

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

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<b>In the Matter of</b>	)	<b>Docket No. 2011-10</b>
<b>Remedies for Small Copyright Claims</b>	)	<b>Submitted April 12, 2013</b>
	)	

**COMMENTS OF THE  
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

**I. PRELIMINARY COMMENTS**

The Motion Picture Association of America, Inc. (“MPAA”) is pleased to provide these comments in response to the Third Request for Comments regarding the Notice of Inquiry (“NOI”) on Remedies for Small Copyright Claims (Docket No. 2011–10) appearing at 78 Fed. Reg. 13,094 (Feb. 26, 2013).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA’s members are frequent litigants in copyright disputes, both as plaintiffs and defendants, enabling them to offer a unique and balanced perspective on issues related to the possible establishment of a system for adjudicating small copyright claims.

The MPAA is grateful to the Copyright Office for the opportunity to present its views. While the MPAA has not previously submitted comments in these proceedings, it has closely reviewed the comments submitted by others and attended the public hearings held November 26-27, 2012 in Los Angeles, exposing it to the wide range of views on this topic.

The MPAA is sympathetic to copyright owners – authors, photographers, graphic artists, illustrators, and others – who have argued throughout these proceedings that their works are frequently infringed, but that they lack effective remedies against such infringement due to the high cost of litigation. For such creators, the protections found in the Copyright Act may in certain circumstances be illusory, depriving them of their “legitimate demand for effective — not

merely symbolic — protection of the statutory monopoly.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). The MPAA supports efforts to ensure that all copyright owners have a practical and realistic means of seeking redress for infringement of their works.

To that end, the establishment of a streamlined judicial or administrative process to provide relief to copyright owners who suffer from relatively low-dollar infringements may well be justified. However, as has become clear from reviewing the previously-filed comments and listening to the views presented at the public hearings, building such a system would be no simple task, and the devil is in the proverbial details. It would entail, quite literally, the construction, from the ground up, of an entire judicial or administrative system, requiring the drafting of an entire set of new rules analogous to the Federal Rules of Civil Procedure. And while providing a quick and inexpensive way to resolve small copyright claims is a laudable goal, it must not be accomplished at the expense of the legitimate rights of either those who would seek to enforce their rights in federal court, or who find themselves defendants in copyright actions.

With those initial thoughts in mind, the MPAA addresses below several of the subjects of inquiry set forth in Section II of the NOI that it believes are most important for the Copyright Office to consider as it sets out to make recommendations to Congress.

## **II. MPAA VIEWS**

### **A. Voluntary versus mandatory participation (Subject 1)**

If Congress establishes a system for adjudicating small copyright claims, such a system should be voluntary for all parties. In other words, no party, either a copyright owner/plaintiff or an accused infringer/defendant, should be forced to participate in a small claims system against its will. Such a rule would serve the laudable goal of providing both copyright owners and alleged infringers with a means of resolving their dispute quickly and relatively cheaply, and with finality. And it would simultaneously alleviate some or all of the potential concerns raised by a small claims system (several of which MPAA addresses below). That is, if a party to a potential small claims action believes that such a forum would not adequately protect its rights, it could simply decline to participate in that forum, resulting in the case being heard (as it would be now) in a federal district court, under the Federal Rules. Such a voluntary system would also have the benefit of obviating many of the potentially knotty constitutional issues raised by a mandatory system, including, for example, the right to a jury trial. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Such a system would thus effectively operate as a government-run arbitration system, where, as with a typical arbitration, parties only participate if they have mutually agreed to do so. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (“arbitration is a matter of contract”).

Contrary to the suggestion of some previous commenters,<sup>1</sup> a small claims system that permitted parties to opt out (and instead litigate in federal district court) would not eliminate the

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<sup>1</sup> *See, e.g.*, comments submitted in response to the August 23, 2012 Notice of Inquiry by: American Society of Media Photographers, at 6 (Document 5); National Press Photographers Association (NPPA), at 2 (advocating system voluntary for plaintiffs but mandatory for defendants) (Document 19); statement of Carolyn Wright, an

potential benefits of a small claims system. A properly designed small claims process could include incentives to encourage participation. Aside from the obvious benefit of providing a relatively efficient and inexpensive means to resolve copyright disputes – which would benefit both plaintiffs and defendants – such a system could also encourage defendants, in particular, to participate by capping damages at a reasonably low level. A large corporation that generally favors litigating in the familiar forum of a federal district court may well choose to litigate in a small claims tribunal if it knows that making that choice would cap its potential exposure at, say, \$30,000, a figure the MPAA believes would be a reasonable upper limit.

