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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.

A P P E A R A N C E S

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ANN CHAITOVITZ, US Patent and Trademark Office

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LORIN BRENNAN, Linde Law Firm

ALICIA CALZADA, National Press Photographers Association

KIM TOMMASELLI, Independent Film & Television Alliance

MICHAEL TRAYNOR, Cobalt, LLP

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GEORGE CLINTON, Musician

TIMOTHY A. COHAN, General Counsel, Peermusic

COREY FIELD, Ballard Spahr, LLP

MICHAEL GRECCO, American Photographic Artists

EDWARD HASBROUCK, National Writers Union

MOLLY KNAPPEN, Designer and Developer

ERIN KUNZE, California Lawyers for the Arts

ALMA ROBINSON, California Lawyers for the Arts

ERICA BRISTOL, Mediator

C O N T E N T S

P R O C E E D I N G S

MS. CHARLESWORTH: Good morning, everyone.

(Pause.)

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

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

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

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

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

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

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

authorship.

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

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

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

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

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

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

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

and to consider potential alternatives.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Thank you.

Ms. Calzada?

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

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

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

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

MS. CHARLESWORTH: Mr. Field?

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

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

Mr. Hasbrouck?

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

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

MS. CHARLESWORTH: Okay. Ms. Knappen?

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

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

MS. KUNZE: Also observing.

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

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

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

MS. CHARLESWORTH: Thank you.

MS. ROBINSON: Thank you.

MS. CHARLESWORTH: Mr. Cohan?

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

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

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

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

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

So for the first question, we just had a

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

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

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

I don't know how it would necessarily work

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. Ms. Knappen?

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

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

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

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

Mr. Hasbrouck?

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. Other thoughts on

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

Ms. Wright?

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

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

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

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

MS. CHARLESWORTH: Okay. Other thoughts?

(No response.)

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

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

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

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

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

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

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

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

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

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

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

would be permitted.

MS. CHARLESWORTH: Mr. Hasbrouck?

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

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

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

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

MS. CHARLESWORTH: Okay. Ms. Knappen?

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

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

MS. KNAPPEN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. WRIGHT: Yes.

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

MS. WRIGHT: Yes. I apologize.

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

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

MS. CHARLESWORTH: Okay. So some anecdotal evidence.

Mr. Cohan?

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

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

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

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

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

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

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

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

MR. FIELD: Oh, thank you.

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

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

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

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

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

MS. CHARLESWORTH: Okay. So perhaps looking

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

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

MS. CHARLESWORTH: Yes. One would hope.

Any further thoughts? Okay. Ms. Calzada?

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

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

initial choice?

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

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

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

MS. CHARLESWORTH: Okay.

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

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

is much larger?

MS. CALZADA: I think Carolyn has an answer.

MS. CHARLESWORTH: Ms. Wright?

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

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

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

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

MS. WRIGHT: Correct.

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

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

MS. CHARLESWORTH: Mr. Hasbrouck?

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

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

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

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

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

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

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

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

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

(No response.)

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

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

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

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

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

(Off the record.)

(On the record.)

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

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

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

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

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

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

MS. ROWLAND: Can you explain?

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

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

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

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

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

MR. COHAN: Yes. It would have to warrant

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

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

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

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

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

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

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

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

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

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

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

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

self-published songwriter who is of limited means?

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

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

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

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

infringement.

MR. COHAN: Right.

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

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

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

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

the songwriter brings to you?

MR. COHAN: No. That would be impractical.

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

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

MS. CLEARY: Oh, music.

MS. ROWLAND: Ms. Cleary?

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

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

MR. CLINTON: I would like to say something.

MS. ROWLAND: Mr. Clinton?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CLINTON: Yes, I do.

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

MR. CLINTON: I think it should be.

MS. CHARLESWORTH: Anyone else?

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

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

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

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

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

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

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

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

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

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

So when you are dealing with audiovisual

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

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

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

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

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

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

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

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

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

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

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

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

MS. CLEARY: Right.

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

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

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

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

MR. CLINTON: Yes.

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

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

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

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

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

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

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

MS. ROWLAND: Ms. Calzada?

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

MS. ROWLAND: Ms. Knappen?

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

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

MS. ROWLAND: Mr. Cohan?

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

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

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

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

MS. ROWLAND: Ms. Robinson?

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

MR. COHAN: May I ask --

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

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

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

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

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

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

MS. ROBINSON: It's another issue.

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

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

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

MR. COHAN: Absolutely, in which case --

MS. CHARLESWORTH: -- something --

MR. COHAN: Yes.

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

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

the small claims court.

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

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

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

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

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

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

MS. ROWLAND: Ms. Calzada?

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

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

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

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

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

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

prepared to deal with these types of claims.

MS. ROWLAND: What about ownership issues? So there's a dispute over who actually took the photograph.

MS. CALZADA: Sure.

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

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

MS. ROWLAND: Okay. Mr. Traynor?

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

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

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

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

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

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

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

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

MS. ROWLAND: Mr. Traynor?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. ROWLAND: Mr. Clinton?

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHAN: I'm sorry.

MS. CALZADA: It's okay.

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

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

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

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

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

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

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

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

MS. ROWLAND: Ms. Wright?

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

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

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

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

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

MS. ROWLAND: Yes.

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

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

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

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

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

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

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

(Pause.)

MS. ROWLAND: Continue.

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

So essentially it's an issue of who owns the

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

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

(No response.)

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

Oh, I'm sorry. Ms. Charlesworth?

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

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

MS. ROWLAND: Ms. Wright?

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

MS. ROWLAND: Anyone else? Mr. Hasbrouck?

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

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

MS. ROWLAND: Mr. Traynor?

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

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

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

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

was not an infringement and was fair use.

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

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

MS. ROWLAND: Okay. And Mr. Cohan?

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

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

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

MS. ROWLAND: Anyone else? Ms. Knappen?

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

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

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

MS. ROWLAND: Anyone else on fair use? While we're on the topic of defenses --

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

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

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

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

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

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

MS. ROWLAND: Anyone else? Ms. Knappen?

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

MS. ROWLAND: And anyone else?

(No response.)

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

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

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

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

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

MS. ROWLAND: Anyone else? Okay.

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

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

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

MS. ROWLAND: Anyone else on that point?

(No response.)

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

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

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

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

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

of people that again have no access.

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

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

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

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

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

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

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

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

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

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

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

Ms. Wright?

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

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

(No response.)

MS. ROWLAND: Your silence is --

MS. CHARLESWORTH: We see nodding heads.

MS. ROWLAND: Nodding, yes.

MS. CHARLESWORTH: We need you to say

something.

MS. KNAPPEN: Yes.

MS. CHARLESWORTH: That was Ms. Knappen.

MS. KNAPPEN: It sounds good.

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

MS. CALZADA: Yes. I agree.

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

MS. ROWLAND: Mr. Hasbrouck?

MR. HASBROUCK: I think that may be a

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

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

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

MS. ROWLAND: Ms. Cleary?

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

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

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

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

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

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

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

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

MS. ROWLAND: Anyone else? Ms. Knappen?

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

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

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

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

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

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

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

MS. ROWLAND: Mr. Cohan?

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

MS. ROWLAND: Ms. Wright?

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

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

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

MS. CLEARY: And I actually don't believe

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

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

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

MS. ROWLAND: Ms. Wright?

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

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

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

MS. ROWLAND: Ms. Knappen?

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

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

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

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

legal issues.

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

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

MS. KNAPPEN: Okay.

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

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

MS. WRIGHT: Sure.

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

MS. WRIGHT: Absolutely.

MS. CHARLESWORTH: And Ms. Knappen?

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

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

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

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

MS. ROWLAND: Mr. Traynor had one.

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

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

MS. ROWLAND: Mr. Hasbrouck?

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

MS. ROWLAND: Ms. Robinson?

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

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

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

MS. ROBINSON: Yes.

MS. CHARLESWORTH: -- advisers in California?

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

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

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

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

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

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

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

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

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

MS. ROWLAND: Ms. Knappen?

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

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

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

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

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

MS. KNAPPEN: And I disagree.

MS. CALZADA: That's okay.

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

So is that something that can be

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

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

MS. ROWLAND: Anyone else? Mr. Clinton?

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

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

MR. CLINTON: Yes.

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

definitely an option to think of.

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

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

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

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

MS. ROWLAND: Okay.

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

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

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

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

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

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

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

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

MS. ROBINSON: Right. The claim could be so

stale or whatever.

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

MS. ROBINSON: Right.

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

Ms. Knappen?

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

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

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

claims.

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

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

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

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

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

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

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

you just mentioned?

MS. ROWLAND: Yes.

MS. KNAPPEN: I could see that being problematic.

MS. ROWLAND: Can you explain?

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

MS. KNAPPEN: Okay.

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

MS. ROWLAND: Either way.

MS. KNAPPEN: Okay.

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

MS. KNAPPEN: I tend to think the second one

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

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

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

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

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

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

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

MS. CHARLESWORTH: Ms. Wright?

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

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

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

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

(No response.)

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

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

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

MS. ROBINSON: I would agree with that.

MS. ROWLAND: Then I guess we're silent. Ms. Charlesworth has a follow-up question.

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

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

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

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

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

MS. CHARLESWORTH: Okay.

MS. ROBINSON: Yes.

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

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

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

MS. CALZADA: If it has --

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

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

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

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

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

MS. ROWLAND: I believe she is suggesting

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

MR. COHAN: Okay.

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

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

MS. ROWLAND: Okay.

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

MS. CALZADA: Yes.

MR. COHAN: -- as well, in addition to that?
MS. CALZADA: Correct.
MS. ROWLAND: That is an interesting --
MS. WRIGHT: So I guess the question is whether it is a compulsory counterclaim?
MS. ROWLAND: I don't know if that is really the question. There is an issue if it is a compulsory counterclaim, which I suppose is the Federal Rules of Civil Procedure, which which may or may not applicable to this new special process.
MS. CHARLESWORTH: Let's assume it's not compulsory.
MS. ROWLAND: Assume it's not. So, even if it's not a compulsory counterclaim, it's sort of a strange situation where you would have two competing -- - so say there was a cap and you're saying it has to be all done in the same proceeding. So the first issue is that's requiring the defendant to be in the forum, I suppose, not that it's the defendant's choosing, for their counterclaim, which they have anyway, right, but it is kind of a strange situation, although in --

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: That's a fair characterization.

MS. ROWLAND: Ms. Knappen?

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

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

MS. KNAPPEN: No.

MS. WRIGHT: The question is whether you

would litigate a counterclaim in that small claims tribunal.

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

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

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

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

MS. ROWLAND: So is that --

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

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

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

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

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

was taken.)

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

MS. CHARLESWORTH: Good afternoon, everyone. We're going to be continuing with our roundtable. I thank you for coming back for those who were here this

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

MR. BRENNAN: Lorin Brennan.

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

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

MS. CHARLESWORTH: Okay. Thank you.

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

MS. ROBINSON: You did.

MS. CHARLESWORTH: Okay. All right.

MS. ROBINSON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. Mr. Brennan?

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

MS. ROWLAND: Can you hold on one second?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

chain of title.

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

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

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

Does that answer your question?

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. Mr. Hasbrouck?

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

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

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

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

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

MS. CHARLESWORTH: Ms. Wright?

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

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

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

MR. BRENNAN: Yes, right.

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: It may be 765.

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

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

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

MR. BRENNAN: Published?

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

MR. BRENNAN: Early performing.

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

MR. BRENNAN: Right.

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

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

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

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

they are sold?

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

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

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

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

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

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

MS. CHARLESWORTH: Okay.

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

My last conversation about copyright registration and the expense of it was when we went to

San Quentin Prison and had a copyright and alternative dispute resolution workshop with inmates

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

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

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

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

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

MR. BRENNAN: Yes.

MS. CHARLESWORTH: Okay.

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. And Mr. Hasbrouck.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHARLESWORTH: Okay. Ms. Knappen?

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

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

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

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

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

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

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

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

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

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

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

I would see these cases in small claims as

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

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

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

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

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

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

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

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

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

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

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

MR. BRENNAN: This makes me work.

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

Other thoughts in terms of thinking as a

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

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

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

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

MS. CHARLESWORTH: Okay. And that would

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

MS. KNAPPEN: Yes.

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

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

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

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

MS. CHARLESWORTH: Okay. Mr. Brennan?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BRENNAN: Yes.

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

MR. BRENNAN: I think the disincentive would

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

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

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

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

MR. BRENNAN: Okay.

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

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

And now I will recognize Mr. Hasbrouck.

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

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

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

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

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

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

MS. BRISTOL: Sure.

MS. CHARLESWORTH: -- and explain who you

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

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

this a mini trial?

