and advocacy, we have won more
5 than a million dollars in recovered damages through
6 those informal mediation and advocacy efforts on
7 behalf of our members through the work of trained
8 volunteer non-lawyer members of our union advocating
9 as grievance officers on behalf of their fellow
10 members.

11 And I think it is very much the case that in
12 a narrow specialized field, non-lawyers who work
13 specifically in that field may have as much or more
14 expertise as a lawyer for whom that is only a small
15 piece of their caseload. So there is much to be said.

16 And also, as a union, we know that there is
17 also the precedent of union grievance procedures. And
18 many of these have much in common, disputes between
19 publishers and writers, which often involve
20 infringement, often have much in common with disputes
21 between employers and employees, where employees
22 routinely in union grievance procedures are

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1 represented by union advocates who are not lawyers.
2 And, again, that is a very long history of that. It
3 is very successful. So we very strongly believe that
4 there needs to be allowance for representation by an
5 advocate of your choice.

6 There are good reasons why many states have
7 chosen to prohibit lawyers in small claims courts.
8 And I think we would be wise to look carefully at the
9 reasons why they have made that choice. It is often a
10 recognition that it is an inherently unfair imbalance
11 when you have a lawyer against a lay person or even a
12 lay advocate.

13 And there is a further problem in that even
14 if you say, "Well, you can recover your legal fees,"
15 recovery of legal fees is a rich get richer system
16 because only those who can afford to front the money
17 up front to pay the lawyer have any chance of getting
18 that money back through recovery of fees. She who has
19 no money to hire a lawyer in the first place has no
20 chance of recovering the fees she can't pay.

21 So there are real problems with allowing
22 lawyers in. I think you need to look carefully at why

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1 it is that many states have chosen to prohibit them
2 from these kinds of proceedings.

3 MS. ROWLAND: Thank you. I was just going
4 to say that the representation issue is going to be
5 addressed in the next panel. So --

6 MS. CHARLESWORTH: I think maybe we are
7 addressing it now.

8 (Laughter.)

9 MS. CHARLESWORTH: I mean in the last 45
10 minutes. Actually, a thought occurred to me as I was
11 listening to Mr. Hasbrouck because many of the
12 comments we received really suggested there should be
13 a remotely conducted process in the sense of paper
14 submissions or electronic submissions, hearings by
15 teleconference and so forth, but I think a large
16 amount of the process would be conducted not in front
17 of a small claims judge.

18 In other words, when I think of small claims
19 court, I think of Judge Judy or something. And I
20 think the way many have envisioned this is we would
21 have one centralized location and people would be
22 sending things in.

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1 And I am wondering as a practical matter,
2 maybe people have thoughts on this. I haven't figured
3 out if you say no lawyers, how you would even enforce
4 that when it comes to putting together papers or, you
5 know, whether you're talking about just at hearings or
6 how -- maybe there are some nuances to this question
7 given the fact that the proceedings might be
8 centralized in the way I described.

9 Does anyone have any reaction to that? Mr.
10 Hasbrouck?

11 MR. HASBROUCK: I think there are two issues
12 here. And maybe the answer is in dividing them. The
13 question of whether the adjudicators are physically
14 located in one place and the question of whether the
15 decisions are made solely on written submissions are
16 separate. You could have the adjudicators located in
17 one place but still have hearings by teleconference.

18 And in many cases in small claims court,
19 part of what the judge does, part of the role of the
20 judge, is to help the lay plaintiff and lay defendant
21 with the process in ways that equalize their lack of
22 procedural knowledge. In some ways, it might be more

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1 dangerous to go into a decision on the pleadings where
2 some unnoticed defect in the paperwork might doom your
3 case; whereas, in a hearing with allowance being made
4 for non-lawyer parties, it might be possible to
5 rectify that defect so it didn't doom your case.

6 I think serving non-lawyer parties is a
7 strong argument for having teleconference hearings,
8 rather than simply decisions on the pleadings.

9 MS. ROWLAND: Ms. Robinson?

10 MS. ROBINSON: There is another feature of
11 the small claims court structure in California, which
12 we have had so many budget constraints lately I hope
13 it's still in effect, but there were small claims
14 advisers that helped people prepare their cases. I
15 think that's still the case. Do you know?

16 Anyway, you know, I think this is a very
17 helpful feature for people who are not represented and
18 something that you might want to consider as some sort
19 of option, you know, especially for those who are not
20 represented.

21 MS. CHARLESWORTH: Can you explain a little
22 bit more about your experience with --

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1 MS. ROBINSON: Yes.

2 MS. CHARLESWORTH: -- advisers in
3 California?

4 MS. ROBINSON: Yes. You would have an
5 appointment prior to your court hearing with an
6 adviser, who would help you evaluate your evidence and
7 think about things that you needed to produce in order
8 to have a credible case and think about your strategy
9 with this neutral adviser who helps you prepare to
10 represent yourself. And that was a paid function of
11 the small claims court.

12 MS. ROWLAND: Ms. Calzada, did you have
13 something to say?

14 MS. CALZADA: Yes. I just keep going back
15 to the question of if a corporation is in court, they
16 must be represented by an attorney. And so if you
17 tell the individual rights holder you can't have an
18 attorney, they're going to be in a position where they
19 really have no choice but to go up against an
20 attorney. And I think that sort of creates an unfair
21 spread. And I'm not sure how that problem would be
22 solved. And in the many states, if you try to

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1 represent a corporation, you know, that's basically
2 practicing law without a license. And so that part
3 concerns me.

4 The other thing that concerns me is that I
5 have been privy to many different presentations,
6 articles, reading books, et cetera, by people who are
7 experts on photography and even copyright issues, but
8 that aren't lawyers. And, inevitably, there are
9 errors.

10 And so in such a specialized field, it
11 concerns me that the consideration of having folks
12 represent photographers or other rights holders that
13 are not attorneys because it is already such a
14 difficult field to gain that understanding and
15 expertise in that I think without that basic
16 underlying ability or that background of the legal
17 education would be very difficult. And also, you
18 know, ultimately I think there would be some sort of
19 appeal process.

20 And there are other issues outside of this
21 small claims tribunal that are going to be addressed
22 and that will be impacted. And I think an attorney is

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1 best suited to explain all of those consequences to
2 the clients. Those are my concerns on the issue.

3 So we really support, obviously, being able
4 to bring it pro se if you choose to, but the idea of
5 eliminating attorneys, it's not something that we
6 would support.

7 MS. ROWLAND: Ms. Knappen?

8 MS. KNAPPEN: Again, I agree that ideally
9 specialists in the field are there representing you.
10 However, if we make it the expectation being that
11 people are going in without representation, there will
12 be greater leeway for people to stumble a little bit
13 through the process because it's understood these
14 aren't professional attorneys that are arguing.
15 They're arguing on their own behalf.

16 MS. CALZADA: But you are still going to
17 have the corporations represented by attorneys.

18 MS. KNAPPEN: Yes, you will, but otherwise
19 the expectation is that that person will be there.
20 People aren't going to go into the process, a lot of
21 people, if they have to lawyer up. They are not going
22 to do it. But if the expectation is that this is a

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1 process open that you don't need a lawyer for, more
2 people enter into it. And if the courts understand
3 that this is designed to be a lawyer-free process,
4 some leeway will be given.

5 MS. CALZADA: Yes. And don't get me wrong.
6 We certainly support that it should be designed to be
7 easy enough that an individual can go and represent
8 themselves. However, it is important that you be able
9 to retain an attorney if you choose to do so and can
10 find one that suits your needs.

11 MS. KNAPPEN: And I disagree.

12 MS. CALZADA: That's okay.

13 MS. ROWLAND: Back to Ms. Knappen's question
14 and this discussion, is anyone familiar with the pro
15 se rules in federal court now because in many, many
16 cases, the courts, the judges will give a lot more
17 leeway to a pro se litigant than to someone who is
18 represented by counsel. They will do things like try
19 to figure out what to try to get at to try to get them
20 a lot more leeway than they would someone who is
21 represented by an attorney.

22 So is that something that can be

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1 incorporated into a small claims procedure? Would
2 that alleviate your concern a little bit or --

3 MS. KNAPPEN: I think if it is an option,
4 it's not an option. If you say, "You have the option
5 of bringing in an attorney," that's a must have in the
6 real world if you want to go to court. But that
7 disincentivizes the process for somebody that is an
8 individual creator or a very small company.

9 MS. ROWLAND: Anyone else? Mr. Clinton?

10 MR. CLINTON: The Copyright Office, could
11 they have a public defender for people who can't
12 afford it? Is that --

13 MS. ROWLAND: You mean like a court-
14 appointed kind of attorney?

15 MR. CLINTON: Yes.

16 MS. ROWLAND: That is a consideration, but
17 you could think of, as Ms. Robinson was saying, there
18 are some people in some small claims situations that
19 are kind of advisers. And I do know in certain
20 situations -- and obviously, if you're a defendant in
21 a criminal situation, you get a public defender. I
22 don't know what that would look like, but that is

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1 definitely an option to think of.

2 Any new small claims procedure, what would
3 be the resources available? That is actually not
4 something we put into our notices, but that is a good
5 point what should be kind of the resources available
6 to people who want to bring claims and the defendants,
7 too.

8 So if you are in a small claims procedure, I
9 know that a lot of state courts on their websites have
10 a lot of different resources, like manuals. And so
11 you file things on forms. And so that is something
12 that might be incorporated but also perhaps some sort
13 of free legal systems as well. That's a good point.

14 Does anyone else have any thoughts on that?
15 Ms. Robinson?

16 MS. ROBINSON: As I thought further about
17 the small claims court legal advisers, they were
18 available prior to filing a complaint.

19 MS. ROWLAND: Okay.

20 MS. ROBINSON: So that you could review your
21 case with them. And they would help you assess what
22 kind of evidence you needed in order to have a

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1 credible chance. So for pro se litigants, that could
2 be really important. They might decide that it's not
3 worth it, they don't want to go through it. And
4 sometimes they don't have a good case. The more
5 realistic thing is for them to get back to work,
6 rather than continue to stew about the possibility
7 of an infringement or some big damage award that
8 they're not going to get.

9 So I think that these other resources would
10 be really important. There are also courts, as you
11 mentioned, that have forms for all sorts of things for
12 family law matters. And there's no reason why that
13 couldn't be available here, too, as well as some self-
14 help guides in some of the more esoteric things we
15 have talked about today, additional media, Copyright
16 Act, or peer use, and so forth.

17 MS. ROWLAND: Does anyone else have any
18 thoughts on that? Ms. Calzada?

19 MS. CALZADA: Well, I know that in the State
20 of Texas, they are introducing sort of standard forms,
21 particularly in family court, where if I wanted to go
22 get a pro se divorce and I wasn't a lawyer, I could

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1 download these forms. I mean, it's basically the same
2 kinds of forms that attorneys use and plug in names.

3 But the Supreme Court actually has gone
4 through this and said, "These are the things that we
5 think belong in these petitions." And so it's very
6 possible that the Copyright Office could develop a
7 series of sort of forms that "This is what you should
8 do. And check here, and check here." And I think
9 that would be a great idea and very useful.

10 MS. ROWLAND: And I wanted to touch on
11 something Ms. Robinson said, which was about the value
12 of having an adviser to let you know whether your
13 claim has merit. And so that is another aspect of
14 having a lawyer available or whatnot because you might
15 want the lawyer to represent you in a proceeding, but
16 come to find out that, even though it might be unfair,
17 you have no actual legal claim. And it might be good
18 to know that at the onset versus spending years and
19 lots of money and your time. Even though it might be
20 an unfair outcome, that's the law. You know, so
21 that's a valuable point for --

22 MS. ROBINSON: Right. The claim could be so

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1 stale or whatever.

2 MS. ROWLAND: Right. There could be a
3 statute of limitations problems. It could have been
4 20 years ago they infringed.

5 MS. ROBINSON: Right.

6 MS. ROWLAND: And it could have been an
7 egregious infringement, but they're precluded. So
8 that's a good point to make, too, that Ms. Robinson
9 brought up.

10 Ms. Knappen?

11 MS. KNAPPEN: And the idea, as in
12 California, if somebody can help review before it goes
13 forward is excellent. That could be a barrier
14 somehow to stop that.

15 MS. ROWLAND: I guess we are at our breaking
16 point for lunch. I guess right before we break, I
17 don't think anyone else had anything more to say on
18 the amount. I'm sorry. Mr. Hasbrouck apparently has
19 something to say.

20 MR. HASBROUCK: Actually, really, there was
21 one item I think that was on the panel II agenda that
22 we hadn't gotten to, which is a question of group

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1 claims.

2 MS. ROWLAND: Right, right. So that was
3 also an issue. So should one plaintiff be able to
4 bring claims against numerous defendants or should a
5 bunch of plaintiffs be able to get together and go
6 after one defendant? So there is that issue of a
7 group claim.

8 And then there is an issue of the limit, the
9 permissible claim limit. So if the limit is \$20,000
10 and you have 5 claims against one person and they're
11 each \$20,000, would you get to use small claims or
12 they all together have to be \$20,000? So there are a
13 couple of different issues around that. Which one did
14 you want to address?

15 MR. HASBROUCK: I wanted to speak to issue
16 of group claims. It seems just common sensical that
17 where there are a bunch of plaintiffs with a similar
18 claim against the same defendant based on similar
19 facts, possibly also maybe based on similar
20 contract clauses that are at issue or the license terms
21 being violated, whatever, it just makes no sense from
22 the point of view of administrative simplicity, and

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1 the whole idea or the point of this to simplify the
2 process, to preclude adjudicating that common set of
3 facts and that common set of legal issues in one
4 group claim. It makes it easier for everybody.
5 It obviously reduces by spreading the burden some
6 of the problems about representations and
7 costs that we have been talking about.

8 And although in theory the National Writers
9 Union has been a party to class action copyright
10 litigation and even where you have many plaintiffs in
11 common issues, copyright class actions are, if
12 anything, even more prohibitively expensive to bring
13 than individuals and even complicated individual
14 copyright actions. So there's just as much need for a
15 small claims track in the case of group claims as
16 there is for individual claims and no real reason that
17 we can see to preclude them.

18 MS. ROWLAND: Does anyone have any thoughts
19 on that? No? So, anything, Ms. Knappen?

20 MS. KNAPPEN: The one that I had on that is
21 when you have somebody who brings a claim against
22 multiple parties at the same time. Is that something

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1 you just mentioned?

2 MS. ROWLAND: Yes.

3 MS. KNAPPEN: I could see that being
4 problematic.

5 MS. ROWLAND: Can you explain?

6 MS. TOMMASELLI: I think that means the same
7 defendant, --

8 MS. KNAPPEN: Okay.

9 MS. TOMMASELLI: -- one defendant but
10 multiple plaintiffs. Right?

11 MS. ROWLAND: Either way.

12 MS. KNAPPEN: Okay.

13 MS. ROWLAND: There are two different sides
14 of the coin. So one type would be a bunch of
15 plaintiffs have a problem with one defendant, they
16 band together and bring their cases to small claims
17 court or there is one plaintiff and maybe she or he
18 has noticed that a bunch of different defendants have
19 done the same thing to their work and should that be
20 allowed. So there are two different types of group
21 claims.

22 MS. KNAPPEN: I tend to think the second one

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1 should be broken out. I think that would make it
2 easier to run through the system where if you have a
3 bunch of people that are having a problem with one
4 organization or person who is infringing, yes, come
5 together to bring that about, but the scatter shot,
6 the other way, I can see being problematic because how
7 do people defend themselves against that when there
8 are so many different parties and they might not know
9 each other?

10 MS. ROWLAND: Anyone have any other thoughts
11 on that?

12 MR. HASBROUCK: I would just clarify that
13 what we were saying was about the former case of
14 multiple plaintiffs against a common infringer.

15 MS. ROWLAND: Like a typical class action
16 kind of situation. Mr. Traynor?

17 MR. TRAYNOR: I just wonder whether you
18 might consider deferring consideration of this issue.
19 You've got so much on your plate that group actions --
20 a few years ago, I defended a copyright class action.
21 There was a leading case out here on the West Coast,
22 ended up in the Ninth Circuit fully briefed and then

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1 settled, but it's an extremely complicated process.
2 But it ended up with a pretty good settlement, where
3 hundreds of claimants got a few hundred bucks each and
4 got credit and licensed and so forth. So it all
5 worked out.

6 The end result can be good, but the process
7 of getting there can be very complicated. And you may
8 want to develop a little experience with individual
9 claims before taking this one on.

10 MS. CHARLESWORTH: Ms. Wright?

11 MS. WRIGHT: And, to put a wrench into the
12 whole conversation about the limits for the damages,
13 is it per work? If you have, for example, one
14 photograph that has been infringed, is the limit of
15 the claim, let's say, for example, 20,000 per
16 photograph and perhaps the alleged infringer has
17 infringed 5 photographs? So then in the small claims
18 tribunal, could the photographer potentially recover
19 \$100,000 or are you going to have the photographer
20 bring 5 individual claims?

21 It seems like if you could get the
22 resolution for all 5 photographs or 100 photographs at

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1 one time, that might be easier. But, then again, you
2 might just prefer to be in federal court if it's that
3 egregious, just something to consider.

4 MS. ROWLAND: Okay. Any other thoughts on
5 that?

6 (No response.)

7 MS. ROWLAND: Okay. And I guess the final
8 permissible claims question that we posed in our
9 notice was about what happens if the copyright owner
10 alleges that they are going to seek damages of \$10,000
11 and that's within the cap and then the defendant
12 counterclaims and their counterclaim goes above the
13 cap? Should that be allowed? How does that work?
14 Would it be automatic removal to federal court or how
15 would that be approached? Does anyone have any
16 thoughts on that? Ms. Calzada?

17 MS. CALZADA: I think that falls in the
18 category of giving the defendant the power to do
19 something procedurally that would get it kicked out.
20 And that concerns me.

21 MS. ROWLAND: Anyone else? Okay. I'm
22 sorry. Ms. Robinson has --

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1 MS. ROBINSON: I would agree with that.

2 MS. ROWLAND: Then I guess we're silent.

3 Ms. Charlesworth has a follow-up question.

4 MS. CHARLESWORTH: My question I guess for
5 the two weighed in. So would your solution then be
6 that the defendant maintain a separate right to bring
7 that claim in federal, the counterclaim? In that
8 case, they would be the plaintiff in federal court and
9 then defend the small claim in small claims court.
10 You're nodding, but, I mean --

11 MS. WRIGHT: Yes, I agree. I agree
12 completely.

13 MS. ROBINSON: Yes. If it really is a
14 worthy claim, then they should be allowed to bring it
15 in the right jurisdiction without being limited by
16 what the plaintiff did, I would think.

17 MS. CHARLESWORTH: So we would preserve that
18 claim for the defendant to bring in regular federal
19 court, as opposed to --

20 MS. ROBINSON: If it's above the
21 jurisdiction level.

22 MS. CHARLESWORTH: Okay.

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1 MS. ROBINSON: Yes.

2 MS. ROWLAND: But then you would have two
3 parallel cases that might deal with the same facts
4 going on simultaneously and what happens if -- what is
5 the preclusive effect of the judgments? It's kind of
6 like a race to judgment which court decides first.

7 MS. CALZADA: Well, couldn't the
8 counterclaim just be considered -- I mean, the
9 jurisdictional limits would be set by what the
10 plaintiff pleads. And generally jurisdiction is not
11 based on any counterclaims. You know, you can't
12 counterclaim a defense and get it kicked out of
13 diversity jurisdiction. And so I'm not sure that -- I
14 guess I would think that the tribunal or the court
15 system, whatever, would be equipped to handle the
16 counterclaim. Even though it's at a higher level, it
17 just wouldn't affect the jurisdiction question because
18 the jurisdiction should be based on what the plaintiff
19 does and pleads.

20 MS. ROWLAND: So you are saying there would
21 be kind of an exception for the counterclaim. So the
22 counterclaim can --

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1 MS. CALZADA: If it has --

2 MS. ROWLAND: -- be a higher cap than the
3 original claim?

4 MS. CALZADA: I think if it's a mandatory
5 claim that has to be brought in that case, you don't
6 want to exclude the defendant. You know, I think most
7 of us here represent plaintiffs, but the defendants
8 are important, too. And I wouldn't want to advocate
9 for a system that left defendants unable to pursue
10 their rights because they got caught in the sort of
11 crossfire.

12 MS. ROWLAND: Anyone else have any thoughts
13 on that? It's definitely a tricky. Mr. Cohan?

14 MR. COHAN: I guess I am not sure I
15 understand how you are saying the federal process
16 would go. Would that be after the adjudication of the
17 initial claim that the defendant could then bring the
18 counterclaim?

19 MS. CALZADA: No. I am saying the
20 counterclaim would be heard also by the tribunal, even
21 if it exceeded the jurisdictional limits.

22 MS. ROWLAND: I believe she is suggesting

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1 that it would be mandatory, so that it would be
2 mandatory that the defendant would have to bring the
3 counterclaim in that same small claims proceedings but
4 that the defendant would have a higher cap. So that
5 even if the cap was \$20,000 and the defendant could
6 allege however much money and it would still stay in
7 that process --

8 MR. COHAN: Okay.

9 MS. ROWLAND: -- I believe is what you were
10 saying. Right? Let me know if I mischaracterized it.

11 MS. CALZADA: I wasn't particularly
12 advocating that there had been a kind of cap. I was
13 just not married to the idea, just thinking that the
14 defendant should have -- if it was a mandatory claim,
15 that must be brought in connection with the initial
16 claim, then the defendant should have a right to bring
17 that claim to the proceeding, regardless of the
18 amount.

19 MS. ROWLAND: Okay.

20 MR. COHAN: And you also maintain there
21 should be an appeal to an Article III --

22 MS. CALZADA: Yes.

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1 MR. COHAN: -- as well, in addition to that?

2 MS. CALZADA: Correct.

3 MS. ROWLAND: That is an interesting --

4 MS. WRIGHT: So I guess the question is
5 whether it is a compulsory counterclaim?

6 MS. ROWLAND: I don't know if that is really
7 the question. There is an issue if it is a compulsory
8 counterclaim, which I suppose is the Federal Rules of
9 Civil Procedure, which which may or may not applicable
10 to this new special process.

11 MS. CHARLESWORTH: Let's assume it's not
12 compulsory.

13 MS. ROWLAND: Assume it's not. So, even if
14 it's not a compulsory counterclaim, it's sort of a
15 strange situation where you would have two competing -
16 - so say there was a cap and you're saying it has to
17 be all done in the same proceeding. So the first
18 issue is that's requiring the defendant to be in the
19 forum, I suppose, not that it's the defendant's
20 choosing, for their counterclaim, which they have
21 anyway, right, but it is kind of a strange situation,
22 although in --

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1 MS. WRIGHT: If it's not a compulsory
2 counterclaim, then the defendant does not have to be
3 in the forum to litigate that defendant's claim.

