Before The Copyright Office
Library of Congress

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

Volunteer Lawyers for the Arts, Inc. ("VLA") submits these comments in response to the Copyright Office Notice of Inquiry, dated February 26, 2013. VLA supports the creation of a small claims process for copyright claims as it would directly and positively affect the artists and arts organizations that we serve.

Volunteer Lawyers for the Arts' Mission

Established in 1969, VLA, a 501(c)(3) tax-exempt, nonprofit corporation, is the pioneer in legal aid and educational programming for artists and arts organizations. VLA believes that the arts community deserves access to dedicated legal representation and advocacy to ensure that its voice is heard and that its interests are protected. VLA also believes that the arts community should understand certain legal and business matters to protect themselves and their creative endeavors. To achieve these goals, VLA provides pro bono legal representation to low-income artists and nonprofit arts and cultural organizations as well as a range of other services (legal counseling, educational programs, advocacy, and alternative dispute resolution services) to the entire arts community, and assists in the training of lawyers. The first arts-related legal aid organization, VLA is the model for similar organizations around the world.

Since its establishment, VLA has played a tremendous role in the life of the arts community, serving more than 265,000 low-income artists and nonprofit organizations. During the fiscal year ending June 30, 2012, VLA programs served over 11,000 artists and arts organizations: over 6,000 individual artists, nonprofit arts organizations, law

students, and attorneys attended 163 VLA educational programs; 810 low-income individual artists and nonprofit arts organizations were placed with volunteer attorneys for pro bono legal representation; and 947 individual artists and nonprofit arts organizations met in person with VLA staff attorneys to receive counseling on their legal and business matters.

VLA Response to Notice of Inquiry

VLA submits the following response to certain of the enumerated questions in the Notice of Inquiry in order to supplement the comments of its chairman, David Leichtman, at the November 2012 Copyright Office Roundtable (the "November Roundtable"). To recap generally, VLA envisions regional administrative panels of attorneys with copyright expertise ("Small Claims Tribunal") administered by the Copyright Office. Similar to the arbitration process, a limited right of appeal to a federal court should be available. The process should be streamlined, and VLA would support putting a time limit on the proceedings from filing to final determination.

1. Voluntary versus mandatory participation.

VLA supports the creation of a mandatory system of participation once a claimant elects to forego other available remedies and a federal court forum. A path is seriously needed in the current system for those copyright owners such as our low-income artists to pursue their copyright infringement claims. However, VLA recognizes that certain groups of defendants may object to a mandatory procedure or lobby against such a process if their interests are not also protected. Accordingly, VLA also supports the creation of incentives to secure the participation of potential small claims defendants and believes the most effective incentives to secure the willing participation of such groups

would be those that demonstrate the potential benefits for such defendants of having an alternative forum available. For example, such incentives could include (1) making the decisions of the Small Claims Tribunal non-precedential so that the focus is simply on resolving a particular dispute between the parties (it would preclude re-litigation of the same claim as between parties); (2) capping damages in a range of $25,000-50,000, far less than a typical defendant would spend on a motion to dismiss in a federal case; (3) precluding enhanced damages for willfulness; (4) making statutory damages unavailable in favor of equitable remedies for restitution capped at the small claims limit and injunctive relief; and (5) providing adequate due process protections and a limited right of appeal.

In any event, as an alternative, even a voluntary Small Claims Tribunal would be an improvement over federal court adjudication of small claims. The cost, time and resources that need to be devoted to federal court litigation often exceed the amount in controversy in a small copyright matter, which discourages authors and artists from bringing such claims. Moreover, the availability of attorneys' fees to prevailing parties is a significant deterrent for copyright claimants with small claims to bring close cases because the other fees that a defendant can incur often far exceed the value of the claim, and courts are uneven in applying criteria for when fees are awarded and in determining the amount of such fees. Accordingly, if the Copyright Office felt that other objections to a mandatory Small Claims Tribunal could not be overcome, VLA would still support a voluntary tribunal.

2. Eligible Works.

VLA believes all types of copyrighted works should be eligible for adjudication before the Small Claims Tribunal, with any limitations focused on the types of claims that may be brought before the tribunal. In particular, VLA does not support a blanket carve out for musical works and sound recordings. VLA is sympathetic to the concerns of the music representatives at the November Roundtable, but believes those concerns are better addressed through a clear definition in the small claims procedures of the types of claims that are appropriate to be adjudicated by the Small Claims Tribunal.

