

BEFORE THE
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of
Remedies for Small Copyright Claims

Docket No. 2011-10

**COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS AND SESAC, INC.**

The American Society of Composers, Authors and Publishers (“ASCAP”) and SESAC, Inc. (“SESAC”) (ASCAP and SESAC are hereinafter together referred to as Performing Rights Organizations or “PROs”) respectfully submit comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) dated October 24, 2011 for written comments on issues regarding remedies for “small” copyright claims. 76 Fed. Reg. 66,758 (October 27, 2011).

I. Interest of PROs

ASCAP is this nation’s first and largest PRO, with over 425,000 writer and publisher members and a repertory of millions of copyrighted musical works. On behalf of its members, ASCAP licenses the non-dramatic public performance rights in musical works to a wide range of users, including television and radio broadcasters, online services, background/foreground music services, hotels, nightclubs, and colleges and universities. ASCAP represents not only U.S. writers and publishers, but also hundreds of thousands of foreign writers and publishers through

affiliation agreements with PROs in over 90 countries, by which the foreign repertoires are licensed in the U.S., and the foreign PROs license the ASCAP repertory in their countries.

Established in 1930, SESAC, the second oldest and fastest growing PRO in the United States, is a musical performing rights society that services both the creators and the users of non-dramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than 250,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers.

The major benefit that PROs provide to both their members and music users alike is the right to perform publicly the millions of works in their repertoires through a single bulk license for a single fee. The numerous efficiencies inherent in PROs' bulk licensing mechanisms provide an easier method by which music users of all types may comply with the requirements of the copyright law by obviating the need, burden and expense of contacting and negotiating with individual copyright proprietors for permission to perform music. Nevertheless, despite these efficiencies and PROs' attempts to educate music users of those copyright requirements, PROs maintain compliance programs to ensure that their members' and affiliates' rights are being enforced.

PROs enforce their members' and affiliates' rights through copyright infringement actions brought in federal district courts throughout the country. While PROs represent hundreds of thousands of music creators and millions of copyrighted works in their licensing, PROs' infringement actions each rest upon a small number of counts reflecting only a few works owned by a few copyright owners. In that regard, PROs' infringement actions are not unlike most any other infringement action brought by individual copyright owners. Accordingly, the PROs have an interest in this study.

II. Issues of Concern to PROs

Despite PROs being collective licensors, the size of most PRO infringement actions often compare to the size of actions brought by most individual copyright owners. PROs bring lawsuits as a means of ensuring compliance with the copyright law. First and foremost, PROs are concerned with ensuring that their members and affiliates receive fair remuneration for the use of their works. To that end, PROs utilize infringement actions in order to place their members and affiliates in at least the same position as if the music user obtained a license from the PROs in compliance with its legal obligations. As many of the music users that fail to obtain a performance license are relatively small, many of PROs' infringement actions are consequently relatively small in size. Yet, these actions against relatively small music users have an important deterrent effect, and allow PROs to more easily license larger classes or types of smaller music users.

Of course, PROs, like most individual copyright owners, seek appropriate statutory damages for each work infringed. And, like most individual copyright owners, PROs generally seek recovery of attorney's fees and costs. Nevertheless, it would be fair to conclude that the "economic value" (as used in the NOI) of many of PROs' infringement actions would be considered small. Accordingly, PROs are concerned that any recommendations of, or actions taken by, the Office might affect these smaller claims brought by PROs on behalf of their members and affiliates.

A. The Current System Should Continue Unchanged for Infringement Actions Regarding the Public Performance of Musical Works.

Collectively, performing rights organizations (PROs, with Broadcast Music, Inc., the third U.S. PRO) represent virtually all copyright owners of musical works for the public

performances of their works in the United States. Accordingly, PROs have long represented such copyright owners in infringement actions concerning the public performance right of copyrighted musical works. Due to that fact alone, it is PROs' contention that no alternative adjudication or resolution system need be implemented to hear actions concerning the public performance right of copyrighted musical works. For these actions, an alternative system is simply unnecessary.

