



October 19, 2012

Register of Copyrights
United States Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559

RE: Notice of Inquiry—Remedies for Small Copyright Claims: Additional Comments

To the Register of Copyrights:

Pursuant to the Notice of Inquiry (“NOI”) published in the Federal Register on August 23, 2012 (77 Fed.Reg. 51,068), I submit these comments on behalf of the Association of American Publishers (“AAP”) regarding the Copyright Office’s efforts to assess the feasibility of creating an alternative copyright enforcement method for claims of small economic value (“small copyright claims”).

AAP’s core mission is to support publishers—copyright owners—by promoting respect for copyright. As the principal national trade association of the U.S. book publishing industry, AAP represents more than 250 member companies and organizations that include most of the major commercial book publishers in the U.S., as well as many small and non-profit publishers, university presses and scholarly societies. Thus, our members have a diversity of perspectives about the best way to structure the adjudication of small copyright claims, which should serve to strengthen copyright protection as a whole.

As noted in our first filing on this issue, larger publishers, in general, are apprehensive about a potential surge in frivolous claims surrounding legitimate uses of third-party works as free-standing publications, inserts within publications, or contributions to collective works. Yet, our smaller publishers can face *de-facto* non-enforcement of their copyrights under the current system.

Appreciating these differences, AAP welcomes the opportunity to provide the Copyright Office with feedback concerning a number of issues integral to forming an alternative forum for adjudicating small copyright claims. In Section I, we have listed our suggestions in parallel format with the NOI. In Section II, in order to illustrate the balance between easing small claims enforcement and preventing a surge of frivolous suits, AAP provides a sample case detailing how our suggestions would be applied.

Before moving to our suggestions, AAP wants to be clear that we are not yet endorsing the creation of an alternative copyright adjudication process. However, should the Copyright Office decide, after carefully reviewing public comments, that it can and should create a small claims process, AAP suggests adopting the following approach based on views received¹ from our members:

Section I

Overarching Approach

Copyright claims are the exclusive province of federal courts.² Devising an alternative method for adjudicating a subset of copyright claims having small economic value deserves the utmost care to achieve a result that strengthens copyright enforcement, rather than compromising it. Therefore, when assessing each of the following components that may form the bases of a small claims process, AAP urges the Copyright Office to consciously evaluate the ways in which streamlining procedures to make filing small claims cost-effective can be balanced by measures that prevent opening the floodgates to frivolous claims.

Nature of Tribunal/ Process

AAP is in agreement with the majority of respondents to the Copyright Office's 2011 NOI³ that oppose vesting state courts with authority to adjudicate small copyright claims.⁴ Earlier comments highlighted the issues engendered by state court lack of expertise, experience with copyright law, and consistency; thus AAP will not re-hash these concerns. With state court adjudication removed from consideration, AAP supports consideration of processing small copyright claims through an informal administrative body, potentially modeled on the Trademark Trial and Appeals Board (TTAB).

More specifically, the Accelerated Case Resolution process of resolving disputes under the TTAB offers a useful example of the type of expedited proceeding that may be suitable for adjudicating small copyright claims.⁵ More detailed reference to ACR processes will be made throughout this comment under the appropriate topic subheadings. As a general proposition, however, AAP believes that "the accelerated timelines, and limitations on discovery, motion practice and the methods of presentation of evidence" under ACR embody a reasonable approach to adjudicating small copyright claims.⁶

¹ AAP notes that we do not represent all publishers in the U.S. Moreover, our comment is a reflection of the feedback we received and does not take into account views of our membership that were not communicated to AAP.

² 28 U.S.C. § 1338 (2012).

³ Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

⁴ See generally Google, AIPLA, and Authors Guild comments re: Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

⁵ See generally *TTAB Accelerated Case Resolution FAQ*, available at http://www.uspto.gov/trademarks/process/appeal/accelerated_case_resolution_acr_faq.doc (last visited, Oct. 17, 2012).

⁶ *TTAB ACR Options*, uspto.gov, available at http://www.uspto.gov/trademarks/process/appeal/TTAB_ACR_Options.jsp (last visited, Oct. 18, 2012).

