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U.S. Copyright Office
Office of Policy and International Affairs
Attn: Catherine Rowland, Counsel
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Submitted electronically via http://www.copyright.gov/docs/smallclaims

Re: Request for Additional Comments from the Public Issued on August 23, 2012 by the U.S Copyright Office in connection with Remedies for Small Copyright Claims [Docket No. 2011-10]

Dear Ms. Rowland:

The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide additional comments to its previous filing regarding remedies for small copyright claims.[1]

Subsequent to IFTA's filing, in May 2010, the U.S. Copyright Office organized a roundtable at which stakeholders discussed various alternatives to costly litigation which small rights holders cannot afford in order to enforce their rights. At the roundtable, the constitutional implications of a small copyright claims tribunal were discussed. IFTA's prior submission did not consider the constitutional implications of the Specialized Court system previously proposed. IFTA now addresses these issues and provides additional suggestions for remedies for small copyright claims. The suggestions contained herein are intended to provide a possible roadmap for a cost effective, efficient and fair remedy to those copyright owners.

I. IFTA Recommends the Establishment of an Administrative Agency for Resolving Small Copyright Claims

As stated in IFTA's prior comments, piracy directly undercuts anticipated revenue from the distribution of a particular project and also impacts the ability of independent producers to secure financing for future productions. Independents typically secure production financing by entering into pre-production agreements with distributors on a territory-by-territory basis. The distributors' commitment to pay guaranteed minimum license fees upon delivery of the completed product becomes security for loans used to finance the film itself. Any territory troubled by extensive

[1]IFTA's response to the Request for Written Comments from the Public Issued on October 24, 2011 by the U.S Copyright Office in connection with the Treatment of Small Copyright Claims [Docket No. 2011-10] dated January 17, 2012.

piracy leaves distributors who are unable to make such commitments, forcing the producer to look elsewhere or give up the project altogether. Moreover, due to declining minimum guarantees and license fees, it is even more impracticable for independent producers who are small copyright owners to enter into costly litigation and attorneys' fees to protect their copyrights because the compensatory damages at stake are frequently lower than the cost of litigation or ex officio copyright enforcement.

A. Article I and Article III Courts

The judicial branch of the government is comprised of tribunals created pursuant to Article III of the United States Constitution.[2] Article III tribunals consist of the Supreme Court of the United States and the inferior courts established by the Congress, including all United States courts of appeals, United States district courts, and the U.S. Court of International Trade. Based on history, it seems highly unlikely that Congress will establish a new Article III court for the purposes of hearing small copyright claims.

Pursuant to Article I of the Constitution, tribunals may be created by Congress to review agency decisions, military courts-martial appeal courts, ancillary courts with judges appointed by Article III appeals court judges, or administrative agencies. When a potential deprivation of life, liberty, property, or property interest is involved, the decisions of Article I tribunals are usually subject to review by an Article III court. It appears that an Article I tribunal is not an option for claims by small copyright owners because such tribunals are typically created only in U.S. territories (including D.C.), to hear military cases or for cases involving public rights and the government is always a party in such cases because matters of government administration (*e.g.* tax courts, veterans claims) are involved.

B. Arbitration and Mediation

A binding arbitration and/or mediation tribunal is also not an option for small copyright claims because adjudication by such tribunal requires the consent of all parties.[3] With unauthorized copyright claims, it is impractical for both parties to agree to use any form of alternative dispute resolution mechanism because the infringer is likely unknown to the copyright owner and is also likely to be uncooperative.

C. Administrative Agency

Administrative agencies were generally created to adjudicate "public rights." Congress may transfer adjudication of "public" but not "private" rights to such administrative agencies despite Article III's stating that "the judicial power shall be vested" in courts whose judges possess protection of their salary and tenure.[4] In *Thomas v. Union Carbide Agricultural Products Co.,* the

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[2] Article III of the Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[3] Federal Arbitration Act (FAA), 9 USC § 2 (1925).

[4] See generally *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

Court held that Congress may exclude cases from Article III adjudication where Congress has "create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be... appropriate for agency resolution with limited involvement by the Article III judiciary."[5] The public's right to fair use of copyrighted works is a long-standing and important premise of U.S. Copyright Law. As such, the creation of an administrative agency for small copyright claims appears to be constitutional.

