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

In the Matter of	)	
	)	**Docket No. 2011-10**
Remedies for Small Copyright Claims	)	

COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AND THE HARRY FOX AGENCY, INC, CHURCH MUSIC PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, BROADCAST MUSIC, INC., AND SESAC, INC
IN RESPONSE TO FEBRUARY 26, 2013 NOTICE OF INQUIRY

The National Music Publishers' Association, Inc. ("NMPA") The Harry Fox Agency, Inc. ("HFA"), American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), SESAC, Inc. ("SESAC"), and the Church Music Publishers Association ("CMPA"), (collectively "the Parties"), submit these comments in response to the Copyright Office's Notice of Inquiry requesting public comment for the third time on the topic of adjudicating small copyright claims dated February 26, 2013 (the "Notice"). 78 Fed. Reg. 13094.

Introduction

NMPA, founded in 1917, is the principal trade association representing the interests of music publishers in the United States. As such, NMPA works to protect the interests of the music publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 2,800 members, NMPA represents both large and small music publishing firms throughout the United States.

HFA, which is solely owned by NMPA, provides licensing and administrative services to over 46,000 music publishing clients that, in turn, control over four million copyrighted musical works. On behalf of its affiliated publishers, HFA issues licenses for the use of music in both physical and digital formats, and collects and distributes royalties due pursuant to those licenses.

ASCAP is this nation's first and largest performing rights organization ("PRO") as defined in the Copyright Act, 17 U.S.C. § 101, with nearly 500,000 songwriter and publisher members and a repertory of millions of copyrighted musical works. On behalf of its members, ASCAP licenses the non-dramatic public performance rights in musical works to a wide range of users, including television and radio broadcasters, online services, background/foreground music services, hotels, nightclubs, and colleges and universities. ASCAP represents not only U.S. writers and publishers but also hundreds of thousands of foreign writers and publishers through affiliation agreements with performing rights organizations in over 90 countries.

Broadcast Music, Inc. (BMI) is also a PRO that issues blanket licenses to music users for the public performance rights of its affiliated songwriters', composers', and music publishers' musical works, collects license fees on behalf of its affiliates, and distributes those fees as royalties to BMI affiliates whose works have been performed on media such as cable television, radio, and the Internet. BMI licenses the non-dramatic public performance right in approximately 7.5 million musical works on behalf of its affiliates, which comprise over 550,000 American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, BMI also represents in the U.S. thousands of works of many of the world's foreign writers and publishers of music. Typical BMI licensees include Internet music services and websites, mobile entertainment services, television and radio broadcasting stations, broadcast and cable/satellite television networks, cable system operators and direct

broadcast satellite services, concert promoters, background music services, restaurants, bars and nightclubs, sports arenas, and others that publicly perform music.

SESAC is a musical performing rights society that services both the creators and the users of non-dramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than 250,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States.

CMPA is an organization of publishers of Christian music who work together on mutual issues of concern regarding copyright protection. Founded in 1926, the organization represents publishers of most major church denominations as well as the publishing companies or affiliates of every major contemporary Christian record label.

The Parties filed comments in response to the Copyright Office's Notice of Inquiry referenced above, and some have participated in a Copyright Office roundtable at Columbia University Law School on November 16-17, 2012. The Parties continue to believe the music industry does not need a small claims tribunal, and that "the existing federal court system suffices, and in fact is preferable, for the enforcement and defense of music industry copyrights." Comment of American Society of Composers, Authors & Publishers (ASCAP); American Association of Independent Music (A2IM); Broadcast Music, Inc. (BMI); National Music Publishers' Association (NMPA); Recording Industry Association of America (RIAA); and SESAC, INC. (SESAC) dated October 19, 2012 (hereafter "Music Industry Parties Comment") at 1.

However, the Parties understand that some authors and copyright owners may benefit from the creation of a copyright small claims court tribunal. While the Parties continue to believe the creation of a streamlined copyright small claims process within the federal court system or a separate tribunal is problematic from a practical and Constitutional standpoint (and perhaps impossible), if the Copyright Office moves forward with such a plan, the program should be developed as a test or pilot program for a limited time period, and musical works should be clearly and unequivocally exempt from such a small claims court system.

