



April 12, 2013

Register of Copyrights
United States Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559

RE: Notice of Inquiry—Remedies for Small Copyright Claims: Third Request for Comments

To the Register of Copyrights:

Pursuant to the Notice of Inquiry (“NOI”) published in the Federal Register on February 26, 2013 (78 Fed.Reg. 13,094), I submit these comments on behalf of the Association of American Publishers (“AAP”) regarding the Copyright Office’s further efforts to assess the feasibility of creating an alternative enforcement method for copyright claims of small economic value (“small claims”).

As noted in previous comments, AAP represents more than 350 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses. Reliable protection and enforcement of copyright are crucial to the publishing industry, and thus AAP has welcomed the Copyright Office’s exploration of new mechanisms to address copyright infringements of small economic value. The diversity of AAP’s membership encourages the organization to be pragmatic in reaching a solution that: (1) addresses our smaller members’ need for effective enforcement against copyright infringements; and (2) avoids creating a new forum for frivolous, low-cost, legal actions that would stymie the creative industries.

AAP appreciated the opportunity to participate in the public hearings on this issue in New York, and welcomes this occasion to provide additional comments to the Copyright Office regarding a few remaining issues. First, AAP recaps our comments regarding an overarching approach for creating a small claims forum, if the Copyright Office finds that it would be legally and practically feasible to develop and implement in an efficient and effective manner. Second, AAP provides our current thinking on remaining issues raised in the third NOI.

That said, AAP wants to be clear that we are not yet endorsing the creation of a small claims forum. However, should the Copyright Office decide, after carefully reviewing public comments, that it

can and should create a small claims forum, AAP suggests, based on views received¹ from our members, resolving the issues addressed in this comment in the following ways:

Overarching Approach

Devising an alternative method for adjudicating a subset of copyright claims having small economic value deserves careful consideration to ensure that the net result strengthens copyright protections and incentives to create new works. To this end, AAP asks that in determining each of the many components that may form the framework of the small claims forum, the Copyright Office consciously evaluate the ways in which streamlining procedures to make pursuing small claims cost-effective and efficient can be balanced by measures that prevent opening the floodgates to frivolous claims.

Remaining Issues

Voluntary v. Mandatory (#1)

No matter what form an expedited small claims forum may take, thorough adjudication in federal courts must remain available as an option for bringing any size copyright claim. Therefore, AAP continues to advocate for a voluntary process that incentivizes plaintiffs and defendants to pursue claims in the small claims forum. For example, the types and amount of damages available in the small claims forum could provide a powerful incentive for potential defendants to work within the system instead of opting for transfer to federal court. Thus, AAP maintains its suggestion to remove statutory damages from the realm of possible awards available through the small claims forum.

As regards the question of whether the forum could employ a voluntary, but “opt-out” system, AAP asks the Copyright Office to consider the following concerns: (1) whether a practical and simple process for proper service could be created to ensure that plaintiffs, likely acting *pro se*, are able to give effective notice to defendants; and (2) whether adequate procedures and guidance could be communicated to defendants to ensure their realistic ability to opt-out in a timely and informed manner. Moreover, safeguards against frivolous suits would be even more crucial in an opt-out setting to counterbalance the possible over-incentive to file claims created by the opt-out system. Key safeguards would include, at a minimum, filing fees, and requiring the plaintiff to establish a *prima facie* case of infringement before the defendant is required to respond. Lastly, if the Copyright Office adopts an opt-out approach, AAP believes a defendant’s option to opt-out should be available in each separate case, as opposed to a system where a possible re-appearing defendant would have to choose whether to avail itself of the small claims court on an all-or-nothing basis.

Permissible Claims (#3)

As stated in our previous comments, AAP believes that in order for the small claims forum to provide an alternative forum which can competently handle copyright claims in a cost-effective and efficient manner, plaintiffs should only be able to pursue infringement claims that are severable from

¹ AAP notes that we do not represent all publishers in the U.S. Moreover, our comment is a reflection of the feedback we received and does not take into account views of our membership that were not communicated to AAP.

related contract, licensing and trademark claims.² However, AAP does note that contract and licensing arrangements should be admissible evidence to defend against allegations of infringement, for instance where a contract precludes a party from asserting a copyright claim or where the particular conduct at issue is within the scope of a license.