With Article I and Article III courts as well as arbitration and mediation as unlikely alternatives, the creation of a federal administrative agency pursuant to the Administrative Procedure Act ("APA")[6] appears to be a possible option for a more cost effective way of resolving small copyright claims.

II. Seventh Amendment Considerations in the Establishment of an Administrative Agency for Resolving Small Copyright Claims

A right to a jury trial in civil cases is not guaranteed by the Seventh Amendment.[7] Moreover, parties to administrative agency hearings do not have a right to jury trial. In *Curtis v. Loether*,[8] the Court stated "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." "The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."[9]

However, in *Feltner v. Columbia Pictures Television, Inc.*, the Court held that, despite section 504(c) of the Copyright Act's silence, the Seventh Amendment provides the right to a jury trial, which includes a right to a jury determination of the amount of statutory damages.[10] The Court found that "there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff." "As a result, if a party so demands, a jury must determine the actual amount of statutory damages under [section 504(c)] in order 'to preserve the substance of the common-law right of trial by jury.'"[11] Therefore, since statutory damages will not be an available remedy to claimants seeking an order from the proposed administrative agency and each copyright owner must detail its damages, which may vary according to the nature of the infringement, the right to a jury trial is inapplicable.

III. Components of the Proposed Administrative Agency

Where there is any conflict between the proposed structure of the agency below and the APA, the APA shall control.

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[5] *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3340 (1985).
[6] Administrative Procedure Act (APA), 5 U.S.C.A. §§ 501 et seq. (1946).
[7] *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977).
[8] *Curtis v. Loether*, 415 U.S. 189, 1974 (1974).
[9] *Yakus v. United States*, 321 U.S. 414 (1944).
[10] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).
[11] *Id*. at 355.

A. Judges

The judges serving as triers of fact in the proposed administrative agency should consist of a panel of experts in copyright law. And, similar to the administrative law judges from the Copyright Royalty Board, the Chief Justice shall also have significant experience in adjudications, arbitrations or court trials. The judges should be free of conflicts of interest with respect to any case in which they are seated. The panel may be expanded based upon the needs of the agency (*e.g.* number of claims, complexity of cases). Minimum qualifications should be established for individuals appointed to the panel. Similar to the Copyright Royalty Board, the judges should be appointed by the Librarian of Congress.[12]

B. Rules

The rules of the proposed administrative agency could be similar to that of the USPTO Trademark Trial and Appeal Board and the Copyright Royalty Board and should be in compliance with the Administrative Procedures Act. The primary goal of the rules should be to facilitate a final decision as quickly as possible while providing due process to the parties so as to terminate continuing infringements.

C. Appeal and Right to Judicial Review

As is typical with most administrative agencies, the proposed agency's decision would be subject to a limited appeal procedure before the agency or perhaps, as necessary, to the Register of Copyrights as prescribed by the rules governing the Copyright Royalty Board.[13] Once administrative remedies are exhausted, the decision may be reviewed by a district court or federal court of appeals and, as is common, such review would be for legal errors only and the court would not hear any additional testimony or receive any additional evidence.[14] Any appeal should only be for questions of law, otherwise, there is no cost or time saving by using the special mechanism for small copyright holders. Parties may voluntarily waive their right of appeal at the outset of the proceedings. Because the agency's finding of facts is not reviewable, the Seventh Amendment right to jury trial is not applicable.

As with the Copyright Royalty Board, review of legal conclusions should be made by the Register of Copyrights. If the Register of Copyrights concludes that any resolution reached by the judges was in material error, the Register of Copyrights shall issue a written decision correcting such legal error, which shall be made part of the record of the proceeding.[15]

D. Location of Proceedings

We propose that the proceedings are heard by written submissions (see Section B. Rules, above) and, in the event an oral hearing is required, the parties may appear in person, telephonically or by videoconference. As such, Washington, D.C. as the centralized location would be sufficient.

E. Initiation of Proceeding

The complaint must be in writing and contain the name and address of the complainant, the necessary defendant(s) and counsel for the respective parties, if any. Some form of documentary

[12] 17 U.S.C.A. § 801(a).
[13] 17 U.S.C.A. § 802(f)(1)(B) and (D).
[14] Administrative Procedure Act § 702.
[15] 17 U.S.C.A. § 802(f)(1)(D).

evidence, *e.g.*, affidavit, certificate of registration, etc. should be filed with the complaint. The complaint should also include a certification that the party commencing the action has not filed any other action or proceeding involving the same issue or issues before any other court or agency. A complainant may seek a declaration of rights, injunctive or other equitable relief, which is crucial in copyright infringement cases. The complaint should be subject to the statute of limitations proscribed by U.S. Copyright Law.

