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January 17, 2012

Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
Washington D.C. 20540

Re: ***Docket No. 2011-10; Remedies for Small Copyright Claims***

Dear Ms. Pallante:

ZipCourt, Inc., a California-based privately held Delaware corporation, submits these comments in response to the Notice of Inquiry (“the Notice”) published in the Federal Register on October 27, 2011 at page 66758 (vol 75; no. 208), concerning “Remedies for Small Copyright Claims.” ZipCourt welcomes the opportunity to provide comments to the proposed study, and beyond the study, to continue to participate with the U.S. Copyright Office, and other interested parties, on matters pertaining to equitable, fair and affordable solutions to resolve small copyright claims.

ZipCourt is an online dispute resolution provider based in Palo Alto, California. Founded in 2011, ZipCourt was established to provide an alternative to litigation and traditional arbitration methods of resolving disputes. It provides a fully web-based platform that allows individuals and corporations to resolve disputes professionally, expeditiously and inexpensively, in a secure online setting. Disputes are resolved by expert third party neutrals, including those with expertise in intellectual property disputes. ZipCourt’s platform was launched in October 2011, and is fully operational. ZipCourt is also available for use as a resource to the Copyright Office, in that ZipCourt can advise in the development of solutions to the problem of small claim resolutions.

In response to the numerous questions and inquiries in the Notice:

- I. “The Office requests comment on potential alternatives for handling copyright claims that have a relatively small economic value.”

First, we take no position on the various judicial or administrative court re-alignments or the establishment of any new federal, state or administrative bodies. Nor do we offer a dollar level – at this time – of what would or should constitute a “small” copyright claim.

Instead, we suggest consideration of an entirely different private-entity dispute resolution alternative, that could serve instead of, or in addition to, these other federal, state or administrative new (or re-aligned) courts. That is, for small copyright claims, we believe that all parties’ interests are best served with the use of an online copyright court (“OCC”). Such a court – entered into as a private dispute settlement – would allow certain authors, photographers, musicians and other individual creators, who own their copyrights, much greater access to the legal system to protect their property rights, increasing their incentives to create and disseminate original works of authorship.

Some of the benefits of an OCC include:

- Reduced costs to copyright owners to enforce their property rights – there are no travel costs to a specific forum; rather, each party simply pays a dispute administration fee, which would cover the Arbitrator’s fee as well as the cost of operating the OCC.
- The ability to proceed without an attorney for the reasons set out in the Notice about the high costs – in time and money – of attorneys in copyright matters. Small sized cases (of an amount to be determined) are unlikely to engage experienced copyright litigators on an hourly fee or contingency fee basis, and most individual copyright holders cannot afford to pay attorney’s fees or other litigation costs, including the costs of depositions, travel, and any expert fees.
- Convenient access to the small claims forum – an OCC would be available for plaintiffs to file a claim, upload documents and supporting evidence, and communicate with the Arbitrator and opposing party from the convenience of their home or office, and from just about anywhere in the country. (At the outset, we would suggest that the OCC not handle any “international” copyright disputes, given the complex jurisdictional, choice of law and conflict of law issues. With experience, the OCC could begin to take on multinational copyright disputes.)
- A streamlined process; ideally, many, if not most, small copyright claims could be decided in a matter of months, absent procedural hurdles, or evidentiary problems, while federal copyright litigation can drag on for years. Some of these evidentiary problems could be resolved utilizing the evidentiary benefits found in 17 U.S.C. 410(c) for timely Copyright Office registrations by plaintiffs.
- Minimal discovery and no motion practice – this increases the expediency of resolutions and reduces costs.
- Impartial neutrals with expertise in copyright law – the Arbitrators would be selected from a network of experienced copyright litigators and retired judges from across the country. Thus, the OCC would have benefits over, for example, alternatively re-aligning small copyright claims jurisdiction in administrative law or state courts, as identified in the Notice, where copyright expertise has not, to date, existed.