## **B. Injunctive Relief (Subject 4)**

The MPAA would strenuously object to empowering small claims tribunals to grant injunctive relief. The Supreme Court has frequently referred to injunctive relief as an “extraordinary remedy.” *E.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376 (2008) (“injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”); *Weinberger v. Romero-Barcelo*, 456 US 305, 312 (1982) (“courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction” (citing *Railroad Comm’n v. Pullman Co.*, 312 U. S. 496, 500 (1941))). In *eBay v. MercExchange*, 547 U.S. 388 (2006), the Court reaffirmed the principle that courts may not take shortcuts in granting injunctions; rather, they must apply the “well-established principles of equity,” *id.* at 391, that require the application of the familiar four-factor test.”<sup>2</sup>

A small claims tribunal would be particularly ill-suited to the kind of careful, thorough fact-finding<sup>3</sup> and legal analysis that is required before a court may take the “extraordinary” step of enjoining an accused infringer, either preliminarily or permanently. A small claims process would presumably be designed foremost to facilitate quick, cheap resolution of copyright disputes. For certain types of such disputes, involving clearly infringing acts and relatively small financial stakes, it may well be worth giving up some procedural and substantive protections in order to achieve an efficient resolution in short order. However, an injunction is wholly different in kind than a small monetary award, and those potentially subject to such an order must not be forced to give up the full panoply of procedural and substantive rights currently available to litigants in the federal courts. While making participation voluntary would avoid a forfeiture of those rights, making the forfeiture of those rights the price of entry into such a system would substantially undermine the benefit and perhaps even the viability of a small claims system.

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attorney specializing in representing photographers, at Public Hearing on Small Copyright Claims, Nov. 26, 2012, at 29:7-12.

<sup>2</sup> “A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Id.*

<sup>3</sup> When considering the issuance of an injunction, courts often receive extensive evidentiary submissions from the parties, including from expert witnesses, on issues such as the existence of prior art, whether the defendant’s work is substantially similar to the plaintiff’s, the market value of the works at issue, the amount of harm the defendant’s infringing activities have inflicted or threaten to inflict on the plaintiff, the cost to the defendant of complying with an injunction, and copyright ownership, among other things.

The availability of injunctive relief through a small claims process risks severe adverse impact upon the MPAA's members and the public, for at least two reasons. First, an injunction enjoining distribution of an MPAA member's motion picture would typically have a massive economic impact, one *several orders of magnitude* greater than the \$30,000-\$50,000 small claims damages cap suggested by several participants in these proceedings. According to a study by the respected SNL Kagan organization, the average "major studio film" released between 2004 and 2008 cost on average \$137 million to produce, market and distribute globally.<sup>4</sup> One need not be a studio accountant to conclude that an order enjoining distribution of such a film would have a dramatic financial impact. A small claims judge, working under a rushed schedule, and without the benefit of all of the facts and legal argument available to a federal district court adjudicating similar cases, must not have the ability to effectively destroy a movie studio's ability to recoup its multi-million-dollar investment.

Moreover, lawsuits in which copyright plaintiffs seek injunctions against distribution of motion pictures often involve the alleged incorporation of the plaintiff's work into a much larger work. *See, e.g., Hart v. Warner Bros.*, No. 1:97-cv-01956 (E.D.Va., filed Dec. 4, 1997) (sculptural work allegedly incorporated into scene of film "The Devil's Advocate"); *Woods v. Universal City Studios*, 1:96-cv-01516, S.D.N.Y., filed March 1, 1996) (chair design allegedly incorporated into scene of film "Twelve Monkeys"). Analysis of whether an injunction is appropriate in such cases necessarily involves careful consideration of First Amendment issues, as an order barring distribution of the accused work would potentially forbid distribution of a large amount of unquestionably non-infringing, fully First Amendment-protected, material. Again, a small claims court, seeking first and foremost a quick, cheap resolution, is not suited to such complex and nuanced analysis, which must also take into account the public interest in access to creative works.

### **C. Registration Requirement**

In a potential small claims system, plaintiffs should be required to register their works as a prerequisite to filing a lawsuit – just as in a traditional lawsuit in federal court. *See* 17 U.S.C. §412. As Congress recognized when it enacted the Copyright Act of 1976, "copyright registration ... is useful and important to users and the public at large ... and should therefore be induced in some practical way." H.R.Rep. No. 1476 at 158, 94th Cong., 2d Sess. (1976) U.S. Code Cong. & Admin. News 1976 at 5659, 5774. As one court explained:

In addition to giving copyright owners incentive to register, § 412 also provides potential infringers with an incentive to check the federal register. If § 412 succeeds in encouraging copyright owners to register and in encouraging potential infringers to check registration, then it will have reduced both the search costs imposed on potential infringers and the enforcement costs borne by copyright owners. And, finally, the simplicity of § 412 confers upon all parties involved the clarity and low administrative costs of a brightline rule.

