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Re: Small Copyright Claims Court

I teach civil procedure and patent law; I do not follow copyright litigation in any detail. However, I just completed a review of the ABA's plan for a small patent claims court. In response to a request by Jacqueline Charlesworth that I look at the Copyright Office's proposal for a small copyright claims court, I offer these reactions.

Overall impact.

I certainly understand the case for a court to resolve small claims. However, I am concerned about its impact on defendants. When I first read the proposal, I thought of it as a boon to small entities, such as individual authors who find others utilizing their work without authority. But that may not turn out to be the predominant use of the new court. Small entities with claims against large-scale infringers will not be able to use the court because of its subject-matter limitations, unless they become aware of infringements early on. But because small entities do not have the resources to monitor the market efficiently, they are unlikely to be in a position to quickly identify infringement. Of course, they could use it to remedy infringement by other individuals and small entitities, or to allocate rights among collaborators. However, that use will depend on the cost of maintaining an action: unless the cost is low relative to the "small claim," suing may not be cost effective. Given these problems, the main beneficiaries of the proposal may well be large entities with the resources to police the marketplace diligently. Accordingly, there is something of an asymmetry: individuals will not often enjoy the benefits of a system, but large firms would be able to sue them cheaply.

Furthermore, infringement that is relatively benign, that now occurs "below the radar," will suddenly become actionable. That could have several consequences. It could increase the amount of litigation overall. Given the near-de minimis nature of some of these infringements, the availability of a small claims court will put pressure on substantive doctrines, such as fair use. Finally, the court creates an ideal mechanism for hassling small-

scale competitors and could reduce the types of expressive materials available to consumers. Fan fiction is one example.

Subjects of Inquiry

1. *Nature of tribunal*. The ABA has considered a variety of tribunals to adjudicate small patent claims. The best choice appears to be the US Court of Federal Claims, which has some analogous sources of jurisdiction. I would suggest that court for these claims as well. Using an existing court would also simplify administration, eliminate the need to hire judges specifically to hear these cases, and reduce the chance that large-scale copyright holders will have too much influence on the selection process. More generally, I would suggest that the two proposals coordinate and choose the same court. It would build adjudicators' expertise in innovation law and policy.

One problem with designating the Court of Federal Claims (or the Copyright Office) as the small copyright claims court is that it is located in Washington, DC. Indeed, the problem with choosing any single court is that it would essentially create a personal jurisdiction rule for small claims that makes contacts with the US sufficient to support jurisdiction in a single location (such as the District of Columbia), and thus might increase the burden of litigating. At the same time, however, if the cost of litigating is low, if oral argument can be accomplished via video, and if the court travels around the country on a regular basis, the imposition may not be considered constitutionally objectionable. Alternatively, and as noted below, if use of the court is voluntary, litigants could be considered to waive their objection to personal jurisdiction by consenting to litigation in the small claims court.

2. *Voluntary vs. mandatory*. I would allow plaintiffs to choose whether to litigate in this court and then enact rules on the timing of answers and motions to remove that furnish defendants with significant opportunity to determine whether they wish to consent. The option to stay in the small claims court would operate as a waiver of the right to a jury trial and a waiver of objections to the personal jurisdiction of the court. If costs are low enough relative to a district court action, I believe that defendants would waive. However, I think it is critical to allow defendants time to develop the case before they must decide whether to remove or consent. First, plaintiffs have as much time as they need to decide whether to lodge the case in the small claims court initially, but the clock starts running for defendants once they do. Second, if efficiencies are achieved by limiting the right to counterclaim, a defendant's decision to stay in the court could have serious substantive consequences. Consent might be seen as a waiver of transactionally-related counterclaims. Even if not, the issues decided in the small claims court could affect later litigation.

In sum, as a constitutional matter, I do not believe that litigation in the court could be made mandatory.

3. *Arbitration*. I have no view.

4. *Mediation.* I have no view.

5. *Settlement.* I do not believe a small claims court can solve all problems. I would not make this a goal. Indeed, the availability of cheap adjudication could thwart settlement.

6. *Location of tribunal*. See above, on use of the Court of Federal Claims.

7. *Qualifications.* See above.

8. *Eligible Works.* I have no view.

9. *Permissible claims.* Limiting the number and types of claims that could be asserted in the small copyright claims court is certainly a way to achieve efficiency and lower costs. However, it can also have severe disadvantages. It could lead to a proliferation of litigation. The experience of the federal courts, the Temporary Emergency Court of Appeals (which had "issue" jurisdiction), and the USITC have not been favorable. Defending in two fora costs more and can be prohibitive for the poorer party. A party can get whipsawed. The defendant can wind up requiring to pay money to a plaintiff who (net) owes it money. The estoppel effects can be unpredictable because it can be unclear which case will go to judgment first and what it will decide.