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

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

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

hear a variety of perspectives.

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

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

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

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

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

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

MS. CHARLESWORTH: Other thoughts?

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

MS. BRISTOL: Thank you.

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

Have I stumped everyone? No. Ms. Wright?

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

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

and know that they will show up in court.

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

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

MS. WRIGHT: Correct.

MS. CHARLESWORTH: -- to confirm service?

MS. WRIGHT: Correct.

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

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

the defendant.

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

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

MS. CHARLESWORTH: Ah.

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

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

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

MS. KNAPPEN: I think I would need to think

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

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

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

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

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

MS. WRIGHT: Yes. I believe definitely if you get the proper service on the defendant, -- this is assuming that this is a non-voluntary process. We

had talked earlier about whether the small claims would be voluntary for both parties. But assuming that it is mandatory, then yes, you get service. They don't respond. You get default.

MS. CHARLESWORTH: Mr. Brennan?

MR. BRENNAN: I think that basically the observation we had before -- and it also depends upon the scope of the claim; in other words, if we do -- small claims, real small claims, where you're limited to a certain amount of damages. You might have a more relaxed service process. If you're doing more of what we call the mini trial, then you probably have to have actual service of process.

But once you get service of process, if somebody doesn't respond, you should be able to have a default prove-up. You just have to get the default prove-up the normal way and get a default judgment.

Now, enforcing the judgment, whether or not the judgment then has to be confirmed by an Article III court, I'm not sure if you need that additional procedure, but certainly you should be able to get a default judgment and then go try to enforce it as best

you can.

MS. CHARLESWORTH: Okay. Does anyone here have experience with the Arbitration Act and filing for judgments in federal court? Mr. Brennan, do you think that might be a helpful model here?

MR. BRENNAN: I mean, just taking an arbitration award and getting the judgment on it, it's not particularly difficult to just -- it's almost a noticed motion procedure. You just file a complaint. Sometimes people don't like to do that, and they often file a complaint in federal court first or in state court and then have a kickback arbitration so you can come back to a decision, get an easier judgment, but right now that you just file the complaint to have the arbitration award confirmed, it's pretty much of a noticed hearing motion unless somebody objects. Then you just get a judgment issued on it. It's not difficult. I don't think that either one is particularly difficult. It just takes a little bit of time.

MS. CHARLESWORTH: Okay. I mean, do you see that -- let's assume this were some sort of voluntary

process for the moment. The question is, a voluntary process, even if you get to a judgment, how would you make that judgment enforceable? So that's why I asked you about the Arbitration Act.

And Ms. Wright may have some thoughts, too. I don't know.

MR. BRENNAN: Here's the interesting thing. If it's an arbitration, it's much more enforceable internationally than if it's a judgment. So if this were a voluntary thing, you would want to have this be a type of arbitration award, rather than a judgment. But if you're just looking to enforce it in this country, it's not difficult to take your arbitration award and have it confirmed and turn it into a judgment. Then you're just in the enforcement judgment procedures.

MS. CHARLESWORTH: Ms. Wright?

MS. WRIGHT: We have some experience with even the federal court, a settlement that was enforced by the federal court. And then we had to domesticate it to state action to collect on it, which is costly and costly for the plaintiff. And they take time.

But that's what you have to do for any sort of collection action.

So yes, this needs to be -- if we are going to go through all of these hoops, let's hope this is enforceable via court action collections.

MS. CHARLESWORTH: Any other thoughts on that issue? No? Yes?

MS. ROBINSON: Well, just to reinforce the basic point because we do administer arbitrations at California Lawyers for the Arts as well. And I just want to underscore what you said about the simplicity of going to state court to get the award confirmed. And then you can go to collection basically. So I don't think that's a big hurdle.

MS. CHARLESWORTH: Okay. That's helpful because, especially again if it were some sort of voluntary, as opposed to a mandatory, process, making sure there was a way to actually collect on the award, which would require some official action.

MS. ROBINSON: So then we would have to go to federal court for that, then, presumably?

MS. CHARLESWORTH: Well, you know, we

haven't come up with any particular plan yet, but, as I said, one model is sort of the arbitration model, where, absent fraud or something, you get your award confirmed and then it's -- in federal court, you would have a federal judgment.

MR. BRENNAN: One of the issues you would have to address here is what are the remedies that are awarded. If it's just a damage award, then you can easily get it confirmed here. The issue is whether or not you are also going to allow injunctions and seizure orders.

My personal thing is that you should be able to get an injunction and seizure order, not preliminarily but as a result of the judgment. But then the question is, where do you go to enforce those? And it may well be you need to take those to a federal court because you are looking to have certain federal remedies, injunction or seizure orders, here. And that may mean that you have to go to federal court to get these confirmed and then to get those remedies issued and enforced, especially across state lines.

MS. CHARLESWORTH: Okay. Then Ms. Wright?

MS. WRIGHT: Then you also have the filing fee problem and federal court action. And that is what we are trying to avoid here.

MR. BRENNAN: Right. I just raise it as an issue. I don't know if --

MS. WRIGHT: Yes, yes. Procedurally it is an issue.

MR. BRENNAN: Yes. Would you allow state courts, then, to enforce a judgment with a copyright seizure order or an injunction?

MS. WRIGHT: I would hope so.

MR. BRENNAN: You think so?

MS. WRIGHT: Yes. I think it is going to be necessary to be able to collect --

MR. BRENNAN: What about if you have -- you are looking for things in multiple jurisdictions?

MS. WRIGHT: Okay.

MR. BRENNAN: Would you rather have a federal court that may have nationwide reach to enforce those or would you rather go to a state court, multiple state courts? So that is the advantage of the federal court because you have the nationwide.

Potentially you would have that remedy here.

MS. WRIGHT: I can say it for our clients. Usually one state would be just fine. We don't usually have that problem.

MR. BRENNAN: Just my personal experience and sense in these things is that by the time you're doing what I'll call these mass tort claims, injunctions don't make much of a difference because you don't have one central defendant. You have hundreds of stores there. And all you want to do is get your damages.

So you probably aren't looking for seizure orders or injunctions in any case. If that's the case, you had an option of seeking remedies in either state or federal court. Maybe if you had an option to seek either one, you may want to just go to state court, where it's cheaper or if you have an injunction, you have to have it enforced across state lines and you want to pay the money, then you can go or you may just say that these claims don't allow those remedies. I don't know.

MS. WRIGHT: Right.

MR. BRENNAN: I don't know if you debated that.

MS. CHARLESWORTH: We haven't gotten to remedies yet.

MR. BRENNAN: Okay.

MS. CHARLESWORTH: But everything is intertwined, as I keep saying.

MR. BRENNAN: Okay. Okay.

MS. CHARLESWORTH: So we welcome your comments, but tomorrow we're going to be talking about remedies --

MR. BRENNAN: Okay.

MS. CHARLESWORTH: -- and fee shifting and so forth in more detail.

Any further thoughts on this particular topic? I know it's mid-afternoon. We're making good progress, though. So we'll probably -- let's see. When are we due to leave?

MS. ROWLAND: 3:30.

MS. CHARLESWORTH: 3:30. So what? We have about 15 more minutes?

MS. ROWLAND: We've got 15 more minutes on

this panel assuming we can get it in. And then we'll have a break and conclude with our fourth panel.

We spoke a lot about attorney representation this morning. I want to make sure there's nothing more that anyone wants to say. I don't think -- Mr. Brennan, you weren't here. I don't know if you had any views. The question is whether attorneys should be allowed in this system, whether they should be optional, whether they should be excluded, how to deal with issues of corporations, which are typically represented by attorneys. Do you have any views on that?

MR. BRENNAN: I think it depends fundamentally on the nature of the claims you envision. If you envision it as true small claims, as only 4 or 5 thousand, up to 10,000, then you don't need attorneys here. But if you're envisioning these as I would hope they were, at least given the option of mini trials so that you can enforce these things you have, you may have limitations on some of your awards, but you actually could have attorneys in a mini trial case. Then definitely you should have

attorney representation of these cases. It just makes it easier for the plaintiffs to go through. And if you have the right sort of possibility to collect attorneys' fees, it makes sense for you to do it. The issues here are what your remedies are. And the recent cases are expensive right now.

It's not necessarily because of the attorneys. It's because you have all this federal procedure. Federal Rules of Civil Procedure are not really attuned specifically to run through copyright cases. And it also allows you to raise a lot of extra issues that make these things complicated.

To me, if you can streamline the procedures and effectively you are going to go from filing disclosure, eliminate summary judgments and go straight to a mini trial, you should have attorneys line up. That's what you used to do in a year, how to do those things effectively if that is what the procedure is envisioned to be.

MS. CHARLESWORTH: Ms. Bristol, did you have any thoughts?

MS. BRISTOL: Well, I agree. I think it

really depends on the natures of the claims and the amount. And, as you get more complex, the whole idea again is access. So, not to dissuade attorneys from being involved -- I am an attorney, and I am very familiar with copyright law. And I know there are some aspects that the client is really going to need help with. But if it is a very, very basic, straightforward issue of a low amount with limited claims, limited parties, then I think the parties should be able to come in without representation and handle those so that they do have the access.

And, as it gets more complex, as Mr. Brennan stated, then you have the option as to whether or not you want an attorney involved. But there should be some controls over that mini trial because the whole point is not to have a regular federal case. So it's got to be something quicker, faster, cheaper, and as effective as a federal case without going there.

And so I think that the easy part is going in with a $10,000 direct infringement. The part that is going to take a little bit more work is if you do decide to have a mini trial, what is that going to be?

Where are the costs going to come from? Who is going to be the adjudicator of that? You know, with the state budget so constricted -- I don't know what's happening necessarily with the federal -- will you be able to put this whole new court structure into play or are you going to have to seek out other means of having these mini trials? How is this going to happen?

So I think if you decide to have a two-tiered structure, the latter is going to be a little more difficult. But I do believe it should be clearly the parties' option to have attorneys there on the more complex issues.

MS. CHARLESWORTH: Okay. Well, I think, as I said, the earlier remarks as well as the more recent ones, I think between the two of them, we have very much aired that issue. And we can move on to again some of the details of the process.

For example, how -- well, there were many, many comments. Almost all of them, there seemed to be a great deal of agreement that there should be an ability to conduct these proceedings electronically or

on paper, which I think really means electronically, without the requirement of actual in-person appearance by the parties, especially if it's in a central location.

Do people here agree with that? Do they disagree? What is the thinking? Ms. Wright?

MS. WRIGHT: I think, yes, absolutely, especially because in our experience, most infringements happen across the states. So you might have the copyright owner on the East Coast and the infringer on the West Coast. So, then, there is the travel, the requirement for travel. And if you have a centralized location where the tribunal is located, it adds to the cost of the litigation.

Fortunately, this world is now getting to the place that we can do most of our things electronically. We submit court documents electronically. And we can have hearings electronically as well. So it seems like very feasible to do if it's electronic.

I can tell you, though, the many times that I have conducted depositions when the other attorney

is not there, it is certainly to my advantage if the attorney is appearing by phone. Many things can happen.

So I think that if you allow electronically it to happen, that it needs to be completely electronic or there is definitely a favoritism for whoever shows up in person oftentimes.

MS. CHARLESWORTH: So you are saying it should be -- if it's going to be done remotely, it should be everyone should be remote --

MS. WRIGHT: Correct, yes.

MS. CHARLESWORTH: -- so as not to give an unfair advantage?

MS. WRIGHT: Correct.

MS. CHARLESWORTH: Other thoughts? Ms. Knappen?

MS. KNAPPEN: Couldn't we set up a system where there was a Skyping center in local courthouses and that if you were part of one of these proceedings, you just had to go to your local courthouse and participate that way?

MS. CHARLESWORTH: It is certainly worth

thinking about or we could perhaps -- I mean, many courts conduct conferences by telephone, which is another option -- most people do have access to a telephone. So it's another possibility.

MS. KNAPPEN: My thought was the video is sometimes that's helpful when you get the body language as well. And it would also mean that people were going to a space that was set aside for law, instead of calling in from their bedroom, which is not necessary.

MS. CHARLESWORTH: Maybe they would. Mr. Brennan?

MR. BRENNAN: Just some experience on conducting these things electronically. Again, we have to keep in mind the scope of what our proceedings is. If we're doing a lot of motion practice and it's for the judge, I think that probably 70 percent of the time, at least in federal court, the judges dispense with oral argument. And they do it all on the paper.

So my hope is that we wouldn't have a lot of pretrial procedures. We would actually be doing -- I'm envisioning a mini trial situation, as opposed to

what we will call the small claims.

Now, in the mini trial proceedings, I recently conducted an arbitration in which I was the arbitrator. And one of the parties was testifying from Greece, and the other one was here.

