



January 17, 2012

**Library of Congress
Copyright Office
[Docket No. 2011-10]
Remedies for Small Copyright Claims**

Comments by the Copyright Alliance

Introduction and Background

The Copyright Alliance welcomes this opportunity to participate in the U.S. Copyright Office study of whether the current legal system hinders or prevents copyright owners from pursuing “small copyright claims.”

The Copyright Alliance is a non-profit public interest and educational organization supported by more than 40 entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent more than 7,000 individual “One Voice Artist Advocates” who give their personal time and creativity to support our work. While many of the entities we represent are small businesses and individual creators, effective copyright enforcement is an issue that concerns all members of the copyright ecosystem. The Copyright Alliance is committed to promoting the cultural and economic benefits of copyright, providing information and resources on the contributions of copyright, and upholding the contributions of copyright to the fiscal health of the nation and for the good of creators, owners and consumers around the world. Among other principles, we seek to promote appropriate copyright enforcement in order to encourage the creation and lawful distribution of works, with fair compensation to the authors of creative works.

Consistent with these principles, the Copyright Alliance supports the effort of the Copyright Office to examine whether or how copyright owners can more effectively enforce copyright claims that may not have sufficient economic value to justify the time, expense and attorney’s fees involved in pursuing a copyright claim through the federal court system. It has been the experience of some of our members that infringers have little regard for the rights of creators where they know that the cost of pursuing a claim exceeds any potential damages that can be collected. Without an effective means for copyright owners to obtain remedies for small copyright claims, there may be continued erosion of creators’ rights and respect for copyright. Creating an alternative system for adjudicating small copyright claims nevertheless presents a host of challenges, including balancing any new approach pursued as part of an alternative small copyright claims system with defendants’ interests in such a system. Thus it is important to ensure that any new alternative claims system not be subject to abuse through frivolous

litigation. Also, consideration should be given to whether a new system would ensure that plaintiffs have an incentive to resolve copyright disputes in the marketplace without resort to litigation, an important goal for any judicial remedy.

We welcome the opportunity to participate in further proceedings before the Copyright Office to consider these issues but, at the outset, we suggest that any alternative system meet at least the following goals:

- Be appropriately limited in the scope and nature of claims
- Encourage creation of new copyrighted works and authorized derivative works
- Provide effective remedies to plaintiffs
- Deter copyright infringements, and encourage licensing of copyrighted works
- Be cost-effective and efficient for all parties
- Discourage frivolous or “nuisance” claims

As the membership of the Copyright Alliance is broad and diverse, we expect that individual members will prepare additional comments elaborating on particular challenges and concerns faced by different segments of the creative community.

Experiences with enforcing claims

The difficulty in enforcing copyright is particularly prevalent for those copyright owners who try to enforce claims against those infringers who make unauthorized online displays and reproductions of works where such uses, if licensed, may be of relatively small economic value. For example, works of visual art such as photographs and literary works such as articles often are used without permission in their entirety on web sites. Unfortunately, a large percent of these uses are unauthorized and obtained by a simple right-click of a mouse, without recognition of the originality and creativity that created and produced the work. Meanwhile these copyright owners, whether individual creators or publishers, may have little practical recourse against such infringers to enforce their copyright in the works and to obtain usage fees for their creative works. While a cease-and-desist letter can be sent to the infringer, or, in cases where the creative work is hosted on a web site that has registered a DMCA agent for notifications of claimed infringement, with the U.S. Copyright Office, such actions often have little impact. Moreover, copyrighted works, including songs, images and written works, can be easily captured and redistributed without authorization. Rights owners often find themselves in a never-ending battle with unscrupulous website operators who pay mere lip-service to obligations of the DMCA while enjoying its safe harbors. This can be an endless task, particularly if a work has gone viral. Even if the copyright owner is successful in having links to the infringing work taken down, the DMCA does not offer means or recourse to obtain a license fee from the infringer.

