

Comments on Remedies for Small Copyright Claims

Getty Images

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BACKGROUND

Getty Images is a leading creator and distributor of still imagery, video and music content. Getty Images represents more than 150,000 individual contributors (photographers, videographers, and musicians), and owns or represents more than 80,000,000 unique works. Our award-winning imagery can be seen at www.gettyimages.com, as well as our other websites, including www.istockphoto.com, www.wireimage.com and www.thinkstock.com.

We have been licensing imagery online since 1998, and our license information is clearly available linked from each and every page of our websites. Neither customers nor casual viewers on the site are permitted to use imagery without obtaining a license. Notwithstanding the license requirement, like other digital media companies, Getty Images does fall victim to tens of thousands of parties pirating intellectual property belonging to Getty Images and its thousands of contributors. To combat this, and to facilitate enforcement of our rights and the rights of our varied contributors, Getty Images uses contractors, employees and digital image recognition software to locate companies that have used Getty Images' photographs without paying a license fee.

In the most recent 12-month period, Getty Images identified and pursued over 40,000 instances of infringement in the United States alone. These cases involved over 60,000 images available through Getty Images' platforms, belonging to Getty Images, its partners or contributors. The harm to our business of such widespread copyright infringement cannot be overstated. Instead of competing with other image providers, we must now compete with free unauthorized use of our own images as well as those of the contributors and image partners that we represent. The individual photographers whose content we represent and whose livelihoods depend on generating income from their photographs face a double penalty of lost revenue and devalued content. If an image is widely used without payment, there is little incentive for the next user to pay for the same image.

For cases of identified infringement, Getty Images typically attempts to recover damages in the form of lost license revenue and enforcement costs. Damages sought vary depending on the image used, and the nature and duration of use. Typical damages range from several hundred to several thousand dollars. While many of these cases are resolved amicably, many others are not. For those cases that are not resolved, litigation is available, but is prohibitively costly for either Getty Images or its individual contributors. The costs associated with litigation far outweigh the damages sought, and render litigation a completely ineffective option, unless a rights holder elects to make the investment to make an example of an infringer, regardless of the economics of the process. Unfortunately, the current system that requires copyright owners to spend more to enforce their copyrights than the value of a small claim deters enforcement and encourages infringement.

Getty Images supports the Copyright Office's inquiry into alternate remedies for small copyright claims without the barriers that currently exist, and believes it would add significant benefits for rights holders without adversely impacting defendants' rights. We favor a system that offers a cost-effective, streamlined adjudication, held telephonically from central locations, initiated at the option of the plaintiff and agreed to by the defendant. We believe the system needs to offer advantages (such as limited discovery, capped costs and fees) to both parties in order to encourage participation in the system. We offer below further comments to the specified subjects of inquiry.

SUBJECTS OF INQUIRY

1. Nature of tribunal/process.

Getty Images favors a system where small value copyright infringement complaints will be quickly, fairly and finally adjudicated by persons having specialized copyright knowledge. We envision an Article III-like adjudicatory process, rather than a mediation or arbitration-type system. However, the small claims process need not reside in the Article III court structure; rather, it could be a very simplified alternate system administered by the Copyright Office and funded through filing costs.

2. Voluntary vs. mandatory participation.

We believe the small claims process should be structured as a voluntary system. Plaintiffs would still have the option of choosing to file claims in the existing federal district court system, and defendants would have the option of not consenting to the jurisdiction of the small claims process. Incentives should be offered to both parties to encourage participation in the small claims process. Incentives could include: lower filing fees for plaintiffs; extremely limited discovery related only to the copyrighted work and infringement; speedy resolution; ; decisions made by those with specialized knowledge; decisions are final (no appeals by either party); and, perhaps most persuasive, capped costs and damages tailored towards incentivizing defendants to participate.

3. Arbitration.

Getty Images does not favor arbitration.

4. Mediation.

Getty Images does not favor mediation.

5. Settlement.

We are in favor of settlement incentives, and believe plaintiffs should be required to make a written (including email) settlement offer prior to proceeding with a claim. The lack of response by a defendant to a settlement offer should not be an obstacle to filing a claim. We frequently encounter defendants whose defense strategy is based on not responding.

6. Location of tribunal(s).

The location of the small claims tribunal would be inconsequential if participants could appear telephonically or via teleconference. In many cases, the parties could submit their positions and evidence in writing, without need for personal appearance. If physical presence is required, we recommend an East and West coast option, perhaps Washington DC and San Francisco.

7. Qualifications and selection of adjudicators.

Because we envision an alternative to the Article III court system, the adjudicators need not be judges confirmed by Congress; rather, the adjudicators could be administrative law judges or attorneys with specialized training and/or experience in copyright law.

8. Eligible works.

All works protected by copyright law, registered or unregistered, should be eligible for the small claims process.

9. Permissible claims.

The small claims process should be limited to claims of infringement. It should not include related claims, such as Lanham Act, trademark, and unfair competition claims. The process should be equipped to interpret a contract or decide an ownership dispute directly relating to the infringement claim. Defendants should not be prohibited from refusing to participate in the simplified process to defend their claims in federal district court. We believe based on years of experience that while some will opt out of this simplified process, there will be thousands of claimants and defendants that will pursue a simplified inexpensive process for resolution.