Voluntary versus Mandatory Participation

There is broad consensus among publishers and other respondents that any small copyright claims process, provided as an alternative to federal district court adjudication, must be strictly voluntary. However, because of the diversity within the publishing industry, AAP appreciates that good faith claimants may desire mandatory jurisdiction over potential defendants in order to prevent removal to federal court, which would result in continued *de facto* non-enforcement of small copyright claims.

Keeping the needs of all copyright owners in mind, AAP would urge the Copyright Office to make participation voluntary for both parties, while creating incentives and, potentially, penalties to encourage parties to keep their claims in the small claims forum. This balanced approach could involve incentives such as a low damages cap and only allowing monetary damages, which would encourage defendants to remain in the small claims forum.

Settlement

AAP supports creation of a small claims process that does not disturb incentives for settling claims out of court. The extent to which such incentives should be incorporated into the adjudicatory process itself is a topic that merits further discussion. Preliminarily, however, one such incentive could be penalizing a party that rejects a reasonable settlement offer, if the rejecting party does not substantially prevail in the case.

Location of Tribunal(s)

AAP recognizes that the high cost of pursuing a claim in federal court is one of the primary factors leading to *de facto* non-enforcement of small copyright claims. In fact, AIPLA's 2011 Economic Survey calculated the median cost of a small copyright case to be \$350,000.⁷ More importantly, AIPLA's survey highlights just how many costs go into federal litigation: "cost of...counsel, associates, paralegals, travel and living expenses, fees and costs for court reporters, photocopies, courier services, exhibit preparation, analytical testing, expert witnesses...surveys, jury advisors," etc.⁸

Cutting down on these expenses is both necessary and appropriate in creating a small claims process that would be cost-effective for pursuing small copyright claims. AAP supports appropriate measures to reduce the cost of enforcing copyrights, provided that counter-measures to limit frivolous suits are paired with such measures. As such, our members that support adjudicating small copyright claims through an administrative proceeding are in favor of

⁷ See AIPLA, *Comments Concerning Development of the Joint Strategic Plan on IP Enforcement*, 3 (August 10, 2012), available at <http://www.aipla.org/advocacy/executive/Documents/AIPLA%20Comments%20to%20IPEC%20on%20Joint%20Strategic%20Plan%20on%20IP%20Enforcement%20-%208.10.12.pdf> (last visited, Oct. 17, 2012). "Small" is relative to the value of copyright cases for which AIPLA sought litigation cost data, the range being divided into (1) less than \$1 million (2) \$1-25 million and (3) greater than \$25 million at risk in the litigation. It is unclear how small the claims in the "less than \$1 million" category were, but this category would necessarily include all of the small claims cases at issue in this filing.

⁸ *Id.* at 2.

establishing a centralized forum location, which uses video- and/or teleconferencing to resolve motions, conduct hearings, and fulfill appearance requirements, if any.

A centralized forum location with remote conferencing would not only eliminate travel costs and living expenses for attorneys, witnesses, parties, etc., but would also promote a host of other benefits that would increase the effectiveness of the small claims tribunal. Such benefits, at a minimum, include: (1) development of the tribunal's expertise; (2) consistency of decisions; (3) elimination of forum shopping; and (4) centralization of information for potential claimants and defendants.

Permissible Claims

In order to meet the Copyright Office's stated goal "to improve the adjudication of" small copyright claims, simplicity will be crucial to creating efficiency. Therefore, AAP suggests that only "pure" copyright infringement claims should be permitted in this process. Although many licensing claims and fair use defenses seem straightforward, such claims and defenses have the potential to become extremely complex.⁹ Moreover, AAP strongly opposes inclusion of contract claims within the jurisdiction of the small claims forum, given that such claims typically raise state law issues and thus detract from the forum's focus on developing expertise regarding copyright claims. Allowing these potentially complex claims and defenses to be raised in what is intended to be an efficient and cost-effective forum will only hinder *bona fide* claimants from enforcing their copyrights.

