
**Before the Copyright Office
Library of Congress**

In the Matter of)
)
Remedies for Small Copyright Claims) Docket No. 2011-10
)

**Comments of the
National Music Publishers' Association,
American Society of Composers, Authors and Publishers and
SESAC, Inc.**

The National Music Publishers' Association ("NMPA") submits these comments on the above-captioned Request for Comments on Remedies for Small Copyright Claims, on behalf of NMPA, the American Society of Composers, Authors and Publishers ("ASCAP") and SESAC, Inc. ("SESAC").

NMPA is the principal trade association of music publishers in the United States and has over 2,800 members, which own or control the majority of musical composition copyrights available for licensing and sale in the United States. Its mission is to protect, promote, and advance the interests of music publishers and songwriters.

ASCAP is this nation's first and largest performing rights organization, with over 425,000 songwriter 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 performing rights organizations in over 90 countries.

SESAC 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. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States.

As trade organizations directly involved with music publishers and songwriters, some with limited resources, we are generally supportive of efforts to improve the copyright enforcement process, even for copyright claims with a relatively small economic value, but we also recognize the creation of a small claims court for copyright claims would be challenging and could result in

a variety of unintended consequences. Considering the number of issues and perceived problems with such a court, we are not to date convinced that the creation of a small claims copyright court is a matter warranting immediate attention.

As a general matter, we have not recognized a discernible grass roots desire in the copyright community to create a copyright small claims court. While there may have been a certain degree of perceived need for such a court in the past, copyright authors and owners today appear to be somewhat satisfied with the copyright enforcement mechanism in place, and are much more concerned about the deficiencies in the DMCA, especially relating to the ever increasing problem of the lack of resources on the part of authors and copyright owners to effectively enforce their rights via the DMCA “take-down” notice regime. We understand this study will not focus on DMCA problems, but we hope in the future the Copyright Office will address the perceived deficiencies in the DMCA process and certain cases that have made it disproportionately expensive for owners to enforce take down rights.

The following comments address our concerns and flag questions regarding the logistical and substantive problems that may be inherent in creating a small claims copyright court, and whether such a court would provide the benefits desired without creating unintended consequences, uncertainty, and/or risk. We hope the questions and points raised below will help the Copyright Office identify issues needing serious examination and scrutiny before the Copyright Office supports a fundamental change to the private copyright enforcement regime that has served the music copyright community well, to one extent or another, for more than 100 years.

Of course, this is not a comprehensive list. Other parties may offer suggestions and/or points not addressed below, and we look forward to addressing those points in future submissions or meetings with the Copyright Office and other stakeholders.

- **Scope of court’s jurisdiction:** One major concern is ensuring that the jurisdiction of the court is not overreaching in ways creating more problems than it solves. For example, would the small claims court exercise jurisdiction over DMCA takedown notices and the counter-claim that may result? Would the court entertain fair use defenses? We have great concern about litigating fair use defenses in a small claims court setting. In the context of P2P downloading, would each infringed song give rise to a new claim or would a Plaintiff have to aggregate all claims, and how would the court deal with multiple infringements? These are just examples of the type of jurisdictional issues that we believe are problematic and must be carefully examined.
- **Consent to jurisdiction:** Should both the plaintiff and defendant consent to small claims court jurisdiction, or should the copyright owner have the sole discretion to file with the small claims court? Mutual consent to proceed with a claim has its merits, but also its drawbacks. A financially secure defendant may not consent to the jurisdiction if they believe their financial advantage may press a purported plaintiff to drop their claim.
- **Qualifying threshold:** What dollar amount threshold should be used? As a practical matter, it is hard sometimes for a copyright owner to know whether or not their claim is

of small economic value until a claim is made and prosecuted. With that said, most small claims courts have a threshold limit of \$10,000.

- **Transfer to Federal Court:** Would there be built-in triggers permitting a transfer to federal court, e.g., a DMCA counter-claim defense that would subject a plaintiff to damages that are more than the qualifying threshold?
- **Legal Counsel:** Should the parties be required to be represented by legal counsel or should such representation be optional? Some small claims courts require that a corporation be represented by legal counsel. Should the copyright small claims court make it discretionary? One concern is that we do not want to provide incentive to not use legal counsel if the issue is complex.
- **Legal fees:** If legal counsel is used, should the small claims court allow for an award of legal fees?
- **Statutory damages:** Would small claims court jurisdiction offer statutory damages as a remedy? The answer is that it most probably would not, but the Copyright Office should consider what actions to take to ensure that the creation of the small claims court does not impact the effective level of statutory damages.
- **Appeals:** Should the parties be allowed to appeal a decision, and if so, which court should hear the appeal and how can appeal costs be minimized?
- **Arbitration process:** Should the small claims court act more as a mediator/arbitrator or should the process be entirely adversarial? There is something appealing to the idea that the court should act as a licensing facilitator and thus would press for party negotiation before actual adversarial court deliberations.
- **Injunctive relief:** Should the small claims court have the option of ordering injunctive relief? This is the remedy most likely wanted when a defendant has little financial resources and the Plaintiff wants to simply order a defendant to “take-down” or stop using their property.
- **Claims by competing copyright owners:** Should the small claims court entertain claims by one copyright owner or creator against another? There is some consensus that this should not be part of the small claims court jurisdiction.
- **Special rules for especially hard hit creators:** Should there be special rules and procedure for certain types of especially disadvantaged creators (e.g., photographers)? Their concerns may need a different and perhaps more stringent level of attention and protection than others who are traditionally better protected (e.g., movie producers).
- **Electronic adjudication:** Should the small claims court allow for adjudication, at least in part, by long distance telephone or electronically? It would not make much sense to force a disadvantaged copyright owner to spend a lot of money getting to DC in order for

them to enter into a process that is supposed to save them money. But that raises serious issues regarding personal jurisdiction and service of process. It seems a form of a long-arm statute would be necessary.

- **Court's experience:** Should there be a requirement ensuring that the small claims court judges have an acceptable level of expertise? And will the small claims court be part of the Copyright Office?
- **Copyright Registration:** Should filing a copyright registration constitute a pre-condition to filing a claim?
- **Discovery:** Should there be a shortened period of discovery?
- **Public Performance Enforcement:** ASCAP and SESAC are filing separately, primarily for the purpose of providing the Copyright Office with their viewpoint on specific PRO related copyright enforcement issues. But as a general matter, NMPA joins with their concern that PRO enforcement proceedings, e.g., an action against an unlicensed live performance venue, should not be subject to a small claims court jurisdiction.

Thank you for the opportunity to provide the Copyright Office with comments on the small claims court proposal. We look forward to continuing our interaction with the Copyright Office in person or in writing on this important issue.

Respectfully Submitted:

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