

January 17, 2012

U.S. Copyright Office
Office of Policy and International Affairs
Attn: Catherine Rowland, Counsel
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Submitted electronically via <http://www.copyright.gov/docs/smallclaims>

Re: Request for Written Comments from the Public Issued on October 24, 2011 by the U.S Copyright Office in connection with the Treatment of Small Copyright Claims [Docket No. 2011-10]

Dear Ms. Rowland:

The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide written comments to the U.S. Copyright Office in response to the above-captioned matter regarding remedies for small copyright claims.

IFTA urges the U.S. Copyright Office to assess the extent to which authors and other small copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system. Specifically, federal litigation requires a substantial amount of time, money and effort, and small copyright owners often do not have the resources to initiate such litigation. The result is that copyright infringers continue to infringe without penalty because the copyright owner is financially prevented from protecting the copyright. A system for resolving small copyright claims pursuant to federal law would be very helpful in combating such infringement and protect small copyright owners.

I. About IFTA

Based in Los Angeles, IFTA is the global trade association of the independent motion picture and television industry. Our nonprofit organization represents more than 140 Member Companies from 19 countries, consisting of the world's foremost independent production and distribution companies, sales agents, television companies and institutions engaged in film finance.¹

For more than 30 years, IFTA Members have produced, distributed and financed many of the world's most prominent films, 19 of which have won the Academy Award® for "Best

¹ A list of IFTA Member Companies is available online at: www.ifta-online.org.

Picture,” most recently *The King’s Speech* (The Weinstein Company), *The Hurt Locker* (Voltage Pictures and Summit Entertainment) and *Slumdog Millionaire* (Pathé). In fact, our Members’ films and television programs are regularly recognized with prominent entertainment awards from around the globe. Collectively, IFTA Members produce more than 400 independent films and countless hours of television programming each year and generate more than \$4 billion in sales revenues annually.

IFTA advocates and works to implement solutions to counteract piracy that include all stakeholders and that are effective for independents. Recently, IFTA has worked with the U.S. Intellectual Property Enforcement Coordinator to implement Best Practices for U.S. Payment Processors (American Express, Discover, MasterCard, PayPal and Visa) to respond to reports from rights holders that certain vendor websites are engaged in the sale of pirated or counterfeit goods. IFTA is also participating in the Copyright Alert Program designed to educate Internet service subscribers about copyright, peer-to-peer infringement and the need to secure their Internet connections, inform them of the consequences of copyright infringement and deter them from allowing such infringement on their accounts.

As a service to its Members, IFTA administers an arbitration tribunal for the resolution of entertainment-related disputes, which often arise out of international film distribution agreements. The arbitration awards issued by the tribunal are final and not subject to appeal.² IFTA Arbitration is less formal, less expensive and more expedient than litigation. IFTA Arbitration is available to both IFTA Members and non-Members, as long as the parties have agreed in writing to use IFTA Arbitration to resolve their dispute. IFTA’s role is to ensure that the administrative functions of IFTA Arbitration are carried out effectively and fairly and in accordance with the IFTA Rules for International Arbitration (“IFTA Rules”).³ To ensure that IFTA Arbitration remains a neutral forum, the IFTA Board of Directors is not involved in the parties’ individual contract disputes or the cases brought before the Tribunal for resolution. The Board has established an international Arbitration Advisory Committee (“AAC”) whose mandate is to recruit skilled arbitrators for the IFTA Panel of Arbitrators (“Panel”) and to evaluate and recommend neutral arbitration policies and procedures, including revisions to the IFTA Rules. The Panel of IFTA Arbitrators is composed of distinguished entertainment attorneys acting as neutral experts who hear arguments, review evidence and issue binding arbitration awards.

A unique, optional, pre-arbitration settlement procedure is also offered whereby IFTA will send a letter to the other party providing for a 10-day settlement period before the arbitration is formally initiated. Many disputes have been resolved this way and without the need for arbitration.