Approximately 20 percent of VLA clients who seek its services are music industry related, many of whom have copyright infringement issues that they have not otherwise been able to address without assistance from counsel. This group falls into two general categories not served fully by the music publishers or record companies providing comments to the Copyright Office. First, as the Internet "democratizes" the actual release of independently written and recorded songs, there are many songwriters and musicians whose works are available on the Internet who are not represented by music publishers, performing rights organizations ("PROs"), or record companies. Second, some VLA artists may be represented by music publishers, PROs, or record companies, but they seek VLA's services after requesting, unsuccessfully, that those entities act on their behalf. Often in such situations, the client's matter is simply too small for the representative entity to take action due to the resources that would be required in light of the incredible financial pressure that the industry is under. But the client may still have a meritorious claim deserving of pursuit in an efficient forum. Accordingly, VLA sees no justification to exclude entire classes of copyrighted works

from the Small Claims Tribunal where copyright owners would benefit greatly from the tribunals.[1]

VLA notes that a small claims process would provide a viable avenue for relief for those copyright owners with unregistered copyright works who encounter infringement. Despite counseling, VLA clients of all disciplines do not always register their works as soon as they are complete, and are often left scrambling to do so once infringement is discovered. It would therefore be very helpful to VLA clients if they could bring claims on both registered and unregistered works. At a minimum, VLA suggests that a Small Claims Tribunal accept claims where registration has not yet been secured, but the Copyright Office has received all registration materials.

3. Permissible Claims and Defenses

The Small Claims Tribunal should focus on claims of infringement including mandatory counterclaims (if they also fall under the statutory small claims cap) and all copyright-infringement defenses.[2]

VLA supports a requirement that the plaintiff demonstrate a *prima facie* case of infringement in order to initiate proceedings; however, the requirements for a *prima facie* case should be clearly defined and not overly burdensome. VLA suggests that one

[1] While VLA believes that all copyrighted works should be eligible for adjudication in a small claims process, it would not be opposed to a "middle ground" approach that addresses both music industry concerns and the need for brevity and simplicity that small claims plaintiffs seek. For example, one potential approach VLA has considered is for copyright claimants in the music industry to respond to certain yes or no questions on a claim form (which could not be used as evidence in any proceeding) as a threshold for eligibility, such as the following in the case of a composer with a reproduction rights claim: (1) Do you have a music publisher? Y or N. (2) If yes, have you requested that the music publisher bring this claim on your behalf? Y or N. (3) If yes, did the music publisher decline to pursue the matter? If the answer to the first question is "no," the claimant could proceed; if the answer to the first question is "yes," then the claimant would also have to answer "yes" to questions two and three before could they proceed before exhausting other available vehicles for having the claim brought by their representative.

[2] VLA believes that all claims and defenses under 17 U.S.C. § 512 would be appropriate for consideration by the Small Claims Tribunal.

criterion, for example, could focus on demonstrating clear evidence of access to the work. This *prima facie* mechanism would ensure that more complex claims requiring experts and other extensive discovery, such as those posed by the music representatives at the November Roundtable concerning complex claims of ownership, would not qualify for the tribunal, while copyright owners who could clearly establish a *prima facie* showing of copying could qualify.

With respect to defenses, in particular, VLA believes that a Small Claims Tribunal should be able to hear and adjudicate fair use defenses – on a no-collateral estoppel basis – to avoid the proliferation of such defenses lodged only to keep meritorious infringement claims out of this process. If there is no risk to the defendant that losing the fair use argument in a truly individual claimant's situation will have any impact on broader policy-driven cases they may have in the courts, there should really be no objection to having it adjudicated through this process. As noted at the hearings, federal judges are often inconsistent in applying the fair use test, so it is not a situation where resort to the courts is required for purposes of consistent results.

Further, it is important to permit related counterclaims so that a defendant cannot manipulate removal of these cases into federal court by merely asserting such claims, whether meritorious or not. Counterclaims can be capped as the defendant would always have the ability to bring its own claim in federal court if the claim exceeded the cap (subject, of course, to Rule 11). For example, where a plaintiff sues in state court for a sum below the required amount in controversy for federal claims, the defendant cannot remove to federal court on the basis of a counterclaim for a higher amount. *See St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288 (1938).

Even where the counterclaim is compulsory in nature, the majority of courts have held that the value of a defendant's counterclaim should not be considered in determining the amount in controversy for removal jurisdiction. *See, e.g., Firestone Financial Corp. v. Syal*, 327 F. Supp. 2d 809, 810-11 (N.D. Ohio 2004); *Kaplan v. Computer Sciences Corp*., 148 F. Supp. 2d 318, 320-21 (S.D.N.Y. 2001). Courts have specifically expressed concern about defendants' use of counterclaims to remove "an action of the most trifling nature" to a higher court at will. *See, e.g., Yankaus v. Feltenstein*, 244 U.S. 127, 132 (1917) (citing the lower court judge's opinion). Courts recognize, moreover, that unfairness to the defendant is mitigated by the option to bring the counterclaim as an affirmative claim in a higher venue. *Id.* A Small Claims Tribunal may therefore conceivably use caps on both permissive and compulsory counterclaims to prevent defendants from taking disputes out of the small claims realm.