4 MS. ROWLAND: Right. So they could be in
5 federal court, at which point you have two cases going
6 on at the same time.

7 MS. WRIGHT: I think that's necessary. I
8 think that if you are in this court, you should be
9 subject to the cap. You shouldn't be able to use,
10 then, the fact that the plaintiff filed in this court,
11 this tribunal, that then the defendant can come in and
12 say, "Okay. Well, I'm going to litigate this million-
13 dollar claim. And I have no cap." It throws a whole
14 wrench into the process, I think.

15 MS. CALZADA: So, then, are you suggesting
16 that any counterclaim not be -- in other words, that
17 there would be no compulsory --

18 MS. WRIGHT: The compulsory counterclaim is
19 a problem. But we were talking about a voluntary
20 counterclaim.

21 MS. ROWLAND: I think Ms. Calzada would like
22 it to be there in the same forum.

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1 MS. CALZADA: My concern is just if it's a
2 compulsory counterclaim, the defendant should be able
3 to litigate it and bring it because if you say, "Okay.
4 You can't bring your counterclaim above the
5 jurisdictional limit," but there's a compulsory
6 counterclaim, then the defendant is out of luck.

7 MS. ROWLAND: Well, I guess the question is
8 if a defendant were to assert a higher-level
9 counterclaim, would that automatically kick it out of
10 the small claims procedure? So then it would just go
11 to federal district court. I guess it's a situation.

12 MS. CHARLESWORTH: So there are two issues,
13 but the first issue is whether it would be a
14 compulsory counterclaim system. And assuming it were
15 compulsory, that raises the issue you suggested, Ms.
16 Calzada. And if it weren't compulsory, Ms. Wright is
17 suggesting that that claim would be preserved and
18 could be separately litigated in federal court. And
19 perhaps you have -- we haven't discussed res judicata
20 and its impact on the small claims judgment, but that
21 also would have a bearing on the question of the
22 independent right to litigate in regular federal court

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1 if you have a bona fide large counterclaim, which
2 certainly the defendant should be entitled to bring
3 somewhere.

4 MS. ROWLAND: I see Ms. Knappen, but I'll
5 let Ms. Calzada respond since it was directed at her.

6 MS. CALZADA: I was in agreement with
7 basically ...

8 MS. CHARLESWORTH: That's a fair
9 characterization.

10 MS. ROWLAND: Ms. Knappen?

11 MS. KNAPPEN: I think that that situation
12 would almost incentivize a lower cap to prevent
13 counterclaims. If you had a lower cap, maybe if you
14 were infringed and it was a pretty clear case, you
15 would just be inclined to pay in and move on. If it
16 was a higher cap, you might be more inclined to file a
17 counterclaim and take it to a larger court.

18 MS. WRIGHT: I don't think the idea is that
19 it would remove the plaintiff's claim from the
20 tribunal, from the small claims tribunal.

21 MS. KNAPPEN: No.

22 MS. WRIGHT: The question is whether you

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1 would litigate a counterclaim in that small claims
2 tribunal.

3 MS. KNAPPEN: It seems to me you shouldn't
4 be forced to because then you could get into a
5 situation where you have preemptive claims, like I am
6 in contact with somebody and they have infringed and
7 they know it's big time. And they know it's bigger
8 than I know it is. So they're going to take the first
9 step by forcing it into small claims court. So then
10 I'm forced to respond back within small claims court.
11 And that's not necessarily a good situation because I
12 would want to counterclaim in a larger federal court
13 in that case. I don't want to be tied there if it's --
14 does that make sense? So in that case, maybe if we
15 kept the limit lower, it would disincentivize that.

16 MS. ROWLAND: I was about to open up a new
17 line of questioning, but I think that we will have to
18 stop on that right now because I think it would
19 actually dovetail into some discussions from the next
20 panel because during the next panel, we're going to
21 discuss how you determine the initiation of the claim.
22 And part of that is about prima facie evidence or if

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1 there is some sort of adjudicatory review before a
2 claim moves forward. I think, actually, this would be
3 a discussion that would be good to see, for example,
4 if you're trying to do a counterclaim for \$100,000.
5 Should there be some sort of preliminary review, like
6 a normal small claim if that was to happen? So I
7 think the next panel would be a good place to discuss
8 it.

9 MS. CHARLESWORTH: Are you saying it is time
10 for lunch?

11 MS. ROWLAND: So is that --

12 MS. CHARLESWORTH: I think it is a long way
13 of saying it's time for lunch.

14 MS. ROWLAND: We ran over a little bit. So
15 do you think we should? And I think, as we did in New
16 York, the afternoon panels were a little quicker. So
17 about 2:00?

18 MS. CHARLESWORTH: So we're thinking maybe
19 2:00. That clock is wrong, by the way.

20 MS. ROWLAND: We are suggesting that we need
21 to be back at 2:00. We are adjourned.

22 (Whereupon, at 12:51 p.m, a luncheon recess

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1 was taken.)

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19 A F T E R N O O N S E S S I O N

20 MS. CHARLESWORTH: Good afternoon, everyone.

21 We're going to be continuing with our roundtable. I

22 thank you for coming back for those who were here this

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1 morning. And I think we have at least one new person
2 at the table. That would be you.

3 MR. BRENNAN: Lorin Brennan.

4 MS. CHARLESWORTH: Mr. Brennan. Would you
5 like to introduce yourself and tell us your interest
6 in the proceeding?

7 MR. BRENNAN: Briefly. I work in the movie
8 business and the fashion business. I am with a small
9 firm. We have probably filed hundreds of cases,
10 copyright infringement cases, that were brought by
11 primarily small claims, primarily what I'll the
12 fashion and pictorial arts business representing
13 photographers, fashion designers, et cetera. We have
14 had a lot of experience in these types of cases and
15 great joy in dealing with the interesting procedures
16 in federal court.

17 MS. CHARLESWORTH: Okay. Thank you.

18 Ms. Robinson, did I give you a chance to
19 introduce yourself earlier?

20 MS. ROBINSON: You did.

21 MS. CHARLESWORTH: Okay. All right.

22 MS. ROBINSON: Thank you.

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1 MS. CHARLESWORTH: So we are now up to panel
2 III. And, again, as you have noticed, there is a fair
3 amount of overlap in these topics. It's hard to
4 segregate things perfectly. But this one really is
5 focused on practice and procedure, the nitty-gritty
6 in terms of how the system might work, what would be
7 required to file a claim, how would it proceed, and so
8 forth.

9 So I would like to open the floor on a
10 particularly important issue in which we have a
11 variety of opinions based on the written comments and
12 also based on our experience in New York, which is the
13 question of registration and whether a work needs to
14 be registered before you could bring a claim in the
15 small claims court, or whether it would suffice to put
16 in an application for registration and so forth.

17 Now, currently under the federal system,
18 obviously you have to have -- if you are a U.S. rights
19 holder, you need a registration, although there is
20 some split of opinion about when you actually have to
21 obtain the registration, whether it's just before
22 judgment or whether you need a certificate in your

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1 hand to go to court. So we're very interested in
2 hearing from you, especially people who have had
3 experiences in this area, with your thoughts in terms
4 of whether registration should be required or some
5 alternative might be a prerequisite to filing.

6 Do I need to call on someone again? I have
7 Mr. Hasbrouck. Okay.

8 MR. HASBROUCK: We are very strongly of the
9 opinion, the National Writers Union, that no
10 registration should be required and that this would be
11 a good place to start with getting rid of the
12 registration requirements in the small claims
13 proceedings.

14 We addressed this in our written comments,
15 but I would make two arguments as to why it makes no
16 sense to have a registration requirement for any
17 purpose. The first is that works first published in
18 any other Berne Party under Berne are not subject to a
19 registration requirement because that is a prohibited
20 formality. So the federal courts already have
21 experience hearing claims of unregistered works that
22 were first published abroad.

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1 I have not heard anybody, we have not heard
2 any suggestion that they have any difficulty
3 whatsoever in adjudicating those claims. And that
4 would have to continue in this system anyway.

5 All that imposing a registration requirement
6 on work first published in the U.S. would do is
7 perpetuate the perverse U.S. governmental disincentive
8 on creators in the U.S. to publish first in the U.S.
9 and drive them to ensure that their works are first
10 published in any other Berne Party other than in the
11 U.S. That makes no sense. It serves no legitimate
12 public policy purpose and is completely ineffectual
13 since it is so trivially easy to ensure when a work is
14 first published, for example, by putting it online in
15 some other country for a few days as a first
16 publication before bringing it out in the U.S.

17 and, thus, securing protection without
18 registration in the U.S.

19 The second reason why the registration
20 requirement is counterproductive is that the current
21 procedures are at best unwieldy and at worst
22 unfeasible for lots of works. There's no clearly

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1 defined process for registering copyright in the
2 stream of updates, of postings and comments in a blog,
3 much less a Twitter feed or the continuity of updates
4 to a Facebook page.

5 Personally, I spent almost three years
6 trying to register copyright in my blog before being
7 told by the examiner at the Copyright Office handling
8 the matter that I would need to file a separate
9 application for the work first published to the blog
10 on each day, something that would raise the cost to
11 something prohibitive for an ordinary self-publisher.

12 So most work, in fact, even if it is published,
13 is not registered. It is increasingly impractical, as
14 more of the first publications are in media that are
15 hard to register under the existing procedures. And
16 you can't apply a registration requirement to work
17 first published elsewhere anyway.

18 So what point is served here? It's time to
19 get rid of the registration requirement, get with the
20 rest of the world, and not disadvantage work first
21 published in the U.S. relative to work published in
22 the rest of the world.

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1 MS. CHARLESWORTH: Okay. Mr. Brennan?

2 MR. BRENNAN: Let me try to give you just
3 practically a --

4 MS. ROWLAND: Can you hold on one second?

5 MR. BRENNAN: Oh, sorry. If I can, at least
6 try to give you practically in day-to-day litigation
7 what the registration requirement really means. It's
8 primarily a way to, if I may, generate fees and waste
9 time.

10 We understand Congress had reasons for a
11 registration requirement. It does help in some sense
12 to identify the work. Registration is also useful
13 because it does two things. If you are a party and
14 you are trying to get a license, you have got a place
15 to search. And it also encourages you to give some
16 definition about what the work is, who owns it, what
17 the authors are, when it was published. Okay. That's
18 all fine, and you need to build in those incentives.

19 I can't think of a case. Well, maybe. No.
20 I can't think of one. Hundreds of cases. There's
21 always a motion for summary judgment that says, "My
22 gosh. The plaintiff made a tiny error in the

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1 registration certificate. This is fraud on the
2 Copyright Office. Bands must play. Dirges must sound.
3 The solar system must stop. And the plaintiff must be
4 kicked out" for what turns out to be essentially
5 trivial claims.

6 The other problem you have, if I may be so
7 careful, is -- and maybe the Copyright Office can add
8 to this -- there is in some courts a belief, strangely
9 enough, that much of copyright is really federal
10 common law. By that, I mean the Pro IP Act. I must
11 have cited the Pro IP Act 50 times. And the last I've
12 seen, only one court that I know in the past year has
13 ever bothered to read it. No matter how many times
14 you say now under the Pro IP Act, materiality is
15 determined by the Copyright Office, the courts just
16 don't care. They just say, "Well, okay. Usually, you
17 wind up finding the registration doesn't make a
18 difference."

19 So the problem you have with registration is
20 this. There are legitimate reasons for registration.
21 And we can look at those incentives. When you get
22 into litigation, every defendant looks at the

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1 registration to say, "Aha. Tiny errors, no matter
2 what they are, are automatic fraud on the Copyright
3 Office. And the case must be dismissed."

4 You then have to go and often file the
5 summary judgment motion, offering all the reasons why
6 this isn't material or it wasn't a real registration
7 or running and scrambling, making corrective filings.
8 This does become a particular problem for
9 registrations when you register what I'll call
10 collective works, a lot in the fashion industry and
11 which people might make 15 or 20 different similar
12 fashion designs, they register as a collection.

13 What immediately happens then is -- and this
14 is why litigation becomes expensive -- the first thing
15 you get is the registration will list these works as
16 all published on a certain date. Immediately there is
17 a request for production. Give us every sale you have
18 ever made for all 15 items disclosed in this
19 registration because if it turns out that one sale may
20 have been made one day early, we're going to allege
21 that you defrauded the Copyright Office. So there is
22 a tremendous effort in generating all of this

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1 paperwork to deal with what comes out to be minor
2 problems.

3 As I said, Congress tried to correct this in
4 the Pro IP Act and should have said, "Well, these
5 things really don't matter. Send it off to the
6 Copyright Office." Maybe the Copyright Office can
7 answer this for me. The last I checked was about a
8 year ago. One District Court in Puerto Rico had ever
9 sent an inquiry to the Copyright Office about this.

10 So what we see in the registration
11 requirement to me is a tremendous effort and an excuse
12 to generate a lot of time and effort in discovery that
13 really doesn't accomplish very much.

14 Having said that, there are reasons for
15 registration. But, especially in a small claims
16 procedure, we need to do one of three things: either
17 eliminate the requirement or streamline the
18 registration process or provide some disincentive; for
19 example, for somebody to waste their time making
20 challenges to the registration that are not really
21 significant. There obviously are cases where
22 registrations are materially deficient or false, a few

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1 Court of Appeals cases on this. But in my view, we
2 should simplify or even for small claims cases, we
3 could eliminate the registration requirements simply
4 as a cost-saving matter.

5 MS. CHARLESWORTH: Okay. Very thoughtful
6 comments. I have a couple of follow-up questions.
7 And I think this is for Mr. Hasbrouck as well.

8 If you eliminate the need to actually supply
9 a certificate or register, how would you meet the
10 requirement of demonstrating copyright ownership,
11 which is obviously one of the elements of an
12 infringement action?

13 MR. BRENNAN: I would add this to a more
14 elaborate procedure and adjusting the procedures. But
15 one of the things the plaintiff has to do -- you have
16 to do two things. You have to show authorship,
17 originality, and chain of title, ownership. And they
18 are all closely related.

19 Usually in the cases that I have, you're
20 going to have a declaration from the original artist
21 who made it, saying, "I made this. This is my
22 original work." And you're going to present all the

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1 chain of title.

2 Ideally, in my view, the plaintiff should be
3 required to provide those documents. And we usually
4 do if there is a chain of title. In many cases, you
5 are just the original owner. So there is nothing
6 there.

7 What the registration does is it just gives
8 you a presumption. And it's only a rebuttable
9 presumption. So if the defendant wants to challenge
10 that, they often ask for this information anyway.

11 So probably in many cases, you can rely on
12 the registration certificate and say, "Oh, this is
13 presumption you didn't challenge it. Why are we
14 wasting our time?" But we often provide both the
15 registration and the declaration of authorship as
16 well, certificate of authorship. So the registration
17 is sort of belt and suspenders here. I'm not sure
18 that it adds much to what you would normally do to
19 prove your case.

20 Does that answer your question?

21 MS. CHARLESWORTH: Yes. And I have one
22 other. In terms of a streamlined procedure, I think

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1 that was one of the things you said, a streamlined
2 registration procedure, you mentioned that earlier,
3 what would that be or what would that look like in
4 your view?

5 MR. BRENNAN: Well, one of the things about
6 the registration procedures -- I mean, and I think you
7 need to change your statutory authority to register
8 collective works because you can only register them if
9 they are published on a certain date. Registering
10 groups of works is a disincentive because of the cost
11 if you register like each design separately. You want
12 to have some sort of a collective registration
13 requirement. And you probably want to have it so that
14 you don't have to have them all published on the same
15 date or all unpublished. That would be helpful.

16 The next thing you might do as the
17 registration is the entire concept of to me a fraud on
18 the Copyright Office is something that was imported
19 from patent practice. And it doesn't to me make a lot
20 of sense here right now. The Pro IP Act tried to
21 eliminate that by requiring the Copyright Office to
22 opine on materiality. It doesn't seem like the courts

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1 seemed to want to pay much attention to that. And it
2 seems to me if you are going to have a registration,
3 errors in the registration, it may be Congress needs
4 more statutory authority to say, "Look, if they made a
5 mistake in the registration, they lose their
6 presumption." Okay. Fine. If they lose their
7 presumption, go and prove it, but let's not make this
8 something that immediately kicks the plaintiff out of
9 court. And that's something that I would do so that
10 the registration doesn't become a prerequisite to
11 suit.

12 Now, we know technically the Supreme Court
13 told us it is not really a prerequisite and it's
14 providential and all this stuff. But every defendant
15 is going to make a registration claim. Sometimes
16 they're valid. But what I would do is in small
17 claims, if you have to have a registration, then all
18 you do is you lose your presumption. An error loses
19 your presumption. And then you go back, and you can
20 still file your claim.

21 The next thing you have to ask is, if you
22 don't have a registration, what do you do to statutory

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1 damages and attorneys' fees? In small claims, I would
2 still allow statutory damages and attorneys' fees,
3 regardless of whether work is registered.

4 MS. CHARLESWORTH: Okay. Mr. Hasbrouck?

5 MR. HASBROUCK: Yes. I have three answers
6 to the question of what you would do in the absence of
7 registration. First, you do what you do now in all
8 the cases brought with respect to foreign works. This
9 is not something new. It happens all the time. We
10 have plenty of precedent and experience. Claims
11 related to foreign works get litigated all of the
12 time. This is not something new, different, exposing
13 new problems.

14 Second, as Mr. Brennan has pointed out, what
15 you need to establish is creatorship. And creatorship
16 is prima facie evidence of holdership of all rights in
17 the absence of some contrary evidence. I mean, the
18 burden of proof is on anyone other than the creator,
19 who asserts that they have been assigned certain
20 rights. So it's sufficient for the creator, who we
21 represent, to establish prima facie evidence of
22 creatorship. And if someone else wants to challenge

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1 that, they then have a further burden of showing
2 evidence of assignment of rights. But I don't think
3 it's that complicated to establish creatorship.

4 The third thing is registrations don't
5 generally resolve the question of rights holdings.
6 What is generally registered is the original
7 copyright. Most rights have been to some degree
8 assigned and divided. It's common for the copyright to
9 be registered. It's rare for assignment of rights to
10 be registered, partly because the fees start at about
11 \$100 a document to register a document about the
12 assignment of rights; whereas, it's only \$35 to
13 register the copyright. And because registering the
14 copyright is required, registering the assignment is
15 not. So copyright registration records are actually
16 relatively useless in determining actual rights
17 holdings as of the present.

18 So I don't really think that registration is
19 making anything any easier for anybody in this
20 process. Let's start with figuring out who holds the
21 rights and forget this whole sideshow of registration.

22 MS. CHARLESWORTH: Ms. Wright?

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1 MS. WRIGHT: I think that in many cases,
2 proof of authorship is easy. And if that is the
3 question as prima facie ownership, it's really proof
4 of authorship unless there's a transfer of the
5 copyright. And then you're going to have a written
6 document. So that's easy.

7 But authorship for photographers, you can
8 show a rough file or a negative oftentimes or a writer
9 would be able to show drafts or transfer of the files
10 or that sort of thing. I don't think that is really a
11 problem.

12 But I did want to say something about, Mr.
13 Brennan --

14 MR. BRENNAN: Yes, right.

15 MS. WRIGHT: -- registering a collection, as
16 opposed to a group. And we've got a real problem with
17 the courts deeming photographs registered together as
18 a group is often deemed to be one statutory damages,
19 rather than separate statutory damages. And the
20 registration of a group of published photographs, that
21 process was put into play for the Copyright Office for
22 ease of registration, but you have got a problem when

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1 you have got photographers who might shoot 10,000
2 images in a day and they want to register them
3 together but then they risk the possibility that they
4 are eligible only for one statutory damage. That
5 might take us off the train of thought. I just wanted
6 to put that out there there's a problem.

7 MR. BRENNAN: Let me add to that. Whether
8 it was a collection or a group, I was just speaking
9 generically, but this really is a problem for people
10 like photographers, visual designers, people who
11 register who do a lot of small little works. To
12 register each one is enormously expensive. And so
13 there is a tendency to register them as a group, as a
14 collection, as one thing. And the issue that you want
15 to face is that you don't want to have registration
16 challenges because a defective 170 destroys them all.
17 You don't want to be limited to you only get statutory
18 damages for one.

19 I mean, the goal of registration is I think
20 twofold. If people want to register, they give notice
21 to the world. Well, we claim the copyright on what
22 the work is and some indication of what the ownership

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1 is, but you can't make it so expensive that people who
2 do these large we'll call collection groups, multiple
3 works, are disincentives to file on that. And that
4 may need some additional statutory authority from the
5 Copyright Office to deal with this, but that has to be
6 something addressed in registration.

7 MS. CHARLESWORTH: What about a system,
8 which has been suggested by some, where, let's say,
9 your work is infringed and it's currently unregistered
10 and it's a photograph, one of the 10,000, that there's
11 some process where you file an application for that
12 work. I mean, as happens today sometimes when you are
13 getting ready to sue on something, that you would file
14 your application for the work that was infringed,
15 which would either -- some have suggested an expedited
16 process. Some have suggested that the registration
17 happens while you're in small claims court. Would
18 that offer a potential solution?

19 MR. BRENNAN: You do that all of the time.
20 The issue on the registration is not doing it. The
21 issue is statutory damages and attorneys' fees. Doing
22 a registration while a suit is filed, you can file a

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1 correct -- you can do these while a suit is filing.
2 Those are easy enough. The issue is you often have to
3 tell your clients in advance, "Well, look, you know,
4 if I want to protect you, you have got to register now
5 because if you are ever infringed in the future, you
6 need those." And that's what it does. It's the
7 effective registration or remedies.

8 MS. WRIGHT: The reason that the defendant
9 will try to invalidate the registration is that it
10 knocks out statutory damages, including attorneys'
11 fees. So if the image is infringed, it's either too
12 late to register timely or you're just not eligible
13 for statutory damages. It doesn't matter. Yes, we go
14 through the process of registering before we file
15 suit. It's pro forma. That's fine.

16 And if you have to pay that expedited fee of
17 -- what is it, 675 now or whatever?

18 MS. CHARLESWORTH: It may be 765.

19 MS. WRIGHT: Seven sixty-five. Okay. So,
20 you know, that is a lot of money to have to expedite
21 it. And so yes, that is a problem. Most
22 photographers, most of our clients, do not register

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1 their works. More and more are doing so. But it is a
2 big hurdle to jump through.

3 And I also wanted to say something that Mr.
4 Hasbrouck mentioned about his registering his blog and
5 that sort of thing. It really relates to he could
6 register your blog entries as published because they
7 were published on separate days. He could have
8 registered them. Under the certain -- the
9 requirements right now, it's unpublished. Unpublished
10 works you can register the entire group. So there is
11 a question as to whether your blog is published.