I agree with the previous comment here that two things happen when you have remote testimony that you have to be careful of. There is a certain advantage to the person who is present in front of the arbitrator, as opposed to the person who is testifying remotely. You try the best as you can to be neutral about that, but there is a lot of crosstalk, and things happen.

The second problem that you have -- there are two other issues that you have here that make it difficult. One is if it's a document-specific case, getting the documents to the person who is testifying remotely to look at because that demands extra administrative procedures to make sure the documents are there.

The second problem that you have is cross-examination. Many times another party feels that they

are not able to adequately conduct a cross-examination, especially if there are impeaching documents, because you're conducting this cross-examination and you have an impeaching document. You like to lock in the witness and say, "Surprise. Did you see this document?"; which you can't do when they're remotely.

So you will find that some parties will believe that it is a mini trial. There may be some disadvantage to them if they can't actually conduct the trial.

I point those out. I would rather do these things remotely. I think that if the claims are not great, especially if they are small claims, you could arrange for electronic procedure because the other side of electronic procedure is it's so much less expensive. Conducting an arbitration, having three witnesses fly from Greece to here to conduct an arbitration with just enormous -- just wasn't worth the expense of the case.

So if it can be done, I don't say I would look for a way to do it electronically. And I point

these out not as negatives but simply as impediments that one needs to get over to make sure that the electronic hearing is conducted fairly.

MS. CHARLESWORTH: Ms. Robinson?

MS. ROBINSON: I think from an efficiency point of view, it would be much better to have one centralized court that works out these rules and procedures because otherwise if this is going on in different jurisdictions, you are going to get people that are forum shopping for various things. And there will be variations that inevitably start to creep into the program.

And especially I would think that we have heard the idea of a pilot project to test some of these concepts. And if it's available to everybody around the country, I think it would more useful.

And then there was also the question that came up earlier about precedent. If it's one court, then they would tend to start to formalize ideas and procedures in a way that becomes helpful for future litigants, rather than sort of seeing what happens in Los Angeles or in Atlanta or et cetera.

MS. CHARLESWORTH: Okay. Mr. Brennan?

MR. BRENNAN: This is actually a little bit different, but I would like to emphasize that I think there is great wisdom in what we just heard right now. One of the issues that you face is one of the advantages of having a centralized court is that you do tend to harmonize or at least regularize what the procedures are.

When you deal with lots of different courts -- remember, when you're dealing with federal court right now, any federal court, you have three sets of rules. You have the federal Rules of Civil Procedure. You have to have the local court rules. And you have to know the judges' own rules. Often they're different and they're conflicting.

It's very complicated to know these rules. And that's sort of an extra glue that you have to face going into federal court. And each judge has their own particular rules that this judge likes to use. You have to deal with that.

A centralized court with one centralized rules means that we would at least know what one

uniform procedure is. And that is a real advantage to doing that. The federal courts are still debating what the federal Rules of Civil Procedure mean almost 50 years later. And there are lots of variations.

And so if we could have a centralized court, I think that that would be a real advantage. How you deal with electronic hearings, remote hearings is a technical issue that I think you can get over, for fairness, but I would really be in favor of having one centralized court.

MS. ROBINSON: It also might be more affordable --

MS. CHARLESWORTH: Okay.

MS. ROBINSON: -- in an era of fiscal constraint.

MS. CHARLESWORTH: Any other thoughts?

(No response.)

MS. CHARLESWORTH: Okay. Now, we talked a little bit about this but not too much in terms of the actual pieces of the proceeding, what should be required and what should not be. Should there be motion practice? Should there be discovery? If there

is discovery, should it be limited in some way? Should there be formal rules of evidence or should the rules of evidence be relaxed? If people have thoughts on that that they would like to share, we would be interested. Yes, Ms. Calzada?

MS. CALZADA: I think that there is definitely going to be a need for the availability of some limited discovery, but I think that the process would benefit from having the adjudicator put limits on those because one of the huge obstacles and expenses in litigation is to the discovery process. And so one of the advantages for both parties, honestly, to go through this procedure would be the limited discovery. And I think that as long as you can make a good case to the adjudicator that you need the specific discovery, that they can set those limits.

MS. CHARLESWORTH: So you would have limited discovery but the adjudicator would have some discretion to decide what is appropriate in the case?

MS. CALZADA: Yes. Perhaps initially there would be here is the kind of discovery that is allowed and then if you feel like you need to expand that

scope, you can go to the adjudicator and ask for extra, a higher scope of discovery.

MS. CHARLESWORTH: Okay. What do people think of that? Mr. Hasbrouck?

MR. HASBROUCK: Well, this is of necessity getting ahead of ourselves. And we'll be talking about statutory damages in the next panel. But it is important to understand -- and we would support statutory damages, availability of them. But, having heard some people suggest that they want to get rid of statutory damages, we need very clearly to say that it's an either/or. Either you need statutory damages or you need discovery in order to determine the amount of actual damages.

Since overwhelmingly the evidence of actual damages and their amount will be in the possession of the defendant, it's not realistically feasible to show the amount of actual damages without discovery, perhaps extensive discovery. So if you say no discovery and no statutory damages, this process doesn't work.

We would argue that statutory damages are

the simpler way. And this is supposed to be a simpler process. But if you don't have them, you must have discovery. And it is likely to be drawn out.

I can go into more detail about why that would be, but I think you need to recognize that you have to have one or the other.

MS. CHARLESWORTH: Okay. Ms. Tommaselli?

MS. TOMMASELLI: I think we would agree with what Ms. Calzada said in that it should be limited but that the adjudicator has discretion to -- and, actually, I think I would differ on the point that anything is allowed at all. I think it should be entirely within the adjudicator's discretion. And based on the facts of the case, sometimes discovery isn't needed at all, you know, if it's a very clear-cut, simple matter. But I think that some limited discovery should be permitted just so that the parties can feel like they can provide the evidence that they need and prove their claims.

MS. CHARLESWORTH: Okay. Mr. Brennan?

MR. BRENNAN: Sorry to keep you, but just going through the procedures here. I'm thinking so

we're clear in terms of what we have called our mini trial procedure, as opposed to the pure small claims because these are where I think it would be, and in my view, the mini claims procedure should have, as I said, a limited scope of what issues are being addressed, what I primarily called our direct infringement, contributory, and vicarious infringement. I wouldn't be including like CMI claims and anti-circumvention, and antitrust, and all of that stuff. So assuming we have these limited claims, what I would envision for the procedure here, if I can, first of all, I would not allow preliminary remedies like preliminary seizures orders or preliminary injunctions. They become too time-consuming and complicated. I would allow those as a result of the judgment but not as part of the initial pleadings.

I would view again form complaints would be the easiest way to file and Rule 26-type disclosures that specifically address to these sorts of claims. So the plaintiff is going to need to disclose their evidence that they are going to present of authorship, either certificate of authorship or whatever they're

going to show, originality, if we don't have registration, access and substantial similarity, and any evidence on willfulness. The defendant then is going to have to say in their Rule 26-type disclosure which of these they contest. And they're going to have to provide their evidence of profits. One of the biggest discovery issues that you face is you're constantly dinging the defendant to give you their evidence of profits. And that is something here defendant should be required to disclose that. If we have these mandatory disclosures up front, I think we can substantially limit the discovery process.

Interrogatories. Interrogatories are somewhat helpful. They're already limited in federal courts. You could limit them again.

Requests for admissions are also somewhat helpful to limit cases here if we limited the amount of them. If we have limited issues, we don't need as many of those.

Depositions. Oftentimes depositions just become a way to torture one of the parties in wasting time taking endless depositions that go nowhere. And

we would like to limit the scope of depositions, especially if they're not addressed. If I'm not contesting authorship, why am I taking the defendant/the author's deposition and asking them, "Well, what did you do to create this work?" when I'm not contesting authorship? So you would want to limit that scope.

I would say limit the scope of discovery here. You are going to have to have some discovery. Leave it to the discretion of the parties. And you should have very strong incentives to make the full disclosures in your initial disclosure, your Rule 26-type disclosures.

Since we're saying here about discovery, I would also suggest that you are going to strongly limit the long motion practice. I wouldn't allow summary judgments in this procedure. Especially if you're going to be trying to a judge, a summary judgment is just a waste of time. All we're going to do is present the same evidence again. And it's very expensive for the attorneys to make responses to that. And if you're a pro se defendant, plaintiff or

defendant, you don't know what you're doing, that's an easy way for you to completely screw up. So I would eliminate those proceedings.

That being the case, I think you would have a lot less procedural glue between filing the case, making the initial disclosures, and then going to court. And that's what I would suggest doing here in the discovery process.

MS. CHARLESWORTH: Okay. Other thoughts on discovery? Ms. Knappen?

MS. KNAPPEN: If you limit, if you say, "No discovery," and go with statutory damages, you have to solve the problem of what do you do with groups of works that have been registered.

MS. CHARLESWORTH: And what do you mean by that?

MS. KNAPPEN: The problem of do they each count as a fraction of the package for maximum damages or is each one on its whole? It just happened to --

MS. CHARLESWORTH: I see. So sort of the legal issue that was raised earlier. Okay.

Oh, I'm sorry. Ms. Wright?

MS. WRIGHT: Because of the nature of our clients and their capacity to pay expenses, the depositions tend to be the most expensive process in litigation. And perhaps I would suggest no depositions without leave of court. Right now it's a limit of ten and you have to seek leave of court for any more than ten depositions for small claims. I think that no depositions likely would be allowed without leave of court.

I think that requests for admissions, limited request for production, and limited interrogatories are really necessary to just have some evidence to understand what the nature of the case is before you have a hearing, if it's like a mini trial.

MS. CHARLESWORTH: Other thoughts on discovery? I see we're a little past the 3:30 mark. There are a couple of more issues in panel III. So we're going to be democratic about this. Would people prefer to take a break now and finish panel III for a few minutes afterwards? Because we think panel IV will probably run a little shorter. Don't you?

MS. ROWLAND: Yes. I think when we were in

New York, we combined panels. So we took a break around, actually, literally on this. And then we combined panels III and IV because, actually, a lot of the issues kind of run into each other.

MS. CHARLESWORTH: Yes. I mean, we have done most of panel III, but there still are a couple of important issues. So people are voting for a break?

MS. ROWLAND: Yes.

MS. CHARLESWORTH: Okay. So we are going to take a break. Yes, yes. About ten minutes. And then we'll see you back here. We will try to finish up panel III pretty quickly and move on to panel IV and get you out of here.

MS. ROWLAND: Thank you.

(Off the record.)

(On the record.)

MS. ROWLAND: It sounds like there is a hush falling over the room.

(Laughter.)

MS. ROWLAND: Are we ready to start? So, as we mentioned before the break, we are going to go

ahead and continue with panel III for the few remaining topics that we had remaining there. And then we are going to launch right into panel IV about litigation alternatives.

It looks like we have a new participant, Mr. Grecco. Before you arrived, we were going around. And each person introduced themselves and explained just briefly their interest here. And so I would like to give you the opportunity to do that now.

MR. GRECCO: Thank you. I am the Executive Vice President of American --

MS. ROWLAND: Excuse me. I think he wants you to put that microphone closer to you.

MR. GRECCO: You also have to excuse me. I have a cold this afternoon.

I am the National, APA's National, Executive Vice President and the head of its Advocacy Committee. So we have been very involved in these issues. We put together the group of Edward C. Greenberg, litigator in New York; and David Nimmer to write the proposal for, our proposal for, copyright small claims infringement system. And we have just -- I have been

very involved in copyright issues and different advocacy issues for the organization and for the prior organizations I have been with.

MS. ROWLAND: Okay. Well, welcome to our panel.

MR. GRECCO: Thank you.

MS. ROWLAND: And so I think one of the issues that we left off with on the last panel was a little bit about the procedure for how to deal with any small claims proceeding. We talked a little bit about teleconferences and centralized location. And what we wanted to delve into is the type of witnesses that might be available, the question being, should you have non-party witnesses available? Should they just be limited to the parties themselves? If it is a non- party witness, what about the subpoena power? What should a small claims tribunal have the ability to do? Does anyone have any thoughts on that? Mr. Grecco?

MR. GRECCO: Can I jump backwards?

MS. CHARLESWORTH: Sure.

MR. GRECCO: Because this was an issue that

we had in the George Washington University panel. How do we get around the issues of taking copyright infringement cases out of Article III courts. Like, how do we deal with the fundamental constitutional issues of trial by jury, you know, and what class copyright infringements fall under first to take them out of that system and to come up with our own system?

