

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

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Notice of Inquiry:)	
)	Docket No. 2011-10
Remedies for Small Copyright Claims)	
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COMMENTS OF BROADCAST MUSIC, INC.

On October 24, 2011, the United States Copyright Office (the “Office”) issued a notice of inquiry in the Federal Register requesting comments on whether and how the current legal system prevents copyright owners from pursuing “small claims,” and soliciting recommendations on how to improve the legal or regulatory landscape in order “to improve the adjudication of these small copyright claims.” 76 Fed. Reg. 66,758 (October 27, 2011) (the “NOI”). Broadcast Music, Inc. (“BMI”), the music performing rights organization, hereby submits its comments in response to the NOI.

BMI’s filing addresses its experience as a leading worldwide music rights licensing organization that enforces unlicensed public performance of musical works in many different industries and fields in the United States. BMI believes that business solutions such as collective licensing can help address the kinds of situations faced by small copyright claimants in other creative fields. Notwithstanding the fact that collective licensing obviates much of the need to pursue individualized small claims, BMI supports the Office’s interest in investigating other possible legal or regulatory processes that would be available to adjudicate a small claim.

I. BMI

America's copyright laws have provided a firm foundation to support a vibrant creative community of songwriters and composers whose works fuel a robust and growing entertainment industry. BMI operates at the nexus where creativity, law, and commerce converge. By establishing and maintaining viable marketplace structures, BMI translates copyright law into real opportunity for America's songwriters and composers. The global markets that BMI creates and nurtures for the public performing right foster economic incentives for creativity, stimulate our country's artistic and cultural output, support small businesses, and positively impact international trade.

BMI was created in 1939 to provide viable competition and choice for America's songwriters and businesses in the licensing of the public performing right in musical works. Competition among the American performing right organizations provides benefits to creators and music users alike. This has been a win-win success story for the American enterprise system. The three performing right organizations enjoy statutory recognition in the Copyright Act.¹

BMI is proud to represent the public performing rights in over 7.5 million musical works of approximately 475,000 affiliated songwriters, composers, and music publishers. BMI also represents the performing rights in the works of thousand of foreign composers and songwriters when those works are publicly performed in the United States. Every quarter, BMI provides cost-efficient copyright valuation, licensing, and clearance services to the more than 3.5 billion musical performances tracked in the United States alone.

¹ A "performing rights society" is defined as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101.

BMI offers through the blanket license a collective licensing solution that takes thousands of performances, each of which individually may be of very small value, and creates a license that is efficient and affordable for users in a wide range of fields of business. The collective licensing organization can monitor uses and negotiate and enforce licenses in a way that tens of thousands of individual composers (or their publishers, for that matter) would not be able to do on a regional or a national basis.² BMI's cross-licensing relationships with music performing rights societies in foreign countries ensure that music users can license the entire world's catalogs of music through only a handful of licenses.

BMI's monitoring and enforcement activities include bringing infringement actions from time to time against music users who have not obtained the necessary licenses for publicly performing BMI musical works. In the ordinary course of business, BMI depends on its ability to enforce its affiliates' public performing right copyrights, even in cases where the damages may be quite small on an individual work basis. As a result, BMI is quite interested in any proposals to alter or change the legal regime protecting copyright.

II. Comments on Small Claims Proposals in the NOI

A preliminary question for the creation of a small claims adjudication procedure is defining what constitutes a "small claim." Is it a claim of \$1,000 or less? Or up to \$5,000, as it is for commercial claims in the State of New York? Whatever the definition, any small claims procedure adopted by Congress should be voluntary for the copyright owner to choose, and adoption of any new judicial machinery should not limit or adversely affect the current statutory damages and federal court remedies available to copyright owners.

² Legendary songwriter/composer, the late Isaac Hayes, said of the unique role that BMI plays in the creative community, "[i]t is very important to have someone who is strong and has good ethics. BMI exemplifies all of that. They've been fighting my battles for years and years."

As a general matter, BMI believes that state courts, which may lack the necessary expertise to rule on federal copyright matters, should not be given the jurisdiction to handle small copyright claims, however defined. Federal copyright law is pre-emptive of state law. Having state courts issue copyright rulings poses the risk of confused and contradictory precedents.³ The use of a local United States magistrate judge to adjudicate (or mediate) disputes and rule on damages could be a less costly option, assuming there exists a jurisdictional basis over the dispute (and the parties consent).⁴ Filing fees are required for parties instituting civil cases in any district court.⁵

For small claims, consideration would presumably have to be given to permitting copyright owners to appear *pro se* or *in forma pauperis* in such a proceeding. An award of reasonable attorney's fees should be available, should the copyright owner obtain representation, even if the fees exceed the damages award itself. Costs of collection should be considered as well. For example, thought should be given to how the small claimant could enforce and collect on the judgment she has obtained.

Consideration must also be given to whether injunctive relief would be among the remedies available to a small claimant. Perhaps injunctive relief could provide a backstop in case the user fails to pay the claim amount awarded by the magistrate judge. Will the small

³ In the absence of a funding mechanism to cover the costs of state court litigation, conferring copyright jurisdiction on state courts might result in an unfunded mandate implicated by the Unfunded Mandate Reform Act of 1995. This law requires the Congressional Budget Office and congressional committees to develop and share information about the costs to the states. *See* 2 U.S.C. § 1501, *et seq.*

⁴ *See* 28 U.S.C. § 636(c). It should be noted that conferring Article III authority on non-lifetime tenured magistrate judges requires constitutional analysis prior to proposing a statutory enactment. *See, e.g.,* H. REP. NO. 95-1364, at 10-11, 95th Cong., 2d Sess. (1978).

⁵ 28 U.S.C. § 1914 (\$350.00, except for writ of habeas corpus).

claims court have the authority to enforce injunctive relief? Contempt motions could also, in theory, be brought against a user who fails to pay the small license fee or damage award.

BMI believes that small copyright claims procedures should not be available to adjudicate “ownership” of the copyright. It is important that any streamlined, low cost, small claims venue for copyright owners not become a vehicle for complex disputes regarding copyright ownership; indeed, the low cost of entry in such a forum may unintentionally invite abuse by claimants.⁶ Questions arise. For example, if a defendant in a small claims proceeding asserts an ownership claim, will the case automatically be transferred to a federal district court?

Conclusion

In summary, BMI applauds the Office’s interest in furnishing new tools and remedies for copyright owners in instances where the value of infringement may be small in relation to the high costs of federal court litigation. The Office should consider carefully the issues and practical problems that new procedures might engender, and in all cases protect the current legal rights and remedies from erosion.

⁶ Congress adopted some small claims relief provisions in recent years to address this situation in the context of compulsory license distribution proceedings conducted by the Copyright Royalty Judges (“Judges”). One of them is the requirement for any party wishing to participate in a distribution proceeding must pay a filing fee of \$150.00. *See* 17 U.S.C. § 803(b)(2)(D). This small fee alone has been successful in discouraging the litigation of *de minimis* (and often frivolous) claims. The Judges have also been given statutory power to conduct “paper proceedings” in cases of low value, and to levy penalties against claimants who make “inflated claims.” *See* 17 U.S.C. § 803(b)(4)-(5).

Respectfully submitted,

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