

**BEFORE THE**  
**COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.**

Remedies for Small Copyright Claims	Docket Number 2011-10
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**COMMENTS OF NEW MEDIA RIGHTS**

New Media Rights submits the following comments in response to the Copyright Office's Notice of Inquiry into Remedies for Small Copyright Claims.<sup>1</sup> In its Notice, the Copyright Office seeks comment on how copyright holders and defendants address small copyright claims within the current legal system, the drawbacks and benefits of the current system, and potential alternative methods for handling such claims.

These comments will address some of the experiences of small-scale defendants and small copyright holders within the current system of copyrights enforcement. Additionally, they will discuss the potential benefits and shortfalls of various alternatives to the current system.

**I. COMMENTING PARTY**

New Media Rights (NMR) is a public interest project of the non-profit Utility Consumers' Action Network (UCAN). NMR provides expertise and advocacy on media, communications, and internet law as it applies to independent creators and internet users. NMR offers pro bono legal resources and its free media studio to creators including artists, filmmakers, podcasters, citizen journalists, bloggers, open source software projects, as well as non-profits. Further information regarding NMR's mission and activities can be obtained at <http://www.newmediarights.org>.

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<sup>1</sup> 76 Fed. Reg. 66758 (Oct. 27, 2011).

## II. THE EXPERIENCE OF SMALL-SCALE DEFENDANTS SMALL-SCALE DEFENDANT FACING SMALL COPYRIGHT CLAIMS IN THE CURRENT LEGAL SYSTEM

In the current copyright litigation system there is a significant power imbalance between wealthy, large-scale copyright holders and small-scale defendants. This has created a climate in which large-scale plaintiffs frequently exploit small-scale defendants' lack of sophistication and resources to extract inappropriate settlements from them.<sup>2</sup> Recently large-scale copyright holders have increasingly undertaken low-cost, high-volume litigation campaigns focused on early private settlement rather than court awarded damages.<sup>3</sup> These campaigns are extremely overinclusive and small-scale defendants frequently find themselves the focus of nonmeritorious claims, including those improperly made against intermediaries instead of direct infringers, or claims made where there is a clear fair use defense. In addition, the current power imbalance encourages copyright holders to enact overbroad DMCA take down policies that do not provide due consideration to questions of fair use, because there is very little risk of reprisal. At NMR we have been able to help many small-scale defendants understand and assert their rights against these improper claims, but we are aware that many other small-scale defendants in such circumstances, intimidated by the threat of federal litigation and unaware of their rights, simply pay the settlement or acquiesce to the takedown.

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<sup>2</sup> Christopher M. Swartout, Toward A Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement, 31 Nw. J. Int'l L. & Bus. 499, 509 (2011); Anthony Ciolli, Lowering the Stakes: Toward A Model of Effective Copyright Dispute Resolution, 110 W. Va. L. Rev. 1005, 1003 (2008).

<sup>3</sup> Art Neill, Does A New Wave of Filesharing Lawsuits Represent A New Business Model for Copyright Owners?, 14 J. Internet L. 1 (2011); Swartout, supra note 2, at 509; Ciolli, supra note 2, at 1003.

There are at least three main varieties of these mass copyright enforcement campaigns: 1) those recently promulgated by the adult content industry and independent film companies which feature litigation against thousands of John Does, identified only by IP address,<sup>4</sup> 2) those settlement campaigns promulgated by large copyright holders and targeted against intermediary forum websites, which allow third-party users to upload content yet have no registered DMCA take down agent,<sup>5</sup> and 3) Those characterized by takedown notices and other content removals which are overreaching, and ignore doctrines like fair use, or simply misuse take down notices to remove legitimate speech to which a plaintiff objects. The first two varieties are particularly problematic because they target third-party intermediaries rather than direct infringers. In the former, Does are identified by IP address, but an IP address will only identify a device, not the infringing individual. Thus, if a small-scale defendant has an unsecured network or makes their network available to friends and family, there is no way to know from IP address alone which individual user actually downloaded the infringing material.<sup>6</sup> In the latter, even without the protection of the DMCA safe harbor, many defendants do not fall within any theory of secondary liability because they do not have knowledge of the infringement, do not financially profit from the infringement, and do not use the existence of infringing material as a selling point for their website.<sup>7</sup> The third variety of litigation campaigns is worrisome because they silence speech, sometimes during the crucial days when it would have made the most impact.

“Confusion and fear are the two primary responses” of those individuals who receive letters from their internet service providers informing them that their IP address has been

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<sup>4</sup>Neill, *supra* note 4, at 8.

<sup>5</sup>Swartout, *supra* note 2, at 512.

<sup>6</sup>Neill, *supra* note 3, at 8-9.

