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In Re:

SMALL COPYRIGHT CLAIMS PUBLIC HEARING

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DATE: Friday, November 16, 2012

TIME: 9:30 a.m.

The following pages constitute the proceedings held in the above-captioned matter, held at Columbia Law School, Jerome Greene Annex, 410 West 117th Street, New York, New York, before Annette M. Montalvo, RMR, of Capital Reporting Company, and a Notary Public in and for the State of New York.

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

2 JACQUELINE CHARLESWORTH, US Copyright Office

3 CATHERINE ROWLAND, US Copyright Office

4 ANN CHAITOVITZ, US Patent & trademark Office

5 LISA SHAFTEL, Graphic Artists Guild

6 VICTOR PERLMAN, American Society of Media

7 Photographers

8 MICKEY OSTERREICHER, Nat'l Press Photographers Assoc.

9 JAY ROSENTHAL, National Music Publishers Association

10 NANCY WOLFF, Picture Archive council of America

11 CHARLES SANDERS, Songwriters Guild of America

12 DAVID LEICHTMAN, Volunteer Lawyers for the Arts, Inc.

13 RANDY TAYLOR, Copyright Defense League, LLC

14 LISA Willmer, Getty Images

15 CHRISTOS BADAVAS, The Harry Fox Agency, Inc.

16 BRUCE LEHMAN, Former Asst. Secretary of Commerce

17 and Commissioner of Patents & Trademarks 1993-1999

18 SUSAN DAVIS, National Writers Union

19 RACHEL FERTIG, Association of American Publishers

20 MARY FRAN LOFTUS, We Research Pictures, LLC

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2 MS. CHARLESWORTH: Good morning, everyone.
3 Welcome back for today's small claims hearing.
4 Thank you for again for your participation. And,
5 again, I want to thank Columbia Law School and
6 Professors Besek and Loengard for helping to
7 arrange this event here.

8 We went around the room yesterday and people
9 introduced themselves and the interests they
10 represented, but there were a couple of people
11 who came in later who did not have that
12 opportunity. So if you did not introduce
13 yourself for the record, Ms. Loftus and maybe Ms.
14 Fertig, if you would like to tell us who you are
15 and your interest in the small claims process.

16 MS. LOFTUS: I'm Mary Fran Loftus. My
17 company is We Search Pictures, and I am on the
18 national board of the American Society of Picture
19 Professionals, which is an organization which
20 encompasses both sellers and buyers of
21 photographs and moving images.

22 MS. FERTIG: Hi. I am Rachel Fertig with
23 the Association of American Publishers. We
24 represent large and nonprofit publishers,
25 including scholarly presses and university

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2 presses as well. And so we have an interest in
3 both the potential plaintiff and potential
4 defendant side of this. And so that's our
5 interest.

6 MS. CHARLESWORTH: Thank you.

7 Unless there are any -- are there any other
8 questions or opening thoughts before we move on
9 to panel 5?

10 Panel 5 is relief and appeals. This is a
11 very critical piece of our study. What kind of
12 damages you can get, what kind of equitable
13 relief, if any should be available through a
14 small claims process. We received quite a bit of
15 commentary. To some extent people touched on
16 these issues yesterday, but we'd really like to
17 focus on some of the key questions.

18 In terms of damages, we discussed the cap
19 yesterday, but I think there's a divergence of
20 opinion in the comments as to whether there
21 should be only actual damages available or
22 statutory damages should also be available
23 through the system.

24 So I think that might be a good place to
25 start, to get people's views on that question,

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2 again, whether damages should be limited to
3 actual damages or whether the full panoply of
4 statutory damages should be available, and then
5 we will move on to attorneys' fees and costs and
6 other aspects of relief that could potentially be
7 awarded.

8 Okay. Ms. Wolff?

9 MS. WOLFF: I think our position was that
10 once there's a cap, that it wasn't really
11 relevant whether it was just the actual or the
12 statutory damages. If you were entitled to
13 statutory damages, you would still be entitled to
14 that, but you would be agreeing that the sort of
15 combination of damages you could achieve, and,
16 you know, hopefully, the idea is that you could
17 perhaps do this without the attorneys so the
18 attorneys' fees would not be relevant, that that
19 would be included within the cap. So you
20 wouldn't have to sort of change the law with
21 respect to the type of damages that you would be
22 entitled to.

23 MS. CHARLESWORTH: So just to take an
24 example, if the cap were \$30,000, and you had an
25 infringement, say, that was in terms of actual

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2 damages, you might value it at \$5,000, that a
3 plaintiff could still seek to recover under your
4 proposal statutory damages in excess of \$5,000?

5 MS. WOLFF: Well, I think that the statutory
6 damages is there when damages are difficult to
7 prove, and there is discretion. And the trier of
8 fact would hopefully also have some experience
9 with copyright and copyright law, and could take
10 in factors that you would be able to take into
11 account in determining whether the statutory
12 damages or the actual damages would apply.

13 MS. CHARLESWORTH: Do you have any thoughts
14 in terms of what the factors might be or in your
15 experience perhaps, is it the same factors that a
16 court might consider today? Do you want to
17 explain what some of those might be in terms of a
18 statutory damages award?

19 MS. WOLFF: Well, I am assuming that
20 copyright law would still be followed by the
21 trier of fact and would take in the factors that
22 would be allowed. Factors that I think are
23 relevant to photographs and licensors would be,
24 for example, if there was an exclusive license,
25 and even though the license might have only been

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2 a few thousand dollars, the fact that it was
3 widely distributed and sort of went viral on
4 line, that would affect sort of the market for
5 that image. So perhaps applying a multiplier
6 might be relevant in that case. So maybe damages
7 could be \$6,000 to \$8,000, which is just, you
8 know, an example, because of the type of
9 infringement. But, you know, those types of
10 examples, and maybe I will let Vic continue on.

11 MS. CHARLESWORTH: Thank you for your
12 thoughts.

13 Mr. Perlman?

14 MR. PERLMAN: I think that in this context
15 there's probably very little practical
16 distinction between actual damages and statutory
17 damages. You have the cap, you have the fact the
18 courts generally try to tie statutory damages to
19 the actual damages. And you have limited or no
20 discovery, so that the kinds of difficulties you
21 were talking about earlier about trying to
22 establish actual damages, with the limited amount
23 of information you are going to have as a result
24 of no or limited discovery, it is going to, in
25 effect, force an adjudicator to make an

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2 estimation that is probably going to render
3 insignificant the difference between statutory
4 damages and actual damages.

5 MS. CHARLESWORTH: Okay. Other thoughts on
6 this?

7 Mr. Taylor?

8 MR. TAYLOR: From what we have seen, the
9 infringers are very often very eager to argue
10 actual damages, and they point to the advertising
11 on the page where the images appeared, and say,
12 look, you know, there were a few thousand page
13 views here, a page rate of 4 dollars per thousand
14 on advertising rates, you know, we owe you, you
15 know, \$100, \$200 based on actual damages.

16 So actual damages, depending on how they are
17 defined, would favor the infringer.

18 MS. CHARLESWORTH: Can you elaborate on that
19 a little bit in terms of when you say it would
20 favor the infringer?

21 MR. TAYLOR: I just observed that the
22 infringer, that's usually what they come back
23 with when they enter settlement discussion. They
24 start talking about the actual damages. And they
25 are looking to the revenue that they made from

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2 that specific infringement as the actual damage.

3 So they are looking at the advertising on the
4 page where the images appeared and the quantity
5 of page views that occurred for those images.

6 Now, often this is a few thousand page
7 views. It is not millions and millions of page
8 views. So if the CPM, the cost per thousand on
9 advertising, is, say, \$4 per thousand, the amount
10 of advertising that they made on that particular
11 page is relatively small, and that's what they
12 would like to argue.

13 MS. CHARLESWORTH: They look to their
14 profits.

15 MR. TAYLOR: They look to their profits and
16 say that's damages --

17 MS. CHARLESWORTH: As opposed to a license
18 fee --

19 MR. TAYLOR: Exactly. Yes. So that's their
20 starting point in the negotiation.

21 MS. CHARLESWORTH: Other points?

22 Ms. Shaftel?

23 MS. SHAFTEL: We had started out by
24 recommending \$30,000 as the cap, and our thoughts
25 are considering that the current amounts for

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2 statutory damages are \$750 to \$30,000, with a
3 \$250 minimum for an innocent infringer, that the
4 damages would -- those damages would remain
5 within that \$30,000. And, again, we are thinking
6 of this court as being sort of a people's court
7 without legal representation involved, no
8 necessity for attorneys' fees, and for very
9 simple straight forward cases.

10 In cases where the statutory damages would
11 be a lot higher for multiple incidences of
12 infringement for huge amount of willful
13 infringement, actual damages, those are the sort
14 of cases that should go to the federal district
15 court. We want to keep this sort of quick and
16 simple for simple straightforward infringements
17 that aren't big numbers.

18 MS. CHARLESWORTH: Okay. Mr. Lehman and
19 then Ms. Fertig.

20 MR. LEHMAN: Well, I think that one of the
21 things that has to be considered here is the
22 deterrent effect of damages. And, you know, what
23 this is all about, basically, we're dealing with
24 -- this is a court that's presumably going to be
25 set up to help small scale individual creators

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2 who have a difficult time getting an attorney,
3 and so on and to forth.

4 They have hard times, you know, meaning
5 damages can be, you know, a very complicated
6 issue in big case litigation, certainly in patent
7 litigation they are huge, and people spend a lot
8 of money.

9 So I think in keeping with the ideal of
10 having a simple procedure, sort of very
11 straightforward, having at least some kind of a
12 range of statutory damages that the adjudicator
13 could award would be preferable to fighting over
14 actual damages.

15 And my sense is that -- and this is
16 particularly in this visual arts, artworks, like
17 Mr. Taylor was talking about, that go online,
18 that you are probably in a situation where
19 infringers are committing multiple infringements
20 against lots of different people, and not all of
21 them are going to go use this procedure or go to
22 court, and so that goes to the deterrent effect.

23 And I think if there's something
24 sufficiently large to take into account, that
25 behavior, and, obviously, we're speaking about a

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2 cap. But, you know, I think if the damages are
3 \$300, if an illustrator, photographer licenses a
4 work for some kind of a use for \$300 or \$500,
5 which wouldn't be totally uncommon for
6 particularly a secondary use, you know, that's
7 hardly worth their time. On the other hand,
8 there probably does need to be, really, a
9 deterrent effect for the court to tell this
10 infringer, no, this is not something that you can
11 do. I think a large award, maybe \$5,000,
12 \$10,000, would be more appropriate.

13 So I personally strongly think, and I think
14 in the interest of a lot of the people that I
15 have worked with, some kind of simple system of
16 statutory damages, maybe scaled damages of some
17 sort, but something, you know, significant enough
18 to make it worthwhile for people who go to court
19 and for infringers to pay attention to the
20 process would be preferable.

21 MS. CHARLESWORTH: Thank you.

22 Ms. Fertig?

23 MS. FERTIG: Sure. Rachel Fertig with AAP.

24 We offered reasonable compensation as an
25 alternative approach for the type of damages that

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2 would be awarded in the forum, recognizing that
3 proving actual damages can be difficult, but that
4 the main reason why many of the people would be
5 using this forum would be because they wanted
6 remuneration for use that they normally would
7 have licensed.

8 And so because there is limited evidentiary
9 finding, we don't think that statutory damages is
10 necessarily the best approach for damages, and we
11 also think going back to some of the comments
12 yesterday, taking statutory damages off the table
13 in the small claims process would be another
14 incentive to get potential defendants to use this
15 system.

16 So we think that setting reasonable
17 compensation as the damages award would provide a
18 sufficient remuneration for the people that would
19 be interested in the small claims process, but
20 also a damage amount that potential defendants
21 would be willing to participate in to avoid the
22 potential statutory damages in a district court
23 setting.

24 MS. CHARLESWORTH: Mr. Sanders?

25 MR. SANDERS: Just a question.

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2 Doesn't that set up a situation where you
3 have catch me if you can? My liability is what I
4 would have paid, you know, had I actually
5 licensed, but otherwise I am not going to pay
6 until you ask?

7 MS. FERTIG: I think we are trying to look
8 at the small claims court as a pragmatic
9 solution. It is not going to be the perfect
10 solution for every instance, but we think that
11 you have to have, you know, practical solutions
12 to have incentives to get potential defendants to
13 come to court.

14 MR. SANDERS: Don't misunderstand me,
15 though. I don't view what you suggested as a
16 solution. I view it as an exacerbation of the
17 problem.

18 I mean, if you set up a system that caps
19 recovery at the amount that would have been paid
20 had it been licensed, that's a get out of jail
21 free card.

22 MS. CHARLESWORTH: What do other people
23 think of that concern? And this did come up in
24 the written comments. That if it is just
25 basically a licensing fee, that there's very

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2 little incentive to take a license up front.

3 Ms. Shaftel?

4 MS. SHAFTEL: There are a lot of instances,
5 often more instances than not, visual works where
6 the infringing use is display and not for any
7 sort of profitable use, often on the Internet, or
8 print. And in many cases that infringing display
9 violates an exclusive license between the artist
10 and a client.

11 So the infringing use is not simply a matter
12 of, well, I would have charged you, you know,
13 \$150 or \$250 for an annual license to use my
14 illustration as a spot illustration in your
15 article for that monthly magazine. That spot
16 illustration is proprietary, it is protected by
17 an exclusive license by another client who's
18 using it. So that display use is violating two
19 people's rights, not just the rights holder, but
20 the client as well.

21 And so simply paying a licensing fee doesn't
22 makeup for the violation of those contracts, and
23 often the value of an artwork is in its potential
24 use of the future, not just what it is being used
25 for so far.

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2 So perhaps something that is not in demand
3 in the marketplace right now, change in current
4 event, change in products, change in consumer
5 interest, might be a tremendous demand at some
6 point in the future, and somebody else has
7 inadvertently unwillfully used that image
8 somewhere else, possibly in a place that has a
9 lot of exposure, or that can't be taken back.

10 And this is true of injunctive use as well.
11 Simply, "Oh, it is out there in the world, they
12 used it unlawfully without authorization." "Okay,
13 well, now just pay a licensing fee, but you get
14 to continue to use it." This isn't an orphan
15 works situation. This is a situation where the
16 infringer knows who the rights holder is, and
17 probably made little or no effort to contact them
18 and willfully or out of ignorance used a
19 copyrighted work without permission, without
20 making any effort to try and contact the rights
21 holder, and as Charles said, it is a "catch me if
22 you can" situation.

23 And as we discovered from our survey of
24 creators, a total of 80 percent had tried to
25 contact the infringer on the sales or had an

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2 attorney contact the infringer and ask them for
3 the payment. This is what the Graphic Arts Guild
4 recommended that people do. You don't go running
5 right to court. Handle it in a business like
6 manner. Send an invoice. "Hi, this is my work.
7 You have used it. Now pay me." And if you do it
8 right, maybe you can spin that into a new client
9 who will, if they agree with the usage, continue
10 to license usage.

11 And then we asked people, after they did
12 that, after they contacted the infringer, what
13 did the infringer do. And 50 percent of the
14 people who responded said the infringer did
15 nothing.

16 So that's why we are in this situation, is
17 50 percent of the people who are infringing are
18 not responding before any legal action is taken.
19 They are not responding to the rights holder or
20 their attorney who asks them to stop, to cease
21 and desist, or ask for money. So to then come
22 back later and say, all right, well, now you are
23 involved in this alternative court procedure. So
24 now all you have to pay is the actual damage and
25 the licensing fee, even if the rights holder did

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2 the right thing and registered their work
3 originally, it's meaningless.

4 It is just pay now, pay later, drag it out,
5 maybe they will go away. I mean, there has to be
6 an incentive and punishment if somebody's not
7 abiding by the rule.

8 MS. CHARLESWORTH: Ms. Willmer, did you have
9 your hand up earlier? There are many people who
10 want to comment, so we'll just continue around
11 the room.

12 MS. Willmer: I did. She raised a number of
13 issues that we also have experienced as well. And
14 I think to the point that was raised earlier
15 about how infringers often will sit back and wait
16 to see if they are caught, and then if they are
17 in a situation where all they are liable for is
18 actual damages in the form of the fair market
19 value of the license, the license fee they should
20 have paid originally, there isn't that deterrent
21 effect.

22 So we would love to see a system where not
23 only is the rights holder entitled to collect
24 what they would have received as the fair market
25 value of the license ahead of time, but there is

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2 also some deterrent component that brings the
3 infringers to the table. Because otherwise they
4 are not coming to the table.

5 MS. CHARLESWORTH: Mr. Osterreicher?

6 MR. OSTERREICHER: We absolutely agree with
7 that. I mean, what we're seeing are people that
8 actually have business models of infringe,
9 infringe, infringe. This is the cost of doing
10 business. And out of a hundred infringements, if
11 98 of them go unnoticed and we have to deal with
12 the other two, we will pay pennies on the dollar.
13 And what we're looking for here is a way to
14 remedy that problem. And by just saying, okay,
15 well, if you get caught, this is what we would
16 have paid originally had you come to us is not a
17 solution. It would just perpetuate the problem
18 that we're seeing now.

19 MS. CHARLESWORTH: Ms. Wolff, and we'll go
20 down the row.

21 MS. WOLFF: I think the problem with the
22 term reasonable compensation is that you are
23 going to have a dispute over what that means
24 because there's many ways of licensing, and
25 there's sort of user generated, sort of micro

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2 stock out there that people, you know, can buy
3 for \$4, and then there's photographs that cost
4 thousands of dollars. And whenever someone
5 starts with reasonable compensation, they always
6 go online and find the cheapest work there is and
7 say that's what they're paying.

8 So it is tiresome to have to go through that
9 discussion every single time that the infringer
10 doesn't get to set the market. So I think that
11 we have to be careful of language and reasonable
12 compensation.

13 And I think that if there's a cap, the
14 copyright owner, if they have registered the
15 work, should be entitled to, you know, all the
16 available remedies that fit within this
17 alternative system, and I think just by agreeing
18 that no matter, you know, how many times
19 something has been infringed, if they are
20 agreeing to use this system, you know that that
21 will be the cap amount.

22 So you just -- that's why our recommendation
23 was not to try to limit what the damages are, but
24 once you have a cap that's the limit, that should
25 be sufficient incentive to use this system.

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2 MS. CHARLESWORTH: Okay. Thank you.

3 I think Mr. Taylor and then Mr. Rosenthal.

4 MR. TAYLOR: I wanted to echo what Ms. Wolff
5 said because the argument is that there's a lot
6 places online where you can find an image for a few
7 dollars, and that's what they say the value of
8 the picture is, is a few dollars. So the actual
9 value of the image can be in great debate if it
10 is argued. But at the same time, they could just
11 let there be a default judgment if there's low
12 valuation.

13 If the value of the judgment is less than it
14 costs to sort of defend the infringer, I would
15 think that the most likely strategy is they will
16 just let it go to default judgment, delay as much
17 as they can, and kind of kick it down the road,
18 and then pay it ultimately if they have to.

19 In the demand letters that are being sent
20 out from the attorneys who are representing
21 photographers that we work with, something like
22 95 percent of them never get replied to. And in
23 those demand letters, very frequently the
24 statutory damages of up to \$150,000 are
25 mentioned.

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2 So the infringers very often are not afraid
3 of \$150,000 settlement to the point that they
4 don't even respond. If it is merely that the
5 actual damages are what they are going to need to
6 pay, I don't think that they will participate at
7 all.

8 MS. CHARLESWORTH: Mr. Rosenthal?

9 MR. ROSENTHAL: I think especially for
10 music, the imprecision of trying to determine
11 what the value of a license would be, really, I
12 think, disqualifies the idea of even going down
13 this road. If it is just a use license, a
14 license for a year is going to be different than
15 a different one for three years, it is going to
16 be different for a license in perpetuity. So it
17 is very hard to nail that down.

18 The other problem here is that we have a
19 system where we're not really going to be
20 probably considering any kind of accounting that
21 a judge can order, meaning that we would have to
22 rely on the proffer of the defendant of the
23 infringer as to, well, this is how many pieces I
24 stole, or this is what I have done, or whatnot.

25 So the idea here is that I think relying on

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2 statutory damages as an alternative is really the
3 only way I think we can go down this road because
4 of the imprecision of understanding what a
5 license value is, and also the fact that we would
6 only be relying on the proffer of the defendant
7 infringer.

8 MS. CHARLESWORTH: Okay. Ms. Willmer and
9 then Mr. Leichtman.

10 MS. Willmer: I just wanted to say that we
11 are not opposed to relying on statutory damages,
12 but we do often find ourselves in the position of
13 not having images registered ahead of time. And
14 that then poses the challenge of being left only
15 with actual damages, which as I just pointed out,
16 has the problem of not having any deterring
17 effect at all.