That said, AAP agrees with many of the respondents from the prior round of comments that it will be difficult to define a narrow category of claims that are "simple" enough to be quickly adjudicated in the small claims forum. As a starting point, however, the Copyright Office should consider the following aspects of a claim as threshold requirements: (1) the amount in controversy should be less than or equal to the cap on damages; (2) adjudication of the claim should be compatible with accelerated proceedings; (3) adjudication of the claim does not require extensive discovery;¹⁰ and (4) the claim is separable from tangential contract and licensing issues. To be sure, this is not a complete list, but AAP supports efforts to improve the functioning of copyright enforcement for all rights holders and is therefore willing to work with the Copyright Office and other stakeholders to devise realistic parameters for the jurisdiction of a small claims forum.

Lastly, AAP appreciates the concern introduced in first-round comments that potential defendants may raise complex defenses or counterclaims, beyond the jurisdiction of the small claims forum, in order to "game the system" and remove the case to federal court. Thus, AAP acknowledges that penalties for frivolous defenses and counterclaims should accompany other measures that narrow the jurisdiction of the small claims forum.

Permissible Claim Amount

AAP agrees with the Copyright Office that there must be a cap on damages available through the small claims forum. Beyond this basic requirement, our members understand that

⁹ For example, whether digital rights were conveyed in a pre-digital licensing agreement that covered all rights.

¹⁰ By non-extensive discovery, AAP means the limited discovery methods commonly associated with ACR proceedings at the TTAB, which are explained in this comment under "Discovery."

creating an alternative system for adjudicating small copyright claims must balance its appeal to claimants against the possibility of increasing frivolous suits. With these counterweights in mind, AAP offers the following suggestions as topics for discussion at upcoming roundtables: (1) a damages cap per work; (2) a \$50,000 aggregate damages cap; (3) a damages cap per work and in aggregate.

Permissible Defenses and Counterclaims

As discussed above, AAP believes the best way to create a cost-effective, efficient and fair process for addressing small copyright claims is to keep the cases simple. Therefore, AAP is opposed to allowing counterclaims, non-Copyright Act defenses, or potentially complex defenses such as fair use to be raised in small claims proceedings. AAP acknowledges that, standing alone, prohibiting such defenses and counterclaims provides a quick “opt-out” mechanism to potential defendants. However, a holistic viewing of the various factors underpinning a small claims forum – such as the damages cap, the unavailability of injunctive relief, and penalties for frivolous defenses – points to a number of potential risks and rewards that can establish a workable process while eliminating opportunities for gamesmanship.

Registration

Starting from the proposition that statutory damages and attorneys’ fees will not be available in the small claims forum, AAP could support allowing claims where registration was not effective at the time of infringement. Specifically, AAP supports the current standard under federal law where a copyright owner can seek actual damages in federal court so long as he files for registration after discovering the infringement and before commencing any legal action.

To be clear, however, AAP does not support waiving registration as a pre-requisite to statutory damages or attorneys’ fees. Registration is required in federal court and to eliminate this requirement within an accelerated small claims forum would likely lead to an unmanageable surge in cases and formalistic, instead of realistic, determinations of liability against defendants deprived of the basic notice that copyright registration provides.

Filing Fee

In developing a small claims process, the Copyright Office could find that a reasonable filing fee would be a useful tool to help strike a balance between the system’s appeal to claimants and the risk of spawning frivolous suits. For example, the TTAB maintains a \$300 filing fee per class per claim,¹¹ which would equate to \$300 for each allegation of infringement of separate copyrights (e.g., if a photographer makes a claim for infringement of 6 photos, the filing fee to address each of those works in a single case would be 6 x \$300 = \$1800).

Initiation of Proceedings

AAP agrees with many respondents that a copyright owner should be required to establish a *prima facie* case of infringement before the defendant is required to respond.¹² In

¹¹ See 37 C.F.R. §2.6(a)(16)-(18) (detailing the filing fees for mark opposition, cancellation, etc. handled by TTAB).

¹² See generally Google, Public Knowledge/Electronic Frontier Foundation/Future of Music Coalition, and Authors Guild comments re: Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

keeping with the goal of creating a simplified avenue for effective copyright enforcement, AAP suggests that a claimant would attempt to meet his *prima facie* burden by submitting to the court the evidence upon which he intends to rely.

