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Public Hearing on Small Copyright Claims 11-27-2012

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PUBLIC HEARING

ON

SMALL COPYRIGHT CLAIMS

Tuesday, November 27, 2012

9:40 a.m.

UCLA School of Law

405 Hilgard Avenue

Room 1314

Los Angeles, California 90095

Reported by: Capital Reporting Company

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1 A P P E A R A N C E S

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of Copyrights

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International Affairs

4 ANN CHAITOVITZ, U.S. Patent and Trademark Office

5 CAROLYN WRIGHT, Law Offices of Carolyn E. Wright, LLC

6 EDWARD HASBROUCK, National Writers Union

7 ERICA BRISTOL, Mediator

8 KIM TOMMASELLI, Independent Film & Television Alliance

9 ALICIA CALZADA, National Press Photographers
Association

10 ART NEIL, New Media Rights

11 LORIN BRENNAN, Linde Law Firm

12 MOLLY KNAPPEN, Designer and Developer

13 KENDALL REED, Mediator, Arbitrator, Attorney

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1 P R O C E E D I N G S

2 MS. CHARLESWORTH: Good morning, everyone.

3 I think all of you were here -- no, we maybe have one
4 newcomer. Two newcomers, I'm sorry.

5 My name is Jacqueline Charlesworth. I'm
6 Senior Counsel to the Register in the U.S. Copyright
7 Office, and this is day two of our hearings on small
8 claims, small copyright claims. And we had a very
9 interesting and lively discussion yesterday, thanks to
10 our participants, and we are anticipating the same
11 today, although it will be, we hope, a shorter day.

12 To my left is Catherine Rowland, who is
13 Senior Counsel for Policy and International Affairs in
14 the Copyright Office. And she and I will be
15 moderating today and trying to elicit all of your good
16 thoughts on a potential small claims system for
17 copyright owners.

18 We are up to Panel V, and we will begin with
19 that today. This panel concerns relief and appeals.
20 The questions on the table are, what types of remedies
21 should be available, assuming we adopt a small claims
22 system? Should they be different from those available

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1 in the regular federal court system? Should we have
2 an ability to get injunctive relief or not? Should
3 there be an opportunity to take an appeal? And, if
4 so, what would the appellate process look like?

5 So we will begin -- we touched on some of
6 these, many of these, issues yesterday, but we didn't
7 really have an opportunity to flesh out all of your
8 ideas or have a very focused discussion on any of
9 them, I don't think. So we will start with damages.

10 There was some discussion yesterday of
11 statutory versus actual damages, and we have received
12 a number of comments from some proponents of a small
13 claims system that suggests that only actual damages
14 should be available through the system, meaning it
15 would be compensatory damages only, there should be no
16 statutory damages.

17 Other people, particularly people here I
18 think in this room, expressed the view that it is very
19 important to have statutory damages. So I want to
20 open the floor on that question and see what people
21 have to say this morning.

22 Mr. Hasbrouck?

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1 MR. HASBROUCK: Well, I would reiterate, as
2 we said in our written submissions and as I said
3 yesterday, that the National Writers Union remains
4 firmly of the opinion that for this process to provide
5 meaningful relief and a meaningful degree of
6 simplification and greater ease of access to the
7 process, statutory damages are essential.

8 In most cases, proving actual damages is
9 going to be extremely difficult and most of the
10 evidence of actual damages is going to be held by the
11 infringer or third parties and not readily available.

12 And I don't want to belabor what I said
13 yesterday, but I would make an additional point here
14 about this, that if the goal is simplicity, why should
15 we even be thinking of getting rid of statutory
16 damages, which are the sole simplifying factor in the
17 current structure. That is the one thing that makes
18 it a little bit easier to deal with is you don't have
19 to prove actual damages if you have registered. I'll
20 come back to that in a moment.

21 But if we don't have statutory damages, you
22 will put victims of infringement in a perverse place

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1 where they have to choose between a process with
2 simplified procedures in some respects -- a small
3 claims process -- but with a huge additional burden of
4 developing evidence and proving actual damages, or a
5 process which is otherwise much more complicated but
6 with a huge simplifying factor of statutory damages.

7 That doesn't make sense. Why should people
8 have to play a guessing game as to which form of
9 simplification and which aspect of simplification is
10 going to be better? If you want a simple,
11 straightforward process, statutory damages are vital.

12 The second thing I would say on that,
13 though, is in most cases statutory damages are not
14 available now because the work wasn't registered.
15 Because most writers know that they are never going to
16 be able to sue in a federal court, it is a rational
17 business decision for a writer not to waste their time
18 registering, even for those kinds of work where it is
19 relatively feasible, unlike, say, most online work
20 where it is practically infeasible to register, as we
21 discussed yesterday.

22 So most of this work is unregistered. If we

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1 want this to work, statutory damages need to be
2 available without any prerequisite or registration, as
3 they would be available for foreign writers anyway.

4 MS. CHARLESWORTH: Now, Mr. Hasbrouck, you -
5 - I know you said that statutory damages would be
6 simpler and they wouldn't require the same amount of
7 proof. My question for you is, let's say infringement
8 is shown, infringement of a textual work. How would
9 the Court go about setting an amount of statutory
10 damages? Would there be any guideposts?

11 Today -- today we have -- or in federal
12 court, you have jury instructions, there are other
13 sorts of guideposts when courts go to award statutory
14 damages or when juries as there is a jury right,
15 attach to statutory damages. When they look at it,
16 there are certain factors that are considered,
17 sometimes including actual damages.

18 So I guess the question is, assuming you
19 have a small claimant, would there be a simple way for
20 a court to award statutory damages that wouldn't
21 involve a further showing by the plaintiff? Or what
22 is your thinking on that?

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1 MR. HASBROUCK: It is not clear that the
2 process would be -- need to be any different than it
3 is when a judge -- if the defendant doesn't elect or a
4 plaintiff doesn't elect for jury, if a judge is
5 assigning damages now. And I think we see this a lot
6 in state small claims practice where judges
7 essentially act largely as making, you know, their
8 best guesstimate in equity.

9 Statutory damages -- there is very little
10 statutory guidelines, frankly, for what statutory
11 damages are supposed to be. And I think for most
12 writers throwing themselves on the mercy of a judge
13 and the judge's best guesstimate is going to be a lot
14 better than what they get now, which is nothing. And
15 compared to the difficulty of proving actual damages,
16 again, I think most writers would be prepared to take
17 what a judge in equity would award as statutory
18 damages.

19 MS. CHARLESWORTH: Any other thoughts? Ms.
20 Wright?

21 MS. WRIGHT: I'll play a little bit of
22 devil's advocate here, because most infringers,

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1 alleged infringers, are going to argue that there
2 should be some relationship between actual damages and
3 statutory damages, arguing that it is three to five
4 times actual damages for statutory damages.

5 Tenenbaum, fortunately, the court said there
6 doesn't have to be the link. It is not a Gore v. BMW
7 problem. But that is going to be an argument.
8 However, I would argue that a lot of it should be an
9 equitable -- the statutory damages should be an
10 equitable remedy that is dependent on a lot of the
11 intentional act, the willfulness of the infringer, and
12 it is just a call by the judge or the jury.

13 MS. CHARLESWORTH: Okay. Other thoughts?
14 We have newcomers. I call on people, I should have
15 warned you.

16 (Laughter.)

17 And, actually, while I'm at it, could you
18 please introduce yourselves and just explain your
19 interest in the proceeding, so we all know who you
20 are.

21 MR. NEIL: Hi, everybody. My name is Art
22 Neil, and I run a program called New Media Rights,

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1 which is a clinic at California Western School of Law
2 down in San Diego. We provide a lot of free one-to-
3 one assistance to both small copyright holders as well
4 as small copyright defendants.

5 So we work with a lot of folks on a lot of
6 informal disputes, and we provide a lot of
7 preventative and transactional help related to
8 copyright law. So we see a lot of the informal side
9 of a lot of this where people are getting, let's say,
10 a YouTube account removed or their Amazon account
11 removed or they are getting a video taken down. Or
12 they have a small-time dispute where they think their
13 copyrighted work has been infringed and they need to
14 figure out, is it appropriate to do a DMCA, a takedown
15 notice, what avenues do I have to get relief. So
16 that's what we do.

17 I also teach internet law at California
18 Western.

19 MR. REED: Good morning. My name is Kendall
20 Reed. I am a mediator, arbitrator, and attorney. My
21 interest here is really two-fold. One, I do neutral
22 work in the intellectual property arena, and I also

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1 have a great interest in dispute resolution systems
2 design generally. And so that when I heard this
3 morning about this forum, I thought that that would be
4 a very interesting discussion to hear.

5 MS. CHARLESWORTH: Okay. Thank you, both.
6 Going back to Mr. Neil, did you have any views you
7 wanted to share on statutory versus actual damages?

8 MR. NEIL: Well, I think that any time --
9 one of the concerns that we have on both sides,
10 whether it be with the -- whether we are going to
11 provide people with certain kinds of defenses, or
12 whether we are going to provide them with certain
13 kinds of claims of statutory damages, actual damages,
14 any time that you take away items from the system in
15 terms of what is available to plaintiffs and
16 defendants, I think you can run the risk of reducing
17 the incentives for folks to participate.

18 And if the system does end up being sort of
19 a voluntary system, which for many reasons it looks
20 like, you know, there has to be some voluntary
21 element, the incentives to participate are going to be
22 pretty important. And I think that if you strip -- I

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1 mean, it's an interesting idea to sort of provide
2 statutory damages without requiring registration. But
3 I think at least providing statutory damages to some
4 extent makes sense, because I wonder about many
5 copyright owners' willingness to kind of participate
6 if statutory damages isn't available.

7 MS. CHARLESWORTH: You weren't here
8 yesterday. We talked a little bit about the damages
9 cap. Do you have any views on that in terms of
10 assuming there would be a cap on the claims that could
11 be brought in this court? Do you want to share your
12 thoughts on that?

13 MR. NEIL: I have a number of thoughts on
14 it. I mean, it is -- I hear the number 30,000 being
15 thrown around a lot, and there are some empirical
16 reasons why I thought that there were some good
17 arguments for that. I mean, I think the ABA's IP
18 section provided a lot of good evidence about, well,
19 people who -- attorneys who are willing to take claims
20 over 60,000, right, in their comments to the Copyright
21 Office, are about one-third.

22 They did a whole survey of when attorneys

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1 are willing to kind of bring cases, and it seemed like
2 the gap in services is somewhere between zero and
3 \$60,000 claims. So somewhere in that gap seems to
4 make sense.

5 Again, I do worry. There I also think about
6 the incentives for folks to take part. And if the cap
7 were too low, you know, who would actually want to
8 take part in the system? So that's a concern. I
9 think that, you know, 30,000 is a number that sort of
10 isn't a bad place to start, just because, you know,
11 that's the basic amount that without willful
12 infringement, you know, that's the basic amount, the
13 range, 750 to 30,000 that's available for damages.

14 So those are thoughts as opposed to -- I
15 don't necessarily feel very strongly that it should be
16 a certain cap level. But I think if you go too low
17 that the incentives are going to disappear to folks --
18 for folks to participate, just because of the sheer
19 cost. I mean, you saw when they survey all of these
20 IP attorneys, they survey the cost, and for actions
21 under a million the average amount, even before --
22 just with -- just at the discovery phase was at least

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1 214,000 I think was about what they had surveyed.

2 And then, even once it had gone through, all
3 the way through appeal, it was more like 350,000, you
4 know, for claims that were under a million dollars.
5 So, you know, these things are going to cost people
6 money to represent themselves. And so when you talk
7 about if you set it too low, it may just be -- there
8 would be no incentive to participate.

9 MS. CHARLESWORTH: What about on the
10 defendant side, though? Does it help to have a lower
11 cap to -- assuming it's a voluntary system -- to
12 encourage defendants to stay in the small claims
13 system?

14 MR. NEIL: Well, I think that with
15 defendants, the way that you deal with that is that
16 you provide, you know, a real way for -- you don't
17 strip them of any right to sort of come back for fees
18 in terms of if something is brought in a frivolous,
19 bad faith manner, you know, that they have a real
20 avenue to actually recover fees in situations where
21 there really was no legitimate claim. So I think
22 that's really important, so, yeah.

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1 MS. CHARLESWORTH: Okay. Other thoughts?
2 Ms. Knappen?

3 MS. KNAPPEN: I just want to take note that
4 the -- when we were talking about incentives to
5 participate, again, we keep coming back to the point
6 where, is it an incentive for a lawyer to participate?
7 That there needs to be a certain amount of money
8 that's on the table?

9 But I also want to mention that incentive
10 for individual creators to participate, and I agree
11 that if there's a smaller cap people might be more
12 likely to use the system just to get this over with.

13 MS. CHARLESWORTH: Okay. Mr. Reed?

14 MR. REED: Yes. I would note that the -- if
15 you do have a system that would preserve rights to
16 claim fees in the event of a frivolous claim, and you
17 are talking about perhaps creating a system whereby
18 attorneys are not necessary, you necessarily invite
19 people in who don't have the sophistication that you
20 would see in a much larger case and with respected
21 counsel.