IFTA Arbitration is designed to provide an expeditious resolution to claims concerning intellectual property rights, which are inherently time sensitive. A similar system for resolving small copyright claims is consistent with and adds to the U.S. Government’s commitment to improving intellectual property enforcement to strengthen the U.S. economy; promoting innovation and the security of America’s comparative advantage in the global economy; protecting consumer trust and safety; and validating rights protected under the Constitution.⁴

² However, such award may be vacated for very limited reasons (*e.g.* fraud or misconduct by the arbitrator) which

³ The current IFTA Rules can be viewed on IFTA’s website at www.ifta-online.org.

⁴ 2011 U.S. Intellectual Property Enforcement Coordinator Joint Strategic Plan.

II. IFTA's Interest in Remedies for Small Copyright Claims

The production, financing and distribution models of independent producers and distributors differ substantially from the Motion Picture Association of America (MPAA) member studios that may self-finance and then control distribution through their worldwide subsidiaries and affiliates. The common practice for independents is to secure financing and distribution for each project on a territory-by-territory basis by means of licensing deals with local distributors around the globe. After assessing the value of a project (*e.g.*, projected gross receipts across all distribution media based upon factors such as script, director, writer or key cast; subject matter or genre; estimated production budget; projected season and year of release), local distributors enter into license agreements, also referred to as pre-sale commitments, with the producer, which provide guaranteed minimum license fees to be paid upon delivery of the completed product in order to secure exclusive distribution rights in a particular territory.

Copyright infringement severely undercuts a film or television program's economic expectations, reducing the advance minimum guarantees and effectively limiting the funds available to independent producers to finance their productions. Piracy damages the value of independently produced films by lowering the license fees that may be obtained from local distributors, thus removing the incentive and in most cases the ability to finance and produce the next film. Due to the damage that piracy does to the local distribution network, it is no surprise that piracy lowers the license fees that legitimate distributors can pay for independent films. Legitimate distributors cannot compete against the pirates when such product is free or nearly free. Increasingly, IFTA Members realize this impact of piracy in individual business negotiations. Local distributors will often cite piracy, even for films not yet released in that market, as a reason to pay reduced license fees or to decline to distribute the film at all. Therefore, not only does piracy directly undercut anticipated revenue from the distribution of a particular project, it also impacts the ability of independent producers to secure financing for future productions.

Given the current situation where minimum guarantees and license fees are rapidly declining, it is even more economically impracticable for independent producers who are small copyright owners to enter into costly litigation and attorneys' fees to protect their copyrights because the compensatory damages at stake are frequently lower than the cost of litigation or ex officio copyright enforcement.

III. IFTA Supports the Establishment of an Alternative Court System for Resolving Small Copyright Claims

IFTA recommends that the Copyright Office consider implementing a specialized federal small copyright claims court ("Specialized Court") for a more efficient and cost effective way of resolving small copyright claims. It is important that all copyright owners have access to means for protecting their intellectual property rights; however, the existing remedies for copyright infringement are awarded solely through federal litigation, which financially precludes many, if not all, small copyright owners, including IFTA Members from obtaining such remedies. Also, small copyright owners often suffer harsher consequences, such as bankruptcy, as a cumulative effect of their copyrights being repeatedly infringed.

Alternative dispute resolution (“ADR”) in the U.S. requires that both parties agree to resolve the dispute using ADR and, in doing so, waive their rights to use of the courts. With unauthorized copyright claims, it is impractical for both parties to agree to use ADR because the infringer is likely unknown to the copyright owner. A federal court system, as opposed to a state court system, is recommended so as to provide a neutral forum and address the concerns that prompted federal diversity jurisdiction. In addition, state courts do not possess the required expertise in copyright law. Similar to U.S. Immigration Courts, there should be federal small copyright claims courts in each state, with the number of courts based on need or population.

The following guidelines for such a Specialized Court are also proposed.

A. Parameters for Filing a Complaint

The Specialized Court should have original jurisdiction in actions for violations of laws involving intellectual property rights of small copyright owners. For example, a “small” claim may be defined as one where the total damages claimed are not more than fifty thousand dollars (\$50,000). Utilizing the Specialized Court should be on a voluntary basis, so that those copyright owners who prefer litigating in the federal courts have the option of choosing which path will best achieve their specific goals.