12 MR. BRENNAN: Published?

13 MS. WRIGHT: And if you look at the
14 definition of published, it may not be --

15 MR. BRENNAN: Early performing.

16 MS. WRIGHT: -- published unless you're
17 trying to sell it. It depends on the --

18 MR. BRENNAN: Right.

19 MS. WRIGHT: -- interpretation of the --
20 just because you post something on the internet does
21 not make it published, but we don't really know the
22 complete answer to that question. And so that would

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1 be another thing, to get rid of the distinction
2 between published and unpublished registrations,
3 because it is prohibitive of registering groups of
4 works because we now have to worry about, was that
5 published? I sent it to a few friends. Is that
6 published? Probably not. But a lot of copyright
7 holders have no idea what the answer to the question
8 is.

9 MR. BRENNAN: If I could add to that, one
10 may say that the distinction between published and
11 unpublished made a tremendous amount of sense. At one
12 point when we had common law and federal statutory
13 copyright. What sense does it make right now? I
14 mean, it's nice to know the work had been published.
15 But the issue that you face is publication is a very
16 nice document.

17 The concept if we were talking about
18 distributing books or to understand published, when
19 you start to get to other types of works, it gets more
20 and more difficult for you to take and stretch this
21 document of published sample fashion industry and at
22 least fashion designs. When are they published? When

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1 they are sold?

2 But what many of the designers do is they
3 have a store. They have a storefront. And they take,
4 and they put all of their designs in the storefront.
5 And they tell all the buyers, "Come on in and look at
6 our new designs."

7 People come in. They look at the new
8 designs. That's, of course, when they get pirated
9 because somebody takes the design, puts it in their
10 pocket, and ships it to China. Is that publishing
11 because that is offering for sale? Yes. That's
12 probably publication. It is offering for sale. And
13 there is a case that says that. But when you get these
14 rarified distinctions of what's published and what's
15 not, especially in works that don't fall into our
16 traditional idea, it becomes harder and harder.

17 And the reason these are hard is not because
18 you can't solve them. Yeah, we can go to court and
19 solve it. But every one of these then becomes a motion
20 for summary judgment. Got to go. You have got to
21 write and do the research. You've got to explain it
22 to a judge again. The judge may not be familiar with

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1 the copyright law. And so this is just all glue. And
2 this is why these things become expensive, because
3 these issues aren't resolved and you've got to argue
4 them out in court.

5 MS. CHARLESWORTH: The other side of the
6 room has been uncharacteristically quiet. Do you have
7 any thoughts on the registration issue? Ms. Knappen,
8 do you have any thoughts?

9 MS. KNAPPEN: I agree that the idea of the
10 group problem is a problem when you put things
11 together. And so I would think that not registering
12 would be a more helpful way to go for to not require
13 registration.

14 MS. CHARLESWORTH: Okay.

15 MS. ROBINSON: I was just thinking, wouldn't
16 it be nice if we participated fully in the Berne
17 Convention, so that we have an even playing field on
18 that topic.

19 My last conversation about copyright
20 registration and the expense of it was when we went to
21 San Quentin Prison and had a copyright and
22 alternative dispute resolution workshop with inmates

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1 who are doing creative work: writers, writing songs
2 and writing plays and so forth. And the barrier of
3 copyright registration seemed really insurmountable to
4 them, \$65 per piece or per collection. And, you know,
5 we were there explaining all of these -- one of my
6 colleagues is a lawyer who specializes in publishing
7 law. And he went through all the permutations of that
8 and copyright registration and what it gives you and
9 all of that. And it was useless to them because they
10 don't have income for it.

11 So if it's an access issue that we are
12 talking about, I think it's really important to look
13 at it from the bottom up and say, "Okay. Who is this
14 eliminating from participating in this economic
15 enterprise?" And it could be lots of people.

16 MS. CHARLESWORTH: Very interesting. I
17 mean, one thing is there is actually, in some sectors,
18 at least, an increasing interest in formalities
19 because of the ability to identify copyright owners.
20 In other words, I think Mr. Brennan mentioned this.
21 There is a countervailing issue here that sometimes
22 comes up, which is, let's say you are out there and

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1 you want to use a photograph. It's a question of the
2 ability to find out who owns it.

3 And so there is a competing policy interest
4 to some extent sometimes or some people would believe
5 in having more information out there in the world
6 about who owns what to help eliminate some of the
7 infringement issues. I don't know if anyone has
8 thoughts on that. Mr. Brennan?

9 MR. BRENNAN: Yes.

10 MS. CHARLESWORTH: Okay.

11 MR. BRENNAN: One of the things that we look
12 at, too, in a number of these areas -- let me try to
13 say that when we are talking about small claims, I
14 think we need to separate what we say for copyright
15 cases. At least in my mind, there are sort of two
16 generic spectrums that we have here. On one spectrum,
17 there is what we might call the magisterial case: one
18 plaintiff, one defendant, complicated issues of fair
19 use, statutory interpretation. Those are not the small
20 claims cases, at least that we see. Most of what we
21 would see in these are what I would simply call either
22 mass order or mass infringement.

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1 You have a work in which somebody like --
2 for example, in the fashion design, somebody has
3 copied your design, taken it to China. They're
4 imported here. And you have thousands of designs,
5 dresses, et cetera, sold in stores or you have copies
6 of your photographs that have been taken and placed on
7 calendars and sold. And what you are trying to do is
8 remedy these claims.

9 In these claims, what you do is you have
10 liability, at least as far as we're concerned, in
11 doing it. It should be fairly clear the damages may
12 not be that great in terms of sales, but at least you
13 can get a remedy and you can stop all of the sales.

14 Injunction usually doesn't work too well,
15 but it's better if you can go to the retailers and the
16 other parties and say, "Look, you've sold 1,000 units.
17 Now you're going to pay for it. Stop."

18 If these claims can be done efficiently and
19 the courts were efficient about doing that, there
20 would be incentive for parties on both sides to look
21 to establish what I would call -- I'm not a big fan of
22 collective management, but there would be collective

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1 information. For example, Corbis right now has all of
2 this information on pictures. And Corbis has been
3 trying to talk to various people like in the design
4 industry, "Why don't you register our designs with
5 us?" Wouldn't it be nice?

6 The retailers who often become the
7 defendants here hate this stuff. They don't want to
8 be sued by this stuff. They're tired of it. But they
9 buy their products from third parties and don't know
10 because if we had an efficient system, there would be
11 incentives for all parties to create what I would call
12 these chain of title searches. Corbis would be
13 available to do it.

14 In the movie industry, you already have
15 people who search chain of title regularly when you
16 are doing these massive works. Photographers would
17 have an incentive to register. And so that would be a
18 source for people to get this information here.

19 To have the government impose it and say,
20 "Well, we should have top down in registration. If
21 you don't register, you lose your remedies," I think
22 would mean a lot of writers and a lot of small parties

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1 wouldn't remedy them, but if we had efficient
2 enforcement, it would work on the inside because then
3 the people who get sued on this stuff, the large
4 retailers, et cetera, who get tired of it would say,
5 "Enough. I'm tired of being sued on this thing. I
6 want to have some procedure." And it could go to the
7 suppliers of the designs. And the design suppliers
8 don't want to be involved in this. Our clients are
9 tired of filing suits. They just want to be paid and
10 do their business.

11 If we had a system, we could go to a Corbis
12 or to some. I could register our designs. They knew
13 that they're going to get a license like they do in
14 the movie industry. I think people would be a lot
15 happier. But in order for that to happen, we have to
16 have an entire cycle in which we have effective
17 enforcement so people can't know that right now it is
18 easier to avoid and dissemble than it is to pay. So
19 that's my thought about it, about registrations.

20 MS. CHARLESWORTH: Okay. And Mr. Hasbrouck.

21 MR. HASBROUCK: Yes. Certainly there are
22 some interest groups who have never been reconciled to

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1 the Berne Convention and who are continuing to
2 advocate for formalities, even though they're
3 prohibited by the Berne Convention. I think we need
4 to be clear that if you're talking about -- you know,
5 that may come up in other public inquiries that the
6 Copyright Office is now holding, in which
7 many of us are likely to be commenting on orphan
8 works.

9 I know there is a conference in Berkeley
10 next spring that the Copyright Office is participating
11 in where this is going to be on the table. But I
12 think we need to be up front that if you're talking
13 about reintroducing formalities, you need to make very
14 clear whether you are proposing for the U.S. to
15 withdraw from the Berne Convention and face the
16 implications of that or whether you're talking about
17 suggesting that the U.S. should diplomatically move to
18 amend the Berne Convention to permit formalities
19 because at present, formalities can't be on the table.
20 They're forbidden by Berne, at least as far as foreign
21 works. And it makes no sense to be talking about them
22 without facing up to the question of whether you're

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1 talking about amending Berne or the U.S. withdrawing
2 from Berne, neither of which would we support.

3 But I would also say that, you know,
4 registration doesn't really get us very far toward the
5 professed goals of even those who dislike Berne and
6 want to reintroduce formalities because the
7 registration data today says so little about current
8 rights holdings. And even for a book, the kind of
9 written work for which copyright is most likely to be
10 registered, it is usually the publisher who registers
11 the copyright, maybe in the name of the author if that
12 is what the agreement stipulates, but they will
13 register it, copyright, in the name of the author with
14 the author's address, care/of the publisher, on the
15 typical case.

16 My first book was copyright registered, and
17 has a registration certificate. Publisher has been
18 through three mergers and acquisitions, changed their
19 name twice, and moved cities twice. The rights have
20 entirely reverted to me. There's nothing in the
21 registration certificate which contains the current
22 name of the publisher's corporate successor, any

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1 contact information for me, or any current valid
2 contact information for the publisher, or any
3 information about the current rights holder. And
4 that's typical. So if you're relying on registration
5 to establish rights, you are barking up the wrong
6 tree.

7 Maybe some alternate system of databases of
8 rights holdings driven by the creators where the
9 creators could for free register their rights holdings
10 and register whether and, if so, to whom they had
11 assigned which rights. That might have some use,
12 although we wouldn't support making it mandatory, but
13 that is not the way the current registration system
14 works.

15 MS. CHARLESWORTH: Okay. Ms. Calzada, did
16 you have some thoughts?

17 MS. CALZADA: I just wanted to say that we
18 echo the concern about published versus unpublished.
19 One of the reasons we have done surveys with our
20 members on why you don't register -- and, of course,
21 cost is one of them. However, getting through the
22 mental hurdles in the process and determining whether

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1 your works are published versus unpublished when you
2 have something that you sent to a client to use but
3 maybe there was a password in the gallery, so it
4 wasn't available to the general public and they picked
5 two works that actually physically were published but
6 they're still online and available for sale, you know,
7 all those, it just gets so nuanced. And there is
8 really no clear answer.

9 And I have never really understood a benefit
10 to a determination on whether it is published or
11 unpublished. So, for that reason, we absolutely echo
12 the sentiment that eliminating that distinction would
13 be very useful.

14 And the other thing I wanted to just touch
15 on is you had mentioned if there is a requirement for
16 registration, we do believe that having applied for
17 the registration should be sufficient to meet that
18 requirement. And it's because of the cost for
19 expediting the registration. If this is truly going
20 to be for small claims, then a \$760 registration rush
21 fee is going to make it prohibitive again, and the
22 goal is to not make it prohibitive.

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1 MS. CHARLESWORTH: Okay. Ms. Knappen?

2 MS. KNAPPEN: There is a need to register I
3 think in the minds of a lot of people because people
4 are using Creative Commons frequently, which has
5 limited rights. It's free online. It gives
6 attribution. You can determine if the work can be
7 reused perhaps non-commercially.

8 So I think that people are trying to create
9 a space where there is some sort of digital paper
10 trail on these works. So I see the benefit in a
11 registration, but the registration system as it exists
12 I don't think is helpful for some of the reasons
13 listed.

14 MS. CHARLESWORTH: Okay. Have we aired all
15 of our views on registration? We appreciate your
16 thoughts and also the comments about publication. And
17 we will take them under consideration.

18 Filing fee. I think you had just mentioned,
19 Ms. Calzada, the expedited fee. Any thoughts in terms
20 of -- well, first of all, should the small claims
21 court have a filing fee? If there is one, what should
22 it be? Thoughts on that?

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1 MS. CALZADA: Yes. We think it is
2 appropriate for there to be a filing fee. And one of
3 our thoughts was potentially a tiered fee based on
4 what you are seeking as a remedy would be appropriate
5 to -- I think we researched what it costs in federal
6 court and obviously something less. Yes, \$350. So a
7 sliding claim, \$100 to \$200. We're not against that.
8 I think that everything costs money. And, of course,
9 we expect this will, too.

10 MS. CHARLESWORTH: Other thoughts on filing
11 fee? Does that sound reasonable to people, \$100 to
12 \$200? Yes? Going, going --

13 MS. ROBINSON: Yes, I think so. I think
14 people have to have some skin in the game. It
15 eliminates some frivolous claims if there is a filing
16 fee.

17 MS. CHARLESWORTH: Okay. Initiation of the
18 proceeding. I think we have touched on this earlier.
19 Some of the comments suggested that, rather than just
20 file a piece of paper that says, "My work was
21 infringed," that the plaintiff attach documentation of
22 a prima facie case; for example, documentation of

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1 ownership, whatever that would be, plus maybe evidence
2 of an infringement to the extent it exists, perhaps an
3 affidavit.

4 I was wondering what people thought of that.
5 Should there be a requirement to initiate a proceeding
6 that you actually basically put forward the core
7 evidence in your case, or should you be able to start
8 up the case and then wait for the defendant to
9 respond? Mr. Brennan?

10 MR. BRENNAN: If no one will intervene, then
11 I will jump in again. The first thing you have to say
12 is before you do that, what is going to be the scope
13 of the small claims proceeding. And one of the issues
14 that occurs to me is that if we look at -- the cases
15 that I described, of course, are these mass tort
16 cases. At least when we reviewed cases, our firm, we
17 do hundreds of these things. We usually wouldn't take
18 on a case unless we have already reviewed it and
19 figured that fairly substantially good evidence of
20 ownership, popular registration, and infringement. So
21 you already know that the case is pretty well set.

22 I would see these cases in small claims as

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1 having to limit certain claims that would be made
2 there, for example. And the reason I say that is
3 because it is important it comes to the pleadings.
4 Are you going to just reduce the amount that is
5 claimed and allow any panoply of cases? Some
6 copyright cases people add in a Lanham Act claim as
7 well for a trademark infringement. Would those be
8 included or if you had a pendent state court claim for
9 right of publicity, would those be included? Would
10 you also include all sorts of additional claims or
11 would you try to limit them to what I would just call
12 direct infringement, maybe vicarious contributory
13 infringement?

14 If you are going to be limiting your scope
15 of what is involved in the small claim procedure to
16 claims like that, if it were me, I would prefer that
17 you did form complaints so that you had -- like they
18 do in California here. We have form complaints that
19 you can file with set statutory causes of action.
20 Maybe you can add a couple of extra paragraphs, limit
21 your claims to direct infringement related to
22 vicarious and contributory.

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1 I would then have form answers, instead of
2 federal court answers, and allow a general denial so
3 that you can have that and then a certain limited
4 number of affirmative defenses you can assert:
5 statute of limitations probably, maybe laches. I
6 don't know about some of the other claims, but we can
7 talk about that.

8 And what I would do, instead, is I would
9 amend Rule 26. In federal court, you have these Rule
10 26 disclosures in which you are trying to make
11 disclosures. That would be the case in which you would
12 ask the plaintiff. You would have something similar
13 to that in which the plaintiff is going to have to
14 address issues.

15 If I may, the type of issues that you would
16 mostly address in these cases, I would say, you have
17 got to show authorship, "I am the author of the work."
18 You have to show originality. That's always a claim.
19 Ownership and chain of title. Right now we have these
20 registration issues. Ideally we wouldn't have to
21 worry about that. The next thing you need to do is
22 show access and substantial similarity. Then if

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1 you're going to have willfulness claims, you need to
2 show willfulness. If you're going to add vicarious
3 contributory claims for the infringement, you have to
4 allege knowledge, which is really part of your
5 willfulness, and then induce, contribute, et cetera.
6 For vicarious, you have to show supervision and direct
7 financial.

8 If those were the basic issues in the case,
9 then those would be the types of things that the
10 plaintiff would be required to say, "This is what I am
11 going to put the evidence on."

12 If the defendant is going to challenge those
13 issues, these would be the things where the defendant
14 was going to say, "I'm going to challenge this. I'm
15 going to challenge that. I'm not going to challenge
16 this" and to describe what their evidence is. So
17 those would be done in a Rule 26 type of disclosure,
18 and you would make those disclosures after a certain
19 period of time, rather than doing it at the pleadings
20 stage. I think it is too cumbersome here. But that
21 is what I would do. And you try to limit the case to
22 those specific issues.

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1 Now, the question is whether you are going
2 to add additional claims. For example, there is a
3 license. And we exceeded the scope of the license. It
4 is probably a good defense. You could add that in.

5 I am torn whether or not you would allow
6 fair use and first sale defenses in these cases or
7 whether they become too complicated and you kick them
8 out. I would leave that up to discussion. But if it
9 were me, I would try to limit the cases to those
10 specific issues and put them in a Rule 26 and have
11 form complaints and form simple answers.

12 MS. CHARLESWORTH: That is very helpful.
13 Just to let you know, this morning we did have a
14 discussion on the nature of the claims that might be
15 included in the proceeding and defenses. So you did a
16 nice recap of our discussion this morning.

17 MR. BRENNAN: This makes me work.

18 MS. CHARLESWORTH: We welcome your thoughts
19 if there are moments to interject them because on some
20 of the issues; for example, fair use, there has been
21 some division of opinion. But thank you for that.

22 Other thoughts in terms of thinking as a

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1 potential plaintiff? I'm going to address this to Ms.
2 Knappen because she is sitting across from me. You are
3 an advocate for being able to proceed pro se. When you
4 think of yourself as a plaintiff, your work has been
5 infringed, what do you think you should have to
6 present to the court in terms of your initial case to
7 get the ball rolling?

8 MS. KNAPPEN: I think it is fair that you
9 have to show some sort of proof. I think that helps
10 screen out people that would just be throwing together
11 these claims to try to grab a little money out of the
12 system.

13 MS. CHARLESWORTH: Okay. So when you say,
14 "proof," in terms of ownership, what kinds of proof
15 would you put in?

16 MS. KNAPPEN: Any kind of drafts or like raw
17 files, intermediate work, any kind of anything showing
18 that you had worked on it and so you actually created
19 this thing along with perhaps screen shots if you
20 found something on the internet or a printed piece,
21 photograph of what you're saying infringes.

22 MS. CHARLESWORTH: Okay. And that would

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1 sort of make -- that is ownership and then
2 infringement.

3 MS. KNAPPEN: Yes.

4 MS. CHARLESWORTH: So that would make up the
5 elements of a prima facie case. So you wouldn't be
6 opposed to having a plaintiff put that in basically at
7 the beginning, do at the very beginning, of the case?

8 MS. KNAPPEN: I don't think so because I
9 think otherwise this is a system that could be abused.

10 MS. CHARLESWORTH: Okay. Other thoughts in
11 terms of what might be? Ms. Calzada?

12 MS. CALZADA: Sure. Let me just say that a
13 prima facie showing requirement I don't think would be
14 an obstacle to most photographers in their claims.
15 We're not specifically advocating that it should be
16 required, but I don't think that it would be an
17 obstacle.

18 MS. CHARLESWORTH: Okay. Mr. Brennan?

19 MR. BRENNAN: Just speaking from doing
20 litigation, I would think that that would not be a
21 good idea to include that in the initial pleadings.
22 I'll tell you why.

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1 First of all, when you do, the pleadings
2 then become public records. The Rule 26 disclosures
3 are between the parties. So you may not want to have
4 those put in to the court filing.

5 The second thing is it makes it far more
6 difficult for a plaintiff to initiate a case because
7 now you have to put all to these little documents in.
8 And if there is one challenge there, you are going to
9 immediately turn this into a motion to dismiss. You
10 failed to present us with proper evidence. And you're
11 going to turn the pleadings into an effective summary
12 judgment stage. I really think it's better to do it
13 in a Rule 26 disclosure.

14 You want to have form complaints in which
15 the plaintiff is going to check off these boxes. When
16 it comes to your Rule 26, you are going to have to
17 give initial information of "I own it." If there is a
18 question of authorship and nobody is challenging
19 authorship, why would you go through the problem of
20 showing all of your drafts and your screen shots there
21 or your form drafts when there is no challenge to
22 authorship or the defendant says, "Okay. I know you

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1 wrote it. I know you did it there. I'm not going to
2 challenge it." Then we're just creating more paperwork
3 for nothing.

4 What we should do is put these in the Rule
5 26-type disclosures. We need to amend Rule 26 for
6 specifically small claims, list the specific issues
7 that are there. And then the plaintiff can say,
8 "Look, authorship. What am I going to do?" I'm going
9 to give you a certificate that says, "I swear under
10 penalty of perjury that I made it."

11 If this is a photographer and the defendant
12 says, "I don't challenge it," why am I spending time
13 doing more than that? Defendant isn't even bothering
14 to challenge it.

15 If the defendant says, "No, I didn't think
16 you took the picture," okay. Well, then I can go and
17 provide that additional information.

18 But I think what you want to do is focus and
19 streamline the case so you focus on what the issues
20 are. The reason these cases are so expensive is not
21 because they're potentially difficult. It's because
22 the federal rules mean that we're constantly spending

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1 an enormous amount of time running in circles in
2 discovery to provide documents and evidence that turn
3 out not to be particularly relevant or determinative.
4 And so we want to streamline those procedures. So
5 that's why I would say that it shouldn't be in the
6 complaint. It should be in a Rule 26 disclosure.

7 MS. KNAPPEN: I think that is an excellent
8 point. However, I don't think that we should say that
9 you are limited to whatever evidence you bring in the
10 beginning. And it is fairly easy to --

11 MR. BRENNAN: Well, you can always amend
12 it.

13 MS. KNAPPEN: -- for someone like me to have
14 that. I've got all the files.

15 MR. BRENNAN: Yes.

16 MS. KNAPPEN: But there needs to be I think
17 a little bit of a hurdle to getting involved just to
18 keep it from people -- just going after random people
19 and saying, "Okay," saying that "I'm going to take you
20 to small claims court" and without anyone looking and
21 kind of vetting the cases first.

22 MR. BRENNAN: I think the disincentive would

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1 be that if you lose, you could -- I mean, you have to
2 ask the question of whether or not the defendant could
3 collect attorneys' fees or costs in case a defendant
4 prevails. We haven't addressed that, but to me, that
5 would be a major disincentive here. And that
6 certainly is a disincentive right now to me in
7 following any copyright cases because the first thing
8 you have to do is you have to look the plaintiff in
9 the eye and say, "Look, are you really telling me the
10 truth?" because if not, you have the potential of
11 being assessed attorneys' fees if we lose.

12 This is a real case here. So you have to
13 make sure that we have vetted this case before we
14 file. But I don't know whether -- we haven't discussed
15 what remedies are available to the defendant.