4. Equitable Relief / Damages/
15. Constitutional Issues.

The question of what remedies can be available in a Small Claims Tribunal overlaps with some of the constitutional questions raised in the Notice of Inquiry. Accordingly, those issues are addressed together here because the availability of certain remedies cannot be considered unless it is first established that sufficient due process protections can be ensured. Once those thresholds are met, which they can be here, the questions of whether a monetary remedy can be available in a Small Claims Tribunal without raising Seventh Amendment concerns, and whether injunctive relief can be available, can be addressed.

Due Process

A threshold question to be addressed before discussion of the appropriate available remedies is what level of due process is required by the Constitution. Courts considering the minimum due process standards required to adjudicate entitlements to federal and state rights have held that an administrative adjudicatory body with abbreviated processes and limited rights could be established without violating due process rights under the Constitution. Due process guarantees an *opportunity to be heard* by an impartial decision-maker "at a meaningful time and meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process avoids formalism and aims for flexible application in different factual situations. At its core, it requires "fundamental fairness." *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24-25 (1981).

A Small Claims Tribunal could comply with all of the minimum due process requirements. First, the defendant in any small claim filing must receive timely and adequate notice describing the legal and factual bases for the claim against him. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The claim must be stated with sufficient particularity to inform the defendant of the facts to which he must be prepared to respond as well as the defendant's rights and obligations at the hearing. *See* Consent Judgment and Decree, *Municipal Labor Committee v. Sitkin*, 79 Civ. 5899 (RLC), 8, 29 (S.D.N.Y. 1983). Service of such a notice could easily be effectuated by a Small Claims Tribunal through use of existing processes approved by the Federal Rules of Civil Procedure.

Because due process mandates only the *opportunity* to be heard, default judgments can be rendered against a defendant, who, for example, fails to make a timely

appearance or who violates a rule on the production of evidence without a justifiable excuse. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Given the possibility that some defendants will never appear, a Small Claims Tribunal would therefore have the authority to render default judgments.

Next, the presiding officer at the hearing must be impartial. Courts grant a presumption of impartiality, and the burden is on the complaining party to show a conflict of interest or other reason for disqualification. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Appointing attorneys with substantial copyright experience to adjudicate small claims proceedings would fulfill this requisite.

While *Goldberg* mandated that parties to a welfare benefits hearing must be afforded the option to retain counsel if desired, *Goldberg*, 397 U.S. at 270, state small claims have varied in their allowance of representation. A Small Claims Tribunal would therefore likely have some flexibility in drafting any rules on representation. However, as discussed below, representation should remain an option for all parties.

A limited discovery procedure in a small claims setting would not violate due process requirements. An individual's right to conduct discovery exists to the extent that the evidence underlying a claim against him must be sufficiently disclosed to afford him an opportunity to show that such evidence is untrue. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). A judge may be given discretion to permit entry of evidence on new issues not articulated in the original notice, as long as good cause is shown, reasons for admittance are stated in the record, parties are informed, and an opportunity to address the new evidence is provided (including, if warranted, a recess in the proceedings to

permit an adequate response to the new evidence). *See* Consent Decree, *Sitkin*, 79 Civ. 5899 at 9.

A Small Claims Tribunal could therefore allow basic written discovery to produce for the opposition documents that a party intends to use at the hearing on any affirmative or defense claims. Limiting the number of document requests, interrogatories, subpoenas, and requests for admissions that would be allowed as of right, with judges having the discretion to increase the number if good cause is shown, would remain in compliance with due process. However, a Small Claims Tribunal must preserve a party's right to confront and cross-examine any adverse witnesses. *Greene*, 360 U.S. at 496-97. Relatedly, a party must be given the opportunity to explain any adverse statements or omissions in any written documentation of the basis of the claim against them. *See* Consent Decree, *Sitkin*, 79 Civ. 5899 at 12.

The judge's findings and conclusions must rest solely on the legal arguments and evidence presented at the proceeding. The court's decision should contain a concise statement of facts relied upon in reaching the decision and reasons for the determination, but there is no need for a full or formal opinion. *Goldberg*, 397 U.S. at 271. A Small Claims Tribunal would therefore not be burdened by the need to prepare formal opinions for each decision rendered.

