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Re: Copyright Office Notice of Inquiry Concerning Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758 (2011)

**Introduction**

This Comment is submitted by June M. Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia University School of Law, in response to the Copyright Office Notice of Inquiry cited above, regarding the need for alternatives to the current legal system to improve adjudication of copyright infringement claims with a relatively small economic value ("small copyright claims").[1]

Right holders are often deterred from bringing suit for copyright infringement due to the expense of litigation. Even when their works have been registered in a timely manner, there is no guarantee that the costs of the suit will not substantially exceed the recovery – when it finally comes, sometimes years after suit was filed. In essence, many times right holders – particularly individuals and small businesses – have a right, but no effective remedy. An appropriately structured small claims process could provide such right holders with a more realistic opportunity to redress infringement. It could also help to combat the perception, held by some, that copyright law is far more effective in protecting the interests of big content providers than those of individuals or small businesses.

[1] Research assistance from Eva Dickerman, Columbia Law School Class of 2012, in the preparation of this Comment is gratefully acknowledged.

However, there are legal constraints in developing a small claims process; neither the Copyright Office nor Congress writes on a clean slate. This Comment addresses certain legal and logistical requirements that must be taken into consideration in creating an alternative forum for the adjudication of small copyright claims. Specifically, this Comment considers how the requirements of the Seventh Amendment right to a jury trial bear on any alternative mechanism for the adjudication of federal small claims, and how such a mechanism might accommodate or preserve a party's Seventh Amendment right to a jury trial.

**Background**

In suits in federal court, the Seventh Amendment of the U.S. Constitution provides a guarantee of a party's right to a jury trial.[2] In *Feltner v. Columbia Pictures Television, Inc*., the Supreme Court stated that it is "beyond dispute" that a plaintiff who seeks actual damages in an infringement suit is entitled to a jury trial.[3] The Court held in *Feltner* that the right to a jury trial applies as well when a copyright owner elects statutory damages.

The right to a jury trial is not implicated when only equitable relief is sought.[4] So, for example, a small claims adjudication procedure in which the only allowable remedy was equitable relief – in particular, an injunction – would not implicate the Seventh Amendment.[5] A small claims procedure with that limitation does not seem responsive to the concerns of right holders with small copyright claims, however, since they would be precluded from obtaining redress for past infringements.

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[2] The Seventh Amendment provides:
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[3] 523 U.S. 340, 346 (1998), quoting 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT §12.10[B] (1997).

[4] *See, e.g.*, *Feltner*, 523 U.S. at 347-48.

[5] *See* 3 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT §12.10[A] (2011).

But "it is not [an actual] 'trial by jury' but 'the right of trial by jury'" which the amendment preserves, and thus statutory constraints or limitations upon the right are not necessarily unconstitutional.[6] A jury trial may be waived, and provisions for automatic waiver can be constitutional.[7]

**Potential Means of Protecting Seventh Amendment Rights**

A small claims court usually does not adjudicate disputes by using a jury, as its purpose is to resolve disputes in the most economical and efficient manner. Thus, the procedural nature of a small claims court holds implications for the Seventh Amendment rights of the parties. Although there is no systematic federal "small claims system," there are state small claims mechanisms that are instructive. So too are federal alternative dispute resolution systems.

*A. State Small Claims Courts*. The Seventh Amendment right to a jury trial does not apply to proceedings brought in state court.[8] However, many states have state constitutions or statutes that provide a right to a jury trial. States may deem the act of filing an action in a state small claims court to be a waiver of the plaintiff's right to a jury trial.[9] Waiver upon filing could also make sense in a federal small claims court. However, the waiver of the right to a jury trial by one party does not vitiate such a right for the other party, and thus some means of protecting that party's right to a jury trial must be available.

Providing the opportunity for transfer or appeal to a forum in which a jury trial is available de novo would protect a defendant's Seventh Amendment right. These mechanisms have been incorporated into some state statutes that govern small claims proceedings.