For example, a plaintiff claiming copyright infringement based on unauthorized copying of a work would need to submit the following to meet his *prima facie* burden: (1) ownership of a valid copyright; and (2) evidence of actionable copying.¹³ As usual, a certificate of copyright registration would establish a rebuttable presumption of ownership of a valid copyright. Assuming that statutory damages and attorneys' fees would not be available in this forum, a claimant lacking proof of an effective registration could offer proof of filing for registration, along with a showing of the originality and copyrightability of the work. To establish actionable copying, the claimant would need to show: (1) factual copying, and (2) the "substantial similarity" of the works. *Prima facie* evidence of these factors could include: (1) proof that the defendant used the copyrighted material in another work; or (2) proof of access¹⁴ to the infringed work and its probative similarity to the claimant's work; or (3) that the works are strikingly similar.¹⁵

Cases that are truly amenable to an accelerated proceeding with limited discovery should be able to establish a *prima facie* case using only a few documents to convey the viability of the infringement claim. Thus, in this abbreviated context, if the evidence is insufficient to establish a *prima facie* case of infringement, AAP would support dismissing the claim without prejudice. This initial screening process should facilitate the aim of funneling only simple cases into the small claims forum, while reserving more complex cases for a more appropriate form of adjudication in federal court.

Representation

As noted in our previous filing, AAP's membership includes many small and independent publishers that face challenges in pursuing small copyright claims. AAP understands that the cost of hiring an attorney is often a key factor that dissuades copyright owners from taking legal action to protect their copyrights.¹⁶ Therefore, AAP supports creation of a small claims process that encourages *pro se* representation, but still allows attorney representation, provided that presiding judges have authority to issue sanctions against attorney and non-attorney representatives alike for bringing frivolous claims.

Conduct of Proceeding

Without question, the bottom line from the first round of comments was that two factors underlie the current failure to pursue enforcement of many small copyright claims in the federal courts—time and money.¹⁷ As noted above, the median cost to litigate a relatively small

¹³ See 18 AM. JUR. 2d Copyright and Literary Property §225 (2012).

¹⁴ See AM. JUR. 2d Copyright and Literary Property §228 (2012) (noting that access could be shown by a "reasonable opportunity to see or hear the plaintiff's work.")

¹⁵ See 18 AM. JUR. 2d Copyright and Literary Property §225 (2012).

¹⁶ See generally Graphic Artists Guild, Picture Archive Council of America, American Photographic Artists comments re: Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

¹⁷ See generally Alliance of Visual Artists and American Photographic Artists comments re: Notice of Inquiry, 76 Fed. Reg. 66,758 (Oct. 27, 2011).

copyright claim is \$350,000.¹⁸ Thus, any small claims forum must adopt procedures that streamline adjudication in a manner that reduces the time and money required to pursue a claim to resolution. For this reason, AAP is willing to support a system that relies on all-paper filings (through e-mail); uses video and tele-conferencing to eliminate travel costs; requires expedited filing, discovery, and adjudication schedules; and, limits motion and discovery procedures.

AAP anticipates that these streamlined procedures could be the keystones for an efficient and effective small copyright claims system. However, the benefits of this system will not come to fruition if it is bogged down by frivolous claims. Therefore, a fair and workable approach for both claimants and defendants requires that these streamlined procedures be adopted only in conjunction with measures that stave off meritless suits. To this end, AAP proposes that the Copyright Office require: (1) filing fees; (2) good faith declarations [or oaths on penalty of perjury]; (3) verification measures for paper filings;¹⁹ and (4) sanctions for delaying proceedings or abusing the discovery process.

In the abstract, a balance between streamlining measures and those to prevent frivolous suits can be hard to see. Thus, following the topic-by-topic explanation of AAP's views, we have provided an example of a model small copyright claims proceeding, incorporating the key issues discussed in our comment.