Injunctive Relief (#4)

AAP continues to urge the Copyright Office not to allow the small claims forum to award any type of preliminary injunctive relief due to: (1) its tendency to undermine the limits of a damages cap; and (2) the structural limitations of the forum, *i.e.*, expedited proceedings, extremely limited discovery, *pro se* claimants and defendants, the equitable nature of the remedy which is the province of the federal courts, etc. That said, final permanent injunctions may be appropriate if appealable to a federal court for review. However, it bears repeating that the Supreme Court has “consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”³ Moreover, it is not clear that the record developed at the small claims forum, on the basis of limited discovery, will be sufficient in any instance to merit the issuance of a permanent injunction.

Willful and Innocent Infringement (#8)

AAP does not support the small claims forum making findings of willful or innocent infringement. A number of our publishers agree with other commenters that cautioned against making such findings on the basis of thin evidentiary records. Moreover, AAP does not believe more extensive discovery is appropriate in the small claims forum. Rather, the federal courts are the more appropriate venue for making these fact-intensive findings.

Default Judgments (#11)

As noted above, AAP supports a voluntary participation model, if a small claims forum is created. In order to properly issue a default judgment the adjudicative forum must have personal jurisdiction over the defendant. Based on the substantial consensus among previous comments that the forum should be a centralized administrative forum, as opposed to creating a new cause of action/streamlined procedure in state or federal courts, there is no basis to generally presume personal jurisdiction over a defendant. Furthermore, as highlighted in the public hearings, many small copyright claims involve infringements on the Internet, where the identity and location of the infringer are difficult to determine. Although this situation vexes all legitimate copyright owners, the solution is not to circumvent due process by presuming personal jurisdiction to award default judgments in an expedited proceeding. As such, AAP believes that default judgments are not constitutionally valid if the defendant has not accepted the authority of the forum over the particular dispute.

To be sure, some stakeholders would like the small claims forum to address the problem that certain defendants are likely not to respond to a notice of filing a claim. However, given the requirements of due process, in order to award a default judgment in the small claims forum, there must be a legal basis for presuming the defendant’s acceptance of the forum despite the lack of response.

² See AAP Comments to Second NOI for further reasoning behind this suggestion.

³ *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

This presumption would only be available in a mandatory or opt-out system. However, many questions have been raised, with good reason, about the general constitutionality of making the small claims forum mandatory, and AAP believes that providing default judgments under a mandatory framework would further complicate that issue.

While not completely satisfactory, default judgments would still be available in federal court, provided the plaintiff brought the claim in a jurisdiction where the defendant had sufficient contact and the defendant was properly served. Lastly, AAP notes that judgments need to be enforced in order to provide a meaningful remedy for rights holders and to uphold the value of adjudicating disputes within the small claims forum. AAP encourages the Copyright Office and other stakeholders to focus on making the core structure of a small claims forum cost-effective, efficient, and fair before attempting to make the forum a silver bullet for combating copyright infringement.

Unknown Defendants (#13)

AAP acknowledges the difficulty of identifying online infringers due to the anonymity of the Internet and the unreliability of registration information. Still, it is unclear under what legal basis a voluntary, administrative, small claims forum could render an enforceable judgment in a “John Doe” suit. To be sure, rights holders need better tools for effective enforcement of copyrights online. Whether or not the small claims forum is the appropriate place to explore new tools is a question for further discussion. Potentially, the small claims forum could facilitate the identification of alleged infringers by subpoenaing internet service providers, in appropriate circumstances, enabling a plaintiff to properly serve the alleged infringer in order to pursue an action in federal court or the small claims forum.

Conclusion

AAP looks forward to continued engagement with the Copyright Office to formulate a solution that strengthens copyright protections and provides for fair and adequate enforcement of copyright to all, without potentially opening the floodgates to frivolous suits, or continuing the pattern of *de facto* non-enforcement for holders of small copyright claims.

Sincerely,



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