18 So we wouldn't be opposed to some other sort
19 of statutory damages, or making statutory damages
20 more widely available within the small claims
21 system, even to the point where it could be an
22 option as a trade off, since we are looking for
23 simple solutions that don't get bogged down in
24 discovery or evidence of what was licensed
25 previously, and what the rates were, and

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2 everything else. Perhaps statutory damages could
3 be an option across the board in a small claims
4 type tribunal, even without regard to whether or
5 not images had been registered previously.

6 MS. CHARLESWORTH: Mr. Leichtman?

7 MR. LEICHTMAN: Thank you.

8 Just reacting to Mr. Sanders' comment. I
9 think that the -- what he commented on about, you
10 know, infringers just waiting to be sued is
11 happening anyway. So, you know, from our
12 perspective, you know, I think if you want
13 \$150,000 or you want to create a deterrent effect
14 with a particular infringer, you would still have
15 the option, of course, of bringing your plenary
16 claim in federal court, and you just wouldn't
17 elect this tribunal, so if you were a plaintiff
18 and that was all your concern was.

19 So I don't think we see this as, you know,
20 adding an additional layer, and, you know, from
21 our perspective as well, already encompassed
22 within actual damages is what you would get as
23 your license fee if the defendant had approached
24 you.

25 So I don't think this necessarily has to be

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2 the vehicle for proposing new remedies that are
3 not already in the Copyright Act or trying to
4 interpret what the existing remedies provide for,
5 it is just, you know, there's a cap, the cap is
6 the cap. If you don't want to be subject to the
7 cap, then go to federal court. If you want a
8 quick, easy procedure that's not going to cost
9 you a lot of money where you may or may not need
10 a lawyer, or you can get a pro bono lawyer, then
11 come to this venue. But it is not -- I don't
12 think we should be trying to make, you know, this
13 tribunal the be all and end all for all claims
14 because it is not going to be successful if we
15 try to do that.

16 MS. CHARLESWORTH: Mr. Perlman. And then
17 Ms. Fertig, I don't know if you want to respond
18 to any of this because you had taken a slightly
19 different position, but after Mr. Perlman speaks,
20 if you would like to comment further on your
21 proposal.

22 MS. FERTIG: Sure.

23 MR. PERLMAN: For all of the reasons that
24 have been articulated, I think it is important
25 that there be some mechanism for providing a

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2 deterrence factor as part of the award. And
3 since we are talking about creating something new
4 and setting up the ground rules under which it
5 would operate, whether statutory damages are
6 available or not, it seems that any legislation
7 could specifically empower the adjudicatory body
8 to make an award that compensates for actual
9 damage and takes into consideration a deterrent
10 effect.

11 MS. CHARLESWORTH: Ms. Fertig?

12 MS. FERTIG: I think just two points. I
13 agree with what Mr. Leichtman said. We are not
14 looking at this to be the be all, end all for the
15 small claims, but we think that offering
16 reasonable compensation, although there are
17 certainly still people who will look at it as not
18 a reason to come to the table, I think that with
19 your not bad actors, that now that there is a
20 small claims forum, which there isn't today,
21 there's a new -- that in itself is a deterrent to
22 going forward with the business model that is
23 based on not paying anything until you're caught.

24 With the prohibitive cost of going to
25 federal court, it is unlikely that a small claim

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2 is going to make it into federal court, which may
3 be why 90 percent of the cease and desist letters
4 aren't responded to. But creating the small claims
5 forum actually gives those rights holders a
6 vehicle to actually bring someone into a
7 proceeding, which they don't have now.

8 And we think that coupled with reasonable
9 compensation, although it is not going to
10 necessarily have a deterrent effect that \$30,000
11 statutory damages might scare someone to the
12 table is another mechanism that they don't have
13 now.

14 So I think the other point is just the
15 publishing industry hasn't actually approved, you
16 know, they are not endorsing a small claims forum
17 at this point, but they are still hoping to work
18 with other stakeholders to find a remedy that
19 actually would be workable.

20 And so I don't think that the reasonable
21 compensation is, you know, something that they
22 are going to stick to, but I think we need to
23 find a damages amount that is still going to be a
24 sufficient incentive to get potential defendants
25 to come to the table that offer something

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2 different than the district court. That
3 statutory damages are available in both places,
4 that doesn't provide a very meaningful incentive
5 for them to elect that forum as opposed to going
6 to district court.

7 MS. CHARLESWORTH: Mr. Sanders?

8 MR. SANDERS: Quick follow-up question.

9 Do you feel that you are here representing
10 the interests more of copyright users than
11 copyright owners?

12 MS. FERTIG: We are really representing
13 both. In our comment we noted we have a very
14 diverse membership. And so our -- we are trying
15 to speak from a baseline position, but the
16 members have, you know, different positions based
17 on the size of their company and their business
18 model. So we really do encompass both sides of
19 the spectrum.

20 MS. CHARLESWORTH: Okay any further thoughts
21 on this? One question, I heard a couple people
22 saying we shouldn't really deviate from the model
23 that we have today. Is there anyone, though, who
24 thinks there is sort of some sort of alternative,
25 for example, a multiple of damages or something

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2 that's, say, in between actual and the existing
3 statutory damages framework. I didn't hear a lot
4 of support for that, but I just want to make sure
5 there were no other ideas out there in terms of
6 addressing the deterrence issue.

7 Ms. Wolff, did you have something else you
8 wanted to say?

9 MS. WOLFF: Yes.

10 I think one way of also making sure that
11 this isn't used to game the system would be if
12 you had -- if you wanted to elect the system, and
13 the same infringer sort of in the same activity
14 had used a number of works, that you wouldn't be
15 able to bring 12 different claims. I think that
16 might be helpful.

17 I think from what I am hearing from Rachel
18 is, really, if you kept bringing 20 different
19 claims, each for 30,000, that might be regarded
20 differently than if you wanted to use this court
21 because you had two or three works, all in the
22 same article, and they were infringed at the same
23 time, that you would, as we would now need to do
24 in the federal court, bring them at once. So you
25 would just choose to have the benefit of the

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2 system, or you could do it in a streamlined way
3 and have the benefit of perhaps not needing to
4 hire an attorney, that you could bring your claim
5 in here and you would be agreeing then to cap all
6 the uses at that amount.

7 Because that is why our position was that
8 nothing should change. If you are going to agree
9 to use this system, that whatever damages you
10 could have gotten would be capped at 10,000,
11 whether they include statutory damages, whether
12 it would include your attorneys' fees or actual
13 damages.

14 Though, I think having some guidance as to
15 deterrence that courts can look at a multiplier I
16 think would, in fact, be very helpful. Because
17 we generally have argued that for decades and
18 decades in the photo industry, to say that
19 compensation should not be what you would give
20 your best customer who came to you first before
21 using it, but all the effort you have to go to to
22 actually find the infringer and contact them and
23 try to get them to pay really means that they
24 should not get the best price going out there,
25 but perhaps a multiplier two or three or whatever

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2 number it is is really much more fair because
3 you've had to work so much harder than that to
4 actually get paid what you are entitled to be
5 paid. And so it isn't really the impact on your
6 business of having to -- having an enforcement
7 team and go after people who don't pay first
8 really should be taken into consideration.

9 MS. CHARLESWORTH: Mr. Taylor?

10 MR. TAYLOR: Just one comment about the bad
11 actors and good actors. There's some of the
12 people at the table here represent well known
13 companies that indirectly are established, and
14 they have an ongoing business, they might be in
15 publishing. Perhaps in those cases an employee
16 made a mistake, there might be a contract
17 dispute, some misunderstanding, but by and large
18 you are looking for some solution.

19 Most of the infringers that we're finding
20 are people that I would describe as willful
21 infringers who have a business model of stealing,
22 they knew exactly what they were doing, their
23 intent is to delay, to obfuscate, to basically
24 not pay any way that they can. And there's quite
25 a difference, I think, in how one would deal with

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2 those two different types of infringers.

3 MS. CHARLESWORTH: Okay. Ms. Wolff
4 mentioned a multiplier. Is there anyone else who
5 wants to comment on that concept?

6 Mr. Leichtman?

7 MR. LEICHTMAN: I think we talked about this
8 a little bit yesterday, where I think once you
9 start getting into willfulness and things like
10 that, then you start to really implicate the 7th
11 Amendment for sure. You know, it is one thing if
12 you have a very relatively small damages number,
13 and, you know, there's a tradeoff. You are going
14 into this court where the defendant is in a sense
15 voluntarily giving up their jury trial right on
16 damages, but you could even frame a cap of
17 something like \$25,000, not really as damages,
18 but really as a fee or a fine or something like
19 that.

20 But it doesn't necessarily implicate the 7th
21 Amendment. But I think if you start talking
22 about deterrence and willfulness and multipliers,
23 then you are definitely getting into 7th
24 Amendment land, and that could be an issue unless
25 you are going to allow an appeal for a damages

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2 award that includes an element of willfulness or
3 deterrence.

4 MS. CHARLESWORTH: Okay. Mr. Perlman?

5 MR. PERLMAN: I love multipliers.

6 Unfortunately, there's at least one federal court
7 decision that states or suggests that the use of
8 multipliers is not permissible. Because of that,
9 if we tried to specifically incorporate a
10 reference to multipliers in any kind of proposed
11 legislation, we may be running into a conflict
12 between what the courts have said and what
13 Congress is saying.

14 MS. CHARLESWORTH: Mr. Lehman, and then I
15 think we probably should move on to equitable
16 relief, because that's another important
17 discussion, unless someone has a very pertinent
18 comment that didn't get said, we can allow that.

19 Mr. Lehman?

20 MR. LEHMAN: I just wanted to make clear
21 that my proposal was really to have some very
22 specific minimal statutory damages, 5, 10, 15,
23 and give the adjudicator, you know, options based
24 on the total circumstances in the case.

25 Speaking of the 7th Amendment issue, you

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2 have defendants who don't pay any attention to
3 these things. The small claims court actually is
4 an advantage for defendants, too, because they
5 aren't going to have to incur the legal expenses
6 and so on of full blown district court litigation
7 and defending ourselves there.

8 So I think there probably are incentives for
9 the defendants to stay in the system, even if you
10 have some kind of specific deterrent schedule of
11 statutory damages. I mean, in regard to the
12 comment that Vic Perlman just made, I mean,
13 unless there's a constitutional problem,
14 basically, whatever the Congress says is what it
15 will be. And I think we're talking about an ad
16 hoc situation. We're talking about a new law
17 that will create a new tribunal and a new system
18 with new rules, and so we are under no obligation
19 necessarily to apply, you know, the existing
20 damages structure, the copyright law, or anything
21 like that. And we can start from scratch in
22 setting up some mechanisms.

23 MS. CHARLESWORTH: Okay. That was the easy
24 part. Now we have injunctive relief.

25 We had some commentary yesterday and

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2 obviously in the written comments about what
3 forms of equitable relief should be available.
4 There's a definite split of opinion on whether
5 you should be able to get an injunction under
6 such a system. I think some people were
7 concerned about the hold up aspects or potential
8 hold up aspects and the value of an injunction,
9 others feel that an injunction is necessary to
10 protect artists who may not want their work used
11 in certain ways.

12 So I want to open the floor to allow
13 everyone to express their views on this. It
14 obviously would be a critical factor in any
15 proposal. Who wants to go first?

16 Mr. Leichtman?

17 MR. LEICHTMAN: Sure.

18 I think I did address this yesterday a
19 little bit. But I think from the standpoint of
20 indigent artists, the injunctive relief is
21 absolutely critical. And what we see more often
22 than not is folks that come in to our offices who
23 really just want their stuff back, or taken down,
24 or the infringement to stop.

25 And one of the obstacles that we have, even

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2 if you just went to federal court to seek
3 injunctive relief, is the coupling of the loser
4 pays provision in the Copyright Act with the
5 remedies. And I thought it might be useful to
6 talk about one particular case which really does
7 have our volunteer attorneys and our clients very
8 concerned.

9 And this is the case of Seltzer against
10 Green Day, which is out in California. And
11 essentially what happened was a street artist had
12 created an image called the Scream image. And a
13 photographer took a picture of the image, then
14 got hired as the set designer for the band Green
15 Day's tour. Took the image, made some
16 alterations to it by just painting some stuff on
17 top of it and making it different colors, and
18 then used it both in the band's video and in the
19 concerts.

20 And here's what the artist testified to in
21 his deposition. And I think it is important to
22 just run through this quickly to see what the
23 court did with it. And then I think that will
24 put in context what our concerns are.

25 So the artist testified that the use by the

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2 defendants of his work tainted the original
3 message of the image and made it now synonymous
4 with lyrics, a video, and concert tour that it
5 was not originally intended to be used with. "I
6 make an image, I produce it, I tailor it to my
7 needs, the concept, the content. And then
8 someone comes along, defaces the image, puts a
9 red cross on it. I mean, maliciously devalues
10 the original intent, and then shows it to
11 thousands upon thousands of people."

12 So the defendants filed a motion for summary
13 judgment on fair use. And they argued that
14 because the image was used in a compilation of
15 images, and the set designer had added graffiti
16 and a back drop, put this red cross over the
17 image, that it transformed the work and it was a
18 transformative fair use.

19 And the court then used the artist's own
20 testimony against him. I mean, here's an artist
21 testifying honestly, you know, "These guys have
22 ruined my image and put it in a context that I
23 didn't approve of. They basically made a
24 derivative work out of it, and without my
25 authorization." And the court says, "There

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2 appears to be no dispute that defendants added
3 new meaning to plaintiff's work, based on the
4 artist's testimony."

5 And then to add insult to injury, the court
6 then awarded the defendant attorney's fees. And
7 here's what the court said: That an award of
8 fees to further the purpose of the Copyright Act,
9 because the defendant's successful defense of the
10 video backdrop secured the public's access to
11 these works, paved the way for defendants and
12 others to manipulate and reinterpret street art
13 in the creation of future multimedia compilations
14 At stake was the ability of photographers and other
15 artists to manipulate images captured from every
16 day life, and view them with their own artistic
17 comment, and then incorporate them into new
18 works, embodying moods, tones, and meanings
19 distinct from the original.

20 And here's the kicker. He says: Since the
21 plaintiff's own testimony effectively conceded
22 that the use was transformative, the court finds
23 the plaintiff's claims were both contradicted by
24 established law and were factually unreasonable.

25 Now, the court is saying that at the same

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2 time on the West Coast, while on the East Coast
3 we have the Prince against -- Cariou against
4 Prince and Gagosian Gallery, where almost
5 the identical facts occurred with respect
6 to an artist's photographs being used by
7 another appropriation artist, and the court
8 said there's no way on earth that's a
9 transformative use.

10 So if I am a copyright lawyer trying to
11 advise a client, particularly in a pro bono
12 situation where there's no way that the client
13 can afford to pay the other side's attorney's
14 fees, you know, what are you supposed to
15 do? Here's one court saying, you know, in what
16 I think most copyright lawyers would say is
17 clearly not a fair use situation, saying,
18 you know, these guys stole my work, and, you
19 know, defaced it. And the court actually
20 awarding attorneys' fees against them.
21 And we have lots of clients in these kinds of
22 situations where you have a close case, where
23 there may be a fair use defense. And, you know,
24 as a lawyer advising the client, you have no
25 idea how that's going to come out, and yet

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2 you have to say to the client, "I can bring
3 your case in federal court for you, we
4 have a 55 percent, 75 percent chance of
5 winning the case, but what I have to tell you
6 is, you are at risk. You know, you are
7 not even asking for money, you are just
8 looking for an injunction to get the
9 infringement to stop, but you are at risk of
10 -- you don't have to pay my fees because I
11 am the pro bono lawyer, but you are at risk
12 of having to pay the other side's attorneys'
13 fees."

14 And so in our concept, we think
15 injunctive relief is really critical to a
16 small claims procedure and to have attorneys'
17 fees not be available for either side, because,
18 essentially, what our clients really want
19 is the ability to stop an infringement.

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2 And if you don't have injunctive
3 relief in this small claims court,
4 then it might be good for some of these
5 small infringements where there's a
6 photograph or something like that,
7 but it really won't address what, you
8 know, a lot of the indigent artists
9 need out of an alternative
10 procedure.

11 But we also do favor, as I mentioned
12 yesterday, to the extent injunctive relief is
13 available, some kind of federal court ability to
14 appeal to a federal court with respect to the
15 scope of the injunction. Because we certainly
16 understand, you know, that there is the
17 possibility of error with a tribunal like this,
18 and in some cases defendants may have invested a
19 lot of money in whatever it is that they are
20 doing. And so if they do have a defense and they
21 feel that the tribunal has made a manifest error
22 of law, again, same standard as the Federal
23 Arbitration Act kind of thing, that they may have
24 an ability to get the scope of the injunction
25 reviewed by a federal judge, if that's an issue.

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2 But they wouldn't get to appeal the merits, but
3 they would get to appeal the scope of the
4 injunction so that that might satisfy some of the
5 concerns by the potential defense bar.

6 MS. CHARLESWORTH: Other thoughts on
7 injunctive -- Ms. Shaftel?

8 MS. SHAFTEL: I am glad you brought that up,
9 David. That was exactly the case I was thinking
10 of. That there should be no option to impose
11 mandatory licenses for derivative works. And
12 that's exactly what happened in the Seltzer
13 versus Green Day.

14 And certainly that was a willful
15 infringement, the plaintiff absolutely had enough
16 money to license that usage, and, unquestionably,
17 the artist would never have granted permission to
18 use his mural transformed into a work that made a
19 clearly offensive religious statement.

20 And, again, this is an not orphan work
21 situation. These cases will primarily involve
22 wilful infringement of visual works owned by
23 currently working visual creators, and visual
24 creators make our livelihood by granting usage
25 rights to our work. And exclusive usage rights

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2 generate the highest fees. An alternative court
3 must not interfere with the plaintiff's rights to
4 determine how and for what price our visual works
5 may be used.

6 In many situations, the plaintiffs may have
7 a license or potential licenses with authorized
8 use to create derivative works, which could be
9 violated by a mandatory license granted to
10 unauthorized infringers. And we believe that
11 equitable relief should be available to
12 plaintiffs and defendants to the same extent as
13 provided under current copyright law.

14 MS. CHARLESWORTH: Other thoughts on
15 injunctive relief? Ms. Fertig?

16 MS. FERTIG: Rachel Fertig with AAP.

17 In our comment we expressed that we would
18 not want injunctive relief to be a part of this
19 forum. We listed a number of reasons, but
20 primarily for that there's going to be very
21 little discovery and a very thin evidentiary
22 record. We don't think that it will be
23 appropriate for the adjudicators in this forum to
24 be making that equitable balancing test based on
25 such a thin evidentiary record.

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2 Also, we think that having the ability to
3 get an injunction through this forum would
4 essentially vitiate any sort of meaningful
5 damages cap that there would be in the forum. And
6 I think a lot of the reasons that are behind that
7 were articulated yesterday, that essentially an
8 injunction can be worth, you know, scale of
9 magnitude more than whatever the damages they
10 would have been able to receive if, you know, a
11 book has incorporated works into it and it is
12 scheduled for release, that's going to be worth
13 more than \$25,000 or \$30,000. And so we think
14 that that's another reason that the injunctive
15 relief would essentially get rid of any
16 meaningful cap.

17 And I think just the other -- you know,
18 having an appeal to a district court isn't
19 necessarily a sufficient remedy, because you
20 still have the very thin record below. And so
21 that wouldn't necessarily satisfy our concerns.

22 MS. CHARLESWORTH: Mr. Rosenthal?

23 MR. ROSENTHAL: Yes. I would like to agree
24 with that sentiment here.

25 We do believe that, you know, injunctive

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2 relief is going to be necessary, and it is
3 appropriate at times. But in the situation of
4 the case that you just talked about, I am not
5 sure that this court should even address that
6 issue, it should be disqualified, because of the
7 inability to have a good record underneath and
8 the idea we would rely on an appeal is not the
9 way to go. I think that case shows why artists
10 need a moral rights law in the United States. I'm
11 not sure we can carve that out of a small claims
12 court process.

13 So I would be very wary about it. If fair
14 use is part of the issue, I'm not, you know, in
15 favor of this court dealing with anything along
16 those lines. It should be disqualified, and you
17 would have to go to a federal court to deal with
18 the fair use complaint -- or defense, excuse me.

19 MS. CHARLESWORTH: Hearing these comments,
20 and Ms. Wolff, you can comment in just a moment,
21 but one question I have, is there some sort of in
22 between here? Does anyone have any idea about
23 how injunctive relief might work, might be
24 limited in a way to avoid some of the problems
25 that Ms. Fertig expressed, or not?

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2 I would be curious if there were any further
3 thinking on that.

4 Ms. Wolff?

5 MS. WOLFF: I remember in the orphan works
6 discussions, and there was a lot of discussion
7 about this, which was maybe about four years ago,
8 and I think the language that seemed to come up
9 based on both users and creators was that there
10 could be some injunctive relief. For example, if
11 images are displayed on a web site, there really
12 wouldn't be any harm to make sure it wasn't
13 continued. But, for example, if there was one
14 image that was in a documentary film, it may
15 cause a lot of harm to have someone redo an
16 entire documentary film.

