Comments in response to
Remedies for Small Copyright Claims
Third Request for Comments
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While the idea of having a procedure to handle small copyright claims is appealing, one only has to look at the questions asked in the Request to see the problems associated with the idea. Perhaps looking at other models besides "small claims courts" may provide a better solution.

Much of the difficulty comes from the bad fit between current copyright law, based on the world of 1886 when the Berne Convention was first signed, and the digital networked world of today. Not only is the physical objects basis of much of copyright law difficult to map onto information exchanged over the Internet, but the digital revolution brought in millions of new players, most of whom had no familiarity with what copyright law really is.

In cases where there is little dispute of the underlying facts but one of the parties is not well-versed on the applicable law, the role of a court becomes educational as well as adjudicatory. The court not only says who won, but gives the reasons in law so that the losing party will understand and respect the judgment.

The idea of teaching as a way to address copyright infringements is the heart of the new Copyright Alert System (CAS), operated by the Center for Copyright Information. (See www.copyrightinformation.org/the-copyright-alert-system.) After what appears to be a clear copyright infringement on the Internet has been determined, the Internet connection provider is furnished detailed information about the infringement, and the provider notifies its account holder. Educational information is provided about how to prevent future copyright infringement, and hopefully the infringement will not continue.

Currently, to assure that there is a high degree of certainty in the allegation of copyright infringement and so the system won't be misused against users, the major content providers (such as the members of the MPAA and RIAA) are the

only ones who can submit CAS notices to the participating Internet service providers. Others, of course, can still submit DMCA notices, but those are for infringing user content stored by an ISP, not the peer-to-peer communications that seem today to be the prevalent mode of copyright infringement on the Internet.

If the Copyright Alert System proves effective, the idea of a copyright small claims court could be transformed into a way for small copyright owners to take advantage of CAS. An unbiased reviewing organization, perhaps a new part of the Copyright Office, could examine allegations of infringement and if they are determined to be correct, and there are no mitigating considerations such as fair use, they could forward the complaint to the participating ISP, who would then follow the same procedures as if the notice had come from the major content providers. If the complaint were not warranted, an explanation would be furnished the party filing the complaint, along with information on how to bring the matter to a federal court if the complainant does not agree with the determination. A fee would cover the costs of operating the reviewing organization, much as a small copyright claims court would be supported by filing fees.

Because this is not a court determining damages, penalties, or possibly injunctions, many of the problems listed in the Notice are not relevant. Yet, it provides the educational aspects of court adjudication targeted at the people who need it.

Besides its current inaccessibility by small copyright owners, a potential problem with the Copyright Alert System as a substitute for a copyright small claims court is the lack of effective remedies for those infringers who continue even after they learn that was they are doing violates the law. The final of the “six strikes” is a reduction in connection speed or some similar inconvenience. In today’s competitive market, an ISP is hesitant to “fine” a user and the user switching to a different ISP avoids the “penalty” of decreased performance while possibly resetting the “strike count.”

If the Copyright Alert System proves ineffective because of its limited penalties, there may be pressure again for a small copyright claims court to address the problem. But there are other approaches possible.

For example, the Federal Communications Commission handles many violations of the Communications Act and its regulations informally. It may contact the violator to

> propose a penalty through issuing a Notice of Apparent Liability for Forfeiture, or NAL, which advises the party how it has violated the law and the amount of the proposed penalty. ... If a party wishes to resolve a potential violation outside of the NAL process, it may engage in settlement discussions with Commission staff; if successful, these discussions generally result in a Consent Decree,

> which include as core elements a compliance plan that is designed to prevent recurrence of the violation that led to the enforcement action, as well as an appropriate voluntary financial contribution to the U.S. Treasury.

See www.fcc.gov/encyclopedia/enforcement-primer.

As a safeguard, a NAL can only be issued to a person or organization that is an FCC licensee unless that person or organization has had prior notification of the violation and has continued the conduct. (See 47 U.S.C. 503(b)(5).) This is similar to the Copyright Alert System's multiple notices before any action is taken against the user.