22 And by providing for the opportunity for

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1 fees against a claimant, you would create --
2 potentially create a very large disincentive for use
3 of the system, because upon the filing of a claim
4 almost invariably the first shot back will be, "Well,
5 we're going to get fees against you if you don't go
6 away."

7 So you have a very practical issue there,
8 whereas the concept is a fair one, it's -- you hate to
9 see frivolous claims. But if you're creating a system
10 whereby you want to encourage people to use it, you
11 might have to back down a little bit on that point.

12 MR. NEIL: Just to follow up on that, the
13 current -- I mean, it is not easy for a defendant in a
14 federal lawsuit to get -- you know, to get costs at
15 this point. You know, you have to show -- it's a
16 pretty high standard. A lot of courts require a real
17 showing of bad faith, you know, in terms of the claim
18 being brought to be able to even get -- to get
19 attorney's costs and fees in the first place. So --

20 MS. CHARLESWORTH: Now, you said your
21 organization represents defendants?

22 MR. NEIL: We work with defendants, but we

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1 also work with plaintiffs as well.

2 MS. CHARLESWORTH: So do you have any
3 anecdotal evidence to share in terms of how often
4 plaintiffs versus defendants are successful in
5 recovering fees, or is that something you keep track
6 of at New Media Rights?

7 MR. NEIL: Well, we don't do a heavy amount
8 of litigation, and most of the work we do is a lot of
9 -- there is a lot of informal dispute resolution that
10 we do with folks, and, you know, a lot of preventive
11 transactional work, so we don't have a lot of specific
12 litigation numbers on that.

13 But in our comments we talk a fair amount
14 about the standard that was set under Fogerty and how
15 that has been implemented in a number of cases. And
16 so even though it is not supposed to be a dual
17 standard, we do kind of find that it is a dual
18 standard, and I think that is -- it is fairly high
19 enough in terms of the way that it is applied at the
20 federal courts, but you can go and find federal court
21 cases where folks have, you know, literally, you know,
22 named the wrong defendant, dragged them through quite

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1 a ways into the case and that defendant turns around
2 and tries to get some of their costs back and can't
3 get them because they have to really show bad faith.

4 And if that person -- you know, if the
5 plaintiff legitimately thought that there was a
6 copyright issue, an infringement, then they actually
7 can often recover. I mean, sorry, then they often --
8 the defendant can't recover. So it's a pretty high
9 standard for defendants to recover anything. And if
10 you applied that standard at the small claims court, I
11 don't think you would be disincentivizing for anybody
12 to participate.

13 MS. CHARLESWORTH: Do other people have any
14 views to share on how typical it is for a defendant to
15 recover attorney's fees for a frivolous or bad faith
16 claim in their experience? Ms. Wright?

17 MS. WRIGHT: The photographer who has just
18 sued The New York Times -- I mean, excuse me, The Los
19 Angeles Times -- and I've forgotten his name right
20 now, but he just got hit with more than \$200,000 of
21 attorney's fees for losing his copyright infringement
22 case against The L.A. Times. I think it is on the

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1 rise that that's happening, that courts are more often
2 awarding fees to the -- whoever wins, be it the
3 plaintiff or the defendant.

4 So it is always a risk. And then, you also
5 have the problem that a lot of defendants in federal
6 court will do -- give an offer of judgment under Rule
7 68, and that increases the chance that the plaintiff
8 will have to pay the attorney's fees if they don't
9 meet the standard of the Rule 68 offer.

10 MS. CHARLESWORTH: Okay.

11 MS. WRIGHT: Even when winning.

12 MS. CHARLESWORTH: Other thoughts?

13 MR. NEIL: And if people are interested, I
14 mean, there's two cases in that area that may be worth
15 looking at, which is the Virgin Records America v.
16 Thompson, and then the other one is the Capitol
17 Records case, which is Capitol Records v. Foster.

18 Virgin Records comes out in a situation
19 where the defendant who was named in a file-sharing
20 lawsuit wasn't able to get costs. And in the Capitol
21 Records v. Foster, they were.

22 MS. CHARLESWORTH: Mr. Hasbrouck?

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1 MR. HASBROUCK: Since we seem to have moved
2 into the question of attorney's fees, I would point
3 out two inequities between creators and infringers in
4 a provision for award of attorney's fees. The first
5 is that the plaintiff victim, assuming that this
6 process is anything like what we hope it will be, will
7 be able to, and, thus, will of necessity be proceeding
8 pro se.

9 So the plaintiff will have no chance of
10 recovering their non-existent attorney's fees. It is
11 not clear whether they would be able to recover for
12 their own time as a pro se plaintiff. But in any
13 case, the only potential beneficiary of a fee award
14 scheme would be the defendant, who is deeper pocketed
15 in the first place.

16 The second inequity is that presently
17 attorney's fees are only available if the work was
18 timely registered, which it usually isn't. So in
19 practice most plaintiffs would not be eligible for
20 attorney's fees unless you want to say, again, as with
21 being able to file the case or receive statutory
22 damages, unless you were able to specify that a

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1 plaintiff could receive attorney's fees even without
2 registration, which if you're going to say that there
3 should be any possibility of recovering attorney's
4 fees, we would strongly argue that it should be
5 without a prerequisite of registration.

6 But as it stands, an attorney's fee recovery
7 provision is just going to be a rich-get-richer
8 provision for deep pocketed defendants. And it's
9 going to be a huge scare factor to scare off people
10 from filing in the first place, if they know not only
11 they are going to be up against lawyers, but they
12 might have to pay for them if they lose.

13 Even if what you say may be correct and the
14 actual chances are small, even if you have to discount
15 the risk in the gamble that, you know, there is only a
16 one in 10 chance that you are going to be hit for
17 several hundred thousand dollars in attorney's fees
18 for the defendant if you lose, a one in 10 chance of
19 being hit for 300,000 is a \$30,000 expected value,
20 which you've got to factor into whether you file. And
21 most people faced with that are not going to file.

22 MS. CHARLESWORTH: Just to ask you a follow

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1 up on that. What about if there were a cap on the
2 amount you could recover as attorney's fees and costs.
3 In other words, what if there were some fee shifting
4 in appropriate cases, but there was a maximum award,
5 would that help balance the concern?

6 MR. HASBROUCK: I would think that that
7 might mitigate the risk and the deterrent to filing in
8 the first place for the victim. But I suspect that
9 what attorneys would think is a small cap would still
10 seem like a very daunting amount to a small creator.

11 MS. CHARLESWORTH: Mr. Reed?

12 MR. REED: You may think of something along
13 the lines of a vexatious litigant standard, that if
14 somebody is repeatedly filing in the system and having
15 trouble making their claim, then maybe it might be
16 available in those circumstances. Just a thought.

17 MS. CHARLESWORTH: Mr. Brennan?

18 MR. BRENNAN: Thinking about attorney's
19 fees, I would like to just propose for discussion
20 something that has occurred to us. If we are looking,
21 again, at our division between what we call the "true
22 small claims" and the "mini trial," let's put aside

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1 the "true small claims" area and look at what I call
2 the "mini trial" proceedings.

3 Ideally, in that sort of proceeding, we --
4 at least in the view that I had before, we have
5 expedited pleadings, so there would be formal
6 complaints. We have limited discovery, so -- and
7 limited motions, so we are directly going to go to
8 trial.

9 In that case, I would have suggested
10 something like the following here. You have the
11 courts establish a schedule of attorney's fees, and it
12 may be -- let's just pick a number. We would say the
13 prevailing party is entitled to \$15,000 in attorney's
14 fees. And this could either be established by -- in
15 the code or their courts could have a range of
16 schedules, because you may have a higher rate in New
17 York or L.A. versus in another city. But let's just
18 take that as a number.

19 I would say either party knows that their
20 attorney's fees are fixed, so we know that the trial
21 is going to be set at that date. Then, I would also
22 do -- is allow allocation of attorney's fees based

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1 upon your success or failure on certain issues.

2 For example, if we are going to have a
3 challenge to originality, I can't tell you -- every
4 case that I have seen -- usually in fashion design we
5 have something like the following. Plaintiff has
6 drawn a picture of a tiger with roses and stars. I
7 then have a claim saying tigers, roses, and stars are
8 part of a well-established visual vocabulary that have
9 existed for thousands of years. I even have an expert
10 saying that there are these. Therefore, your claim
11 cannot be original as a matter of law.

12 You say, well, you are arguing novelty. You
13 are not arguing originality. If you have to face, and
14 the other side decides to make this claim, and they
15 fail, then I would have an additional deemed
16 attorney's fee award for dealing with those specific
17 issues, I think around \$5,000.

18 So that it focuses each side on addressing
19 the issues that are important. So the plaintiff could
20 have, if they prevail, \$15,000. Plus, if they succeed
21 on certain of these discrete issues, an additional
22 attorney's fee award.

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1 By the same token, if the defendant
2 succeeds, then they have an attorney's fee award, but
3 it can be reduced if they make a claim that the
4 plaintiff prevailed on. Or if the plaintiff made an
5 assertion of willfulness that turned out to be
6 frivolous, then the defendant could get an additional
7 fee.

8 And the reason I would do that and set a
9 definite fee rate is it gives parties a real ability
10 to monetize what these claims are worth, focuses their
11 mind directly on settlement, and lets us know that we
12 are not going to have fees.

13 My personal experience is I am sometimes
14 shocked at the amounts that are claimed for attorney's
15 fees in copyright cases. I don't understand how
16 people can run up these excessive fees.

17 So I do think that that would help focus it.
18 The difficulty you face for obviously small parties is
19 if they face a potential attorney's fees award, even
20 for a small party, of \$15,000, that could be a serious
21 amount. So you probably want to give the judge some
22 discretion in awarding those fees based upon

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1 prevailing party frivolousness, et cetera.

2 But I think if you had some sort of a fee
3 award system where the courts established rates that
4 are probably at least presumptively applicable, it
5 might be beneficial to both sides, because they know
6 what the cost is going to be, it limits the cost, you
7 get fees award based upon success, so it focuses on
8 issues that are important, and certainly focuses the
9 mind to come to settlement, because then everybody
10 knows what their dollar is and what it's going to cost
11 them.

12 MS. CHARLESWORTH: Okay. An interesting
13 proposal. Do people have reactions to that, sort of a
14 set schedule of potential fees to be awarded, so
15 people know going in what their exposure is?

16 MR. BRENNAN: And fees awarded on specific
17 issues. So it's not just a winner-take-all prevailing
18 party. You could be a non-prevailing party, but if
19 you prevailed on a certain issue that could either
20 increase or reduce the other side's award. So it
21 makes you focus on dealing with issues that are really
22 material to resolving the case.

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1 MS. CHARLESWORTH: Ms. Calzada?

2 MS. CALZADA: I think generally the purpose
3 of attorney's fees is to encourage litigants to seek
4 the advice of counsel and have that expertise and that
5 sort of independent perspective and advice that, you
6 know, somebody can step out and look without the
7 emotional factor when you're a personal litigant, and
8 there is a good argument for providing attorney's fees
9 for a successful litigant/plaintiff.

10 I actually have researched the issue on pro
11 se, and I can tell you that it is almost widely -- it
12 is widely accepted that pro se litigants are not
13 entitled to recover for their time. So I just wanted
14 to clarify that question for those who had it.

15 I am concerned about the risk to a
16 plaintiff, a small plaintiff, who then faces
17 attorney's fees of -- you know, maybe they didn't
18 realize that this really would come down as a fair
19 use, and so then they are left holding the bag with
20 \$15,000 in attorney's fees. That is an awful lot to
21 ask, and I think part of the goal of this court is to
22 take away some of that edge and risk of keeping people

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1 out of court, and that's one of the things that does
2 keep people out of court.

3 So I can see both sides, and, you know, for
4 my people it would benefit them to recover, obviously,
5 but I almost feel like it would be a bigger penalty to
6 have them faced with the prospect of paying the other
7 side's attorney's fees if they lose. So --

8 MS. CHARLESWORTH: Let me just --

9 MS. CALZADA: Oh, go ahead.

10 MS. CHARLESWORTH: I'm sorry.

11 MS. CALZADA: No, no.

12 MS. CHARLESWORTH: I was just going to ask
13 you, what about if the standard were you only recover
14 fees for truly frivolous claims, there had to be a
15 finding of bad faith, or a fairly high bar, what is
16 your view on that?

17 MS. CALZADA: I think certainly on the
18 defendant's side that would be appropriate. You know,
19 if you are going to allow for attorney's fees for a
20 successful defendant on occasion, I think it is only
21 fair to allow for attorney's fees on a successful
22 plaintiff.

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1 So then maybe if the plaintiff offered some
2 kind of settlement or participated in mediation, and
3 the other side just wouldn't participate or something,
4 you know, if the other side did something that
5 illustrated bad faith, that might be an appropriate
6 time to say, okay, attorney's fees.