These problems are why the Federal Circuit was given "case" jurisdiction and why Congress enacted the supplemental jurisdiction statute. It is also part of the reason the US lost the United States-Section 337 of the Tariff Act (L/6439 - 36S/345, Nov. 7 1989) case in GATT dispute settlement (pre-WTO): foreign parties were forced to defend patent infringements in a court with short time limits and no possibility of asserting counterclaims while domestic parties were free to use the district courts. Granted that was a case about national treatment under the GATT, which is not an issue here. But the point is the same: if a party cannot assert its rights and cannot remove to the district court, the result is unfair. Defendants should either be given the right to assert all their claims or be permitted to remove (after being given ample time to decide whether to remove).

Paradoxically, and as noted earlier, eliminating supplemental jurisdiction could have the opposite effect: instead of proliferating litigation, courts may take the decision to proceed in a court with limited authority as *waiving* (estopping) transactional- related claims. That is, these claims may be regarded as res judicata, and not as preserved for later submission to a court with broader authority. An involuntary system with this effect would not, in my view, be constitutionally permissible.

10. *Claim amount.* I have no intuition as to the amount. A plaintiff who did not fully investigate before filing should not be allowed to exceed the cap, or to remove a case that has been fully developed by the defendant. Note that if there is a cap on the claim amount, it will be necessary to set rules for determining how claims regarding ownership or demands for injunctive relief will be evaluated.

11. *Defenses.* I believe any defense that could be asserted in district court should be available in this court. There is a strong possibility that the existence of this court will give right holders new opportunities to harass individuals. Disallowing important defenses would make this problem even more severe.

12. *Registration.* I have no view.

13. *Filing fee.* I have no view.

14. *Initiation.* I would use the same rules that obtain in district court. Otherwise, the cost of litigation will increase, not decrease. I think the main reason people would use the court is to reduce costs so anything that requires a new showing or different procedures should be disfavored. I would permit declaratory judgment actions, though valuation of the claim may present a problem. I would permit a defendant sued in district court to remove to the small claims court only on consent of the plaintiff.

15. *Representation*. I would permit the parties to decide whether they wish to be represented. Because of concerns about harassment, I would not permit corporations to hire nonlawyers, who are not subject to ethical obligations, to conduct these cases. The mortgage crisis offers cautionary tales.

16 & 17. *Conduct of proceedings, discovery, motion practice.* The more truncated the proceedings, the lower the cost and the more likely people will consent. The rocket docket rules that are used in some jurisdictions for patent litigation may offer a good template.

18. *Damages.* I have no view.

19. *Equitable relief.* Injunctive relief is so critical in copyright cases, it is difficult to see how it could be eliminated from the court's remedial power. Given *eBay v. MercExchange*, that must include the power to withhold injunctive relief in favor of a compulsory license.

20. *Attorneys' fees and costs.* I would retain the current rules on fee shifting – otherwise, the unfairness to the poorer party increases. When they are available, I would cap them.

21. *Recording*. I have no view.

22. *Effect.* The res judicata implications depend heavily on the proceedings that are offered, whether participation is mandatory, whether the defendant is given sufficient time to remove the case to a district court. See above.

23. *Enforcement.* For many administrative reasons, it makes little sense to deviate from the normal rules on the enforceability of judgments.

24. *Review.* I would certainly include a right to review. As noted above, the new opportunities to litigate may affect substantive rights. Technological change raises novel legal issues. There could easily be a selection effect, where some of these new issues arise more often in this court than in district courts. Without appellate review, copyright law could easily fragment, leading people to shop for this court in order to obtain the advantage of special law. Fee shifting might discourage review (and therefore reduce costs). However, it favors the richer party and the establishment of the court already provides ample opportunities for abuse.

25. *Group claims.* I have no view.

26. *Frivolous claims*. I would rely on the usual rules. Proliferating specialized law should be disfavored.

27. *Constitutional issues.* I think the right of removal would deal with these problems, see above.

28. *State court alternatives.* There are good reasons for giving federal courts sole authority over the development of copyright law. Giving state courts authority could also lead to legal fragmentation and require the Supreme Court to step in more often.

29. *Empirical data.* The ABA group looking at a small patent claims court has some data that might be useful to you.

Sincerely,

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