BEFORE THE
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON D.C.

In the Matter of:	
Remedies for Small Copyright Claims: Third Request for Comments	Docket Number: 2011-10

COMMENT OF CHRISTOPHER CIFRINO

This Comment is submitted in response to the Copyright Office's above-captioned Notice of Inquiry. The Notice seeks comments on the feasibility and potential structure and function of an alternative "small claims" procedure for resolution of copyright infringement claims of small economic value.

As a law student, small copyright holder, and consumer of copyrighted works, I support the Office's inquiry. A streamlined process for resolving copyright disputes would improve access to courts and lower costs for all parties involved. It is vital, then, that the new system be able to survive judicial review. Although the Notice touches on a wide variety of subjects, this Comment focuses on the issue of whether the process should be voluntary or mandatory, recommending that a voluntary system, for both plaintiffs and defendants, would resolve constitutional issues and additionally aid in administering the new procedure.

I. Consent and Constitutional Issues (Subjects of Inquiry 1 and 15)

A. *Seventh Amendment*

The Seventh Amendment confers the right to a jury trial in copyright infringement cases, as confirmed by *Feltner v. Columbia Pictures Television, Inc.*.[1] However, as mentioned in other comments, the right to jury trial may be waived. The defendant's voluntary consent to the small claims process could constitute a waiver, resolving this constitutional issue. As the right to jury trial is central to our legal system, however, such waivers will be carefully examined by any reviewing court.[2] To avoid any issues, therefore, it is imperative that defendants are clearly informed of the differences between the small claims process and the standard process. This could be easily accomplished by an informational pamphlet provided at the time of service. Such a pamphlet would, ideally, contain a minimum of "legalese," which would not only aid understanding for a layperson but potentially increase the odds of them opting-in to the expedited process.

B. *Personal Jurisdiction*

Any adjudicatory body must, as a threshold question, establish proper personal jurisdiction. For federal courts, this frequently means undertaking a "minimum contacts" analysis. Such analysis is often time-consuming, requiring a court to investigate factual matters and utilize a complex multifactor balancing test. This issue looms large for copyright infringement cases, since many of the potential infringing uses arise through Internet use. If litigants are to dispute personal jurisdiction in every small claims case it will severely undermine the new tribunal's primary goal: speedy and efficient resolution of infringement cases.

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[1] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

[2] For example, the Second Circuit stated that "the Seventh Amendment right to a jury trial is fundamental and that its protection can only be relinquished knowingly and intentionally." *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

Voluntary participation, requiring consent of all parties, provides an easy solution. It is permissible for parties to consent to have their dispute resolved in a certain jurisdiction.[3] Thus, any voluntary small claims process would avoid running afoul of constitutional personal jurisdiction issues.

C. *"Opt out" and Due Process*

The Office also is interested in the feasibility of a procedure with an "opt out" option; properly served defendants would be considered to have consented to the small claims process unless they affirmatively opt out. I do not believe this procedure is *ex ante* unfeasible, but any such provision must be carefully constructed to avoid Due Process issues.

Due Process is generally understood to require a party being heard at a meaningful time and in a meaningful manner.[4] Thus, in the Anglo-American legal tradition there is a strong presumption, endorsed by the Supreme Court, that one should not be bound by a judgment without having a day in court.[5]

Opt-outs are, as an example, permitted in class action suits.[6] A plaintiff may be considered to have consented to be part of the class if the plaintiff has been properly served; the plaintiff's informed inaction is considered consent. There are, however, significant differences between a class action plaintiff "consenting by default" and a copyright small claims defendant doing so. For example, Due Process may require additional protections for binding a defendant

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[3] "We have noted that, because the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court." *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 472 n.14 (1985) (internal quotation marks and citations omitted).
[4] *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976).
[5] "[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process, it being our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fireboard Corp.*, 527 U.S 815, 846-47 (1999) (internal quotation marks and citations omitted).
[6] FRCP Rule 23(c)(2)(B)(v).

(who is forced to respond to a suit) rather than a plaintiff (who initiated the suit). Furthermore, the large scale of class action suits may be a special case requiring special procedures, while small copyright claims, small in scale by definition, do not merit special procedural allowances such as the "opt out" mechanism.

To combat any such issues, any "opt out" procedures must include robust service of process. I would counsel against any sort of electronic service or even standard mail, and instead recommend using a service procedure at least as comprehensive as in FRCP Rule 4. If it is clear that a defendant had the informed opportunity to opt out, but made a conscious choice to not do so, then considering that refusal to be consent to the small claims process is less likely to violate the defendant's right to Due Process. Such robust service of process may run counter to the small claims *modus operandi* of faster, cheaper, streamlined procedure, but is probably necessary to avoid constitutional problems.

II. Consent and Administrability

In addition to resolving constitutional issues, a voluntary system presents advantages for administration. Voluntary participation with consent to jurisdiction allows any small claims tribunal to be located in a single location. This is less costly for both litigants (saving on travel expenses) and the government (lowered overhead). Furthermore, one centrally-located tribunal would improve consistency across decisions and eliminate forum shopping.

Furthermore, a voluntary system allows for a more controlled implementation of the small claims procedure. Opening the new system to a small set of volunteers as a pilot group will allow the administering body to gauge the successes and failures of the system, and make changes. For example, perhaps the damage cap is too low, preventing plaintiffs from finding

representation, or perhaps the procedures are too technical, frustrating *pro se* plaintiffs. Feedback will allow the administrating body to adjust the contours of the system gradually to maximize its efficacy.

III. Conclusion

Any proposed small claims procedure must walk a fine line: it must be cheap but constitutional. Consent, either via direct opt-in or opt-out with more robust service procedures, provides a potential resolution for any constitutional issues. Before it can be of any use to copyright litigants, the new procedure must incur what cost is necessary to insure that it survives judicial review.

Respectfully submitted,

/s/

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