7 Another thing I wanted to mention was the
8 idea of tiered -- not tiered but just sort of a cap on
9 attorney's fees. And I'm not sure \$15,000 is a good
10 number. Something a little lower, like two, three,
11 four, you know, if this is really a simple process
12 you should be able to seek the advice of an attorney
13 and their support for a relatively low cost. And I
14 would think that if -- if the court actually
15 establishes a low tier of attorney's fees recovery,
16 not only would you solve the problem of that fear
17 factor, but you would get attorneys who really
18 developed a practice that found an efficient way to
19 deal with this.

20 And we would sort of lose that problem of,
21 you know, let's see how far along we can drag this
22 out, because you would have attorneys who just said,

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1 "Okay. This is what I'm going to do. This is what
2 I'm going to charge. If we get it back, great. If
3 not, that's all you owe."

4 And I think that would go to the
5 predictability of the cost of litigation, which,
6 again, is one of the challenges to litigation. You
7 know, do I want to sue somebody? Well, what are my
8 grand risks? You know, and how much I'm going to be
9 stuck paying an attorney is one of them. So I think a
10 very low cap on attorney's fees might actually serve
11 the system very well.

12 MS. CHARLESWORTH: Mr. Brennan?

13 MR. BRENNAN: I think it is useful to have a
14 schedule. When you say a "low cap," we have to --
15 imagine, again, we are dealing with two tiers of
16 cases. We are dealing with the true -- our small
17 claims or our mini trials. It just takes time to do a
18 mini trial. Even if you are only one day there, plus
19 one day of preparations, plus the time to write all of
20 the motions, you could be looking at minimum time 40
21 or plus hours of attorney time. And if your cap is
22 \$2- or \$3,000, and you're at cap, I, as an attorney,

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1 will say I can't do it. I'm sorry, I can't work for
2 nothing.

3 So that you do need a fee schedule there
4 that allows you -- my vision in that is, if I had a
5 case right now, it usually takes you time to review
6 it. They don't take a case, especially on a
7 contingency, unless I am relatively convinced on
8 liability and damages. So you already have a
9 screening process on frivolity, because otherwise you
10 won't take the case for a mini trial.

11 The time it takes to prepare and put one
12 together, even for one day of trial in federal court,
13 \$2- or \$3,000, you just wouldn't do it. That means a
14 whole tier of cases, without the small claims and the
15 major cases, the whole tier of cases in the middle it
16 wouldn't be economical for you to take.

17 So you need -- if we're going to have a
18 schedule -- and I like the idea of a schedule, but it
19 has to be enough to compensate you for at least, you
20 know, what could be a day or more trial, plus all of
21 the time to prepare, plus the pleadings and the
22 motions. And that is not going to be \$2- or 3,000.

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1 I put up 15 as a number just to consider. My
2 colleagues tell me that is way too low for the time
3 that it takes to do this. If we had this plus add-ons
4 it might make a difference. But we do have to have
5 something more than just a few thousand dollars;
6 otherwise, those cases just won't be tried. No
7 attorney will take them. It's not worth your time.

8 MS. CHARLESWORTH: Did you want to say
9 something, Ms. Calzada?

10 MS. CALZADA: I was just going to say, if
11 you go back to that -- the screening process for
12 frivolity is whether or not an attorney will take it,
13 then you go to Molly's point which is that, you know,
14 it's -- that's not what should be determining whether
15 you can go into this particular court. It's whether
16 or not you can get an attorney. You should be able to
17 access this court without an attorney.

18 MR. BRENNAN: Remember, we have to be
19 careful what we mean by "this court." If you are
20 thinking about what I'll call the "true small claims"
21 or only doing something for a few thousand dollars,
22 that is not what I'm talking about.

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1 So when you say "this court," that's not
2 what I mean. What I'm thinking about are the cases in
3 this middle tier that our colleague here said
4 yesterday, under \$80,000, where you are looking at
5 something that is going to have to be effectively a
6 mini trial, where you are going to have expedited
7 proceedings but you are going to have to put on a
8 trial, probably have to get experts there to testify
9 at least to substantial similarity or to damages,
10 prepare pleadings, take it through, prep witnesses,
11 put them on trial.

12 That's the type of case where you really
13 probably should have an attorney to represent you.
14 You can try to do that pro se, and that's fine, people
15 can try to do that. But you probably are going to be
16 better off finding an attorney. And if you know what
17 the rates are, I think there will be attorneys who
18 will do this even on a contingent fee basis, provided
19 they know they can get an attorney's fees recovery
20 that is going to compensate for their time.

21 MS. CHARLESWORTH: Okay. Yes.

22 MS. BRISTOL: Hi. I think we have to be

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1 very careful about the discussion on limiting
2 attorney's fees. Although the purpose of the court is
3 to provide a greater access to those I'm going to call
4 them middle level or lower level litigants, you also
5 don't want to undercut the fee so much that you have
6 attorneys who are not really experienced in copyright
7 law trying to come in and handle these cases for a low
8 amount.

9 It is a specialty area that has twists and
10 turns that counsel do need to have some experience in.
11 And not to say that every case will involve a big
12 firm, but in some very particular cases -- fair use
13 and other types of defenses -- you might not want a
14 first year associate trying that type of case, because
15 of the low attorney's fees involved.

16 So I think you really have to think about
17 when you are coming up with a schedule, when you are
18 capping it, yes, maybe having some reasonable caps, so
19 that experienced attorneys will come in and try these
20 lower cases, and so they will be attracted. You know,
21 a new industry for middle level attorneys will come in
22 to represent these clients, but not so low that you're

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1 -- you have inexperienced counsel or no counsel at all
2 because there is a cap.

3 So I think if you are planning on putting
4 some cap on fees, you really have to think that
5 through, so that you don't end up harming the
6 plaintiffs or the defendants. Having a defendant find
7 any attorney just to come in and represent then,
8 because they know it's going to be a low amount, or
9 just having a flood -- opening up a flood gate of
10 inexperienced attorneys wanting to practice IP
11 thinking it is a new area and ending up harming the
12 people that we are supposed to be helping.

13 MS. CHARLESWORTH: Okay. Mr. Brennan?

14 MR. BRENNAN: Just to add -- I think that's
15 very important. Just ask -- let me just ask a
16 rhetorical question here. How many people can tell us
17 the difference between a fair use as a transformative
18 use and a transformative use as a derivative work?
19 Don't want to ask, but --

20 MS. CHARLESWORTH: I think our new
21 adjudicators will be able to tell us that, right?

22 (Laughter.)

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1 They're going to be very expert.

2 MR. BRENNAN: I can give you my theory. But
3 the point is is that there are technicalities here.
4 If I look at cases here right now, just on the
5 average, if I have to take a copyright case and I'm
6 thinking what I'm thinking, what I'll call the mini
7 trial, I have a case, I'm certain on liability, very
8 certain substantial similarity. I have somebody that
9 has taken my particular tie. They have access. They
10 sent it to China and made a copy.

11 I am probably looking at federal court right
12 now, because of all of the procedures, close to about
13 \$50,000 just in my time, to move that through court,
14 simply because filing on -- I have the motion to
15 dismiss, I am going to have a mini trial on the
16 registration certificate, I'm going to have a motion
17 for summary judgment, that is saying that, oh, there
18 is no substantial similarity, plus all of the
19 discovery. I am going to have at least two depositions
20 where I am going to have to sit and listen to somebody
21 spend eight hours asking my designer how they designed
22 this thing, plus I am going to have some -- probably

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1 another deposition of the defendant here. I'm going
2 to have to get an expert, and I am going to have to
3 fight in discovery to get the plaintiff's profits
4 here. So I am looking at about that amount of time.

5 The goal of the mini trial I'm hoping is to
6 reduce those costs, because I don't have to spend all
7 of this time fooling around in federal court with
8 wasting time on motions that don't really matter,
9 excessive discovery, the summary judgment motion, and
10 take our evidence, present it to the other side, get
11 something, and go to trial.

12 If I could do that in just one or two days,
13 then our costs would be reduced, and I'm more than
14 happy to pass that on because I don't have to spend a
15 dime. But it is going to take a certain minimum level
16 to do that, and I think that what we just heard here
17 is exactly correct. There is a level of experience
18 that you need to walk through all of this. And if we
19 set a figure -- and I'm happy to do that -- if we can
20 reduce the other procedural costs, but reducing and
21 setting an attorney's fees rate is based upon reducing
22 these other costs, it's got to be enough so that in

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1 this middle area, this mini trial area, you have
2 experienced attorneys that get compensated for their
3 time, because there is at least going to be some time
4 there.

5 MS. CHARLESWORTH: Okay. Well, I think --
6 I'm sorry, I was just going to say, we touched on this
7 yesterday. A lot of these questions, really, they are
8 a little bit chicken and egg, because a lot of this
9 depends on how -- the scope of the proceeding, how
10 involved the proceeding would be, what kinds of claims
11 would be permitted, whether it's a very simple
12 proceeding, what we think of when we think of state
13 small claims court, or whether it's something that you
14 are suggesting, more like a mini trial.

15 So it is a lot of things that -- many things
16 to think about, but I think they are very interrelated
17 in terms of what the fee rules would be.

18 Did anyone have anything further -- I think
19 you did, Ms. Knappen -- on fees? And then, I want to
20 move us on to equitable relief, so that we stay a
21 little bit on schedule today.

22 MS. KNAPPEN: I think the schedule idea is a

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1 good idea because that way even if an individual
2 creator loses on one point, they are not deterred by
3 the prospect of getting soaked if there is some sort of
4 of repayment of attorney's fees. But I just want to
5 point out that most, for most individual creators, it
6 would already be the junior level attorney, even if the
7 cap was higher, because most people just can't afford
8 a good, quality attorney.

9 MS. CHARLESWORTH: Any further thoughts on
10 fees?

11 MR. NEIL: Just one last point from the
12 defendant's perspective again. You know, these
13 defendants are only going to -- they may only hear of
14 this at the time, you know, that it's filed. And so
15 procedurally they are going to have to put together
16 their defense relatively quickly.

17 And it does depend on what the scope is,
18 whether it's a mini trial or whether it's something
19 much more reduced. But those folks also need access
20 to -- you know, to quality representation and making
21 sure that some attorney's fees is available -- are
22 available to them is really important for them to be

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1 able to actually go out and get representation.

2 I mean, I have some other ideas that -- I
3 have been talking to some of the self-help groups at
4 the federal court system, and the one up in San Jose,
5 called FLASH, has some really, really great examples
6 of networks they have built of attorneys that help
7 these folks with the self-help work.

8 So there are examples out there of networks
9 that provide assistance and experts in that
10 assistance. There are a lot of IP attorneys there in
11 Silicon Valley who know what they are talking about
12 when it comes to copyright and patent and trademark
13 matters. So just from a defendant's perspective as
14 well, we've got to be careful about limiting
15 attorney's fees, because there are going to be
16 complicated defenses like fair use and DMCA, safe
17 harbors, and things like that, and those require --
18 you know, obviously, if people want to access the
19 system by themselves and go pro se, you know, I think
20 that should be available to them. But also, if folks
21 want representation, I really think that they should
22 be allowed to have it.

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1 MS. CHARLESWORTH: You touched on -- I just
2 wanted to follow up. Can you explain a little bit
3 more about the self-help groups you just mentioned?

4 MR. NEIL: Well, as I understand it, there
5 is -- I wasn't really aware of this until a couple of
6 weeks ago when I went to the state's IP Institute, but
7 I met some folks from FLASH, which is -- so there are
8 five district courts, as I understand it, that have
9 self-help groups that actually specialize in IP-
10 related issues.

11 The one I am most familiar with -- and I had
12 a conversation with them early last week -- is FLASH,
13 which is in the San Jose area, in that district. And
14 they provide a lot of self-help I think focused on
15 defendants who have been sued, and so you can imagine
16 their three main cases. I think they tend to see a
17 lot of the file-sharing, the mass file-sharing
18 lawsuits that have been going on the last two years,
19 from the adult entertainment industry, as well as
20 independent film creators. And then, also, they see a
21 lot of -- apparently, their cases right now that they
22 see are a lot of cases against restaurants, bars, et

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1 cetera, for illegal streaming of content.

2 So they provide direct assistance to those
3 folks to help them through the process of defending
4 themselves pro se.

5 MS. CHARLESWORTH: Are they lawyers, the
6 people who are advising?

7 MR. NEIL: So as I understand -- so in the
8 FLASH situation, there is actually a wonderful
9 individual who really should be brought into this
10 process who happens to have -- his background is as a
11 small claims judge, but provides this IP assistance to
12 folks, self-help in the federal court.

13 So there is a lot of -- so that is an
14 attorney there, and then there is a number of law
15 students who also help out there. But I believe they
16 only have two attorneys, but they have built this
17 network of IP firms in Silicon Valley to help folks
18 have representation as well.

19 MS. WRIGHT: I found the website. It's
20 through the Northern District of California.

21 MR. NEIL: Right.

22 MS. WRIGHT: And it is on the Northern

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1 District of California website at helpcenterssj, C-A-
2 N-D, dot U.S. courts dot gov, forward slash
3 helpcenterssj. And it is called the Federal Legal
4 Assistance Self-Help Center at the San Jose
5 Courthouse.