Damages, the Seventh Amendment, and Article III

VLA believes that there is some chance that the Supreme Court would eventually hold that Congress could enable a new small claims tribunal with a monetary remedy, free of any right to a jury trial, if it made sufficient findings that the public interest would be served by such a new remedy as a procedural option to a claimant to permit the

adjudication of infringement claims in a summary, streamlined proceeding. While existing authority is not enough to safely predict the result, and VLA can imagine the Court deciding either way, the unconstitutionality of such a provision is not certain. Congress should acknowledge existing case law on the applicability of the Seventh Amendment to copyright remedies, and the legislative history should explain the justification for the proposal to maximize its chances of passing constitutional muster.

As a threshold matter, if the tribunal were voluntary, a defendant always has the right to waive his right to a jury trial, and therefore, there would not be any Seventh Amendment impediment in a voluntary Small Claims Tribunal.

Moreover, even a mandatory Small Claims Tribunal could offer several types of available relief without triggering Seventh Amendment concerns absent specific Congressional authority. For example, merely providing for injunctive relief, which would be an improvement over the current system for small claimants who simply want their work returned, could be provided without the need to address the Seventh Amendment.

Monetary relief may be in a different category. It is generally agreed that actual damages are considered to be legal relief to which the Seventh Amendment applies, as is the amount of statutory damages when that is in issue. *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340, 355 (1998). Where there is no issue appropriate for a jury – for instance, where a plaintiff only requests the statutory minimum in damages – a jury trial is not required. *BMG Music v. Gonzalez*, 430 F.3d 888, 892-93 (7th Cir. 2005). However, $750, the current statutory minimum, is far less than the envisioned cap for the

Small Claims Tribunal. So further legislation is likely necessary to permit a capped monetary award free of a jury right.

Section 504(b) of the current copyright statute specifically provides for disgorgement of profits in addition to damages. Disgorgement of profits is an equitable remedy, and for some causes of action does not entitle the defendant to a jury trial. The Supreme Court has held "that actions for disgorgement of improper profits are equitable in nature," and "the fact that disgorgement involves a claim for money does not detract from its equitable nature." *Securities and Exchange Commission v. Rind*, 991 F.2d 1486, 1493 (9th Cir. 1993) (citing *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)). Because the court is exercising discretion to prevent unjust enrichment, rather than awarding damages as a legal entitlement, disgorgement of profits does not trigger the right of trial by jury. *Id.* (citing *Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978).[3]

[3] Section 504(b) provides:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C.A. § 504(b) (West 2010). While this section does not permit double recovery, as VLA understands it, a plaintiff can elect to receive disgorgement of the defendant's profits in lieu of actual damages in an appropriate case. *See, e.g., Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983)(noting that section 504(b) permits a plaintiff to choose to present only evidence of infringer's profits). In any event, to the extent that this section might be interpreted as requiring the grant of actual damages before consideration of the disgorgement of profits, VLA suggests that language in the small claims amendment clarify that disgorgement is a separate remedy from actual damages.

Recovery of a defendant's profits has long been available as a traditional equitable remedy in copyright cases. The Supreme Court has made note of this tradition:

> Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been allowed in equity both in copyright and patent cases as appropriate equitable relief incident to a decree for an injunction. That relief had been given in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment.

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940) (citation omitted). This background is particularly important to the Seventh Amendment inquiry, which focuses primarily on the historical roots of the claim and remedy. *See Feltner*, 523 U.S. at 350-52.

Still, no decisional authority has tested the proposition as to whether disgorgement requires a jury, and it is likely that not all small claims would merit a disgorgement remedy in any event. Further, the *Feltner* decision, while applying only to statutory damages, can be read to suggest that all current monetary remedies for copyright infringement entitle either party to a jury trial.

Nevertheless, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), decided prior to *Feltner*, the Supreme Court recognized that in certain situations involving private rights and remedies, Congress could sufficiently occupy the field so as to make regulatory agency adjudication of monetary claims pass constitutional muster:

> The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."

Id. at 54 (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-94 (1985)). Accordingly, to pass constitutional muster, it is likely that Congress would need to make findings that it was necessary for it to occupy the field of small copyright claims and to provide for a new equitable remedy providing for monetary relief up to the selected cap.

It seems plausible that, on recommendation from the Copyright Office, Congress is prepared to do so. In the October 11, 2011 letter from Chairman Lamar Smith that instigated this inquiry by the Copyright Office, Congress asked the office to

> undertake a study to assess: (1) The extent to which authors and other copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system; and (2) furnish specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution.