16 I don't mean to get into crosstalk. I'm
17 sorry.

18 MS. CHARLESWORTH: No, no. First of all, I
19 think some crosstalk is good --

20 MR. BRENNAN: Okay.

21 MS. CHARLESWORTH: -- because it helps air
22 the issues, but you are right. That is an important

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1 issue as well as how to deter frivolous claims, which
2 is really what you are getting at, Ms. Knappen.

3 And now I will recognize Mr. Hasbrouck.

4 MR. HASBROUCK: What evidence would be
5 sufficient at trial or at the hearing, whatever you
6 are going to call the hearing, to establish
7 creatorship? If that is a contested issue or even if
8 it's not contested, to make a prima facie showing of
9 that I think is quite different from what should be
10 required simply to file the claim? Creators' work
11 process varies enormously, even within a particular
12 discipline, as far as how they go about it, what kinds
13 of records they are going to have.

14 For purposes of filing the claim, the most
15 that should be required is an affidavit of creatorship
16 under penalty of perjury. The disincentive to filing
17 perjured affidavits is the threat of a perjury
18 prosecution. It's pretty straightforward.

19 Now, if, in fact, that is contested, becomes
20 a contested issue at the hearing or the trial or
21 whatever you call it, then obviously there is a
22 standard of proof, whatever that standard may be, to

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1 be met by sufficient evidence, but requiring you to
2 marshal all of that evidence, which may not be a
3 simple process for the creator to come up with,
4 particularly if they are not actually in custody of
5 the records and they have to dig into historical
6 stuff. That is overkill to require that just to file
7 the case. If someone is prepared to stipulate under
8 penalty of perjury, that should suffice. I mean, you
9 don't require that someone present all of their
10 evidence of their case in chief at the time they file
11 their case.

12 And authorship is only one issue. And maybe
13 there are cases. Maybe there are songwriting cases of
14 disputed authorship where that is going to be what the
15 hearing is going to hang on. We think it is
16 relatively unlikely to be the main issue or even any
17 issue at all, probably in most cases of written work.

18 MS. CHARLESWORTH: Further thoughts? What
19 about -- did you have a question? I'm sorry. Can you
20 give your name --

21 MS. BRISTOL: Sure.

22 MS. CHARLESWORTH: -- and explain who you

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1 are for the record? We're sorry we don't have a table
2 tent.

3 MS. BRISTOL: No problem. My name is Erica
4 Bristol. I am an attorney and intellectual property
5 mediator in Universal City. I think some of those
6 issues are really going to be determined by what is
7 the small claims proceeding. Is it going to be
8 similar to a Superior Court small claim proceeding,
9 where you file a one or two-page application with some
10 supporting documents, you go in and you have your hour
11 in front of the judge and that's it, and then the
12 judge makes a determination outside of that one hour
13 and sends it to you in the mail or is this really
14 going to be a mini trial? I mean, there is lots of
15 different room here to have a different type of
16 proceeding. It can be very, very simple, where it's,
17 like I said, a one-hour meeting in front of judge
18 where you present your case and it's an individual
19 with a certain number of pictures or maybe one
20 plaintiff or two plaintiffs or two defendants and
21 there's no massive discovery and no depositions and
22 you get it done relatively quickly at low cost or is

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1 this a mini trial?

2 So I think some of these factors will really
3 depend on what is this proceeding going to look like,
4 how involved is it going to be, and who is going to
5 participate and how much discovery, how much
6 procedure, like a normal trial, is going to be
7 involved in this. And so I think you will have to
8 determine the parameters of this before you can come
9 up with whether it is going to be a one-page standard
10 form that you fill out or submitting a certification
11 or an affidavit of ownership at the front. It really
12 depends on how big is this going to be.

13 And I think that is going to be one of the
14 difficulties of the Copyright Office in determining
15 what is this. Is it a mini-trial or is it really
16 truly like a small claims court that we see in the
17 Superior Courts?

18 MS. CHARLESWORTH: I think that is a good
19 observation. And I think my observation in response
20 is that a lot of people walk in here and they -- their
21 view of it is based on their own experience. And so it
22 has been very helpful to me and to Catie as well to

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1 hear a variety of perspectives.

2 But there is a bit of a chicken and egg
3 problem. I agree with you. Without knowing more about
4 the process, it is hard to come up with particulars.
5 At the same time, I found that in discussing some of
6 the particulars, it kind of helps inform perhaps what
7 some of the limitations of the process might be.

8 MS. BRISTOL: And I think one of the things
9 that you are looking at is access, access by
10 individuals who may not have the time or the resources
11 or the expertise to come in and do a full-blown mini
12 trial.

13 So if you're really looking for individual
14 artists to be able to have a venue to come in, have
15 their day in court, which I think is very important,
16 it sounds like, for the creative artist, not to just
17 submit a form online to wait for a result but to
18 actually be able to express how they feel quickly so
19 they can get back to work. You may want something,
20 really, of abbreviated smaller proceeding, where they
21 fill out a form, they attach documentation, they go
22 and have their day or their hour, and bring in a

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1 witness or two or subpoena documents, and maybe get a
2 decision later, rather than a full-blown mini trial.

3 And maybe you could have different staggered
4 levels of this small claims court proceeding. If it's
5 clear, direct infringement, you are only asking for
6 \$10,000 and that's the aggregated amount, you come in,
7 you don't have an attorney, and you represent
8 yourself, and you have your day in court. If there
9 are going to be more complex issues, like fair use or
10 first sale or counterclaims, then maybe it's another
11 level.

12 So I don't know if the court really needs to
13 limit this to one level. Maybe there could be
14 multiple levels within the small claims court
15 procedure depending on the remedies you are seeking,
16 the plaintiffs, the defendants, the complexity, so
17 that you don't have to go to federal court, but each
18 of the issues that we have been talking about today
19 get addressed in a particular manner that works for
20 the different people who are bringing the case or
21 responding to it.

22 MS. CHARLESWORTH: Other thoughts?

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1 MR. BRENNAN: I would just like to say that
2 was an excellent observation. Thank you very much.

3 MS. BRISTOL: Thank you.

4 MS. CHARLESWORTH: How about this? This is
5 a good one, particularly for practicing lawyers. How
6 should we go about notifying the defendant of the
7 action? Do people have thoughts on service and how
8 the defendant would know that they were being sued?
9 And, in particular, I am interested in thoughts where
10 it's an online infringement and the defendant is
11 perhaps far away.

12 Have I stumped everyone? No. Ms. Wright?

13 MS. WRIGHT: We use the Rule 4 provisions
14 quite often and rarely have to resort to service of
15 process for our lawsuits. So a notification is
16 similar to Rule 4, which can be First Class mail, you
17 know, Priority Mail, something like that.

18 It seems to be legitimate. However, you
19 don't always know that you have reached the person,
20 the correct person. But sometimes I guess you do have
21 to find the defendant. And it's not always someone so
22 easily that you can just send them a First Class mail

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1 and know that they will show up in court.

2 So in those circumstances, especially a lot
3 of Web uses are by people who are hard to find. And
4 so you might have to do service of process there. I
5 don't know. I don't know with due process how you are
6 going to get over that otherwise without having the
7 service of process.

8 MS. CHARLESWORTH: So, in your experience,
9 you often use Rule 4 successfully but then sometimes
10 have to resort to an actual process servicer --

11 MS. WRIGHT: Correct.

12 MS. CHARLESWORTH: -- to confirm service?

13 MS. WRIGHT: Correct.

14 MS. CHARLESWORTH: And do you have any --
15 how often is it that you need to? Like in what
16 percentage of cases?

17 MS. WRIGHT: I would say 90 percent of time,
18 we go with Rule 4 service or the waiver of service and
19 it's fine. I would say ten percent of the time we
20 have to actually employ or sort of find the defendant,
21 first of all. That is always a problem -- I mean, not
22 always a problem but can be a problem and then serve

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1 the defendant.

2 MS. CHARLESWORTH: Okay. Other thoughts on
3 this issue? Okay. Oh, Ms. Knappen?

4 MS. KNAPPEN: So I am assuming that this
5 situation if somebody doesn't respond, you
6 automatically win, --

7 MS. CHARLESWORTH: Ah.

8 MS. KNAPPEN: -- as you would in --

9 MS. CHARLESWORTH: Another very good -- that
10 is an interesting question. And we can open the floor
11 to that. You are talking about default judgments.
12 This came up a little bit in the New York hearing.
13 Basically, as you probably know, in federal court now,
14 if you sue someone and you serve them and they don't
15 appear and you have made out the basic elements of
16 your case, you can get a default judgment. And then
17 you can try and collect on the judgment.

18 And so a question that has come up is
19 whether this court would permit such judgments. And
20 I'm curious to know your thought on that, if you have
21 one, or further thoughts.

22 MS. KNAPPEN: I think I would need to think

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1 a little bit on that. One problem I can see is that
2 when you're dealing with internet hosting, now many
3 people have a company except they're like a registrar
4 buffer almost. But those people are not necessarily
5 good about pushing through legal documents when they
6 come to them because they are not actually acting in
7 that capacity. It's this kind of odd gray area.

8 So it would be possible that people would
9 never find out that they were being brought to small
10 claims court. And that could be problematic.

11 MS. WRIGHT: You can subpoena the internet
12 service provider to get that information once you had
13 the lawsuit.

14 MS. KNAPPEN: Yes, but in a small claims
15 court situation, where you are dealing with people
16 that don't have means. So I don't have an opinion
17 just yet.

18 MS. CHARLESWORTH: Okay. Default judgments?
19 Does anyone -- Ms. Wright?

20 MS. WRIGHT: Yes. I believe definitely if
21 you get the proper service on the defendant, -- this
22 is assuming that this is a non-voluntary process. We

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1 had talked earlier about whether the small claims
2 would be voluntary for both parties. But assuming
3 that it is mandatory, then yes, you get service. They
4 don't respond. You get default.

5 MS. CHARLESWORTH: Mr. Brennan?

6 MR. BRENNAN: I think that basically the
7 observation we had before -- and it also depends upon
8 the scope of the claim; in other words, if we do --
9 small claims, real small claims, where you're limited
10 to a certain amount of damages. You might have a more
11 relaxed service process. If you're doing more of what
12 we call the mini trial, then you probably have to have
13 actual service of process.

14 But once you get service of process, if
15 somebody doesn't respond, you should be able to have a
16 default prove-up. You just have to get the default
17 prove-up the normal way and get a default judgment.

18 Now, enforcing the judgment, whether or not
19 the judgment then has to be confirmed by an Article
20 III court, I'm not sure if you need that additional
21 procedure, but certainly you should be able to get a
22 default judgment and then go try to enforce it as best

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1 you can.

2 MS. CHARLESWORTH: Okay. Does anyone here
3 have experience with the Arbitration Act and filing
4 for judgments in federal court? Mr. Brennan, do you
5 think that might be a helpful model here?

6 MR. BRENNAN: I mean, just taking an
7 arbitration award and getting the judgment on it, it's
8 not particularly difficult to just -- it's almost a
9 noticed motion procedure. You just file a complaint.
10 Sometimes people don't like to do that, and they often
11 file a complaint in federal court first or in state
12 court and then have a kickback arbitration so you can
13 come back to a decision, get an easier judgment, but
14 right now that you just file the complaint to have the
15 arbitration award confirmed, it's pretty much of a
16 noticed hearing motion unless somebody objects. Then
17 you just get a judgment issued on it. It's not
18 difficult. I don't think that either one is
19 particularly difficult. It just takes a little bit of
20 time.

21 MS. CHARLESWORTH: Okay. I mean, do you see
22 that -- let's assume this were some sort of voluntary

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1 process for the moment. The question is, a voluntary
2 process, even if you get to a judgment, how would you
3 make that judgment enforceable? So that's why I asked
4 you about the Arbitration Act.

5 And Ms. Wright may have some thoughts, too.
6 I don't know.

7 MR. BRENNAN: Here's the interesting thing.
8 If it's an arbitration, it's much more enforceable
9 internationally than if it's a judgment. So if this
10 were a voluntary thing, you would want to have this be
11 a type of arbitration award, rather than a judgment.
12 But if you're just looking to enforce it in this
13 country, it's not difficult to take your arbitration
14 award and have it confirmed and turn it into a
15 judgment. Then you're just in the enforcement
16 judgment procedures.

17 MS. CHARLESWORTH: Ms. Wright?

18 MS. WRIGHT: We have some experience with
19 even the federal court, a settlement that was enforced
20 by the federal court. And then we had to domesticate
21 it to state action to collect on it, which is costly
22 and costly for the plaintiff. And they take time.

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1 But that's what you have to do for any sort of
2 collection action.

3 So yes, this needs to be -- if we are going
4 to go through all of these hoops, let's hope this is
5 enforceable via court action collections.

6 MS. CHARLESWORTH: Any other thoughts on
7 that issue? No? Yes?

8 MS. ROBINSON: Well, just to reinforce the
9 basic point because we do administer arbitrations at
10 California Lawyers for the Arts as well. And I just
11 want to underscore what you said about the simplicity
12 of going to state court to get the award confirmed.
13 And then you can go to collection basically. So I
14 don't think that's a big hurdle.

15 MS. CHARLESWORTH: Okay. That's helpful
16 because, especially again if it were some sort of
17 voluntary, as opposed to a mandatory, process, making
18 sure there was a way to actually collect on the award,
19 which would require some official action.

20 MS. ROBINSON: So then we would have to go
21 to federal court for that, then, presumably?

22 MS. CHARLESWORTH: Well, you know, we

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1 haven't come up with any particular plan yet, but, as
2 I said, one model is sort of the arbitration model,
3 where, absent fraud or something, you get your award
4 confirmed and then it's -- in federal court, you would
5 have a federal judgment.

6 MR. BRENNAN: One of the issues you would
7 have to address here is what are the remedies that are
8 awarded. If it's just a damage award, then you can
9 easily get it confirmed here. The issue is whether or
10 not you are also going to allow injunctions and
11 seizure orders.

12 My personal thing is that you should be able
13 to get an injunction and seizure order, not
14 preliminarily but as a result of the judgment. But
15 then the question is, where do you go to enforce
16 those? And it may well be you need to take those to a
17 federal court because you are looking to have certain
18 federal remedies, injunction or seizure orders, here.
19 And that may mean that you have to go to federal court
20 to get these confirmed and then to get those remedies
21 issued and enforced, especially across state lines.

22 MS. CHARLESWORTH: Okay. Then Ms. Wright?

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1 MS. WRIGHT: Then you also have the filing
2 fee problem and federal court action. And that is
3 what we are trying to avoid here.

4 MR. BRENNAN: Right. I just raise it as an
5 issue. I don't know if --

6 MS. WRIGHT: Yes, yes. Procedurally it is
7 an issue.

8 MR. BRENNAN: Yes. Would you allow state
9 courts, then, to enforce a judgment with a copyright
10 seizure order or an injunction?

11 MS. WRIGHT: I would hope so.

12 MR. BRENNAN: You think so?

13 MS. WRIGHT: Yes. I think it is going to be
14 necessary to be able to collect --

15 MR. BRENNAN: What about if you have -- you
16 are looking for things in multiple jurisdictions?

17 MS. WRIGHT: Okay.

18 MR. BRENNAN: Would you rather have a
19 federal court that may have nationwide reach to
20 enforce those or would you rather go to a state court,
21 multiple state courts? So that is the advantage of
22 the federal court because you have the nationwide.

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1 Potentially you would have that remedy here.

2 MS. WRIGHT: I can say it for our clients.

3 Usually one state would be just fine. We don't

4 usually have that problem.

5 MR. BRENNAN: Just my personal experience

6 and sense in these things is that by the time you're

7 doing what I'll call these mass tort claims,

8 injunctions don't make much of a difference because

9 you don't have one central defendant. You have

10 hundreds of stores there. And all you want to do is

11 get your damages.

12 So you probably aren't looking for seizure

13 orders or injunctions in any case. If that's the

14 case, you had an option of seeking remedies in either

15 state or federal court. Maybe if you had an option to

16 seek either one, you may want to just go to state

17 court, where it's cheaper or if you have an

18 injunction, you have to have it enforced across state

19 lines and you want to pay the money, then you can go

20 or you may just say that these claims don't allow

21 those remedies. I don't know.

22 MS. WRIGHT: Right.

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1 MR. BRENNAN: I don't know if you debated
2 that.

3 MS. CHARLESWORTH: We haven't gotten to
4 remedies yet.

5 MR. BRENNAN: Okay.

6 MS. CHARLESWORTH: But everything is
7 intertwined, as I keep saying.

8 MR. BRENNAN: Okay. Okay.

9 MS. CHARLESWORTH: So we welcome your
10 comments, but tomorrow we're going to be talking about
11 remedies --

12 MR. BRENNAN: Okay.

13 MS. CHARLESWORTH: -- and fee shifting and
14 so forth in more detail.

15 Any further thoughts on this particular
16 topic? I know it's mid-afternoon. We're making good
17 progress, though. So we'll probably -- let's see.
18 When are we due to leave?

19 MS. ROWLAND: 3:30.

20 MS. CHARLESWORTH: 3:30. So what? We have
21 about 15 more minutes?

22 MS. ROWLAND: We've got 15 more minutes on

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1 this panel assuming we can get it in. And then we'll
2 have a break and conclude with our fourth panel.

3 We spoke a lot about attorney representation
4 this morning. I want to make sure there's nothing
5 more that anyone wants to say. I don't think -- Mr.
6 Brennan, you weren't here. I don't know if you had
7 any views. The question is whether attorneys should be
8 allowed in this system, whether they should be
9 optional, whether they should be excluded, how to deal
10 with issues of corporations, which are typically
11 represented by attorneys. Do you have any views on
12 that?

13 MR. BRENNAN: I think it depends
14 fundamentally on the nature of the claims you
15 envision. If you envision it as true small claims, as
16 only 4 or 5 thousand, up to 10,000, then you don't
17 need attorneys here. But if you're envisioning these
18 as I would hope they were, at least given the option
19 of mini trials so that you can enforce these things
20 you have, you may have limitations on some of your
21 awards, but you actually could have attorneys in a
22 mini trial case. Then definitely you should have

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1 attorney representation of these cases. It just makes
2 it easier for the plaintiffs to go through. And if
3 you have the right sort of possibility to collect
4 attorneys' fees, it makes sense for you to do it. The
5 issues here are what your remedies are. And the
6 recent cases are expensive right now.

7 It's not necessarily because of the
8 attorneys. It's because you have all this federal
9 procedure. Federal Rules of Civil Procedure are not
10 really attuned specifically to run through copyright
11 cases. And it also allows you to raise a lot of extra
12 issues that make these things complicated.

13 To me, if you can streamline the procedures
14 and effectively you are going to go from filing
15 disclosure, eliminate summary judgments and go
16 straight to a mini trial, you should have attorneys
17 line up. That's what you used to do in a year, how to
18 do those things effectively if that is what the
19 procedure is envisioned to be.

20 MS. CHARLESWORTH: Ms. Bristol, did you have
21 any thoughts?

22 MS. BRISTOL: Well, I agree. I think it

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1 really depends on the natures of the claims and the
2 amount. And, as you get more complex, the whole idea
3 again is access. So, not to dissuade attorneys from
4 being involved -- I am an attorney, and I am very
5 familiar with copyright law. And I know there are
6 some aspects that the client is really going to need
7 help with. But if it is a very, very basic,
8 straightforward issue of a low amount with limited
9 claims, limited parties, then I think the parties
10 should be able to come in without representation and
11 handle those so that they do have the access.

12 And, as it gets more complex, as Mr. Brennan
13 stated, then you have the option as to whether or not
14 you want an attorney involved. But there should be
15 some controls over that mini trial because the whole
16 point is not to have a regular federal case. So it's
17 got to be something quicker, faster, cheaper, and as
18 effective as a federal case without going there.

19 And so I think that the easy part is going
20 in with a \$10,000 direct infringement. The part that
21 is going to take a little bit more work is if you do
22 decide to have a mini trial, what is that going to be?

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1 Where are the costs going to come from? Who is going
2 to be the adjudicator of that? You know, with the
3 state budget so constricted -- I don't know what's
4 happening necessarily with the federal -- will you be
5 able to put this whole new court structure into play
6 or are you going to have to seek out other means of
7 having these mini trials? How is this going to
8 happen?

9 So I think if you decide to have a two-
10 tiered structure, the latter is going to be a little
11 more difficult. But I do believe it should be clearly
12 the parties' option to have attorneys there on the
13 more complex issues.

14 MS. CHARLESWORTH: Okay. Well, I think, as
15 I said, the earlier remarks as well as the more recent
16 ones, I think between the two of them, we have very
17 much aired that issue. And we can move on to again
18 some of the details of the process.

19 For example, how -- well, there were many,
20 many comments. Almost all of them, there seemed to be
21 a great deal of agreement that there should be an
22 ability to conduct these proceedings electronically or

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1 on paper, which I think really means electronically,
2 without the requirement of actual in-person appearance
3 by the parties, especially if it's in a central
4 location.

5 Do people here agree with that? Do they
6 disagree? What is the thinking? Ms. Wright?

7 MS. WRIGHT: I think, yes, absolutely,
8 especially because in our experience, most
9 infringements happen across the states. So you might
10 have the copyright owner on the East Coast and the
11 infringer on the West Coast. So, then, there is the
12 travel, the requirement for travel. And if you have a
13 centralized location where the tribunal is located, it
14 adds to the cost of the litigation.

15 Fortunately, this world is now getting to
16 the place that we can do most of our things
17 electronically. We submit court documents
18 electronically. And we can have hearings
19 electronically as well. So it seems like very
20 feasible to do if it's electronic.

21 I can tell you, though, the many times that
22 I have conducted depositions when the other attorney

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1 is not there, it is certainly to my advantage if the
2 attorney is appearing by phone. Many things can
3 happen.

4 So I think that if you allow electronically
5 it to happen, that it needs to be completely
6 electronic or there is definitely a favoritism for
7 whoever shows up in person oftentimes.

8 MS. CHARLESWORTH: So you are saying it
9 should be -- if it's going to be done remotely, it
10 should be everyone should be remote --

11 MS. WRIGHT: Correct, yes.

12 MS. CHARLESWORTH: -- so as not to give an
13 unfair advantage?

14 MS. WRIGHT: Correct.

15 MS. CHARLESWORTH: Other thoughts? Ms.
16 Knappen?

17 MS. KNAPPEN: Couldn't we set up a system
18 where there was a Skyping center in local courthouses
19 and that if you were part of one of these proceedings,
20 you just had to go to your local courthouse and
21 participate that way?

22 MS. CHARLESWORTH: It is certainly worth

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1 thinking about or we could perhaps -- I mean, many
2 courts conduct conferences by telephone, which is
3 another option -- most people do have access to a
4 telephone. So it's another possibility.

5 MS. KNAPPEN: My thought was the video is
6 sometimes that's helpful when you get the body
7 language as well. And it would also mean that people
8 were going to a space that was set aside for law,
9 instead of calling in from their bedroom, which is not
10 necessary.