Discovery

AAP supports limiting discovery as much as possible, while still allowing parties to gather evidence essential to proving simple infringement claims within the forum's jurisdiction. While the time may not yet be ripe to explore all the minutiae of how to limit discovery, AAP offers the following suggestions, which are put in context in the model case described below: (1) limit discovery to 90 days; (2) allow only written discovery; (3) limit interrogatories, requests for admission and document requests;²⁰ and (4) allow good faith discovery motions,²¹ but require resolution through phone conference.

Damages

Damages will be a crucial factor in shaping the overall viability of an alternative process for adjudicating small copyright claims. The types and amount of damages available under a small copyright claims system could provide a powerful incentive for potential defendants to work within the system instead of opting for transfer to federal court. Thus, AAP suggests removing statutory damages from the realm of possible awards available through the small claims forum.

¹⁸ See *supra* FN 7.

¹⁹ See 37 C.F.R. § 10.18(a)-(d) (explaining the verification measures for electronically filed documents in TTAB proceedings).

²⁰ See *AIPLA ACR Options*, uspto.gov, available at http://www.uspto.gov/trademarks/process/appeal/AIPLA_ACR_Options.jsp (last visited, Oct. 17, 2012) (promoting ACR procedures that limit parties to 20 interrogatories, 10 request for admission, and 10 document requests based off previous ACR discovery agreements).

²¹ See USPTO, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 408.01 (3d ed., 2012) available at http://www.uspto.gov/trademarks/process/appeal/tbmp_3rd_ed_rev_1_chapter_400.pdf (last visited, Oct. 19, 2012) (detailing the "Duty to Cooperate" in regards to discovery, which requires parties to only seek discovery and file motions that are truly relevant to resolving the case).

However, as copyright owners, publishers are aware that *actual* damages can be difficult to prove in infringement cases. Moreover, as many of the comments pointed out, artists, independent publishers, and authors alike are most often seeking remuneration for unauthorized use of a work that they would have been willing to license. Therefore, AAP proposes that “reasonable compensation”²² should serve as the primary small claims forum award for a prevailing claim. As explained by the Copyright Office, reasonable compensation “represent[s] the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced.”²³

Although higher damages awards, such as statutory damages, are available in federal court, it is AAP’s position that such potentially high damages should not be allowed in an expedited proceeding that establishes a relatively thin evidentiary record. Furthermore, although photographers, illustrators and graphic artists have noted concerns with limiting damages to reasonable compensation when this same issue was discussed as a remedy in the context of orphan works legislation, the rationale was that such compensation would be so low in comparison to the high costs of hiring an attorney to litigate the claim that it would be inefficient to enforce their copyrights.²⁴ The Copyright Office’s proposed small claims system, however, should solve this inefficiency, and thus validate reasonable compensation as a fair outcome.

Limiting damages to reasonable compensation will promote the protection of all copyrights, facilitate honest bargaining between the parties, and ensure that the expedited process does not impose unnecessarily high levels of liability based on minimal evidence.

Equitable Relief

AAP opposes authorizing the small claims forum to award any type of injunctive relief because “the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts.”²⁵ The rightful aim of the small claims proceedings will be to determine instances of copyright infringement. However, the Supreme Court “has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”²⁶

Awarding injunctive relief on the basis of the necessarily thin evidentiary record in small claim cases would work a substantial injustice against the enjoined, even if not automatically imposed following a finding of infringement, because the traditional rigors of the four-factor balancing test could not be meaningfully applied.

Moreover, as a practical matter, an injunction can be worth much more than a monetary damages award considering the losses a movie, song, or book producer could suffer if a claimant was allowed to hamstring the release of a work by securing an injunction through a simplified administrative proceeding. Thus, in order to preserve the equity considerations articulated by the

²² See COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 115-117 (2006).

²³ *Id.* at 116.

²⁴ *Id.* at 117.

²⁵ *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

²⁶ *Id.* at 390.

Supreme Court, as well as the vitality of the damages cap, injunctive relief cannot be part of the small claims system.

Effect of Adjudication

Decisions of the small claims tribunal should be final, enforceable, and appealable. And while AAP supports giving the decisions *res judicata* and collateral estoppel effect, we oppose giving the decisions any precedential value. *Res judicata* and collateral estoppel ensure that there is finality to the decisions reached concerning disputes between the parties to the litigation. Precedent, on the other hand, applies to unrelated parties and should not be afforded to decisions from the small claims forum.