MS. ROWLAND: That is a good question. And we do have a panel tomorrow on constitutional issues, but for now, we talked about this a bit in New York in the panels that we had a couple of weeks ago. And there was a lot of discussion about this, actually, throughout all of the panels, which I guess hasn't happened here so much, but one of the things that a lot of people talked about was whether making any sort of procedure voluntary would have any impact on constitutionality, so allowing the defendants the ability to opt out. And if that was the case, then what kind of incentives would keep them there? And there was a lot of discussion about that in the New York panel. So that is something to think about.

If it's a purely voluntary system, then that

would be helpful as far as the constitutional issues are. However, saying voluntary, we have heard in the past from others that it can't just be voluntary in name only and somewhat coercive. So there's a balance of that.

So there's that issue. And then as far as juries, we discussed in the New York panels about injunctive relief versus monetary damages because if you don't go for monetary damages, the Seventh Amendment issues are diminished somewhat, although there is some debate. And so it is a big issue.

There are a lot of issues that come up. And I guess we're taking them.

MR. GRECCO: Well, the two --

MS. CHARLESWORTH: Yes. I just want to add. I am sorry. If you read -- and I am sure you have read a lot of the comments, but there are also some comments that have been submitted about creating an Article I court with an appeal, right of appeal, to an Article III court and, you know, setting up a framework for running a court and perhaps those decisions would be appealable to an Article III court.

So there are a couple of different proposals, I think, or variations, more than a couple of variations on those proposals in terms of trying to work within the constitutional parameters.

MS. ROWLAND: And we are still studying them. So the Copyright Office hasn't come to an opinion about that issue yet, but we are still looking at it. And what I was mentioning earlier are different things that other stakeholders have said. If you have any thoughts, we would love to hear them.

MR. GRECCO: Well, the reality is in most copyright infringement cases, it's an artist against a Google or whoever it is. It's an artist against -- nothing personal.

MS. CHARLESWORTH: Let the record reflect --

(Laughter.)

MS. CHARLESWORTH: -- not reflect that Mr. Grecco was gesturing behind him.

MR. GRECCO: It is a corporation that has the wherewithal and the finances to go full bore into the federal court system. So, whatever impetus you have to bring them to a tribunal, from a strategic

standpoint, they have got no reason to. They can collapse most small cases by saying, "We're not going to do that." So the impetus has to be really, really good. And it has to be solid. If it's appealable afterwards, this large corporation is going to take it. And then if they don't like the ruling, they are going to appeal it on their Seventh Amendment rights, on the Seventh Amendment grounds.

So it's the dynamic of what I think the litigation is mostly about. It's not always about, you know, ABC and NBC fighting over intellectual property rights. It's often about David and Goliath. And that makes I think what is proposed very important on how strategic it is as far as what the incentive is to expedite the case and how non-appealable it is.

MS. ROWLAND: Understandable and the point taken about that. We definitely think that constitutional issues are very important and that it is a two-sided coin. So you need to have something that would encourage the use of any sort of small claims procedure but also would adequately protect the constitutional rights of the defendant. So it's a

balance, and it is something that we definitely are very interested in researching and learning about to make sure that we understand it completely and come up with a good understanding.

MS. CHARLESWORTH: Will you be here tomorrow, Mr. Grecco, for the constitutional panel?

MR. GRECCO: I wasn't planning on it.

MS. CHARLESWORTH: Well, we invite you.

MR. GRECCO: Thank you. I appreciate it. We were told that we can be on one panel.

MS. ROWLAND: Oh, no. You can be on as many as you want.

MS. CHARLESWORTH: No. That is not true.

MR. GRECCO: Okay.

MS. CHARLESWORTH: I don't know what your schedule is, but if you have thoughts that you would like to share? Because tomorrow we are also discussing remedies and fee shifting and things.

MR. GRECCO: What time is that panel?

MS. CHARLESWORTH: Starting at 9:30 in the morning to --

MR. GRECCO: Thank you. I think I have

calls and prior engagements, but if I can make it, I will.

MS. CHARLESWORTH: Okay.

MS. ROWLAND: Okay. So I think I have apparently opened something up for discussion here a little bit. Mr. Hasbrouck?

MR. HASBROUCK: Just on the specific question that you posed of witnesses, I suspect that very few witnesses may be needed if you have statutory damages. But if you don't have statutory damages and you have to establish actual damages, the evidence of the damages may well be in third party hands. So you are going to need third party witnesses and/or subpoena power. For example, if the infringement is online, typically the revenues for the infringement will come through clickstream advertising revenue.

So you're going to need to get, well, hypothetically let's just say Google or perhaps some other ad network or ad broker who has the evidence of how much revenue has been generated from clicks on the infringing copy, even if they aren't named as actually the infringers themselves, which -- well, we can leave

that out of it for the moment.

So there is a great likelihood that you would need -- unless you have statutory damages, there's a strong likelihood that proving damages will rest on third party witnesses and subpoenas to third party holders of evidence.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: Thank you. Again, it depends upon the scope of the procedure, but if we are thinking in terms of the mini trial, I would agree that you are probably going to have to have third party witnesses here in terms of issues on possibly ownership and authorship if there is a claim. Depending upon the nature of the claim, you are going to have to ask whether you need an expert to opine on substantial similarity. If you're dealing in art pieces, like, for example, many of the things that we have that are photographic works, usually they judge as you can make an eyeball claim. Start getting to other claim literary works, especially if it's not direct copying, musical works, software. You may need an expert to opine on substantial similarities.

You are going to have to have those sorts of witnesses there in sort of a mini trial case. And if you don't have them, you're going to have to have just the small claims case, where there are only two parties. There's going to have to be some consideration of how you address those issues of substantial similarity.

If I say somebody has infringed my software program, I write software. I would feel perfectly confident of looking at a software program for making a decision if I were a judge, but I'm not sure many other judges would if they were trying to say, "Are these two types, you know, bits of software, substantially similar, especially in a small claims case?"

So I'm going to think you're probably going to have to have third party witnesses, probably have to allow expert witnesses. You'll need subpoena power for that.

MS. ROWLAND: Okay. Does anyone else have any thoughts on the witness issue? Ms. Wright?

MS. WRIGHT: Well, if this tribunal process

is done electronically, then perhaps like you have the subpoena power of the court to have a witness appear and within the jurisdiction, within that same jurisdiction, you could enforce the witness to be able to appear in the jurisdiction electronically, you know, via phone or something like that. I don't know how in the world you could have the witness, force the witness, to travel to a centralized location to appear to testify. So maybe within the subpoena power of the court, you could have the witness appear telephonically, just as you would for a deposition preparing for a trial.

MS. ROWLAND: Okay. Anyone else have ideas on that? Mr. Grecco?

MR. GRECCO: Just in general, I think to get rid of statutory damages and have to deal with actual, you are going to add litigation expense and time. Proving actual damages, you know, is often a lot more difficult and maybe not as relevant if you have a serial infringer also or someone who has built a business model around infringing and these are -- it's willful infringement and there is proof of many

infringements.

So I personally wouldn't see getting rid of the statutory damages model.

MS. ROWLAND: Ms. Robinson?

MS. ROBINSON: On the topic of subpoena, it is in our arbitration administration. We allow subpoena of witnesses and subpoena of documents through a subpoena duces tecum process. So at least the subpoena of documents could be helpful in the kind of electronic court we seem to be starting to envision here.

MS. CHARLESWORTH: Okay. Can you elaborate on what kinds of witnesses and documents that you subpoena in your system, your arbitration system?

MS. ROBINSON: The documents might be some relevant financial information, for example. I'm thinking of hypotheticals. Maybe you want to see the sales records for certain product that you are claiming has been infringed and you would like to see the other side's documentation of that. If they don't produce anything and you can establish that there was something, then it's definitely an issue for the trier

of fact.

MS. CHARLESWORTH: What about experts? Do people have any further thoughts on that? I know just Mr. Brennan mentioned experts. I was curious to know whether people think a system like this could operate without experts or some people have suggested not so much expert but witnesses who are professional peers, for example, to help establish the value of a license who might come in and testify on behalf of the plaintiff in a less formal way than an expert that is certified by the court. Any thoughts on that? Yes, Mr. Hasbrouck?

MR. HASBROUCK: We would take the same position on expert witnesses as on third party witnesses and subpoenas. If you don't have statutory damages, it's going to be necessary to establish actual damages. You know, you need an expert to figure out how much of the clickstream revenue earned by advertising on this webpage, which has multiple components, one of which is this infringing content, how much of that revenue is attributable to that particular infringing content on the page, for

example. That is going to be hard to disentangle without experts.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: What do you need experts for here? You may need experts to establish originality, unlikely, but it could be possible, especially if somebody says the work here is marginal work, pieces of a database or something. You're going to need experts depending on the type of work to establish substantial similarity. And if there are damages, you are going to need financial experts to determine what the damages are.

I mean, you just sort of can't get around these things unless you are going to tell the judge "I have two literary works. Read them and see what you think" or "two musical works." If somebody is a musician, it is not difficult, but if you are not a musician, hearing substantial similarity between musical works, you usually need experts for that. So those are the types of things we sort of can't get around having the experts to assist the trier of fact unless you have a very, very educated trier of fact.

MS. ROWLAND: Ms. Robinson?

MS. ROBINSON: On the experts topic, we also have another option for parties to agree on a neutral expert, which really shortens up the process because, sort of like an advisory opinion or neutral evaluation, if parties can agree on the expert, then it's very helpful.

MR. BRENNAN: Well, the thing that you can do is you can't have a court-appointed expert. So you could allow the tribunal to appoint an expert. Either the parties agree or the court has the ability to appoint an expert from a panel to make these decisions. That may limit expenses.

One of the issues, then, you have to face here on expert fees -- and this is just a little technicality, but it's important -- expert fees, who pays the fees? Right now court-appointed expert fees are awarded to the prevailing party, but otherwise your expert fees are not collectible as costs. So you have to determined if there is an expert, is somebody going to pay for them or who pays for the expert?

MS. ROWLAND: Anyone else? Ms. Knappen?

MS. KNAPPEN: It sounds like we're talking now about a three-tier system, your existing system. And then the mini trial for experts would be helpful and then the small claims court. Is that --

MR. BRENNAN: We sort have been dancing around that, but it sounds to me that that may well be where you are, very simple small claims procedure.

Here's the thing. If we have just a very simple small claims procedure as in the federal court, there is a large group of cases that are going to be in the middle. They aren't going to get any recovery. They are too big for the small claims, but, you know, you may be looking at cases that $40 or $50 thousand is statutory damages. It's not worth it for somebody to take, even on a contingent basis, simply because of a thing in federal court.

So you may have these three tiers. I don't know. But it sounds to me like we are sort of dancing around that issue, and it makes a lot of sense.

MS. ROWLAND: That is something that is a theme of the day that there appear to be different ideas on how to handle the small claims process.

There might not be just one. There could be several different ones depending on the work and whatnot. So it's an apt observation.

Another issue that we have with the procedures for any potential small claims process would be the time frame. And a lot of people have noted that federal court litigation could take a long time and can be a bit of a burden on a copyright holder. And so one of the questions we had was whether there should be a specific time frame built into any small claims process; for example building in that you have X time to respond, which is a common thing; you have X time for discovery but making it very short, maybe longer and what kind of the length of time would be. And it's actually even something that should be considered.

Ms. Wright?

MS. WRIGHT: The federal court system is set up for four-month discovery period and then time for motions practice after that. And some federal courts just don't have time to put you on the calendar. And the whole process gets delayed.

However, I've been on the rocket docket in Virginia. And they enforce the four months, and you go to trial right after that. So I would hope that this is a fairly quick process, within a few months, you file it, and you get your decision within just a few months' period, hopefully, six months or less, because the delay is very frustrating to a lot of our clients. They don't understand what takes so long.

And it would be also nice to have a quick remedy. It might help curtail infringements if there were a faster turnaround time from a complaint, filing of the complaint, to the judgment.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: In the APA member proposal, that's exactly what we do. We deal with what Mr. Brennan brought up with these medium-sized claims, that anything under $80,000 would fall under this. And it uses the existing and the rocket docket timetable. So that it expedites discovery witnesses. Everything gets done on a timely basis. And that in itself cuts costs. And that in itself makes this an affordable thing, you know, system, to use.

MS. ROWLAND: Okay. Ms. Tommaselli?