11 MS. CHARLESWORTH: Maybe they would. Mr.
12 Brennan?

13 MR. BRENNAN: Just some experience on
14 conducting these things electronically. Again, we
15 have to keep in mind the scope of what our proceedings
16 is. If we're doing a lot of motion practice and it's
17 for the judge, I think that probably 70 percent of the
18 time, at least in federal court, the judges dispense
19 with oral argument. And they do it all on the paper.

20 So my hope is that we wouldn't have a lot of
21 pretrial procedures. We would actually be doing --
22 I'm envisioning a mini trial situation, as opposed to

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1 what we will call the small claims.

2 Now, in the mini trial proceedings, I
3 recently conducted an arbitration in which I was the
4 arbitrator. And one of the parties was testifying from
5 Greece, and the other one was here.

6 I agree with the previous comment here that
7 two things happen when you have remote testimony that
8 you have to be careful of. There is a certain
9 advantage to the person who is present in front of the
10 arbitrator, as opposed to the person who is testifying
11 remotely. You try the best as you can to be neutral
12 about that, but there is a lot of crosstalk, and
13 things happen.

14 The second problem that you have -- there
15 are two other issues that you have here that make it
16 difficult. One is if it's a document-specific case,
17 getting the documents to the person who is testifying
18 remotely to look at because that demands extra
19 administrative procedures to make sure the documents
20 are there.

21 The second problem that you have is cross-
22 examination. Many times another party feels that they

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1 are not able to adequately conduct a cross-
2 examination, especially if there are impeaching
3 documents, because you're conducting this cross-
4 examination and you have an impeaching document. You
5 like to lock in the witness and say, "Surprise. Did
6 you see this document?"; which you can't do when
7 they're remotely.

8 So you will find that some parties will
9 believe that it is a mini trial. There may be some
10 disadvantage to them if they can't actually conduct
11 the trial.

12 I point those out. I would rather do these
13 things remotely. I think that if the claims are not
14 great, especially if they are small claims, you could
15 arrange for electronic procedure because the other
16 side of electronic procedure is it's so much less
17 expensive. Conducting an arbitration, having three
18 witnesses fly from Greece to here to conduct an
19 arbitration with just enormous -- just wasn't worth
20 the expense of the case.

21 So if it can be done, I don't say I would
22 look for a way to do it electronically. And I point

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1 these out not as negatives but simply as impediments
2 that one needs to get over to make sure that the
3 electronic hearing is conducted fairly.

4 MS. CHARLESWORTH: Ms. Robinson?

5 MS. ROBINSON: I think from an efficiency
6 point of view, it would be much better to have one
7 centralized court that works out these rules and
8 procedures because otherwise if this is going on in
9 different jurisdictions, you are going to get people
10 that are forum shopping for various things. And there
11 will be variations that inevitably start to creep into
12 the program.

13 And especially I would think that we have
14 heard the idea of a pilot project to test some of
15 these concepts. And if it's available to everybody
16 around the country, I think it would more useful.

17 And then there was also the question that
18 came up earlier about precedent. If it's one court,
19 then they would tend to start to formalize ideas and
20 procedures in a way that becomes helpful for future
21 litigants, rather than sort of seeing what happens in
22 Los Angeles or in Atlanta or et cetera.

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1 MS. CHARLESWORTH: Okay. Mr. Brennan?

2 MR. BRENNAN: This is actually a little bit
3 different, but I would like to emphasize that I think
4 there is great wisdom in what we just heard right now.
5 One of the issues that you face is one of the
6 advantages of having a centralized court is that you
7 do tend to harmonize or at least regularize what the
8 procedures are.

9 When you deal with lots of different courts
10 -- remember, when you're dealing with federal court
11 right now, any federal court, you have three sets of
12 rules. You have the federal Rules of Civil Procedure.
13 You have to have the local court rules. And you have
14 to know the judges' own rules. Often they're
15 different and they're conflicting.

16 It's very complicated to know these rules.
17 And that's sort of an extra glue that you have to face
18 going into federal court. And each judge has their
19 own particular rules that this judge likes to use.
20 You have to deal with that.

21 A centralized court with one centralized
22 rules means that we would at least know what one

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1 uniform procedure is. And that is a real advantage to
2 doing that. The federal courts are still debating
3 what the federal Rules of Civil Procedure mean almost
4 50 years later. And there are lots of variations.

5 And so if we could have a centralized court,
6 I think that that would be a real advantage. How you
7 deal with electronic hearings, remote hearings is a
8 technical issue that I think you can get over, for
9 fairness, but I would really be in favor of having one
10 centralized court.

11 MS. ROBINSON: It also might be more
12 affordable --

13 MS. CHARLESWORTH: Okay.

14 MS. ROBINSON: -- in an era of fiscal
15 constraint.

16 MS. CHARLESWORTH: Any other thoughts?

17 (No response.)

18 MS. CHARLESWORTH: Okay. Now, we talked a
19 little bit about this but not too much in terms of the
20 actual pieces of the proceeding, what should be
21 required and what should not be. Should there be
22 motion practice? Should there be discovery? If there

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1 is discovery, should it be limited in some way?
2 Should there be formal rules of evidence or should the
3 rules of evidence be relaxed? If people have thoughts
4 on that that they would like to share, we would be
5 interested. Yes, Ms. Calzada?

6 MS. CALZADA: I think that there is
7 definitely going to be a need for the availability of
8 some limited discovery, but I think that the process
9 would benefit from having the adjudicator put limits
10 on those because one of the huge obstacles and
11 expenses in litigation is to the discovery process.
12 And so one of the advantages for both parties,
13 honestly, to go through this procedure would be the
14 limited discovery. And I think that as long as you can
15 make a good case to the adjudicator that you need the
16 specific discovery, that they can set those limits.

17 MS. CHARLESWORTH: So you would have limited
18 discovery but the adjudicator would have some
19 discretion to decide what is appropriate in the case?

20 MS. CALZADA: Yes. Perhaps initially there
21 would be here is the kind of discovery that is allowed
22 and then if you feel like you need to expand that

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1 scope, you can go to the adjudicator and ask for
2 extra, a higher scope of discovery.

3 MS. CHARLESWORTH: Okay. What do people
4 think of that? Mr. Hasbrouck?

5 MR. HASBROUCK: Well, this is of necessity
6 getting ahead of ourselves. And we'll be talking
7 about statutory damages in the next panel. But it is
8 important to understand -- and we would support
9 statutory damages, availability of them. But, having
10 heard some people suggest that they want to get rid of
11 statutory damages, we need very clearly to say that
12 it's an either/or. Either you need statutory damages
13 or you need discovery in order to determine the amount
14 of actual damages.

15 Since overwhelmingly the evidence of actual
16 damages and their amount will be in the possession of
17 the defendant, it's not realistically feasible to show
18 the amount of actual damages without discovery,
19 perhaps extensive discovery. So if you say no
20 discovery and no statutory damages, this process
21 doesn't work.

22 We would argue that statutory damages are

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1 the simpler way. And this is supposed to be a simpler
2 process. But if you don't have them, you must have
3 discovery. And it is likely to be drawn out.

4 I can go into more detail about why that
5 would be, but I think you need to recognize that you
6 have to have one or the other.

7 MS. CHARLESWORTH: Okay. Ms. Tommaselli?

8 MS. TOMMASELLI: I think we would agree with
9 what Ms. Calzada said in that it should be limited but
10 that the adjudicator has discretion to -- and,
11 actually, I think I would differ on the point that
12 anything is allowed at all. I think it should be
13 entirely within the adjudicator's discretion. And
14 based on the facts of the case, sometimes discovery
15 isn't needed at all, you know, if it's a very clear-
16 cut, simple matter. But I think that some limited
17 discovery should be permitted just so that the parties
18 can feel like they can provide the evidence that they
19 need and prove their claims.

20 MS. CHARLESWORTH: Okay. Mr. Brennan?

21 MR. BRENNAN: Sorry to keep you, but just
22 going through the procedures here. I'm thinking so

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1 we're clear in terms of what we have called our mini
2 trial procedure, as opposed to the pure small claims
3 because these are where I think it would be, and in my
4 view, the mini claims procedure should have, as I
5 said, a limited scope of what issues are being
6 addressed, what I primarily called our direct
7 infringement, contributory, and vicarious
8 infringement. I wouldn't be including like CMI claims
9 and anti-circumvention, and antitrust, and all of that
10 stuff. So assuming we have these limited claims, what
11 I would envision for the procedure here, if I can,
12 first of all, I would not allow preliminary remedies
13 like preliminary seizures orders or preliminary
14 injunctions. They become too time-consuming and
15 complicated. I would allow those as a result of the
16 judgment but not as part of the initial pleadings.

17 I would view again form complaints would be
18 the easiest way to file and Rule 26-type disclosures
19 that specifically address to these sorts of claims.
20 So the plaintiff is going to need to disclose their
21 evidence that they are going to present of authorship,
22 either certificate of authorship or whatever they're

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1 going to show, originality, if we don't have
2 registration, access and substantial similarity, and
3 any evidence on willfulness. The defendant then is
4 going to have to say in their Rule 26-type disclosure
5 which of these they contest. And they're going to
6 have to provide their evidence of profits. One of
7 the biggest discovery issues that you face is you're
8 constantly dinging the defendant to give you their
9 evidence of profits. And that is something here
10 defendant should be required to disclose that. If we
11 have these mandatory disclosures up front, I think we
12 can substantially limit the discovery process.

13 Interrogatories. Interrogatories are
14 somewhat helpful. They're already limited in federal
15 courts. You could limit them again.

16 Requests for admissions are also somewhat
17 helpful to limit cases here if we limited the amount
18 of them. If we have limited issues, we don't need as
19 many of those.

20 Depositions. Oftentimes depositions just
21 become a way to torture one of the parties in wasting
22 time taking endless depositions that go nowhere. And

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1 we would like to limit the scope of depositions,
2 especially if they're not addressed. If I'm not
3 contesting authorship, why am I taking the
4 defendant/the author's deposition and asking them,
5 "Well, what did you do to create this work?" when I'm
6 not contesting authorship? So you would want to limit
7 that scope.

8 I would say limit the scope of discovery
9 here. You are going to have to have some discovery.
10 Leave it to the discretion of the parties. And you
11 should have very strong incentives to make the full
12 disclosures in your initial disclosure, your Rule 26-
13 type disclosures.

14 Since we're saying here about discovery, I
15 would also suggest that you are going to strongly
16 limit the long motion practice. I wouldn't allow
17 summary judgments in this procedure. Especially if
18 you're going to be trying to a judge, a summary
19 judgment is just a waste of time. All we're going to
20 do is present the same evidence again. And it's very
21 expensive for the attorneys to make responses to that.
22 And if you're a pro se defendant, plaintiff or

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1 defendant, you don't know what you're doing, that's an
2 easy way for you to completely screw up. So I would
3 eliminate those proceedings.

4 That being the case, I think you would have
5 a lot less procedural glue between filing the case,
6 making the initial disclosures, and then going to
7 court. And that's what I would suggest doing here in
8 the discovery process.

9 MS. CHARLESWORTH: Okay. Other thoughts on
10 discovery? Ms. Knappen?

11 MS. KNAPPEN: If you limit, if you say, "No
12 discovery," and go with statutory damages, you have to
13 solve the problem of what do you do with groups of
14 works that have been registered.

15 MS. CHARLESWORTH: And what do you mean by
16 that?

17 MS. KNAPPEN: The problem of do they each
18 count as a fraction of the package for maximum damages
19 or is each one on its whole? It just happened to --

20 MS. CHARLESWORTH: I see. So sort of the
21 legal issue that was raised earlier. Okay.

22 Oh, I'm sorry. Ms. Wright?

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1 MS. WRIGHT: Because of the nature of our
2 clients and their capacity to pay expenses, the
3 depositions tend to be the most expensive process in
4 litigation. And perhaps I would suggest no
5 depositions without leave of court. Right now it's a
6 limit of ten and you have to seek leave of court for
7 any more than ten depositions for small claims. I
8 think that no depositions likely would be allowed
9 without leave of court.

10 I think that requests for admissions,
11 limited request for production, and limited
12 interrogatories are really necessary to just have some
13 evidence to understand what the nature of the case is
14 before you have a hearing, if it's like a mini trial.

15 MS. CHARLESWORTH: Other thoughts on
16 discovery? I see we're a little past the 3:30 mark.
17 There are a couple of more issues in panel III. So
18 we're going to be democratic about this. Would people
19 prefer to take a break now and finish panel III for a
20 few minutes afterwards? Because we think panel IV
21 will probably run a little shorter. Don't you?

22 MS. ROWLAND: Yes. I think when we were in

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1 New York, we combined panels. So we took a break
2 around, actually, literally on this. And then we
3 combined panels III and IV because, actually, a lot of
4 the issues kind of run into each other.

5 MS. CHARLESWORTH: Yes. I mean, we have
6 done most of panel III, but there still are a couple
7 of important issues. So people are voting for a
8 break?

9 MS. ROWLAND: Yes.

10 MS. CHARLESWORTH: Okay. So we are going to
11 take a break. Yes, yes. About ten minutes. And then
12 we'll see you back here. We will try to finish up
13 panel III pretty quickly and move on to panel IV and
14 get you out of here.

15 MS. ROWLAND: Thank you.

16 (Off the record.)

17 (On the record.)

18 MS. ROWLAND: It sounds like there is a hush
19 falling over the room.

20 (Laughter.)

21 MS. ROWLAND: Are we ready to start? So, as
22 we mentioned before the break, we are going to go

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1 ahead and continue with panel III for the few
2 remaining topics that we had remaining there. And
3 then we are going to launch right into panel IV about
4 litigation alternatives.

5 It looks like we have a new participant, Mr.
6 Grecco. Before you arrived, we were going around.
7 And each person introduced themselves and explained
8 just briefly their interest here. And so I would like
9 to give you the opportunity to do that now.

10 MR. GRECCO: Thank you. I am the Executive
11 Vice President of American --

12 MS. ROWLAND: Excuse me. I think he wants
13 you to put that microphone closer to you.

14 MR. GRECCO: You also have to excuse me. I
15 have a cold this afternoon.

16 I am the National, APA's National, Executive
17 Vice President and the head of its Advocacy Committee.
18 So we have been very involved in these issues. We put
19 together the group of Edward C. Greenberg, litigator
20 in New York; and David Nimmer to write the proposal
21 for, our proposal for, copyright small claims
22 infringement system. And we have just -- I have been

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1 very involved in copyright issues and different
2 advocacy issues for the organization and for the prior
3 organizations I have been with.

4 MS. ROWLAND: Okay. Well, welcome to our
5 panel.

6 MR. GRECCO: Thank you.

7 MS. ROWLAND: And so I think one of the
8 issues that we left off with on the last panel was a
9 little bit about the procedure for how to deal with
10 any small claims proceeding. We talked a little bit
11 about teleconferences and centralized location. And
12 what we wanted to delve into is the type of witnesses
13 that might be available, the question being, should
14 you have non-party witnesses available? Should they
15 just be limited to the parties themselves? If it is a
16 non-party witness, what about the subpoena power?
17 What should a small claims tribunal have the ability
18 to do? Does anyone have any thoughts on that? Mr.
19 Grecco?

20 MR. GRECCO: Can I jump backwards?

21 MS. CHARLESWORTH: Sure.

22 MR. GRECCO: Because this was an issue that

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1 we had in the George Washington University panel. How
2 do we get around the issues of taking copyright
3 infringement cases out of Article III courts. Like,
4 how do we deal with the fundamental constitutional
5 issues of trial by jury, you know, and what class
6 copyright infringements fall under first to take them
7 out of that system and to come up with our own system?

8 MS. ROWLAND: That is a good question. And
9 we do have a panel tomorrow on constitutional issues,
10 but for now, we talked about this a bit in New York in
11 the panels that we had a couple of weeks ago. And
12 there was a lot of discussion about this, actually,
13 throughout all of the panels, which I guess hasn't
14 happened here so much, but one of the things that a
15 lot of people talked about was whether making any sort
16 of procedure voluntary would have any impact on
17 constitutionality, so allowing the defendants the
18 ability to opt out. And if that was the case, then
19 what kind of incentives would keep them there? And
20 there was a lot of discussion about that in the New
21 York panel. So that is something to think about.

22 If it's a purely voluntary system, then that

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1 would be helpful as far as the constitutional issues
2 are. However, saying voluntary, we have heard in the
3 past from others that it can't just be voluntary in
4 name only and somewhat coercive. So there's a balance
5 of that.

6 So there's that issue. And then as far as
7 juries, we discussed in the New York panels about
8 injunctive relief versus monetary damages because if
9 you don't go for monetary damages, the Seventh
10 Amendment issues are diminished somewhat, although
11 there is some debate. And so it is a big issue.

12 There are a lot of issues that come up. And
13 I guess we're taking them.

14 MR. GRECCO: Well, the two --

15 MS. CHARLESWORTH: Yes. I just want to add.
16 I am sorry. If you read -- and I am sure you have
17 read a lot of the comments, but there are also some
18 comments that have been submitted about creating an
19 Article I court with an appeal, right of appeal, to an
20 Article III court and, you know, setting up a
21 framework for running a court and perhaps those
22 decisions would be appealable to an Article III court.

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1 So there are a couple of different proposals, I think,
2 or variations, more than a couple of variations on
3 those proposals in terms of trying to work within the
4 constitutional parameters.

5 MS. ROWLAND: And we are still studying
6 them. So the Copyright Office hasn't come to an
7 opinion about that issue yet, but we are still looking
8 at it. And what I was mentioning earlier are
9 different things that other stakeholders have said.
10 If you have any thoughts, we would love to hear them.

11 MR. GRECCO: Well, the reality is in most
12 copyright infringement cases, it's an artist against a
13 Google or whoever it is. It's an artist against --
14 nothing personal.

15 MS. CHARLESWORTH: Let the record reflect --
16 (Laughter.)

17 MS. CHARLESWORTH: -- not reflect that Mr.
18 Grecco was gesturing behind him.

19 MR. GRECCO: It is a corporation that has
20 the wherewithal and the finances to go full bore into
21 the federal court system. So, whatever impetus you
22 have to bring them to a tribunal, from a strategic

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1 standpoint, they have got no reason to. They can
2 collapse most small cases by saying, "We're not going
3 to do that." So the impetus has to be really, really
4 good. And it has to be solid. If it's appealable
5 afterwards, this large corporation is going to take
6 it. And then if they don't like the ruling, they are
7 going to appeal it on their Seventh Amendment rights,
8 on the Seventh Amendment grounds.

9 So it's the dynamic of what I think the
10 litigation is mostly about. It's not always about,
11 you know, ABC and NBC fighting over intellectual
12 property rights. It's often about David and Goliath.
13 And that makes I think what is proposed very important
14 on how strategic it is as far as what the incentive is
15 to expedite the case and how non-appealable it is.

16 MS. ROWLAND: Understandable and the point
17 taken about that. We definitely think that
18 constitutional issues are very important and that it
19 is a two-sided coin. So you need to have something
20 that would encourage the use of any sort of small
21 claims procedure but also would adequately protect the
22 constitutional rights of the defendant. So it's a

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1 balance, and it is something that we definitely are
2 very interested in researching and learning about to
3 make sure that we understand it completely and come up
4 with a good understanding.

5 MS. CHARLESWORTH: Will you be here
6 tomorrow, Mr. Grecco, for the constitutional panel?

7 MR. GRECCO: I wasn't planning on it.

8 MS. CHARLESWORTH: Well, we invite you.

9 MR. GRECCO: Thank you. I appreciate it.
10 We were told that we can be on one panel.

11 MS. ROWLAND: Oh, no. You can be on as many
12 as you want.

13 MS. CHARLESWORTH: No. That is not true.

14 MR. GRECCO: Okay.

15 MS. CHARLESWORTH: I don't know what your
16 schedule is, but if you have thoughts that you would
17 like to share? Because tomorrow we are also
18 discussing remedies and fee shifting and things.

19 MR. GRECCO: What time is that panel?

20 MS. CHARLESWORTH: Starting at 9:30 in the
21 morning to --

22 MR. GRECCO: Thank you. I think I have

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1 calls and prior engagements, but if I can make it, I
2 will.

3 MS. CHARLESWORTH: Okay.

4 MS. ROWLAND: Okay. So I think I have
5 apparently opened something up for discussion here a
6 little bit. Mr. Hasbrouck?

7 MR. HASBROUCK: Just on the specific
8 question that you posed of witnesses, I suspect that
9 very few witnesses may be needed if you have statutory
10 damages. But if you don't have statutory damages and
11 you have to establish actual damages, the evidence of
12 the damages may well be in third party hands. So you
13 are going to need third party witnesses and/or
14 subpoena power. For example, if the infringement is
15 online, typically the revenues for the infringement
16 will come through clickstream advertising revenue.

17 So you're going to need to get, well,
18 hypothetically let's just say Google or perhaps some
19 other ad network or ad broker who has the evidence of
20 how much revenue has been generated from clicks on the
21 infringing copy, even if they aren't named as actually
22 the infringers themselves, which -- well, we can leave

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1 that out of it for the moment.

2 So there is a great likelihood that you
3 would need -- unless you have statutory damages,
4 there's a strong likelihood that proving damages will
5 rest on third party witnesses and subpoenas to third
6 party holders of evidence.

7 MS. ROWLAND: Mr. Brennan?

8 MR. BRENNAN: Thank you. Again, it depends
9 upon the scope of the procedure, but if we are
10 thinking in terms of the mini trial, I would agree
11 that you are probably going to have to have third
12 party witnesses here in terms of issues on possibly
13 ownership and authorship if there is a claim.
14 Depending upon the nature of the claim, you are going
15 to have to ask whether you need an expert to opine on
16 substantial similarity. If you're dealing in art
17 pieces, like, for example, many of the things that we
18 have that are photographic works, usually they judge
19 as you can make an eyeball claim. Start getting to
20 other claim literary works, especially if it's not
21 direct copying, musical works, software. You may need
22 an expert to opine on substantial similarities.

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1 You are going to have to have those sorts of
2 witnesses there in sort of a mini trial case. And if
3 you don't have them, you're going to have to have just
4 the small claims case, where there are only two
5 parties. There's going to have to be some
6 consideration of how you address those issues of
7 substantial similarity.

8 If I say somebody has infringed my software
9 program, I write software. I would feel perfectly
10 confident of looking at a software program for making
11 a decision if I were a judge, but I'm not sure many
12 other judges would if they were trying to say, "Are
13 these two types, you know, bits of software,
14 substantially similar, especially in a small claims
15 case?"

16 So I'm going to think you're probably going
17 to have to have third party witnesses, probably have
18 to allow expert witnesses. You'll need subpoena power
19 for that.

