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**Before the Copyright Office  
Library of Congress**

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

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**Comments of  
The Songwriters Guild of America and  
The Nashville Songwriters Association International**

The Songwriters Guild of America (“SGA”) and the Nashville Songwriters Association International (“NSAI”) submit these comments in the above-captioned Notice of Inquiry dated October 27, 2011, 76 FR 66758.

SGA is the nation’s oldest and largest organization run exclusively by and for songwriters with over 5000 members throughout the United States. As a voluntary association comprised of composers and the estates of deceased members, SGA provides contract advice, royalty collection and audit services, copyright renewal and termination filings, and numerous other benefits, including advocacy on behalf of creators in Congress, before the courts, and in administrative proceedings.

NSAI is the world’s largest not-for-profit songwriters trade association. Established in 1967, the membership of more than 6000 active and pro members spans the United States and six other countries. NSAI is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music.

SGA and NSAI welcome the Office’s inquiry and strongly endorse the concept of establishing a forum in which individual copyright owners could pursue infringement claims that have a relatively small economic value. Such small claims and random infringements may seem unimportant, but taken in the aggregate, they have an effect on the livelihoods of individual creators akin to the infamous torture “death by a thousand cuts.”

It is an all-too-common complaint among individual songwriters that they have no effective remedy for infringement under the current system. That is not to say that a remedy does not exist; it is simply a recognition of the fact that the challenges and expense of bringing an action in federal district court put the remedy out of reach for most songwriters, particularly when a small claim is involved. The Notice of Inquiry outlined these challenges in some detail. As the Notice explained:

To the extent an infringement results in a relatively small amount

of economic damage, the copyright owner may be dissuaded from filing a lawsuit because the potential award may not justify the expense of litigation. Even where statutory damages and attorney fees are possible, they are not available until the conclusions of the litigation. Moreover, awards of statutory damages may be as low as \$750 (or, in cases of innocent infringement, \$200), and may not always make the copyright owner whole. [76 FR at 66759]

Nonetheless, despite our support of an alternative to the current legal system that could better accommodate small claims, SGA and NSAI are mindful of the significant structural, legal, and practical issues surrounding such a proposal. Our organizations realize that, unless these issues are considered carefully and resolved, establishment of a small claims tribunal could have serious unintended consequences, perhaps creating more problems than it would solve.

SGA and NSAI would offer the following thoughts and concerns regarding the questions raised in the Notice:

- ***Possible alternatives for small copyright claims.*** The Notice lays out a number of potential alternatives for small claims, including: use of the Copyright Royalty Board to handle such claims; creating a federal small claims court or otherwise streamlining federal procedures; creating a staff of administrative law judges to specialize in such cases; amending the Copyright Act to allow state courts to handle small copyright claims; using ADR or mediation; or establishing an administrative proceeding affiliated with the Copyright Office. SGA and NSAI believe it is crucial that any small claims tribunal have expertise in copyright law, not only to keep costs down but also to prevent multiple inconsistent and legally unsupportable judgments. Because of that, it is our belief that a small claims court affiliated with the Copyright Office would be the best alternative. While we would certainly be willing to consider proposals utilizing the CRB, creating a streamlined procedure in federal court, or creating a staff of experienced administrative law judges, we are concerned that those options would likely prove too formal and expensive for individual litigants. SGA and NSAI agree with the point raised in the Notice regarding amending the Copyright Act to allow for state small claim courts to handle copyright actions: “[S]tate courts are not experienced in the nuances of copyright law and may not have sufficient resources to devote to a claim’s intricacies, especially when limited in a small claims court context.”[*Id.* at 66760]
- ***Logistical issues involved in creating a small claims court.*** SGA and NSAI are concerned that, if a small claims tribunal were to sit in only one location, it might discourage individual litigants who would be faced with travel and associated costs, along with time away from work. Therefore, we believe that, to the maximum extent possible, a small claims court should utilize use electronic means, mail and telephone for filings, conferences, and arguments, rather than requiring appearances. Moreover, a mechanism whereby a copyright owner

plaintiff is able to name multiple defendant infringers within the same action is critical to the fairness and accessibility of the system to creators, ensuring that it is an effective means of deterring the type of mass piracy that currently plagues the creative community.