MS. TOMMASELLI: We would definitely agree that it needs to be a quick process. As I have mentioned earlier, we do administer an arbitration tribunal. And within that set of rules, it's a 180-day time frame from start to finish where an award is issued. And that is really important to our member companies that there is a quick remedy that is also cost-effective with respect to the arbitration award but that they can take that and enforce it because when the film was being infringed upon, it obviously decreased the value of the film the longer that that goes on. So a quick remedy is really important. And that they could enforce any sort of judgment or award that they get immediately is critical.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: I would agree that you need to have a quick procedure, understanding that the plaintiff usually has the advantage there because they can prepare their cases as long as they want before they file. So the defendant has to have some time to prepare. You probably want to have a relatively fast

procedure, but the court also has to be allowed to change and adjust its calendar. So you probably would have suggested like the form in federal court where the court had the ability to extend it for whatever the court wants to extend it for.

MS. ROWLAND: Okay. Ms. Bristol?

MS. BRISTOL: Maybe if you are thinking of the pure small claims, where it's just individuals coming in, you could mimic what you have for the current small claims, where you get a hearing date in front of a judge within 30 or 60 days and you go in and you have your 15 minutes or 30 minutes or an hour, and that's it. You don't have a full-day trial. We're just talking individuals here.

So you would know within 60 days you're going to have your time in front of a judge if we're talking individual, the true small claims. And then the judge sends maybe a decision within 30 days after you actually have your time in front of the judge. So it's something much shorter than the mini trial.

MS. ROWLAND: Does anyone else have thoughts on the time frame? Ms. Robinson?

MS. ROBINSON: Well, I think the speed and efficiency are an attraction of this. So whatever we can do to promote that would be really important.

MS. ROWLAND: Okay. And, with that, we can move along to I think a topic that is of interest to us. I'm not so sure. I don't know how many people commented on it, but it's more about the record of the proceedings. And so once a decision is made, how should that be memorialized? Should there be any sort of written opinion on these small claims matters where it would be published? Would it be publicly available? And how would that work?

So who has thoughts on what happens with the decision? Does anyone? Ms. Calzada?

MS. CALZADA: Yes. We also believe that they should be in writing, in part, because if the party needs to appeal, it is more useful for the appellate. And also, as a journalism organization, as an organization that represents and advocates for open government, we highly support records, open records, that kind of thing.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: I think that you have to have a written decision here. And, again, you have to ask, how does this thing fit into the whole process? Again, let me just ask it a simple way here.

We said we're just going to have copyright infringement claims. Great. I'm not going to have a CMI claim. What is the effect of this decision? Assume I have a decision in a small claim of willfulness. Does that have res judicata collateral estoppel or, as our Supreme Court likes to say, claim preclusion, issue preclusion?

I have a decision in small claims court, willful infringement. Can I use that as a basis to now have a separate claim on the CMI claim and say, "Look, I proved knowledge. I proved the infringement. Now I also have a CMI violation. And I don't have to prove that again because I have res judicata effect in the small claims court. In order for it to have that effect, you've got to have a written decision.

And the other question is, do you have records of the proceedings? And that may be up to the parties to elect to have records, but you probably

want them to have court reporters and a record of the proceeding or at least an electronic record if we do it electronically so there can be a record. And if there's a written opinion on an electronic record, then you have to ask, what is the effect of this decision? It's appealable, probably has to be appealable in some way. You don't want to have a decision that doesn't have an appeal. This is sort of not like arbitration. Even arbitration has some limited challenges.

And so I would suggest written opinions, record of the proceedings unless the parties say they don't want to have it or if they opt into it and also then has a claim preclusion effect if you use issues adjudicated in this claim and other related matters that were filed outside the scope.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: But I don't think it should be appealable because of the venue. It can't be appealable because you decided to go into a tribunal or an arbitration. I mean, that was my issue with making sure that constitutional issues were dealt

with. It can't be appealable because you decide to have a tribunal and then you can't go and say, "Well, my constitutional rights weren't met because I didn't have a trial by jury."

MR. BRENNAN: This is another issue. If you are going to make it appealable, on what issues? And that brings --

MR. GRECCO: Yes.

MR. BRENNAN: -- the next issue. Are you going to use Federal Rules of Evidence or not? My suggestion would be, at least in the mini trial, sure, you would use the Federal Rules of Evidence. So you would have appeals on the usual grounds, you know, evidentiary errors, errors of law.

I agree that if we resolve the constitutional issues, you're not going to have a constitutional appeal. And I didn't get a jury trial. Otherwise, it should be appealable on normal grounds that you would appeal any decision.

MS. ROWLAND: Anyone else? Okay.

MR. BRENNAN: But we didn't answer --

MS. ROWLAND: I'm sorry. Mr. --

MR. BRENNAN: -- your question here. You said, what if we have just the pure small claims procedure or it's only two parties come in, they are here for the judge? Are those decisions written and appealable? I think it should be written. They probably should be appealable just like small claims procedures are appealable right now. I think you come to the same issues here.

Whether or not it has claim preclusion effect, however, is a different issue. It might be appealable, but maybe you say a small claims issue, especially if in small claims, you allowed willfulness claims. If you had a small claim, under 10,000, and somebody found willfulness, would you want that to be claims preclusion or would you like to say, "No. Willfulness has to be something that if you need to go back and use it in a related matter, like a CMI claim, that the small claims, two parties, maybe that willfulness filing is not sufficient."

Just off the top of my head, thinking right now, I would say that willfulness findings in the tiny small claims procedures, my instinct, just off the top

of my head, would be that they should not have claim preclusion effects. So you can retry that. But a finding of infringement in that small thing would be sufficient to use in another matter.

MS. ROWLAND: We are going to discuss that tomorrow morning.

MR. BRENNAN: Okay. Sorry.

MS. CHARLESWORTH: It's okay.

MS. ROWLAND: No. It's been mentioned many times. It's all interrelated.

Anyone else have any thoughts about the record of the proceeding? Has anyone ever been involved in other kind of dispute resolution processes, like UDRP, like domain name disputes; or the Trademark Trial and Appeal Board; or other kinds of similar small -- well, they're not really small claims, but, you know, different procedures in which you can try to get your claims heard.

My point is they have different ways of recording their pleadings. For example, in the domain name dispute arena, they have these opinions that they post on their website. So, for example, the World

Intellectual Property Organization, they post all of their decisions up on their website. And the National Arbitration Forum does the same. They're usually three or four pages. And there you have the record. And that is public. So it's shown for everybody to see.

MS. CALZADA: So I definitely think that that is critical that there be the opportunity. Maybe it's not the responsibility of this particular tribunal to post all of that stuff, but it should be available so that people can track and get a sense of who common infringers are. And it will put people on notice that, yes, these are folks that do this on a repeat basis.

And I think that it will benefit the public. It will benefit people who are infringed who want to know, you know, should I go to this court? What will happen if I go to this court? Just all of these things will benefit the public by having these opinions available and clear and in writing.

MS. ROWLAND: Anyone else? Mr. Hasbrouck?

MR. Hasbrouck: Whatever form the decision

takes and whatever degree of detail it needs to go into, it does need to be a public record that is publicly accessible for all the reasons that have been stated and so people will be able to make decisions about whether to deal with these companies or trust them when they license to them on the basis of what has been found about their historical record.

Especially given whatever kinds of limitations on damages, the naming and shaming are an important function of this tribunal. And that can't be carried out if its decisions aren't a public record.

MS. ROWLAND: Any other thoughts on the record of the proceeding?

(No response.)

MS. ROWLAND: Okay. Another issue -- and this is the final issue that we had for the third panel of the day -- is actually a very important one. And it's about frivolous claims. And there were a lot of comments worrying about and pointing out concerns with frivolous claims and how to stop them, worrying that if the bar is set too low, then there could be

some spurious claims out there that could kind of muck up the system.

Has anyone had any experience with this type of situation, claims against your clients or it was -- we're hearing laughter from the --

MS. CHARLESWORTH: From the gallery.

MS. ROWLAND: -- the gallery. Mr. Brennan?

MR. BRENNAN: Well, speaking here as a litigator, I know when I am the defendant, I think every plaintiff's claim is frivolous. And when I am a plaintiff, I think every defense is frivolous. So I am sure that happens, but if we look at it right now, your big defense, if you will, in the current system with regard to either filing frivolous claims is the fact that the defendant can collect attorneys' fees, costs and attorneys' fees, if their defendant wins. So that is always something that you think about.

Especially if you are representing a plaintiff, you always have to advise them, "Look, this isn't just like, you know, state court in an auto accident case. We file. We lose. We go home. You just lose your money. You are going to get assessed

attorneys' fees," and that is a very real possibility.

And to me, I don't think that there is much of a problem here as if you have some attorneys' fees, potential for defendants to collect attorneys' fees if they prevail in the case.

Now, I would suggest caps on what those fees were. And I might even suggest certain ways to adjust those fees. We can discuss them tomorrow. But it seems to me that is the biggest disincentive you need against frivolous claims.

MS. ROWLAND: Ms. Calzada?

MS. CALZADA: So I definitely echo some of what he says. I would say, though, that in a small claims situation, my concern would be that I don't want a plaintiff stuck with paying the attorneys' fees of the defendant if it's not truly a frivolous claim. And so an automatic I lost, now I have to pay the other side's attorneys' fees would concern me. I would want a specific finding of frivolousness from the adjudicator.

And a cap would be also beneficial, but in general, you know, for truly, truly frivolous claims,

I am not opposed to that. I caution you that we don't put plaintiffs in situations -- I mean, already the whole -- part of the problem with going to federal court is all of the intimidating elements. And that is certainly one of the intimidating elements.

And so accessibility being an issue, it has to be reasonable. And it has to be something that, you know, if I just happen to lose because my claim wasn't good enough, that I am not stuck with enormous attorneys' fees.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: Yes. I haven't heard of very many frivolous claims by individual artist plaintiffs. I mean, if the case isn't good enough, your attorney is not going to take it on contingency. And if the case isn't good enough, it's a lot of out-of-pocket for witnesses, experts, attorneys' fees, costs. I mean, I don't think this is a tremendous issue, especially when you're dealing with these smaller infringements.

MS. CHARLESWORTH: Well, I think, at least in one version of the system -- and I think we have

been discussing maybe two different versions, two, what we have been calling the true small claims version and then a version that's the mini trial version. But in the true small claims version, in theory, someone could file a case by filling out some paperwork and paying $100 or $200. And then you would be in the small claims court. And so the concern is that there would be individuals who would do that without -- perhaps with good intentions but not understanding copyright law and perhaps maybe with not good intentions and how to prevent that from happening because I think the user community or people who use copyrighted works, although one such claim may not be a big deal, if there are suddenly a lot of small claims, it still kind of gums up their system. And they would feel obligated to defend them.

So I think at that level, the question is what are some good safeguards that would ensure that the claims being asserted were meritorious and in good faith.

MR. GRECCO: I think that the way a true small claims system deals with that is there are

attorneys allowed into the courtroom unless it is an appeal. So what is the cost to a defendant by questioning their use of a photograph, that an employee has to show up and defend that use? I mean, I can see how it gums up the works, but there isn't really an incredible expense, you know, for the defendant.

And I think if you're going to that level of small claims tribunal or system, which I don't support -- I support, you know, our system. I think there needs discovery. I think, you know, no one truly knows what was stolen until someone answers the question and has to produce discovery and has to, you know, possibly do a deposition and swear under oath that this was the only use of a photograph, but if you're keeping the system to that level, then I don't see what the damages are to the defendant.

MS. ROWLAND: So this is definitely an issue for debate. And I think that it does come up.

Ms. Wright?

MS. WRIGHT: Well, we already have Rule 11.

MS. ROWLAND: Yes.

MS. WRIGHT: So it could be on the same standard. And you have prove frivolousness. It was completely a frivolous claim. And if there's an abuse of the system, then the tribunal can handle it accordingly, similar to Rule 11.

MS. ROWLAND: Sanctions, that kind of thing?

MS. WRIGHT: Yes.

MS. ROWLAND: Ms. Knappen?

MS. KNAPPEN: The idea that what keeps the frivolous claims from coming is that you set a standard where people have to have a certain amount of money to play the game. I don't think it's helpful. At small claims here in California, you don't need an attorney. Attorneys I believe are prohibited. And so it opens it up. So I would argue that the way that you would prevent frivolous claims under that sort of system is that you do ask for some sort of proof going in and somebody reviews the case before it goes all the way into the court.

MS. ROWLAND: Ms. Bristol?

MS. BRISTOL: I might be mistaken, but I think at least Los Angeles County small claims does

have a way of tracking frivolous claims and people who are repeat filers. So it might be something to look into.

Also, just on the issue of attorneys' fees, I'm not a litigator, but it is my understanding that the majority of cases settle and don't really end up going to trial or judgment unless they're the bigger cases. So, at least with the cases that I mediate, the attorneys' fees issue might not really come into play unless we're really talking the cases that are actually going all the way to trial.