Filing a complaint with the Specialized Court should be consistent with the statute of limitations proscribed by U.S. Copyright Law. The complaint must be in writing and contain the name and address of the complainant as well as those of the necessary respondent(s). Some form of documentary evidence, *e.g.*, affidavit, certificate of registration, etc. should be filed with the complaint. The complaint should also include a certification that the party commencing the action has not filed any other action or proceeding involving the same issue or issues before any tribunal or agency. A complainant may seek a declaration of rights, injunctive or other equitable relief, which is crucial in copyright infringement cases. The complaint may be filed in the state of residence of the claimant; however, the defendant should not be permitted to remove the action to another court.

While small claims courts typically do not allow parties to be represented by counsel, copyright law is more complex than the types of cases on the docket of small claims courts so the parties should be entitled to be represented by counsel. Also, a defense to copyright infringement is more difficult than defenses to other small claims because there is a presumption of copyright ownership. For example, a defense asserting fair use would likely need to be briefed by an attorney.

Similar to state small claims courts, the filing fees should be minimal so as to allow access to all small copyright owners.

In an effort to conserve the resources of small copyright owners, trade associations, such as IFTA, or group representatives should be permitted to act as “channeling associations” and file a single claim on behalf of a sizeable group of small copyright owners. While the court should have a maximum amount of damages that may be sought in order to bring an action, for channeling associations, the amount in dispute should be calculated per infringement, not per action.

B. Panel of Triers of Fact

Unlike state small claims courts, the Specialized Court should consist of a panel of experts in copyright law, such as the administrative law judges from the Copyright Royalty Board, to serve as triers of fact. The panel may be expanded based upon the needs of the system and the location of the courts. Minimum qualifications should be established for individuals to be admitted to the panel.

The trier of fact shall determine the admissibility, relevance, materiality and weight of any evidence offered by the parties; and shall ensure that each party is given a full opportunity to present its case within reasonable constraints of time. The trier of fact shall also have the authority to issue interim equitable relief, including but not limited to, prohibitory or mandatory injunctions, specific performance or extraordinary writs. The trier of fact shall also be permitted to effectuate any attachment or garnishment necessary to safeguard the subject matter of the dispute, including deposits or security for costs in connection with such measures.

Damages awarded by the trier of fact should be in accordance with U.S. Copyright Law, which include monetary relief (including statutory damages), injunctions, attorneys' fees and other costs.

C. Conduct of the Hearing

It is proposed that the hearing of the case on the merits shall be held as soon as possible after the claim is filed. For example, not later than sixty (60) days after the last response to the last claim is filed or is due to be filed. In order to obtain an expedient resolution of the claim, no formal discovery procedures should be permitted, however, in the interest of justice, the trier of fact may permit formal depositions or other appropriate discovery of information, but such procedures should not be permitted if the intent is to delay the proceeding.

The decision issued by the trier of fact should be final and binding on the parties, with no right to appeal, or alternatively, appeal for very limited reasons similar to vacatur of arbitration awards.

D. How to Implement the Specialized Court

Basic information as to the responsibilities and jurisdiction of the Specialized Court as well as sample forms, including a complaint and a notice of complaint to be served on defendant, should be publicly available for ease of claim filing. A fee schedule should also be provided.

While the substantive law will be federal copyright law, rules of procedure are necessary to address preliminary procedural issues, for example, how the trier of fact will be assigned, the types of evidence required to make a prima facie case, etc. The procedural rules and key copyright provisions should also be made available to prospective claimants.

IV. Conclusion

IFTA is pleased that the Copyright Office is actively seeking to establish remedies for small copyright claims and would like to express its sincere interest in being part of industry and

governmental discussions with regard to any further development of such remedies. IFTA supports the Copyright Office's establishment of specialized federal court system for resolving small copyright claims and remains available to provide further comments on or to assist with implementation of such system.

Thank you for your time and support of the intellectual property industries.

Respectfully submitted on January 17, 2012

INDEPENDENT FILM & TELEVISION ALLIANCE

/s/

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