17 And so I think there was factors that could
18 be considered when a work is maybe not altered
19 like the artist work there, where it is -- you
20 know, that's almost a whole separate issue.
21 That's whether something is a derivative work or
22 fair use. But if something is incorporated into
23 a final product, and it's one of many, many
24 elements, and there's a lot of other creativity
25 added to that final product, that that would be a

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2 factor to consider. And if it would then take it
3 over the cap, then that would be something that
4 would be inappropriate for this type of court,
5 and that would be something that would have to --
6 you know, and maybe if the trier of fact saw that
7 kind of request, would pull something out of this
8 court, that you would have the option of
9 withdrawing from this court, and then maybe bring
10 it into regular federal court, if what you are
11 really seeking is going to cause a lot more
12 dollar harm to the user.

13 MS. CHARLESWORTH: So you are drawing a
14 distinction, I think, between sort of a basic
15 perhaps takedown right or stop use right, however
16 you want to describe that, and sort of a
17 derivative work issue.

18 MS. WOLFF: Right. For example, if there's
19 an ad that can be discontinued in that cycle, or
20 within a very short amount of time, versus, you
21 know, an image that's put into a documentary film
22 or something like that.

23 MS. CHARLESWORTH: Other thoughts?

24 Mr. Leichtman?

25 MR. LEICHTMAN: Yes. I just wanted to

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2 respond to some of the comments about the thin
3 record. And it's not clear to me that it is
4 going to be a thin record because we are still
5 discussing what discovery would be available in
6 this proceeding. It may not be a thin record.

7 I think one of the things we talked about
8 yesterday would be in what instances would the
9 tribunal have the ability to order additional
10 discovery beyond just some very basic written
11 discovery. And, obviously, this would be the
12 kind of case where maybe the tribunal would be
13 able to, you know, in its discretion order
14 additional discovery. So I don't think it is
15 correct to assume that you necessarily are having
16 these judges decide a question like this which
17 may or may not be a difficult question. I think
18 in the Seltzer case it was easy, but the court
19 got it wrong 180 degrees.

20 But I think that we shouldn't necessarily
21 assume there aren't -- the tribunal wouldn't have
22 the ability to decide these issues.

23 MS. CHARLESWORTH: Mr. Sanders?

24 MR. SANDERS: If we were trying to fashion a
25 compromise on this, which I think is part of one

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2 of the last questions that you asked, is there a
3 middle ground, the ability to issue a temporary
4 restraining order for a period of time, roughly
5 akin to labor negotiations, might be worth
6 exploring. I mean, proof of irreparable harm at
7 the threshold is going to be necessary, I
8 believe, to get a TRO anyway.

9 Maybe we say that there's a limitation on
10 time for the restraint, during which time a
11 hearing is made necessary and figure out some way
12 to address all the concerns that we have heard on
13 both sides today, but still give the parties time
14 to avoid whatever irreparable harm that they
15 claim is taking place while they sort the
16 situation out.

17 MS. CHARLESWORTH: Mr. Rosenthal?

18 MR. ROSENTHAL: I certainly think there is -
19 - you raised the issue of are there certain
20 instances where you can have injunctions where
21 there's not derivative works involved, yeah, I
22 think that that is the case.

23 I think, though, that the issue of this
24 court dealing with issues of fair use really
25 brings to the forum the knowledge of the judge

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2 and also we are talking about pro se parties
3 here.

4 I would not like to see a small claims court
5 deal with whether or not a musician files an
6 action against Girl Talk for a mashup. For that
7 particular law to be established, even if it is
8 not precedential, for in any way to address the
9 issue on this level I think is wrong. And I
10 think that that's where we really just have to
11 understand there's some issues that are too
12 complex for this level. That would be one of
13 them, but certainly I believe that there are many
14 instances where an injunction would be warranted
15 for takedown in particular, song to song, image
16 to image.

17 MS. CHARLESWORTH: Ms. Fertig?

18 MS. FERTIG: I think that the distinction
19 between the takedown right and the derivative
20 work issue is something that I will take back to
21 our members and discuss with them. But I think
22 that federal court is still an option. So since
23 you still have the possibility, although, as the
24 case that Mr. Leichtman brought up shows, it
25 doesn't always turn out the way you'd want, and

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2 there are still risks involved.

3 The ability to seek injunctive relief is
4 still available. This forum isn't going to take
5 that away from anyone. And so we may not want to
6 look at it as a solution for every problem, but
7 keep it simple. I think somebody suggested
8 yesterday, "keep it simple, stupid" so that it
9 really is serving the function of an expedited
10 cheap, easy process for pro se people to be able
11 to come and use. And I think trying to have it
12 solve every single problem and thinking about,
13 you know, discretion to order extensive discovery
14 in order to have a record that would be
15 appropriate for having injunctive relief just
16 brings us further and further away from making
17 sure that it is a simple, quick process.

18 MS. CHARLESWORTH: Further thoughts on
19 injunctive relief?

20 Are there any other forms of equitable
21 relief that people have considered? Under the
22 current law, of course you have destruction of
23 copies and other things. Are these significant
24 to this process in anyone's view?

25 I think we heard one comment about mandatory

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2 licenses. Ms. Shaftel, I think you said you were
3 opposed?

4 MS. SHAFTEL: Yes.

5 MS. CHARLESWORTH: Does anyone else have a
6 thought on, you know, the court's ordering in the
7 case of a derivative work, a mandatory license?
8 No?

9 Mr. Perlman?

10 MR. PERLMAN: I have always been a proponent
11 of the artist's right to say no. And for that
12 reason, I would be opposed to having a mandatory
13 license as part of the panoply of relief
14 available.

15 MS. CHARLESWORTH: Okay. Well, I think the
16 next topic is attorneys' fees and costs. We've
17 heard some preliminary thoughts on that in terms
18 of whether fee shifting should be available. I
19 think there's obviously the form that we are
20 familiar with which exists today in the Copyright
21 Act. I think some of the comments suggested
22 maybe variations on what we have today in terms
23 of whether it would be automatic in some cases,
24 whether it would never be allowed, or whether it
25 would follow existing federal law.

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2 Another question is whether there might be
3 limits on the amount of attorneys' fees that
4 could be recovered by the prevailing party. So I
5 want to open the floor on that question and hear
6 what people have to say.

7 Should we -- I guess the first question is
8 should we have fee shifting as part of a small
9 claims system at all?

10 Ms. Shaftel?

11 MS. SHAFTEL: We don't want attorneys to be
12 involved in the court proceeding at all. That's
13 the whole point of keeping this new system
14 affordable. If either party wants to pay an
15 attorney to counsel them behind the scenes, they
16 may do so, but we don't want attorneys allowed in
17 court, and, therefore, attorneys' fees should not
18 be awardable.

19 We are very well aware that corporations
20 most likely have legal staff, and that their
21 attorneys would be preparing the case. So that's
22 not necessarily a level playing field for the
23 plaintiff. And the plaintiff may in reality,
24 probably will, consult with an attorney before
25 going into the case.

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2 We will explain to them how to do this, and
3 in all likelihood consult with an attorney along
4 the way during the proceedings. But that should
5 be each parties' choice. And the whole point is
6 that we don't want individual plaintiffs and
7 rights holders to be bowled over by a big legal
8 department from a large business entity, which is
9 what's happening now.

10 MS. CHARLESWORTH: Okay. Other thoughts on
11 the attorneys' fees?

12 Mr. Leichtman?

13 MR. LEICHTMAN: I mean, the unpredictability
14 of the way the courts rule under the current act
15 really is, as I have mentioned, a deterrent to
16 artists bringing meritorious claims. So in our
17 view, in this alternative venue, there should not
18 be any fee shifting allowed at all.

19 MS. CHARLESWORTH: Mr. Rosenthal, and then
20 Mr. Lehman.

21 MR. ROSENTHAL: I think that for music, with
22 the much more complex issues involved, we are
23 very worried that a system like this that we're
24 contemplating creating here brings a disincentive
25 for a plaintiff or defendant to go to an attorney

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2 to get some advice. This is not a good idea. I
3 mean, we talked about fair use. We talked about
4 transformative nature. We talked about mashups.

5 This is stuff that these folks need advice
6 on. So the idea of not having attorneys' fees,
7 even if the attorneys aren't in the building, in
8 the courtroom, we want to promote the idea that
9 you go and you find out what the law is about, go
10 and understand that you may get your fees
11 returned because of this, because -- and you can
12 shift it to the defendant if you win, possibly, I
13 think it is a good thing. And to not have
14 attorneys' fees here is just going to be opening
15 the door to an amazing amount of amateurish
16 presentations and problems that we can't even
17 contemplate right now, especially for music. I
18 understand maybe for photographs and visual
19 images it is a different story, but we want
20 plaintiffs to talk to attorneys about these
21 issues, especially before they walk in.

22 MS. CHARLESWORTH: So is it fair to say, Mr.
23 Rosenthal, then, that you think the potential --
24 the ability potentially to cover attorneys' fees
25 would be an incentive for people to hire

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2 attorneys and for attorneys to represent
3 claimants in the system?

4 MR. ROSENTHAL: Yes. We want to get it
5 right, too. So it is also an incentive to get it
6 right as a system, and also it's an incentive for
7 that particular party to get it right.

8 MS. CHARLESWORTH: And do you think there
9 should be automatic shifting, or should it sort
10 of follow the current discretionary rule?

11 MR. ROSENTHAL: I would think a
12 discretionary rule might be more appropriate in a
13 case by case. You know, you don't know the
14 complexity of each case. You don't want somebody
15 walking in in a very simple case and say, hey,
16 here's my bill, you know, from the law firm. And
17 here's my bill, throw it on the other side.

18 No. You have to have a judge have some
19 reasonableness standard involved, but not to
20 allow that to come into the picture I think would
21 be a great disincentive and a disservice to
22 plaintiffs and at times to the defendant.

23 MS. CHARLESWORTH: Mr. Lehman?

24 MR. LEHMAN: First, I would say I strongly
25 disagree with the view that attorneys should not

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2 be involved, and would associate myself in that
3 with Mr. Rosenthal. I also think that Mr.
4 Leichtman has raised very -- again, he gave a
5 specific factual example that is extremely
6 troubling. And I think this goes a little bit to
7 the -- also to the forum, the nature of the
8 forum. If this is an expert panel within, for
9 example, the Copyright Office, with ALJs who
10 don't do anything but this, but who are steeped
11 in copyright law, then situations like Mr.
12 Leichtman described are less often to happen.
13 Certainly with this particular forum, you know,
14 this is going to be the only one place to go.
15 That's that panel.

16 So I think it really depends on how you set
17 up the forum. If on the other hand the system is
18 a system where, for example, you go to a US
19 district court where these cases are assigned to
20 some kind of a part-time special master, whatever
21 then, you are more likely to get a lot of
22 diversity in results of the type that Mr.
23 Leichtman described.

24 My concern, as I am in favor of the creator,
25 I want the creator to be able to use the

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2 copyright law and to get justice. And that's why
3 yesterday I mentioned that -- and this is related
4 to the damages issue. What I would like to see
5 is there be a cottage industry of contingent fee
6 lawyers and that this system provides sufficient
7 damages that they can be shared with these
8 lawyers and I presume there would be experts. And
9 I think that sort of avoids the problem as
10 opposed to just making attorneys' fees available,
11 that Mr. Leichtman talked about.

12 But as I mentioned it also, I think it has a
13 lot to do -- a lot of these issues have to do
14 with how we set up the forum. Because,
15 personally, I feel much, much better about giving
16 all kinds of discretion and so on if you have a
17 specialized small claims court with people who
18 don't do anything else, and really then will
19 apply this jurisprudence uniformly, presumably.

20 MS. CHARLESWORTH: Ms. Willmer?

21 MS. Willmer: I just wanted to say that if
22 the system is set up in the way that we hope it
23 will be, where it is very streamlined and very
24 simple, and available to both plaintiffs and
25 defendants on a pro se basis, the hope would be

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2 that, "Well, while you may need to consult with
3 an attorney at various points, you may not need
4 to hire one," which would then make the issue of
5 attorneys' fees less important here.

6 So we don't have real strong feelings about
7 it one way or the other, other than I don't think
8 that it is necessary. And I am not sure that we
9 would want to cultivate a new crop of contingency
10 lawyers for this, but we do want to make sure
11 that the system is available.

12 The one thing I did want to say is I would
13 like to address the issue of costs separately. I
14 know you have them together in this group here.

15 MS. CHARLESWORTH: We haven't reached them,
16 but, yes, go ahead.

17 MS. Willmer: I just wanted to say that we
18 would be in favor of cost shifting. So to the
19 extent that the plaintiff has to bear the costs
20 to file, if they were successful and able to
21 receive a judgment, we do believe that the cost
22 should be shifted to the defendant in that case.

23 MS. CHARLESWORTH: Okay. Mr. Sanders?

24 MR. SANDERS: Once again, I think a number
25 of very good points have been made on both sides

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2 of this argument, and, therefore, again, I think
3 that there's a middle ground to be found here.

4 We clearly do not want to scare off
5 potential plaintiffs from using a system that's
6 been developed specifically for them to be able
7 to address small claims. But we do, of course,
8 want to avoid harassment of defendants by what
9 amounts to something more than frivolous and
10 bordering on fraudulent claims. That's not fair
11 either.

12 So my suggestion would be to have specific
13 rules in this context involving fee shifting that
14 set an extremely high standard for the shifting
15 of fees, but that plaintiffs be admonished at the
16 threshold of filing that if this is found to be
17 fraudulent or an attempt at harassment, that they
18 will, in fact, be subject to fee shifting, and
19 somehow try to finesse a compromise that serves
20 both interests.

21 MS. CHARLESWORTH: And Mr. Perlman?

22 MR. PERLMAN: I agree with Charles. This is
23 one of these where I am listening to both sides
24 and thinking everybody's right.

25 I think that in addition to what Charles

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2 suggested, my concern is that you may have a
3 corporate defendant who's running up a
4 significant legal bill. And I guess the way to
5 deal with that situation is to use a sort of
6 system that Charles suggested, to have
7 discretionary power in the adjudicator to award
8 attorneys' fees, but to cap the fees at some
9 level so that, for instance, a photographer or an
10 artist isn't faced with the prospect of a five
11 figure award or more, legal bills being assessed
12 against him if he loses.

13 MS. CHARLESWORTH: Mr. Osterreicher?

14 MR. OSTERREICHER: It has been very
15 interesting listening to both sides of this. I
16 mean, on one hand, I certainly think that what
17 we're trying to envision here in small claims is
18 something where you do have pro se litigants.
19 That being said, I also think the right to
20 counsel is something that's very inherent in this
21 country, and to preclude that, especially when we
22 look at state small claims court as an example
23 where it is usually a pro se litigant, but, of
24 course, as you do have the right to counsel. I
25 think that's important, and I wouldn't want to

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2 see that cut off.

3 I know one of our suggestions in our
4 submitted comments was to have the courts do a
5 survey and determine the number of hours that are
6 normally spent on adjudicating these types of
7 cases, and then picking a reasonable fee as a
8 multiplier, and pretty much capping the fees at
9 that.

10 So you don't have a corporate defendant
11 coming in and having a fee request that dwarfs
12 what's looked for in terms of any recovery. So I
13 think that that's something to consider, and I
14 certainly think it should be in the discretion of
15 the court.

16 MS. CHARLESWORTH: Mr. Taylor and then Ms.
17 Fertig.

18 MR. TAYLOR: Anecdotally, the attorneys that
19 work with photographers that we work with usually
20 want a demand that's fairly large because they
21 know the outcome is going to be less than what
22 they are demanding.

23 If the cap on this alternative court ends up
24 being, say, all the way down to the \$20,000,
25 \$30,000 range, it will be very difficult for the

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2 individuals, the rights holders, photographers,
3 to find legal counsel to represent them.

4 This would be a huge incentive for the
5 rights holders to be able to have professional
6 counsel on their side, if they knew walking in
7 that they could get the attorneys' fees covered
8 in the adjudication.

9 So there's another factor, which is there's
10 this footnote that is -- as I understand it, is
11 basically saying that only the exclusive rights
12 holder can enter federal court and have copyright
13 lawsuits.

14 So one of the questions might be whether or
15 not the rights holder themselves is the only
16 person who can enter this court.

17 For example, there are a lot of picture
18 agencies out there that represent photographers
19 on a nonexclusive basis. Conceivably, it might
20 be an efficient process to have a photo agency
21 that represents an artist be able to go into
22 court on their behalf. But I don't think that
23 that would be allowed at the federal level. That
24 might be a consideration at this level. And
25 then, again, attorneys' fees kind of kicks into

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2 that question as well, and kind of how does one
3 pay for competent representation.

4 MS. CHARLESWORTH: Ms. Fertig?

5 MS. FERTIG: I think, just following on some
6 of the earlier comments from Mr. Sanders and Ms.
7 Willmer, we at AAP saw that concern about having
8 attorneys' fees in this forum may not actually be
9 that relevant of an issue if we are trying to
10 make sure that it is available, meaning for pro
11 se plaintiffs.

12 And so our suggestion was setting a
13 different amount that would substitute as
14 attorneys' fees that would be available across
15 the board subject to a high discretionary
16 standard, as Mr. Sanders mentioned. But it would
17 be set at a percentage of the amount in
18 controversy so that it is not dependent on if
19 somebody has an attorney not, but it is a set
20 percentage that's there, and we saw that as a
21 potential middle ground. So that you don't have
22 a pro se plaintiff who might get stuck with a
23 five-figure bill from a corporate defendant, but
24 they would also take into their calculation how
25 much they really want to claim if it is set as a

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2 percentage of what they're asking for.

3 MS. CHARLESWORTH: So that's an interesting
4 proposal. Does everyone understand the proposal?
5 What is the reaction to that, and also while we
6 are on that subject, let's talk about cost
7 shifting. I think Ms. Willmer had raised that
8 comment.

9 Do people think that some sort of system
10 where a percentage of the claim is set aside to
11 go to the prevailing party, is that the --

12 MS. FERTIG: Right. In the judge's
13 discretion, if he feels that it is merited. It
14 wouldn't be an automatic presumed shifting, but
15 it would only be where there had been evidence
16 that the claim may have not been, you know, as
17 full of merit as it necessarily should have been
18 then to award those costs, but not a presumed
19 shifting.

20 MS. CHARLESWORTH: Okay. Any reaction to
21 that?

22 Ms. Wolff?

23 MS. WOLFF: I think it is an interesting
24 thought. I think the practical result will be
25 that every plaintiff will come in and say that

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2 the award is at the top amount because that would
3 be the only way to really, you know, to get the
4 assistance of an attorney, if you're really
5 trying to collect on something that's \$1,000 or
6 \$2,000, it is not going to be very effective.

7 So maybe just a flat fee for some kind of
8 process that should be quick and efficient may
9 work out. I don't recall, I think Germany has
10 very efficient ways of resolving infringements.
11 And I think that they always get attorneys' fees
12 cost, but it is a very -- it is sort of an amount
13 for filing very specific papers. And I think
14 everyone sort of knows what that is. I don't
15 have all the details in front of me, but I am
16 aware that they have a very easy process. And
17 usually when someone sends a letter about you
18 having -- for example, even with a publisher, if
19 an image was used and it wasn't paid for,
20 essentially, it's basically one letter because
21 they know if they don't, there's this very simple
22 proceeding that gets filed on and attorneys' fees
23 cost, and it is a very set amount. And so it
24 really encourages payment. Of course, none of it
25 is extraordinary like you might get in the US or

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2 no reaction.

3 So it seems here you either get no reaction
4 or some extraordinary result. But I do think
5 that dealing with cost would be important because
6 I think if usually these cases would have been
7 brought, someone would have tried to ask to have
8 payment first, and it would have probably been
9 either ignored or rejected. So I think if the
10 plaintiff does prevail and gets an award for the
11 use, that the initial cost of filing should at
12 minimum be covered.

13 MS. CHARLESWORTH: Mr. Perlman?

14 MR. PERLMAN: On the AAP suggestion, I
15 think, first, we have to keep in mind that in our
16 view the ideal is that this system is working
17 without lawyers. But where there are lawyers
18 involved, rather than a flat percentage, I think
19 the thing would have to work in steps. So that
20 there would be increments under which the lower
21 award would have a higher percentage for
22 allowable for counsel fees, and then the bigger
23 the award got, that percentage would come down.

24 MS. CHARLESWORTH: Mr. Leichtman?

25 MR. LEICHTMAN: Again, I think just from

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2 what we see on a, you know, fairly regular basis,
3 I think that the availability of fees for the
4 defendant would be a deterrence to people
5 bringing claims in anything other than these kind
6 of slam dunk cases where it is clear your
7 photographs are put on a web site and they are
8 selling it. But if there's any kind of even
9 arguable defense, it is going to deter artists
10 who can't afford to pay the other side's fees
11 from bringing claims.