MS. ROWLAND: Okay. Mr. Brennan, did you have your --

MR. BRENNAN: I would agree with the comments here before that I think a Rule 11-type sanction is there, especially if you have one court, a centralized court. It's not like this is very diversed. You're going to see if one party starts filing multiple claims that don't make any sense.

You know, you have some sort of a vexatious litigant standard, at least in California. And I think you could apply a similar standard in the

federal court under Rule 11. The same court is going to be there and say, "Look, this is the tenth time I've seen you on this claim. You aren't getting anywhere. You're just out. And you become vexatious."

So I'm not sure that the frivolous claims are going to be as serious. I don't see them as being significant, at least in the small claims area. I think the court will be able to control those and keep those out.

MS. ROWLAND: Mr. Hasbrouck?

MR. HASBROUCK: The creators have better things to do than being in court. The last place that they want to be spending their time is in court. Court is a last recourse. They're only going to be there. They are only going to put their creative work on hold to waste their time chasing the prospect of getting some money for some old work that is being infringed if they take the matter really seriously. I think their own self-censorship, self-vetting of the legitimacy and the worth and the value and the importance of the claim and the amount of time they're going to have to invest in it is the strongest check

on the likelihood of truly frivolous claims from creators themselves.

The other thing is that there are going to be a lot of claims. We hope there are going to be a lot of claims. We know there are a lot of infringements, that the number of infringements is orders of magnitude larger than the number of cases we're seeing now. That is the reason for this whole proceeding. So we should expect a lot of cases. And while there may be some frivolous cases coming from somewhere, they're going to be a drop in the bucket compared to the legitimate cases that are being foreclosed by the present system. And if the occasional frivolous case taking up a little bit of time to get thrown out once it gets in front of the adjudicator, if that is the cost of doing business or bringing justice to very large numbers of victims of infringement who have no justice now, that is a cost of doing business that we should be prepared to accept as something that the government should pay for as part of the cost of providing justice.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: I would agree. I think that most artists feel that going to court is, you know, this horrific, horrible experience. And some don't --

MS. CHARLESWORTH: We lawyers are trying not to take this too personally.

(Laughter.)

MR. GRECCO: Some don't defend their work, even if they have a righteous case, because they don't want to deal with it. So the frivolous lawsuit issue -- I don't believe Rule 11 applies in copyright, though, right?

MS. ROWLAND: It is a Federal Rule of Civil Procedure. So it applies to all federal cases.

MR. GRECCO: Okay. I thought in copyright, only the plaintiff can get an award of attorneys' fees. It supersedes. The copyright law supersedes --

MS. CHARLESWORTH: There are two different provisions. The Rule 11 --

MR. GRECCO: I am not an attorney in court.

MS. CHARLESWORTH: No. I can tell from your comments.

(Laughter.)

MS. ROWLAND: I think she was saying -- she was not remarking about the quality of your comments. She is remarking about the comments about going to court.

MS. CHARLESWORTH: Strike that.

Rule 11 is a general rule that basically says if you sign a pleading and submit a pleading to court, it is a good faith requirement. And if you are found to violate it, the court can sanction you. And it's a fairly high standard. But basically it is to keep lawyers honest when they file something.

In the Copyright Act, you have section 505, which is a separate provision, which has to do with fee shifting, I think, maybe -- is that what you're referring to? -- which has to do with whether you win or lose the case and whether the court awards fees.

MR. GRECCO: Versus an offer of judgment.

MS. CHARLESWORTH: Which is another rule, --

MR. GRECCO: Okay.

MS. CHARLESWORTH: -- yet a separate rule, which is also general in terms of a party makes an offer, and then if it's not accepted, there can be

certain consequences in terms of the outcome of the litigation.

MS. ROWLAND: Ms. Calzada?

MS. CALZADA: I just wanted to say there are frivolous claims now being litigated in federal court. And if I am a defendant, I would much rather have my frivolous claim adjudicated in a small claims court, where I had to spend less time and had some sort of rocket docket and less discovery because I think that would get me out of there quicker.

MS. ROWLAND: Ms. Wright, did you have something?

MS. WRIGHT: No. That's all right.

MS. ROWLAND: I would just, just for the record, that we did have comments that did discuss the importance of the Rules of Evidence and that there are people out there who, parties out there who, seem to have encountered these. And it's an issue that really does need to be dealt with.

And we have a great panel here. So perhaps no one here is engaged in such frivolousness. But it is a problem that the copyright community faces. And

it undermines the entire procedure. So anything we can do to limit frivolous claims is something that we are interested in.

Ms. Wright?

MS. WRIGHT: That just brings up the point that, actually, some courts now will award the defendants the attorneys' fees with the idea that if attorneys' fees can be awarded to the plaintiff, the copyright infringement lawsuit, that it can be awarded to a successful defendant and not even necessarily successful defendant, even when infringement has been found if it has not been too egregious or in certain circumstances, courts have awarded attorneys' fees to the defendant in a copyright infringement lawsuit. So it is just another way to temper the frivolous claims filing.

MS. ROWLAND: Does anyone else have any thoughts on it? Ms. Robinson?

MS. ROBINSON: My colleague Erin Kunze reminded me that we do get a number of frivolous inquiries in our office, people who wrote all of Michael Jackson's music or et cetera, wrote the latest

blockbuster movies, the scripts. And so I think having some sort of screening, we discussed legal advisers at the front door that would help people self-evaluate and decide that they didn't really have the evidence to pursue this would be helpful.

MS. ROWLAND: Right. And a point to be made was that sometimes a person who brings a claim might not realize quite how frivolous it is.

MS. ROBINSON: Right.

MS. ROWLAND: You know, they're not a lawyer. They don't understand the system or the laws. They might in their head think, "Well, this is the situation." And they don't realize too much time has lapsed. So it's really not a viable claim at all. So there are times when frivolous claims are not completely malicious. And so if there is a way that we could figure out how to reduce those claims as well, it would be great.

Does anyone else have any thoughts on the frivolous claims issue?

(No response.)

MS. ROWLAND: Okay. So we can move along to

panel IV, which I think will be actually a shorter panel just due to the number of topics we have to discuss, basically deals with arbitration, mediation, and settlement. So these are all different types of litigation alternatives. Thinking that if there's not going to be the mini trial like Mr. Brennan was talking about, are there other options that could be helpful to small claims holders? And the first one would be arbitration.

And does anyone have any thoughts on what role arbitration might play in a small claims process, whether it's a good thing/a bad thing/indifferent. Mr. Grecco?

MR. GRECCO: It automatically alleviates an attorney doing a case for a plaintiff on contingency because of the cost involved. Somebody has got to pick up the cost of the arbitration. And that is usually more than court costs, filing fees. So it changes the dynamic of an artist and attorney relationship and limits one of the possibilities for the artist.

MS. ROWLAND: Mr. Brennan, do you have a

point?

MR. BRENNAN: Just when you say, "arbitration," you have to be careful because now you are putting yourself I assume under the federal Arbitration Act. And there is a whole different range of things that happened there: evidence, how you present it, finality of the rules, appealability, enforceability. So if you're thinking this as arbitration, you know, parties can always agree to arbitrate right now.

IFTA has a number of our cases in which we do arbitration. And it covers these infringement claims. I'm not sure if setting up an extra arbitration procedure at the federal level really adds anything. There are enough arbitration procedures here. And in order to have arbitration, you can't force people into it. It's going to have to be voluntary. So I'm not sure that you added very much by looking at arbitration as an alternative.

MS. CHARLESWORTH: I had a question. Ms. Tommaselli, you referred to your arbitration program. Could you just briefly explain how it works, what the

process is?

MS. TOMMASELLI: For filing a claim?

MS. CHARLESWORTH: Well, just an overview of the process: filing the claim. And I think you mentioned you have 180 days. And who bears the costs? How does it just as a --

MS. TOMMASELLI: Well, basically the claimant will file a claim. And then the respondent has a certain number of days to respond to that claim. And, also, within that time frame, they have to put a deposit on the arbitrator's fees. So the parties share the fees of -- the claimant pays the filing fee, which is a percentage of the claim, with a cap. So it's, you know, a percentage of the damages with a cap. And then we have various fees for members and non-members.

There are differences. But once the plaintiff pays the fee, then the parties put a deposit on the arbitrator. And they share those costs equally for the arbitrator's hourly fee, which, you know, we encourage the fast resolution of the claim. So the average amount of the arbitrator's time is usually

less than 16 hours, and less than 5 hours if it's a default, where one party doesn't show up.

And then, according to the rules, the arbitrator has the authority to allocate the costs differently. So at the end of the arbitration, the prevailing party, whether it be claimant or respondent, plaintiff or defendant, could recover the entire amount of what they paid for the filing fee as well as their costs and attorneys fees. The arbitrator has discretion in those three areas to award that to the prevailing party or just decide that both parties pay their own costs and equal share of the arbitrator's fees.

After the respondent responds to the claim, then the arbitrator is generally appointed by then, sets a hearing date. The time frame is 60 days from the date of the filing of the last claim or when it was due to be filed in the case of a respondent who doesn't show up. And then there is a 120-day outside hearing date.

So if the parties are engaged in settlement or sometimes, you know, there are illnesses or things

like that, then the parties can agree, with the arbitrator's approval, to extend up to 120 days outside of that.

After the hearing has been heard and the matter is deemed submitted for decision, the arbitrator then has 45 days to issue an award.

So when you add all of that up, it turns out to be about 180 days. And there are certain things, like I said, if there are settlement discussions or if there are, you know, extenuating circumstances, where some of those deadlines can get pushed, either by the arbitrator or by the parties, agreeing to extend them. But according to the rules, it is set up to have a final award issued within 180 days of the filing of the first claim.

MS. CHARLESWORTH: Thank you. What is, just out of curiosity, the range of costs that you see in terms of the arbitration fees?

MS. TOMMASELLI: For the arbitrator, you mean?

MS. CHARLESWORTH: Yes. Five hours or so, I think you said?

MS. TOMMASELLI: Well, our arbitrators actually work for less than the going rate for attorneys in the entertainment industry. And they're admitted to the panel based on their expertise. They have to meet a certain number of qualifications in order to be even considered and admitted to the panel.

And for the member rate, so if one of the parties is a member, it is $300 an hour for the arbitrator. And if both parties are non-member companies, then it's $350 an hour. So an average of default cases is generally under the $1,500 deposit that the claimant makes and then, you know, up to 16 hours, just a general case that goes beginning to end with both parties appearing.

MS. CHARLESWORTH: That is very helpful. So, looking at that as just sort of one arbitration model, I guess we heard one negative reaction. I mean, does anyone think that a model like that might serve small copyright claimants or is it too expensive for them? Does it make any sense to consider it further, an arbitration alternative?

MS. CALZADA: I do feel like it's too

expensive. And, also, it is not clear to me what forcing parties to go through another proceeding would add to the process of something that is supposed to make it simpler. And our other concern, of course, is mandatory arbitration wouldn't be constitutional. You know, what other parties chose to do I don't know. It would be up to them.

MS. CHARLESWORTH: I think one question is whether setting aside a small claims court, whether just instituting or making an arbitration system available, similar to -- I don't want to say exactly like what we heard, but along those lines, whether that would be of service to the copyright community or whether it really wouldn't fill the need that we have been discussing today. Lots of hands. Mr. Hasbrouck?

MR. HASBROUCK: Our feeling, our experience with our members who have ended up in arbitration has not been particularly positive or that it's particularly cheaper or more accessible or more fair to the small claimant than would a federal lawsuit.

Generally, writers end up in arbitration if and only if publishers have imposed arbitration

clauses on them. Publishers are not irrational. They impose mandatory arbitration clauses because they correctly believe that those arbitration procedures will be more biased in favor of the publishers and against the small creator than regular court procedures would be. And in our experience, that proves to be true.

So if people genuinely want to make a free choice to go to arbitration, they have a variety of options available now, but setting up one more federally administered system of arbitration is not going to resolve the problem that we are trying to address here. And hopefully the copyright small claims process will provide a better and genuinely more accessible and cheaper, yet still fair system as an alternative to possibly going to arbitration because it's the only thing that maybe you can afford, even though you know it's stacked against you.

MS. ROWLAND: Ms. Tommaselli?

MS. TOMMASELLI: I obviously disagree that an arbitration system is biased. We think that is a fair system for either party in that the arbitrator

weighs all of the evidence and makes a decision. And we actually did start publishing summaries of the cases because the arbitration users were interested to see if a certain arbitrator always chooses one side or that the claimants always win or vice versa. And there was actually no evidence of that. One side always prevails. So we disagree with that.