<sup>7</sup>Galen Hancock, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.: Inducing Infringement and Secondary Copyright Liability*, 21 Berkeley Tech. L.J.189, 212 (2006). See *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913, 933-35 (2005).

implicated in a John Doe copyright suit.<sup>8</sup> They often do not understand the procedural and substantive law at issue and “it is not unheard of for some individuals to incorrectly think that the letter means they are being investigated by the government or being charged with a crime that could lead to jail time.”<sup>9</sup> They then have mere weeks to ascertain their rights and determine if they want to settle or hire an attorney and litigate.<sup>10</sup> Concerns of privacy and public embarrassment only augment these stresses further for those small-scale defendants involved in the porn suits.<sup>11</sup> A significant portion of innocent defendants would rather pay a settlement, than see their names publicly associated with downloading porn. Thus, while some of these John Doe copyright cases have been “bogged down by significant procedural issues,” it remains the bottom line that small-scale defendants often see it as cheaper and easier to settle for a few thousand dollars than to litigate.<sup>12</sup>

For individuals who run forum websites and come under fire for content uploaded to their websites by third-party users, the settlement/litigation calculus is remarkably similar to that of defendants in the John Doe cases. In these cases, some of the most aggressive plaintiffs include some of the largest stock photo and video companies in the world, and the defendants are often running personal, noncommercial, or small-scale forums or blogs. The cost of federal litigation greatly outweighs the settlement large-scale plaintiffs demand (anything from a few hundred to a few thousand dollars), and therefore unless small-scale defendants can convince plaintiffs to drop the claim prior to litigation, or are willing to take a calculated risk that their arguments against infringement are strong enough to refuse any settlement, they invariably pay the

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<sup>8</sup> Neill, *supra* note 3, at 10.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Swartout, *supra* note 2, at 511; Nate Anderson, [A new record: 9,729 P2P porn pushers sued at once](http://arstechnica.com/tech-policy/news/2010/11/a-new-record-9729-p2p-porn-pushers-sued-at-once.ars), *Ars Technica* (Jan. 9, 2012), <http://arstechnica.com/tech-policy/news/2010/11/a-new-record-9729-p2p-porn-pushers-sued-at-once.ars>.

<sup>12</sup> Swartout, *supra* note 2, at 509-10.

settlement regardless of actual liability.<sup>13</sup> Because the plaintiffs in these cases are very much aware of this power imbalance, they push hard for settlement even when defendants make it plain that their claims are most likely nonmeritorious.

The copyright company Righthaven LLC is another example of a large-scale plaintiff whose entire enforcement campaign rests on the assumption that most small-scale defendants would rather pay a relatively small settlement fee than defend their rights in federal court. This is well illustrated by their tendency to drop cases when any kind of legitimate resistance was mounted.<sup>14</sup> Since March 2010, Righthaven has filed 275 copyright infringement suits against website owners and internet users claiming they had illegally uploaded news articles and photographs belonging to Righthaven.<sup>15</sup> Righthaven appears to be deliberately targeting small website owners who do not have DMCA takedown agents, most likely because these are the defendants least able to defend themselves.<sup>16</sup> Initially, despite the fact that many of Righthaven's targets appeared to have good fair use arguments, many of them simply settled rather than deal with the costs of litigation.<sup>17</sup> Recently, though Righthaven has been somewhat on the defensive after a flood of dismissals of its claims based on either lack of standing or fair use.<sup>18</sup>

Although the news of these decisions is heartening, it does not mark the death of Righthaven's mass claim enforcement strategy. A key Righthaven mistake, improperly assigning

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<sup>13</sup> Courtney Boyd Meyers, Getty Images' "Unauthorized Use Fees" Border on Mobster-like Extortion, TNW Insider (Dec 22, 2011), <http://thenextweb.com/insider/2011/12/22/getty-images-unauthorized-use-fees-border-on-mobster-like-extortion/>; David Kravets, The \$105 Fix That Could Protect You From Copyright Troll Lawsuits, Wired (Oct. 27, 2010, 1:54 PM), <http://www.wired.com/threatlevel/2010/10/dmca-righthaven-loophole/>.

<sup>14</sup> Swartout, supra note 2, at 512-13.

<sup>15</sup> Steve Green, Google sides against Righthaven in appeal of copyright case, Vegas Inc (Jan. 13, 2012), <http://www.vegasinc.com/news/2012/jan/13/google-sides-against-righthaven-appeal-copyright-c/>.

<sup>16</sup> Kravets, supra note 13.

<sup>17</sup> Nate Anderson, Righthaven: Saving the Newspaper Industry, One Lawsuit at a Time, Ars Technica (Sept. 9, 2010), <http://arstechnica.com/tech-policy/news/2010/09/righthaven-saving-the-newspaper-industry-one-lawsuit-at-a-time.ars>.