12 So, again, I think we would be very
13 concerned about certainly something that was
14 automatic, you know, unless there was a very,
15 very high standard of frivolousness or something
16 like that that would, you know, have to be found,
17 or repeat violators or some of the things we
18 heard yesterday about the concerns about
19 frivolous claims.

20 But just because somebody prevails in a case
21 where there was a meritorious claim, but a more
22 meritorious defense, we think if there's a risk
23 of fees being awarded in a case like that, it
24 will deter the claims.

25 MS. CHARLESWORTH: Any further thoughts

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2 about costs, particularly the filing fee and
3 whether those should be automatically recovered
4 by a prevailing plaintiff or not?

5 Mr. Perlman?

6 MR. PERLMAN: Yes. I agree with Lisa. If
7 the plaintiff wins, the plaintiff ought to have
8 his costs reimbursed.

9 MS. CHARLESWORTH: Okay. Mr. Sanders?

10 MR. SANDERS: I think as long as we
11 understand that an effort is to be made to keep
12 filing costs very low in these cases, certainly
13 the common sense approach would be they would be
14 a lot lower than going into federal court on the
15 matter. So I think that -- you know, I don't
16 know how you enforce a limitation like that, but
17 I think that's important to set these costs low.

18 MS. CHARLESWORTH: Mr. Lehman?

19 MR. LEHMAN: I don't want to abuse my place,
20 but I just want to emphasize that I think that
21 this issue of providing effective legal counsel
22 for rights holders is very important, and, you
23 know, over the course of my career I have been
24 involved a lot in administration of justice
25 issues, intellectual property rights.

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2 One of the big problems we have across the
3 board in the legal system is we have an
4 absolutely fabulous legal system in the United
5 States if you can afford to hire Robins Kaplan.
6 But, unfortunately, most small individuals, small
7 businesses and so on, can't. And so this creates
8 a big problem.

9 Now, maybe I should make an admission, a
10 disclosure. I am on the board -- advisory board
11 of a company that actually does as part of its
12 offering to the public, provides on the basis of
13 a legal plan, a system of low cost counsel. And
14 this is still in somewhat early stages.

15 But what we see happening is, you know, we
16 have a surplus of lawyers right now. You know,
17 not every -- again, I don't think Mr. Leichtman's
18 firm, they are picking probably associates from
19 the finer law schools, law review, et cetera,
20 like Columbia, they are not necessarily -- there
21 are lots of -- there is in the press all over the
22 place, law students are suing law schools because
23 they are not getting jobs.

24 So there's really a surplus of lawyers. And
25 so part of the problem, I think, of the challenge

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2 is to, you know, model legal business practices,
3 and legal systems so that, you know, not
4 everybody's going to be a million dollar partner
5 of a law firm. So that actually these services
6 of our surplus of lawyers can be effectively used
7 to resolve this problem. And that's why I think
8 in this context, you know, I just argue very
9 strongly for setting some kind of a system that
10 would make, you know, some kind of attorney
11 business model that would -- that would justify
12 somebody getting in there and representing these
13 clients and making it a business.

14 In the situation that I just described with
15 this -- with my affiliation, you know, they are
16 not necessarily doing this, but you pay to
17 basically have Internet legal services, and then
18 you have a legal plan and you get certain
19 consultation with a lawyer for a certain period
20 of time, and that's automatically included in
21 your monthly payment. And then if you want to
22 have something more, for example, if you want to
23 litigate, then you -- there's kind of a
24 discounted rate schedule for the individuals.

25 And this is something that's really becoming

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2 very popular with small sole practitioners and
3 small law firms of the kind that I just
4 described. And I think that if we encourage the
5 use of that sort of thing in this procedure, then
6 it would really provide something that doesn't
7 exist for right now.

8 So your only choice right now is basically
9 pro se representation, not suing at all, or
10 basically going to New York Lawyers for the Arts
11 or some similar situation and asking for pro bono
12 counsel.

13 MS. CHARLESWORTH: Okay. Mr. Perlman? And
14 Ms. Willmer, did you have your hand up?

15 MS. Willmer: No.

16 MR. PERLMAN: I want to go back to something
17 Charles said, that mentioned that ideally when we
18 are designing it, costs would be fairly nominal.
19 And I think that's exactly right, and it is
20 important.

21 But I also just want to point out that's
22 what's nominal to us sitting around the table,
23 \$1,500 or something like that, is very
24 significant to most of the constituents and many
25 of the people around the table, including my

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2 people.

3 MS. CHARLESWORTH: Mr. Leichtman?

4 MR. LEICHTMAN: Yes.

5 And I think yesterday we had talked about we
6 would support some kind of system of fee waivers,
7 if they could demonstrate that they were -- that,
8 you know, that they were needy and couldn't
9 afford the filing fees.

10 But I just come back to, you know, again, we
11 have an army of pro bono lawyers in the New York
12 City, but also in other cities, and there are
13 Volunteer Lawyers for the Arts organizations not
14 affiliated with us, but all around the country.
15 And so we just don't see necessarily --
16 obviously, people should have a right to counsel,
17 we strongly believe in that. So I am not
18 advocating that. I think what we are saying on
19 the flip side, because I think there's no way you
20 are going to get buy-in from the defense
21 community on this tribunal if it is not
22 evenhanded.

23 And so we just see on the flip side, a much
24 greater risk of claimants not bringing claims
25 because they are afraid of having to pay the

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2 defendants' fees, than there is a risk of not
3 being able to get either, you know, pro bono
4 counsel, or counsel at reduced rates to help
5 people that need help in these proceedings.

6 There are plenty of organizations that are
7 around to help, and plenty of small law firms and
8 solo practitioners to help. And we would see if
9 we are balancing the two dangers, we see the
10 dangers of people being deterred as a greater
11 danger than the danger of people not getting
12 good representation.

13 MS. CHARLESWORTH: I am going to break in
14 here. We started a little late. It is a little
15 after 11:00. There are actually -- this panel
16 was action packed, but we still have several
17 important topics, including appeals and so forth.

18 One question I have, how many people here
19 think they will have a lot to say on
20 constitutional issues? I want everyone to have
21 their opportunity. But we are trying to figure
22 out -- we are thinking that panel may be a lot
23 quicker and shorter because it seemed we got
24 fewer comments.

25 So what I am thinking is we will take a

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2 break, continue this panel with the additional
3 topics of enforceability, appeals and so forth,
4 maybe take another quick break, do the
5 constitutional panel and then have lunch, and
6 then do our wrap up.

7 Does that seem look a good schedule? Or if
8 people have another suggestion, I am open to it.
9 The alternative my colleague is suggesting is
10 that we could perhaps combine the constitutional
11 questions with the wrap up panel, and maybe go a
12 little bit later and then not take lunch. So
13 maybe we try to go, say, to 1:30 or a little
14 later than anticipated, and end the day there, or
15 would people prefer to take lunch and do a final
16 panel after lunch?

17 Okay. Ending the day early, all those in
18 favor?

19 Taking lunch and ending later? Okay.

20 Okay. Ending earlier. And we can adjust.
21 So let's assume now we are going to try to march
22 through and try to finish around 1:30 or so.

23 (WHEREUPON, a recess was had.)

24 * * * * *

25 MS. CHARLESWORTH: The next two issues,

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2 which I think we can consider together, because
3 they are fairly intertwined, are the effect of
4 the adjudication and enforceability.

5 Most of the comments suggested it should be
6 a final and binding outcome, although if someone
7 has a different view today, feel free to express
8 that. And many people suggested that any
9 decision should not carry precedential weight,
10 but it should be considered as res judicata
11 between the parties.

12 So I am wondering if people would like to
13 elaborate on any of the views they expressed or
14 have different views in terms of the outcome of
15 any adjudicatory process in a small claims
16 tribunal.

17 Mr. Sanders?

18 MR. SANDERS: I think part of this is tied
19 to the issue of whether we are dealing with a
20 mandatory system or a voluntary system.

21 And unless I am incorrect, I think we maybe
22 arrived at a consensus, at least among this
23 group, that the voluntary system seemed to make
24 more sense in terms of satisfying the
25 constitutional issues. Therefore, I think that

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2 the appeals process should perhaps be limited so
3 that this does not become an exercise in futility
4 for indigent plaintiffs or small plaintiffs who
5 prevail and then are subjected to an appellate
6 process.

7 MS. CHARLESWORTH: Okay. Appeals is also on
8 the table, and feel free to comment. I think as I
9 said, many of these issues are overlapping. So
10 thank you for that.

11 And other thoughts in terms of
12 enforceability, appealability, and whether this
13 would carry precedential weight.

14 Ms. Wolff?

15 MS. WOLFF: PACA put it in their papers. We
16 are thinking of this as trying to be something
17 that would be efficient and would work well, and
18 there would be incentives for it. And I know
19 when I have had sort of the mandatory mediation
20 in federal court, often if you don't like the
21 result or you don't get anywhere, it is just, you
22 know, you are back at square one. You haven't
23 saved any time, and you certainly haven't saved
24 any money.

25 So the concept is something being similar to

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2 the arbitration process, since you voluntarily
3 agree to use this system, that it would only be a
4 limited appeal for the example of gross abuse of
5 discretion or looked at evidence that wasn't in
6 the record, or did something that was really
7 outside the bounds. Because this is really
8 intended to be something that to give up the full
9 rights you would have under the Act and would
10 agree to a limited award, that you need some kind
11 of finality. You need to know that you are not
12 going to be drained of all your resources.

13 And I think the elements that with all the
14 associations that we discussed the system on the
15 phone, agreed upon that we wanted something that
16 was efficient, you wouldn't be required to use an
17 attorney, it would be fair, and streamlined.

18 So I think if you went through this process
19 and you could easily file for \$300, the other
20 side could go right into federal court, you might
21 as well not even have started. It would just be
22 a waste of time.

23 MS. CHARLESWORTH: Other thoughts?

24 Ms. Shaftel?

25 MS. SHAFTEL: We feel a decision should

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2 constitute final and enforceable judgment. The
3 decision of a small claims tribunal should not be
4 published and/or carry any precedential weight.
5 Decisions should have res judicata and collateral
6 estoppel effect, but should be limited to the
7 specific activities at issue and the parties in
8 question.

9 As far as enforceability, in the event of
10 noncompliance the plaintiff should be entitled to
11 a contempt of court ruling and appropriate
12 remedies as are available in state and federal
13 courts. And we feel that the appeals should be
14 allowed under the standard of use of discretion
15 only.

16 The party appealing the decision should have
17 to post a bond. We propose that a tribunal
18 within the alternative court review appeals of
19 the alternative court decisions and keep the
20 cases within the alternative court system.

21 An example of this is the en banc procedure
22 in US district courts. And we hope this would
23 prevent a losing defendant from appealing the
24 decision upstairs to a federal district court,
25 hoping the enormous increase of legal fees and

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2 costs would cause the plaintiff to give up.

3 MS. CHARLESWORTH: Just to clarify
4 something, are you suggesting that -- let's
5 assume this was a process that somehow initially
6 involved an administrative law judge, it would be
7 appealable to a banc of administrative judges?

8 MS. SHAFTEL: Right. There's a panel within
9 that same system that hears the appeals.

10 MS. CHARLESWORTH: But they would have
11 limited discretion, it would be an abuse of
12 discretion standard?

13 MS. SHAFTEL: Right.

14 MS. CHARLESWORTH: That's a little bit
15 different than what Ms. Wolff proposed, which was
16 more like the Arbitration Act, where it is only
17 if you show that, basically, there was fraud
18 somehow in the way that the decision was arrived
19 at that you can overturn it. So you would have a
20 little bit more substantive review?

21 MS. SHAFTEL: Right. We don't want an
22 unlocked backdoor that if the plaintiff loses,
23 that they can go, okay, appeal, as a way of just
24 getting out of it, knowing that -- I mean, the
25 defendant would just appeal, knowing that the

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2 plaintiff would never be able to afford to go
3 through an appeal in federal district court.

4 MS. CHARLESWORTH: Okay. Other thoughts?

5 Mr. Osterreicher?

6 MR. OSTERREICHER: Well, in terms of the
7 enforceability, one of our suggestions had been
8 for a request for treble damage, even if it took
9 it outside of the cap, as a way to make sure that
10 whatever judgment was awarded actually is paid.

11 So that's just something that --

12 MS. CHARLESWORTH: So are you suggesting if
13 they did not pay, you could go back and get a
14 higher or trebled amount?

15 MR. OSTERREICHER: Correct.

16 MS. CHARLESWORTH: Mr. Leichtman?

17 MR. LEICHTMAN: Yes. We think that in some
18 of these issues, like the right to appeal and the
19 constitutional questions, the 7th Amendment and
20 the due process, they are all wrapped up together
21 because you can't really address the
22 constitutional issues without thinking about the
23 right to appeal.

24 So it may be that what you need is you need
25 within the tribunal individual ALJs, and then an

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2 appellate board or -- second level appellate
3 board, but then there would also be under sort of
4 Federal Arbitration Act kind of standards the
5 right to challenge an award.

6 So because you have to have some enforcement
7 mechanism. So what we had in mind was something
8 like you would then have this award, which would
9 be akin to an arbitration award. And if the
10 defendant didn't pay, you would then be able to
11 go to court to enforce the award, at which point
12 the award could be challenged, but only on the
13 basis similar to the basis that you could
14 establish an arbitration award under the Federal
15 Arbitration Act.

16 So it would be -- that would in some sense
17 address any due process concerns. You still have
18 the 7th Amendment issue, which, again, we don't
19 think that's an issue with respect to injunctive
20 relief. With respect to damages, if the cap was
21 going off, I think these could be characterized
22 in some way as to make them not subject to the
23 7th Amendment, but that's something that I think
24 some more deep thought has to be done, but if it
25 is small enough, I am not so sure that the 7th

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2 Amendment is implicated.

3 But I think the question on the right to
4 appeal to a federal court may be wrapped up in
5 some of these constitutional questions. So you
6 may have to really -- you may have to permit an
7 appeal on some basis in order to avoid at least
8 the due process issue.

9 MS. CHARLESWORTH: So are you -- I just want
10 to make sure I understand. Do you agree with
11 what was said earlier by Mr. Sanders, that it
12 seemed that a lot of people were leaning towards
13 a voluntary standard or voluntary process? So if
14 people agree to the system, do you think it's
15 appropriate for them to waive their jury right?

16 MR. LEICHTMAN: Well, if they agree to the
17 system, the 7th Amendment issue goes away if it's
18 voluntary. But if it's mandatory, then you still
19 have to deal with that, and I think you can deal
20 with that, you know, in different ways to make
21 this tribunal compliant with the 7th Amendment if
22 it is mandatory. But, you know, it would be
23 mandatory essentially if the plaintiff electing
24 the forum, but agreeing to forego their usual
25 remedies.

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2 So if they are agreeing to forego their
3 usual remedies, then you are characterizing this
4 new remedy as a different kind of remedy, and
5 then I don't know whether it implicates the 7th
6 Amendment or not. You have to, I think, do some
7 more deep thinking about that, if it was
8 mandatory.

9 But if it was voluntary, I don't think there
10 is a 7th Amendment issue, but you still -- I
11 think even if it is voluntary, there is still a
12 due process question, and I think that the
13 defense, you know, the likely group of potential
14 defendants in these proceedings are less likely
15 to do this voluntarily if there's not at least
16 some outlet for appeals, for instance, if there's
17 some gross injustice that's been done.

18 MS. CHARLESWORTH: Okay. I just want to
19 follow up on something. You had said earlier you
20 talked about injunctions and the ability to
21 appeal injunctive relief. Do you want to comment
22 a little further on that in the context of what
23 you just said?

24 MR. LEICHTMAN: Yes, sure. And, again, I
25 thought some of the suggestions earlier were

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2 helpful things to think about going forward.

3 But I think if you are going to award -- if
4 you are going to award injunctive relief, which
5 we think is very important to this tribunal, that
6 you be able to get some form of injunctive
7 relief.

8 Then there is this concern that the defense
9 side is going to have about the scope of such an
10 injunction because it could impact their business
11 in ways that go well beyond what the small claims
12 court really is meant to do.

13 And, therefore, if there are concerns about
14 the scope of an injunction or a particular manner
15 in which an injunction is going to be
16 effectuated, I think, you know, the tech
17 companies of the world would be much more
18 comfortable having a federal judge address some
19 of the issues about what the proper scope of the
20 injunction is necessarily than a tribunal that is
21 under the auspices of the Copyright Office.

22 So what we are talking about again is maybe
23 a very limited right to appeal on the question of
24 the scope of the injunction, if that's an issue
25 for the defendant and they want to take that

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2 election.

3 But, again, in the first instance, we think
4 the tribunal ought to be able to handle these
5 questions about a balancing test for injunctive
6 relief, but then in order to get defendants to
7 buy into this system, I think they are going to
8 want some right to go outside of that process on
9 an appellate basis and take their second shot,
10 which is -- and, again, this may be tied into
11 some of the fair use questions we talked about
12 that yesterday.

13 And I think in most of these fair use
14 situations you are talking about seeking
15 injunctive relief. And so to get sort of the
16 defense group brought into this system a little
17 bit more, I think they will have more of a
18 comfort level in those kind of situations if they
19 can have at least some appeal, even if it is on
20 an abuse of discretion or very high standard, but
21 as long as they have some outlet to the federal
22 courts, they will be a lot more comfortable in
23 buying into this system from a systemic
24 standpoint.

25 MS. CHARLESWORTH: Mr. Badavas?

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2 MR. BADAVAS: David alluded to it. I think
3 the scope and standard for appeal and whether
4 defendants are more or less likely to participate
5 in a voluntarily system or a mandatory system or
6 support a mandatory system, probably depends on
7 the type of claims that are allowed. David
8 alluded to fair use defenses, but I described
9 some claims yesterday that I think certain music
10 companies would be very concerned about not
11 having a right of appeal that had a sort of
12 normal standard as opposed to a heightened
13 standard.

14 The abuse of discretion or typical
15 arbitrator standard might be too high in those
16 instances. On the other hand, if this was more
17 what's referred to as a bootleg court, where it
18 is just the work and the work is being passed off
19 and sold without a license, and it looks just
20 like your work, you know, the scope of that
21 appeal might not concern people quite as much.

22 I also wonder if this isn't that big an
23 issue. It is an issue as a constitutional
24 matter, but I wonder if as a practical matter it
25 is really an issue. Unfortunately, I didn't

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2 think of this before two seconds ago, but my now
3 dated somewhat experience in small claims court
4 in New York where I handled tens, not hundreds,
5 but tens of cases, no one ever appealed, even
6 though there's a right of appeal. And it's a
7 full right of appeal. You can appeal to the
8 lower court. And no one ever did it because the
9 value of the claim, it's a \$5,000 limit now, was
10 so low that it just wasn't worth doing.

11 And I assume that one can find statistics
12 from the Office of Court Administration in New
13 York about that. My guess is you could probably
14 find statistics about it in other state courts.
15 And I don't know whether it is that big of a
16 deal, even if you had a full right of appeal, if
17 the numbers are low enough, the damages that are
18 available are low enough. Now, as it gets
19 higher, the import and the standard, and the
20 necessity of that appeal becomes more important,
21 it probably has more constitutional implications.

22 MR. LEICHTMAN: And that's why I think,
23 though, from the standpoint of injunctive relief,
24 in particular, I think a right to appeal is
25 important, because as we have discussed over the

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2 last two days, there is some concern, legitimate
3 concern, that in some cases an injunction could
4 be worth more than the cap. It could be -- it
5 could have this hold up value.

6 And so whereas, you know, in these kinds of
7 cases, if the monetary cap was small enough, the
8 likelihood of appeals is very low, as Christos
9 mentioned, I think there's one way to alleviate
10 concerns about the injunctive relief sort of
11 exceeding what the scope of the proceeding is
12 supposed to be about, in a given case, would be
13 alleviated somewhat if the defense bar knew that
14 they had some way of getting someone's attention
15 to a really, really bad result.

16 MS. CHARLESWORTH: Okay. Ms. Fertig?

17 MS. FERTIG: I think I have a couple points.

18 First, just to reiterate that I don't think
19 the appeal would necessarily be sufficient to
20 relieve our concerns about allowing injunctive
21 relief, but I also think following on Mr.
22 Badavas' point, if there aren't a lot of people
23 appealing, but then you incorporate injunctive
24 relief into the system and you have an appeal to
25 alleviate concerns about having injunctive

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2 relief, then you raise the probability that there
3 will be more appeals into the district courts.

4 And if we are trying make this a streamlined
5 cost efficient and quick process, then that's
6 just increasing the probability that this becomes
7 a longer, more expensive, more drawn out process
8 for these people who are likely going to be pro
9 se, don't want to spend that much time, don't
10 want to end up in federal court to begin with, so
11 you may be creating a problem that we are trying
12 to avoid with this system by trying to
13 incorporate a type of relief that they have
14 available in another forum into this, whereas if
15 we keep injunctive relief out of it, then we may
16 keep it closer to the original intention and keep
17 it simple.