In sum, in an OCC, many small claim disputes could be quickly and fairly submitted electronically to an experienced neutral who would consider the evidence, and the parties’ arguments, and

come to a decision that would be reasonable and fair to both plaintiffs and defendants, and above all, produce quick and economic results.¹

An OCC, for many small claims, would achieve the objectives of quick, fair and economic resolution of claims by being modeled on traditional arbitration, but then dispensing with those aspects that are the most time-consuming and expensive (including formal discovery and in-person hearings). By limiting discovery and dispensing with in-person hearings, the OCC would eliminate the most disruptive and expensive aspects of court and traditional arbitration proceedings and eliminate the scheduling conflicts that, alone, can cause delays of months or years. In this way, we believe that most small copyright claim resolutions could dispense with (since they would not be helpful to a resolution), oral testimony or cross-examination of witnesses, and the need to subpoena third-parties to depositions or hearings. All of these activities add substantially to the costs of traditional copyright litigation, for large or small matters.

Further, the OCC would be secure and feature various technological security protections for secure communications among the parties and Arbitrators, including, for example, online conferencing systems.

Finally, the OCC would retain the most beneficial aspects of arbitration because *it is arbitration*. As background, the Federal Arbitration Act, enacted in 1925 (9 U.S.C. Section 1 *et seq.*) provides for contractually-based compulsory and binding arbitration, resulting in an arbitration award entered by an arbitrator or arbitration panel as opposed to a judgment entered by a court of law. In an arbitration, the parties give up the right to an appeal on substantive grounds to a court. We would propose that once an award is entered by an arbitrator or arbitration panel, it must be "confirmed" in a court of law, or subject to an administrative appeal to a panel of administrative judges. If a party is still unhappy with the outcome of a complaint on appeal, the party could have the option of bringing the dispute to a district court for review. We believe that such appeals to the federal judiciary would be unlikely, because of the prohibitive costs of such appeals. Once confirmed by a court of law, the award is then reduced to an enforceable judgment, which may be enforced by the winning party in court, like any other judgment.

2. "The Office is interested in comment on the logistics of potential alternatives, as well as the benefits and risks presented by different types of processes."

¹ Similar systems have been proposed; see, e.g. Mark A. Lemley and R. Anthony Reese, "A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes, 23 CARDOZO ARTS & ENT. L.J. 1 (2005) ("Provided the copyright dispute resolution system avoids the obvious mistakes of the UDRP - systematic bias of judges, lack of an administrative appeal, and a tendency to resolve difficult questions best left for the courts - - it should prove an attractive alternative to litigation for copyright owners without being unfair to accused infringers.") The proposed OCC would avoid the cited flaws of the UDRP system by doing the following: implementing an administrative appellate process; permitting parties to vote for the Arbitrator hearing their dispute in complex cases; and if the OCC process were deemed compulsory, giving the Arbitrators discretion to permit removal to federal court in the case of complex disputes.

We treat the request for comments on “logistics” as opportunity to suggest some specific procedures and processes of arranging and resolving a small copyright dispute through the use of an OCC. We recommend the following procedures and processes:

1) *Dispute Created.* The Inviting Party initiates a Dispute by categorizing the nature and complexity of the Copyright Dispute (“Dispute”). Certain Disputes might be simple, some more complicated. The cost to initiate a Dispute should be free. As Copyright Disputes may have different complexities, the inviting party should be able to invite up to eight parties to participate (in order to “bring in” all parties in a chain of publication and distribution, for example), and could request permission from the OCC Dispute Administrator to invite more parties upon a showing of necessity and good cause. Note, that if online arbitration is mandatory, then the parties would be obligated to respond. Further, if a plaintiff brings a case, the defendant might be obligated to use the OCC. See the comment on the rules for voluntary/mandatory use by the parties as noted below.

2) *Invitations Sent.* An OCC Dispute Administrator would extend an invitation to the parties using e-mail, phone, or registered letter, depending on the notification method selected by the Inviting Party upon registration of the Dispute. The OCC Dispute Administrator should have the ability to add additional parties, whether as witnesses, experts, or parties to the actual dispute.

3) *Party Registration.* The parties who receive an invitation to participate in the OCC Process from an OCC Dispute Administrator would then register with the site. If after a period of time (e.g., 30 days), there are still parties that have not registered, an OCC Administrator will need to determine if it is still feasible to resolve the Dispute between or among parties that have registered.