6 It says that they don't help with bankruptcy
7 or any criminal cases. And it has to be a case that
8 is in the Northern District, but that they do provide
9 legal assistance to help you with the procedures.

10 MS. CHARLESWORTH: Thank you, Ms. Wright.
11 That's helpful. And thank you, Mr. Neil.

12 Ms. Calzada?

13 MS. CALZADA: I just wanted to highlight two
14 points. One is that what the court awards in
15 attorney's fees is not a limit to what the attorney
16 can charge the client. So, you know, in the cases
17 where it is really going to cost more, the client can
18 decide, is it still worth it to have an attorney?

19 But the other thing I wanted to highlight
20 was is this discussion to me really brings home how
21 important the simplification is. If we make this
22 extremely complicated, and allow a lot of discovery

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1 and allow a lot of these things that only attorneys
2 can handle, then, yeah, we are going to need attorneys
3 and we are going to need a very high level of
4 attorney's fees awards to be available.

5 But I think the goal of this is to keep it a
6 little more simple, and so I think describing what you
7 have described, you are going to need an attorney, and
8 it is going to have to be expensive. But I think part
9 of our goal is to create a system that people can
10 navigate on their own, creators can navigate on their
11 own, and so I think this just highlights how important
12 that other part that we were discussing yesterday is.

13 MS. CHARLESWORTH: Okay. I think I am going
14 to -- unless there is someone else has a burning
15 comment on attorney's fees, I want to move us on to
16 equitable relief, which is a very important issue,
17 particularly the question of injunctions and whether
18 they would be available through the system, would
19 there be any limitations on them. Obviously, there
20 are other forms of equitable relief as well, such as
21 destruction of infringing copies and other things that
22 courts sometimes order in the copyright context, but I

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1 think most of the discussion in New York and in many
2 of the comments involved the availability of
3 injunctive relief and what impact that might have on
4 this system if it were permitted.

5 So any takers? Ms. Calzada?

6 MS. CALZADA: Sure. I will start. For
7 artists who produce work, the ability to control their
8 work is not just about money. It is about how their
9 work is used. And I can highlight for you a very
10 interesting case that happened earlier this year.
11 There was a wedding photographer who photographed a
12 homosexual couple, did engagement portraits, that kind
13 of thing, and her photograph of them was stolen by an
14 anti-gay political group and used in their political
15 ads.

16 And, you know, obviously now there is
17 litigation related to that, but it just highlights the
18 important of how the ability to control your work is
19 just as important as money for some situations. And
20 so I really do think that injunctions are critical.

21 MS. CHARLESWORTH: Okay. Mr. Brennan?

22 MR. BRENNAN: I think you have to

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1 distinguish between whether you are granting this
2 relief preliminarily or as a result of a judgment, and
3 that is really key. I would put injunctions and
4 seizure orders into the same category.

5 It would seem to me that in this very small
6 claims procedures you just simply -- let me put that -
7 - very small claims procedure I don't think you should
8 allow preliminarily injunctions or seizure orders at
9 all. Whether you can get one after the result of a
10 small claims -- and we're thinking about these very
11 small claims judgment -- let me reserve on that.

12 In the sort of mini trial version that we
13 said, I would also not allow injunctions or seizure
14 orders preliminarily. And the reason is twofold. One
15 is, when you do that, you are invoking the equitable
16 powers of a district court. And there are a number of
17 procedural and perhaps even constitutional limitations
18 on what that court does.

19 The Supreme Court has been very reluctant
20 recently, or has limited the ability to grant those
21 injunctions. So that means a motion procedure, you
22 often have to have a strong evidentiary presentation,

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1 and it is very hard to do that, especially if you are
2 pro se, and know that you have done everything
3 correctly. And it also increases the cost and
4 complexity.

5 If our mini trial procedure is -- at least
6 as I have envisioned it or mentioned it, is going to
7 be something that happens rather rapidly. It is
8 probably -- you can give an injunction or a seizure
9 order after the result of the hearing and the trial,
10 because we have had the evidentiary presentation.
11 There may be something of a delay.

12 But in both of these procedures I certainly
13 would not allow injunctions or seizure orders
14 preliminarily. I would allow them after the mini
15 trial proceedings. I have to think about whether they
16 would make sense after a small claims hearing. I'm
17 kind of reluctant to say that they should be allowed
18 after what we'll call a "true small claims" hearing.

19 I understand very seriously the need for
20 artists to control their works. But, again, it
21 depends upon what -- our vision here. If the vision
22 is we are having recovery for piracy that has already

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1 occurred, damages are probably the most you can get
2 here. So that's what I would say about injunctions
3 and preliminary awards.

4 MS. CHARLESWORTH: Okay. Mr. Hasbrouck?

5 MR. HASBROUCK: Injunctive relief is vital
6 for our members in many cases for at least two
7 reasons. One is, as was previously pointed to,
8 injunctions are often essential to protect the moral
9 rights of the author. And so I think there is some
10 question as to whether a system that doesn't provide
11 the availability of injunctions is going to satisfy
12 the Berne requirements for the protection of moral
13 rights.

14 But the other reason, more economically, is
15 that in most of the grievances we get -- hear about
16 from our members, the infringement is continuing. And
17 the infringer -- probably we are not going to end up
18 in court, if the infringer hasn't already ignored a
19 cease and desist demand.

20 And there may be some cases where it's a
21 question of, well, if you asked for a license, I would
22 have given you one if you paid. And so, you know,

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1 fine, okay, you were awarded damages, now you've got a
2 license and you can go on.

3 But normally there wouldn't be a one-time
4 fee for usage in perpetuity, so you've still got
5 continuing infringement if you don't get an injunction
6 to cease and desist the infringing conduct.

7 And so are you going to have to come back to
8 keep, you know, collecting damages for the continuing
9 infringement? That's really counterproductive.

10 The other thing is that the creator
11 typically has already made a decision as to what form
12 of exploitation of the work will maximize the
13 revenues. If they decided that the optimum revenue
14 strategy is to put this on their website with
15 advertising, they are probably not interested in
16 licensing it to some other website.

17 And where the damage occurs from placing
18 infringing copies in competition with legitimate
19 copies or legitimately licensed copies, it is
20 essential to shut down the infringement, not just
21 charge for it. Most writers are not particularly
22 interested in having a plethora of different versions

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1 of their work, even if they were getting some
2 compensation. They would rather have one edition that
3 they have chosen in the way that they think is going
4 to maximize the revenue.

5 So, at least with respect to injunctions to
6 cease and desist the infringing conduct, that is
7 really important to protecting the rights of our
8 members.

9 MS. CHARLESWORTH: Okay. Ms. Tommaselli?

10 MS. TOMMASELLI: Speaking on behalf of our
11 members who are independent film producers and
12 distributors, we would oppose any injunctive relief.
13 And we agree with basically everything that Mr.
14 Brennan said.

15 And to get an injunction to halt the
16 production or distribution of a film would cause great
17 financial stress on that company through such a small
18 claims procedure. And, again, commenting -- it's hard
19 to comment now not knowing what the structure of the
20 tribunal is going to be. But, you know, basically we
21 echo everything Mr. Brennan said, and we would oppose
22 injunctive relief through this system.

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1 MS. CHARLESWORTH: Okay. Other thoughts? I
2 mean, one distinction that was suggested I think, or
3 grew out of the New York discussion of this issue, was
4 a distinction between a work such as a film that, say,
5 incorporates another work potentially in an infringing
6 manner, but has great value, and that the injunction
7 itself or the value of the injunction would far
8 outweigh potentially the actual amount of damages
9 being claimed through the small claims system versus a
10 situation where, let's say it's a photograph, it's on
11 someone's website, and you just want it taken down.

12 Where there really isn't a huge economic
13 impact that would come out of the injunction, and
14 there is no derivative work issue. It is just a
15 straight copy. And I'm wondering if anyone has any
16 thoughts on whether, in considering the question of
17 injunctions, there is a distinction to be drawn
18 between different types of injunctions or different
19 infringement scenarios or different -- you know, where
20 you would have -- you would take into consideration
21 the complexity value of the work that might be halted
22 versus kind of a bootleg situation.

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1 Ms. Calzada?

2 MS. CALZADA: I think you are now saying
3 that some defendants are better than others, and it is
4 okay if you infringe somebody's work and continue to
5 do so, so long as you are doing something good for the
6 economy. And that, to me, gets into a dangerous
7 territory where we say that, you know, your rights are
8 protected against some people, but not others, because
9 of who those other people are, and that is --

10 MS. CHARLESWORTH: Well, actually, I'm not -
11 - I didn't mean to suggest that. I think the comment
12 that was made in New York, or comments, really
13 suggested that if you are going to sue in small claims
14 -- let's say there was a \$20,000 cap, or a \$50,000 cap
15 even, but you also are seeking an injunction to shut
16 down, say, a major motion picture, that that
17 injunction -- or to stop the publication of a book --
18 or distribution of a book, that that is actually --
19 that the economic value of that injunction far exceeds
20 or could far exceed the cap on the small claims
21 process.

22 In other words, you have streamlined

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1 procedures, you have sort of an easy way to proceed
2 through the process, but the economic consequences of
3 certain injunctions might be very significant and
4 greater than the damages cap.

5 So it is not about the value of the
6 defendant; it is really about sort of what kinds of
7 controversies would be appropriately decided, and what
8 kinds of relief would be appropriate in the system.

9 MS. CALZADA: So you are talking about
10 putting a dollar value on the injunction and weighing
11 that into the equation of, have we met the threshold
12 for the small claims?

13 MS. CHARLESWORTH: Well, I think it might be
14 hard to assign. I'm saying, it's a consideration. I
15 mean, some people are very concerned about this. I
16 think Ms. Tommaselli basically voiced this concern,
17 perhaps more eloquently than I did.

18 MS. CALZADA: Well, and I certainly can
19 relate in terms of a preliminary injunction, but I
20 feel like if you have been found to be infringing, you
21 know, and maybe it's -- you know, so maybe it's one
22 photograph in your entire film, but what if it's the

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1 script, you know. I mean, so -- and, really, if you
2 have been found to be infringing and you are not
3 willing to stop infringing on that photograph, why
4 can't I force you to take that photograph out of your
5 film? Presuming it is just a photo, you know.

6 MS. TOMMASELLI: Right. And as Mr. Brennan
7 pointed out, I mean, I think there is a difference
8 between preliminary injunctions and then after going
9 through something similar to a mini trial where there
10 has been evidence and stuff like that. And that's
11 what, you know, we are sort of reserving our comment
12 on, to see what the actual format of the tribunal is
13 going to be.

14 MS. CALZADA: Understand.

15 MS. CHARLESWORTH: I'm sorry. Mr. Brennan,
16 you've --

17 MR. BRENNAN: What you said is interesting,
18 but all you've done is articulated the injunction
19 standards to begin with. We are just reinventing the
20 wheel. In order to get an injunction right now, there
21 are two tests. You have to hold a likelihood of
22 success on a preliminary injunction, likelihood of

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1 success on the merits, and irreparable harm or
2 substantial harm.

3 There is also a four-factor test that
4 includes public policy issues here. So when we say,
5 "What is going to happen here?" I am now more
6 convinced than ever we shouldn't have preliminary
7 injunctions at all, because if you do this and ask for
8 a preliminary injunction, you have got to have a
9 hearing. You've got to present evidence on the
10 standard. So now we have more procedural glue here.

11 And then, once you get an injunction, and
12 the court automatically grants it, the first thing the
13 court is going to say is you've got to bond the
14 injunction. If you get a preliminary injunction,
15 you've got to do a bond. And if we have a picture --
16 photographs and a motion picture, to use the example
17 we just had right now, and the example says, "Well, I
18 am going to lose \$50 million on releasing my motion
19 picture," the first thing I'm going to say is,
20 "Outside jurisdictional limits of the court." You
21 only have a limit here. You are posting a bond beyond
22 your jurisdictional limit. So now you are going to

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1 have a jurisdictional appeal here.

2 So you are already going to have to deal
3 with all of these issues here on a preliminary stage.
4 And all we're doing is creating now more glue and
5 confusion and having a mini trial in effect, or a mini
6 hearing, on the nature and the standards for issuing
7 an injunction, which is going to require you to get an
8 attorney to do that. Otherwise, the courts are going
9 to be very reluctant to issue it.

10 So I am -- the more I think about it, I
11 don't think we should have these preliminarily.

12 Now, whether or not an injunction can be
13 issued after trial, after an evidentiary hearing, and
14 after you have heard all of these matters, if we are
15 doing it in what we have called these true small
16 claims matters where we are limiting the claims, if
17 the defendant shows the amount of damage -- remember,
18 you don't get an injunction automatically even after a
19 trial right now.

20 Even in the famous Rear Window case, they
21 didn't get an injunction at all. The Supreme Court
22 said, "Go back to the Ninth Circuit," and the Ninth

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1 Circuit said, "You know something? Even though they
2 are showing the movie, and we know you're infringing
3 your work, you can really solve this by damages." So
4 you still have all of these equitable limits on the
5 courts, and they may not necessarily grant an
6 injunction here.