Because copyright is a federal act and all claims must be brought in federal court, where claims of relatively small economic value are at issue, it is rarely economically viable to hire an attorney to navigate the federal system, to pay the federal court filing fees, and to proceed with litigation that may involve lengthy and burdensome discovery, motions practice and a jury trial. These costs almost invariably exceed the expected licensing revenues and damages due to these rights holders. In many instances, works created by individuals or other small copyright owners will not have been registered until the infringement is found, eliminating any statutory damages or attorney's fees. If there are no profits associated with the infringer's use, the copyright owner

may be entitled only to licensing fees. The licensing fees associated with the online use of such a work will, in most instances, never justify the costs, time, and human resources that are required in a federal action, which can exceed hundreds of thousands of dollars and take a number of years. As a result, most of these claims are not pursued and respect for copyright and the rights of creators suffer. The difficulty in justifying the expense of copyright enforcement is not limited to small copyright owners, as many online infringements of works by book publishers, music publishers, newspaper publishers, recording labels and others may not always justify the resources required to pursue litigation in federal courts.

General Issues

Any proposal which might ultimately be considered by the Copyright Office almost inevitably will involve a tapestry of remedies and checks and balances to ensure that it effectively meets the goals of copyright owners seeking a more affordable forum to pursue claims involving relatively small monetary damages, while ensuring that the process provides a fair opportunity for any defendant to present defenses. It is therefore impossible at this preliminary phase to offer concrete recommendations on isolated issues. The following are general suggestions and observations that will require further reflection and analysis as the process for evaluating any alternative dispute system moves forward. It is intended not to reflect a membership proposal by the Copyright Alliance of a particular approach, but to raise some of the potential challenges and benefits that an alternative dispute system might pose.

- *Need for a Cost Effective and Efficient System.* Any alternative system considered must be cost effective and efficient for all parties. All copyright owners, but small copyright owners in particular, might benefit from a system that would enable rightsholders voluntarily to bring a claim in a forum that can be navigated in a cost effective manner, without expensive travel, legal costs or expert fees. Some solutions to be examined further might include the use of teleconferencing or videoconferencing, and the submission of claims electronically. Of course, the costs and procedural safeguards of federal litigation often serve a beneficial cause, so any alternative system would need to balance the interest of effective and efficient resolution of small claims against the need to ensure veracity of claims and to avoid abuse.

- *Limitations on Discovery.* While there are many benefits in adjudicating claims based on a federal statute within the federal court system, such as the copyright expertise of the federal judges presiding over the claim, any streamlined dispute resolution system for copyright claims will likely need to consider whether discovery can be limited while at the same time affording both parties some of the benefits provided for under the federal court system. Plaintiffs will want assurances that all infringing uses are disclosed if they are willing to limit the amount of damages claimed, while defendants will need assurances that the party asserting rights is the proper rights owner and will want an opportunity to examine the specifics of a claim in sufficient depth to ensure well informed resolution of claims.

- *Discouraging Frivolous Claims.* We are mindful that the process of devising an alternative system to federal court litigation will present challenges and risk in itself and must be done with careful thought and consideration. Safeguards must be in place so that frivolous claims will not be encouraged which can erode the copyright system as much as the inability to bring meritorious claims based on the economic value. Penalties similar to Rule 11 may be considered to discourage fraudulent conduct as could a rule that requires the losing party to pay costs and attorneys fees. For the system to be embraced by the copyright and user community, it must

seem fair and rational to both the copyright owner and defendants that participate in the alternative system.

- Voluntary Nature of Venue. In order to avoid setting up a class-based system of copyright enforcement, where certain works might be relegated to more limited forms of relief, the use of any alternative dispute resolution system must be voluntary to the rightsholder. There may be legitimate instances, moreover, where a defendant wishes to avail themselves of the full procedural safeguards of federal litigation. In order to encourage agreement between the parties to pursue alternative dispute resolution, incentives structures may be useful. This alternative tribunal, in whatever form it takes, should offer significant benefits to both parties in the reduced litigation costs and the limitation on any potential damages, provided all parties feel that the process is fair.