4) *Agree to Terms.* The parties agree to participate in the OCC process pursuant to the terms of a process agreement. The OCC would make a final determination as to the characterization of the Dispute. (If the Dispute involves greater complexity, the Dispute Administrator can re-characterize the Dispute as a Complex Dispute.) Most Disputes would be considered of small or moderate complexity. The complexity may depend on the types of issues raised (e.g., fair use, peer to peer file sharing, or the like), the number of witnesses and experts presented, and the forecasted amount of time needed to resolve the Dispute.

5) *Arbitrator Assignment/Arbitrator Selection.* For moderate complexity disputes, in the interests of speed and simplicity, it might make sense for the OCC to assign the Arbitrator. For more advanced disputes, we would recommend that the OCC would nominate Arbitrators for the parties to vote on.

6) *In Process.* While the dispute is in process, the parties receive instructions presented to them as Action Items, and various messages that may be sent to the parties. Each of the parties may continue to add documents if appropriate in addition to the Factual Background Document and Recommended Resolution.

7) *In Arbitration.* The OCC could likely resolve a dispute within several months (plus any time to make a copyright registration certificate to assist this process). The Arbitrator could address any issues or request additional facts through the online conferencing system or secure email message.

8) *Decision.* The OCC Arbitrator would then reach a decision and upload it to the Dispute Room. All parties would then acknowledge receipt of the decision. The Dispute Room would remain available for a period of 30 days, allowing Parties to download documents or access the messages and logs. After 90 days, the OCC Dispute Administrator would close out the Dispute Room. If an administrative appeal were filed, the Dispute Room would remain open pending such appeal.

3. “The Office hereby seeks comment from the public on factual and policy matters related to the treatment of small copyright claims.”

Further, the unique attributes of a small copyright claim could be best handled by OCC as follows:

- *Expertise:* The Office points out that “State courts do not have expertise in copyright jurisprudence...” and that “. . . state 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.” By contrast, an OCC with a number of qualified neutrals on staff (many of which would have copyright expertise) would be ideal. Further, an online process could also be scalable (with the payment of additional fees) for the resolution of complex copyright disputes that require significantly more time to resolve.
- *Location of Federal Court / Tribunal:* An OCC would not face the logistical issues presented by land-based courts. An OCC should facilitate different means of communication, including (i) telephone conferences, (ii) a secure email and document distribution system; and (iii) technologies such as a conferencing system (similar to a chat room). In an OCC conferencing system, a transcript is delivered to the parties at the conclusion of the session. Such technologies could expedite the process and reduce the number of issues. As one example of the alternative (federal, state or administrative proceedings): travel costs associated with in-person hearings alone are as expensive, or may be more expensive, than any remedy the copyright owner might receive.
- *Discovery.* To limit costs, traditional discovery procedures such as depositions and document requests should be eliminated. The OCC should adopt a more “European” type of discovery in which parties produce the documents and evidence most favorable to their case. This is similar to the small claims discovery procedures in many state courts. The Arbitrator may also request certain documents that may be helpful in a resolution. For example, when a fair use defense is asserted and presented to the OCC, the Arbitrator would have discretion to allow appropriate discovery relating to

that defense, including, among other things, inducement of infringement, bad faith, or willful infringement.