18 And I think, we did ask our members for
19 feedback on how we would like this, the appeal
20 process to work. We, as I mentioned earlier,
21 looked at the TTAB proceedings. And there's a
22 motion for reconsideration that essentially goes
23 to a panel. I think this was Ms. Shaftel's
24 suggestion, that it goes to a larger en banc type
25 proceeding within the same tribunal. And we

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2 think that that would be an appropriate appeals
3 mechanism at the first instance, and then to have
4 an appeal for an abuse of discretion standard in
5 the district court because we do think that's
6 still an important incentive for many of the
7 defendants to come to the table and buy into the
8 process.

9 MS. CHARLESWORTH: So I'm sorry. I just
10 want to make sure. So there's an administrative
11 panel, and then from there you could go to, under
12 your proposal, could go to federal district
13 court, under --

14 MS. FERTIG: An abuse of discretion. Right.

15 MS. CHARLESWORTH: Okay. Thoughts on that?

16 What about, I think there were some
17 suggestions that, you know, after this process
18 you could just file de novo. And, in fact, in
19 some state courts, small claims courts, if you
20 are not satisfied with the outcome in the small
21 claims process, you can just file a new plenary
22 suit in the court of general jurisdiction and
23 relitigate it perhaps more fully.

24 Do people think that that could or should
25 play a role in this, the ability go to, say,

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2 federal district court and have a de novo
3 process, or would that defeat this process? I am
4 seeing some nodding.

5 MR. OSTERREICHER: I think that would
6 absolutely defeat the whole process, and all the
7 time that we spent sitting here talking about all
8 of this, really, would be moot.

9 MS. CHARLESWORTH: Okay. Mr. Leichtman?

10 MR. LEICHTMAN: I agree with that, except if
11 the alternative is no injunctive relief. Having
12 something like what you just suggested would be
13 better than having no injunctive relief available
14 at all.

15 So, in other words, maybe the answer is that
16 with respect to injunctive relief, the appeal to
17 the district court is not just abuse of
18 discretion, but is more of a plenary, you know,
19 review and allows them to take additional
20 evidence into the record, but for monetary
21 relief, it is an abuse of discretion standard.

22 So maybe there's a hybrid in there somewhere
23 where, you know, sort of the defense side could
24 get a little bit more comfortable with injunctive
25 relief. So if the alternative is we are not

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2 going to have injunctive relief at all, I would
3 rather have a more extensive appeals process and
4 have the ability to get injunctive relief than
5 not have injunctive relief at all.

6 But if the decision is to have no injunctive
7 relief, then I don't think you need as elaborate
8 appeal procedures.

9 MS. ROWLAND: I have a follow-up question
10 for everyone.

11 I don't know who it was that brought up the
12 domain dispute resolution process. What if one
13 of --

14 MS. WOLFF: I believe I did.

15 MS. ROWLAND: Ms. Wolff? So, to me, I
16 wonder, you know, how often is that kind of
17 situation brought to district court? Because in
18 the UDRP context, you can -- it's binding on the
19 parties because the defendant or the infringer
20 has made themselves required to be bound by it by
21 virtue of signing the registration agreement so
22 they must go to arbitration.

23 And then they have it, it's a short
24 procedure, three months or so max. And then if
25 you lose, you have ten days, basically, to go to

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2 district court, start over again de novo.

3 So I wonder if that's kind of -- if that
4 gives any insights on how often, similar to what
5 Mr. Badavas saying the small claims situation
6 that he saw, he rarely saw it appealed. And the
7 question is, how can we gather information on
8 that? That's maybe more for our next panel, but
9 I think it is something that I think is important
10 to see, and how often is it? What type of
11 defendant or alleged infringer might appeal?

12 You know, there are different people.
13 There's large corporations who might have more
14 resources and interests in doing it versus the
15 people who I guess you were saying have a
16 business model of infringing, they will just go
17 on to the next one and might not appeal.

18 So I wonder if anyone has any thoughts on
19 that.

20 MS. WOLFF: I was looking at the UDRP model
21 for the way it is handled in a location where you
22 would have everything submitted electronically,
23 and there's sort of a procedure and forum, and
24 you get a decision.

25 Typically, in my experience, we generally

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2 have gone after people who are cyber squatters.
3 And once there's a decision, you never really
4 hear from them again. So I haven't had personal
5 experience with having, you know, everything
6 start from scratch after that.

7 I would think that would be limited to if
8 there was really disputes between two large
9 corporations, and there was a belief that there
10 was a legitimate use of domain name, and then
11 they brought it into federal court under some
12 trademark theories.

13 MS. ROWLAND: Mr. Sanders?

14 MR. SANDERS: Yes. I think somebody may
15 have mentioned this before, but if we're going to
16 go with a voluntary system, it requires a certain
17 give and take for the defendant to be motivated
18 to participate. I see the ability to refile de
19 novo as completely vitiating, you know, all of
20 the motivations that we try to build in to get
21 defendants to buy into this system.

22 My answer is the defendant in that case
23 would say, "You know what? Sue me, you know, in
24 federal court." So I think that's a real
25 problem.

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2 MS. CHARLESWORTH: Okay.

3 MS. ROWLAND: That's a good point, and I
4 have a question about, would it be the other way,
5 too, though. Perhaps if you are trying to get
6 someone to buy into it, would they want to have
7 the ability to appeal?

8 So two sides of the coin, and how does that
9 get resolved? Any thoughts?

10 MS. CHARLESWORTH: Ms. Wolff has a comment.

11 MS. WOLFF: I think, again, you end up with
12 usually you are going into this position because
13 there's sort of inequity in the amount of ability
14 to pay for attorneys because if you had all the
15 money in the world, even if your actual damages
16 was \$5,000, if someone wronged you, you could
17 afford to go to court.

18 So I think that this entire system is to
19 give redress for people who can't use the federal
20 court system, and, in effect, really don't have
21 copyrights because they have no enforcement
22 means.

23 So I think if you are going in, and once
24 there's an appeal, in my experience, whenever
25 there is a decision and you finally get through a

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2 hole, either you win something by a motion, or
3 you've actually even have a trial, even though
4 they don't happen that much anymore, the fact
5 that there's appeal is just a way to bargain down
6 rights again.

7 It kind of gets held over someone's head,
8 and there's a risk that can be reversed. So if
9 you have gotten any kind of award, it is a way to
10 come to a settlement to reduce that award in most
11 cases. So I am not sure that given the fact that
12 the cap would be limited to some amount, that
13 that would be something that would be
14 interesting.

15 MS. CHARLESWORTH: Another question that
16 maybe people have thoughts on, you know, if you
17 are operating -- and this has been alluded to,
18 but if you are operating essentially in a pro se
19 oriented system to end up in a federal court, do
20 people think that someone who had handled their
21 matter by themselves might find that intimidating
22 or not, or whether -- in other words, whether
23 filing briefs in federal court might be a
24 different proposition from litigating something
25 in the system we're talking about.

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2 Any thoughts?

3 MS. WOLFF: I have seen state court lawyers
4 walk into federal court and be totally lost and
5 confused and not doing anything right. So I
6 think the idea of giving a pro se party the
7 federal rules to look at and to wind their way
8 through the appeals, and even the fonts they have
9 to do, the amount of footnotes and the page
10 limits, the requirements to cite would just -- I
11 can't even begin to imagine how hard that would
12 be for -- particularly for a creative person.

13 I mean, I can sometimes wind my way through
14 these federal rules, and then the local rules --
15 I just did a federal case in Los Angeles. And
16 not only did I have the federal rules, I had the
17 local rules, and I had the judge's rules, and
18 buried in the judge's rules where everything had
19 to be done at 4:00. So I am thinking I'm on
20 California time, you know, but, meanwhile, I am
21 really at 7:00 and not midnight.

22 MS. CHARLESWORTH: And then there's the
23 electronic filing system.

24 Okay. So on appeals, one thing that came up
25 in some of the comments was the idea that if you

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2 filed an appeal, particularly a defendant appeal,
3 and it was unsuccessful, there should be again
4 fee shifting and/or cost shifting.

5 Do people have views on that? In terms of
6 whether or how attorneys' fees and costs might
7 work on appeal, or whether they would -- everyone
8 would bear their own costs? Thoughts?

9 Uncharacteristic silence.

10 A concern that also arose in many of the
11 comments was enforceability of the judgment. And
12 I am curious to know if people have anecdotal
13 evidence or stories to share about enforcing
14 small judgments in the real world.

15 Okay. You get your judgment, it is \$3,000.
16 Have people had any experiences chasing people,
17 especially people who might be far away? How do
18 they do it? People are nodding.

19 Mr. Leichtman, if you want to start on that.

20 MR. LEICHTMAN: Clients of Volunteer Lawyers
21 for the Arts see this quite a lot. It actually
22 comes up more often in the context where you
23 settle a case or resolve a case. For example, a
24 visual artist has a dispute with a gallery
25 because the gallery didn't pay them for their

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2 paintings that they sold or something like that,
3 which is more of a contractual dispute. But what
4 happens is, you settle the case, there's a
5 payment plan agreed to, and then the gallery
6 doesn't make the payments on time, and then you
7 have to go to court to enforce the settlement
8 agreement.

9 And, typically what we advise people to do
10 is if you have a payment plan, do it as a
11 promissory note, and then your state court will
12 have the procedure of summary judgment in lieu of
13 complaint, which you can bring on settlement
14 agreement, but which is easier to bring on a
15 promissory note. And then we have to obviously
16 chase, and we have to do creditor exams, you
17 know, and things like debtors exams and things
18 like that.

19 So we do see that, we do see that quite a
20 lot. And so there really does need to be some
21 enforcement mechanism. And our thought on that
22 again is similar to the way arbitration awards
23 are enforceable in court. You could, you know,
24 write that into the regulations that in the event
25 that -- you wouldn't have to confirm the award

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2 affirmatively, but that in the event that the
3 defendant failed to pay or plaintiff failed to
4 pay if it was a counterclaim or whatever it was,
5 that they could go to court to get the award
6 enforced, and in that circumstance, again, you
7 would have to address the question of what right
8 to challenge in defense of that, what right to
9 challenge the award would you have.

10 MS. CHARLESWORTH: Ms. Shaftel?

11 MS. SHAFTEL: We asked this exact question
12 in our survey. We asked, if you hired an
13 attorney and filed an infringement lawsuit, what
14 was the outcome. 21 percent said they won. 22
15 percent said they lost. 50 percent said the suit
16 was settled out of court. 12 percent said the
17 suit was dismissed or dropped. And 14 percent
18 said, I won, but the infringer has not paid me.

19 And then in the next question, if you did
20 not hire an attorney and filed a copyright
21 infringement lawsuit, why not. And there were a
22 lot of choices based on what I heard anecdotally
23 over the years. And one of the responses was the
24 infringer would have been unable to pay damages
25 and legal costs even if I had won. And 23

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2 percent of the people responding said that.

3 And I was discussing this with Paul Aiken of
4 the Authors Guild a couple weeks ago. And he
5 gave me a good nugget. He suggested, in event of
6 a default judgment against plaintiff of an
7 infringer, the penalty payment be made to the US
8 court, and that would trigger government
9 enforcement of a judgment of monetary damages
10 such as means and seizures of property.

11 MS. CHARLESWORTH: Okay. Any reactions?

12 Mr. Taylor?

13 MR. TAYLOR: In some way, this is kind of
14 the elephant in the room because even if you get
15 a judgment, getting paid is really important. And
16 if they are bad actors, that their whole business
17 is to circumvent paying anything, getting them to
18 pay is going to be very, very difficult.

19 So the experiences that we have been
20 directly having is the good actors, sure, you
21 reach an agreement, there's a check in the mail,
22 and, you know, releases are signed and everything
23 is fine. In this process, I expect that there
24 will be a great many players that might just let
25 there be a default judgment and not pay at all.

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2 So the question becomes kind of one of
3 deterrence again. And to the degree that the
4 process is streamlined, it feels like the
5 judgment and enforceability issue will be
6 strengthened. And so I suggest that there maybe
7 are some rules that enforce to a higher degree
8 what happens if the person simply refuses to pay.

9 One possibility might be injunctive relief
10 can actually shut down their web site. If
11 there's a judgment, they refuse to pay, certain
12 period of time, they haven't initiated an appeal,
13 shut down their web site. That would definitely
14 get their attention.

15 Another possibility might be to by default
16 escalate to the maximum statutory damages, that
17 if they haven't paid the settlement within a
18 certain period of time, same thing, escalate to
19 whatever the maximum statutory damages are at the
20 time.

21 Another possibility has been discussed about
22 whether or not these outcomes should be disclosed
23 publicly or not. That might be an interesting
24 deterrent, that if you refuse to pay in a certain
25 period of time, that outcome would become public.

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2 And if there were a number of repeat offenders
3 that weren't paying, then suddenly the Department
4 of Justice could very quickly surmise that this
5 is a repeat offender and some of the criminal
6 activities could possibly kick in and the DOJ
7 might be able to step in and say, look what's
8 going on here, let's approach this from a
9 different point of view.

10 MS. CHARLESWORTH: Mr. Rosenthal?

11 MR. ROSENTHAL: I think that without some
12 kind of traditional remedy of assessing the costs
13 of enforcement over and above the cap, I don't
14 know what other deterrent you could really use to
15 really solve this problem of enforcement.

16 If it is a voluntary system, if you go in
17 there and you deal with it, fine, you know,
18 great. But if you are not going to abide by the
19 ruling, then if there's cost of enforcement, that
20 could be also charged against you one way or
21 another.

22 I think for most small claims courts, one of
23 the issues as to whether they are effective or
24 not is can you, for instance, use the judgments
25 as a lien of some kind, like a mechanic's lien.

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2 Can you file it in a jurisdiction if you can find
3 them, if they are in your jurisdiction or
4 whatnot.

5 There are state court remedies and state
6 court procedures on mechanic's liens that might
7 be interesting to look at to see how they've
8 dealt with the issue of, you know, small number,
9 small low level judgments that need to be
10 enforced, and you just -- you can go after their
11 bank account. You can file it as a property
12 interest of some kind.

13 So I think that's where maybe we should be
14 looking at in terms of enforcing. But the -- I
15 think strongly that we've got to have a very, you
16 know, hard hand on enforcement costs, that they
17 can be assessed even over the cap that we're
18 discussing.

19 MS. CHARLESWORTH: Thank you.

20 Mr. Taylor?

21 MR. TAYLOR: A brief follow up to the idea
22 of subpoenas. It has been discussed that maybe
23 subpoenas might be allowed or not allowed in the
24 streamlining of the process. Something like half
25 of the web sites don't have a contact address on

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2 the web sites. And there's about 15 to 20
3 percent of the web sites that use private
4 registration services, and part of their policy
5 is that they need to receive a subpoena in order
6 to release the address of the person who has
7 infringed. And then oftentimes the infringer has
8 put in a false address even in that registration.

9 So, again, this idea that to the degree that
10 the process is streamlined, the outcome needs to
11 be strengthened, if, for example, subpoena power
12 is not allowed, well, then maybe part of the
13 outcome is an automatic release of information
14 from an ISP as to, you know, who is the entity
15 and how do we contact them.

16 In other words, it would be very difficult
17 to actually track down bank accounts and stuff
18 like that even if you have a judgment.

19 MS. CHARLESWORTH: Do people have
20 experience, that's an important issue, in terms
21 of identifying ownership of web sites, or who
22 would actually be the defendant? Do people have
23 any experience, other experience with that they
24 would like to share?

25 Mr. Badavas?

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2 MR. BADAVAS: It is extremely difficult.
3 What was just described, the "who is" look up
4 takes you to a private registry, which you can't
5 get any information from, and you don't know it.

6 I am not sure, however, that that is the
7 type of entity that an individual pro se
8 plaintiff should be going after. You know, those
9 are -- that sounds like it, but these are massive
10 infringers, usually. I mean, in our experience
11 that type of service has been used for someone
12 who really is running a complete business on
13 infringement, where we have had success getting
14 contingency lawyers to bring the cases on behalf
15 of all of the infringed works.

16 So in terms of who you're focusing on as the
17 defendant in a small claims court and whether or
18 not it would be successful, this issue, is, you
19 know, SOPA and PIPA. And that worries me, when
20 you start getting into that in a small claims
21 court, I am not sure you will have a small claims
22 court.

23 So this is extremely difficult, yet someone
24 running a store, someone is infringing and
25 located in the US could use those services, and

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2 that's difficult. You would have to have the
3 subpoena, and you'd have to have the ability, to
4 seek the name of the party. So you would have to
5 be able to sue a John Doe, and then you'd have to
6 be able to serve the ISP with the subpoena to
7 identify the party.

8 This exists in federal court now, and I
9 think it is clear you would have to have that, or
10 you might never identify the defendant.

11 MS. CHARLESWORTH: Yes. Ms. Wolff?

12 MS. WOLFF: I mean, I think sometimes with
13 images, because of the display right, there may
14 be situations where you do need to find out the
15 owner of the web site, and it may not be always
16 the mass infringements. There are those as well.

17 But that is because of the nature of images,
18 they are often on web sites and trying to
19 determine who the owner is can be difficult. The
20 other thing is, other experience with trying to
21 prevent like sellers of, you know, celebrity
22 photographs that are selling on eBay, they often
23 will be very cooperative with eBay, but the
24 address you get when you send your FedEx letter
25 is to someplace that doesn't exist. That does

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2 happen a lot.

3 So probably the ability to try to find
4 people I think exists no matter what system we're
5 in. I don't know what that responds to exactly.
6 There may be some help with service and subpoena.

7 MS. CHARLESWORTH: Ms. Willmer?

8 MS. Willmer: I just wanted to say that there
9 are undoubtedly challenges in terms of enforcing
10 judgments, and there's been some interesting
11 ideas raised today. I am just not sure that this
12 is the proceeding to address those challenges.
13 Because they are really not endemic to the small
14 claims type process that we've been talking
15 about.

16 And, in fact, it seems to me that if we're
17 heading towards a voluntary system, that, in
18 fact, those enforceability challenges may
19 actually be lessened in a small claims type
20 court, if people are voluntarily coming to the
21 table and participating in the process.

22 MS. CHARLESWORTH: Okay.

23 MR. LEICHTMAN: One thing I thought of, when
24 Mr. Rosenthal was talking about judgment
25 enforcement, that is actually pretty effective in

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2 ordinary course judgment enforcement is a high
3 rate of statutory post judgment interest. Because
4 there's nothing that gets a reluctant defendant
5 to pay than the concept that eventually I am
6 going to have to pay, but it is going to be
7 multiples of what the award actually is. So one
8 incentive to get them to pay quicker would be to
9 have some kind of post judgment interest, and
10 that's a possibility. But, obviously, that would
11 have to be done by statute. It couldn't be
12 something that the Copyright Office can just do
13 that by regulations.

14 So if the goal here is to come up with a
15 procedure that isn't going to require
16 legislation, then that wouldn't work. But if
17 we're calling for legislation anyway because of
18 some of the other issues, that might be something
19 to tack on for consideration.

20 MS. CHARLESWORTH: Yes. Obviously, post
21 judgment interest is a fairly common feature in
22 state and other contexts.

23 One thing that Ms. Willmer raised was the
24 issue of the voluntary system, and considering
25 your comment, how do you see that as interacting

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2 with -- or an ability to get a default judgment
3 in this system? Should that be something that
4 one can pursue if the defendant doesn't respond
5 to service, and there's some way to confirm they
6 have been satisfactorily served, should the
7 plaintiff be able to obtain a default judgment
8 upon some showing of infringement, and should
9 that be enforceable?

10 Ms. Willmer, I am going to ask you, since you
11 raised the thought in my head, if you have any --

12 MS. Willmer: Well, I guess the issue there,
13 and I am going to defer to those who might be
14 more familiar with the constitutional issues,
15 because it does seem like we get around so many
16 of those constitutional issues by making the
17 system voluntary.

18 And I am just not certain that we can force
19 it through a default judgment if it hasn't been
20 consented to. But it would be ideal. So I would
21 love for somebody else to confirm that, in fact,
22 they think that that would be constitutional.

23 MS. CHARLESWORTH: Any constitutional
24 scholars in the room?

25 MR. LEICHTMAN: My thought on that is, if

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2 the goal were to be to develop a body of default
3 judgments for this tribunal, if that was one of
4 the things that the participants in this really,
5 really wanted, I think you would have to actually
6 -- you would have to make it a mandatory process,
7 but allow for an opt out.

8 So, in other words, say, from a
9 constitutional purpose would be to have the
10 ability to opt out or have the ability to appeal,
11 and, you know, you could talk about again, as we
12 did earlier, what the nature of those appeals
13 would be, but you would in order for a default
14 judgment to stick, I think you would have to make
15 it mandatory with the ability to opt out, and
16 that way you could still take a default judgment
17 because you would say, well, this person had the
18 opportunity to opt out and didn't do so, and,
19 therefore, it is okay to give a default judgment.