<sup>18</sup> Green, supra note 15.

the rights of the content it was suing over to ensure it had standing,<sup>19</sup> is correctable. Already, other content companies are jockeying to replace Righthaven, utilizing a new technique of sending “settlement invoices” directly to defendants, rather than waste time and energy actually filing claims. This new technique also virtually eliminates their risk of getting slapped with sanctions or lawyers’ fees like Righthaven,<sup>20</sup> while still allowing them to exploit small website owners’ tendency to settle.

The experience of one such website owner, who came under scrutiny for photographs uploaded to their online forum by a third-party user, well illustrates the power imbalance between small-scale defendants and large-scale plaintiffs. The website owner received an email explaining that two unlicensed photographs belonging to the plaintiff had been found buried in the archives of the forum and requesting a settlement of about a thousand dollars. The website owner had been unaware of the infringing content on the site, and quickly removed it and the offending user upon notification from the plaintiff. The website owner then sent an email to the plaintiff explaining that he had previously not known the images existed on his site but had now removed the images and user, that the legal rights to the images were the responsibility of the user who posted them, and that they had been uploaded contrary to the websites terms of service. Rather than drop the claim once it became clear they could not make a good case for secondary liability, the plaintiff continued to push for settlement, demanding a slightly smaller settlement to be paid within the next week. At this point NMR stepped in, sent an email to the company explaining the weakness of their claim, and eventually got them to drop their demands. However, had we not intervened the website owner, like most small-scale defendants in this situation, probably would have paid the settlement rather than deal with a lawyer and court fees. Of the

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<sup>19</sup> Steve Green, Another judge doubtful of Righthaven’s standing to sue, Vegas Inc (Oct. 21, 2011), <http://www.vegasinc.com/news/2011/oct/21/another-judge-doubtful-righthavens-standing-sue/>.

<sup>20</sup> Green, supra note 15.

cases made against third-party online intermediaries that NMR has observed, significant portions are particularly weak on the merits, because the defendants' actions rarely satisfy the necessary elements for secondary liability. Since the Netcom decision in 1995, it has been clearly established that an intermediary website that merely stores and passes along all messages on a forum automatically and indiscriminately has not "caused" these works to be publicly distributed.<sup>21</sup> Arguments for contributory liability typically fail, because in many of the situations we have observed, the plaintiffs often still demand settlement even though they cannot show the necessary elements of 1) knowledge of and 2) material contribution to the infringing conduct of primary infringer.<sup>22</sup> Similarly, arguments for inducement and vicarious infringement in these cases are unwarranted because the target websites rarely encourage the third-party users' infringing activity or get any financial benefit from it.<sup>23</sup> Moreover, users' infringing activity is usually prohibited by the forums' terms of service and outside their practical control, further undermining a vicarious infringement claim.<sup>24</sup> Even if such cases did succeed on the merits, the forums in could be considered "innocent infringers" and would only have to pay a couple hundred dollars in damages.<sup>25</sup>

Despite the flaws in their claims, plaintiffs still pursue third-party intermediaries for settlements rather than the direct infringers because they are much easier to identify and target. They are successful in extracting settlements of a few thousand dollars for cases where damage awards would likely be inappropriate, or at most be in the hundreds. Their entire litigation strategy is based on the fact that for most small-scale defendants, the excessive cost of federal

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<sup>21</sup> Religious Tech. Ctr. v. Netcom On-Line Comm'n Services, Inc., 907 F. Supp. 1361, 1373-74, 1383 (N.D. Cal. 1995).

<sup>22</sup> Id. at 1375.

<sup>23</sup> Grokster, 545 U.S. at 933-35.

<sup>24</sup> Id. at 928.

<sup>25</sup> 17 U.S.C.A. § 504(c)(2).

litigation strongly discourages them from defending themselves where damages are comparatively low. What is a few thousand dollars in inappropriate settlement when compared to the hundreds of thousands it might cost to mount a proper defense in court that may not be successful, and/or may not be repaid.<sup>26</sup> Additionally, small-scale defendants as a rule are an especially risk-averse group because they have comparatively less funds available to them. The cost of litigating a single case in federal court would be devastating to a small-scale defendant while most large-scale plaintiffs could take the cost in stride. Furthermore, large-scale plaintiffs need not worry about the strength of their claim or the high cost and low payoffs that may result if such a case actually went to court, because they can conduct a great deal of intimidation through letters and phone calls, and simply not file a formal complaint if it appears a small-scale defendant actually plans to litigate. This tendency of large-scale plaintiffs not to file formal complaints, illustrates their reliance on small-scale defendants' impetus to settle, instead of basing their settlement demands on the actual strength of their infringement claims.