1. Voluntary or Mandatory – In order to be mandatory and binding, the proposed administrative agency should have jurisdiction over all claims which qualify (*e.g.* damages do not exceed cap, statutory damages are not requested, etc), however the parties may choose to waive such jurisdiction and litigate their claims in U.S. district court.
2. Eligible works/permissible claims – The proposed administrative agency should be available to all copyrighted works, but limited to infringement claims as this should be a specialized tribunal much like the Copyright Royalty Board. With the exception of claims for statutory damages, all claims and defenses under the DMCA should be permitted.
3. Amount of claims – Consideration should be given to setting minimum and maximum claim amounts with the minimum being the cost of the filing fee and the maximum being the amount required for filing in U.S. District Court, *i.e.* exceeding $75,000.[16]
4. Proof of copyright ownership – Some form of documentary evidence, *e.g.*, affidavit, certificate of registration, etc. should be filed with the complaint.
5. Filing fee – Filing fees should be minimal so as to allow access to all small copyright owners. In an effort to assist with the administrative costs in processing and hearing cases, the filing fees could vary based on a percentage of the amount in dispute.
6. Attorney representation – Parties may appear through counsel or *pro se*. However, similar to the rules for the USPTO Trademark Trial and Appeal Board, no "authorized representatives" should be permitted unless they are attorneys. While small claims courts typically do not allow parties to be represented by counsel, copyright law is more complex than the types of cases on the docket of small claims courts so the parties should be entitled to be represented by counsel. Also, a defense to copyright infringement is more difficult than defenses to other small claims because there is a presumption of copyright ownership. For example, a defense asserting fair use would likely need to be briefed by an attorney.
7. Group claims – In an effort to conserve the resources of small copyright owners, trade associations, such as IFTA, or group representatives should be permitted to act as "channeling associations" and file a single claim on behalf of a sizeable group of small copyright owners. While the proposed administrative agency should have a maximum amount of damages that may be sought in order to bring an action, for channeling associations, the amount in dispute should be calculated per infringement, not per action.

F. Proceedings

It is proposed that the hearing of the case on the merits shall be held as soon as possible after the claim is filed. In order to obtain an expedient resolution of the claim, limited formal discovery procedures should be permitted, however, in the interest of justice, the trier of fact may expand such

[16] 28 U.S.C.A. § 1332(a).

limitations, but such procedures should not be permitted if the intent is to delay the proceeding. The form of the opinion or decision shall show a ruling on each finding, conclusion or exception presented and shall state "the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and the appropriate rule, order, sanction, relief, or denial thereof."[17] Publications of opinions and decisions of the agency shall be in accordance with the APA.

G. Damages

With the exception of statutory damages, parties should be permitted to seek damages pursuant to U.S. Copyright Law, which include monetary relief, injunctions, attorneys' fees and other costs. If statutory damages are requested, then the defendant must be provided with an option for a trial by jury[18] and the agency will no longer have jurisdiction over the claims. While it is possible that the legislature has the power to delegate the assessment of penalties for violation of statutes to administrative agencies, in light of the *Feltner* case, the proposed agency's statutory damages award may be unconstitutional.

H. Frivolous Claims, Defenses or Counterclaims

A determination by the administrative agency that a claim, counterclaim or defense is frivolous or asserted in bad faith, then the agency should have the authority to order sanctions, including payment of a party's attorneys' fees.

IV. Conclusion

IFTA is pleased that the Copyright Office is actively seeking to establish remedies for small copyright claims and would like to express its sincere interest in being part of industry and governmental discussions with regard to any further development of such remedies. IFTA supports the Copyright Office's establishment of system for resolving small copyright claims and remains available to provide further comments on or to assist with implementation of such system.

Thank you for your time and support of the intellectual property industries.

Respectfully submitted on October 19, 2012

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[17] Administrative Procedure Act § 557(c)(3).
[18] Feltner, *supra.*