20 MS. CHARLESWORTH: Okay. Any further
21 thoughts?

22 Mr. Taylor?

23 MR. TAYLOR: On the idea of it being a
24 voluntary process, most of the people that we're
25 encountering would not participate in a

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2 voluntarily process. They would not subject
3 themselves to the process because their goal is
4 not to pay. So if it is a voluntary process, you
5 would think that there would be no default
6 judgments because the two parties want to
7 participate.

8 The problem really is, there's enormous
9 frustration among individual artists, whether
10 they be graphic artists or photographers or
11 whoever they might be, all the time they are
12 seeing their creative works stolen online and
13 they want to do something about it.

14 So if there's -- it is a great idea to have
15 class action lawsuits against the really big
16 players and stuff like that. Those come along
17 once in a while. But part of the dilemma is how
18 do you satisfy the needs of lots and lots of
19 creators to go after the people that don't want
20 to play fair.

21 MS. CHARLESWORTH: Okay. Unless people --
22 Mr. Sanders?

23 MR. SANDERS: You know, just a quick comment
24 on that, because I certainly sympathize. But
25 sometimes it really is up to the community of

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2 creators to get together and say, we are going to
3 kick in some percentage or some contribution to
4 set up a fund that begins to address that.

5 I think that the mechanism that we are
6 talking about helps that process along. But I
7 think, you know, Christos is right, the music
8 industry has spent a hundred years now trying to
9 develop a system among its creators where they
10 take a more proactive role in banding together to
11 defend their rights. And we would love to see
12 that throughout the rest of the creative
13 community, where we think it would benefit
14 everyone.

15 MR. TAYLOR: And I would agree.

16 MS. CHARLESWORTH: Ms. Willmer?

17 MS. Willmer: I just want to go back to the
18 default judgment idea in a voluntary system.
19 Because I do think it is worth more exploring,
20 and I still don't think I have the answers.

21 But I am wondering if there could be some
22 mechanism whereby you file in the small claims
23 tribunal, and if you hear nothing, you would get
24 a default judgment in the amount that you sought,
25 and you would then have an automatic right to

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2 enforce that judgment in the federal district
3 court, possibly without having to pay the
4 additional filing fee or something like that so
5 that it is not an additional burden on the
6 copyright holder.

7 But perhaps that sort of escalation, right,
8 could address the constitutional issues, so at
9 that point you are in federal district court,
10 essentially seeking to approve your default
11 judgment, and the absence of the defendant at
12 that point wouldn't pose any constitutional
13 issues.

14 MS. CHARLESWORTH: Okay. I think that's a
15 helpful thought. I think -- I mean, if someone
16 defaults in federal court, in a sense they have
17 waived their right to a jury, right?

18 MS. Willmer: That's right. You can have
19 default judgment there because they didn't
20 respond and make a jury demand.

21 So it does merit further investigation of a
22 significant issue. I think because you don't
23 want a system where people just routinely default
24 out, especially if they are properly served.

25 MS. CHARLESWORTH: Okay. Well, does anyone

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2 have anything further to say on this panel, the
3 topic we have been discussing?

4 Yes. Mr. Perlman?

5 MR. PERLMAN: I just want to return back to
6 yesterday when I had the senior moment when you
7 asked about the context where an application for
8 copyright registration had been filed, but the
9 decision of the panel who would be adjudicating
10 was ready before any certificate was received.
11 The easy resolution of that issue is simply to
12 withhold the adjudication pending the receipt of
13 certificate of registration.

14 MS. CHARLESWORTH: Thank you.

15 Mr. Taylor?

16 MR. TAYLOR: You mentioned the phrase, if
17 they are properly served. If this really ends up
18 being a small claims court, the court might want
19 to consider that service by e-mail be acceptable.

20 MS. CHARLESWORTH: Any closing thoughts for
21 this panel? Any further thoughts? Going? Going?
22 Going? Gone.

23 I am going to turn the microphone over to my
24 colleague, and she will discuss the remainder of
25 the schedule for today.

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2 MS. ROWLAND: So we are going to take a
3 little break now. I think that would be helpful.
4 So I think it's 12:20. So maybe 15 minutes, be
5 back at 12:35, and at that point we are going to
6 go ahead and we are going to combine the last two
7 panels that we mentioned earlier. And so we are
8 going to be dealing with the issues of the
9 constitutional panel as well as the moving
10 forward panel. So for either of those panels,
11 you are welcome to come to the table and talk
12 about it.

13 We think that the constitutional issues are
14 extremely important and one of the most important
15 things that we have to consider here, but we do
16 also understand that, you know, it is a difficult
17 issue, there are a lot of people with very good
18 expertise on this issue. We would love to hear
19 any information people have. So we're hoping
20 some people have some really great comments about
21 it. If not, we are going to soldier on and
22 continue researching and trying to figure them
23 out at the Copyright Office.

24 So the fact that we're collapsing these two
25 panels does not by any means mean that we don't

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2 find constitutional issues important. In fact,
3 we fine them to be probably the most important.

4 So it is not indicating that we don't find
5 them extremely important. But we will see you
6 guys in 15 minutes at 12:35.

7 (WHEREUPON, a recess was had.)

8 * * * * *

9 MS. ROWLAND: As I mentioned before the
10 break, we are going to go ahead and combine the
11 last two panels, the constitutional panel and the
12 moving forward panel. As I mentioned earlier, if
13 you are on either panel, you are welcome to join
14 the table. If you had only picked one, it's no
15 problem if you are here for both.

16 So the one we are going to start with is the
17 constitutional issues, and there are a lot of
18 them. There are a lot of very important
19 constitutional issues that would occur if we were
20 to create some sort of alternative small claims
21 procedure.

22 And one of the first things we thought of
23 was the Article III issue. Normally judges, it
24 would have to be under Article III to have these
25 kind of decision making powers, and we are

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2 suggesting -- we're reviewing something that
3 would be slightly different.

4 Does anyone have any insight into the
5 Article III issues that might be presented?
6 Nobody?

7 MS. CHARLESWORTH: Do we have any
8 constitutional scholars at the table, or even
9 wannabees?

10 MS. ROWLAND: The answer is no.

11 So I guess for the record, this is an issue
12 we are going to continue to review. It is an
13 important issue because we are studying the
14 different types of adjudication models that we
15 could possibly think about, and some of them
16 would be an alternative that would be in the
17 Copyright Office or a different type of
18 administrative agency. So there are all sorts of
19 issues that come up with that.

20 So we will put a marker in the record for
21 that, and the Copyright Office will continue to
22 look into it.

23 And the next issue that we have is the 7th
24 Amendment, which we have had a little bit of a
25 discussion about earlier. And the 7th Amendment

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2 gives you the right to a jury trial in certain
3 situations.

4 And I was wondering if any of you had any
5 thoughts about how to preserve that. And I know
6 Mr. Leichtman, not to put you on the spot, had
7 some thoughts. You had talked about it earlier
8 in the cases of damages and injunctions, and if
9 you have any thoughts about how to deal with
10 that.

11 MR. LEICHTMAN: Yes. I am sort of trying to
12 reach back to law school. But, I mean, there are
13 certain categories of cases where even monetary
14 relief isn't thought to require a jury trial
15 right. And so I can't remember what category of
16 cases those are, and how that remedy is
17 characterized. But in some instance, monetary
18 relief, even though there's an exchange of money,
19 is actually characterized more as equitable
20 relief.

21 And so all I was trying to say earlier is I
22 don't think that just because money is involved,
23 that it is 100 percent conclusive that it
24 implicates the jury trial right, and, you know,
25 probably if some research were done, and, you

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2 know, I would be willing to volunteer our
3 organization to look at this if the Copyright
4 Office didn't have somebody else to do the legal
5 research. But there are definite categories of
6 claims where money is exchanged that doesn't
7 demand -- you know, don't implicate the jury
8 trial right.

9 So if the remedy is characterized in a
10 particular way, you know, I think it is not -- it
11 shouldn't be a foregone conclusion that that's
12 going to be an issue to making the proceeding
13 mandatory. Obviously, if it is a voluntary
14 proceeding, that's not implicated. But I think a
15 lot of what we're hearing is there's a great
16 concern on behalf of the artist community that if
17 it is not a mandatory tribunal, that you will get
18 very few defendants who will voluntarily
19 participate.

20 So if it is going to be mandatory, then that
21 question about the 7th Amendment really needs to
22 be looked at more deeply.

23 MS. ROWLAND: And we'll welcome any
24 additional research that anyone wants to provide
25 to us on all the issues.

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2 I was wondering if anyone here has any
3 experience with waiving a jury as either a
4 plaintiff or a defendant, you know, trying to
5 say, okay, we are not going to go for monetary
6 damages, we are just going to try to get an
7 injunction to avoid this jury issue.

8 Has that ever come up with any of you?

9 No? No, it has not, apparently.

10 MS. CHARLESWORTH: I have a question, which
11 is whether anyone thinks we should incorporate a
12 jury into this process. You can't just shake
13 your heads.

14 MS. ROWLAND: Let the record reflect the
15 shaking of heads.

16 MS. CHARLESWORTH: We want to make sure the
17 record is clear.

18 MS. ROWLAND: Mr. Sanders?

19 MR. SANDERS: You know, I want to take off
20 on something that Christos first mentioned, the
21 dreaded initial SOPA, PIPA.

22 The real politics of this situation is that
23 if we attempted to do something I think that
24 implicates constitutional rights on a mandatory
25 basis, we are going to walk off a cliff. And I

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2 don't know, you know, you feel that that's worthy
3 of a discussion in terms of likelihood of
4 success. Perhaps as part of the next steps
5 discussion. But it strikes me that as we discuss
6 these constitutional issues, including rights of
7 privacy that might be implicated, and the jury
8 trial, I think we are handing opponents the
9 ability to stop this before its conception, I
10 think. I don't know how everybody else feels.

11 MS. ROWLAND: Mr. Perlman?

12 MR. PERLMAN: I guess I wanted to repeat
13 what I said initially yesterday in explaining our
14 extraordinarily reluctant decision to support a
15 state court concurrent jurisdiction. That seemed
16 to us the only way to avoid the incredibly
17 complex and difficult and politically challenging
18 issues of the constitutional aspects of this, and
19 also to avoid making it voluntary so that
20 defendants could just say, "No, I am not doing
21 that. Go ahead and sue me in federal court."

22 MS. ROWLAND: Any other thoughts on that?

23 As far as the voluntary versus mandatory
24 issues that Mr. Sanders raised and Mr. Perlman
25 just spoke to, that is an issue that underlies

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2 all the constitutional issues that are raised.
3 It's the Article III, 7th Amendment, we've got
4 personal jurisdiction issues, and we have due
5 process considerations about the type of
6 discovery. It all does seem to be involved with
7 the mandatory versus voluntary.

8 I know at an earlier event we heard some
9 language about perhaps you have to know what is
10 voluntary. So it would be great if anyone wants
11 to do any research on that. Just because we say
12 it is voluntary, it might be coercive in some
13 way, and that might impact whether or not it is
14 constitutional. So, for example, depending on
15 the level of the incentive, it might get to the
16 point where it might not be considered, quote-
17 unquote, voluntary. That's not something we are
18 at this time able to really opine on, but it is
19 something that would be -- we'd greatly
20 appreciate any further insight into.

21 Mr. Rosenthal?

22 MR. ROSENTHAL: I mean, certainly one of
23 things I am thinking about here, when you say
24 voluntary, is voluntary just upfront, and then as
25 you walk in you basically waive your rights to

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2 voluntarily leave, you know, the process, or
3 whether it is a process where you can just leave
4 whenever you want, and you don't like it? At
5 that point, it is just no more than mediation
6 with Judge Judy up there kind of looking at you.

7 So that, to me, is a threshold issue. When
8 you're talking about voluntary, when you walk in,
9 yes, I am voluntarily submitting myself to this
10 court. What then am I waiving in any way, shape,
11 or form down the road. So that seems to be
12 something you need to look into.

13 MS. ROWLAND: That's a good point. So is it
14 voluntary just not when you enter the procedure,
15 but all the way through? And I think also that
16 goes to the appeals issue we were discussing
17 earlier. Anyone else have anything to say?

18 MR. LEICHTMAN: Yes. Mr. Sanders' point
19 about what happened with SOPA and PIPA is a
20 really very good one because the knee-jerk
21 reaction to any kind of alternative copyright
22 tribunal is, from the tech community, is going to
23 be no. And that was the kneejerk reaction with
24 SOPA and PIPA because I think it wasn't
25 necessarily explained correctly. I can't tell

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2 you how many panels I saw or articles I saw
3 written by people who clearly hadn't even read
4 the legislation, but just had assumptions about
5 what was in it.

6 And so I think some of the things that we
7 have been talking about, you know, keeping the
8 damages amount relatively at a low number, you
9 know, dealing with what kind of scope and what
10 kind of appeals you would have for injunctive
11 relief, those kinds of things, taking each kind
12 of relief separately, thinking about what are the
13 due process, what are the 7th Amendment issues
14 with respect to each type of relief, I think
15 could go a long way towards neutralizing that
16 knee jerk reaction that we're going to get and
17 say, so when we come out of the box with this and
18 say, okay, we're proposing this alternative venue
19 to resolve copyright disputes, but we think you
20 are going to be happy because we've heard from
21 publishers, we've listened to both print and
22 music publishers, we have gone out and actually
23 talked to the tech community.

24 And I think, you know, some of that should
25 be done, and the groundwork should be laid for

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2 that in advance. And we have come up with some
3 things that are palatable to them as a tradeoff
4 towards their own expensive attorneys' fees when
5 they have to go to federal court to adjudicate
6 these disputes.

7 So a lot of the discussion over the last two
8 days was, you know, about what are the incentives
9 to get somebody to voluntarily participate. But
10 I have been thinking about them more as what are
11 the incentives to get them not to object to this
12 procedure at all.

13 And so I think if you start to give that
14 some thought and bring them more into the process
15 of talking to them and say, if we went forward
16 with this, you know, what are procedural
17 protections you would want, what is the damages
18 cap that would be acceptable to you that would
19 get you not to lobby against this legislation,
20 and you bring them more into the fold. Because I
21 think what happened with SOPA and PIPA was there
22 were lots of discussions, but they happened after
23 the legislation was proposed and not before it
24 was proposed.

25 So I think there are a lot of lessons that

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2 can be learned from what went wrong there, with,
3 you know, taking those views into account, not
4 necessarily going with all of them, but at least
5 bringing that community into the fold.

6 MS. ROWLAND: Mr. Rosenthal?

7 MR. ROSENTHAL: Yes. I gather we are moving
8 towards moving forward when we talk about this.
9 Can we discuss this now, or do you want to wait?

10 MS. ROWLAND: You mean the next steps
11 process?

12 MR. ROSENTHAL: Yes.

13 MS. ROWLAND: Let's just kind of -- I think
14 we have a few more constitutional issues.

15 MR. ROSENTHAL: Okay. Because I would like
16 to eventually talk about the issue of the
17 politics about all of this.

18 MS. ROWLAND: Sure.

19 MR. ROSENTHAL: And we can get back to that.

20 MS. ROWLAND: Ms. Willmer?

21 MS. Willmer: I just wanted to say in regards
22 to the constitutional issues, that we have been
23 operating under the assumption that a voluntary
24 system would eliminate most of these issues.

25 And I think you just raised an interesting

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2 point as to whether or not -- I have been
3 assuming in my mind that it looked like an opt in
4 system, where you had to get a defendant to
5 affirmatively agree to participate. But I think
6 it is well worth exploring whether or not an opt
7 out system, where it is presumed that there is
8 jurisdiction in a small claims court, unless a
9 defendant chooses to opt out. Could that still
10 meet the voluntary aspect of it, such that the
11 constitutional issues are obviated.

12 There is still choice in that instance where
13 a defendant certainly has the right to take
14 advantage of a jury system or, you know, object
15 to a non-Article III type basis. It seems to me
16 that those rights are still preserved by having
17 that ability to opt out.

18 MS. CHARLESWORTH: Which is also sometimes
19 characterized in some of the comments as a right
20 of removal. In other words, it is another way to
21 look at something that, of course, is known today
22 in the court system.

23 So I think that's an interesting point, and
24 definitely relevant to when we go about
25 considering whether this is voluntary or not.

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2 MS. Willmer: And just back to what we were
3 discussing right before lunch, several of us had
4 conversations about how to address this default
5 issue, because I think for us as copyright
6 owners, it is probably the largest problem that
7 we face, is not getting any response at all. Not
8 getting any engagement, and I think the status
9 quo is that we can be ignored.

10 So anything that we can do that would put a
11 default judgment option within the small claims
12 court I think gives the small claims court such
13 greater significant value for us.

14 MS. ROWLAND: Ms. Wolff?

15 MS. WOLFF: We operated in our responses as
16 to the fact that something voluntary would be the
17 way to avoid a lot of the Article III and some of
18 the right to jury issues. But I guess I am also
19 presuming where we are also looking at this as we
20 would be limited to US defendants, of course,
21 because of the jurisdictional issues. And I
22 think that's just a presumption we probably have
23 to live with in terms of the jurisdiction and
24 enforcement.

25 MS. ROWLAND: That's a good point as to the

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2 personal jurisdiction issues because you could
3 technically have jurisdiction over a foreign
4 defendant if they are doing things here, selling
5 things in the United States or whatever. So that
6 is another constitutional issue as well that I
7 think, obviously, you have to deal with.

8 MR. LEICHTMAN: We talked about service a
9 little bit yesterday, and you'd have to have, you
10 know, at least some kind of service system in
11 place because I think the minimal due process
12 requirements, I don't see why there's any reason
13 why this tribunal couldn't go to the full
14 extraterritorial extent of the Copyright Act,
15 generally, but then you would have to have those
16 due process things in place like, you know, a
17 system for service.

18 And then one thing I wanted to just talk
19 about in terms of due process is there's I think
20 a really good model for this in the unemployment
21 insurance hearings in New York City, New York
22 state, really, there was a series of litigations
23 called the MLC against Sitkin cases. And those
24 resulted in a consent decree. And what was
25 happening was unemployment insurance claimants

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2 were getting denied benefits without the right to
3 a hearing.

4 And so this consent decree established a
5 minimum set of procedures, training for judges,
6 right to cross examination, right to a hearing,
7 and those kinds of a things, right to an
8 administrative appeal, really minimal due process
9 standards. And if you look at those proceedings,
10 you can see what the courts basically approved as
11 to what a minimal set of due process standards
12 would be.

13 And one of the things about those -- that
14 consent decree, it permitted law students,
15 actually, to represent the claimants at the
16 hearings, even though they are not admitted to
17 the bar yet, just as any layperson could, you
18 could go to the proceedings pro se. So they
19 said, well, why not at least have law students be
20 allowed to go to these hearing and represent the
21 claimants.

22 And one of the things that the statistics
23 showed was something like -- and I don't know
24 what they are now, but I remember back from when
25 I was in law school, where the claimant went with

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2 a law student representative, they were likely to
3 win 80 percent of the time. Where they went by
4 themselves, they were likely to win 20 percent of
5 the time.

6 So it was a huge improvement by having law
7 student representation available through this
8 unemployment action center that was created by a
9 number of law students after the consent decree was
10 approved.

11 So that might be something for you guys to
12 look at in terms of what are the minimal
13 procedures that we have to have in place to have
14 the tribunal meet the requirements of due
15 process.

16 MS. CHARLESWORTH: Very helpful. Thank you.

17 MS. ROWLAND: And I think the last sort of
18 series of constitutional issues we have dealt
19 with in a practical manner, so the practical
20 effects of the discovery, the testimony, the
21 evidence, the appeal, that kind of thing. We
22 have discussed those in kind of the context of
23 how practical is it, and how do you get things to
24 work.

25 But, you know, when we do that, we also have

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2 to keep in mind that there also are
3 constitutional implications to all of that. It's
4 really important that this is a fair proceeding
5 that abides by the Constitution and gives
6 everyone the right to defend themselves.

7 Does anyone else have any points to make
8 about the constitutional issues?

9 No?

10 Okay. I guess we will -- the Copyright
11 Office will continue to do our research, and we
12 welcome any research people want to send our way.

13 MS. CHARLESWORTH: In that regard, we are
14 not sure yet, but there may be a third and final
15 round of comments. Growing largely out of these
16 proceedings, I think some new questions have come
17 up. This has been extraordinarily helpful. So
18 keep your eye out. We will try to give people a
19 sufficient amount of time to really reflect. And,
20 obviously, some of the -- those who are
21 volunteering research, in particular, we would
22 hope you would take advantage of that to give us
23 your guidance.

24 MS. ROWLAND: So with that, we are going to
25 go to our last panel, which is the moving forward

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2 panel, and wraps up our discussion and also talks
3 about, you know, what we should do, continuing to
4 go forward, and if there was a small claims
5 process, you know, what would we do to continue
6 evaluating it, making sure that things were to
7 run smoothly.