A major drawback of what has been labeled the "settling culture" of the current copyright litigation system is the chilling effect it has on economic innovations that stray anywhere near possible copyright infringement.<sup>27</sup> Because important copyright doctrines are especially ambiguous, notably the fair use doctrine, it is difficult for businesses to predict whether or not a particular act will infringe copyright. Some small businesses, developers, and creators can be so discouraged by the risk of federal litigation costs that they will not pursue creation of media and technologies that could potentially be fair use. Those entities that do take the risk can essentially

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<sup>26</sup> Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, 35 (2011) (survey showing that the median cost for litigating a copyright infringement lawsuit with less than \$1 million in damages at issue was \$350,000).

<sup>27</sup> Fischman Afori, Flexible Remedies as a Means to Counteract Failures in Copyright Law, 29 Cardozo Arts & Ent LJ 1, 16-17 (2011).

be fined by settlement fees or have their work undermined by copyright infringement claims.<sup>28</sup>

An example of this is how the threat of copyright litigation, and complication in our licensing system causes many new kinds of mobile applications for distributing and displaying music to remain on the shelf or in the lab rather than reach the hands of consumers.

Another common difficulty we have encountered when working with small-scale defendants is overzealous DMCA take down campaigns instigated by copyright holders both large and small. For large-scale copyright holders, reuse of their works can be so common that they often use automated means (for example web crawlers) to find infringing content<sup>29</sup> and then mass-produce DMCA take down notices. Large-scale copyright holders often use their privileged relationships with content sharing websites like YouTube to abuse the ContentID system and remove reuse of their content which would otherwise be legal. We have helped numerous video artists whose videos were removed from services like YouTube despite extremely strong fair use arguments. Throughout this process, large-scale copyright holders often don't pay satisfactory attention to questions of fair use. Similarly, small copyright holders are often guilty of overlooking fair use considerations when filing take down requests, because they are simply unaware of the applicable law and do not have the resources to attain legal advice on the issue, or they intentionally mean to misuse the DMCA to remove legal but objectionable content. NMR has seen DMCA notices sent to remove content like journalistic articles that fall well within the fair use exception. Similarly, we have seen DMCA take down requests based on trademark infringement, rather than copyright infringement, fulfilled by online service providers unaware of the difference. Another common form of improper take down request, are those attempting to restrict political speech or negative public relations. For example, one blogger posted an article

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<sup>28</sup> *Id.* at 17-18.

<sup>29</sup> Associated Press, [MPAA Snooping for Spies](http://www.wired.com/politics/law/news/2002/07/54024), *Wired* (Jul. 22, 2002), <http://www.wired.com/politics/law/news/2002/07/54024>.

analyzing an email that was publically embarrassing to its original author. The author successfully filed a DMCA take down request claiming the email was copyrighted, even though the bloggers actions were clearly fair use.

While the DMCA counter notice system is available to defendants in such cases they are often unaware of its existence and their rights, causing many improper take down requests to go unanswered. Moreover, even if a counter notice is filed it takes 10-14 days from the initial counter notice for the content to be reinstated. Such a length of time can be especially harmful to individuals like news bloggers, political campaigns, and satire artists, who must keep their work abreast of current events. A high profile example of this occurred in the 2008 Presidential election, when John McCain complained about YouTube's compliance with DMCA takedown notices sent just 2-3 weeks before election day<sup>30</sup>. Improper take down suits are not a viable source of relief for small-scale defendants in such circumstances because the current legal standard for "misrepresentation" is so high.<sup>31</sup> Defendants must carefully consider the benefits of succeeding in such a suit against the risk of failing and having to pay their own lawyer's fees. There are also few attorneys that handle such lawsuits. While the Lenz case and a few others have tried to push back somewhat against this rigid standard,<sup>32</sup> it has not been fully successful, and we have yet to see a change in large-scale plaintiffs' pattern of behavior. Indeed we are not aware of more than a handful of improper take down lawsuits under section 512(f).

Another frustration afflicting small-scale defendants, are notices of take down requests that do not provide the details of which material is suspect. These incomplete notices are especially problematic for remix and compilation artists who reuse content from many different

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<sup>30</sup>Nate Anderson, McCain / Palin Campaign Angry Over Bogus DMCA Takedowns, ArsTechnica. (Oct. 14, 2008) <http://arstechnica.com/old/content/2008/10/mccainpalin-campaign-angry-over-bogus-dmca-takedowns.ars>.

<sup>31</sup> 17 U.S.C.A. § 512(f).