I. MUSICAL WORKS SHOULD BE EXEMPT FROM A SMALL COPRYIGHT CLAIMS PROCESS

The Notice requests comments on what types of works should be covered by a small copyright court claims process. While certain creators, such as photographers, believe a small claims court system would enable them to more fully protect the property interest in their photographic works, there is no evidence that the current scheme fails to adequately protect the authors of music works in cases involving small scale infringement.[1] Nor is there any significant body of evidence supporting the contention that musical work claims of low economic value are not being pursued in Federal Court, when feasible. While photographs are often sold or licensed on a flat fee basis by their copyright owner/creators directly, and thus subject to an easy valuation, with few issues of ownership or authorship, the same cannot be said for musical works

[1] See Comments of National Music Publishers' Association, American Society of Composers, Authors and Publishers and SESAC, Inc. dated January 17, 2012 (hereafter "NMPA Comments") at 2. ("As a general matter, we have not recognized a discernible grass roots desire in the copyright community to create a copyright small claims court."). BMI filed separate comments in response to the October 27, 2011 Notice of Inquiry. Of course, the problems with court interpretations of the scope and extent of the DMCA safe harbors have led to large scale copyright avoidance online, but this requires a different remedy.

infringements. In some cases the damages for infringement of music works are unknown at the time a claim is filed. In addition, the issues of ownership and authorship are regularly the focus of judicial consideration in music copyright cases. Thus, for most music claims, for these reasons and others set forth below, a small claims court might not be adaptable to the needs of the music community. Furthermore, the creation of such a copyright small claims court would not be as attractive an option for authors or copyright owners of musical works (or users of such works) to file small claims actions instead of filing claims in Federal Court.

In contrast, photographers may have a more pressing need for a small claims process. This suggests that if a test small claims program should be considered, the works subject to such a small claims system should be initially limited to photographs. After a period of time to assess the effectiveness (and legality) of such a program, the Register, the music industry, copyright owners and users at large, will be much better situated and informed to properly assess whether or not a small claims process for all copyright, in particular music, is feasible and desirable.

II. MOST MUSIC COPYRIGHT ISSUES ARE TOO COMPLEX FOR A SMALL CLAIMS COURT

The Parties believe, as a general matter, both the judges and the litigants in a Copyright Small Claims court process would be ill equipped to address the vast majority of intricate copyright questions raised regarding musical works. Music issues in even the most basic copyright cases frequently require nuanced consideration of key elements of authorship, ownership, copying, and damages assessments. Such nuances are not typically part of the small claims court dynamic. If litigants are permitted to appear "pro se," they will likely be unfairly matched to the parties who do retain counsel. Similarly, a small claims court cannot reasonably

expect the Judges to be the "experts" in the proceedings. Furthermore, in this age of budget cutting, funds sufficient to properly educate these "new" Judges, or to even educate sitting Federal Court Judges if they are called upon to act as the small claims judge, are mostly likely not available. Establishing a court that does not require and ensure that judges have a certain level of expertise in this boutique area would raise serious legitimacy concerns, and would prevent copyright claims brought in such a court from being expeditiously adjudicated. Additionally, it is not good public policy to establish a court – small claim or not – that would run the risk of allowing important issues of precedent or ownership issues to be determined by those without the necessary level of knowledge to fully understand the reach of such determinations.

Further, the Office should not underestimate the complexities of legal issues that might arise in a small claims proceeding in the musical works context. Even the most sophisticated and experienced federal judges and copyright attorneys have difficulties with music copyright issues, such as fair use, authorship and co-authorship, work-for-hire, license compliance, the first sale doctrine, termination rights, secondary liability, sampling, the digital creation of works, access and substantial similarity, willfulness, interpretation of the DMCA safe harbors, divisibility of copyright, and so on.

One telling example of this complexity is the fair use defense, which is a fact-specific inquiry requiring an in-depth four-factor analysis applied to each respective claim. A small claims court and the parties litigating in such a court are unlikely to be properly equipped to deal with such claims and defenses and most likely, the defense of "fair use" as related to claims involving musical works would not be effectively adjudicated. In music, this analysis is

particularly complicated and unsettled as courts continue to wrestle with concepts such as sampling in the context of fair use.

Small claims courts work best when the issue of liability is cut and dried. Did the defendants act or fail to act in a manner to which he or she was legally obligated? If so, what amount of money damages should be assessed? This is generally not the same as a typical copyright case involving music. In addition to the issues identified above, there is often a consideration of actual damages and the calculation of defendant' profits, including the allocation of those profits to the infringement. And, of course, there is the consideration of injunctive relief, which is as likely as not to impact the interests of those parties.