Such a system could be instituted to support the Copyright Alert System by the Copyright Office through legislation, or could be done under the existing criminal copyright provisions by the Department of Justice. 17 U.S.C. 506(a)(1) currently provides that

> Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—
> (A) for purposes of commercial advantage or private financial gain;
> (B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or
> (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

It is highly likely that a person who has been informed about copyright law and their particular infringement of it and has continued their activities is doing it "willfully," and that their conduct falls within one of the three categories in the statute.

The penalties for criminal copyright infringement may sound draconian – imprisonment for up to five years and a fine of up to $250,000. But there appears to be nothing that would prevent a prosecutor to notify infringers who has ignored the warnings from the Copyright Advisory System of their likely violation of the criminal copyright law and then say that they would not be prosecuted if they signed an agreement not to continue the infringement and pay a forfeiture to the government, much like the FCC NAL procedure. The notification could also indicate the penalties for willful copyright infringement, both in statutory damages in a civil suit and fines and possible imprisonment in criminal prosecution.

While this would not provide damages to the a copyright owner, as a court might, even a nominal forfeiture (say, $500 or $1000) may stop future infringement without imposing the time and expense of a trial.

The are other ways that federal agencies provide a substitute to full-scale litigation that can benefit copyright owners and those using copyrighted works. One of them is the IRS Private Letter Rulings program.

> A private letter ruling, or PLR, is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's represented set of facts. A PLR is issued in response to a written request submitted by a taxpayer. A PLR may not be relied on as precedent by other taxpayers or by IRS personnel.

See www.irs.gov/Tax-Exempt-Bonds/TEB-Private-Letter-Rulings:-Some-Basic-Concepts.

In short, you describe the facts of the situation and pay a fee, and the IRS says whether it is permissible. The situation can be a hypothetical (and often is, if you are developing a new tax strategy), but to receive the benefit of the PLR the actual facts must match the hypothetical.

Determining whether a particular use qualifies as "fair use" can be as confusing as tax law. And "fair use" isn't determined until you are sued for infringement ("fair use" being a defense) or sufficiently threatened so that you can sue for declaratory judgment. It would be far better if there were some way to resolve that uncertainty before you begin to infringe, particularly if the result of asking was an indication that what you were proposing would not be a "fair use" and that you misunderstand what the law is.

Of course, there is a substantial difference between an IRS PLR and a "probable fair use" determination by the Copyright Office. The IRS can bind itself to any determination it makes in the PLR (as long as the later conduct is within the facts initially presented), but the Copyright Office cannot bind a copyright owner in future litigation.

However, seeking a determination that proposed conduct would be a "fair use," receiving that determination, and doing what was proposed and no more would be an excellent indication that any infringement later determined in court was not "willful." That would not only take it out of the realm of criminal copyright infringement (and therefore the forfeiture letters discussed above), but also remove the possibility of enhanced statutory damages for willful infringement and most likely making any infringement "innocent." While statutory damages can be reduced to $200 per work for innocent infringement, if such a "letter ruling" system were set up, it would make sense to allow the court to remit all statutory damages, as is currently the case for libraries or nonprofit educational institutions. (See 17 U.S.C. 504(c)(2).

In addition, if a person had sought and received an opinion that their use was fair before any infringement, that should be ample basis for a court to exercise its discretion not to award attorney's fees. (See 17 U.S.C. 505.) It is highly unlikely that a copyright owner would file suit against an alleged infringer who has received a "fair use letter," effectively making them binding on the matter like an IRS private letter ruling.

There are a number of alternatives to a small claims court that avoid the problems mentioned in Notice. Two possibilities extend the current Copyright Alert System to make it accessible to small copyright owners and provide penalties for those who continue their conduct after they have been informed why their conduct is infringing. A third addresses the uncertainty of whether a use is "fair," a frequent question in copyright litigation. I urge the Copyright Office consider these, as well as investigate how other federal agencies handle enforcement of their laws without having to resort to expensive litigation.