7 And if you do have that, you are immediately
8 going to face -- the defendant, I guarantee you, is
9 always going to say, "Oh, the cost of the injunction
10 is more than the jurisdictional limit of the court.
11 No jurisdiction." And you are going to have to face
12 that issue.

13 And you want to have small claims courts
14 issuing preliminary injunctions, I just think that if
15 you are going to be doing that, you are probably going
16 to want to have only an injunction after you have had
17 the mini trial where you could have all of the
18 evidence presented that justifies the injunction. And
19 that is a substantial showing here.

20 MS. CHARLESWORTH: Yes. Just to be clear, I
21 wasn't suggesting there should be preliminary
22 injunctions. I was just speaking generally, and

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1 probably referring more to final injunctions because -
2 -

3 MR. BRENNAN: We haven't distinguished that
4 here. But the more I think about it, I think it's
5 very important to distinguish preliminary versus
6 final, because I think preliminary remedies here are
7 going to really increase the cost of the procedure,
8 and I really don't think we should do that.

9 An injunction after a small claims hearing,
10 the more I think about it the less -- if you are going
11 to get an injunction, it's a serious remedy. And I
12 think you are probably not going to be able to do it
13 in the true -- what we are calling the real small
14 claims procedures.

15 After the mini trial's procedure, I am
16 little bit more sanguine about doing it, because I
17 think we have made the presentations necessary for
18 that injunction hearing and equitable remedies. But I
19 don't think we should do it preliminarily.

20 MS. CHARLESWORTH: Ms. Knappen?

21 MS. KNAPPEN: If you take injunctions out of
22 the equation for the true small claims, you take the

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1 teeth out of it. So I create a bunch of icons and
2 they are put into a piece of software and I go,
3 "Golly, I was" --

4 MR. BRENNAN: How do you answer this
5 question? You have created a bunch of icons. They
6 have gone into the software, and I come back to you
7 and say, "Well, okay, I've put icons -- you put your
8 icons in my software. I understand. It is now going
9 to cost me \$10 million in order to uncover all of
10 those. Will you please bond the injunction?"

11 MS. KNAPPEN: That is not my problem.

12 MR. BRENNAN: Well, no, it is your problem,
13 because if you don't bond the injunction the court is
14 not going to issue it.

15 MS. KNAPPEN: No, no, no. The fact that it
16 is going to cost you \$10 million will --

17 MR. BRENNAN: No. You are going to have to
18 bond the injunction.

19 MS. CHARLESWORTH: Here is the issue.
20 Again, to sort of -- and this is drawing on prior
21 comments, but to try and characterize them. The issue
22 is, if it's a \$10 million problem that you need a lot

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1 of due process safeguards. You need a lot of -- you
2 know, you need a court to review it very carefully,
3 and that's inconsistent with the idea of having a very
4 small court where you have a very streamlined process
5 without a lot of opportunity for discovery, perhaps no
6 deposition, you know, all of the things we have been
7 talking about.

8 And so there is -- at the same time, there
9 is the problem of the simple, you know, sort of
10 takedown, I just want my photo off that website, which
11 doesn't seem that overwhelming. And so this is I
12 think a particularly tricky problem to try and
13 resolve, if we can resolve it, in terms of how we
14 would think about this system.

15 Mr. Hasbrouck?

16 MR. HASBROUCK: I didn't think we were
17 talking about preliminary injunctions. And it's
18 really a different can of worms. In most of these
19 cases, the infringement has already been going on for
20 some time, and hopefully, crossing our fingers, we
21 will have a quick enough process that we will get to a
22 resolution.

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1 So speaking in terms of, once there has been
2 a finding of infringement -- we are in agreement that
3 there has been -- that it's the infringer's problem
4 what it is going to cost to fix that.

5 And I think that trying to put limits on it
6 based on the overall value of the work or the value of
7 the infringement in relationship to the value of the
8 work is going to create -- is really opening a can of
9 worms, because you are going to see whether it is an
10 article in a magazine. The magazine publisher is
11 going to claim, well, that's an integral component of
12 that issue or even of that entire volume or even of
13 the entire corpus of the archives of the magazine.

14 One page on a website, the web publisher is
15 going to say that is integral part of the entirety of
16 the website. So, and if you set up the kind of
17 process you are describing, it will be to the
18 infringer's advantage to incorporate these infringing
19 things into something that can be claimed as a large,
20 valuable corpus, the integrity of which would be
21 destroyed by taking out this one now-proven-to-be
22 infringing work.

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1 So I think you have to rest it on, if you
2 have proven infringement, you are entitled to an
3 injunction, or at least to pursue an injunction
4 through this process mandating the cessation of the
5 infringing conduct. And how the infringer goes about
6 doing that is their problem.

7 MS. ROWLAND: I wanted to raise a point
8 about this whole discussion, because when we were
9 talking about these issues yesterday we were talking
10 about mandatory, which is voluntary, and the
11 constitutional issues. So for a moment think of this
12 as being a voluntary system and -- for Ms. Tommaselli.

13 So if it's a voluntary system for the
14 defendant, and the defendant is concerned, so up front
15 the plaintiff would have to say, "We are going for
16 injunctive relief." Ms. Tommaselli could say, "See ya,
17 you know, we're not going to go into this. We don't
18 feel comfortable."

19 And so then a question is, what is an
20 incentive to make the film producers, the music
21 producers, and whoever comfortable agreeing to be in
22 this procedure.

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1 And so a question is: how can that be done?
2 Could it be something like, if they are going after a
3 film producer, there would be no preliminary
4 injunction and perhaps at the end of this -- at the
5 end of the procedure there was some sort of showing, a
6 film producer could say, "This is going to have this
7 huge financial impact, we can't do this injunction,"
8 if there would be a way to appeal that or do
9 something.

10 But I think that the talk about, you know,
11 we need an injunction, I understand that's very
12 important to a lot of rights holders. But if it would
13 be a voluntary procedure, we have to think of a way
14 that they just wouldn't immediately refuse to be
15 involved. And I don't know if anyone has any
16 suggestions on how to get everyone to agree to that,
17 but suggestions would be welcome. I think I threw a
18 wrench into the --

19 MS. CHARLESWORTH: I think you stumped the
20 audience. Well, I think -- as I said, I think this is
21 a very important issue, and it has two very compelling
22 sides to it at least, probably more. So we will

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1 continue to look at that and take the comments, the
2 written comments, into consideration, as well as
3 everything that has been said at these meetings.

4 We have a couple -- let's see, we have about
5 15 minutes left. A couple of additional topics here.
6 One -- well, two of them sort of are interrelated --
7 the effect of the adjudication and the enforceability
8 of the judgment. And I think we touched on some of
9 this yesterday, but the question is, should this be a
10 final and enforceable judgment? Should it be
11 precedential?

12 I think many people yesterday expressed the
13 view that it should be publicly available in some sort
14 of written form, although if you disagree with that,
15 you know, here is your opportunity to speak to that.

16 Should it be res judicata and collateral
17 estoppel? What should the impact of the outcome in
18 small claims court be? Any thoughts on this? Yes,
19 Mr. Reed.

20 MR. REED: Well, the specific reference to
21 whether it could be used as precedent, collateral
22 estoppel, that sort of thing, any time you have a

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1 process that purports to be streamlined, you then have
2 great difficulty, I think, in making that applicable
3 to other circumstances.

4 And I could see the opportunity for some
5 gamesmanship for a battle in a small claims
6 environment over an issue that could really have
7 applicability much more broadly, and the opportunity
8 for somebody to go in, test the waters, try to get a
9 quick and cheap ruling in their favor, and then go
10 riding around the countryside and using that very
11 broadly. And so I would be very hesitant to have a
12 system that would allow for that.

13 MS. CHARLESWORTH: So your view is that the
14 judgment should apply to the specific parties and
15 issues that were --

16 MR. REED: And only in that case.

17 MS. CHARLESWORTH: Only in that case.

18 MR. REED: One at a time. If we are talking
19 truly expedited and small claims, yeah, absolutely.

20 MS. CHARLESWORTH: Are there different
21 points of view on that? Everyone agree? Mr. Brennan?

22 MR. BRENNAN: Again, if we are truly just

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1 the small claims proceeding, that seems reasonable.
2 If we are talking more, as some proposed, a mini trial
3 proceeding, in which we are going to have actually an
4 adjudicated hearing, I think those should be written
5 decisions. You could have claim preclusion, issue
6 preclusion in effect, because we have had a true
7 evidentiary hearing on it. So we should just
8 distinguish those two cases.

9 MS. CHARLESWORTH: Okay. Is everyone
10 satisfied with that approach? At least here? Ms.
11 Calzada, are you not -- oh, Mr. Hasbrouck? I'm sorry.

12 MR. HASBROUCK: I would just point out that
13 this may in fact be one of the significant incentives
14 to participate in if it were to be a voluntary process
15 -- the fact that the judgment would be of limited
16 effect.

17 And that is not going to be a problem for
18 small creators, because they are not going to have the
19 resources to be trying to pursue any collateral cases
20 or anything anyway. So, you know, their outcome is
21 going to be determined by the judgment in this case
22 anyway. So they are not giving up anything that they

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1 actually have now by forgoing that. But the defendant
2 may see it as a more narrow, closed-end thing that
3 makes them more willing to participate.

4 MS. CHARLESWORTH: Okay. Those are good
5 comments. Thank you.

6 MS. CALZADA: I will add, I do think it is
7 important that it is res judicata on that particular
8 issue for those parties, because you don't want a
9 finding in this court, and then the loser deciding to
10 go out and litigate it again because that defeats the
11 purpose. So definitely important that it sticks, you
12 know?

13 MS. CHARLESWORTH: Okay. Enforceability --
14 we spoke a little bit about this yesterday. Does
15 anyone have further thoughts on, let's assume we are
16 dealing here with some sort of voluntary process.
17 There is an administrative tribunal of some sort that
18 is not an Article III court, how to make these
19 judgments enforceable? Ms. Wright is -- I think you
20 had some comments yesterday, a few. Do you have --
21 from your experience, do you want to comment --

22 MS. WRIGHT: Yes.

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1 MS. CHARLESWORTH: -- a little bit further
2 on that?

3 MS. WRIGHT: Right. The suggestion
4 yesterday was that it would be enforceable by a state
5 court because the procedure to domesticate judgments
6 is expensive, and we are trying to make it easier for
7 people of limited means to be able to collect. And
8 because of the internet, we've got -- we do have
9 national implications of -- where you may find your
10 infringer, and where you may be able to collect.

11 So I am hopeful that it would be
12 enforceable, but you do have to worry about
13 constitutionality of all of that. And good luck with
14 that.

15 MS. CHARLESWORTH: Oh, no, no. We don't
16 want that. I mean, do you think there is some process
17 -- I think you talked a little bit yesterday about a
18 process where you could take the judgment and file it,
19 similar to an arbitration award, and then it would be
20 a federal court judgment. Is that -- do you think
21 that would be helpful?

22 MS. WRIGHT: If you can enforce it through

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1 federal court, that's fine. If you can enforce it
2 through state court, I think that would be better and
3 easier, cheaper to collect. But, again, it has to be
4 enforceable under constitutional avenues.

5 MS. CHARLESWORTH: Okay. Any further
6 thoughts? All right. Well, we are down to our last
7 topic for Panel -- what panel are we on?

8 MS. ROWLAND: Five.

9 MS. CHARLESWORTH: Five. Review and
10 appeals. I think this is a very -- another very
11 significant issue. Some have suggested that if we set
12 up an administrative court one way to overcome some of
13 the constitutional concerns is to make everything
14 appealable to an Article III court.

15 Others have suggested that there should be
16 no appeals. In other words, if you volunteer to
17 partake of this process, you are agreeing that
18 whatever is done is over unless there is some sort of
19 fraud or some gross abuse of process.

20 I want to open the floor on this issue in
21 terms of thinking about the scale of the system and
22 the usability, and whether a right of appeal makes

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1 sense, and, if so, to what body, another
2 administrative body, to an Article III court, what are
3 your thoughts?

4 Mr. Reed?

5 MR. REED: Again, making the analogy to
6 arbitration, in arbitration there is a very limited
7 right of appeal, basically, to an arbitration award
8 based upon very specific standards -- bribery, fraud.
9 There are very few, three or four, bases.

10 And then, also, following on Mr. Brennan's
11 distinction several times this morning between the
12 very small -- true small claims and a more
13 intermediate mini trial concept, you might be able to
14 have two different approaches that in the small claims
15 environment, based upon the parties' agreement to
16 participate, then they can only object to the outcome
17 based upon some of the similar sort of very, very
18 egregious potential misconduct on the part of the
19 hearing officer.

20 Then, in the more intermediate size matters,
21 you could have a broader right to object, and then
22 perhaps that would be to the Article III judge, who in

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1 all likelihood would give it to a Magistrate anyway.

2 So, I mean, you might be able to get some
3 complexity in there that would get the benefits that
4 you are looking for and not any of the real burden of
5 process.

