

FLASH Federal Legal Assistance Self Help Center

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Ms. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000
April 1, 2013

Re: Comments Submitted Pursuant to Notice of Inquiry Regarding
“Remedies for Small Copyright Claims,” 76 Fed. Reg. 66,758 (Oct. 27, 2011)

Dear Register Pallante:

The Federal Legal Assistance Self-Help Center at the San Jose Courthouse (“FLASH”) is pleased to offer comments in response to the U.S. Copyright Office Notice of Inquiry regarding “Remedies for Small Copyright Claims.”

FLASH was established in May 2010 by the U.S. District Court, Northern District of California, San Jose Division, to provide limited assistance to civil litigants without an attorney. FLASH is administered by the Pro Bono Project of Silicon Valley. From May 2010 through May 2012, Flash had 227 clients pass through its doors, logging 534 appointments. FLASH is one of just a handful of innovative federal court-funded programs assisting pro se civil litigants.

FLASH is particularly interested in these proceedings because after employment law and civil rights claims, intellectual property claims are the third most common claim involving pro se litigants.

Based on our review of the notice of inquiry, FLASH offers the following comments.

The Federal Court System Is Ill Equipped To Handle Pro Se Litigants

Of FLASH assisted pro se litigants handling their own litigation in federal court, 61% were met with one of these negative outcomes: dismissal, summary judgment by opposing party, default judgment by the opposing party, jury verdict for the opposing party.¹

Certain characteristics make pro se litigants less likely to succeed.² First, they are more likely to submit unnecessary or necessary, but unintelligible, pleadings.³ These pleadings often ask for remedies the court simply cannot provide. Many pro se’s also try to prove their entire case in the complaint, attaching hundreds of pages of exhibits.

Second, pro se litigants are far more likely to file frivolous cases and/or frequently file cases.⁴ Some pro se’s even repeatedly file the same case.

¹ Based on an internal FLASH report.

² *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*,” by Donna Stienstra, et al., Federal Judicial Center, 2011

³ *Id.*

⁴ *Id.*

And third, pro se litigants lack an understanding of both substantive and procedural law.⁵ For example many pro se's are unaware that the local rules prohibit filing hand written documents. Most of the pro se's do not even know what they have to prove to win their case.

Pro se litigants are ill-suited for federal court because they lack the legal knowledge, training and experience to navigate the procedural case flow and value a case. Thus, FLASH wholly supports a small claims system for copyright cases.

Key Features Of A Pro Se Friendly Copyright Small Claims

- **Complete Set Of Forms**

One of the biggest disadvantages for pro se litigants in federal court is the lack of template forms of pleadings and other essential documents. Without template forms and thorough instructions, most pro se complaints are unintelligible to judges and the opposing party. We would be in favor of the Copyright Office creating copyright-specific forms for each major step of a case.

Although some may argue that many of the Internet forms sites that have popped up serve as an excellent resource, these sites tend to lack template forms for copyright litigation. Moreover, if the copyright small claims court had its own readily available forms, pleadings would be more consistent. Consistent pleadings would make evaluating and responding to claims easier for both the opposing parties and the judges.

- **Advice Attorney(s)**

Even within the legal profession, few non-IP attorneys have an understanding of the complexities of copyright law. Moreover, most copyright attorneys will not touch small copyright claims because copyright litigation is prohibitively expensive. Thus, when our office does an intake on an intellectual property case, much of our time is spent explaining the basic law. From our experience, this area of law is less accessible to pro se litigants than other areas.

A copyright small claims court would benefit significantly from the inclusion of an advice office to answer basic copyright law questions. Often simple explanations during a consultation of how copyright law actually works and how it applies to an individual's situation can avoid entire lawsuits, especially frivolous ones.

One of our goals at FLASH is to ascertain whether a case should be filed in federal court. Of clients advised against filing a case in federal court, 80-90% followed FLASH's advice. We believe an advice attorney in the copyright small claims court could produce a similar positive result. They could also help with valuing the case, which can be complex for pro se's especially artists who have an emotional attachment to their work.

Along with an advice attorney, a pro bono referral panel⁶ is also a great resource. We created our pro bono referral panel because we do not have the resources to assist every client with a worthy complex case who cannot afford an attorney. Our placements have been quite successful, of the placed cases 83% succeeded, which was a huge step up from the 39% rate for unassisted pro se litigants.

⁵ *Id.*

⁶ Our pro bono referral panel is made up of experienced attorneys, primarily from big law firms. They typically work in a limited scope capacity which is ethical in California, but not in all states. Once a case is assigned, FLASH provides additional support in terms of legal research and litigation guidance. However, if the pro bono panel is made up of copyright law experts the advice office of the copyright small claims court may not need to provide additional guidance.

A pro bono referral program implemented in the small claims court would have a similar positive effect. In the small claims system, a pro bono panel could aid litigants with more nuanced small claims cases. This would increase court efficiency because it would help ensure the pleadings filed are comprehensible. The pro bono panel could also partner with programs like FLASH to refer cases that belong in federal court as opposed to small claims court.

- **Consequences For Unsubstantiated Claims**

Frequent filers and vexatious litigants can be more of a risk when pro se litigants are involved, and the copyright small claims court must guard against this. We think a bond system, such as Cal. Code Civ. Proc. § 391, which is the national standard for implementing bonds against vexatious litigants, could be a great way to prevent frivolous lawsuits. We also agree with Google,⁷ that defendants should not have to engage in litigation or even submit an answer until the plaintiff has proven their prima facie case.

We hope these insights into our work will prove helpful in the development of a copyright small claims system.

Regards,
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FLASH Director

Tej Singh
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⁷ Catherine Rowland, Google, Notice of Inquiry: Remedies for Small Copyright Claims, Docket 2011-10, page 4. (January 17, 2012) http://www.copyright.gov/docs/smallclaims/comments/22_google_inc.pdf.