20 MS. ROWLAND: Okay. Does anyone else have
21 any thoughts on the witness issue? Ms. Wright?

22 MS. WRIGHT: Well, if this tribunal process

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1 is done electronically, then perhaps like you have the
2 subpoena power of the court to have a witness appear
3 and within the jurisdiction, within that same
4 jurisdiction, you could enforce the witness to be able
5 to appear in the jurisdiction electronically, you
6 know, via phone or something like that. I don't know
7 how in the world you could have the witness, force the
8 witness, to travel to a centralized location to appear
9 to testify. So maybe within the subpoena power of the
10 court, you could have the witness appear
11 telephonically, just as you would for a deposition
12 preparing for a trial.

13 MS. ROWLAND: Okay. Anyone else have ideas
14 on that? Mr. Grecco?

15 MR. GRECCO: Just in general, I think to get
16 rid of statutory damages and have to deal with actual,
17 you are going to add litigation expense and time.
18 Proving actual damages, you know, is often a lot more
19 difficult and maybe not as relevant if you have a
20 serial infringer also or someone who has built a
21 business model around infringing and these are -- it's
22 willful infringement and there is proof of many

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1 infringements.

2 So I personally wouldn't see getting rid of
3 the statutory damages model.

4 MS. ROWLAND: Ms. Robinson?

5 MS. ROBINSON: On the topic of subpoena, it
6 is in our arbitration administration. We allow
7 subpoena of witnesses and subpoena of documents
8 through a subpoena duces tecum process. So at least
9 the subpoena of documents could be helpful in the kind
10 of electronic court we seem to be starting to envision
11 here.

12 MS. CHARLESWORTH: Okay. Can you elaborate
13 on what kinds of witnesses and documents that you
14 subpoena in your system, your arbitration system?

15 MS. ROBINSON: The documents might be some
16 relevant financial information, for example. I'm
17 thinking of hypotheticals. Maybe you want to see the
18 sales records for certain product that you are
19 claiming has been infringed and you would like to see
20 the other side's documentation of that. If they don't
21 produce anything and you can establish that there was
22 something, then it's definitely an issue for the trier

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1 of fact.

2 MS. CHARLESWORTH: What about experts? Do
3 people have any further thoughts on that? I know just
4 Mr. Brennan mentioned experts. I was curious to know
5 whether people think a system like this could operate
6 without experts or some people have suggested not so
7 much expert but witnesses who are professional peers,
8 for example, to help establish the value of a license
9 who might come in and testify on behalf of the
10 plaintiff in a less formal way than an expert that is
11 certified by the court. Any thoughts on that? Yes,
12 Mr. Hasbrouck?

13 MR. HASBROUCK: We would take the same
14 position on expert witnesses as on third party
15 witnesses and subpoenas. If you don't have statutory
16 damages, it's going to be necessary to establish
17 actual damages. You know, you need an expert to
18 figure out how much of the clickstream revenue earned
19 by advertising on this webpage, which has multiple
20 components, one of which is this infringing content,
21 how much of that revenue is attributable to that
22 particular infringing content on the page, for

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1 example. That is going to be hard to disentangle
2 without experts.

3 MS. ROWLAND: Mr. Brennan?

4 MR. BRENNAN: What do you need experts for
5 here? You may need experts to establish originality,
6 unlikely, but it could be possible, especially if
7 somebody says the work here is marginal work, pieces
8 of a database or something. You're going to need
9 experts depending on the type of work to establish
10 substantial similarity. And if there are damages, you
11 are going to need financial experts to determine what
12 the damages are.

13 I mean, you just sort of can't get around
14 these things unless you are going to tell the judge "I
15 have two literary works. Read them and see what you
16 think" or "two musical works." If somebody is a
17 musician, it is not difficult, but if you are not a
18 musician, hearing substantial similarity between
19 musical works, you usually need experts for that. So
20 those are the types of things we sort of can't get
21 around having the experts to assist the trier of fact
22 unless you have a very, very educated trier of fact.

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1 MS. ROWLAND: Ms. Robinson?

2 MS. ROBINSON: On the experts topic, we also
3 have another option for parties to agree on a neutral
4 expert, which really shortens up the process because,
5 sort of like an advisory opinion or neutral
6 evaluation, if parties can agree on the expert, then
7 it's very helpful.

8 MR. BRENNAN: Well, the thing that you can
9 do is you can't have a court-appointed expert. So you
10 could allow the tribunal to appoint an expert. Either
11 the parties agree or the court has the ability to
12 appoint an expert from a panel to make these
13 decisions. That may limit expenses.

14 One of the issues, then, you have to face
15 here on expert fees -- and this is just a little
16 technicality, but it's important -- expert fees, who
17 pays the fees? Right now court-appointed expert fees
18 are awarded to the prevailing party, but otherwise
19 your expert fees are not collectible as costs. So you
20 have to determined if there is an expert, is somebody
21 going to pay for them or who pays for the expert?

22 MS. ROWLAND: Anyone else? Ms. Knappen?

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1 MS. KNAPPEN: It sounds like we're talking
2 now about a three-tier system, your existing system.
3 And then the mini trial for experts would be helpful
4 and then the small claims court. Is that --

5 MR. BRENNAN: We sort have been dancing
6 around that, but it sounds to me that that may well be
7 where you are, very simple small claims procedure.

8 Here's the thing. If we have just a very
9 simple small claims procedure as in the federal court,
10 there is a large group of cases that are going to be
11 in the middle. They aren't going to get any recovery.
12 They are too big for the small claims, but, you know,
13 you may be looking at cases that \$40 or \$50 thousand
14 is statutory damages. It's not worth it for somebody
15 to take, even on a contingent basis, simply because of
16 a thing in federal court.

17 So you may have these three tiers. I don't
18 know. But it sounds to me like we are sort of dancing
19 around that issue, and it makes a lot of sense.

20 MS. ROWLAND: That is something that is a
21 theme of the day that there appear to be different
22 ideas on how to handle the small claims process.

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1 There might not be just one. There could be several
2 different ones depending on the work and whatnot. So
3 it's an apt observation.

4 Another issue that we have with the
5 procedures for any potential small claims process
6 would be the time frame. And a lot of people have
7 noted that federal court litigation could take a long
8 time and can be a bit of a burden on a copyright
9 holder. And so one of the questions we had was
10 whether there should be a specific time frame built
11 into any small claims process; for example building in
12 that you have X time to respond, which is a common
13 thing; you have X time for discovery but making it
14 very short, maybe longer and what kind of the length
15 of time would be. And it's actually even something
16 that should be considered.

17 Ms. Wright?

18 MS. WRIGHT: The federal court system is set
19 up for four-month discovery period and then time for
20 motions practice after that. And some federal courts
21 just don't have time to put you on the calendar. And
22 the whole process gets delayed.

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1 However, I've been on the rocket docket in
2 Virginia. And they enforce the four months, and you
3 go to trial right after that. So I would hope that
4 this is a fairly quick process, within a few months,
5 you file it, and you get your decision within just a
6 few months' period, hopefully, six months or less,
7 because the delay is very frustrating to a lot of our
8 clients. They don't understand what takes so long.

9 And it would be also nice to have a quick
10 remedy. It might help curtail infringements if there
11 were a faster turnaround time from a complaint, filing
12 of the complaint, to the judgment.

13 MS. ROWLAND: Mr. Grecco?

14 MR. GRECCO: In the APA member proposal,
15 that's exactly what we do. We deal with what Mr.
16 Brennan brought up with these medium-sized claims,
17 that anything under \$80,000 would fall under this.
18 And it uses the existing and the rocket docket
19 timetable. So that it expedites discovery witnesses.
20 Everything gets done on a timely basis. And that in
21 itself cuts costs. And that in itself makes this an
22 affordable thing, you know, system, to use.

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1 MS. ROWLAND: Okay. Ms. Tommaselli?

2 MS. TOMMASELLI: We would definitely agree
3 that it needs to be a quick process. As I have
4 mentioned earlier, we do administer an arbitration
5 tribunal. And within that set of rules, it's a 180-
6 day time frame from start to finish where an award is
7 issued. And that is really important to our member
8 companies that there is a quick remedy that is also
9 cost-effective with respect to the arbitration award
10 but that they can take that and enforce it because
11 when the film was being infringed upon, it obviously
12 decreased the value of the film the longer that that
13 goes on. So a quick remedy is really important. And
14 that they could enforce any sort of judgment or award
15 that they get immediately is critical.

16 MS. ROWLAND: Mr. Brennan?

17 MR. BRENNAN: I would agree that you need to
18 have a quick procedure, understanding that the
19 plaintiff usually has the advantage there because they
20 can prepare their cases as long as they want before
21 they file. So the defendant has to have some time to
22 prepare. You probably want to have a relatively fast

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1 procedure, but the court also has to be allowed to
2 change and adjust its calendar. So you probably would
3 have suggested like the form in federal court where
4 the court had the ability to extend it for whatever
5 the court wants to extend it for.

6 MS. ROWLAND: Okay. Ms. Bristol?

7 MS. BRISTOL: Maybe if you are thinking of
8 the pure small claims, where it's just individuals
9 coming in, you could mimic what you have for the
10 current small claims, where you get a hearing date in
11 front of a judge within 30 or 60 days and you go in
12 and you have your 15 minutes or 30 minutes or an hour,
13 and that's it. You don't have a full-day trial.
14 We're just talking individuals here.

15 So you would know within 60 days you're
16 going to have your time in front of a judge if we're
17 talking individual, the true small claims. And then
18 the judge sends maybe a decision within 30 days after
19 you actually have your time in front of the judge. So
20 it's something much shorter than the mini trial.

21 MS. ROWLAND: Does anyone else have thoughts
22 on the time frame? Ms. Robinson?

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1 MS. ROBINSON: Well, I think the speed and
2 efficiency are an attraction of this. So whatever we
3 can do to promote that would be really important.

4 MS. ROWLAND: Okay. And, with that, we can
5 move along to I think a topic that is of interest to
6 us. I'm not so sure. I don't know how many people
7 commented on it, but it's more about the record of the
8 proceedings. And so once a decision is made, how
9 should that be memorialized? Should there be any sort
10 of written opinion on these small claims matters where
11 it would be published? Would it be publicly
12 available? And how would that work?

13 So who has thoughts on what happens with the
14 decision? Does anyone? Ms. Calzada?

15 MS. CALZADA: Yes. We also believe that
16 they should be in writing, in part, because if the
17 party needs to appeal, it is more useful for the
18 appellate. And also, as a journalism organization, as
19 an organization that represents and advocates for open
20 government, we highly support records, open records,
21 that kind of thing.

22 MS. ROWLAND: Mr. Brennan?

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1 MR. BRENNAN: I think that you have to have
2 a written decision here. And, again, you have to ask,
3 how does this thing fit into the whole process?
4 Again, let me just ask it a simple way here.

5 We said we're just going to have copyright
6 infringement claims. Great. I'm not going to have a
7 CMI claim. What is the effect of this decision?
8 Assume I have a decision in a small claim of
9 willfulness. Does that have res judicata collateral
10 estoppel or, as our Supreme Court likes to say, claim
11 preclusion, issue preclusion?

12 I have a decision in small claims court,
13 willful infringement. Can I use that as a basis to
14 now have a separate claim on the CMI claim and say,
15 "Look, I proved knowledge. I proved the infringement.
16 Now I also have a CMI violation. And I don't have to
17 prove that again because I have res judicata effect in
18 the small claims court. In order for it to have that
19 effect, you've got to have a written decision.

20 And the other question is, do you have
21 records of the proceedings? And that may be up to the
22 parties to elect to have records, but you probably

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1 want them to have court reporters and a record of the
2 proceeding or at least an electronic record if we do
3 it electronically so there can be a record. And if
4 there's a written opinion on an electronic record,
5 then you have to ask, what is the effect of this
6 decision? It's appealable, probably has to be
7 appealable in some way. You don't want to have a
8 decision that doesn't have an appeal. This is sort of
9 not like arbitration. Even arbitration has some
10 limited challenges.

11 And so I would suggest written opinions,
12 record of the proceedings unless the parties say they
13 don't want to have it or if they opt into it and also
14 then has a claim preclusion effect if you use issues
15 adjudicated in this claim and other related matters
16 that were filed outside the scope.

17 MS. ROWLAND: Mr. Grecco?

18 MR. GRECCO: But I don't think it should be
19 appealable because of the venue. It can't be
20 appealable because you decided to go into a tribunal
21 or an arbitration. I mean, that was my issue with
22 making sure that constitutional issues were dealt

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1 with. It can't be appealable because you decide to
2 have a tribunal and then you can't go and say, "Well,
3 my constitutional rights weren't met because I didn't
4 have a trial by jury."

5 MR. BRENNAN: This is another issue. If you
6 are going to make it appealable, on what issues? And
7 that brings --

8 MR. GRECCO: Yes.

9 MR. BRENNAN: -- the next issue. Are you
10 going to use Federal Rules of Evidence or not? My
11 suggestion would be, at least in the mini trial, sure,
12 you would use the Federal Rules of Evidence. So you
13 would have appeals on the usual grounds, you know,
14 evidentiary errors, errors of law.

15 I agree that if we resolve the
16 constitutional issues, you're not going to have a
17 constitutional appeal. And I didn't get a jury trial.
18 Otherwise, it should be appealable on normal grounds
19 that you would appeal any decision.

20 MS. ROWLAND: Anyone else? Okay.

21 MR. BRENNAN: But we didn't answer --

22 MS. ROWLAND: I'm sorry. Mr. --

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1 MR. BRENNAN: -- your question here. You
2 said, what if we have just the pure small claims
3 procedure or it's only two parties come in, they are
4 here for the judge? Are those decisions written and
5 appealable? I think it should be written. They
6 probably should be appealable just like small claims
7 procedures are appealable right now. I think you come
8 to the same issues here.

9 Whether or not it has claim preclusion
10 effect, however, is a different issue. It might be
11 appealable, but maybe you say a small claims issue,
12 especially if in small claims, you allowed willfulness
13 claims. If you had a small claim, under 10,000, and
14 somebody found willfulness, would you want that to be
15 claims preclusion or would you like to say, "No.
16 Willfulness has to be something that if you need to go
17 back and use it in a related matter, like a CMI claim,
18 that the small claims, two parties, maybe that
19 willfulness filing is not sufficient."

20 Just off the top of my head, thinking right
21 now, I would say that willfulness findings in the tiny
22 small claims procedures, my instinct, just off the top

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1 of my head, would be that they should not have claim
2 preclusion effects. So you can retry that. But a
3 finding of infringement in that small thing would be
4 sufficient to use in another matter.

5 MS. ROWLAND: We are going to discuss that
6 tomorrow morning.

7 MR. BRENNAN: Okay. Sorry.

8 MS. CHARLESWORTH: It's okay.

9 MS. ROWLAND: No. It's been mentioned many
10 times. It's all interrelated.

11 Anyone else have any thoughts about the
12 record of the proceeding? Has anyone ever been
13 involved in other kind of dispute resolution
14 processes, like UDRP, like domain name disputes; or
15 the Trademark Trial and Appeal Board; or other kinds
16 of similar small -- well, they're not really small
17 claims, but, you know, different procedures in which
18 you can try to get your claims heard.

19 My point is they have different ways of
20 recording their pleadings. For example, in the domain
21 name dispute arena, they have these opinions that they
22 post on their website. So, for example, the World

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1 Intellectual Property Organization, they post all of
2 their decisions up on their website. And the National
3 Arbitration Forum does the same. They're usually
4 three or four pages. And there you have the record.
5 And that is public. So it's shown for everybody to
6 see.

7 MS. CALZADA: So I definitely think that
8 that is critical that there be the opportunity. Maybe
9 it's not the responsibility of this particular
10 tribunal to post all of that stuff, but it should be
11 available so that people can track and get a sense of
12 who common infringers are. And it will put people on
13 notice that, yes, these are folks that do this on a
14 repeat basis.

15 And I think that it will benefit the public.
16 It will benefit people who are infringed who want to
17 know, you know, should I go to this court? What will
18 happen if I go to this court? Just all of these
19 things will benefit the public by having these
20 opinions available and clear and in writing.

21 MS. ROWLAND: Anyone else? Mr. Hasbrouck?

22 MR. Hasbrouck: Whatever form the decision

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1 takes and whatever degree of detail it needs to go into,
2 it does need to be a public record that is publicly
3 accessible for all the reasons that have been stated
4 and so people will be able to make decisions about
5 whether to deal with these companies or trust them
6 when they license to them on the basis of what has
7 been found about their historical record.

8 Especially given whatever kinds of
9 limitations on damages, the naming and shaming are an
10 important function of this tribunal. And that can't
11 be carried out if its decisions aren't a public
12 record.

13 MS. ROWLAND: Any other thoughts on the
14 record of the proceeding?

15 (No response.)

16 MS. ROWLAND: Okay. Another issue -- and
17 this is the final issue that we had for the third
18 panel of the day -- is actually a very important one.
19 And it's about frivolous claims. And there were a lot
20 of comments worrying about and pointing out concerns
21 with frivolous claims and how to stop them, worrying
22 that if the bar is set too low, then there could be

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1 some spurious claims out there that could kind of muck
2 up the system.

3 Has anyone had any experience with this type
4 of situation, claims against your clients or it was --
5 we're hearing laughter from the --

6 MS. CHARLESWORTH: From the gallery.

7 MS. ROWLAND: -- the gallery. Mr. Brennan?

8 MR. BRENNAN: Well, speaking here as a
9 litigator, I know when I am the defendant, I think
10 every plaintiff's claim is frivolous. And when I am a
11 plaintiff, I think every defense is frivolous. So I
12 am sure that happens, but if we look at it right now,
13 your big defense, if you will, in the current system
14 with regard to either filing frivolous claims is the
15 fact that the defendant can collect attorneys' fees,
16 costs and attorneys' fees, if their defendant wins.
17 So that is always something that you think about.

18 Especially if you are representing a
19 plaintiff, you always have to advise them, "Look, this
20 isn't just like, you know, state court in an auto
21 accident case. We file. We lose. We go home. You
22 just lose your money. You are going to get assessed

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1 attorneys' fees," and that is a very real possibility.

2 And to me, I don't think that there is much
3 of a problem here as if you have some attorneys' fees,
4 potential for defendants to collect attorneys' fees if
5 they prevail in the case.

6 Now, I would suggest caps on what those fees
7 were. And I might even suggest certain ways to adjust
8 those fees. We can discuss them tomorrow. But it
9 seems to me that is the biggest disincentive you need
10 against frivolous claims.

11 MS. ROWLAND: Ms. Calzada?

12 MS. CALZADA: So I definitely echo some of
13 what he says. I would say, though, that in a small
14 claims situation, my concern would be that I don't
15 want a plaintiff stuck with paying the attorneys' fees
16 of the defendant if it's not truly a frivolous claim.
17 And so an automatic I lost, now I have to pay the
18 other side's attorneys' fees would concern me. I
19 would want a specific finding of frivolousness from
20 the adjudicator.

21 And a cap would be also beneficial, but in
22 general, you know, for truly, truly frivolous claims,

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1 I am not opposed to that. I caution you that we don't
2 put plaintiffs in situations -- I mean, already the
3 whole -- part of the problem with going to federal
4 court is all of the intimidating elements. And that
5 is certainly one of the intimidating elements.

6 And so accessibility being an issue, it has
7 to be reasonable. And it has to be something that,
8 you know, if I just happen to lose because my claim
9 wasn't good enough, that I am not stuck with enormous
10 attorneys' fees.

11 MS. ROWLAND: Mr. Grecco?

12 MR. GRECCO: Yes. I haven't heard of very
13 many frivolous claims by individual artist plaintiffs.
14 I mean, if the case isn't good enough, your attorney
15 is not going to take it on contingency. And if the
16 case isn't good enough, it's a lot of out-of-pocket
17 for witnesses, experts, attorneys' fees, costs. I
18 mean, I don't think this is a tremendous issue,
19 especially when you're dealing with these smaller
20 infringements.

21 MS. CHARLESWORTH: Well, I think, at least
22 in one version of the system -- and I think we have

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1 been discussing maybe two different versions, two,
2 what we have been calling the true small claims
3 version and then a version that's the mini trial
4 version. But in the true small claims version, in
5 theory, someone could file a case by filling out some
6 paperwork and paying \$100 or \$200. And then you would
7 be in the small claims court. And so the concern is
8 that there would be individuals who would do that
9 without -- perhaps with good intentions but not
10 understanding copyright law and perhaps maybe with not
11 good intentions and how to prevent that from happening
12 because I think the user community or people who use
13 copyrighted works, although one such claim may not be
14 a big deal, if there are suddenly a lot of small
15 claims, it still kind of gums up their system. And
16 they would feel obligated to defend them.

17 So I think at that level, the question is
18 what are some good safeguards that would ensure that
19 the claims being asserted were meritorious and in good
20 faith.

21 MR. GRECCO: I think that the way a true
22 small claims system deals with that is there are

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1 attorneys allowed into the courtroom unless it is an
2 appeal. So what is the cost to a defendant by
3 questioning their use of a photograph, that an
4 employee has to show up and defend that use? I mean,
5 I can see how it gums up the works, but there isn't
6 really an incredible expense, you know, for the
7 defendant.

8 And I think if you're going to that level of
9 small claims tribunal or system, which I don't support
10 -- I support, you know, our system. I think there
11 needs discovery. I think, you know, no one truly
12 knows what was stolen until someone answers the
13 question and has to produce discovery and has to, you
14 know, possibly do a deposition and swear under oath
15 that this was the only use of a photograph, but if
16 you're keeping the system to that level, then I don't
17 see what the damages are to the defendant.

18 MS. ROWLAND: So this is definitely an issue
19 for debate. And I think that it does come up.

20 Ms. Wright?

21 MS. WRIGHT: Well, we already have Rule 11.

22 MS. ROWLAND: Yes.

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1 MS. WRIGHT: So it could be on the same
2 standard. And you have prove frivolousness. It was
3 completely a frivolous claim. And if there's an abuse
4 of the system, then the tribunal can handle it
5 accordingly, similar to Rule 11.

6 MS. ROWLAND: Sanctions, that kind of thing?

7 MS. WRIGHT: Yes.

8 MS. ROWLAND: Ms. Knappen?

9 MS. KNAPPEN: The idea that what keeps the
10 frivolous claims from coming is that you set a
11 standard where people have to have a certain amount of
12 money to play the game. I don't think it's helpful.
13 At small claims here in California, you don't need an
14 attorney. Attorneys I believe are prohibited. And so
15 it opens it up. So I would argue that the way that
16 you would prevent frivolous claims under that sort of
17 system is that you do ask for some sort of proof going
18 in and somebody reviews the case before it goes all
19 the way into the court.

20 MS. ROWLAND: Ms. Bristol?

21 MS. BRISTOL: I might be mistaken, but I
22 think at least Los Angeles County small claims does

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1 have a way of tracking frivolous claims and people who
2 are repeat filers. So it might be something to look
3 into.

4 Also, just on the issue of attorneys' fees,
5 I'm not a litigator, but it is my understanding that
6 the majority of cases settle and don't really end up
7 going to trial or judgment unless they're the bigger
8 cases. So, at least with the cases that I mediate,
9 the attorneys' fees issue might not really come into
10 play unless we're really talking the cases that are
11 actually going all the way to trial.