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[6] Capital Traction Co. v. Hof, 174 U.S. 1, 22-23 (1899)
[7] 47 AM. JUR. 2d Jury §§ 69, 70 (updated 2011).
[8] *See* 47 AM. JUR. 2d Jury § 5 (updated 2011) and cases cited therein.
[9] *See, e.g.*, N.Y. Uniform Justice Court Act § 1806 (McKinney); Nancy M. King, Annotation, *Small Claims: Jury Trial Rights in, and on Appeal From, Small Claims Court Proceeding*, 70 A.L.R. 4th 1119, §3[b] (originally published in 1989).

Massachusetts, for example, allows a party to request transfer to the regular civil docket, or the court may initiate transfer itself upon its own motion.[10] Other statutes allow a party to appeal from an adverse ruling in the small claims action, although in some cases, states limit the right to appeal to the losing defendant.[11]

If a party is allowed to transfer the action to a forum in which a jury will be present, then arguably any potential violation is cured, because the party will ultimately have the matter tried by jury. Similarly, if a party retains the right to appeal to a court with a jury, then the Seventh Amendment right has also been preserved, because again, the party will ultimately have the matter tried by a jury.[12] The right to trial by jury does not need to be granted immediately but rather made available at some point during the process.[13] Providing that a jury trial is available only upon transfer or appeal might delay adjudication by jury, but in light of the beneficial purposes of a small claims court (namely efficiency, lowering the costs of litigation, and increasing opportunities for right holders with small claims to protect their copyright interests), such delay would not be unreasonable.

*B. Federal Alternative Dispute Resolution Systems.* These mechanisms have also been applied in federal ADR systems. Federal courts have found that district court rules that provide for the use of court-supervised alternative dispute resolution such as arbitration or mediation do not violate the Seventh Amendment where parties have the option to seek a trial de novo.[14]

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[10] Mass. Gen. Laws Ann., Trial Court Rules, Uniform Small Claims Rule 4 (West 2011).
[11] 20 AM. JUR. 2d, Courts § 15*; see, e.g.*, Cal. Civ. Proc. §116.710 (West 2011).
[12] Capital Traction Co. v. Hof, 174 U.S. at 23.
[13] *Id.*; *see also* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 506 (1989).
[14] *See* John F. Wagner, Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. Fed. 211 (originally published in 1988). *See also* Simon v. St. Elizabeth Medical Center, 355 N.E. 2d 903, 907 (Ohio Ct. Common Pleas 1976) (discussing state and federal case law indicating that "when compulsory arbitration, voluntarily imposed upon litigants, prevents them from presenting their dispute to the courts and makes the decision of the arbitrator final with

For example, in *Kimbrough v. Holiday Inn*,[15] the court held that a local rule requiring certain cases involving claims for damages under $50,000 be automatically referred to nonbinding arbitration (with an option for a trial de novo if requested within 20 days of the arbitration award) did not violate the Seventh Amendment. The court observed that the rule was designed to increase the efficiency of the court, and concluded that it did not unduly burden the right to a jury trial.[16]

**Considerations for a Federal Small Copyright Claims Adjudication Mechanism**

The challenge in developing a federal small claims mechanism is to preserve Seventh Amendment rights while providing an efficient and effective means of resolving small copyright disputes. [17]

*Voluntary system.* One way of preserving jury trial rights is to have the small claims system be completely voluntary. Parties could agree in advance to have their claims adjudicated in the small claims system. If there was no advance agreement and plaintiff invoked the small claims procedure, defendant would have the right to transfer the claim to federal court (where a jury trial would be available) "at will." Even if "at will" transfer were permitted, defendant should be required to make a timely decision whether or not to transfer the case to federal court; otherwise, the transfer right might be used as a means to delay adjudication. Presumably the right to transfer would also pertain to plaintiff, in the event defendant files a counterclaim for legal relief.