- Types of Claims Heard. In examining the alternative system, there may be some types of complex copyright claims that may not be appropriate for an alternative dispute tribunal with more limited discovery. The Copyright Office may want to examine whether challenges to enforcement apply to all types of work protected by copyright. If not, it may be appropriate to look at differences that emerge from that study and whether any considerations should be made based on the class of work or other factors. It also may not be appropriate to include additional claims, such as Lanham Act, common law trademark or state law breach of contract claims. This issue requires further examination and might be approached by considering the exclusion of parties with existing licensing agreements—such matters being more appropriately heard outside of the limited tribunal.

- Damages. While we are not in a position at this time to consider a specific cap on damages that might be appropriate for any alternative copyright dispute forum, it seems reasonable that such a limit be explored in order to appropriately limit the scope and nature of claims to be considered by the tribunal. The amount of damages that could be sought under such an alternative dispute tribunal likely would be balanced against potentially limited discovery and other federal procedures so that there would be an incentive to elect this alternate system and to provide an adequate opportunity to present defenses. Any such limit on damages should be reevaluated over time to determine if the system is functioning fairly and effectively.

- Forum. Because copyright is nuanced and requires expertise, the forum in which these disputes are to be heard must be carefully considered. Whether there is a special court within the federal system, or a central copyright tribunal where claims can be filed, the expertise necessary for reviewing copyright claims is an important consideration. For example, it is questionable whether the judges in the various state small claims systems, having never heard copyright cases, would have the necessary expertise to adjudicate copyright claims. We are mindful that complex issues such as fair use and other statutory exemptions are likely to arise. It could ease the burden on copyright claimants if they could elect that certain proceedings did not require personal appearances or representation by attorneys. The study also should consider the extent to which jurisdictional limitations based on geography should be relaxed. While the Copyright Office cannot give legal advice to the public, we anticipate that the Office could be helpful in assisting the tribunal, both in confirming from the public record that the work that is the basis of the claim is registered and owned by the claimant and in providing fundamental copyright information. In addition, there may be a subset of claims that lend themselves to this streamlined process and some more complex claims that would not be as appropriate.

- Limitation on Remedies. Whether any new tribunal should have the power to issue injunctive relief is a question that may be appropriate in all situations must be carefully examined.

- Other Considerations. There are numerous other considerations that should be taken into account in considering whether or how to devise any alternative system. For example, thought should be given to whether this alternative system should include a right to appeal. Looking at procedures followed elsewhere such as out-of-court arbitration, the Uniform Dispute Resolution Procedure ("UDRP") used to resolve domain name disputes or procedures employed by the Trademark Trial and Appeal Board ("TTAB") may all be helpful. Thought should also be given to questions such as whether any new tribunal should issue written decisions, whether decisions of any such tribunal would be precedential and, if so, in which courts, and whether the tribunal should be empowered to deal with complex issues such as the fair use defense.

Because any alternative system would be a departure from the federal system that has been time-tested, there may need to be adjustments and reevaluations once a system were in place to determine what elements of the new system were effective and which should be changed or abandoned. There should be periodic review of any system to assess what changes may or may not be appropriate after a reasonable period of time.

Enforcement of copyright is important to the members of the Copyright Alliance. We, as an organization, are respectful of the Copyright Office's attention to this initiative. The issues in any such alternative approach are complex and we look forward to working with the Copyright Office to address the many details that will be raised when evaluating a possible alternative dispute resolution system for small copyright claims.

We thank you for the opportunity to comment.
Sincerely,

A handwritten signature in blue ink, appearing to read 'Sandra Aistars', followed by a stylized flourish.

Sandra Aistars
Executive Director
Copyright Alliance