- *Affiliation With the Copyright Office or Copyright Royalty Board:* Recognizing that the Copyright Office has considerable expertise on copyright law, the OCC would welcome an association with the Office to assure competencies in terms of quality control, user experience, and low cost. There should also be an evaluation process with feedback by the Copyright Office regarding the parties' and the Office's satisfaction by which copyright disputes are being resolved.
- *Determination of "Small" Copyright Claims:* There are no artificial dollar ceilings on the size of copyright claims that might be brought in the OCC, but public policy reasons might dictate such a ceiling. We take no position on what this level might be, or whatever other restrictions might apply. Also, it is worth noting that even a dollar ceiling on what a "small" claim might be, does not resolve situations where the amount of controversy is small, but the principles involved are complex, or vice-versa. Still an OCC could help to sort out, in a balanced approach, those claims deemed "disputes" versus "complex disputes" (and thus might dispense with minimum, or capped, or amounts in controversy determinations).
- *Voluntary or Mandatory:* In recommending when and whether to use new small claims processes, the Copyright Office may determine that use of an OCC, for example, could be voluntary or compulsory. Making the process compulsory would avoid allowing either party to remove the claim to federal court, and the benefits of an OCC would be lost, and the corresponding burdens on the federal judicial system would increase. However, due process considerations about any "mandatory" process must be carefully considered; in any OCC process, it would be possible for the Arbitrator in his or her discretion, to permit the removal to federal court in the event of a complex dispute.
- *Appeal.* The decisions of an OCC could be appealable; as stated above, once an award is entered by an arbitrator or arbitration panel, it must be "confirmed" in a court of law. Alternatively, the initial Arbitrator decision could be subject to an administrative appeal in a streamlined format to a panel of Arbitrators (or perhaps Administrative Law Judges outside of OCC). If a party is still unhappy with the outcome of a complaint on appeal, the party could have the option of bringing the dispute to a district court for review. To discourage groundless appeals, a party that brings an unsuccessful appeal could be required to pay costs. Further, to be enforced under the Federal Arbitration Act, an Arbitrator's decision must be registered with a federal judge, who may choose to set aside the OCC award under certain circumstances (e.g., upon a showing of fraud or mistake by the Arbitrator).
- *Fair Use:* Certainly, fair use determinations, even by copyright experts, are very difficult in some circumstances, and in any judicial proceeding are very fact specific and treated on a case-by-case basis. Still, while the small claims process should focus on clear copyright violations, any fair use defenses could be fairly presented to, and decided by, an experienced Arbitrator. The OCC would provide a forum for defendants to assert

fair use – and their consideration of the four factors (and any others), giving defendants (and plaintiffs) the ability to submit supporting documents and evidence and to offer additional evidence or testimony via a telephonic or live-chat conference. Experienced neutrals, who are well-versed in copyright law, would actively consider any asserted fair use defense on a case-by-case basis, taking into consideration, inter alia, the four factors set forth in Section 107 of the Copyright Act (i.e., purpose and character of the use, nature of the work, portion used in comparison to the overall work, and effect of use on the value of the work), as well as applicable judicial precedent.

Note to the extent complex fair use defenses, copyright misuse, unenforceability, or similar defenses are raised, the OCC Arbitrator could decline to hear the defenses, proceed to consider all other aspects of the case, and if he awards a decision against the defendant, the decision could be stayed pending the filing of a declaratory judgment suit in federal court. The OCC Arbitrator's decision would be subject to de novo review by the federal court in the corresponding declaratory judgment proceeding.

- *Defendants' Appearance:* The OCC should require the parties to agree to the OCC dispute resolution process, including timing, the formats that supporting documents are submitted, and the like. The parties must also pay the appropriate dispute administration fee before the parties submit their documents and litigate a dispute. This up-front payment may operate to deter copyright owners from dragging a defendant into a small copyright proceeding without cause. In any event, all parties would be required to pay the dispute administration fee, which would depend on the complexity of the dispute.² Moreover, the copyright owner would need to verify the veracity of any claims filed, similar to the procedure under Federal Rule Civil Procedure 11. As an added deterrent, the Arbitrator should have the discretion to award costs and fees to the prevailing party in a case where the copyright owner files a specious claim.

One other consideration for the Office in making its recommendations: it would be possible, in the OCC, to consider a requirement that the plaintiff be required to make a *prima facie* showing of copyright infringement before the defendant is required to appear. This would be an extra step for the OCC but would avoid assertions that the plaintiff is filing harassing or frivolous claims.