All of the administrative law judges (ALJs) that would decide small claims cases in the forum would have equal weight to their decisions. Therefore, just as trial court decisions are not binding precedent on other trial court judges, decisions of fellow ALJs should not constitute precedent either. That said, federal appeals court rulings should still be binding precedent governing small claims disputes because appeals court rulings are a higher authority by law and are intended to clarify the meaning of federal laws, including copyright.

Review/ Appeals

AAP supports including a right to appeal decisions of the small claims forum. Options for appeal could include: (1) an abuse of discretion review by a larger panel of ALJs from the forum; and/or (2) review by a federal court.²⁷ Additionally, while not endorsing the suggestion, AAP appreciates that requiring the appellant to post a bond may be a reasonable mechanism for disincentivizing gamesmanship surrounding the adjudication of small copyright claims.

Frivolous Claims

Throughout this comment, AAP suggests various mechanisms that could help stymie the potential for opening the floodgates to frivolous claims. These suggestions include: (1) filing fees; (2) verification procedures for electronically submitted paper filings; (3) good faith requirements for proposing claims and defenses; and (4) requiring the claimant to establish a *prima facie* case of infringement.

Moreover, devising sanctions to award against parties that raise frivolous claims, defenses, and counterclaims (if allowed) would be integral to creating a workable small claims system. A party could be required to pay a percentage of the alleged claim's value to the defendant, if the judge determines that the party raised a frivolous claim. And, on balance, a similar sanction could be assessed against a defendant for raising a frivolous defense.

Aside from specific sanctions, however, AAP would remind the Copyright Office, and all stakeholders, that each component of the small claims system presents an opportunity to strike a

²⁷ AAP respects the constitutional requirement of making a jury trial available and appreciates the comments from the Kernochan Center at Columbia University to the first NOI, which suggest the possibility of an appeal to federal court as a method of safeguarding this right, while also noting that waiver of the right by voluntary use of the small claims system may obviate the need to provide an appeal to a federal court.

balance between facilitating simplified copyright enforcement and unleashing a flood of frivolous suits.

Evaluation of Small Claims System

As the detailed questions within the second NOI demonstrate, creating an alternative method to adjudicate small copyright claims in an efficient, effective, and just manner will be a complex task, to say the least. Therefore, AAP strongly supports launching the system as a pilot program. Starting on a small scale, reviewing procedures, and amending qualifications and processes before expanding to a full-scale system will allow stakeholders to revise and improve the system so that small copyright claims are no longer subject to *de facto* non-enforcement.

AAP assumes that creating the small claims tribunal would require the Copyright Office to recommend proposed legislation to Congress, to be followed by public hearings on the legislative embodiment of the proposal. AAP supports this approach and would suggest providing a 3 year time-frame for the pilot version of the small claims tribunal, followed by the Copyright Office’s review and request for public comment on its functioning and further refinement or, potentially, discontinuation.

Section II

As noted above, AAP views the expedited trial format of the TTAB’s Accelerated Case Resolution process as a potentially reasonable model for creating a small claims forum. The following timeline provides a step-by-step illustration of the application of this model to a hypothetical copyright infringement case where a photographer alleges that a publisher made unauthorized copies of four photographs by including them in a book that is scheduled for release in three months. Additionally, AAP gives our rationale for suggestions that will provide balance to the streamlining measures, such as centralization, all-paper filings, teleconferencing and limited discovery, which could encourage genuine as well as frivolous claims.

Adjudication Phase	Party Action	AAP Rationale
Initiating Case: Filing Fee	Claimant pays \$300 per work he alleges the defendant infringed: \$300 x 4 photos = \$1200	Requiring a modest filing fee is an important threshold that will dis-incentivize filing frivolous claims.