- ***Threshold legal questions.*** It is apparent to SGA and NSAI that there are a number of legal questions that would have to be resolved in the creation of a small copyright claims court. First, what would constitute a “small claim?” SGA and NSAI would await comments from other stakeholders on this point; we have no definite dollar amount in mind, beyond believing that it should be high enough to encourage individual creators to use the new system and not so high that defendants might be prejudiced by the more informal procedures. Second, what showing must a copyright owner make before a defendant is required to appear? As the Notice mentions, two possible options would be for the copyright owner to make a *prima facie* showing of infringement or, alternatively, to require the plaintiff to certify the veracity of the claim, as in Federal Rule of Civil Procedure 11. Our organizations believe the latter option is more consistent with the small claims concept and would be far easier for an individual copyright owner appearing *pro se* to understand.
- ***Secondary legal questions.*** SGA and NSAI believe there are a number of other legal questions that must be considered if a small claims court is to be established. First, how would claims of “fair use” be handled? Because these claims are in most cases fact-specific, litigating them in small claims court could prove problematic. Our organizations believe that if such a defense is raised, and it is *credible and substantial*, the case should be dismissed without prejudice and removed to federal court. There are also issues relating to the Digital Millennium Copyright Act (“DMCA”). How would claims involving DMCA takedown notices, and any counterclaims be handled? Should individual copyright holders in small claims court be allowed to bypass the takedown notice requirement so as to make the process easier and more attractive? SGA and NSAI believe that the more burdens imposed on individual creators before they can utilize any small claims process the less likely it will be that the court would serve as a meaningful alternative to the current system. Finally, should appeals from decisions by a small claims tribunal be permitted? Our organizations are concerned that the benefits of establishing a small claims court could be eliminated if appeals to federal court are allowed. The savings in money and time would simply vanish if a small claimant were then forced to hire counsel and litigate his or her case again in the appellate court. The expense would just be moved up a notch to a higher court. Consequently, we believe that any appellate option should, like the small claims court, be simple, informal, and inexpensive.
- ***Remedies.*** Of great concern to SGA and NSAI would be the effect that establishment of a small claims court might have on statutory damages. If the small claims court could not offer statutory damages as a remedy, we feel strongly that there must be some assurance that the level of those damages in federal court

would not be effectively undercut. SGA and NSAI also believe that, at least in some instances, a small claims court should be authorized to order injunctive relief. In particular, injunctions would seem appropriate in cases in which there are repeated infringements with no colorable defense, and the defendant has limited resources against which to collect a monetary judgment. In such circumstances, the copyright owner's only recourse might be to stop the infringement.

- ***Estoppel.*** SGA and NSAI believe that one issue the Office should consider in its deliberations is whether the small claims process would act to estop subsequent related claims in a larger infringement action in federal district court. For example, what would happen in a situation in which a copyright owner sued one website for infringement in small claims court, obtained redress, and subsequently it became apparent that this website was in fact part of a much larger pattern of willful infringement? If the website was thereafter named as a defendant in federal district court, we believe the Office should clarify that the website should not be able to argue that its liability is limited to the relief obtained in the earlier small claims proceeding.
- ***Legal fees.*** SGA and NSAI believe a provision to award legal fees in a small claims setting would be fatally counterproductive. A small claims statute that included a "loser pays" provision, for example, would discourage--if not eliminate--the likelihood of an individual songwriter or other creator utilizing the new system. The risk of having to pay the legal fees of a well-heeled defendant, particularly a corporation, that hired an attorney or attorneys to litigate the case would be all out of proportion to the possible benefit of prevailing on the "small claim." Individuals would simply not take the risk and would effectively remain without a remedy for infringement.

SGA and NSAI appreciate the opportunity to participate in the Copyright Office's small claims inquiry and look forward to reviewing the submissions of the other stakeholders.

Respectfully submitted,

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