



January 17, 2012

The Honorable Maria A. Pallante
Register of Copyrights
United States Copyright Office
Washington DC 20004

Re: Initial Comments in “Remedies for Small Copyright Claims”, Docket No. 2011–10

Microsoft Corporation submits these Initial Comments in response to the Copyright Office's Notice of Inquiry into Remedies for Small Copyright Claims. *See* 76 Fed. Reg. 66,758 (Oct. 27, 2011) (“Notice”).

Background and Interest in the Notice

Microsoft appreciates the opportunity to provide comments in the Copyright Office’s study of remedies for small copyright claims. As an owner, licensee and user of copyrighted works, Microsoft has a keen interest in the effective functioning of the copyright system, and believes that it may be improved by a well-designed, accessible means of resolving small copyright claims.

Microsoft views copyright from many perspectives. As a copyright owner of some of the most successful copyrighted products in history, such as Windows and Microsoft Office, we rely extensively on copyright to help drive our innovation in new technology. We also make significant use of others’ copyrighted works, such as through licensing of entertainment content for the Xbox Live service. We also operate online services that can become involved in disputes between other copyright owners and users, as when we receive notices under Section 512 of the Digital Millennium Copyright Act.

As the Notice explains, there are many possible ways a new procedure for resolving small copyright claims could be structured, many potential venues for such claims, and other aspects to be considered. Most importantly, the costs and benefits of any particular option will be determined by the specifics and details of any proposal and the context in which it would be deployed. At this early stage Microsoft does not have a view on whether any particular method of resolving small claims would be effective or desirable.

Instead, these comments offer some thoughts and suggestions on important goals and objectives that an effective small claims system should try to meet. This list is not exhaustive; there are likely several other objectives that are important to a beneficial small claims system.



We look forward to reviewing the comments, proposals and information from other stakeholders and ongoing development and discussion of these ideas and issues.

The Goals of a New Small Claims Procedure

Among other things, an effective small claims procedure should strive to meet the following objectives:

Provide value for all copyright stakeholders. It is obvious that a small claims procedure could benefit copyright owners, particularly individual authors and small business owners who cannot afford federal court litigation to enforce their copyrights. But any small claims procedure should also afford benefits to users of copyrighted works and the public at large. For example, many individuals and small businesses are daunted by the uncertainty surrounding use of copyrighted works, despite their good intentions not to infringe. A well-designed small claims procedure could remove that uncertainty for users by providing a clear path to resolve disputes and limits on liability (such as caps on damages at a low level), which would encourage a user to work with an owner to license a work and make appropriate payment where necessary. It could also give practical effect to a legitimate defense of fair use or other exemption enjoyed by an individual subject to a claim.

Similarly, a small claims procedure could benefit the public if it helped to generate more and better information about copyrighted works that other users could rely upon. For example, small claimants could be required to provide more explicit licensing contact information about the work when they invoke the small claims procedure, perhaps as a supplement to existing registration records.

A small claims system that offers benefits to stakeholders beyond copyright owners will be more robust and likely to provide lasting value to the overall copyright system.

Provide the right incentives for copyright owners and users. As the Notice explains, individual copyright owners have long expressed concerns about the high cost of federal litigation, and that attorney fees comprise most of these expenses. It is critical, therefore, that any small claims system be designed to allow individual owners and users to resolve disputes *without* attorneys in most instances and thus without incurring attorney fees. Moreover, the small claims procedures should not be structured in a way to incentivize new enforcement “business models” for lawyers, a somewhat troubling development in recent years. *See, e.g.,* Frosch, Dan, “Enforcing Copyrights, for a Profit”, *New York Times* (May 3, 2011); Kravets, David, “Newspaper Chain Drops Righthaven – ‘It Was a Dumb Idea’”, *Wired* (Sept. 8, 2011).



Some mechanisms that may help ensure the right incentives are in place include (i) resolving disputes only on written submissions without hearings to allow for low-cost presentation of cases that does not require attorneys; (ii) meaningful filing fees that help fund the system and discourage nuisance claims but reasonable enough for copyright owners with legitimate disputes; (iii) short time frames for issuance of decisions ; and (iv) caps on damage awards so that they can provide meaningful but reasonable compensation but not the prospect of windfall results.