6 MS. CHARLESWORTH: Mr. Brennan?

7 MR. BRENNAN: Following up on that comment,
8 I think we need to look again at our true -- what we
9 are calling our true small claims and our sort of mini
10 trial. If you are looking at the true small claims
11 area, if you limit the right of appeal -- and here is
12 the issue on the appeal. What you usually want to
13 appeal is an error of law, somebody didn't follow the
14 law.

15 Whether you can appeal an arbitration on
16 that ground is still something of an open issue here.
17 But you certainly want that. If you're a defendant
18 and you have a limited or no right of appeal, plus the
19 possibility of an injunction, that is a strong
20 disincentive never to consent to going in small claims
21 proceeding.

22 So you might consent to go if it was just

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1 limited to the parties, damages only. It makes sense
2 to do; it's a limited claim. But the more you start
3 to increase the remedies and decrease the ability to
4 review, the more you disincentivize any defendant to
5 consent to that. So that is the first thing to
6 consider.

7 The second thing is, if we do have a small
8 claims, you have to ask, what do we -- what are the
9 grounds for appeal, and where do we appeal? For
10 example, let's assume we say we appeal to Article III
11 court. Which one? Is it the one located in
12 Washington, D.C., where the court is issued? Or is it
13 any district court in the country or the district
14 court where the defendant is located? Which one?

15 That then puts you in the issue of, do you
16 have one court that is centralized where you have
17 uniform procedures? Or if we go to multiple different
18 district courts, then we can have all sorts of
19 different procedures.

20 Second ground is, what is the basis for the
21 appeal? In California, when you appeal on small
22 claims, you can actually go back and have a new trial

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1 again. Do you go back and have a new trial in
2 district court if the grounds of appeal are like an
3 error of law? Or does the court only correct errors
4 in law and send it back to the small claims to have
5 there? Or does it just vacate the award and say you
6 have to start over?

7 So if you do appeal, on what grounds do you
8 appeal? And what's the result of the appeal? Is it
9 only review of law? Is it review of law and facts?
10 So those are all of these procedural questions.

11 The next thing you have to ask is on your
12 mini trial area there. I'm assuming that we had some
13 sort of a trial and either it was in a court that was
14 maybe a special district court, so maybe your mini
15 trial wasn't an Article III court, a special district
16 court, just in D.C. to handle this, or it was part of
17 the other district courts. We don't know whether it's
18 just one court or if it's part of the other district
19 courts using a streamlined procedure in the other
20 district courts.

21 You then have to ask, if those are appealed,
22 where do they go? They go to a court of appeal.

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1 Which one? Do they go to the federal circuit in D.C.?
2 Or do they go to the regional circuits? If they go to
3 the regional circuits, you have the problem of, again,
4 uniformity.

5 If they go to the federal circuit, the
6 federal circuit needs some -- how can I say this
7 politely? Sometimes one does not have -- the federal
8 circuit would probably need to have some additional
9 judges that had some more experience in the copyright
10 and contracting area, so that they would have
11 experience in this. So when you say "appeal," it's
12 not just what you appeal, it's what are the grounds
13 for the appeal, where is it going to go, and if we do
14 have an appeal, what is the result of the appeal?

15 Does it go back to the -- it seems to me in
16 the mini trial areas we could do the appeals the way
17 we normally do it, and then it just depends whether or
18 not the appeal is going -- where the mini trial is
19 being held, in one place or in the district courts.

20 In the small claims area here, though, I
21 think you have to think very carefully about what the
22 appeal is going to do. I think you should have a

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1 right to appeal; otherwise, defendants probably won't
2 consent. And if you do have a right of appeal, then
3 we have to ask on what grounds, and what is the effect
4 of the appeal?

5 MS. CHARLESWORTH: Ms. Wright?

6 MS. WRIGHT: A lot of it has to do with the
7 risk that the defendant has going into this process.
8 If it's the injunctive relief, if it's high damages,
9 and if there is an appeal process available. If there
10 is an appeal process available, I can sort of foresee
11 a larger defendant represented by counsel and sending
12 the first year attorney, go get some litigation
13 experience, go try this case, see how you do. If you
14 lose, we can appeal, no problem, we haven't lost
15 anything. You have to have - - have a stake in this
16 outcome.

17 Also, you are talking about artists who
18 don't have a lot of money. And if you make it an
19 appealable process, if they win, then the defendant
20 says, "Well, we are just going to appeal," and you are
21 going to have to -- you are going to be in the same
22 boat as you were in the first case. You're going to

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1 be in federal court. The plaintiff is not going to be
2 able to represent him or herself very well, have to
3 get an attorney, incur costs. So you are really -- it
4 is just a circle.

5 And so it -- to me, it seems as though it
6 needs to be final process. Therefore, you limit
7 somewhat -- to some extent the risk that the defendant
8 has so that the defendant is more willing to
9 participate in the process.

10 MR. BRENNAN: I mean, all of that makes
11 sense here. The issue is for a defendant here, the
12 more you limit their ability to have -- if you make
13 the procedure expedited and eliminate their right to
14 review, the defendant is not going to consent if you -
15 - especially if you have injunctive relief. I can
16 just --

17 MS. WRIGHT: Or high damages.

18 MR. BRENNAN: I could not, in good
19 conscience, recommend a defendant ever consent to
20 that. So that would mean that -- or high damages. So
21 that means you are going to have to limit severely
22 your remedies in what we'll call the true small claims

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1 procedures, if you don't have an appeal.

2 One of the things we see in arbitration and
3 do in a lot of arbitrations is you are always -- the
4 other thing that happens is if you don't have a right
5 of appeal here, especially to review -- and, again, it
6 depends on what their appeal is. If the appeal is a
7 trial de novo, that is one thing. If the appeal is
8 only errors in law, there is a lot less -- a lot more
9 incentive to participate actively.

10 But if you don't have an appeal at least for
11 errors in law, then the tendency is to make the entire
12 proceeding much more complicated, because, as I said
13 before, you don't know what the adjudicator is going
14 to do, and you are going to throw everything on the
15 wall because you only get one shot.

16 So I would say at least you should have a
17 right to appeal for errors in law, which is a standard
18 grounds for appeal, even in a small claims proceeding.

19 MS. CHARLESWORTH: And do you think a pro se
20 litigant would be able to move forward with that type
21 of appeal?

22 MR. BRENNAN: When we say "appeals," we have

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1 to understand how many cases are appealed. Even if
2 you win or lose in the trial court, only a small
3 percentage of even judgments are appealed. No
4 defendant wants to sit down -- I mean, it is time-
5 consuming and expensive to do an appeal. You don't
6 sit down and say, "Oh, I lost a case. I'll
7 automatically appeal." That's --

8 MS. CHARLESWORTH: No, I'm not suggesting
9 that. What I'm suggesting is, you know, there has been
10 a lot of discussion here about making this system
11 accessible to pro se litigants. And so if you have a
12 right of appeal, one issue that has come up -- even if
13 it's to an administrative body and it is focused on
14 errors of law, which is itself a fairly legalistic
15 standard, but especially I think if you are talking
16 about appealing to an Article III court, the question
17 comes up of whether a pro se litigant really could
18 effectively represent themselves, in most cases. I am
19 not saying there wouldn't be exceptions, but whether
20 that would be accessible to them. If, say, the
21 defendant chose to appeal, would they be able to
22 represent themselves effectively at the appellate

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1 level?

2 MR. BRENNAN: Hard to say whether they would
3 or not. I don't know.

4 MS. WRIGHT: And one concern is that the
5 defendants often use the threat of appeal to negotiate
6 a lower award, to say, okay, we are going to appeal,
7 we are going to take you into federal court, unless
8 you agree to accept a lower amount of the judgment.
9 And so that threat is --

10 MR. BRENNAN: Of course. But the other side
11 to that is this: you are now a pro se litigant. You
12 have won your small claims case. You have an award.
13 You have a set award plus an attorney's fees award.

14 Now, although you may say, "Well, now I have
15 to get an attorney," it's a much different thing if
16 you walk in and somebody says, "Will you handle an
17 appeal for me? I have already won at the lower court
18 level, and I have this money awarded." "Oh, and by
19 the way, since there is an attorney's fees clause, if
20 I win on the appeal, I could probably get the appeal,
21 too." That's a much more appealing case for an
22 attorney to take on for you here.

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1 I mean, we are thinking about trying to do
2 this in which we have -- the reason we have lawyers
3 here and do these cases is not because -- lawyers
4 aren't here and making this procedurally complicated
5 for the fun of it. No lawyer likes to sit and waste
6 their time answering interrogatories or screwing
7 around in discovery. It's there because we've made
8 them for due process concerns, and that's part of what
9 your specialty is.

10 It's like going to a doctor. You know, you
11 could probably go and remove your appendix yourself,
12 but it wouldn't be a good idea.

13 MS. WRIGHT: But that doesn't set a model
14 for pro se litigant, and a pro se litigant is going to
15 be extremely intimidated by the threat of having to
16 have an appellate process at the federal court level.
17 That's what we're trying to do is get rid of that
18 fear.

19 MR. BRENNAN: I understand that. But if we
20 are only creating a system for pro se litigants, then
21 we are going to have to create a very narrow system.
22 And the question is, if you want somebody to be able

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1 to get a recovery beyond a very limited level because
2 of our due process and our technical concerns, then
3 they are going to have to look about hiring this
4 specialist to help them do it.

5 MS. CHARLESWORTH: Other -- Ms. Calzada?

6 MS. CALZADA: So we feel like the most
7 effective system would be non-voluntary. In other
8 words, you couldn't just say, okay, let both sides
9 agree, it has to be mandatory. And our research shows
10 that in order to be constitutional and mandatory there
11 has to be a right of appeal. But with an
12 administrative agency, the appeal standard is
13 typically an abuse of discretion. So that's what I
14 have to add to the conversation.

15 MS. CHARLESWORTH: So in your proposal, you
16 would go from the administrative agency to an Article
17 III court.

18 MS. CALZADA: Yeah.

19 MS. CHARLESWORTH: And I guess I would --
20 that raises the question I think Ms. Wright addressed.
21 The question then is, is that -- assuming you -- one
22 goal, and this is just an assumption, we are here to

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1 have a totally open discussion, so I'm not trying to -
2 - but assuming one goal is to allow people to go
3 through this process without a lawyer, how would you
4 envision that working if they were faced with an
5 appeal or chose to appeal themselves?

6 MS. CALZADA: Well, I think that right now
7 the system -- you know, if there is the opportunity
8 for appeal, I could win pro se, but I would still be
9 subject to appeal. And so I am not sure that it is
10 that much different, other than, as Mr. Brennan said,
11 there would be, you know, the lower precedent, and you
12 are at the abuse of discretion standard.

13 Perhaps, you know, we could insert something
14 that says, you know, if a non-prevailing party appeals
15 and loses the appeal, then they are required to pay
16 the attorney's fees of the prevailing party, that
17 might be a way to sort of even the playing field and
18 attract attorneys, because I do think on an appeal you
19 would probably be stuck needing some assistance.

20 MS. CHARLESWORTH: What do people think of
21 that, fee shifting on appeal? Is that -- Mr.
22 Hasbrouck?

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1 MR. HASBROUCK: Pretty much the same thing
2 we think of fee shifting in any of these cases -- the
3 rich get richer. It would seem that the
4 constitutional choice is between either a mandatory
5 system with right of appeal or a voluntary system with
6 no right of appeal.

7 The voluntary system with no right of appeal
8 gets small creators nowhere, because the defendant
9 infringers aren't going to opt in. So if the choice
10 is something that is useless, or something that might
11 be helpful, we would go for the mandatory system with
12 right of appeal, presumably on the standard that
13 currently applies for appealing from the decision of
14 an administrative law judge.

15 And even in California where you have a
16 right to a trial de novo on appeal from a small claims
17 court, small claims courts are quite effective. I
18 tend to suspect that part of the reason is that the
19 calculus of the defendant, the losing party, once they
20 have already gone before the small claims adjudicator
21 and gotten that verdict, they are going to look
22 differently on their chances of success in the next

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1 round, and they are going to make a different kind of
2 business decision based on that more realistic sense
3 of the strength of their case and the likelihood of
4 prevailing.

5 So it may well be that a lot of people who
6 would not opt in in the first place to a voluntary
7 process will be prepared to throw in the towel even if
8 they had a right to a trial de novo, rather than
9 invest the money in trying to pursue that. It would
10 at least provide some prospect of relief.

11 MS. CHARLESWORTH: Further thoughts?

12 MS. CALZADA: I tend to agree that it seems
13 that nothing is going to be perfect in the way that it
14 solves all problems. And so if we can come up with
15 something that solves a lot of problems, that would be
16 a net positive.

17 MS. CHARLESWORTH: On that hopeful note --
18 actually, I think now we are about almost 10 minutes
19 overdue to end this panel. So why don't we take a
20 break until, say, 20 after. Is that --

21 MS. ROWLAND: Yes. And I think we are going
22 to make an announcement about the next two panels or -

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1 -

2 MS. CHARLESWORTH: Yes. I think we have
3 very few people who signed up specifically to address
4 constitutional issues.