8 The first issue is empirical data. We've
9 already received some empirical data. The
10 Graphic Artist Guild has provided some, and Ms.
11 Wolff, as she mentioned earlier, yesterday, the
12 ABA has some information. Also the AIPLA, they
13 have surveys they do, and the Federal Judicial
14 Center also does some reviews and statistics.

15 But we wanted to know if anyone had any
16 other citations to other types of empirical data
17 that they thought would be helpful.

18 Ms. Davis?

19 MS. DAVIS: I am from the National Writers
20 Union, a voice that you have not yet heard from.
21 And part of the reason is because I goofed when I
22 was filling out the form, and I only said that I
23 wanted to speak in this session. And all day
24 yesterday I was biting my tongue and my hand kept
25 going up, but I am here now.

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2 I am the cochair of the book division. I am
3 the national contract advisor for the National
4 Writers Union.

5 At present there is no affordable effective
6 legal resource for writers who have had their
7 copyright infringed. Financial resources needed
8 to sue for statutory and economic damages are not
9 provided under the current US copyright law. Even
10 the cost of filing for arbitration is prohibitive
11 for most writers.

12 You should know that our members write in
13 all kinds of genres. And the average amount that
14 they earn from their writings is less than
15 \$5,000. So is it a hobby, no, but it is very
16 hard to make a living as a writer.

17 We believe that it is imperative that every
18 aspect of the copyright small claims system,
19 including registration, criteria, filing costs,
20 length of time from filing to hearing a case,
21 invoke actual and statutory damages, must reflect
22 and respect writer's substantive, procedural,
23 economic, and moral rights.

24 We have extensive experience in the union
25 with having writer's copyrights infringed and

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2 ways in which current legal procedures fail to
3 protect writer's rights.

4 We initiated a suit in 2001 that was on
5 behalf of infringed writers. It ended up in the
6 2001 Supreme Court decision, *Tasini v. The New*
7 *York Times*. We have also had advocacy in
8 Congress and the Copyright Office, and nonlegal
9 representation and assistance for our members
10 through the grievance and contract division.

11 Since 1991, which was ten years after the
12 union was founded, the grievance and contract
13 division has obtained nearly \$1.5 million in
14 remuneration for our members who would not
15 otherwise have been paid. Most of these
16 grievances were small claims, for writers with
17 few legal resources, and we are currently
18 pursuing two group grievances on behalf of two
19 groups of writers who are owed tens of thousands
20 of dollars by publishers who have infringed their
21 copyrights by publishing work without complying
22 with payment and other conditions of their
23 contracts.

24 The biggest issue in the union at this point
25 is due to, as the graphic artists and the

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2 songwriters and the photographers have already
3 mentioned, is because of electronic media.
4 Because people can go in and take someone's work.
5 And, particularly, the issue has become
6 aggravated now that eBooks have become such a
7 large part of publishing commerce.

8 We did a survey based on this of our members
9 earlier this year, and slightly less than half,
10 48.5 percent of respondents believed they are not
11 being truly paid what they are owed for eBook
12 royalties by their publishers. I've got some
13 other statistics, but I am going to skip over
14 those.

15 Some publishers are infringing copyrights by
16 issuing eBooks without writer's knowledge or
17 permission, even when electronic rights have been
18 withheld. There is no cost effective method at
19 this point to address this type of infringement.

20 Some publishers' royalty statements do not
21 delineate eBook royalties, so writers do not have
22 a true picture of their earnings, which is
23 interesting because this is a problem because
24 earnings from eBooks should be accelerated, but
25 they are not called out in royalty statements.

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2 While most contracts allow audits of
3 publishers' books, that's a really costly and
4 time consuming procedure.

5 I am going to talk about two cases. The
6 first one involves infringement by a writer's
7 publisher. The writer filed her statement, by
8 the way, with the Copyright Office on January 27
9 of this year. It is item 54. And her name is
10 Miryam Ehrlich Williamson.

11 Her publisher issued an eBook without her
12 knowledge or permission in direct violation of
13 her contract. She had reserved the right to
14 publish an eBook on her own. When she discovered
15 the eBook's existence and the publisher's
16 infringement about a year after the eBook was
17 published, she notified the publisher of her
18 error.

19 The publisher then offered her a 25 percent
20 royalty for the eBook. But she requested 50
21 percent because the contract for a subsequent
22 book for which she did have -- for which she had
23 granted electronic rights stipulated a 50 percent
24 royalty. Shortly thereafter, she received a
25 royalty statement. The first to report the sales

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2 of eBooks.

3 Amazingly, two years after the print book
4 went out of print, the returns on the print book,
5 lo and behold, were big enough to wipe out most
6 of the eBooks royalties. The publisher requested
7 a statement with the two formats separated, but
8 the publisher refused. The writer is in the
9 process of negotiating a settlement with the aid
10 of a pro bono lawyer provided by Volunteer
11 Lawyers for the Arts.

12 We must conclude that writers need a legal
13 means to make publishers accountable with respect
14 to copyright infringement. The most common type
15 of infringement claim by a writer is against a
16 publisher and involves copyright based on
17 contract issues. To be useful to writers in the
18 real world, a copyright small claims court must
19 be able to deal with these kinds of cases in a
20 single proceeding in a single court. To be
21 clear, the contract must be able to be used in
22 defense of the copyright claim.

23 The other case I want to cite is involving
24 the piracy by a third person.

25 Our member discovered his short stories had

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2 been pirated, relabeled under the pirate's name,
3 and sold repeatedly in a variety of books as well
4 as given away free on the Internet.

5 Our member was not alone. He discovered
6 that there were at least 20 other writers whose
7 work had been similarly infringed.

8 MS. ROWLAND: Ms. Davis, that's fine. I
9 would like you to finish up in a minute or two.

10 MS. DAVIS: I will. I am on the last page.

11 MS. ROWLAND: Great. Thank you.

12 MS. DAVIS: Given that the pirate refused to
13 pay damages for the infringement, and the member
14 could not afford to mount a federal class action
15 case, though that was called for, he enlisted the
16 aid of the Attorney General in the State of
17 Indiana where the pirate resided and filed a suit
18 of consumer fraud.

19 However, the case has not yet been resolved,
20 and the member is not able to sue for damages.

21 All these examples show conclusively that
22 writers' real world experience of copyright
23 infringement and an attempt to attain redress for
24 violations of our copyrights, which often involve
25 contract violations, must be addressed.

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2 At present, existing copyright law provides
3 no substantive effective protection for the vast
4 majority of writers. The time for a copyright
5 small claims court that will serve writer's
6 interests is long overdo.

7 MS. ROWLAND: Thank you, Ms. Davis.

8 And back to the issue of the empirical data.
9 Does anyone have some thoughts on that?

10 Mr. Leichtman?

11 MR. LEICHTMAN: Yes. We, Volunteer Lawyers
12 for the arts, have anecdotal, experiential input
13 that we can give, but I did want to mention that
14 we do probably touch, you know, 9,000, 10,000
15 artists a year in some way, shape, or form. We
16 have something called the art law line where
17 artists call in and they can get a very quick
18 question answered. We have mediation services,
19 we have consults that we do in-house. And, of
20 course, we have the cases that come in that
21 require, you know, more than half an hour's worth
22 of work that go out to, you know, an army of law
23 firms, as well as clinics that we do, and a host
24 of educational classes. And so we do have some
25 database with a lot of artists in it, but we also

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2 touch a lot of artists periodically as the year
3 goes through.

4 So if the Copyright Office was interested in
5 getting some additional empirical data and
6 wanted, after these series of hearings, wanted to
7 put some open questions together, you know, we
8 would be happy to be a vehicle for getting that
9 survey out to artists, and I think some of the
10 other organizations that are here also could do
11 that.

12 There are other guilds and unions that are
13 also not here now, but I think they would also be
14 willing to do that. So I think there could
15 definitely be some vehicles for gathering
16 additional data if the Copyright Office wanted to
17 do that.

18 MS. ROWLAND: That would be valuable. As
19 Ms. Charlesworth said earlier, we'll probably
20 have a reply period in which we can accept those
21 kinds of comments. That will be helpful to us.

22 MS. CHARLESWORTH: And I will take the
23 opportunity for those who did do the surveys in
24 response to the last notice, we appreciate the
25 effort and time that went into that, and that

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2 information also is very valuable to us as we
3 move forward.

4 I think, obviously, Congress is going to be
5 interested in trying to understand the experience
6 and the realities of the situation. So providing
7 a factual context is very valuable.

8 MS. ROWLAND: Anyone else have any questions
9 to offer about the data that they could collect
10 or review? Not just on why litigants or
11 claimants might want to file a suit, but the
12 reasons why and how much it costs the -- the cost
13 basis. It would be helpful to learn a little bit
14 more about how often attorneys' fees are awarded,
15 that kind of thing. So if anyone has any
16 information they would like to share now or in
17 the future, that would be helpful.

18 Ms. Shaftel?

19 MS. SHAFTEL: Do you think the Copyright
20 Society would be able to collect that
21 information?

22 MS. CHARLESWORTH: I think the suggestion by
23 Mr. Leichtman, we will take that back and we will
24 consider whether you should have a more
25 formalized -- you know, whether the Copyright

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2 Office should take a particular role in getting
3 more information, or just make suggestions to
4 other outside organizations in terms of what we
5 are looking for. We will take that under
6 consideration.

7 MS. SHAFTEL: Copyright Office -- the
8 Copyright Society.

9 MS. CHARLESWORTH: No, I know. We can't --
10 I don't know what they -- I can't speak for them.
11 But, obviously, we could -- the question, I
12 think, from our perspective is whether to put out
13 a call for empirical data to a lot of
14 organizations, including the Copyright Society.

15 MS. WOLFF: If there were very specific
16 questions, that would be easy for other
17 organizations and associations then could pick
18 the ones that would be appropriate for their
19 members, and we could all do surveys.

20 MS. CHARLESWORTH: So there seems to be some
21 interest and willingness, at least in this room,
22 to help facilitate or survey evidence? Is that a
23 fair statement?

24 MS. WOLFF: That would be helpful.

25 MS. CHARLESWORTH: Okay. Thank you for that

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2 insight.

3 MR. LEICHTMAN: And I am sure the other
4 Volunteer Lawyers for the Arts organizations
5 around the country would, I am sure, be willing
6 to do that. I don't speak for them, but they
7 would be willing to do that, I am sure, as well.

8 MS. ROWLAND: Mr. Lehman?

9 MR. LEHMAN: Is that something, you know,
10 you could -- you have e-mail, you could send us
11 an e-mail, and then we could, you know, start
12 working on it?

13 MS. CHARLESWORTH: We would -- it definitely
14 would be a public process, and it would be
15 transparent, and we would certainly communicate.
16 I don't know -- for those who don't know, I think
17 many of you do know, we have a service called
18 News Net, which is typically how we send out
19 notices, sometimes too many, from the Copyright
20 Office, calling for comments and information.

21 So if you are not a subscriber, if you go on
22 the web site, you can easily sign up for that so
23 you will get that type of bulletin from us, in
24 addition to just checking the small claims page
25 on our web site, which is frequently updated.

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2 MS. WOLFF: If it was helpful to you to have
3 questions consistent across various associations,
4 that's what I was suggesting, that maybe there
5 would be very specific questions, and that way
6 the responses wouldn't be apples and oranges. You
7 would get more consistent answers.

8 MS. CHARLESWORTH: Right.

9 So the suggestion is that maybe the
10 Copyright Office might put together sort of a
11 centralized or common survey that can then be
12 distributed amongst various organizations.

13 We will take that under consideration.

14 MS. ROWLAND: Thank you for that discussion
15 about the empirical data.

16 The next issue, moving forward now, is about
17 funding, how would any small claims procedure be
18 funded. Earlier, I think it was yesterday, we
19 talked about the filing fees, and how high or low
20 they would be. And I think we heard some
21 opinions that they should not fund the entire --
22 they should not be so high as to fund the entire
23 process. And we would like some more input on
24 that. So where the funding should come from, how
25 it should be tied to the filing fees.

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2 Anyone have opinions on that, other than
3 what was said yesterday or earlier?

4 Ms. Wolff?

5 MS. WOLFF: It is hard to answer the funding
6 issues without knowing all what will be involved.

7 So I think in filing our responses to the
8 notice of inquiry, I was trying to think of a
9 system that would not be too burdensome for
10 whoever would be the trier of fact. Not having
11 to write every long lengthy decision and thing
12 like that.

13 Because I don't think those individual
14 creators or small business creators who would be
15 benefited by this system could, you know, could
16 afford a, quote, filing fee that would cover the
17 entire cost of one of these systems.

18 I am sure that even at a \$300 level, which
19 it would be high for these claimants, that the
20 \$300 that's paid in the federal court, I am sure
21 that does not cover all the judge's time and
22 effort for everything. So I think it would be a
23 little unrealistic for Congress to expect that
24 the whole thing could be funded from the initial
25 fee.

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2 But I think that having a fair copyright
3 system is good for the whole country and to have
4 creators that can earn a living and pay taxes
5 because they are getting paid for their work is a
6 benefit to society.

7 And that's why I don't think that the index
8 number fee or claim fee should be looked at as
9 covering the whole amount of whatever the cost of
10 this would be. And I am mindful that we can't
11 build an expensive system, but with things like
12 electronic filing, streaming, everything would
13 have to be done within a short period, limited
14 discovery, and not a lengthy decision, that
15 hopefully we can find a balance here that would
16 work where there could be funding for this.

17 But I do think that there's such a benefit
18 having creators, and that earn money from their
19 work, and have a copyright system that's
20 respected, because if so many people are left out
21 of this system, then the only companies that can
22 enforce their rights are the largest corporate
23 companies, and we don't have a real copyright
24 system.

25 MS. ROWLAND: Mr. Lehman?

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2 MR. LEHMAN: The funding problem is
3 obviously, you know, a very serious problem, but,
4 really, there are very limited choices. I mean,
5 you can have a tax or you can have fees, or a
6 special tax or you can have fees or it just comes
7 out of general revenue.

8 And certainly if the Copyright Office is
9 administering it, that's a big problem if it
10 comes out of general revenue because that means
11 that basically it is coming out of your taxpayer
12 portion. So if it is going to be a fee system,
13 obviously, it would be too onerous just for the
14 litigants using the system probably.

15 So I think if you had fees, you have to
16 somehow or other build it into the larger fee
17 system with the Copyright Office, the filing
18 fees. Because after all, it would be one of the
19 benefits that people would get for, of course,
20 this gets back to the question whether you have
21 to register and whatnot. But assuming that
22 registration was a requirement, then that's one
23 of the things you would get, maybe you would have
24 to increase the registration fee, I suppose.

25 So there's really only a limited number of

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2 options. And the third option is that if you are
3 not going to have it in the Copyright Office, and
4 you are going to locate these in the US district
5 courts with -- I'm assuming, as I said before,
6 some kind of special master system, now that is a
7 little bit different because, you know,
8 obviously, there are fees associated with the
9 federal court system, but they don't even
10 remotely pay for the cost of the federal courts.

11 So this would just be folded into the, you
12 know, to the basic cost taxpayer from the cost of
13 the judicial system. So in some ways that would
14 be one thing, even though I don't personally
15 favor that approach, that would be the -- I don't
16 think that's the best place to put these cases,
17 but one reason to have them located in US
18 district courts is sort of a subsidiary function
19 would be the funding issue because I think, you
20 know, I don't think that the judicial council is
21 going to complain about it, the money, the
22 judges. I think they would go along with it.

23 MS. ROWLAND: Anyone else?

24 Mr. Leichtman?

25 MR. LEICHTMAN: One thing that you might

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2 look at is the WIPO arbitration, mediation
3 center. They have done a very effective job at
4 keeping arbitration fees down, and one of the
5 ways that they have done that so, for example, if
6 you -- and I'm not just talking about their
7 domain name arbitration system, which is
8 excellent, but they also have a separate
9 arbitration and mediation center for intellectual
10 property disputes for people who want to mediate
11 and arbitrate intellectual property issues.

12 And if you look at their fee schedule and
13 compare, for example, the AAA, it is about a
14 third. And one of the ways they have done that
15 is they use, you know, experts in the field as
16 the arbitrators, but they say to them, you know,
17 look, for the privilege of being a WIPO
18 arbitrator, you are not going to charge your
19 usual hourly wage. You are going to charge "X"
20 dollars, or a very reduced hourly rate. You are
21 not going to be able to use associates and bill
22 the arbitration center and so on.

23 So they have done some things that have
24 allowed them to keep the cost of adjudicating the
25 disputes at a very low level, well below the

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2 other arbitration mediation centers. So they
3 also have an excellent set of arbitration
4 mediation rules, some of which maybe could be
5 used as some of the procedures here. So I would
6 really recommend that you take a look at those
7 and maybe talk to some of the WIPO folks because
8 they have done an extremely good job of keeping
9 the costs low for users.

10 MS. ROWLAND: Mr. Rosenthal?

11 MR. ROSENTHAL: This is my opinion. I think
12 Google should pay for it. That's why we are
13 really all here.

14 On a serious matter, I think there is
15 possibly a way to get private industry and
16 companies who believe that they will benefit by
17 this, economically, meaning that if a system is
18 set up that could save them money in terms of
19 litigating or being a litigant in these matters,
20 there might be some private enterprise that might
21 be interested in donating some portion of the
22 cost of this court. Because it is in their best
23 self-interest. So it is a joke, but kind of half
24 a joke.

25 MS. ROWLAND: Mr. Sanders?

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2 MR. SANDERS: Putting aside the appreciated
3 humor of that remark, and I do appreciate it, you
4 know, we live in a country that over the last
5 several decades has shifted its focus from a
6 manufacturing based economy to an intellectual
7 property based economy.

8 For us to be worried whether or not we can
9 get funding for a project, the type of which we
10 are discussing to serve the needs of the creators
11 of this country is, to me, a bit of an
12 embarrassment. If we are talking about private
13 corporate funding, I mean, if protecting creators
14 in the United States is not enough of a priority
15 to try to set up an alternative system like this
16 to deal with indigent creators and giving them a
17 chance to survive economically, then, you know,
18 we're on the wrong train anyway. I see corporate
19 funding as a horrendous step in the wrong
20 direction.

21 MS. ROWLAND: Anyone else?

22 Mr. Lehman?

23 MR. LEHMAN: Can I add to the corporate
24 funding issue? I mean, I think the only -- you
25 know, you are not going to have voluntary

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2 contributions. However, I think this goes to
3 what I maybe said yesterday at the beginning. You
4 know, all these various issues that you are
5 examining are linked, you know. Whether it is
6 orphan works, whether it is this. You know, it
7 is something you are not really dealing with, but
8 the Google books settlement, and licensing and so
9 on and to forth.

10 So I think that Congress is going to look at
11 your recommendations. But I think that there is
12 at least the possibility that at some point in
13 the coming couple of years, that Congress will
14 intervene in all of these matters to provide some
15 sort of statutory solution that maybe could
16 involve, you know, a statutory license or
17 something like that.

18 And if that happens, something like that
19 were to happen, everything's packaged together to
20 provide industrial peace, in effect on the
21 Internet, then I think you are really cooking in
22 terms of being able to get a source of funding
23 for this piece of it. And then the money could
24 come and some how or other from Google out of
25 whatever statutory licensing fees they would pay

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2 and so on and so forth.

3 I mean, I think, for example, I am not sure,
4 but under section 111, basically is a license
5 statutory for retransmission of cable television
6 signals, and you have the Copyright Royalty Board
7 that provides an adjudicatory function.
8 Basically, I think that license, you know, pays
9 for the Board, doesn't it? Or is that taxpayer
10 money? It certainly could. It could have just
11 come out of there and Congress could provide for
12 that.

13 MS. ROWLAND: Anyone else?

14 Mr. Rosenthal?

15 MR. ROSENTHAL: Yes. I just have one thing
16 to say. You know, fiscal cliff are the two words
17 of the day. Even if you're not in Washington, we
18 all have to think about that.

19 But I am not sure it is such a farfetched
20 idea that there can't be some cooperation with
21 industry. Right now the recording industry is
22 about to start a voluntary system that they
23 worked out with the ISPs to have the three or six
24 or four strikes and you are out program. It is
25 an educational program, but the ISPs are shoving

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2 money into a system that will be, really,
3 enforcing something against them. And they're
4 gaining from it.

5 So I don't know if it is such a crazy idea
6 to think that if in the political sense that if
7 certain industries are brought into this, that
8 they might not find this to be something
9 worthwhile to throw some money in. And I am
10 really thinking more along this recent RIAA,
11 MPAA, and the ISP deal that makes me think there
12 might be some validity to that.

13 MS. ROWLAND: Mr. Sanders?

14 MR. SANDERS: Again, I don't take issue with
15 the fact that there shouldn't be dialogue and
16 cooperation between the industries on almost
17 every issue. What we are talking about here is
18 an adjudicative body. It cannot be viewed in any
19 sense as favoring one party or industry over
20 another. It doesn't work on an ethical basis. So
21 that was my only point.