As discussed above, most copyright issues are complex and a creator's interests are best served by retaining experienced legal counsel and pursuing claims in a forum that is best suited to resolving the often complex copyright issues of the day. Even for the cut-and-dry music infringement cases – as may be brought by PROs – other unique issues may be raised. While creating a small claims copyright court may appear to offer a sensible option for financially challenged creators, arguably there is a much better option, and it does not entail the creation of a new court. A financially challenged creator has the option today of retaining experienced copyright counsel and legal services from one of the numerous law school or public interest legal clinics with expertise in copyright law. These law school clinics offer passionate advocates (the law students) supervised by experienced copyright counsel. There are also organizations like Volunteer Lawyers for the Arts that offer very specialized and competent legal services to qualifying clients. Another option is to seek pro bono help from established law firms. For all options above, the financial status of the creator is taken into consideration upon intake, and creators of limited means will be provided an opportunity to secure legal services for free or at a

reduced rate. For music issues, this is far more preferable to filing a copyright claim in a small claims court without experienced copyright counsel – which will occur if music is part of any copyright small claims tribunal.

III. A SMALL CLAIMS COURT COULD UNDERMINE PRE-EXISTING CONTRACTUAL OBLIGATIONS AND RIGHTS

Most music publishers, performing rights and mechanical rights societies, and record companies enter into exclusive or non-exclusive contracts with songwriters and/or recording artists which contain standard contractual terms relating to the prosecution of third party infringers, that have been negotiated between and relied upon by the parties. Generally, a standard clause will address which party (or both parties) has the right to prosecute, defend, and/or fund a copyright prosecution on behalf of the parties. In some instances, the parties must mutually approve the filing of a copyright claim – no matter which party is obligated to pay and/or supervise the case.

For example, in the case of ASCAP, licensees of ASCAP are typically given as part of the license, a promise by ASCAP to indemnify and defend the licensee, if the licensee is sued by a third party for infringement in respect of a musical work in ASCAP's repertory. Again as discussed above, the license addresses the rights of the parties to notice of a claim, the right to prosecute or defend, and which party bears such costs. Similar arrangements are in place with respect to licensors of mechanical rights.

How these cases are prosecuted and funded is completely a matter of contract, and should not be subject to interference from the courts or the government. Including musical works in a small copyright claims process could unnecessarily complicate and might even undermine the

current contractual relationships between the parties, and create potential conflicts between the creators of musical works and their publishers, performing and mechanical rights societies and their respective licensees, and/or record companies authorized to act on their behalf in cases of copyright infringement.

An important contractual issue to consider is the right to approve the filing of a claim. If the mutual approval of both co-owners (e.g. in the case of a co-authored musical works) is necessary to approve the filing of a copyright infringement claim, creating a small claims court allowing a claim to be filed by only one of the parties, creates immediate contractual breach implications that could result in the co-owners or co-administrators of a copyright bringing actions against each other. This is one of the numerous unintended consequences that could result from the creation of a small claims court.

IV. A SMALL CLAIMS COURT COULD RESULT IN A SIGNIFICANT INCREASE IN FRIVOLOUS CLAIMS

The Parties are concerned that, without proper procedural safeguards, there is significant potential for parties filing frivolous claims that would amount to a serious abuse of a copyright small claims system and an unnecessary financial burden on both plaintiffs and/or defendants. The lack of certain formalities, such as filing fees or requirements that parties be represented by legal counsel, would encourage parties to bring questionable claims in a cheaper small claims court process, wasting the resources of other involved parties, the court, and taxpayers in general. The Parties support previous comments analogizing a potential small claims court to Copyright Royalty Board DART distribution proceedings and its streamlined process that "invites frivolous claims that ultimately cost copyright owners disproportionate resources to defend." Comments

of the American Society of Composers, Authors and Publishers and SESAC, Inc. dated January 17, 2012 (hereafter "ASCAP Comments") at 6. The Parties are not convinced a small claims court system can be created that will mitigate the risk of very disruptive and counter-productive frivolous claims.[2] Arguably, the costs and formalities associated with filing a copyright claim in federal court or some other contractually obligated forum such as arbitration, work as an incentive in the context of a small claims court, for a party to improperly use the small claims court system as a less expensive, yet inappropriate alternative forum to litigate claims, even if those claims are subject to other pre-existing contractual restrictions and rights.