<sup>32</sup> Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1152–53 (N.D. Cal. 2008).

sources in their work. One film-mixer had an entire half hour film comprised of various short clips from different sources taken down, with only the name of the company requesting the take down to help determine which part of the film was considered infringing. Because they are unsure as to the details of the take down request, small-scale defendants in these situations find it difficult to confidently submit a counter notice. Some intermediary websites do provide the full contents of the take down notice, but the DMCA does not require it. Defendants who don't receive the details in a take down notice can have a difficult choice as to whether to counter notice, if they are not aware of what specific content is alleged to be infringing.

In conclusion, NMR believes that small-scale defendants are at a distinct disadvantage in the current copyright litigation system, a fact that large-scale copyright holders do not hesitate to take advantage of. Through mass litigation and DMCA take down campaigns, large-scale copyright holders are able to exploit small-scale defendants' lack of sophistication and resources and extract inappropriate settlements from them or induce their acquiescence to improper take down of their content. One major concern that is raised by this is the inevitable chilling effects that will result from such a "settling culture." The high cost of mounting a defense in federal trial court appears to be a key motivator behind small-scale defendants' acquiescence to inappropriate settlements and take downs. Additionally, various complications within the DMCA counter notice system, including the looming threat of federal litigation, lack of specific information in notices of removal, the length of time required to reinstate removed content, and the high standard for improper take down suits, prevent small-scale defendants from protecting their rights.

### **III. THE EXPERIENCE OF PLAINTIFFS WITH SMALL COPYRIGHT CLAIMS IN THE CURRENT LEGAL SYSTEM**

As a non-profit that specializes in one-to-one assistance with media, communications, and internet law, NMR provides services to many small copyright holders: creators like artists, filmmakers, and citizen journalists, who may make a modest income from their works, but cannot otherwise afford quality legal services. In the course of NMR's work with such small copyright holders, we have observed that they usually avoid federal litigation and consider it only as a last resort. This is most likely for some of the reasons the Copyright Office highlighted in their Inquiry,<sup>33</sup> the foremost being the large time and monetary commitment necessary to pursue federal litigation.<sup>34</sup>

Nonetheless, there are a host of alternative sources of redress available for plaintiffs with small copyright claims. Though much of our work is with defendants, many of the small copyright holders NMR has aided in a plaintiff's role have been able to reach satisfactory conclusions through such methods as pursuing contract violation claims in lieu of copyright infringement claims, utilizing the DMCA take down process, taking their complaints to middlemen like search engines, sending cease and desist letters, or direct negotiations with the opposing party. Thus, although plaintiffs with small copyright claims are noticeably reluctant to utilize federal trial courts, there are alternative avenues by which they might gain relief. Our discussion in this section will center around informing the Copyright Office regarding the approaches that plaintiffs take as an alternative to, or at least prior to federal litigation.

One such approach is to bring contract claims in state small claims court in lieu of small copyright claims in federal court. Small copyright infringement cases often arise from situations

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<sup>33</sup> 76 Fed. Reg. 66759-60 (Oct. 27, 2011).

<sup>34</sup> Ciolli, supra note 2, at 1006.

where works are being produced collaboratively or by commission. Contract law, in addition to copyright law, frequently dictates the relationship between the parties and the works in question. In NMR's experience, because contract law is usually more straightforward than copyright law, and bringing suit in state small claims court is significantly less expensive and time consuming than federal court, it generally makes more economic sense for plaintiffs to protect their rights through contract law alone. For example, a non-profit group funded a film project overseas and hired a filmmaker to produce footage for the project. Days before the filming was completed, the filmmaker decided they no longer wanted to work on the project and refused to turn over the footage. Like other small copyright holders NMR has worked with, the non-profit sought relief through contract law and state small claims court for a number of reasons, including the cost and uncertainty of federal court.

The DMCA notice and take down system is another tool small copyright holders commonly use to address infringements.<sup>35</sup> (In Section II above we talk about the abuses of the DMCA and other forms of content removal actions.) With the rise of the internet age, a large portion of reuse of copyrighted works, infringing and non-infringing, now occurs online, both due to the ease with which things can be copied in a digital medium and the increasing transfer of our daily lives and interactions into cyberspace.<sup>36</sup> DMCA notices of copyright infringement are a relatively quick and easy, out of court method to get infringing materials removed from third-party websites.<sup>37</sup> Individuals and organizations large and small with small copyright claims utilize this process regularly. A model case is that of a journalist we assisted who had an entire article copied and reposted verbatim as the "story of the day" on a commercial website with no

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<sup>35</sup> 17 U.S.C § 512(c)(1).

<sup>36</sup> Matthew V. Pietsch, International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement, 24 Hastings Comm. & Ent. L.J. 273, 277-78.

