January 10, 2012

U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
[(202) 707-3000, 1-877-476-0778]

Re: Library of Congress, Copyright Office, [Docket No. 2011–10], Remedies for Small Copyright Claims

Dear Sir or Madam,

You seek comments on small copyright claims and their difficulties. I am a literary agent and lawyer with an extensive author clientele and over 30 years of experience in book publishing.

The responsibility to pursue infringements is complicated by the fact that the authority to pursue a claim may be joint, that is, some rights in a work may have been granted by an author to a licensee-publisher, and thus, governed by contract.

Some authors are under a false impression that their publishers will protect them by pursuing infringement claims on their behalf. This makes some authors hesitant to act for themselves, and unaware that they can or should act for themselves. Many wrongly believe that the publisher assumes responsibility for all such matters.

Infringement clauses in book contracts may also be of limited relevance, implanted as they usually are on a one-sided publisher-generated contract form. Publishing boilerplate is often not precision engineered to govern real litigation situations (facts being largely unforeseeable from within contract forms). So contract issues tend to confuse and raise conflict and costs, as the parties argue about control and the terms of the contract. Nearly all publishers are organized to obstruct contract negotiations and impose transactions costs, using delay and stonewalling by low level staff, upon authors. Publishing law, such as Tasini v. NYT, has long recognized this reality of low author bargaining power against publishers. Authors are similar to consumers in their oppression and victimization by large publishing firms. Most are in no position to argue over contract terms and so focus their attention on ginning up price competition to maximize advance. While the internet may help to shift this dynamic in the future, publisher-stacked boilerplate is still sticky. Powerful authors who might be expected to help pull against publishers in contract details, often negotiate on that basis least, as their greater ability to command high advances overwhelms all motivation to bother about terms. So, the publishing contract has tended to fail to evolve, to the detriment most of the smaller author, and, with the exaggerated focus on advance by the market as a whole, to backslide. Increasingly, malicious mischief has also been played in devils in the details of contract forms, with traditional author protections turned on their heads in contracts that have gone increasingly unread and unargued. This is all a source of author-publisher conflict in any future joint litigation.

In any infringement action, the two parties' interests may also substantively differ. Authors might be inclined to forgive some infringements, and publishers less so (or vice versa). Author publicity generated around some types of infringement might reduce the author's perception of damage to himself, but his publisher might not agree. Squabbles of of this kind increase litigation costs, while reducing potential recoveries.

This means that many infringements will go unlitigated and unrectified. This is not always or necessarily bad. A barrier to entry to litigation exists in nearly everything, and, in the interests of social peace, should exist. Close cases, say, of fair use, should not be litigated unless the party with an interest in the matter chooses to sue. This is how over time law is shaped properly, over controversies of real critical mass to real individuals. The fact that people choose not to sue may be compelling evidence of the issue's simple lack of significance to most owners, and hence compelling evidence of fair use. Not everything should be aggregated or collectivized; the only persons to benefit from this are the aggregators or collectivizers, to whose ventures individuals need to consent, not be forced into by declaration of law. For individuals to lose control over the status and disposition of their property from interlopers out of left field, is a negative, for it forces owners to keep track of the world just to know the status of their rights. People do not act to defend themselves or their property when they are in a state of confusion about their rights. They stand still, stunned and hesitant.

If the object is to allow individuals other than large corporations to enforce copyrights, one might consider making the statutory remedy of "up to" $150,000 not a cap, but a straight remedy payable on a finding by a court of an act of infringement. Lawyers then might then be able to prosecute infringement claims economically. This monetary amount was also set into law many years ago and is subject to no cost of living increases. It is not really enough. There are too many arguments over facts and details in these cases to inspire many attorneys to care to represent such small, or smallish, claims. Even Volunteer Lawyers for the Arts seemed, in an instance I referred to them, to be stumped and uncertain about how to proceed. The issues are not necessarily that complex, but attorneys need to be able to make a specialty of this area, in a way that is reasonably rewarding to them, if authors' needs are to be met in the marketplace for copyright litigation.

Sincerely,

Lynn Chu

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