5 MS. ROWLAND: Right. So we have -- the next
6 two panels are the constitutional issue panel and the
7 moving forward panel. And people I guess didn't rank
8 constitutional issues high, I don't think because it's
9 not extremely important, but probably because people
10 are intimidated and do not feel that they have the
11 information necessary to contribute to the discussion.

12 We are still going to have the panel, but
13 the issue with the panel and the people who are
14 interested in it means that it probably will be quite
15 short, unless some other people decide to start
16 speaking up.

17 And if that happens, of course, we will go
18 the whole way. But we have also determined in our
19 last meetings that the moving forward panel did not go
20 that long either, so the last time we actually
21 combined those two panels and just saw how far they
22 went.

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1 That seemed to work for us that day, but we
2 will put it up for a vote. And why don't you guys
3 think about it in your break. And when we come back,
4 we can decide if we are going to combine them or not.
5 And if we don't combine them, it will just probably be
6 a very short Panel VI, and then moving on to Panel
7 VII.

8 So with that, I guess we are releasing the
9 panel for now. So we are adjourned for another, what
10 did you say, 15 minutes?

11 MS. CHARLESWORTH: Yes. Which really is 25
12 after I guess.

13 MS. ROWLAND: Okay. So 'til 25 after. So
14 we'll see you back then.

15 MS. CHARLESWORTH: See you in a few minutes.

16 (Brief recess.)

17 MS. ROWLAND: Okay. I think we are ready to
18 start the next panel. And as I mentioned before the
19 break, we were discussing that perhaps these panels
20 won't each take an hour and a half each. And we were
21 contemplating combining them.

22 The two panels, just to refresh your memory,

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1 are constitutional issues and moving forward. And I'm
2 looking around, I'm not sure if we have any
3 constitutional law experts in here. But if we could
4 put it to a vote and see what people think. So we
5 could either just go ahead and do them panel by panel
6 and start with Panel VI, and stop after we're done
7 with it and then take another break and then go into
8 Panel VII, just moving forward, or we can just try to
9 combine them.

10 And our experience from our panels in New
11 York I think it probably was only an hour and a half
12 for both of them combined there, and we had a few more
13 participants who were very into some of these issues.

14 MS. CHARLESWORTH: So the idea is we would
15 end before lunch, so people would be free to depart --

16 MS. ROWLAND: Yes. Instead --

17 MS. CHARLESWORTH: -- get out of school a
18 little bit early.

19 MS. ROWLAND: Instead of taking an hour long
20 break and then coming back for maybe another shorter
21 panel.

22 MS. CHARLESWORTH: Compress them to get

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1 people out of here sooner. Or if people prefer a more
2 leisurely pace, that's fine with us.

3 MS. ROWLAND: And we wanted to emphasize
4 this not because we do not think either of these are
5 very important issues. In fact, we think the
6 constitutional issues are probably the most important
7 issues that we have to consider, because if we come up
8 with something that we think might be viable that is
9 unconstitutional, well, that is really no help to
10 anybody.

11 And it is very important to take into
12 account all of the due process issues, the Article III
13 issues, the 7th Amendment, so there are many issues
14 that we really, really need to spend a lot of time
15 researching. And at the Copyright Office we will be
16 spending our time researching them and trying to
17 understand how they interact with all of these other
18 issues that we are dealing with. We think they are
19 extremely important, so don't think that combining
20 these panels says anything about that, because we
21 think they are very, very important.

22 So with that in mind, who here would like to

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1 combine the panels? I need a show of hands. Okay.
2 So it's unanimous. We don't need to poll the audience
3 or anything.

4 So we are going to go ahead and combine
5 them. And what we'll do is we'll start -- I think that
6 whoever is here for one panel can be on the other
7 panel. I think everyone at this point we can just
8 join in.

9 So the first panel is on constitutional
10 issues, and talk just briefly about the different
11 types of constitutional issues and see if anyone has
12 thoughts or ideas on these issues. And if they don't
13 have thoughts themselves, perhaps if they have advice
14 on where the Copyright Office can look, if there are
15 other resources that people might think would be
16 helpful for us to look at.

17 And so the first issue is really a
18 specialized -- the separation of powers issue and the
19 question of an Article III court and whether or not a
20 small claims proceeding, if it is not within a
21 district court system, how would that interact with
22 Article III and the requirements of that. And does

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1 anyone have kind of a general thought on that issue?

2 Okay. Calzada?

3 MS. CALZADA: Yeah. So just generally, an
4 Article I court, which is an administrative agency,
5 doesn't trigger a separation of powers question if
6 it's done properly.

7 MS. ROWLAND: Okay. Do you have anything
8 more to add on how to perhaps make that work properly?

9 MS. CALZADA: Well, by creating an
10 administrative agency, you know, I think the biggest
11 concern would be the public right question. But we
12 believe that the public's right to having copyrighted
13 works in our culture and that kind of thing could be
14 sort of that public right. I think that's probably
15 going to be the biggest question is how to make the
16 administrative agency apply in these cases. That
17 would be our biggest hurdle, in my opinion.

18 MS. ROWLAND: Do you have any
19 recommendations on how to help with that?

20 MS. CALZADA: Well, just generally that
21 copyright -- there is a public right and a
22 constitutional element to copyright and protection of

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1 copyright, and the public has a great interest in
2 protection of copyright.

3 MS. ROWLAND: I think Mr. Brennan had
4 something to say.

5 MR. BRENNAN: I think the first question you
6 have to ask is whether or not you are going to make
7 the procedure voluntary or mandatory. Because if it's
8 going to be voluntary, and the people opt in, then I
9 don't think you have any constitutional issues. So
10 the first thing you have to do is say, which road are
11 we going to go down?

12 If you make it voluntary, then the issue is,
13 well, how do we create incentives for people to opt
14 in? It seems to me that the easiest way to go and the
15 way you do to create incentives is, what are the
16 incentives for a plaintiff to want to opt in? And on
17 the plaintiff's point of view, I think simplification
18 of procedures, reduced cost, and for a defendant to
19 opt in, maybe limitation on certain remedies and
20 perhaps, as I said before, just an effectiveness
21 between the parties.

22 So then you want to create a system of

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1 incentives for people to opt in. And if that's the
2 case, then you can look at either setting it up as an
3 administrative board or an administrative tribunal. But
4 that's the first question you have to ask.

5 If you are going to make it mandatory, it
6 seems then you go through a whole host of issues. And
7 not only the institutional issues, but you have to
8 start asking things like, if it's mandatory, where is
9 it going to be? Is it going to have to have multiple
10 locations, or will you have national service of
11 process? Are we going to have judgments? What are
12 the remedies? And you have a whole range of
13 additional questions.

14 So the first question I think to ask is:
15 voluntary or not? That will determine what your
16 answers are going to be before you even have to walk
17 down any of these more complicated issues.

18 MS. ROWLAND: Okay. Does anyone else have
19 anything to say on that issue? Ms. Calzada?

20 MS. CALZADA: Well, the reason that we
21 pursued the administrative agency option was that we
22 felt that it should be mandatory, and that it would be

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1 most effective if it's mandatory.

2 MS. ROWLAND: You have the -- and then, as
3 we discussed, so then you have to be very careful
4 about how to create such a mandatory system to see if
5 it would be able to pass constitutional muster.

6 MS. CALZADA: Yes.

7 MS. ROWLAND: Okay.

8 MS. CHARLESWORTH: And we want to thank you
9 for doing research on that. I know it's a little far
10 afield for some of us. But we appreciate your
11 comments and thoughtful approach, so we will look at
12 that.

13 MS. ROWLAND: Another constitutional issue
14 that comes up is the 7th Amendment and the right to a
15 jury trial. And the question becomes, at what point
16 can you -- would you have to have a jury in a small
17 claims procedure? If not, how would you get around
18 it? On our New York panels, there was a discussion of
19 perhaps limiting it to injunctive relief, which is a
20 whole other can of worms. But at least in some
21 people's thoughts that would remove kind of the
22 ability to have the 7th Amendment right to a jury.

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1 I don't know if that's something that anyone
2 would be interested in, just limiting it to injunctive
3 relief, but I suspect not. I would poll the audience
4 here. Does anyone -- people are shaking their heads,
5 so no one seems to be for this idea. Does anyone have
6 any ideas about the role of a jury system, or how to
7 have a small claims procedure co-exist with the 7th
8 Amendment? Ms. Calzada?

9 MS. CALZADA: Well, again, if you are in an
10 administrative agency, there is no requirement for a
11 jury trial. And, of course, on appeal to an Article
12 III court, they would have a right to a jury trial.
13 So that right wouldn't necessarily be --

14 MS. ROWLAND: Okay. Does anyone else have
15 thoughts on that? Okay.

16 One of the big issues that we have seen
17 raised and considered at the Copyright Office is about
18 personal jurisdiction and how one is to get
19 jurisdiction over a defendant.

20 So, for example, if you had a centralized
21 tribunal or court, perhaps in D.C. or New York or
22 L.A., and you wanted to get jurisdiction over somebody

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1 who has never been to any of those places and perhaps
2 is in Montana somewhere churning out T-shirts that are
3 infringing, how would you get jurisdiction over that
4 person? Does anyone have any thoughts on that?

5 It's a very complicated question for sure.
6 And it is very important, because you do need to make
7 sure that you have the minimum contacts and all of the
8 constitutions standards satisfied. So that's
9 something that we would love people to think about,
10 because this is a major issue.

11 Mr. Brennan?

12 MR. BRENNAN: Zippo.

13 MS. ROWLAND: Well, let's say it's not an
14 internet issue. Say they --

15 MR. BRENNAN: That was -- yeah, exactly.
16 That's the second issue.

17 MS. ROWLAND: Right. So say they're not on
18 the internet. And so there is -- for those of you who
19 are not familiar with the Zippo line of cases, there
20 is a line of cases. People are not -- I'm not sure
21 everyone is familiar with it. Basically, it's an
22 early -- it was one of the earliest cases about

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1 internet jurisdiction and how to get the
2 jurisdiction over individuals who might be doing
3 things on websites. The Zippo case set up kind of a
4 test, which was how active the website is. So if it's
5 a passive website, or perhaps it's just a blog or
6 something where nothing is really -- there is no
7 interaction, that's a passive website, so you probably
8 can't get jurisdiction over a person for that.

9 If there's an interactive website at the
10 other end of the spectrum, or it's -- where the
11 defendant is sending packages all over the place and
12 soliciting customers everywhere, then that would be --
13 probably give you enough for a jurisdiction. And
14 then, there's kind of this kind of middle ground where
15 it's not totally interactive, it's not passive, it's
16 an intermediate site. And so there is some issue
17 there.

18 But that is really for the internet. So say
19 it's somebody who, as I mentioned earlier, is in their
20 garage churning out some T-shirts with some photograph
21 on it that people find very valuable. And how do you
22 get jurisdiction over that person who is not selling

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1 them over the internet but maybe is going to, I don't
2 know, their local flea market or something and selling
3 them.

4 Yes, Mr. Brennan?

5 MR. BRENNAN: Well, again, you have to ask
6 whether or not you are going to create just in our --
7 just one court located in D.C., or you are going to
8 make this as a separate procedure as an adjunct to a
9 part of a district court. So that means if you are
10 going to set up separate tribunals, or is it just a
11 new -- is it an appendix to the Federal Rules of Civil
12 Procedure that you have to teach every district court
13 judge, or do you create something in the district
14 court?

15 I mean, one thing you could always do, I
16 mean, if you had to is you could initiate the case in
17 the district court where the defendant resides and get
18 jurisdiction, and then see whether or not there could
19 be a change of venue, especially if you are going to
20 do it online and electronically if the local district
21 court had facilities to count electronic mitigations
22 where the tribunal is. Then, you sort of meet your

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1 jurisdictional requirements. It is awkward, but you
2 could do that from personal jurisdiction.

3 MS. ROWLAND: Okay. Does anyone else have
4 any thoughts on that? As he mentioned, it is very
5 complicated. So it's something that we are going to
6 be giving a lot of thought to.

7 And one of the final constitutional issues
8 that we are considering is about due process and
9 making sure that defendants have sufficient due
10 process, and making sure they are able to represent
11 themselves well and have the opportunity to present
12 their case in a fair manner.

13 And a lot of the issues that we have been
14 discussing deal with discovery and motion practice and
15 kind of a mini-trial scenario that Mr. Brennan brought
16 up. And so the question is, the less complicated the
17 procedure gets, the less due process you have. And if
18 it's a voluntary system, I suppose that's helpful to
19 your due process concerns, because you are opting in.
20 But does anyone have any thoughts on how to ensure
21 that the due process concerns are taken care of?

22 Because even if it is a voluntary process,

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1 perhaps you have an unsophisticated defendant who
2 doesn't really understand what they are opting into.
3 They don't realize. I think most members of the
4 public really aren't really aware of their due process
5 rights in civil litigation, so they don't really
6 understand that in a federal court they would have all
7 sorts of rights to take discovery and depositions, and
8 what not.

9 And how informed would they have to be to
10 give that up? Because just saying it's voluntary
11 doesn't mean they are knowingly giving up those very
12 important due process rights. I wonder if anyone has
13 any thoughts about that.