<sup>37</sup> 17 U.S.C § 512(c)(1). Not all third-party websites have DMCA agents and take down policies, but those that do tend to remove infringing material quickly with proper notice.

attempt to transform it. Although the journalist initially failed in getting the article removed through informal communication with the website, the journalist later sent a DMCA notice of infringement to the website and the article was removed. It has been our experience that DMCA take down requests are fairly reliable and effective in getting infringing material removed, provided the third-party website actually has a DMCA agent.

Unfortunately, it is true that DMCA take down requests are often unavailable for small copyright owners whose works are infringed on websites hosted internationally, because the DMCA does not apply extraterritorially.<sup>38</sup> For example, a web designer we assisted discovered that their website had been reproduced with embedded spam links on a server hosted in the Ukraine. Because the webhost was based outside the United States they did not comply with DMCA take down policies and were difficult to reach through federal litigation due to questions of lack of personal jurisdiction, inconvenient forum, and an unfavorable choice of law.<sup>39</sup> The web designer was predominantly concerned that someone would search for them on the web and mistakenly come to the conclusion that they were associated with the fake, spam-ridden website. The web designer ultimately tried to practically resolve this issue by contacting popular search engines and convincing them to remove the false website from their search results. She was able to get some of the search engines to comply. Thus, while the infringing website was still in existence, it was much less likely that anyone searching for the web designer's work would stumble across it. This method of defending copyrights is especially useful to small copyright holders where infringers are based abroad, however it is entirely dependent on the cooperation of the search engines.

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<sup>38</sup> Adam D. Fuller, Extraterritorial Implications of the Digital Millennium Copyright Act, 35 Case W. Res. J. Int'l L. 89, 112 (2003) ("The Digital Millennium Copyright Act does not apply extraterritorially. There is a presumption against extraterritorial application of U.S. copyright law.").

<sup>39</sup> Bradley D. Spitz, Cyber-Swashbuckling? The U.S. Copyright Holder's Battle Against Extraterritorial Peer-to-Peer Network Infringement in U.S. Courts Will Not End with Grokster, 16 Ind. Int'l & Comp. L. Rev. 423, 452 (2006).

We have also seen smaller copyright disputes resolved through simply negotiating directly with infringers. In our experience, plaintiffs with small copyright claims are often more interested in preventing future infringement at negligible cost than receiving damages after a lengthy and costly trial process. Since small copyright holders often neglect to register their works, statutory damages are often not available to them, and actual damages are negligible relative to legal fees.<sup>40</sup> One illustration is the case of a musician who collaborated with a filmmaker to produce a music video. The two parties had falling out and the filmmaker refused to give the musician a copy of the videos they had created together and began using the musician's songs in the filmmaker's own new works. With the aid of a manager, the musician sent the filmmaker a cease and desist letter, which led to direct negotiations between the two parties.

To sum up, NMR has observed that in actual practice plaintiffs with small copyright claims have some avenues outside of federal litigation to address their complaints. They can pursue contract violation claims in state small claims court in lieu of copyright infringement claims in federal court. If the infringing content is uploaded to a website by third-party users, they can send DMCA take down notices and have it removed. Further, if the more formalized avenues to resolution are not available to them they can also take their complaints to middlemen, like search engines, or negotiate directly with the opposing party. We have also observed that among those plaintiffs with small copyright claims that we have assisted, these alternative methods are almost universally preferred over federal litigation. The bottom line for plaintiffs with small copyright claims is that these alternatives are less expensive and less time consuming than a full trial in federal court, and as long as the status quo in the legal system is maintained, they will continue to seek relief outside the courts.

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<sup>40</sup> Ciolli, supra note 2, at 1001-02 .

#### **IV. DISCUSSION OF PROPOSED SOLUTIONS FOR THE CASE OF SMALL CLAIMS IN THE CURRENT LEGAL SYSTEM**

In the two sections above we have described our observations on the experience of small-scale defendants and plaintiffs with small copyright claims within the current legal system and zeroed in on some of its drawbacks. The current power imbalance between wealthy plaintiffs and small-scale defendants has created a “settling culture” where defendants are more inclined to pay unwarranted settlements and accept the improper take down of their content than risk the time and expense needed to defend themselves in federal court. For small copyright holders, the chief drawbacks are the high expense and time investment required to litigate any copyright claims in federal court. Although there are multiple alternative avenues of relief available to plaintiffs with small copyright claims, federal litigation remains their last line of action, and at the moment it is practically inaccessible to many of these plaintiffs, as well as defendants who wish to address the abuses outlined earlier. While the current legal system is clearly in need of reform vis-a-vis small copyright claims, as we work towards amending these weaknesses, we need to keep in mind the possible pitfalls of the various suggested solutions discussed below.