Accordingly, to the extent that findings are required in order to ensure that enabling legislation will not be met with a successful constitutional challenge, it appears that Congress could be persuaded to make such findings.[4]

[4] The following is a rough example of language in the legislation that might satisfy the *Granfinanciera* test:

> We find that existing remedies for copyright infringement cannot be effectively enforced where the amount in controversy is less than $[cap]. Accordingly, we hereby enter and occupy the field and find that an administrative court within the administrative agency that regulates copyright (the Copyright Office) is desirable and necessary to adjudicate such claims, so we hereby enact the following enabling legislation that creates a new equitable remedy (which may be in the form of injunctive relief or money of no more than $[cap]) and that if the copyright owner so elects to use this proceeding instead of federal court, it shall be mandatory that the claim be adjudicated in the forum that the Copyright Office determines (so long as due process is provided) without a right to a jury trial for either party.

The question of whether Article III presents any additional impediment to a Small Claim Tribunal has a clear answer, based on authority: no. If Congress chooses to occupy the field for purposes of addressing any Seventh Amendment concern, and if doing so is permissible, Article III presents no additional hurdle to be overcome, because the Seventh Amendment inquiry would answer both questions.[5]

Accordingly, there is a reasonable argument, sufficient to permit Congress to go ahead if it chooses to do so, that monetary relief, particularly in the modest amounts that the damages cap would potentially subject defendants to paying, should be available in a Small Claims Tribunal.

[5] *See Granfinanciera*, 492 U.S. at 53-54:

> In *Atlas Roofing*, *supra*, at [430 U.S.] 458, we noted that Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity. Our case law makes plain, however, that the class of "public rights" whose adjudication Congress may assign to administrative agencies or courts of equity sitting without juries is more expansive than *Atlas Roofing*'s discussion suggests. Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power." *Crowell v. Benson*, *supra*, at [285 U.S.] 51. And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. See, *e.g.*, *Atlas Roofing*, *supra*, at [458 U.S.] 453-455, 460; *Pernell v. Southall Realty*, *supra*, at [416 U.S.] 383; *Block v. Hirsh*, *supra*, at [256 U.S.] 158. In addition to our Seventh Amendment precedents, we therefore rely on our decisions exploring the restrictions Article III places on Congress' choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial.

Injunctive Relief and Appellate Rights

VLA believes that permanent injunctive relief is compatible with a small claims process because low-income artists' primary goal is often simply to stop the infringing activity, with the availability of monetary relief being a secondary concern. However, VLA suggests that any injunctive relief have non-precedential value, and that decisions of Small Claims Tribunals to grant injunctive relief be subject to appeal to either a second administrative body (perhaps an institution such as the TTAB or the Copyright Royalty Board), or the district court for review of the scope of the injunction.

Appellate review could take the form of a plenary review of the propriety and scope of an injunction. There also could be a more limited right of appeal, for example, only as to the scope of the injunctive relief that would also pass constitutional muster. Even a plenary review, however, should require an abuse of discretion or clear error appellate standard; *de novo* review would defeat the purpose of the Small Claims Tribunal in the first place. The Federal Arbitration Act provides a ready source for the types of reasons that an award by the Small Claims Tribunal could be overturned in whole or in part, as well as for affirming awards and turning them into enforceable judgments if a defendant fails to comply with a remedy that is ordered.

6. Role of Attorneys

While representation should not be required in order to bring suit and should not be permitted to slow down the process, VLA sees no reason to bar attorneys from the small claims process. VLA and other similar organizations throughout the country routinely provide access to either pro bono legal services or referrals to low cost legal

representation, which VLA feels will only be encouraged with the addition of a streamlined, expedited small claims process.

The inclusion of a fee-shifting provision as a means of encouraging attorney participation is unnecessary and would serve as a deterrent to both parties to engage in a small claims process. The potential responsibility for defendant's attorneys' fees often deters low-income artists from bringing meritorious claims (particularly those involving potential fair use defenses) and, from the defendants' point of view, any required fee award to plaintiff's attorneys would serve as a disincentive for them to participate in the Small Claims Tribunal. Provided the case is brought in good faith, which the *prima facie* case threshold will already have vetted, attorneys' fees should not be available to prevailing parties.

8. <u>Willful and innocent infringement</u>.

VLA believes that a finding of willfulness should not be a part of the Small Claims Tribunal. This issue is intertwined with the voluntary nature of the tribunal, the cap of damages awards, and the desire to provide incentives to defendants to participate in the tribunal, as discussed above. On the other hand, VLA sees no reason to eliminate an innocent infringer defense because it would fall well below the cap proposed and would remove an incentive for defendants who might assert such defense.

Dated: April 12, 2013

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