But the bigger issue I think with the arbitration and as far as I want to address also it being cheaper, yes, because you are paying for the arbitrator and you wouldn't be paying for a judge that does get to be more expensive. However, if the arbitrator -- if we're comparing it to court, if the arbitrator, you know, keeps within the confines and knows what the purpose of arbitration is and doesn't allow the extensive discovery that's allowed and, you know, a lot of times, we even have hearings on written submissions, you know, if it's a clear-cut case or it's a default case. So, I mean, it's really up to the arbitrator as to how far it can go and how long and drawn-out it can be. You know, and that goes to choosing who you pick to be on the arbitrator panel so

that they understand what the goal is and what the objective is.

And just a third issue is it is required that both parties consent to arbitration. So I think, aside from how we feel about arbitration, getting the defendant to agree to use the procedure is really the biggest hurdle, I think.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: I want to run this by the attorneys because I can only assume this, that if it is binding arbitration and it's not appealable, do we throw out the law, to a certain extent? Does the arbitrator get to decide, get to decide, get to cut up the child the way they get to cut up the child because there is no threat of appeal and sticking onto the legal point? I'm asking a question because that would be my fear here.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: Also, being an arbitrator in some of these procedures, let me just add two things. I think Ms. Tommaselli is right about sort of the neutrality of the arbitration procedures here, but,

remember, the IFTA arbitration was set up primarily for commercial disputes among people in the international motion picture industry. So I have had arbitrations where I have handled claims, as I said, against somebody from Greece and somebody in the U.S.A. I had one against Poland and another guy from Turkey. So it's more of a professional thing. And you are looking for an arbitration because you are looking for a procedure that can be enforced internationally.

The thing that happens in arbitration that is different from litigation that you have to be careful about, when you are dealing with commercial parties, you often have parties who are rather sophisticated in what they are doing. And so that they can usually present their case. And they just both need to tell their story.

However, what my experience has been is since you never know what the crazy arbitrator is going to do, especially in contested cases, the attorneys tend to try to litigate to the max and raise every issue they can before the arbitrator because

they don't know what exactly you are going to do. And so they tend to raise whatever issues they can to say, "Well, maybe some mud will stick on the wall."

So, at least in some contested cases, I think that the arbitration is at least -- attorneys always do this. They just make cases more complicated because they don't know.

In terms of arbitration, you have to remember there is an entirely different mindset and procedure that happens. When you are in arbitration, the first thing is parties have to agree. The thing you have to realize is that Rules of Evidence are relaxed. You have different arbitration rules. There are three different arbitration statutes in California, and they're all different. The FAA is not the same as California. International arbitration is not the same as commercial arbitration or it's not the same as mandatory judicial arbitration. So they are all different. The Supreme Court hasn't allocated those.

Whether or not you can challenge an arbitration award for failure to follow the law is a

very tough issue. It's not firmly decided by the Supreme Court. They still haven't issued it. So you are throwing yourself into an entirely different set of rules that are not necessarily well-decided or uniform.

So my sense as a litigator here is I would rather -- if I am dealing with the mass tort cases that you have, it is usually a plaintiff against a party who has never agreed to arbitrate here before. And it is just better to go into small claims court. You're not dealing with commercial parties here. And so I am not sure that arbitration really gives you much of a benefit.

And if you wanted one for the parties here, there are plenty of arbitration procedures. If the plaintiffs and defendants want to arbitrate, you can always, the court can always, say, "Well, why don't you go mediate?" There is mandatory mediation in federal court. You can always look at each other and say, "Let's arbitrate." And you could always make that decision. I have had that happen in a number of cases where people have said, "Well, let's just go

arbitrate." And then you make a strategic decision of whether or not you like the arbitration panel.

I'm not sure setting up something here gets you very far for what you are trying to do.

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

MS. ROBINSON: Well, I was going to speak to mediation because I think that would be a much more useful adjunct to the small claims court procedure than arbitration, --

MR. BRENNAN: Sure. Sure.

MS. ROBINSON: -- which can be clumsy. And it's not going to get the efficiency and speed that we would like to see out of a small claims process.

MS. ROWLAND: Okay. Does anyone else have anything else to say about -- Mr. Grecco?

MR. GRECCO: Mediation is a part of the federal court system now. I mean, before any case goes to trial, you are to sit there with a magistrate and try to settle, you know, possibly right after discovery. So I don't think that there is anything new there, that mediation should be available always,

whether it's a small, very tiny, small, claim system, which it is in Los Angeles County. It should be available in a federal fast track system. And it is already available in the federal court system.

MS. ROWLAND: Ms. Robinson, I know that the California Lawyers for the Arts has a mediation program. Would you care to tell us a little bit about that?

MS. ROBINSON: We do. And it's specialized for arts legal problems of all sorts. As a result of our work with the response to the notice for these proposed changes for small claims court, we investigated it further and went to the U.S. District Court in San Francisco to see what kind of mediation services are available and if it would be useful to have a specialized panel for IP cases. And so we have collaborated with the mediation program of the U.S. District Court in San Francisco to plan a mediation training for IP lawyers.

And there are many courts around the country which have mediation, as you suggested. I think it's mandatory in different degrees in different places.

But whether it would be sort of a pro forma situation, where you have to go to a magistrate, as you mentioned, or you would really have a genuine mediation process, where a mediator is trying to foster communications between the parties to facilitate a resolution are really two different kinds of procedures. And it's the latter that we try to promote; that is, if the parties are there in good faith.

Now, if the infringer is somebody you are chasing around the world, then you are obviously not going to get them into mediation. And you are probably just going to be satisfied with your small claims court procedure. But, on the other hand, if this is someone that you may have had a working relationship with -- we talked about co-authors, for example. People who have worked together suddenly find themselves in court. If they have an opportunity to talk to each other and figure out all of the other kinds of opportunities to settle the situation or resolve it through mediation, it can be a much more creative process that leads to I think a wider variety

and more satisfying set of results than you would get in small claims court. So I think we would do well to encourage people to really use mediation in good faith and not just as a formality to get on to the heart of the matter, which they are conceiving of as a quick resolution in court.

MS. CHARLESWORTH: Just a quick follow-up question. Do you think that -- assuming that this were largely a remotely conducted process where you had people perhaps far away from one another in the case of, say, an internet infringement issue. Do you think there is an effective way to mediate if the people are not there in person? Is that --

MS. ROBINSON: We have had telephonic and electronic mediations with people in different locations.

MS. CHARLESWORTH: So you found that to be effective or less effective or --

MS. ROBINSON: It can be effective. Again, if people are there in good faith, if they really want to resolve it, if they want to explore other options, then it can be effective.

MS. ROWLAND: I saw a bunch of people over here. Ms. Calzada?

MS. CALZADA: Yes. We do support making mediation a part of the process. But, again, we just want to make sure that it doesn't become a burdensome part of the process. I think it could be very effective to sit both sides down and, you know, have a mediator with that experience and knowledge, you know, getting things going and pushing things towards a settlement so that perhaps we finish this sooner and move on.

But we would hope that it would be a telephonic conference, something that didn't require an in-person appearance, you know, maybe a videoconference or something along those lines but as long as it doesn't sort of add to the burden of the process too much.

MS. ROWLAND: Mr. Hasbrouck?

MR. HASBROUCK: A common experience for us at the National Writers Union in working with our members who have grievances is that the infringer won't even talk to the victim, won't respond to

attempts to negotiate or discuss the infringement. And they can do that now because they are confident that the infringer is impotent to sue because they aren't rich enough to sue. So they can with some confidence just literally ignore them.

And we would hope that if this small claims process proves effective, then we would actually see a lot of its effect in settlement, where people would realize that there actually is a recourse that is available, that if they go through with the adjudication, they are likely to lose if they are, in fact, an infringer. And they will be motivated, at least at the point where they get notice, "Oh, they actually filed a small claims copyright lawsuit. I guess now we actually have to talk to them."

So while we would be hopeful for the prospect that, you know, whether through direct negotiations or mediated settlement talks in some way, a lot of these cases would settle. They would settle if and only if infringers have come to learn that they're actually going to lose and it is actually going to be costly to them if they pursue these

matters to a small claims adjudication. So I think if they make the small claims process work, the settlements will take care of themselves.

MS. ROWLAND: Does anyone -- Ms. Bristol?

MS. BRISTOL: Being a copyright mediator, I do find that many of the clients who come to me are pre- litigation. So, although mediation is in the federal courts and I am on the federal court mediation panel, I do have quite a few people who are coming to avoid the filing of the lawsuit in the first place because once the plaintiff has reached out and sent their demand letter, sent their cease and desist, and is then forced to go into court, they have a completely different attitude about going forward and how much they are going to demand in a settlement. And this may not be the same for all of you, but I find that they are a little bit angrier that they have had to get an attorney, file, and pay the costs, and go through all of those steps.

So pre-litigation, I don't know if this is something that could be considered for the small claims panel or even the mini trial might be an option

to get the parties talking. There certainly will be instances where the infringer is going to blow the plaintiff off until they actually file something and force them in. But there might be some situations where you have innocent infringers who really don't understand copyright law at all. And for some clients I have had as an attorney, they really don't understand copyright law. They do believe all they need to do is attribute a picture or an article. And they can copy it and paste it somewhere.

So, for those who are uneducated, pre-litigation mediation might be a way to resolve the matter confidentially without putting those clients' names on the docket, either as a litigious plaintiff or a defendant who has been sued for copyright infringement. It may help to preserve the reputation of those who are ignorant of the copyright law without putting them in the public eye and with a sophisticated mediator who is experienced in copyright law explaining what has happened and helping the parties to settle outside of court. It might be an option.

MS. ROWLAND: I was going to say that is one option. How do people feel about making the parties try to do some sort of mediation before moving forward to a more formal situation? Obviously sometimes the defendants might not show up at all. So then you could have some sort of process by which the copyright owner files something with the small copyrights tribunal saying "We sent them. They didn't respond. Moving along" or do people not agree with that as a process? I saw Mr. Brennan shaking his head.

MR. BRENNAN: He can go.

MS. ROWLAND: Mr. Grecco?

MR. GRECCO: I think the reality is no one takes you seriously until you file. I think that -- is that your experience? No one takes you seriously until you file. Every defendant I know in my own copyright cases are like "Whatever."

MS. ROWLAND: I see Ms. Wright shaking her head.

MS. WRIGHT: Well, we resolve the vast majority of our copyright claims pre-suit. And so we go through the settlement process. Sometimes we

employ mediation, formal mediation process. The vast majority of the time is just a negotiation between our attorneys and either the alleged infringer directly or the alleged infringer's attorney. It's probably about 50 percent where the alleged infringer is represented.

And sometimes we can't get it resolved. Then we make the decision as to whether we are going to file suit but since it's such a major process. And at that point, the expense is dramatically increased. And it's a very serious conversation and decision with our clients as to whether we will file suit.

But definitely since it's -- hopefully with the small claims copyright infringement tribunal, it would be much easier that the suit and then get the attention of the alleged infringer. If it was much easier to do that, then we would be able to resolve many more cases much easier. And I think it would be fantastic. I am very hopeful for our clients that we can get this established.

But, unfortunately, other claims if we can't resolve them pre-suit, sometimes we have to give up on them. But we do what we can to enforce our clients'

rights.

MS. CHARLESWORTH: I had just had a quick follow-up. Ms. Bristol, you said you handled a lot of pre-litigation mediations?

MS. BRISTOL: Yes, copyright and other types of cases.

MS. CHARLESWORTH: How do those cases come to you?

MS. BRISTOL: Private. I am both private and, of course, the ones through the court are in the court system already but referrals. My clients are attorneys. And so if I were able to resolve a case outside of the court system or sometimes -- I think the litigators will attest to this -- they prepare the complaint, but they don't file it. And they will send it over and say, "We're going to file this unless we get into some negotiations." So sometimes just creating the complaint and the document, sending it over, and threatening to actually file it with the court gets the defendant to start talking. And then they will want to go into mediation.

So it really just depends. I mean, I think

there are lots of cases where you do have to file to get them to start discussing, but depending on how sophisticated the parties are, prior relationships, like he said, if they want to preserve a relationship, sometimes it's just a disagreement on a contract term. Well, they will want to just mediate it without incurring a lot of attorneys' fees or incurring court costs. It really just depends. So I think, of course, I am self- interested because I am a mediator, but I think it is a great process from pre-litigation to litigation.

MS. ROWLAND: Thank you.

Mr. Hasbrouck?

MR. HASBROUCK: I would just point out I think the explanation for the difference between what Mr. Grecco said that nobody listens to you until you file, and Ms. Wright's experience, they were able to get infringers' attention and settle cases -- Ms. Wright is a lawyer and Mr. Grecco is not.