Moreover, PROs contends that an alternate system for small claims can potentially be damaging to PROs. While PRO infringement actions rest upon basic fundamentals of copyright law, the PROs' unique position of licensing only one right -- the non-dramatic public performance right -- for one type of work, has effectively resulted in PROs' infringement actions setting a historical body of federal case law applicable to those uses. Moreover, due to ASCAP's unique position of licensing collectively under the cover of a Consent Decree with the U.S. Department of Justice, issues unique to ASCAP and its members are bound in that case law. It is therefore PROs' belief that continued reliance on, and development of, this federal case law is important, and continued federal jurisdiction is necessary. Therefore, it is imperative that regardless of whatever recommendations for small claims are made by the Office, PROs must retain the ability to choose and control where and how they bring their infringement litigation, including those that fall within the Office's definition of "small claims," and that the status quo for *all* actions -- whether small or large -- remain always an option for plaintiffs. Furthermore, considering this historical jurisprudence, it is crucial that no competing or alternative body of case law be created to disrupt nearly a century of case law regarding the performance right of musical works. Therefore, PROs urge the Office to recommend that at least with regard to the adjudication of any copyright infringement action brought regarding the public performance

right, the status quo remain and jurisdiction over any such action remain limited to actions in federal court.

Finally, there exists a potential for music users to bring declaratory actions against copyright owners, effectively placing the initial litigation decision in their hands. Therefore, it is equally important that a copyright owner be able to control the litigation even when they are placed in the role of defendant. The Office should ensure that jurisdiction for matters concerning the public performance right be lacking in such alternate forum, and in any event copyright owners must be able to remove any such action without cause in order to retain the status quo as an option.

B. Other Matters of Concern to PROs and Copyright Owners

Other copyright owners have raised certain issues regarding a proposal for an alternative system to adjudicate small claims. PROs reiterate those concerns and raise the following points for consideration:

1. Frivolous Claims. PROs have been interested participants in compulsory licensing matters before the Copyright Royalty Tribunal, Copyright Royalty Arbitration Panels and the current Copyright Royalty Board for over three decades. A major issue that PROs have experienced routinely is the existence of small claimants that bring frivolous, unjustified or economically negligible claims which ultimately waste the resources of other copyright owners, as well as the CRB and its staff. As an example that was raised in hearings that ultimately led to the creation of the Copyright Royalty Board, in one DART distribution proceeding, PROs and other copyright owners were forced to expend tens of thousands of dollars in legal fees in litigation with an individual claimant who was ultimately awarded only a few dollars. While

new rules applicable to Copyright Royalty Board proceedings were implemented in order to provide procedural safeguards against frivolous claims, the streamlined process still invites frivolous claims that ultimately cost copyright owners disproportionate resources to defend. The Office should be mindful of the effect a small claims adjudication system may have on frivolous claims and actions and should ensure that proper safeguards are in place to discourage or eliminate such actions.

2. Precedence. As discussed above, PROs and other copyright owners have a long history of infringement litigation in the federal judicial system. It is that history and jurisprudence that has shaped the public performance right and PROs' current litigation process. PROs are concerned that the opinions and results of any alternative adjudication system can have an effect on PROs' and other copyright owners' continued federal infringement litigation. Accordingly, the Office should ensure that decisions and opinions of any such adjudication body be limited to that case and not serve as precedent for any other action, including specifically for any action brought in a federal or state court.

3. Joint Owners. PROs are concerned that the availability of a second parallel adjudication system may create conflict situations where one joint-owner brings an action in the federal system and another joint-owner simultaneously brings an action in the alternative system. The Office should ensure that an action filed in federal court prior to, or simultaneous with, the same action on the same work brought to the alternative adjudication body shall preclude jurisdiction in the alternative small claims system.

4. Remedies. PROs and other copyright plaintiffs have the wherewithal to bring infringement actions only if they are able to rely upon the right and ability to collect statutory damages, action costs and attorney's fees. Otherwise, the expense of most litigation would

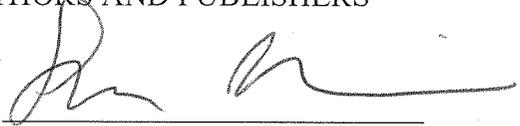
become prohibitive relative to the size of the action. Therefore, it is crucial that the Office recommends maintaining unchanged the current system of remedies, at least as an option at the discretion of the plaintiff.

5. Enforcement. One issue which the Office has failed to address is the process that follows final judgment. While the Office correctly noted the expense of litigation, it is PROs' experience that costs following litigation at times exceed those expended in litigation. Enforcement of a judgment is often expensive, and attempts are often fruitless. Accordingly, the Office should be mindful to ensure that a litigant in a small claims proceeding not be hampered in its attempts to enforce subsequently the judgment ordered in that proceeding.

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Respectfully submitted,

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