Establishing a copyright small claims court would also open the door for plaintiffs to easily and cheaply file a purported copyright claim in a copyright small claims court, when in fact the claim concerns an alleged breach of contract that has nothing to with copyright. In those instances, the copyright small claims court would be used as a proxy for other non-copyright contractual claims usually brought in state court. For example, in the music industry, it is common for songwriters and/or artists to file claims of non-payment or under payment of royalties pursuant to their respective contracts. The standard contracts usually provide for a dispute resolution process that may allow for claims to be filed in a State court or with an arbitration tribunal. Similarly, both ASCAP and BMI have dispute resolution clauses with their respective members, as does HFA with respect to those publishers which have authorized HFA to represent their mechanical rights. Generally, the parties would either end up in arbitration or in State or Federal court – there is nothing in those contracts or membership agreements about a copyright small claims court.

[2] This is particularly a problem if the sham claimant can place a cloud over title to a work by disputing ownership of a famous, high value song(s) in the context of a low cost streamlined tribunal proceeding.

Another typical type of artist claim would address non-compliance with an "artist approval" clause in a contract. Again, the proper forum for dispute resolution would most likely be arbitration or an action in a state or federal court. Because the cost and ease of a small claims court proceeding is so enticing, the entire system could be open to abuse and manipulation by those filing inappropriate contractual claims in the small claims copyright court.

Ultimately, a small copyright claims court system could be used either willfully or innocently by an aggrieved songwriter or recording artist, in violation of contractual terms of a pre-existing contract mandating restrictions on the right to file a copyright claim against a third party or even against a partner.

For this, and other reasons, allowing for easier and less expensive legal process in a small claims court system with respect to musical works, will surely increase the probability of the filing of frivolous claims.

V. A SMALL CLAIMS COURT SYSTEM WOULD PRESENT MANY DIFFICULTIES WITH GUIDING LAW

The Office has asked for comments on what decisional law should guide a potential small claims tribunal and whether the decisions of such a tribunal should have any precedential effect, at least within the tribunal. The Parties are concerned that the current split among the circuits on certain copyright issues would make it complicated to determine which legal interpretation of these issues should be applied in any small claims court. Although the Copyright Act defines a significant amount of copyright law, much of copyright law - in particular the most contentious aspects of copyright law - is judge-made and can differ among circuits in some cases. Any small claims court system would necessarily have to adopt a new uniform set of laws – or ignore

certain aspects of copyright law - and clarify which specific tests and standards from different circuits would be applied in such a system. Because of the rich history of copyright law already in existence in each circuit, it would cause significant discord and confusion to attempt to determine how issues on which the circuits have split should be resolved. This reason, along with others, constitutes compelling evidence why a small copyright claims court may be unfeasible, and the entire system unworkable.

VI. CONSTITUTIONALITY OF A SMALL CLAIMS COPYRIGHT PROCESS

Finally, the Parties are concerned that a small claims system lacking an appeals process could deprive parties of their constitutional rights, including their right to appeal. Although Article III of the Constitution grants Congress the power to create inferior courts, the issue of whether the creation of such a court is constitutional must be considered, either in an internal study by the Copyright Office or independently by the Department of Justice. This is essential. Without it, some or perhaps even all of the decisions in a copyright small claims court would be subject to constitutional challenge.

VII. LIMITED DMCA RELATED CLAIM PROCESS COULD BE CONSIDERED

As stated above, the Parties believe the music industry has no pressing need for a small claims court at this time. However, if the "test" program suggests additional consideration should be given to adding music works to the jurisdiction of a copyright small claims court, consideration should be given to limiting the range of music copyright issues that are amenable to small claims resolution, such as eliminating contract claims or complaints based on disputed ownership. In these situations, injunctive relief would be an appropriate alternative to sending

DMCA take-down notices to Internet Service Providers or qualifying infringing websites, which requires that plaintiffs adhere to strict formats and often repeatedly send notices for the same content after such content is initially removed and subsequently reposted.

CONCLUSION

As a general matter, a copyright small claims court is inappropriate for adjudicating the vast majority of music industry copyright claims, and music works should be exempt from such a court. The Parties believe that far more potential harm than benefit would result from the development of a small claims court system, especially if music issues are subject to the court's jurisdiction.

However, a copyright small claims court process might be helpful to photographers and other similar rights holders with relatively simple low economic value claims. In our estimation, this is not the case for music works. Copyright claims involving musical works should require the procedures and expertise that can likely only be provided by the federal court system, and with experienced legal counsel representing the plaintiff(s).

For this and other reasons, the Parties again request that music be exempted from such a small claims system, and if music is involved, it is only as part of a very small and narrow exception.

The Parties appreciate the opportunity to participate in this inquiry and look forward to the opportunity to continue our involvement in the Copyright Office's inquiry into the creation of a copyright small claims court.

Dated: April 12, 2013

Respectfully submitted,

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