Focus on dispute resolution and mutual agreement rather than adjudication. Another worthwhile goal of a small claims system would be to foster mutually agreed resolution of disputes rather than deciding “who’s right” and awarding damages or imposing a penalty. It is likely that many disputes involving small claims involve misunderstanding or miscommunication about licensing terms, conditions or payments rather than intentional infringement, and that a large number of disputes may be ripe for resolution with a licensing arrangement. To that end, any small claims procedure should be designed and oriented toward encouraging the parties to communicate and work out a settlement, rather than keeping them apart and in an adversarial posture until a third party resolves their dispute.

For related reasons, an effective small claims system should be voluntary for both owners and users, not mandatory, or at least offer as much choice as possible so that any decisions and result are grounded in mutual acceptance by the parties involved. Also, any findings or opinions that result from a system should be limited to the works at issue, and non-precedential except as between the parties, particularly on fact-specific issues involved in the dispute, such as application of fair use or other exemption.

Of course, a binding decision by a neutral party may be necessary to provide the correct incentive for both parties to reach settlement, so any small claims system is likely to need to go beyond mere voluntary, non-binding mediation and include some process by which those involved will be bound. But such system should recognize that such a binding decision is only a *means* to the more preferred *ends* of mutual agreement.

One aspect that could help foster this goal is focusing the remedies available on compensatory damages rather than injunctive relief. The point of small claims resolution should be to make the copyright owner whole in an efficient, simple process, not to punish the defendant or give the plaintiff excessive leverage for lower cost. While some non-monetary relief may be appropriate, such as takedown of an online use of a work if no ongoing licensing arrangement is reached, ample protection for legitimate reliance interests of the defendant should be allowed as well.



Provide Internet-based proceedings and resolution as much as possible. Given the focus of the Notice on reducing the costs for participants in a small claims system, any new procedures should be designed as much as possible to leverage the power of the Internet to help the parties communicate their positions and obtain a resolution of their dispute. The Notice raises the problem of venue in small claims – it will not serve the ends of reducing costs if the small claims court requires either party to travel long distances to attend a hearing physically in a courtroom, or be forced to hire an attorney to appear for them in a court across the country. Also, it is likely that many small claims will involve parties who are geographically disparate – for example, where an advertising firm in San Diego uses a copyrighted image owned by a photographer in New York that it found on the Internet. If the small claims procedure requires attendance at some physical location, it will almost certainly disadvantage at least one of the parties.

Instead, it may be preferable for parties to be limited to written submissions to the court, panel or other neutral for evaluation and resolution, and allowing these submissions be made electronically. If the scope of the claims involved is sufficiently targeted to relatively simple disputes for small amounts, potential concerns about the scope of submissions could be overcome in favor of efficient resolution for both sides. Other technologies, such as Internet-based videoconferencing, may also be useful in reducing costs and making the procedures more accessible. There is a growing body of academic study of online dispute resolution,¹ as well as practice and experience of what works well and not so well under ICANN's Uniform Domain-Name Resolution Policy,² which might provide useful insights to how a copyright small claims process could be operated.

Use pilot programs to test any new system. It will likely be difficult to find right off the bat the right mix of rules, procedures, limitations, remedies caps, fees and other facets of a small claims procedure that can accomplish these and other objectives. Also, it will be hard to predict how frequently a new system will be used – there is a chance that it might spur many more claims than anticipated, or it might have too many restrictions and only prompt a handful. For this reason, we think that whatever system is developed should be tested through a pilot program or other controlled deployment so that errors or miscalculations can be identified and minimized.

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¹ See, e.g., *The National Center for Technology and Dispute Resolution*, <http://www.odr.info/publications> (collecting books and articles on online dispute resolution).

² <http://www.icann.org/en/udrp/>.



Microsoft looks forward to submissions of other stakeholders and would be pleased to participate in further proceedings and discussion on this important topic.

Sincerely,

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