12 MS. ROWLAND: Okay. Mr. Brennan, did you
13 have your --

14 MR. BRENNAN: I would agree with the
15 comments here before that I think a Rule 11-type
16 sanction is there, especially if you have one court, a
17 centralized court. It's not like this is very
18 diversified. You're going to see if one party starts
19 filing multiple claims that don't make any sense.

20 You know, you have some sort of a vexatious
21 litigant standard, at least in California. And I
22 think you could apply a similar standard in the

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1 federal court under Rule 11. The same court is going
2 to be there and say, "Look, this is the tenth time
3 I've seen you on this claim. You aren't getting
4 anywhere. You're just out. And you become vexatious."

5 So I'm not sure that the frivolous claims
6 are going to be as serious. I don't see them as being
7 significant, at least in the small claims area. I
8 think the court will be able to control those and keep
9 those out.

10 MS. ROWLAND: Mr. Hasbrouck?

11 MR. HASBROUCK: The creators have better
12 things to do than being in court. The last place that
13 they want to be spending their time is in court.
14 Court is a last recourse. They're only going to be
15 there. They are only going to put their creative work
16 on hold to waste their time chasing the prospect of
17 getting some money for some old work that is being
18 infringed if they take the matter really seriously. I
19 think their own self-censorship, self-vetting of the
20 legitimacy and the worth and the value and the
21 importance of the claim and the amount of time they're
22 going to have to invest in it is the strongest check

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1 on the likelihood of truly frivolous claims from
2 creators themselves.

3 The other thing is that there are going to
4 be a lot of claims. We hope there are going to be a
5 lot of claims. We know there are a lot of
6 infringements, that the number of infringements is
7 orders of magnitude larger than the number of cases
8 we're seeing now. That is the reason for this whole
9 proceeding. So we should expect a lot of cases. And
10 while there may be some frivolous cases coming from
11 somewhere, they're going to be a drop in the bucket
12 compared to the legitimate cases that are being
13 foreclosed by the present system. And if the
14 occasional frivolous case taking up a little bit of
15 time to get thrown out once it gets in front of the
16 adjudicator, if that is the cost of doing business or
17 bringing justice to very large numbers of victims of
18 infringement who have no justice now, that is a cost
19 of doing business that we should be prepared to accept
20 as something that the government should pay for as
21 part of the cost of providing justice.

22 MS. ROWLAND: Mr. Grecco?

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1 MR. GRECCO: I would agree. I think that
2 most artists feel that going to court is, you know,
3 this horrific, horrible experience. And some don't --

4 MS. CHARLESWORTH: We lawyers are trying not
5 to take this too personally.

6 (Laughter.)

7 MR. GRECCO: Some don't defend their work,
8 even if they have a righteous case, because they don't
9 want to deal with it. So the frivolous lawsuit issue
10 -- I don't believe Rule 11 applies in copyright,
11 though, right?

12 MS. ROWLAND: It is a Federal Rule of Civil
13 Procedure. So it applies to all federal cases.

14 MR. GRECCO: Okay. I thought in copyright,
15 only the plaintiff can get an award of attorneys'
16 fees. It supersedes. The copyright law supersedes --

17 MS. CHARLESWORTH: There are two different
18 provisions. The Rule 11 --

19 MR. GRECCO: I am not an attorney in court.

20 MS. CHARLESWORTH: No. I can tell from your
21 comments.

22 (Laughter.)

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1 MS. ROWLAND: I think she was saying -- she
2 was not remarking about the quality of your comments.
3 She is remarking about the comments about going to
4 court.

5 MS. CHARLESWORTH: Strike that.

6 Rule 11 is a general rule that basically
7 says if you sign a pleading and submit a pleading to
8 court, it is a good faith requirement. And if you are
9 found to violate it, the court can sanction you. And
10 it's a fairly high standard. But basically it is to
11 keep lawyers honest when they file something.

12 In the Copyright Act, you have section 505,
13 which is a separate provision, which has to do with
14 fee shifting, I think, maybe -- is that what you're
15 referring to? -- which has to do with whether you win
16 or lose the case and whether the court awards fees.

17 MR. GRECCO: Versus an offer of judgment.

18 MS. CHARLESWORTH: Which is another rule, --

19 MR. GRECCO: Okay.

20 MS. CHARLESWORTH: -- yet a separate rule,
21 which is also general in terms of a party makes an
22 offer, and then if it's not accepted, there can be

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1 certain consequences in terms of the outcome of the
2 litigation.

3 MS. ROWLAND: Ms. Calzada?

4 MS. CALZADA: I just wanted to say there are
5 frivolous claims now being litigated in federal court.
6 And if I am a defendant, I would much rather have my
7 frivolous claim adjudicated in a small claims court,
8 where I had to spend less time and had some sort of
9 rocket docket and less discovery because I think that
10 would get me out of there quicker.

11 MS. ROWLAND: Ms. Wright, did you have
12 something?

13 MS. WRIGHT: No. That's all right.

14 MS. ROWLAND: I would just, just for the
15 record, that we did have comments that did discuss the
16 importance of the Rules of Evidence and that there are
17 people out there who, parties out there who, seem to
18 have encountered these. And it's an issue that really
19 does need to be dealt with.

20 And we have a great panel here. So perhaps
21 no one here is engaged in such frivolousness. But it
22 is a problem that the copyright community faces. And

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1 it undermines the entire procedure. So anything we
2 can do to limit frivolous claims is something that we
3 are interested in.

4 Ms. Wright?

5 MS. WRIGHT: That just brings up the point
6 that, actually, some courts now will award the
7 defendants the attorneys' fees with the idea that if
8 attorneys' fees can be awarded to the plaintiff, the
9 copyright infringement lawsuit, that it can be awarded
10 to a successful defendant and not even necessarily
11 successful defendant, even when infringement has been
12 found if it has not been too egregious or in certain
13 circumstances, courts have awarded attorneys' fees to
14 the defendant in a copyright infringement lawsuit. So
15 it is just another way to temper the frivolous claims
16 filing.

17 MS. ROWLAND: Does anyone else have any
18 thoughts on it? Ms. Robinson?

19 MS. ROBINSON: My colleague Erin Kunze
20 reminded me that we do get a number of frivolous
21 inquiries in our office, people who wrote all of
22 Michael Jackson's music or et cetera, wrote the latest

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1 blockbuster movies, the scripts. And so I think
2 having some sort of screening, we discussed legal
3 advisers at the front door that would help people
4 self-evaluate and decide that they didn't really have
5 the evidence to pursue this would be helpful.

6 MS. ROWLAND: Right. And a point to be made
7 was that sometimes a person who brings a claim might
8 not realize quite how frivolous it is.

9 MS. ROBINSON: Right.

10 MS. ROWLAND: You know, they're not a
11 lawyer. They don't understand the system or the laws.
12 They might in their head think, "Well, this is the
13 situation." And they don't realize too much time has
14 lapsed. So it's really not a viable claim at all. So
15 there are times when frivolous claims are not
16 completely malicious. And so if there is a way that we
17 could figure out how to reduce those claims as well,
18 it would be great.

19 Does anyone else have any thoughts on the
20 frivolous claims issue?

21 (No response.)

22 MS. ROWLAND: Okay. So we can move along to

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1 panel IV, which I think will be actually a shorter
2 panel just due to the number of topics we have to
3 discuss, basically deals with arbitration, mediation,
4 and settlement. So these are all different types of
5 litigation alternatives. Thinking that if there's not
6 going to be the mini trial like Mr. Brennan was
7 talking about, are there other options that could be
8 helpful to small claims holders? And the first one
9 would be arbitration.

10 And does anyone have any thoughts on what
11 role arbitration might play in a small claims process,
12 whether it's a good thing/a bad thing/indifferent.
13 Mr. Grecco?

14 MR. GRECCO: It automatically alleviates an
15 attorney doing a case for a plaintiff on contingency
16 because of the cost involved. Somebody has got to
17 pick up the cost of the arbitration. And that is
18 usually more than court costs, filing fees. So it
19 changes the dynamic of an artist and attorney
20 relationship and limits one of the possibilities for
21 the artist.

22 MS. ROWLAND: Mr. Brennan, do you have a

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1 point?

2 MR. BRENNAN: Just when you say,
3 "arbitration," you have to be careful because now you
4 are putting yourself I assume under the federal

5 Arbitration Act. And there is a whole
6 different range of things that happened there:

7 evidence, how you present it, finality of
8 the rules, appealability, enforceability. So if
9 you're thinking this as arbitration, you know, parties
10 can always agree to arbitrate right now.

11 IFTA has a number of our cases in which we
12 do arbitration. And it covers these infringement
13 claims. I'm not sure if setting up an extra
14 arbitration procedure at the federal level really adds
15 anything. There are enough arbitration procedures
16 here. And in order to have arbitration, you can't
17 force people into it. It's going to have to be
18 voluntary. So I'm not sure that you added very much
19 by looking at arbitration as an alternative.

20 MS. CHARLESWORTH: I had a question. Ms.
21 Tommaselli, you referred to your arbitration program.
22 Could you just briefly explain how it works, what the

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1 process is?

2 MS. TOMMASELLI: For filing a claim?

3 MS. CHARLESWORTH: Well, just an overview of
4 the process: filing the claim. And I think you
5 mentioned you have 180 days. And who bears the costs?
6 How does it just as a --

7 MS. TOMMASELLI: Well, basically the
8 claimant will file a claim. And then the respondent
9 has a certain number of days to respond to that claim.
10 And, also, within that time frame, they have to put a
11 deposit on the arbitrator's fees. So the parties
12 share the fees of -- the claimant pays the filing fee,
13 which is a percentage of the claim, with a cap. So
14 it's, you know, a percentage of the damages with a
15 cap. And then we have various fees for members and
16 non-members.

17 There are differences. But once the
18 plaintiff pays the fee, then the parties put a deposit
19 on the arbitrator. And they share those costs equally
20 for the arbitrator's hourly fee, which, you know, we
21 encourage the fast resolution of the claim. So the
22 average amount of the arbitrator's time is usually

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1 less than 16 hours, and less than 5 hours if it's a
2 default, where one party doesn't show up.

3 And then, according to the rules, the
4 arbitrator has the authority to allocate the costs
5 differently. So at the end of the arbitration, the
6 prevailing party, whether it be claimant or
7 respondent, plaintiff or defendant, could recover the
8 entire amount of what they paid for the filing fee as
9 well as their costs and attorneys fees. The arbitrator
10 has discretion in those three areas to award that to
11 the prevailing party or just decide that both parties
12 pay their own costs and equal share of the
13 arbitrator's fees.

14 After the respondent responds to the claim,
15 then the arbitrator is generally appointed by then,
16 sets a hearing date. The time frame is 60 days from
17 the date of the filing of the last claim or when it
18 was due to be filed in the case of a respondent who
19 doesn't show up. And then there is a 120-day outside
20 hearing date.

21 So if the parties are engaged in settlement
22 or sometimes, you know, there are illnesses or things

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1 like that, then the parties can agree, with the
2 arbitrator's approval, to extend up to 120 days
3 outside of that.

4 After the hearing has been heard and the
5 matter is deemed submitted for decision, the
6 arbitrator then has 45 days to issue an award.

7 So when you add all of that up, it turns out
8 to be about 180 days. And there are certain things,
9 like I said, if there are settlement discussions or if
10 there are, you know, extenuating circumstances, where
11 some of those deadlines can get pushed, either by the
12 arbitrator or by the parties, agreeing to extend them.
13 But according to the rules, it is set up to have a
14 final award issued within 180 days of the filing of
15 the first claim.

16 MS. CHARLESWORTH: Thank you. What is, just
17 out of curiosity, the range of costs that you see in
18 terms of the arbitration fees?

19 MS. TOMMASELLI: For the arbitrator, you
20 mean?

21 MS. CHARLESWORTH: Yes. Five hours or so, I
22 think you said?

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1 MS. TOMMASELLI: Well, our arbitrators
2 actually work for less than the going rate for
3 attorneys in the entertainment industry. And they're
4 admitted to the panel based on their expertise. They
5 have to meet a certain number of qualifications in
6 order to be even considered and admitted to the panel.

7 And for the member rate, so if one of the
8 parties is a member, it is \$300 an hour for the
9 arbitrator. And if both parties are non-member
10 companies, then it's \$350 an hour. So an average of
11 default cases is generally under the \$1,500 deposit
12 that the claimant makes and then, you know, up to 16
13 hours, just a general case that goes beginning to end
14 with both parties appearing.

15 MS. CHARLESWORTH: That is very helpful.
16 So, looking at that as just sort of one arbitration
17 model, I guess we heard one negative reaction. I
18 mean, does anyone think that a model like that might
19 serve small copyright claimants or is it too expensive
20 for them? Does it make any sense to consider it
21 further, an arbitration alternative?

22 MS. CALZADA: I do feel like it's too

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1 expensive. And, also, it is not clear to me what
2 forcing parties to go through another proceeding would
3 add to the process of something that is supposed to
4 make it simpler. And our other concern, of course, is
5 mandatory arbitration wouldn't be constitutional. You
6 know, what other parties chose to do I don't know. It
7 would be up to them.

8 MS. CHARLESWORTH: I think one question is
9 whether setting aside a small claims court, whether
10 just instituting or making an arbitration system
11 available, similar to -- I don't want to say exactly
12 like what we heard, but along those lines, whether
13 that would be of service to the copyright community or
14 whether it really wouldn't fill the need that we have
15 been discussing today. Lots of hands. Mr. Hasbrouck?

16 MR. HASBROUCK: Our feeling, our experience
17 with our members who have ended up in arbitration has
18 not been particularly positive or that it's
19 particularly cheaper or more accessible or more fair
20 to the small claimant than would a federal lawsuit.

21 Generally, writers end up in arbitration if
22 and only if publishers have imposed arbitration

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1 clauses on them. Publishers are not irrational. They
2 impose mandatory arbitration clauses because they
3 correctly believe that those arbitration procedures
4 will be more biased in favor of the publishers and
5 against the small creator than regular court
6 procedures would be. And in our experience, that
7 proves to be true.

8 So if people genuinely want to make a free
9 choice to go to arbitration, they have a variety of
10 options available now, but setting up one more
11 federally administered system of arbitration is not
12 going to resolve the problem that we are trying to
13 address here. And hopefully the copyright small claims
14 process will provide a better and genuinely more
15 accessible and cheaper, yet still fair system as an
16 alternative to possibly going to arbitration because
17 it's the only thing that maybe you can afford, even
18 though you know it's stacked against you.

19 MS. ROWLAND: Ms. Tommaselli?

20 MS. TOMMASELLI: I obviously disagree that
21 an arbitration system is biased. We think that is a
22 fair system for either party in that the arbitrator

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1 weighs all of the evidence and makes a decision. And
2 we actually did start publishing summaries of the
3 cases because the arbitration users were interested to
4 see if a certain arbitrator always chooses one side or
5 that the claimants always win or vice versa. And
6 there was actually no evidence of that. One side
7 always prevails. So we disagree with that.

8 But the bigger issue I think with the
9 arbitration and as far as I want to address also it
10 being cheaper, yes, because you are paying for the
11 arbitrator and you wouldn't be paying for a judge that
12 does get to be more expensive. However, if the
13 arbitrator -- if we're comparing it to court, if the
14 arbitrator, you know, keeps within the confines and
15 knows what the purpose of arbitration is and doesn't
16 allow the extensive discovery that's allowed and, you
17 know, a lot of times, we even have hearings on written
18 submissions, you know, if it's a clear-cut case or
19 it's a default case. So, I mean, it's really up to
20 the arbitrator as to how far it can go and how long
21 and drawn-out it can be. You know, and that goes to
22 choosing who you pick to be on the arbitrator panel so

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1 that they understand what the goal is and what the
2 objective is.

3 And just a third issue is it is required
4 that both parties consent to arbitration. So I think,
5 aside from how we feel about arbitration, getting the
6 defendant to agree to use the procedure is really the
7 biggest hurdle, I think.

8 MS. ROWLAND: Mr. Grecco?

9 MR. GRECCO: I want to run this by the
10 attorneys because I can only assume this, that if it
11 is binding arbitration and it's not appealable, do we
12 throw out the law, to a certain extent? Does the
13 arbitrator get to decide, get to decide, get to cut up
14 the child the way they get to cut up the child because
15 there is no threat of appeal and sticking onto the
16 legal point? I'm asking a question because that would
17 be my fear here.

18 MS. ROWLAND: Mr. Brennan?

19 MR. BRENNAN: Also, being an arbitrator in
20 some of these procedures, let me just add two things.
21 I think Ms. Tommaselli is right about sort of the
22 neutrality of the arbitration procedures here, but,

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1 remember, the IFTA arbitration was set up primarily
2 for commercial disputes among people in the
3 international motion picture industry. So I have had
4 arbitrations where I have handled claims, as I said,
5 against somebody from Greece and somebody in the
6 U.S.A. I had one against Poland and another guy from
7 Turkey. So it's more of a professional thing. And
8 you are looking for an arbitration because you are
9 looking for a procedure that can be enforced
10 internationally.

11 The thing that happens in arbitration that
12 is different from litigation that you have to be
13 careful about, when you are dealing with commercial
14 parties, you often have parties who are rather
15 sophisticated in what they are doing. And so that
16 they can usually present their case. And they just
17 both need to tell their story.

18 However, what my experience has been is
19 since you never know what the crazy arbitrator is
20 going to do, especially in contested cases, the
21 attorneys tend to try to litigate to the max and raise
22 every issue they can before the arbitrator because

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1 they don't know what exactly you are going to do. And
2 so they tend to raise whatever issues they can to say,
3 "Well, maybe some mud will stick on the wall."

4 So, at least in some contested cases, I
5 think that the arbitration is at least -- attorneys
6 always do this. They just make cases more complicated
7 because they don't know.

8 In terms of arbitration, you have to
9 remember there is an entirely different mindset and
10 procedure that happens. When you are in arbitration,
11 the first thing is parties have to agree. The thing
12 you have to realize is that Rules of Evidence are
13 relaxed. You have different arbitration rules. There
14 are three different arbitration statutes in
15 California, and they're all different. The FAA is not
16 the same as California. International arbitration is
17 not the same as commercial arbitration or it's not the
18 same as mandatory judicial arbitration. So they are
19 all different. The Supreme Court hasn't allocated
20 those.

21 Whether or not you can challenge an
22 arbitration award for failure to follow the law is a

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1 very tough issue. It's not firmly decided by the
2 Supreme Court. They still haven't issued it. So you
3 are throwing yourself into an entirely different set
4 of rules that are not necessarily well-decided or
5 uniform.

6 So my sense as a litigator here is I would
7 rather -- if I am dealing with the mass tort cases
8 that you have, it is usually a plaintiff against a
9 party who has never agreed to arbitrate here before.
10 And it is just better to go into small claims court.
11 You're not dealing with commercial parties here. And
12 so I am not sure that arbitration really gives you
13 much of a benefit.

14 And if you wanted one for the parties here,
15 there are plenty of arbitration procedures. If the
16 plaintiffs and defendants want to arbitrate, you can
17 always, the court can always, say, "Well, why don't
18 you go mediate?" There is mandatory mediation in
19 federal court. You can always look at each other and
20 say, "Let's arbitrate." And you could always make
21 that decision. I have had that happen in a number of
22 cases where people have said, "Well, let's just go

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1 arbitrate." And then you make a strategic decision of
2 whether or not you like the arbitration panel.

3 I'm not sure setting up something here gets
4 you very far for what you are trying to do.

5 MS. ROWLAND: Ms. Robinson, do you have any
6 thoughts on this?

7 MS. ROBINSON: Well, I was going to speak to
8 mediation because I think that would be a much more
9 useful adjunct to the small claims court procedure
10 than arbitration, --

11 MR. BRENNAN: Sure. Sure.

12 MS. ROBINSON: -- which can be clumsy. And
13 it's not going to get the efficiency and speed that we
14 would like to see out of a small claims process.

15 MS. ROWLAND: Okay. Does anyone else have
16 anything else to say about -- Mr. Grecco?

17 MR. GRECCO: Mediation is a part of the
18 federal court system now. I mean, before any case
19 goes to trial, you are to sit there with a magistrate
20 and try to settle, you know, possibly right after
21 discovery. So I don't think that there is anything
22 new there, that mediation should be available always,

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1 whether it's a small, very tiny, small, claim system,
2 which it is in Los Angeles County. It should be
3 available in a federal fast track system. And it is
4 already available in the federal court system.

5 MS. ROWLAND: Ms. Robinson, I know that the
6 California Lawyers for the Arts has a mediation
7 program. Would you care to tell us a little bit about
8 that?

9 MS. ROBINSON: We do. And it's specialized
10 for arts legal problems of all sorts. As a result of
11 our work with the response to the notice for these
12 proposed changes for small claims court, we
13 investigated it further and went to the U.S. District
14 Court in San Francisco to see what kind of mediation
15 services are available and if it would be useful to
16 have a specialized panel for IP cases. And so we have
17 collaborated with the mediation program of the U.S.
18 District Court in San Francisco to plan a mediation
19 training for IP lawyers.

20 And there are many courts around the country
21 which have mediation, as you suggested. I think it's
22 mandatory in different degrees in different places.

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1 But whether it would be sort of a pro forma situation,
2 where you have to go to a magistrate, as you
3 mentioned, or you would really have a genuine
4 mediation process, where a mediator is trying to
5 foster communications between the parties to
6 facilitate a resolution are really two different kinds
7 of procedures. And it's the latter that we try to
8 promote; that is, if the parties are there in good
9 faith.

10 Now, if the infringer is somebody you are
11 chasing around the world, then you are obviously not
12 going to get them into mediation. And you are
13 probably just going to be satisfied with your small
14 claims court procedure. But, on the other hand, if
15 this is someone that you may have had a working
16 relationship with -- we talked about co-authors, for
17 example. People who have worked together suddenly
18 find themselves in court. If they have an opportunity
19 to talk to each other and figure out all of the other
20 kinds of opportunities to settle the situation or
21 resolve it through mediation, it can be a much more
22 creative process that leads to I think a wider variety

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1 and more satisfying set of results than you would get
2 in small claims court. So I think we would do well to
3 encourage people to really use mediation in good faith
4 and not just as a formality to get on to the heart of
5 the matter, which they are conceiving of as a quick
6 resolution in court.

7 MS. CHARLESWORTH: Just a quick follow-up
8 question. Do you think that -- assuming that this
9 were largely a remotely conducted process where you
10 had people perhaps far away from one another in the
11 case of, say, an internet infringement issue. Do you
12 think there is an effective way to mediate if the
13 people are not there in person? Is that --

14 MS. ROBINSON: We have had telephonic and
15 electronic mediations with people in different
16 locations.

17 MS. CHARLESWORTH: So you found that to be
18 effective or less effective or --

19 MS. ROBINSON: It can be effective. Again,
20 if people are there in good faith, if they really want
21 to resolve it, if they want to explore other options,
22 then it can be effective.