- *Available Remedies:* The effectiveness of the OCC could be assured by giving it access to the full panoply of remedies available, including (i) monetary damages, (ii) statutory damages, and (iii) injunctions in limited cases. For instance, if a plaintiff demonstrated

² For example, a suggested fee for a simple dispute would be \$399 per party; a moderate dispute would be \$1999 per party; and a complex dispute (where an expert neutral may be expected to provide extensive amount of review, analysis and preparing an award) would be \$14,900 per party. We believe many small copyright disputes could be resolved in the range between \$399 and \$1999 per party. (Such fees could also be modified for use in Copyright Disputes.) For complex disputes, an alternate price point might be suggested which balances the amount of expert neutral time required to analyze and adjudicate the dispute with the goal of an accessible and efficient OCC forum.

that a defendant repeatedly infringed plaintiff's copyright with no colorable defense of fair use, then the OCC should be empowered to enjoin any further infringement of the registered work. The injunction would be enforceable in federal court, and would serve as a deterrent to future infringement.

In conclusion, ZipCourt notes that the system described above has already been developed and is operational in the United States, and could be used for small copyright claims within a few months.

The mechanics of the system were developed in the Microsoft .NET environment and it uses an SQL back end. The system is robust and secure, and can be readily accessed by anyone with any PC or Mac with an Internet connection using a standard web browser, such as Internet Explorer, Safari, Firefox, or Chrome.

We look forward to working the Copyright Office to further explain ZipCourt during the course of the study, at the roundtable, and in any future deliberations, and would welcome the Office's inquiries on the ability of ZipCourt to meet the needs of resolving some, if not many of the small copyright claims being considered by the Office and Congress. A copy of the ZipCourt data sheet describing ZipCourt is appended at the end of this letter. Craig Harding, our CEO, can be reached at craig@zipcourt.com.

In addition to a consideration of the OCC, we would be happy to support the Copyright Office in its deliberations in connection with any required changes in administrative, regulatory and statutory authorities – whether establishing new authorities, or re-aligning existing ones, if it would improve the adjudication of small copyright claims and thereby enable all copyright owners (and users) to more fully realize the promise of the creation, dissemination and use of copyrighted works.

Sincerely yours,

ZipCourt, Inc.

Appended: ZipCourt Data Sheet



"I can't continue to waste precious time and resources resolving disputes."

ZipCourt Online Dispute Resolution

ZipCourt is an innovative alternative to expensive litigation and arbitration proceedings which enables you to resolve disputes professionally and in a secure, online environment. We cover a broad range of disputes -- from simple to complex -- and use technologies that will save you significant time and money.

An Innovative Solution

ZipCourt covers a broad range of disputes from simple disagreements to more complex disputes. ZipCourt's carefully selected arbitrators (including retired federal judges and magistrates) can help you resolve disputes with an emphasis on high quality service.

ZipCourt was developed by in-house lawyers and is optimized for the way that business is done throughout the world, and disputes are resolved in a way that people's lives are not disrupted. Disputes are quickly and fairly submitted to a neutral party who considers the evidence, and the parties' arguments, and rapidly comes to a reasonable decision that is produced quickly and economically.

Contact us today to find out more about ZipCourt and the ways we can help you control costs and reduce your litigation time.

We will help you reduce

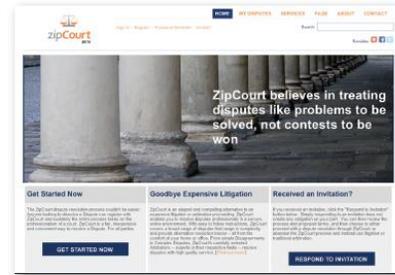
- Lost time and productivity
- Legal expenses
- Long distance travel
- Uncontrollable delays
- Hostile confrontations



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When to Use ZipCourt

- When corporations may find disputes can be handled In-House without the involvement of outside law firms
- If the parties want to present their evidence to have it considered by an independent neutral decision maker
- When parties want to get a decision without it becoming "a federal case"
- If parties want an objective and enforceable decision without delay or disruption to their respective businesses
- If individuals would rather not hire lawyers or leave home or their desks
- When you want to reduce your legal spend by streamlining resolution

When Not to Use ZipCourt

- When parties want to turn over every stone (and potentially spend millions of dollars) in discovery
- When parties want to wait a year or more after a decision is reached while the losing party takes an appeal
- When parties think oral testimony and cross-examination of witnesses is crucial
- When you want to subpoena third-parties for depositions or hearings

ZipCourt provides an online dispute resolution service that is efficient and reduces your litigation costs.