When considering the concept of small copyright claims reform the first question that comes to mind is: what is a copyright small claim? In state small claims court small claims are defined by the jurisdictional limit set for the court.<sup>41</sup> For example, California has the average national jurisdictional limit, \$5000, and Georgia has the highest national limit, \$15000.<sup>42</sup> These limits may be perfectly sufficient for the average small contract and tort claim, but the bar for

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<sup>41</sup> Bruce Zucker & Monica Her, The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System, 37 U.S.F. L. Rev. 315, 315 (2003).

<sup>42</sup> Id. at 319.

statutory damages for a single infringing use of a copyrighted work is set at \$30,000.<sup>43</sup> An excessively low jurisdictional limit could unnecessarily close the small claims to many of those who are in need of it most. Thus, the question becomes what should the jurisdictional limit of small claims be.

One possibility is to calculate the average cost of litigations versus damages pay-off and set the limit at the point where cost of litigation begins to outweigh damages. For example, if the cost of litigation for claims less than \$350,000 is \$350,000,<sup>44</sup> then the limit should be set at \$350,000 to ensure that no plaintiffs will be discouraged from pursuing claims because the cost outweighs the possible awards. Another option, which Anthony Ciolli suggests, is to do away with jurisdictional limits altogether and instead rely on alternative safeguards, like an appeals system which evaluates whether small claims court is the appropriate venue based on the complexity of discovery needed in the case.<sup>45</sup> But without a clear jurisdictional limit, wealthy plaintiffs may simply prefer to file in federal trial court rather than the small claims system in order to pressure small-scale defendants to accept settlement rather than litigate. Ciolli proposes that defendants therefore be empowered to opt-in to small claims court where appropriate.<sup>46</sup> Alternatively, Mark Lemley and Anthony Reese have proposed determining jurisdiction based on the subject matter of the cases and removing any cases involving plausible mistaken identity or the fair use defense as overly complex for a small claims proceeding.<sup>47</sup> Creating a definition for small copyright claims is probably the foremost issue in devising a new small copyright

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<sup>43</sup> 17 U.S.C.A. § 504 (c) (1).

<sup>44</sup> Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, 35 (2011) (survey showing that the median cost for litigating a copyright infringement lawsuit with less than \$1 million in damages at issue was \$350,000).

<sup>45</sup> Ciolli, *supra* note 2, at 1025-26.

<sup>46</sup> *Id.* at 1024.

<sup>47</sup> Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1415-16 (2004).

claims system, but there appears to be little agreement as to what that definition should be, and no obviously winning answer.

One suggested solution is to amend the Copyright Act to permit state courts, including small claims courts, to hear small copyright claims.<sup>48</sup> A major issue with this proposal, which the Copyright Office correctly identified in their Inquiry,<sup>49</sup> is that state courts have no expertise in the intricacies of copyright law.<sup>50</sup> Copyright law is notoriously complex. It is often unclear from the outset of a case whether a particular use is permitted under governing law and decisions are frequently hedged, resting on such ambiguous doctrines as “originality” and “fair use.”<sup>51</sup> While the state small claims courts are well experienced in dealing with small disputes, they usually deal with contract and tort law<sup>52</sup> which have clearer established doctrines and are easier to simplify into matters of equity. It is unclear whether it is even possible to adapt current copyright law to a more simplified form for small claims court without first resolving some of the ambiguities in the current doctrine. Small claims courts are specifically designed to allow self representation by parties.<sup>53</sup> If copyright law is full of issues that even fully trained attorneys struggle with, how will the average small-time plaintiff or defendant successfully represent themselves?

Another possible stumbling block in allowing state courts to hear small copyright claims is that some States, like California, do not allow malicious prosecution claims to arise out of small claims cases on the basis that it “would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to

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<sup>48</sup> 76 Fed. Reg. 66760 (Oct. 27, 2011).

<sup>49</sup> Id.

<sup>50</sup> 28 U.S.C.A. § 1338.

<sup>51</sup> Afori, supra note 27, at 2.

<sup>52</sup> Zucker, supra note 41, at 335.

<sup>53</sup> Id. at 327.

avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts.”<sup>54</sup> NMR has already seen the abuse of the DMCA take down system to silence small-scale defendants who reuse content under the fair use doctrine or whose legal speech a plaintiff simply wants removed from the public discourse. With the lowered litigation costs of state small claims court, it follows that there will be little to stop plaintiffs from undertaking malicious claims. When designing a copyright small claims system it would be prudent for the Copyright Office to consider instituting procedural blocks to such malicious suits such as a modified DMCA section 512(f) defense, Rule 11 sanctions, or banning overly litigious plaintiffs from small claims court.