22 I think you are absolutely right in terms of
23 the industry dealing with one another, supporting
24 one another moving forward together, they both
25 drive economically. But in this one case where

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2 we are talking about a system of justice, I think
3 private funding is out of the question.

4 MS. ROWLAND: Anyone else on the funding
5 issue?

6 The next topic is basically the evaluation
7 of any system that would be in place.

8 So assuming for the sake of argument that
9 there was a small claims alternative procedure,
10 what could be done to evaluate it throughout the
11 years or months to make sure it is on track and
12 doing a good job and doing what it is supposed to
13 be doing.

14 I know yesterday there was some discussion
15 about the rule making that the Copyright Office
16 did for Section 1201, a similar kind of thing for
17 maybe the amount of money that the cap would be
18 for such a procedure? But I was wondering if
19 anyone had any other thoughts about whether to do
20 it at all, and, if so, how to evaluate the small
21 claims process going forward.

22 Mr. Perlman?

23 MR. PERLMAN: Well, as was incorporated in
24 the failed orphan works legislation, you could
25 have a review and report by the Copyright Office

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2 to Congress after a period of time such as five
3 years or something like that.

4 MS. ROWLAND: Any other thoughts?

5 Mr. Rosenthal?

6 MR. ROSENTHAL: This kind of incorporates
7 some of my final thoughts on all of this, because
8 it does come back to the issue of rule making and
9 the process that's going on right now.

10 You know, as you know, our position is that
11 we think for music, we might be going too fast.
12 We certainly would love to see some kind of
13 system built up on the photography side, the
14 visual images side. And we also think it would
15 be instructive to look at what happens to them.

16 But if you take a look at the dynamics of
17 the process that occur right now in rule making,
18 whether it is rate setting, whether it is rule
19 making, it seems that the Copyright Office has
20 understood, and I think there's a very good
21 benefit here, that if they allow the stakeholders
22 to kind of have an informal process of being
23 involved in settling the matters, and maybe in
24 this context it could be a matter of evaluating
25 the matters, that that's kind of a way to have

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2 the industries look at this, and then come back
3 to the Copyright Office in one way or another
4 with their opinions.

5 I think that's the only way we are going to
6 get to a point with music. We have many folks in
7 the music industry who are not here. Charlie is
8 right. There's not, you know, there are no
9 technical artists groups, even though a couple of
10 us have represented artists. There's no labels
11 here.

12 I can't believe I am bemoaning the fact that
13 the RIAA isn't here, but I am. And A2IM, which
14 the independent labels, and the small publishing
15 groups, and the unions, Ann is here in spirit,
16 yes, the unions are here. But, you know,
17 officially they are not. And the music services
18 aren't here.

19 And I think that, you know, there's plenty
20 of folks, the producers are here, NRIS and all of
21 this. Maybe there's a process that we can create
22 where there is some kind of a working group
23 that's created to address this issue across the
24 industry so that we can deal with the politics.
25 And that's what was raised before. How do you

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2 stop SOPA from happening again.

3 Well, what we have done, at least in the
4 music publishing end, we get Google in the room,
5 and we get the services in the room. And we all
6 kind of come to a conclusion, hopefully on
7 everything, and we kind of present it to the
8 Copyright Office as, well, here's our deal, and
9 we hope you will rubber stamp it, but at least,
10 you know, Google is not going to complain because
11 they were part of the process.

12 Maybe that's the thing that at least for us,
13 for the music community, we should think about
14 doing so that when we do come up with a final
15 solution, we are not going to have those
16 outliers, and we are going to have the people
17 that can really all buy into the system, whatever
18 that system is going to be.

19 MS. CHARLESWORTH: I just want the record to
20 reflect, and I think everyone here understands,
21 this is a public meeting, and all those groups
22 were, of course, welcome to join us, and some of
23 them actually did submit written comments.

24 But we at the Copyright Office absolutely
25 welcome the broadest possible stakeholder

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2 participation. We have another set of hearings
3 coming up in LA. I don't know exactly who's
4 represented there, but we certainly have tried to
5 make this a broad and inclusive process. And I
6 think it would benefit from some of the
7 additional voices you mentioned, Jay.

8 MR. ROSENTHAL: But this was a question as
9 to evaluation later on.

10 I mean, certainly as far as the initial idea
11 of coming up with a system that works for music,
12 whether you think it should be this big or this
13 big, is one thing. But then actually overseeing
14 the process later on and having a working group
15 that deals with this, maybe that's the way it can
16 be evaluated, and there's an ongoing input into
17 the process.

18 MS. ROWLAND: Ms. Davis?

19 MS. DAVIS: I have sort of a macro -- I
20 mean, Jay talked a macro solution. I am talking
21 micro.

22 What about I know I get these surveys all
23 the time after I work with a credit card company
24 if I call them about a problem. I get a survey
25 afterwards, how effective was this. You could

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2 have a survey after each case, and ask both sides
3 what they thought of the process, answering
4 specific questions, and then requesting what they
5 would do to better the process to make it more
6 fair or equitable or whatever.

7 MS. ROWLAND: Interesting idea. Anyone else
8 have thoughts on that or other ideas?

9 Originally, there was discussion yesterday
10 about the different types of music and whatnot,
11 and the idea of a pilot program had been floated.
12 Is that something that some of the people want to
13 talk about now? Or, no?

14 Okay. Ms. Wolff?

15 MS. WOLFF: If that's the only way to get
16 something started, I would rather start something
17 sooner than later because as the longer all these
18 processes delay, the more time everyone sort of
19 gets accustomed to what I call in the visual
20 community the right click license. They pull
21 images and never paying for it. And so sort of
22 the ease and the fact and the inability -- or not
23 inability, sort of the lack of any deterrence and
24 lack of much litigation against it, makes it just
25 feel like it is the way to do things.

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2 So I think even if it was just a pilot
3 program, I think get it started very quickly,
4 that would be helpful. I don't like the idea as
5 a policy matter that any one group of artists
6 would be deprived from this process, but I have
7 heard from a lot, that, "Oh, the only people who
8 really want it are the visual artists," which is
9 probably not true.

10 And we would be fine if they did it, but not
11 in the music -- you know, I wouldn't want to do
12 something that was bad from a policy point of
13 view, but if you were to at least get something
14 started to show that it was successful and
15 worked, I think that could help.

16 MS. ROWLAND: Mr. Lehman?

17 MR. LEHMAN: I guess I don't see how you do
18 a pilot project because you are talking about --
19 I mean, unless it is like a system of private
20 arbitration, which anyone is free to do, you are
21 talking about something, you know, carrying the
22 force of law here, and that requires statutory
23 change. And, you know, I don't know that
24 Congress is going to like to set up a pilot
25 project court.

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2 You know, it is -- you could, obviously, to
3 the extent that you go to the route that you are
4 talking about, that is provide a narrower
5 category of rights holders, and only apply it to
6 them and then maybe later expand it. That would
7 be a pilot project. But what we normally think
8 of as a pilot project, and just try something
9 out, that's -- you know, that's really not, I
10 think, feasible here.

11 Just one point about the surveys, it
12 involves other stuff I have been doing, there's
13 something called a Paperwork Reduction Act. And
14 unless you get in the statute that you set up a
15 specific exemption to that, anytime you send out
16 a survey, you have to put a notice in the Federal
17 Register, you have to wait six months. It has to
18 go to the Office of Management and Budget to be
19 approved. So it is like a total mess.

20 MS. ROWLAND: Any other thoughts on
21 evaluation and surveys?

22 Mr. Rosenthal?

23 MR. ROSENTHAL: I just want to answer
24 Nancy's point about moving forward with a pilot
25 program.

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2 I can't stress enough how much the feedback
3 I have gotten from the music community is we do
4 not want to be the impediment to moving forward
5 with, if you want to call it a pilot program or a
6 program that just deals with a subject matter
7 that's limited. We want the photography and
8 visual arts communities to move forward, and we
9 will be very much in support of that, while we
10 kind of figure out all the complexities and
11 craziness of our particular, you know, world.

12 I just want to point out, on empirical data,
13 I think it's great stuff to get, but I think
14 sometimes it is over relied upon. I remember the
15 economist from the Commerce Department who asked
16 us one day, do you have any data on the songs
17 that haven't been written because of piracy.
18 That's the way economists think with data. You
19 know, it is great stuff and we need it, but we
20 also have to be balanced in how much we rely on
21 it at the end of the day.

22 MS. ROWLAND: And with that, Mr. Sanders?

23 MR. SANDERS: Yeah. I can actually provide
24 statistics on that based upon the number of
25 songwriters who are no longer able to write

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2 songs.

3 MR. ROSENTHAL: That's different data. There
4 you go.

5 MR. SANDERS: You know, I want to emphasize
6 once again that the songwriter community that I
7 am here representing today is very much
8 interested in having this apply to songwriters.
9 There's a difference of opinion in the music
10 industry about this, apparently, but my
11 constituents would not be pleased to be carved
12 out on an experimental basis.

13 MS. CHARLESWORTH: I think it has been an
14 interesting dialogue we've observed, and the time
15 for more discussion privately is now, as opposed
16 to waiting to see what the report says and
17 reacting to that. Because as I had mentioned, it
18 is likely, for example, we will have an
19 additional final comment period, and if there are
20 updated views, we would welcome them, given the
21 difference of opinion within the music industry.

22 MS. ROWLAND: Mr. Badavas?

23 MR. BADAVAS: I think the difference of
24 opinion is interesting because the more I sat
25 here, quite frankly, the more confused I got,

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2 which I guess the happens as I get older, too.

3 But I came in thinking that I understood
4 what a small claims court sort of was. I have
5 been in one at least many times, and I sort of
6 know what the other ones in other state courts
7 are. And I have been sitting around the table,
8 and I have absolutely no idea what a small claims
9 court in this area would look like.

10 And that's because to pick up where Joe
11 DiMona left off yesterday, I have heard about two
12 different types of courts. I think the first
13 court people have described in this room is a
14 specialized lower value copyright court. Not a
15 small claims court. A lower value specialized
16 copyright court.

17 I think the second type of court some people
18 talked about, and maybe the one I had in mind,
19 was what I will call a small court for very, very
20 low value copyright claims. Pick a low value,
21 call it \$15,000.

22 And those two types of courts have very
23 different implications for procedural
24 protections, for rights of appeal, for whether or
25 not you feel comfortable with injunctive relief

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2 being there, the type of claim you might want to
3 bring or people might be allowed to bring. And I
4 think our clients' reactions and some of the
5 differences might be based on a lack of clarity
6 on where that is going. And our opinions might
7 change, quite frankly, depending on exactly what
8 that is.

9 And then the other thing I have great
10 confusion over, based on the comments made here,
11 are sort of the types of defendants that people
12 think are going to be haled into the small claims
13 court. I have heard people talk about large
14 scale Internet pirates who distribute copyrighted
15 works on the Internet as their business. They
16 are not coming. They never come. Good luck
17 finding them. They are probably in Russia.

18 I have heard people talk about a more
19 regional type of pirate that maybe is on the
20 Internet. Doesn't have to be. It could be
21 someone down on Canal Street. That person you
22 might be able to get. You might be able to
23 obtain jurisdiction and maybe bring them in, and
24 that might be an appropriate person. And that
25 has a different implication for the type of rules

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2 you want to have in the court.

3 And then I think I have heard people talk
4 more about a smaller scale company or person
5 who's making money from the piracy of their
6 client's work, which is in our world the eBay
7 sellers, or maybe the swap meet sellers, or maybe
8 the person who has the equivalent of a swap meet
9 online. I can probably get them. We have had
10 success in sort of going after them one by one.
11 They don't respond right away, but I believe we
12 do that. They might be even more amenable and
13 even easier to hale them into small claims court.

14 And then I have heard descriptions about
15 users of works who had included them in their own
16 product, whatever that is, if you want to call it
17 a book, if you want to call it another song, as I
18 described it, or you want to call it a web site,
19 and it is unauthorized. Maybe knowingly, maybe
20 not. And they are probably located in the US,
21 and they might be relatively easy and more
22 amenable to come into this.

23 And as I go through that list of defendants,
24 and as I think about two different types of
25 courts, I have very different reactions to what

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2 protections I want, what claims I think are good
3 and bad, how the process should be set up. And I
4 don't have a clear view of what the consensus is
5 of this room, much less the broader public, about
6 which of those types of claims and defendants,
7 and which of those courts should actually happen.

8 And I assume that you will weed through that
9 in your report and try to figure it out. But it
10 makes it extremely difficult for me to go back to
11 our clients and say, well, we should support this
12 because, you know what, I have a really good
13 handle on the fact that this is really going to
14 be a piracy court that pro se litigants are going
15 into, a claim is never going to be more than
16 \$10,000, and you shouldn't care about the
17 injunctive relief because -- of course you need
18 injunctive relief when you are dealing with the
19 piracy case. Because it is just more work, and
20 you are stopping the sales of it, you are getting
21 paid for whatever is already sold. It is the
22 same as a Canal Street seizure in a different
23 business.

24 That's not something I think too many people
25 in our side -- in our world would have a problem

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2 with. You start getting bigger and broader and
3 more complicated, that's where our support from
4 our constituents breaks down. And that probably
5 has more to do with what Charlie calls
6 disagreements among family, than anything else
7 here. And I don't -- I am not sure we have
8 gotten to the crux of those issues, although the
9 discussion has certainly raised all of those
10 issues, which I hadn't thought of before.

11 MS. ROWLAND: I think Mr. Perlman has
12 something to say.

13 MR. PERLMAN: I want to hark back to
14 something I said yesterday. Almost anything, any
15 change that might come out of this process would
16 be an improvement. And my nightmare scenario is
17 Congress looks at the reports and information
18 that this process yields and says, well, these
19 folks can't agree among themselves what to do, so
20 we shouldn't do anything.

21 MS. ROWLAND: Ms. Wolff?

22 MS. WOLFF: This is kind of ironic, I am
23 sitting here, and my office sent me a blog that
24 one of our clients wrote, because it is too
25 expensive for her to continue to fight. Her most

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2 popular Flickr photograph was used by a famous
3 fashion designer, Chris Benz. He just made the
4 entire fabric was her design.

5 So we did what we did. We wrote a letter,
6 and he wrote back and said "I got inspired by
7 looking everywhere online, and it is not
8 substantially similar." You can lay it on top of
9 each other. So she can't afford to go to court.
10 So she just did a blog that's now going viral,
11 where she just puts the pictures on top of each
12 other.

13 So, I mean, there really is a need to give
14 redress because you are always going to get the
15 responses, "I didn't see it, it's not mine. It
16 doesn't look like that." And I think just going
17 back to the early principles, to try to keep it
18 simple, try to keep it fair, and maybe look at
19 those areas where there really is direct rip off,
20 direct piracy, direct infringement. There may
21 always be a small variation, and at least get
22 started somewhere. Because there really just is
23 a need, and sort of the respect of copyright is
24 eroded when there's nothing anyone can do.

25 MR. SANDERS: Again, as I said yesterday, I

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2 am not hearing anything from anyone that would
3 lead me to believe that we have insurmountable
4 problems. In fact, we have solutions or
5 recommendations to the Copyright Office, which
6 would then consider them.

7 It would be sufficiently narrow to address
8 almost all of the problems that we have
9 articulated here. I think that the dangers of
10 going too broad have been very well stated. We
11 understand that we do not want to set precedents
12 that would be damaging to any one of our
13 industries in the long run, and that if we commit
14 ourselves to going as narrow as we possibly can
15 while serving the needs -- I don't want to
16 characterize anyone else's thoughts about this
17 being limited to antipiracy, but that seems to be
18 a point on which we can all agree.

19 I think that a working group can easily come
20 up with a compromise that avoids what Vic
21 articulated as the main danger, that it looks
22 like we're in disarray and disagreement so then
23 why should anyone help us.

24 So I come out of these two days of meetings
25 with a much more optimistic view that we can,

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2 working together, pretty easily come up with
3 something that we can all support. I may be
4 nuts, but I do feel that way.

5 MS. ROWLAND: Ms. Shaftel?

6 MS. SHAFTEL: I am disappointed that there
7 are some creators that are conspicuously absent,
8 at least yesterday and today in this. And that's
9 the independent filmmakers who are getting
10 clobbered, if by nothing else, YouTube, and
11 academic infringement, and software developers.

12 And when my committee discussed this
13 possibility and what sort of works would be
14 applicable to be heard in this small claims
15 court, we immediately thought how on earth could
16 a quick and dirty simplified system be able to
17 judge software infringement. I mean, that would
18 have to be experts. And that's an example of
19 something that might not work for this, but I
20 would love to hear from that industry sector of
21 creators and what their particular concerns and
22 problems are.

23 And the independent filmmakers touch on all
24 of us because a lot of them, depending on the
25 type of work they do, incorporate all of our

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2 works, or, you know, some of them are shooting
3 incidents, occurrences, events as they happen,
4 rather than incorporating other copyrighted
5 works.

6 So as far as filmmakers go, there are two
7 really distinct types of creators in filmmakers
8 and the types of films that they produce. And
9 without -- especially the filmmakers in the room,
10 and I am not talking about MPAA and big studios,
11 because they are on a much higher level of
12 infringement. They're not little guys and little
13 infringements. I think without the independent
14 filmmakers here, we are missing a really big
15 piece of the puzzle.

16 MS. ROWLAND: I think we actually will have
17 a chance to hear from them when we go to LA.

18 MS. SHAFTEL: I know a lot are in New York.
19 Where are they?

20 MR. ROSENTHAL: Downtown.

21 MS. ROWLAND: Anyone else have anything to
22 add?

23 Mr. Lehman?

24 MR. LEHMAN: I don't want to belabor things
25 and keep people here, but just something you

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2 might keep in mind in terms of an analogous
3 situation is the America Invents Act, you know,
4 by example, passed. One of the most important
5 aspects of that legislation is that it vastly
6 expanded the alternative, you know, dispute
7 mechanism for the patent system, the nonfederal
8 court mechanism.

9 Now, obviously, it is apples and oranges,
10 but it expanded a third party re-examination, it
11 expanded -- created an opposition system, and,
12 indeed, the USPTO is hiring I think 200 ALJs,
13 they are in the process of doing that right now.
14 And Congress was receptive to that.

15 So my point is that I don't think it is
16 unthinkable at all that -- I think there's a real
17 recognition, the same committees that deal with
18 it, you know, that nonfull scale federal
19 litigation alternatives to intellectual property
20 disputes is something that really is timely right
21 now. So you might even look at what's going on
22 there and hear from the PTO and might reference
23 that in your report.

24 MS. ROWLAND: Anyone else?

25 Now we can open the floor up to any other

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2 issues that you wanted to raise during this
3 procedure. Anyone?

4 MS. CHARLESWORTH: Has everyone said their
5 peace, for now at least?

6 MS. ROWLAND: Okay. We would like to thank
7 you again, all of you for coming and
8 participating in this event. As you see, we have
9 a reporter here taking notes. So we are going to
10 put the transcript up in due course on our web
11 site. And so you can read it there. We will
12 also do the same for our Los Angeles hearings.

13 And we really appreciate the time you have
14 taken, and we hope if we do have a reply comments
15 period, we will hear from you again.

16 Ms. Wolff?

17 MS. WOLFF: After you have these hearings,
18 what do you think is the next step in the
19 timeline?

20 MS. ROWLAND: Well, we must produce a report
21 to Congress by the end of September of 2013. So
22 that is the deadline by which we have to finish
23 our work, initial stage.

24 We do, as Ms. Charlesworth said, we are
25 probably going to have another set of comments.

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2 And I'm not sure at that point if there will be
3 anything else, but we are again taking into
4 consideration any other next steps.

5 MS. CHARLESWORTH: We are going to take the
6 suggestion of survey questions back and consider
7 that. If it is a reply period, we will try to
8 give people ample time, so it is not terribly
9 rushed. And then, obviously, in the meantime, we
10 are going to be continuing to look at the issue
11 at the Copyright Office. And we will produce a
12 report as Catie said by the end of September.

13 Thank you.

14 MS. ROWLAND: Thank you.

15 (WHEREUPON, the proceedings were
16 concluded at 2:00 p.m.)

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1 C E R T I F I C A T E

2

3 STATE OF NEW YORK)

4 COUNTY OF NEW YORK)

5

6 I, ANNETTE M. MONTALVO, Registered Merit Reporter
7 and Notary Public, do hereby certify that I reported in
8 shorthand the proceedings had at the hearing aforesaid,
9 and that the foregoing is a true, complete and correct
10 transcript of the proceedings of said hearing as
11 appears from my stenographic notes so taken and
12 transcribed under my personal direction.

13 I further certify that I am not a relative or
14 employee of counsel/attorney for any of the parties,
15 nor a relative or employee of such parties, nor am I
16 financially interested in the outcome of the action.

17 IN WITNESS WHEREOF, I have hereunto set my
18 hand this 4th day of December, 2012.

19

20

21

22 _____
Annette M. Montalvo, RMR

23

24 My commission expires: January 31, 2015

25

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