<p>Pleading:</p>	<p>Complaint: Plaintiff establishes <i>prima facie</i> case of copyright infringement.</p> <p>If No = Case Dismissed Without Prejudice</p> <p>If Yes = Defendant Responds</p> <p>Answer: Defendant files an Answer only after notification from the forum that the Plaintiff has met its <i>prima facie</i> burden.</p>	<p>The <i>prima facie</i> burden on the plaintiff is another step that filters out meritless suits.</p> <p>Upon filing the Complaint and all other trial documents, forum rules must establish that electronic signatures represent certification of good faith filing.</p> <p>Discovery of violation of the requirements of good faith filing should result in varying levels of sanctions.</p>
<p>Discovery Conference</p>	<p>Parties meet to discuss possibility of settlement and agree to the limited discovery and motion procedures of the small claims forum.</p>	<p>As stated above, AAP supports creation of a forum that promotes settlement. The extent to which unfruitful settlement discussion should result in penalties based on the result of the trial is a matter in need of more discussion.</p> <p>Important to note, if injunctive relief was available in the small claims forum, the photographer in this example could leverage the publishers' relatively large losses that would result from an injunction to force the publisher to settle a meritless suit.</p> <p>If a small claims forum is to have a meaningful damages cap, which it must, injunctive relief cannot be a possible remedy.</p> <p>Given that AAP supports creating a completely voluntary forum, we expect parties that agree to adjudicate claims within the forum to uphold the agreement to limited discovery as it leads to lower costs and speedier resolution of the claim for both parties.</p>
<p>Discovery Period: 90 Days</p>	<p>(1) Only written discovery; (2) Limited interrogatories,</p>	<p>An accelerated timeline coupled with limited discovery requests</p>

	requests for admission and document requests; and (3) Good faith discovery motions.	will significantly reduce the cost of pursuing a copyright infringement claim. However, as explained by the TTAB, these cost and time savings are not realized if parties do not uphold a “Duty to Cooperate,” which requires parties to focus only on relevant requests and ways to narrow the issues, instead of gamesmanship.
Submission of Evidence: 75 Days	Plaintiff and Defendant have opportunity to electronically submit evidence.	Parties, again, must certify through an electronic signature that documents are submitted in good faith. In a forum that does not require personal appearances, verification and authentication procedures, with meaningful penalties for violation, are essential for creating a just system.
Trial Briefing: 75 Days	Plaintiff has 30 days after the close of discovery to file its trial brief. Defendant has 30 days to file its response. Plaintiff has 15 days to file a reply brief.	In addition to verification procedures, the ALJs should be empowered to sanction any representative that proposes frivolous arguments in the pleadings as well as the briefs.
Decision: 50 Days	Decisions should be final between the parties (<i>res judicata</i> and collateral estoppel); enforceable; and appealable. Decisions should not serve as precedent within the forum, and especially not in federal courts.	Affording forum decisions <i>res judicata</i> and collateral estoppel status ensures that dissatisfied (or victorious) claimants will not bring the same infringement action against the defendant in district court.
Appeal: 30 Days	Parties may file a Motion for Rehearing, and if granted, the case goes to a panel of ALJs to review the record under an abuse of discretion standard.	

Conclusion

AAP is committed to representing the best interests of all of our members. This includes a category of members that share the frustration that pursuing small copyright claims through the federal court system does not provide a practical enforcement mechanism. Specifically, AAP represents numerous small and non-profit publishers, university presses, and scholarly societies. Conversely, AAP also represents publishers that have been successful in enforcing their copyrights using currently available methods, ranging from private settlements to full-scale litigation.

In general, the above mentioned views represent a baseline within the publishing industry. However, as discussions continue, AAP members representing diverse viewpoints within the book and journal publishing industry may raise their specific concerns in response to more defined proposals.

We appreciate the Copyright Office's attention to detail in reviewing suggestions for an alternative system to adjudicate small copyright claims. Hence, AAP reiterates that the importance of crafting a just and efficient system requires consciously evaluating the ways in which streamlining procedures to make filing small claims cost-effective can be balanced by measures that stave off meritless claims.

AAP looks forward to working with the Copyright Office to formulate a solution that strengthens copyright protections and provides this fair and adequate enforcement mechanism for all, without potentially opening the floodgates to frivolous suits, or continuing the pattern of *de facto* non-enforcement for holders of small copyright claims.

Sincerely,



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