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1 MS. ROWLAND: I saw a bunch of people over
2 here. Ms. Calzada?

3 MS. CALZADA: Yes. We do support making
4 mediation a part of the process. But, again, we just
5 want to make sure that it doesn't become a burdensome
6 part of the process. I think it could be very
7 effective to sit both sides down and, you know, have a
8 mediator with that experience and knowledge, you know,
9 getting things going and pushing things towards a
10 settlement so that perhaps we finish this sooner and
11 move on.

12 But we would hope that it would be a
13 telephonic conference, something that didn't require
14 an in-person appearance, you know, maybe a
15 videoconference or something along those lines but as
16 long as it doesn't sort of add to the burden of the
17 process too much.

18 MS. ROWLAND: Mr. Hasbrouck?

19 MR. HASBROUCK: A common experience for us
20 at the National Writers Union in working with our
21 members who have grievances is that the infringer
22 won't even talk to the victim, won't respond to

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1 attempts to negotiate or discuss the infringement.

2 And they can do that now because they are confident
3 that the infringer is impotent to sue because they
4 aren't rich enough to sue. So they can with some
5 confidence just literally ignore them.

6 And we would hope that if this small claims
7 process proves effective, then we would actually see a
8 lot of its effect in settlement, where people would
9 realize that there actually is a recourse that is
10 available, that if they go through with the
11 adjudication, they are likely to lose if they are, in
12 fact, an infringer. And they will be motivated, at
13 least at the point where they get notice, "Oh, they
14 actually filed a small claims copyright lawsuit. I
15 guess now we actually have to talk to them."

16 So while we would be hopeful for the
17 prospect that, you know, whether through direct
18 negotiations or mediated settlement talks in some way,
19 a lot of these cases would settle. They would settle
20 if and only if infringers have come to learn that
21 they're actually going to lose and it is actually
22 going to be costly to them if they pursue these

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1 matters to a small claims adjudication. So I think if
2 they make the small claims process work, the
3 settlements will take care of themselves.

4 MS. ROWLAND: Does anyone -- Ms. Bristol?

5 MS. BRISTOL: Being a copyright mediator, I
6 do find that many of the clients who come to me are
7 pre-litigation. So, although mediation is in the
8 federal courts and I am on the federal court mediation
9 panel, I do have quite a few people who are coming to
10 avoid the filing of the lawsuit in the first place
11 because once the plaintiff has reached out and sent
12 their demand letter, sent their cease and desist, and
13 is then forced to go into court, they have a
14 completely different attitude about going forward and
15 how much they are going to demand in a settlement.
16 And this may not be the same for all of you, but I
17 find that they are a little bit angrier that they have
18 had to get an attorney, file, and pay the costs, and
19 go through all of those steps.

20 So pre-litigation, I don't know if this is
21 something that could be considered for the small
22 claims panel or even the mini trial might be an option

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1 to get the parties talking. There certainly will be
2 instances where the infringer is going to blow the
3 plaintiff off until they actually file something and
4 force them in. But there might be some situations
5 where you have innocent infringers who really don't
6 understand copyright law at all. And for some clients
7 I have had as an attorney, they really don't
8 understand copyright law. They do believe all they
9 need to do is attribute a picture or an article. And
10 they can copy it and paste it somewhere.

11 So, for those who are uneducated, pre-
12 litigation mediation might be a way to resolve the
13 matter confidentially without putting those clients'
14 names on the docket, either as a litigious plaintiff
15 or a defendant who has been sued for copyright
16 infringement. It may help to preserve the reputation
17 of those who are ignorant of the copyright law without
18 putting them in the public eye and with a
19 sophisticated mediator who is experienced in copyright
20 law explaining what has happened and helping the
21 parties to settle outside of court. It might be an
22 option.

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1 MS. ROWLAND: I was going to say that is one
2 option. How do people feel about making the parties
3 try to do some sort of mediation before moving forward
4 to a more formal situation? Obviously sometimes the
5 defendants might not show up at all. So then you
6 could have some sort of process by which the copyright
7 owner files something with the small copyrights
8 tribunal saying "We sent them. They didn't respond.
9 Moving along" or do people not agree with that as a
10 process? I saw Mr. Brennan shaking his head.

11 MR. BRENNAN: He can go.

12 MS. ROWLAND: Mr. Grecco?

13 MR. GRECCO: I think the reality is no one
14 takes you seriously until you file. I think that --
15 is that your experience? No one takes you seriously
16 until you file. Every defendant I know in my own
17 copyright cases are like "Whatever."

18 MS. ROWLAND: I see Ms. Wright shaking her
19 head.

20 MS. WRIGHT: Well, we resolve the vast
21 majority of our copyright claims pre-suit. And so we
22 go through the settlement process. Sometimes we

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1 employ mediation, formal mediation process. The vast
2 majority of the time is just a negotiation between our
3 attorneys and either the alleged infringer directly or
4 the alleged infringer's attorney. It's probably about
5 50 percent where the alleged infringer is represented.

6 And sometimes we can't get it resolved.
7 Then we make the decision as to whether we are going
8 to file suit but since it's such a major process. And
9 at that point, the expense is dramatically increased.
10 And it's a very serious conversation and decision with
11 our clients as to whether we will file suit.

12 But definitely since it's -- hopefully with
13 the small claims copyright infringement tribunal, it
14 would be much easier than the suit and then get the
15 attention of the alleged infringer. If it was much
16 easier to do that, then we would be able to resolve
17 many more cases much easier. And I think it would be
18 fantastic. I am very hopeful for our clients that we
19 can get this established.

20 But, unfortunately, other claims if we can't
21 resolve them pre-suit, sometimes we have to give up on
22 them. But we do what we can to enforce our clients'

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1 rights.

2 MS. CHARLESWORTH: I had just had a quick
3 follow-up. Ms. Bristol, you said you handled a lot of
4 pre-litigation mediations?

5 MS. BRISTOL: Yes, copyright and other types
6 of cases.

7 MS. CHARLESWORTH: How do those cases come
8 to you?

9 MS. BRISTOL: Private. I am both private
10 and, of course, the ones through the court are in the
11 court system already but referrals. My clients are
12 attorneys. And so if I were able to resolve a case
13 outside of the court system or sometimes -- I think
14 the litigators will attest to this -- they prepare the
15 complaint, but they don't file it. And they will send
16 it over and say, "We're going to file this unless we
17 get into some negotiations." So sometimes just
18 creating the complaint and the document, sending it
19 over, and threatening to actually file it with the
20 court gets the defendant to start talking. And then
21 they will want to go into mediation.

22 So it really just depends. I mean, I think

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1 there are lots of cases where you do have to file to
2 get them to start discussing, but depending on how
3 sophisticated the parties are, prior relationships,
4 like he said, if they want to preserve a relationship,
5 sometimes it's just a disagreement on a contract term.
6 Well, they will want to just mediate it without
7 incurring a lot of attorneys' fees or incurring court
8 costs. It really just depends. So I think, of
9 course, I am self- interested because I am a mediator,
10 but I think it is a great process from pre-litigation
11 to litigation.

12 MS. ROWLAND: Thank you.

13 Mr. Hasbrouck?

14 MR. HASBROUCK: I would just point out I
15 think the explanation for the difference between what
16 Mr. Grecco said that nobody listens to you until you
17 file, and Ms. Wright's experience, they were able to
18 get infringers' attention and settle cases -- Ms.
19 Wright is a lawyer and Mr. Grecco is not.

20 And so I would modify that. Nobody takes
21 you seriously until either you file or you send them a
22 letter with "Esquire" after your name. I mean, people

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1 do listen when they get a letter from a lawyer. It
2 all of a sudden gets escalated into a different -- you
3 know, every organization has a sort of normal business
4 track. And then they have got a "We are getting sued"
5 sort of litigation track of how they deal with things.
6 Once you hear from a lawyer, it kind of gets dumped
7 into that other thing.

8 But some people, all it takes is finding a
9 friend who is a lawyer to use their letterhead to
10 write a letter to the infringer. But that's not fair
11 that those people should be special privileged, as
12 opposed to people who don't happen to have a friend
13 who is willing to use their legal letterhead to send a
14 demand letter on their behalf. And, without a lawyer
15 getting involved, it doesn't get their attention.

16 MR. GRECCO: I want to clarify that. I have
17 never contacted -- unless you are a client of mine and
18 you have made a mistake, if you are a third party
19 thief, they have always been in contact with an
20 attorney. And most of these are huge Fortune 500
21 companies that still don't take you seriously, even
22 with a lawyer letter, because they know how expensive

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1 it is for an artist for a small plaintiff to defend
2 the copyright. So once you have filed, they will take
3 you seriously. There will be an offer.

4 I have never done depositions on a federal
5 copyright case because there's an offer of judgment
6 that comes very quickly. And then it's a negotiation
7 back and forth. But it's usually taking a filing.
8 And these are very sophisticated people who have a
9 system of infringement. It's a risk management issue
10 out there. There are corporations that are weighing
11 how many times they can rip off the artist versus how
12 many times they're going to get caught and then if
13 they're caught, how many times the artist will have
14 the money and the wherewithal and the lack of fear of
15 the courtroom to deal with it.

16 It's nothing against you guys. It's an
17 opposing space.

18 MS. ROWLAND: Ms. Tommaselli?

19 MS. TOMMASELLI: I guess I would just say
20 that, you know, as far as our members specifically, we
21 wouldn't find mediation particularly helpful because
22 it is important for them to get something enforceable,

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1 an award, quickly in order to preserve their rights and
2 stop any damage that has already occurred.

3 But I also wanted to point out that we do
4 have -- so that means that our members have found they
5 don't want any mediation service. But we did
6 institute a pre-arbitration settlement procedure where
7 a claimant can file a notice of arbitration, basically
8 have everything all ready to go but choose to do this
9 letter, which is complimentary to members and it's a
10 nominal fee for non- members. And the respondent, the
11 defendant, has ten days in which to settle that claim.
12 Otherwise the claimant can choose to go forward with
13 the arbitration. And that has actually been quite
14 successful.

15 So it's the sort of threat of filing a claim
16 that seems to work. And it has actually been pretty
17 successful without the plaintiff having to file, you
18 know, the full arbitration.

19 MR. GRECCO: I don't think that anyone jumps
20 into this from a practical standpoint filing a claim
21 and exploding. I think that, you know, anyone who
22 contacts a lawyer for advice, this is a step by step

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1 by step. You know, the attorneys reach out with a
2 letter. You know, there's been discussion of, you
3 know, "Can we have a phone call to settle this?"
4 Then, you know, when there is no response or "Too bad.
5 We have the right to do this," then the complaint is
6 sent to them. Then it is filed.

7 I think that this is a -- in most cases that
8 I have seen, this is a very measured strategic
9 situation. I don't think any attorney -- I think
10 attorneys know how to play chess very well. And they
11 do all play chess very well. But there is a large
12 percentage of people who make this their risk
13 management and are willing to go and get thrown down
14 to the mat.

15 MS. ROWLAND: Mr. Brennan?

16 MR. BRENNAN: I would agree with the other
17 comments. I don't think that any sort of mandatory
18 prefiling procedures for mediation, et cetera, would
19 have it benefit. It only increases costs and
20 increases the glue and the procedural hurdles you have
21 to jump through to go through a case.

22 We have often debated in our firm whether

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1 even to send out demand letters. Having sent out
2 scores of them, they never seem to do any good. No
3 one takes you seriously in my opinion until you file,
4 although maybe it's larger cases. And the only issue
5 you make on filing a demand letter is, "Gee, am I
6 going to set somebody up for a willfulness claim
7 because they ignored my demand letter?"

8 That is really the only issue, is that it is
9 not going to resolve any cases. Most cases that you
10 can resolve, people figure that, especially if you're
11 dealing with large corporations where large
12 corporations, we know how to negotiate something -- we
13 either don't need to mediate or we can take care of
14 it. Cases where I think that, especially in the cases
15 I'm thinking about here, where I call these mass tort
16 claims or where it's pretty obvious what the liability
17 is, you're going to resolve it or not. And I don't
18 think establishing any sort of a pre-filing mandatory
19 procedure would have much benefit. It would only
20 increase costs.

21 MS. CHARLESWORTH: Just to pare it down, I
22 think the suggestion was made earlier that sometimes,

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1 you know, giving a party a period of time to make an
2 offer to settle before you move to a more formal
3 proceeding; so, in other words, requiring a settlement
4 offer and response.

5 MR. BRENNAN: Why? People can do that now.
6 I mean, I don't see any point in doing that. Lawyers
7 know how to do that or lots of cases that we have
8 seen, they have come to the attorneys because they
9 have already tried to contact the other side. They
10 sent them a note. They sent them an email. People can
11 do that on themselves. We don't need any formal
12 procedure to help them do that. They already know how
13 to do it. And they can resolve these cases themselves.
14 All it does is increase time and costs.

15 And then what you have done is you have now
16 set up the defendant's motion. In the first motion,
17 you are going to say, "Motion to dismiss for failure
18 to comply with mandatory pre-investigation discovery
19 procedures." Oh, God. You know, explain that motion.

20 And now I've got to waste time responding.
21 Oh, "And, by the way, yes, I did.

22 "Well, no, you didn't. No, you didn't use

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1 the magic words in the letters.

2 "Yes, you did.

3 "Your Honor, what are you going to do?" And
4 now I've got to have the hearing. And that just
5 delays it. We're just creating glue for no purpose.
6 That's why I would say no.

7 MS. CHARLESWORTH: Well, just to paint a
8 slightly different picture, I think if you're assuming
9 you have pro se litigants, let's say, who aren't
10 necessarily being advised by attorneys, maybe they
11 don't have a full understanding of copyright law or so
12 forth, you know, you could have a process where before
13 the case starts moving forward, there's an opportunity
14 for the defendant to make a formal offer if they'd
15 like. Obviously, if they don't do that, it shouldn't
16 preclude the plaintiff from moving forward because
17 it's not within the plaintiff's control but just
18 having that built into the process to encourage
19 settlement before the case moves forward.

20 I take it your answer is still no?

21 MR. BRENNAN: It is just a waste of time.

22 MS. CHARLESWORTH: Okay.

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1 MR. BRENNAN: Once you serve the complaint,
2 if it's a small claims case, the defendant gets the
3 complaint, that is my offer to try to resolve it.
4 Defendant calls you up, "What am I doing here? Let's
5 resolve this thing right now." It doesn't add
6 anything. I don't think you get any benefit from doing
7 it.

8 MS. CHARLESWORTH: Ms. Wright?

9 MS. WRIGHT: Our experience is that
10 mediation except for court-ordered mediation is a
11 voluntary process. And, frankly, in Central District
12 of California, you can leave five minutes after the
13 mediation begins. So unless the parties are there and
14 want to try to resolve it through a mediation to avoid
15 a longer process, it's just a waste of time. And if
16 people do want to resolve it, they can either set up
17 their own mediations, such as using the California
18 Lawyers for the Arts' process, or they can settle it
19 on their own. It just doesn't need to be part of the
20 process because I think everyone has testified that an
21 expedient process is very important here.

22 MS. ROWLAND: Ms. Robinson?

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1 MS. ROBINSON: Well, a couple of things. I
2 think it would be good to have it as an option.
3 There's the concept of the multi-door courthouse. So
4 before you go into the door where you file your claim,
5 you have an opportunity to learn a little bit about
6 mediation because it is still kind of a foreign word
7 to most people. And they confuse it with other
8 processes.

9 So if you could establish a national pool of
10 such mediators who were specialists in IP who might
11 also be available for the patent bar, for other IP
12 situations, such as in the patent/trademark area, that
13 could be broadly useful.

14 And, then, finally, a story that I want to
15 share if you will bear with me for a couple of
16 minutes. This came from our Los Angeles office when I
17 asked for some recent examples. A visual artist
18 worked with a nonprofit to produce a mural that was
19 part of a children's educational project. The artist
20 borrowed from a photograph she had found and was
21 unable to locate the photographer.

22 At a festival, they met. And she was

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1 excited to tell him that she was using his work --

2 (Laughter.)

3 MS. ROBINSON: -- and it had inspired her
4 piece. And initially that excitement was mutual. He
5 later sent the nonprofit organization a demand letter
6 for payment for copyright infringement. The nonprofit
7 said they couldn't pay him because they were low on
8 funds and because they thought their use of his image
9 was fair use, but they could give him credit. He
10 refused and demanded more money.

11 At the mediation, they agreed not only on a
12 monetary figure, but the organization, in addition,
13 offered to host a solo project for him in the upcoming
14 year.

15 He expressed that the mediation was a
16 transformative process for him and that he learned a
17 lot about where others were coming from and about
18 himself. And our staff person says this was amazing
19 considering he initially refused to mediate because he
20 felt he could not trust the other parties in the
21 process.

22 So the point is mediation can have a lot of

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1 creative results that aren't anticipated at the
2 beginning. And it is an option that is well worth
3 letting people know about if you are successful in
4 having legal advisers advise people as to how they
5 might use the small claims court. Then that would be
6 another thing in the menu that they could offer, that
7 they could help facilitate people getting to mediation
8 because they may not do it on their own. They may not
9 know about it.

10 MS. BRISTOL: I think, as the attorney said,
11 this might not work in the case of the willful
12 infringer or the corporations that are doing the
13 cost/benefit analysis. And it might not work for
14 people who are waiting for the lawsuit. It may be a
15 good alternative for the individual infringers who
16 really are innocent or who want an out-of-the-box
17 solution that is not necessarily going to court. It
18 is another option to try to help the individuals have
19 access without necessarily the cost and the expense.

20 MS. ROBINSON: And it takes account of
21 different layers of the legal issues. I mean, here
22 you see they talked about fair use. They talked about

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1 a lot of things that may never have come up in a
2 lawsuit which was just structured around damages in
3 the monetary, which, you know, in fact, as we often
4 say, court decisions you might win, but it's still a
5 lose- lose situation because there's so much animosity
6 that is a fallout of that.

7 MS. ROWLAND: Ms. Knappen?

8 MS. KNAPPEN: I like the idea of including
9 that as an option because artists typically don't
10 understand any of the options in front of them or that
11 contracts can be negotiated. It's a different
12 situation if it's the David and Goliath situation,
13 where literally this is the contractor. You're not
14 getting hired. But in a lot of cases, there is
15 negotiation that is possible. But artists aren't
16 aware of it unless somebody has trained them. And
17 you're not trained in schools.

18 So put that in the process. And we're like
19 "Oh, by the way, there is another option."

20 MS. ROWLAND: Right.

21 MS. KNAPPEN: That is very helpful.

22 MS. ROWLAND: Does anyone else have anything

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1 else to add about mediation? We touched a little bit
2 on the settlement offers and what to do with that.
3 Did anyone have any discussion of any other ways to
4 optimize settlement to kind of get people more excited
5 about settling claims in the onset? Does anyone have
6 any ideas on how to promote that? Ms. Robinson?

7 MS. ROBINSON: May I say one more thing
8 about mediation?

9 MS. ROWLAND: Sure.

10 MS. ROBINSON: We also have a med/arb
11 option. I don't think we've discussed that today.

12 MS. ROWLAND: Well, you can. Please talk
13 about that.

14 MS. ROBINSON: So that when people agree to
15 mediate, if they also want to make sure that they have
16 a resolution at the end of process, they in writing
17 agree that if the mediation is not successful, they
18 will go on to arbitration and get a final and binding
19 award. And so that can be efficient for people who
20 really would like to make sure that there is a
21 resolution one way or the other.

22 That second process can be with the same

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1 third party, neutral, or they can decide to go to a
2 different person for the arbitration procedure.

3 MS. ROWLAND: Okay. Ms. Calzada?

4 MS. CALZADA: I just wanted to reiterate
5 that I feel it's important that there not be a penalty
6 for failing to settle or failing to mediate or failing
7 to choose any of these alternative options, that this
8 can, you know, be a way that we go and get our
9 disagreement settled, worked out by a court, and that
10 I not be penalized for declining a settlement.

11 MS. ROWLAND: Okay. Does anyone else have
12 any other thoughts? I think that pretty much covers
13 panel IV. If anyone has any closing remarks they want
14 to make about it, feel free. Otherwise, that
15 concludes -- I'm sorry. Mr. Brennan?

16 MR. BRENNAN: All I would say is that what
17 focuses the mind on settlement is very closely tied to
18 what the remedies are and the certainty of the
19 remedies. If you know, for example, that you have a
20 potential willful infringement award and you're pretty
21 certain about collecting statutory damages, if you
22 have a claim for attorneys' fees and you know you are

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1 going to collect them or not, for example, if you are
2 a defendant and you think you have a very strong case
3 and you know what the potential remedies are, that's
4 what really helps settlement. Settlement often
5 becomes difficult the more uncertain your remedies
6 are. And so the greater the certainty of remedies, I
7 think, the easier it is for people to focus their
8 minds on settlement. And that something, remedies, to
9 be discussed tomorrow.

10 MS. ROWLAND: Thank you.

11 And so that wraps up panel IV, I believe.
12 So we will see those of you who come tomorrow
13 tomorrow. We appreciate everyone's participation
14 today. It was very productive and helpful for us to
15 hear all of these different opinions. And so we'll
16 adjourn it now.

17 As we mentioned at the outset, we are
18 recording this. So we have a transcriber over there
19 taking notes. And eventually we will post the comments
20 on the website. So you will see your words on the
21 page.

22 So thank you. And we will see those of you

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1 who return tomorrow tomorrow. Have a nice evening.

2 MS. CHARLESWORTH: We hope to see a lot of
3 you.

4 Ms. Bristol, could you step up here for a
5 minute? Yes.

6 MS. ROWLAND: Thank you.

7 MS. CHARLESWORTH: Thank you very much,
8 everyone.

9 (Whereupon, the public hearing on small
10 copyright claims was adjourned at 5:27 p.m.,
11 to reconvene at 9:30 a.m. on Tuesday,
12 November 27, 2012.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, TROY ANTHONY RAY, the officer before whom the
3 foregoing hearing was taken, do hereby certify that
4 the testimony appearing in the foregoing pages was
5 recorded by me and thereafter reduced to typewriting
6 under my direction; that said transcription is a true
7 record of the testimony given by said parties; that I
8 am neither counsel for, related to, nor employed by
9 any of the parties to the action in which this hearing
10 was taken; and, further, that I am not a relative or
11 employee of any counsel or attorney employed by the
12 parties hereto, nor financially or otherwise
13 interested in the outcome of this action.

14

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16

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Troy Anthony Ray

18

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1 CERTIFICATE OF TRANSCRIBER

2 I, SARAH VEACH, do hereby certify that this
3 transcript was prepared from audio to the best of my
4 ability. I am neither counsel for, nor party to this
5 action nor am I interested in the outcome of this
6 action.

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DATE

SARAH VEACH

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