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<sup>4</sup> *See* SNL Kagan, *Economics of Motion Pictures*, 2009 edition, at 3. The study defined "major studio films" as those that played on at least 1,000 screens in the United States. SNL Kagan examined 764 such films in the 2004-2008 period.

*Johnson v. Jones*, 149 F.3d 494, 505 (6th Cir. 1998). These goals would be no less salient in a potential small claims context than they are in federal court. Generally speaking, a fully-populated registration system aids in searches by potential users of others' copyrighted works. A small claims system should not be designed in such a way as to lessen the incentive to register, which would lead to various negative outcomes, including an increase in the volume of potential orphan works. Moreover, in the litigation context, it is vitally important for a defendant to know exactly what it is he is accused of infringing. The registration requirement directly serves this goal, by stating the plaintiff's position on ownership, authorship, and date of creation; directing the defendant's discovery efforts; and, where necessary, enabling the defendant to obtain the deposit copy from the Library of Congress. The registration certificate, in effect, serves as a form of mandatory initial disclosure in the spirit of Federal Rule 26, aiding in more efficient resolution of claims.

#### **D. Finality and Precedential Effect of Small Claims Decisions (Subject 7)**

A small claims system should provide finality to both parties that choose to participate. That is, they should be confident that, once the small claims proceeding is over, the dispute between them is fully and finally resolved, once and for all. There should be no appeals, and no opportunity to re-litigate the same or related infringements in a later suit. (Of course, if the parties insist on the ability to do these things, they may opt instead for Federal District Court.) Small claims decisions should also have no precedential effect. In a system where quick, cheap resolution of claims is the primary goal, judges' main goal should be to do justice – perhaps even rough justice – for the parties before them. Litigants will likely not have engaged in the extensive discovery necessary to build a full factual record, and small claims judges will rarely have the time, nor the assistance from law clerks, to do the careful and thorough legal research and opinion-drafting engaged in by federal district and appellate court judges. In a legal system where much of “the law” is judge-made, and that relies heavily on judicial opinions to interpret vague concepts such as “fair use” or “substantial similarity,” only thorough, carefully-considered opinions should influence – or, worse yet, bind – other courts and litigants. Such opinions are less likely to be produced by a small claims system.

#### **E. Role of Attorneys (Subject 6)**

Parties in a potential small claims system should be permitted, though not required, to appear through counsel. Allowing parties – either individuals or corporate entities – to be represented by non-lawyers (including the parties themselves) would serve the goal of providing a less expensive means to resolve small disputes. However, no party should be denied representation by counsel of its choice. Corporations are frequent copyright litigants, and they should not be required to have their legal interests represented by non-lawyers. The amounts at stake in a potential small claims system may be relatively small, but they are not insignificant, and if an individual or company – whether a small business or a major corporation – wishes to retain an attorney to handle a \$30,000 copyright claim, then it must be permitted to do so.

MPAA does not believe attorneys' fees should be available to a prevailing party in a small-claims action. First, while, as noted above, parties should have the *right* to counsel of their choice, the rules should not *encourage* parties to “lawyer up,” which would undermine the goal of providing a quick, inexpensive forum for resolution of disputes. Second, MPAA suspects that

a fee-shifting provision would be ineffective in providing relief to prevailing defendants. The likely “customers” of such a system would be non-wealthy individuals, or small businesses, who would avail themselves of a small claims process precisely to avoid large litigation costs, including legal fees. In the event that such a plaintiff lost a small claims suit against a defendant represented by counsel, the chances of the defendant actually recovering its fees from that plaintiff appears remote.

**F. Offers of Judgment (Topic 10)**

MPAA does believe that some sort of process, perhaps akin to that provided in Federal Rule of Civil Procedure 68, could be a useful tool in the small-claims context to encourage early settlement of disputes. However, we suggest an important modification. While Rule 68 contemplates the actual entry of judgment in favor of the plaintiff, MPAA believes that in the unique context of a voluntary small claims system, a settlement – including one encouraged by a Rule 68-like provision – should not result in a judgment in favor of one party or the other. Rather, just as with a traditional settlement, the parties should enter into a private agreement, one provision of which is a promise by the plaintiff to dismiss its case. MPAA further encourages the Copyright Office to explore various means of facilitating settlement, such as, for example, a requirement that the parties certify that they have engaged in meaningful negotiations – or at least attempted to – before trial.

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The MPAA appreciates this opportunity to provide our views in response to the NOI. We look forward to providing further input and working with the Copyright Office going forward.

Respectfully submitted,

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