10. Permissible claim amount.

The cap on claim amount inclusive of costs should be \$30,000 at the most. This amount matches the statutory limit for damages for non-willful infringement. This amount may need to be reviewed over time.

11. Permissible defenses and counterclaims.

The defendant should have an opportunity to present its defenses, including fair use, independent creation, non-infringement or any other statutory exception (including DMCA safe harbor).

12. Registration.

Getty Images represents millions of individual digital assets, including millions of photographs. We would welcome a system of bulk registration that would, for example, provide registration benefits to each individual photograph. In the absence of such a system, we would still support a registration requirement for the small claims process *if* an application for registration would meet that requirement and *if* an expedited filing fee were not required or were significantly reduced. Recognizing the application, rather than needing to wait months for the issuance of the registration certificate, would encourage prompt remediation of infringement.

13. Filing fee.

We would support a reasonable filing fee of \$100, or such other amount that permits funding of the system. A higher amount may discourage enforcement of small claims when small amounts are involved. This amount may need to be reviewed over time.

14. Initiation of proceeding.

Proceedings could be initiated by filing a complaint that includes: (1) a copyright registration certificate or application (establishing prima facie evidence of copyright ownership); (2) proof of infringement (including visual proof where available); and (3) a statement of the amount of damages sought (must be under the small claims threshold). A defendant could be served electronically with a confirmation by email.

A defendant sued in federal district court should not be permitted to transfer the matter to small claims court without the consent of the plaintiff. A party on notice of an alleged infringement could seek a declaratory judgment in federal court, but could not initiate the small claims process without the consent of the other party.

15. Representation.

Litigants in the small claims process should be allowed to appear pro se or represented by an attorney at the party's option. Likewise, corporations and other business entities should be permitted to appear through employees or attorneys. Lack of representation, however, should not preclude proceeding with the process.

16. Conduct of proceedings.

The small claims process could be conducted by electronic submissions only. The adjudicator should have the discretion to hold teleconferences or videoconferences as needed, but the parties should not be required to appear in person. Expert witnesses should not be permitted due to the expense and complexity of assessing their expert role. If an expert is required, the matter is not suitable for the small claims process.

17. Discovery, motion practice and evidence.

Limited discovery should be permitted in the form of written depositions and interrogatories to allow the plaintiff to establish its infringement claim and to allow the defendant to establish its defense(s). Depositions and motion practice should not be allowed, though a mechanism for resolving a dispute regarding the limited permissible discovery should be provided.

18. Damages.

Damages available in the small claims process should include actual damages or statutory damages, at the plaintiff's option (if available), and provided that the amount does not exceed the small claims threshold. We have proposed that statutory damages would be capped at the current non-willful

threshold of \$30,000. We would not object to a fixed amount to be awarded across the board in the event of a finding of infringement, provided that such amount would cover our actual damages (> \$1500 per work).

19. Equitable relief.

The small claims process tribunal should be able to grant declaratory relief.

20. Attorneys' fees and costs.

The prevailing party's fees should be capped at \$3,000 in total fees per infringed work. The cap on fees would be a meaningful incentive for defendants to participate in the process, waiving what other rights and remedies may be available.

21. Record of proceedings.

The outcome of the small claims process should be memorialized in a written decision that includes a finding of "infringement or "no infringement" and a brief explanation along with the damages awarded, if any (total length of writing should be no more than 1-2 pages). These decisions should be publicly available.

22. Effect of adjudication.

The decision of the small claims tribunal should be final. It should not be precedential, other than as between the same parties with respect to the same alleged infringement.

23. Enforceability of judgment.

The judgment of the small claims tribunal should be enforceable in the same manner as an arbitration award.

24. Review/appeals.

The merits of the small claims process are lost or undermined if the decision can be appealed. There should be no right to appeal absent a plain error of law.

25. Group claims.

Principles of standing should remain the same. Claims should only be brought by copyright owners or their exclusive licensees.

26. Frivolous claims.

Claims should require statements of truth and validity under penalty of perjury. Frivolous claims can be deterred through the awarding of attorneys' fees and costs to the defendant, and through making decisions of the tribunal publicly available.

27. Constitutional issues.

Most, if not all, of the constitutional issues are mitigated by making participation in the small claims process voluntary.

28. State court alternative.

Pursuing small claims through state court is not an adequate solution, in part due to jurisdictional issues. Copyright holders would still be required to pursue infringement claims where personal jurisdiction exists over the defendant. In addition, state courts do not have historical experience or expertise in copyright law.

29. Empirical data.

Getty Images currently pursues more than 40,000 claims in the US alone each year. Due to prohibitive costs and delays inherent to traditional litigation, we currently file litigation in very few of these cases per year. While we will be investing money to pursue infringers through the coming year, defendants are emboldened to infringe because they are aware that litigation is rarely pursued. This ratio of infringement to enforcement is far worse for individual rights holders unable to make the heavy investment in a traditional court process.

30. Funding considerations.

Keeping the nature of the small claims process streamlined should help to keep costs down. Ideally, filing fees would cover the majority of costs, but federal courts could also look to subsidize the small claims process as a way to clear their dockets.

31. Evaluation of small claims system.

The small claims system should be subject to evaluation and public comment on a periodic basis. Getty Images would support an initial launch of the process as a pilot program.

32. Other issues.

Getty Images looks forward to providing additional comment on any other issues raised.