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respect to the rights of the parties, the procedure is unconstitutional" but citing precedent that holds that if the system provides a de novo appeal, then the constitutional infirmity is corrected).

[15] 478 F. Supp. 566 (E.D. Pa. 1979).

[16] *Id.* at 573-75.

[17] While this Comment refers in places to "adjudication" of small claims, it takes no position on the best mechanism for resolving such claims. The concerns discussed herein are relevant to any small claims system that does not involve a jury determination, regardless of whether the claims are resolved through trial, arbitration or mediation.

Allowing "at will" transfers could undermine the small claims mechanism (though some states do allow such transfers, as observed above). However, there may be ways to discourage defendants from transferring the case to federal court. For one thing, a plaintiff whose case is transferred to federal court by defendant should not be limited to the amount of damages available through the small claims procedure, nor should the initial filing be considered as evidence of the scope of plaintiff's damages. (The plaintiff may have been willing to accept a smaller damage award in exchange for the opportunity to adjudicate its claim in a more efficient, less expensive manner.) Thus, a defendant who transfers a case out of the small claims proceeding would potentially expose itself to a larger damage award. Consideration could also be given to requiring defendant to pay plaintiff's costs and attorney's fees if plaintiff prevails in federal court[18]

While generally a transfer mechanism would not be required if both parties agreed on the small claims procedure, it would probably be necessary to invest the small claims system with some ability to transfer cases if and when it becomes apparent that the case does not meet the criteria for a small claims determination. (This might happen if, for example, an issue is raised that is outside the competence of the small claims court.[19])

*Mandatory system*. In order to avoid undermining the goal of a small claims procedure – that of providing copyright owners a fast and efficient means of resolving small copyright claims – it may be preferable not to allow defendant to opt out of the system "at will." Some transfer mechanism would still be necessary, however. For example, a defendant who raised a

[18] *I.e.*, beyond what is provided by 17 U.S.C. §§ 412, 505.

[19] This Comment does not address the specific criteria that would make a claim eligible for the small claims procedure. Presumably such a procedure would envision a cap on available damage awards; it is also possible that cases involving certain types of claims or defenses would not be eligible for the small claims proceeding. By filing a claim in the small claims system a plaintiff could presumably be held to have waived damages in excess of the jurisdictional amount, but it may be that other restrictions on jurisdiction would not be waivable.

counterclaim that invoked issues or demanded damages outside the jurisdictional competence of the small claims procedure would be permitted to transfer.

In a case where a party has only a limited right to transfer the case to federal court, the appeal right would need to be relatively robust in light of Seventh Amendment concerns, and permit the opportunity for a jury trial. To limit appeal to a losing defendant would, however, be a reasonable limitation on the appeal right.[20] Depending upon the structure of the small claims tribunal, appeal to a federal district court might be conditioned upon an intermediary round of appeal to a panel of administrative law judges.[21] But ultimately any party that did not waive its rights by voluntarily invoking or accepting the jurisdiction of the small claims proceeding would have to be afforded the opportunity for a jury trial.

Additionally, consideration could be given to requiring that a party that brings an unsuccessful appeal be required to pay for the costs of the appeal, including the prevailing party's attorney's fees and costs.[22]

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It is obvious from the Notice of Inquiry that the current request for comments is but an early step in the process of considering whether a system for the adjudication of small copyright claims is desirable and practicable. In that vein, this Comment merely suggests that any small claims procedure must include adequate protection for parties' Seventh Amendment rights. More detailed consideration of this issue will be appropriate when the process is further along.

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[20] *See, e.g.*, Cal. Civ. Proc. § 116.710(b) (West 2011).
[21] *See* Mark A. Lemley and R. Anthony Reese, "Reducing Digital Copyright Infringement Without Restricting Innovation," 56 STAN. L. REV. 1345, 1417 (2004) (suggesting this intermediary layer as a feature of their proposed system to resolve certain P2P disputes).
[22] *See id.*