The Copyright Office also discussed the possibility of creating a federal small copyright claims court or creating an administrative proceeding within the Copyright Office for determination of small copyright claims.<sup>55</sup> An advantage to these possibilities is that both the federal courts and the Copyright Office are already experienced in the nuances of copyright law. However some of the issues with state courts likewise would apply to a federal small claims court or an administrative proceeding, including questions of jurisdictional limits, the sheer complexity of copyright law, and propagation of malicious claims. Additionally, along these lines, discovery costs would pose another major impediment to the establishment of any specialized copyright small claims process. Discovery is a major part of the cost of copyright suits; some studies have even placed the cost of discovery at 40 percent of the total cost of pursuing a low stakes copyright infringement suit.<sup>56</sup> Therefore, any new system would necessarily incorporate procedures to minimize discovery costs.

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<sup>54</sup> *Id.* at 338.

<sup>55</sup> 76 Fed. Reg. 66760 (Oct. 27, 2011).

<sup>56</sup> Am. Intell. Prob. Law Ass’n, AIPLA Report of Economic Survey, 2003, 96-97 tbl. 22 (2003).

To this end, a court or administrative body might be empowered to force wealthy plaintiffs to pay for a poorer defendant's discovery, with the costs paid back if the claim is successful.<sup>57</sup> Alternatively, a party might be able to refuse to undertake discovery on the understanding that the disputed facts would subsequently be considered in the light most favorable to the opposing party.<sup>58</sup> More simply, a court or administrative body could apply stricter standards for discovery requests and laxer standards for admissibility of evidence. Another possibility is that the small claims system could only be made open to those cases where discovery was cheap and straightforward. However it is ultimately addressed, the high cost of discovery in copyright cases will be a key issue in the design of a new small claims system.

The Copyright Office has also raised the idea of allowing trade associations and other groups to bring a single large filing on behalf of many small copyright holders.<sup>59</sup> The main perceived benefit of this reform would be to reduce costs created by increasing the overall efficiency of small copyright claims. However, this benefit is overshadowed by the drawbacks to this particular remedy. Firstly, it would only provide a partial remedy for the frustrations afflicting plaintiffs and defendants within the small copyright claims system, because it could only be applied to those cases where a large number of small copyright holders had common complaints against the same defendants. While mass filesharing case plaintiffs may see this as useful for their pursuit of file sharing cases against vast numbers of defendants, this would do little to address the many unacceptable procedural and practical challenges such suits pose for filesharing defendants, which we discussed earlier in this comment.<sup>60</sup> It would do little to address infringements that do not occur within a larger system like a file sharing network. Plaintiffs like

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<sup>57</sup> Ciolli, *supra* note 2, at 1030.

<sup>58</sup> *Id.*

<sup>59</sup> 76 Fed. Reg. 66760 (Oct. 27, 2011).

<sup>60</sup> *Supra* Section II.

the nonprofit with the wayward filmmaker or the web designer whose website was copied, described above, would see no change in their circumstances. Furthermore, such a system would greatly encourage suits against third-party intermediaries, which would be inadvisable due to the resulting chilling effects on innovation in software and on the internet.<sup>61</sup> Lastly, this system does nothing to resolve the problems small-scale defendants regularly face with the current small copyright claims system. Allowing trade organizations to represent small claim copyright holders en masse would not serve as a remedy to the current weaknesses in the copyright system by itself.

All in all, while there are challenges with the way we deal with small claims copyright system, no one proposed solution stands out as superior to all others. However, there are clearly some knotty issues that reformers should keep an eye on including how to define “small copyright claims,” problems with attempting to simplify massively complex copyright doctrines, the possible propagation of malicious claims, the costs of discovery, and addressing the needs of both plaintiffs with small copyright claims and small-scale defendants.

## **V. CONCLUSION**

In this comment we sought to address some of the experiences of small-scale defendants and small copyright holders within the current system of small copyrights enforcement. The key frustration afflicting small-scale defendants is the “settling culture” that has emerged within the current system, whereby defendants are more inclined to pay unwarranted settlements and accept the improper take down of their content than risk the costs of federal litigation. Similarly, the chief drawbacks for plaintiffs with small copyright claims are the high expense and time investment required to litigate any copyright claims in federal court.

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<sup>61</sup> Supra Section II.

Although there are multiple alternative avenues of relief available to plaintiffs with small copyright claims, federal litigation does remain their last line of action, and at the moment it is practically inaccessible to many of these plaintiffs.

While it is clear that challenges exist with the way we handle small copyright claims, any reform must navigate such possible pitfalls as “defining small claims,” the sheer complexity of current copyright doctrines, the dangers of encouraging more malicious claims, runaway discovery costs, and addressing the needs of both plaintiffs with small copyright claims and small-scale defendants. The challenges outlined here also suggest a broader need for our entire copyright system to be revisited by the Copyright Office and Congress, to ensure that it is fitting the needs of creators, small businesses, and other organizations, by properly promoting the “Progress of Science and Useful Arts” in the twenty-first century.