And so I would modify that. Nobody takes you seriously until either you file or you send them a letter with "Esquire" after your name. I mean, people

do listen when they get a letter from a lawyer. It all of a sudden gets escalated into a different -- you know, every organization has a sort of normal business track. And then they have got a "We are getting sued" sort of litigation track of how they deal with things. Once you hear from a lawyer, it kind of gets dumped into that other thing.

But some people, all it takes is finding a friend who is a lawyer to use their letterhead to write a letter to the infringer. But that's not fair that those people should be special privileged, as opposed to people who don't happen to have a friend who is willing to use their legal letterhead to send a demand letter on their behalf. And, without a lawyer getting involved, it doesn't get their attention.

MR. GRECCO: I want to clarify that. I have never contacted -- unless you are a client of mine and you have made a mistake, if you are a third party thief, they have always been in contact with an attorney. And most of these are huge Fortune 500 companies that still don't take you seriously, even with a lawyer letter, because they know how expensive

it is for an artist for a small plaintiff to defend the copyright. So once you have filed, they will take you seriously. There will be an offer.

I have never done depositions on a federal copyright case because there's an offer of judgment that comes very quickly. And then it's a negotiation back and forth. But it's usually taking a filing. And these are very sophisticated people who have a system of infringement. It's a risk management issue out there. There are corporations that are weighing how many times they can rip off the artist versus how many times they're going to get caught and then if they're caught, how many times the artist will have the money and the wherewithal and the lack of fear of the courtroom to deal with it.

It's nothing against you guys. It's an opposing space.

MS. ROWLAND: Ms. Tommaselli?

MS. TOMMASELLI: I guess I would just say that, you know, as far as our members specifically, we wouldn't find mediation particularly helpful because it is important for them to get something enforceable,

an award, quickly in order to preserve their rights and stop any damage that has already occurred.

But I also wanted to point out that we do have -- so that means that our members have found they don't want any mediation service. But we did institute a pre-arbitration settlement procedure where a claimant can file a notice of arbitration, basically have everything all ready to go but choose to do this letter, which is complimentary to members and it's a nominal fee for non- members. And the respondent, the defendant, has ten days in which to settle that claim. Otherwise the claimant can choose to go forward with the arbitration. And that has actually been quite successful.

So it's the sort of threat of filing a claim that seems to work. And it has actually been pretty successful without the plaintiff having to file, you know, the full arbitration.

MR. GRECCO: I don't think that anyone jumps into this from a practical standpoint filing a claim and exploding. I think that, you know, anyone who contacts a lawyer for advice, this is a step by step

by step. You know, the attorneys reach out with a letter. You know, there's been discussion of, you know, "Can we have a phone call to settle this?" Then, you know, when there is no response or "Too bad. We have the right to do this," then the complaint is sent to them. Then it is filed.

I think that this is a -- in most cases that I have seen, this is a very measured strategic situation. I don't think any attorney -- I think attorneys know how to play chess very well. And they do all play chess very well. But there is a large percentage of people who make this their risk management and are willing to go and get thrown down to the mat.

MS. ROWLAND: Mr. Brennan?

MR. BRENNAN: I would agree with the other comments. I don't think that any sort of mandatory prefiling procedures for mediation, et cetera, would have it benefit. It only increases costs and increases the glue and the procedural hurdles you have to jump through to go through a case.

We have often debated in our firm whether

even to send out demand letters. Having sent out scores of them, they never seen to do any good. No one takes you seriously in my opinion until you file, although maybe it's larger cases. And the only issue you make on filing a demand letter is, "Gee, am I going to set somebody up for a willfulness claim because they ignored my demand letter?"

That is really the only issue, is that it is not going to resolve any cases. Most cases that you can resolve, people figure that, especially if you're dealing with large corporations where large corporations, we know how to negotiate something -- we either don't need to mediate or we can take care of it. Cases where I think that, especially in the cases I'm thinking about here, where I call these mass tort claims or where it's pretty obvious what the liability is, you're going to resolve it or not. And I don't think establishing any sort of a prefiling mandatory procedure would have much benefit. It would only increase costs.

MS. CHARLESWORTH: Just to pare it down, I think the suggestion was made earlier that sometimes,

you know, giving a party a period of time to make an offer to settle before you move to a more formal proceeding; so, in other words, requiring a settlement offer and response.

MR. BRENNAN: Why? People can do that now. I mean, I don't see any point in doing that. Lawyers know how to do that or lots of cases that we have seen, they have come to the attorneys because they have already tried to contact the other side. They sent them a note. They sent them an email. People can do that on themselves. We don't need any formal procedure to help them do that. They already know how to do it. And they can resolve these cases themselves. All it does is increase time and costs.

And then what you have done is you have now set up the defendant's motion. In the first motion, you are going to say, "Motion to dismiss for failure to comply with mandatory pre-investigation discovery procedures." Oh, God. You know, explain that motion.

And now I've got to waste time responding. Oh, "And, by the way, yes, I did.

"Well, no, you didn't. No, you didn't use

the magic words in the letters.

"Yes, you did.

"Your Honor, what are you going to do?" And now I've got to have the hearing. And that just delays it. We're just creating glue for no purpose. That's why I would say no.

MS. CHARLESWORTH: Well, just to paint a slightly different picture, I think if you're assuming you have pro se litigants, let's say, who aren't necessarily being advised by attorneys, maybe they don't have a full understanding of copyright law or so forth, you know, you could have a process where before the case starts moving forward, there's an opportunity for the defendant to make a formal offer if they'd like. Obviously, if they don't do that, it shouldn't preclude the plaintiff from moving forward because it's not within the plaintiff's control but just having that built into the process to encourage settlement before the case moves forward.

I take it your answer is still no?

MR. BRENNAN: It is just a waste of time.

MS. CHARLESWORTH: Okay.

MR. BRENNAN: Once you serve the complaint, if it's a small claims case, the defendant gets the complaint, that is my offer to try to resolve it. Defendant calls you up, "What am I doing here? Let's resolve this thing right now." It doesn't add anything. I don't think you get any benefit from doing it.

MS. CHARLESWORTH: Ms. Wright?

MS. WRIGHT: Our experience is that mediation except for court-ordered mediation is a voluntary process. And, frankly, in Central District of California, you can leave five minutes after the mediation begins. So unless the parties are there and want to try to resolve it through a mediation to avoid a longer process, it's just a waste of time. And if people do want to resolve it, they can either set up their own mediations, such as using the California Lawyers for the Arts' process, or they can settle it on their own. It just doesn't need to be part of the process because I think everyone has testified that an expedient process is very important here.

MS. ROWLAND: Ms. Robinson?

MS. ROBINSON: Well, a couple of things. I think it would be good to have it as an option. There's the concept of the multi-door courthouse. So before you go into the door where you file your claim, you have an opportunity to learn a little bit about mediation because it is still kind of a foreign word to most people. And they confuse it with other processes.

So if you could establish a national pool of such mediators who were specialists in IP who might also be available for the patent bar, for other IP situations, such as in the patent/trademark area, that could be broadly useful.

And, then, finally, a story that I want to share if you will bear with me for a couple of minutes. This came from our Los Angeles office when I asked for some recent examples. A visual artist worked with a nonprofit to produce a mural that was part of a children's educational project. The artist borrowed from a photograph she had found and was unable to locate the photographer.

At a festival, they met. And she was

excited to tell him that she was using his work --

(Laughter.)

MS. ROBINSON: -- and it had inspired her piece. And initially that excitement was mutual. He later sent the nonprofit organization a demand letter for payment for copyright infringement. The nonprofit said they couldn't pay him because they were low on funds and because they thought their use of his image was fair use, but they could give him credit. He refused and demanded more money.

At the mediation, they agreed not only on a monetary figure, but the organization, in addition, offered to host a solo project for him in the upcoming year.

He expressed that the mediation was a transformative process for him and that he learned a lot about where others were coming from and about himself. And our staff person says this was amazing considering he initially refused to mediate because he felt he could not trust the other parties in the process.

So the point is mediation can have a lot of

creative results that aren't anticipated at the beginning. And it is an option that is well worth letting people know about if you are successful in having legal advisers advise people as to how they might use the small claims court. Then that would be another thing in the menu that they could offer, that they could help facilitate people getting to mediation because they may not do it on their own. They may not know about it.

MS. BRISTOL: I think, as the attorney said, this might not work in the case of the willful infringer or the corporations that are doing the cost/benefit analysis. And it might not work for people who are waiting for the lawsuit. It may be a good alternative for the individual infringers who really are innocent or who want an out-of-the-box solution that is not necessarily going to court. It is another option to try to help the individuals have access without necessarily the cost and the expense.

MS. ROBINSON: And it takes account of different layers of the legal issues. I mean, here you see they talked about fair use. They talked about

a lot of things that may never have come up in a lawsuit which was just structured around damages in the monetary, which, you know, in fact, as we often say, court decisions you might win, but it's still a lose- lose situation because there's so much animosity that is a fallout of that.

MS. ROWLAND: Ms. Knappen?

MS. KNAPPEN: I like the idea of including that as an option because artists typically don't understand any of the options in front of them or that contracts can be negotiated. It's a different situation if it's the David and Goliath situation, where literally this is the contractor. You're not getting hired. But in a lot of cases, there is negotiation that is possible. But artists aren't aware of it unless somebody has trained them. And you're not trained in schools.

So put that in the process. And we're like "Oh, by the way, there is another option."

MS. ROWLAND: Right.

MS. KNAPPEN: That is very helpful.

MS. ROWLAND: Does anyone else have anything

else to add about mediation? We touched a little bit on the settlement offers and what to do with that. Did anyone have any discussion of any other ways to optimize settlement to kind of get people more excited about settling claims in the onset? Does anyone have any ideas on how to promote that? Ms. Robinson?

MS. ROBINSON: May I say one more thing about mediation?

MS. ROWLAND: Sure.

MS. ROBINSON: We also have a med/arb option. I don't think we've discussed that today.

MS. ROWLAND: Well, you can. Please talk about that.

MS. ROBINSON: So that when people agree to mediate, if they also want to make sure that they have a resolution at the end of process, they in writing agree that if the mediation is not successful, they will go on to arbitration and get a final and binding award. And so that can be efficient for people who really would like to make sure that there is a resolution one way or the other.

That second process can be with the same

third party, neutral, or they can decide to go to a different person for the arbitration procedure.

MS. ROWLAND: Okay. Ms. Calzada?

MS. CALZADA: I just wanted to reiterate that I feel it's important that there not be a penalty for failing to settle or failing to mediate or failing to choose any of these alternative options, that this can, you know, be a way that we go and get our disagreement settled, worked out by a court, and that I not be penalized for declining a settlement.

MS. ROWLAND: Okay. Does anyone else have any other thoughts? I think that pretty much covers panel IV. If anyone has any closing remarks they want to make about it, feel free. Otherwise, that concludes -- I'm sorry. Mr. Brennan?

MR. BRENNAN: All I would say is that what focuses the mind on settlement is very closely tied to what the remedies are and the certainty of the remedies. If you know, for example, that you have a potential willful infringement award and you're pretty certain about collecting statutory damages, if you have a claim for attorneys' fees and you know you are

going to collect them or not, for example, if you are a defendant and you think you have a very strong case and you know what the potential remedies are, that's what really helps settlement. Settlement often becomes difficult the more uncertain your remedies are. And so the greater the certainty of remedies, I think, the easier it is for people to focus their minds on settlement. And that something, remedies, to be discussed tomorrow.

MS. ROWLAND: Thank you.

And so that wraps up panel IV, I believe. So we will see those of you who come tomorrow tomorrow. We appreciate everyone's participation today. It was very productive and helpful for us to hear all of these different opinions. And so we'll adjourn it now.

As we mentioned at the outset, we are recording this. So we have a transcriber over there taking notes. And eventually we will post the comments on the website. So you will see your words on the page.

So thank you. And we will see those of you

who return tomorrow tomorrow. Have a nice evening.

MS. CHARLESWORTH: We hope to see a lot of you.

Ms. Bristol, could you step up here for a minute? Yes.

MS. ROWLAND: Thank you.

MS. CHARLESWORTH: Thank you very much, everyone.

(Whereupon, the public hearing on small copyright claims was adjourned at 5:27 p.m, to reconvene at 9:30 a.m. on Tuesday, November 27, 2012.)

CERTIFICATE OF NOTARY PUBLIC

I, TROY ANTHONY RAY, the officer before whom the foregoing hearing was taken, do hereby certify that the testimony appearing in the foregoing pages was recorded by me and thereafter reduced to typewriting under my direction; that said transcription is a true record of the testimony given by said parties; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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Troy Anthony Ray

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I, SARAH VEACH, do hereby certify that this transcript was prepared from audio to the best of my ability. I am neither counsel for, nor party to this action nor am I interested in the outcome of this action.

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