14 I feel like all my questions are stumping
15 everybody today.

16 (Laughter.)

17 But it's a very important issue that we are
18 definitely researching.

19 MS. CHARLESWORTH: It's a good thing we're
20 not law professors.

21 MS. ROWLAND: I know.

22 MS. CHARLESWORTH: We're not doing a very

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1 good job.

2 (Laughter.)

3 MS. ROWLAND: If you guys have any thoughts
4 after this, if you want to be -- we may be opening up
5 another comment period. We're not sure yet. But if
6 you have -- if we do and you have any thoughts, not
7 just on your own personal views, if you have thoughts
8 on other sources of information on this, we would love
9 to hear them.

10 And so does anyone have any other
11 constitutional issues they want to discuss? No? Mr.
12 Neil?

13 MR. NEIL: I mean, there is a lot of
14 questions in this area. I don't mean to put, you know
15 -- make this a whole lot longer, but I'm curious if
16 folks have any insight. I mean, I just was -- with
17 regards to the Feltner case, when I was looking at it,
18 my understanding is that, you know, it relates to
19 statutory damages particularly, 504(c). Is that other
20 folks' understanding as well? So, in other words,
21 there wouldn't be a jury trial issue if it was just
22 an actual damages court, for instance?

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1 MS. ROWLAND: Ms. Calzada?

2 MS. CALZADA: My interpretation of Feltner
3 was that it decided that the right to a jury applies
4 in both cases. The question was whether, you know, if
5 it's statutory damages, do you need a jury, and the
6 answer was yeah.

7 MS. CHARLESWORTH: Am I -- well, I think the
8 case was focused on statutory damages, because that
9 was the question that came up, but I don't disagree
10 with Ms. Calzada's --

11 THE COURT REPORTER: I'm sorry. Can we stop
12 for one second? I'm just having some technical
13 problems.

14 MS. ROWLAND: Sure. Okay. We're taking a
15 little technical break.

16 (Brief recess.)

17 MS. ROWLAND: I think we are back up.

18 THE COURT REPORTER: Yes.

19 MS. ROWLAND: I think he was talking about
20 the statutory damages case, so --

21 MR. NEIL: Oh, sure. I was just asking the
22 panel here about their interpretation of the Feltner

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1 case and whether or not folks felt that the case was
2 limited to focusing on statutory damages or whether it
3 was broader in terms of focusing on all damages in
4 terms of requiring a jury trial under the 7th
5 Amendment.

6 It seemed like there was some -- a little
7 bit of a difference of opinion. Some folks thought it
8 was just statutory damages. Some folks thought it was
9 both.

10 MS. ROWLAND: I think Ms. Calzada had
11 something to say.

12 MR. NEIL: Yeah. I'm sorry.

13 MS. CALZADA: My interpretation of the case
14 -- and it has been a while since I read it -- but it
15 was that the question on the table in that case
16 specifically was whether a jury trial was required for
17 statutory damages, you know, outside of the general
18 constitutional point that a jury trial is required for
19 regular damages. So it did specifically address
20 statutory, but that doesn't mean that the rule is
21 limited to statutory.

22 MS. ROWLAND: And I think Mr. Hasbrouck has

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1 his hand up.

2 MR. HASBROUCK: Our one constitutional
3 concern is to ensure that treaty obligations are
4 respected, particularly Berne Convention obligations,
5 to make sure that whatever is proposed here comports
6 with the Berne obligations, which would seem to have
7 potential concerns in at least three areas that
8 hopefully can be respected, but I want to make sure
9 that they're on the table.

10 One is to ensure that the process is
11 accessible to people who may not be in the U.S. and
12 may not even be capable of getting here. The second
13 is to ensure that this respects and allows people to
14 get redressed for violation of their moral rights.
15 And the third is to ensure that it doesn't require any
16 formalities.

17 MS. ROWLAND: Okay. Does anyone have any
18 responses to that? Okay. Point taken, Mr. Hasbrouck.

19 MR. NEIL: You are talking about -- I mean,
20 you are talking about U.S. honored moral rights,
21 right? I mean, U.S. --

22 MR. HASBROUCK: Rights guaranteed by Berne.

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1 MR. NEIL: Okay.

2 MS. ROWLAND: Right. So I think like, as we
3 know in the United States, the statutory basis for
4 moral rights are somewhat limited to the Visual Artist
5 Rights Act. And there are various state law avenues
6 that you might be able to avail yourself of. That's a
7 discussion for another day about how robust the U.S.
8 moral rights scheme is, so -- but point taken about
9 the Berne Convention, Mr. Hasbrouck.

10 Does anyone else have any thoughts about any
11 constitutional issues?

12 MR. NEIL: If I could ask a question about
13 -- how many folks are -- I know things are up in the
14 air, but how many folks are advocating a voluntary
15 system at this point that are on the panel?

16 MS. ROWLAND: Can we have a show of hands?
17 Okay. Two.

18 MR. NEIL: How many are advocating a
19 mandatory system? Okay. And as far as the --

20 MS. ROWLAND: Six for the record.

21 MR. NEIL: Okay. And so as far as the
22 mandatory folks, I am very interested to hear -- I saw

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1 a lot of comments about, okay, like is mandatory or
2 voluntary, and also there should just be -- kind of
3 jump right into saying, okay, this is going to be a
4 tribunal or, you know, this is just going to be a
5 tribunal. And I'm curious, does anybody have any --
6 why Article I versus Article III? Any choice of like
7 why you want to use the Article I tribunal process?

8 MS. ROWLAND: Ms. Calzada?

9 MS. CALZADA: Yeah. So the basic reason
10 that we pursued the Article I tribunal process track
11 is political. We had a great intern who did a lot of
12 research on this kind of stuff, and she determined
13 that it is virtually impossible to get a new Article
14 III court set up.

15 And so given that hurdle, even though
16 actually that would be phenomenal, if they could
17 create a small claims federal court just in general,
18 I'm sure a lot of people would be very happy. Might
19 solve the patent people's problem as well, you know,
20 and we would be thrilled. We felt that that was
21 probably not something that was likely to happen. And
22 so, you know, we sort of tried to pursue this balance

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1 between what we felt could get done and what we felt
2 would survive constitutional scrutiny, and that's how
3 we ended up on our proposal path.

4 MS. ROWLAND: Okay. Mr. Neil?

5 MR. NEIL: Well, okay, so there is a number
6 of other folks interested in mandatory. Do you -- are
7 you -- does anybody feel strongly one way or the other
8 about Article III or Article I with regards to the
9 mandatory system? No? Okay.

10 MS. ROWLAND: There is no response. Okay.
11 Thank you.

12 MS. KNAPPEN: No.

13 MS. ROWLAND: Ms. Knappen says no.

14 (Laughter.)

15 MR. NEIL: And I think that is really
16 important in terms of what is going to go -- be
17 involved in the legislative process. My basic
18 understanding of this is that Congress has the right
19 to create Article I or Article III courts. But in
20 terms of what is involved in each process, I'm sure
21 that is going to be an important consideration.

22 Did you have --

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1 MS. CALZADA: Yeah. Well, I think it was
2 more of a reluctance, that we have seen historically a
3 reluctance to create additional Article III courts,
4 while we haven't seen that same kind of reluctance to
5 create administrative agencies. But, again, like I
6 said, that would be ideal because you would solve so
7 many of these constitutional problems if you could
8 create a new Article III court system. And we
9 certainly wouldn't be opposed to that if Congress was
10 behind it.

11 MS. ROWLAND: Okay. Mr. Neil?

12 MR. NEIL: As far as -- just a last comment
13 about the due process considerations that this
14 gentleman over here raised, particularly with folks
15 from -- internationally, but also folks in this
16 country. I'm sure you all talked about it yesterday,
17 but allowing folks to appear through videoconferencing
18 or teleconferencing is going to really help to address
19 those issues.

20 MS. ROWLAND: And we did have a discussion
21 yesterday about trying to make it easier for everyone
22 involved. So taking advantage of teleconferencing,

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1 videoconferencing, email submissions, that kind of
2 thing.

3 Ms. Calzada, did you have something to say?

4 MS. CALZADA: I was just going to say it's
5 an interesting dichotomy that I am sure that the folks
6 that wrote our Constitution didn't think about, if you
7 can appear by videoconference -- on your due process
8 rights. Can a court in Washington haul you in, you
9 know, and have jurisdiction over you? I mean, because
10 the jurisdictional question isn't just about getting
11 there. It's about the court having power over you.
12 And it's an intriguing question about whether that
13 would solve the problem.

14 MS. ROWLAND: Okay. Any other points before
15 we move on to our next panel?

16 MS. CHARLESWORTH: Does anyone think the
17 court should ride circuit?

18 MS. ROWLAND: I think that's something the
19 U.K. -- I think they kind of/sort of do a little bit
20 of that with their small claims thing that they have
21 come up with.

22 MS. KNAPPEN: I think that would be

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1 fabulous.

2 MS. CHARLESWORTH: Especially if they were
3 on horseback.

4 (Laughter.)

5 Sorry. The hour is growing late.

6 (Laughter.)

7 MS. ROWLAND: It depends on the horse, I
8 suppose.

9 MS. CALZADA: You mean travel?

10 MS. ROWLAND: Yes.

11 MS. CHARLESWORTH: Well, actually, I mean,
12 this comes out of your comment. I mean, originally,
13 there was this idea that the court needed to go to
14 where the people were and ride circuit. So, and I
15 think even -- we may have gotten one comment to that
16 effect, I think, actually, in this process. It was an
17 interesting thought, that the court would actually
18 move around as opposed to being only in one location.

19 MS. ROWLAND: Ms. Wright?

20 MS. WRIGHT: Certainly, it would seem to
21 address a lot of the personal jurisdiction issues and
22 travel issues and also consistency in the rulings with

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1 the court. If you -- I understand that the opposite
2 is -- the opposite idea is just to have one court and
3 we all use that one court as opposed to traveling.
4 But it -- regardless, the other alternative is to have
5 separate courts like we have 11 Circuits.

6 Then, you are going to get different
7 rulings, and it is going to be inconsistent. So if
8 you -- they ride the circuit, then hopefully that
9 would help for consistency.

10 MS. ROWLAND: And then, you have the issue,
11 if you were to ride circuit do you go to where the
12 defendant is? No, the plaintiff is not there. Because
13 under our current system you do have to have the
14 constitutional ability to bring that defendant into
15 court.

16 So is the -- in my Montana garage T-shirt
17 example, so is the circuit riding judge going to go to
18 Montana? And then, how is that going to work with the
19 plaintiff if the plaintiff is in Washington, D.C.?

20 Mr. Brennan?

21 MR. BRENNAN: Going on that, how many judges
22 or adjudicators do you envision being in this court?

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1 If there is only one person, you are riding circuit.
2 If there are 10, then you could have -- and we are
3 doing everything online in a virtual space, I mean, we
4 could set up Second -- some place in Second Site or
5 whatever it's called, Second Life, whatever the site
6 is.

7 (Laughter.)

8 You're online in virtual space. I mean --

9 MS. ROWLAND: That is a whole new idea.
10 Virtual world court.

11 MR. BRENNAN: Well, I'm sorry. You know,
12 sometimes it just happens. We are finally waking up
13 here; the coffee has kicked in. But the only thing,
14 if there are different people, then everything is
15 going to be virtual and online.

16 The reason we have a court in the courtroom
17 is because there is a room where people come in and
18 they appear. But if everything is going to be online,
19 and then there are 10 or whatever different judges or
20 adjudicators in a court, they can all be in different
21 locations here, and they are communicating with each
22 other and maintaining a virtual court online. Just --

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1 I'm asking just. I just asking.

2 MS. ROWLAND: Something to consider. Does
3 anyone else have any thoughts about that, or any other
4 constitutional issues that have been on your mind?

5 Ms. Calzada?

6 MS. CALZADA: I do have one other
7 constitutional comment on the personal jurisdiction.
8 First of all, I believe with copyright anywhere that
9 the work is infringed you can get jurisdiction. And
10 so I think that would -- is that -- am I missing the
11 point?

12 MR. BRENNAN: Located and doing business.

13 MS. WRIGHT: I'm sorry. Say --

14 MS. CALZADA: So if I infringe on you here,
15 you can bring me to court here. No?

16 MS. ROWLAND: Well, I think it's --

17 MS. WRIGHT: It's where the defendant is.

18 MS. ROWLAND: Well, no. But it's a little
19 bit -- so it's when the defendant has minimum contact.
20 So it's not just where. So, for example, we are going
21 to get -- move from my Montana example. He now starts
22 a website and he is selling everything in California.

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1 On his website he has like "Hello, California people,
2 buy my stuff, and I will totally ship it there."

3 Then, you know, you don't need to -- he
4 doesn't need to be in California, but that's just a
5 whole other line of jurisdictional analysis. I don't
6 think it's like a per se rule. But, I mean, it is
7 definitely to be considered.

8 MS. CALZADA: Okay. My other point about
9 personal jurisdiction -- and not to get into a
10 completely different hornet's nest -- but I know that
11 you all are considering or have inquired for comments
12 on orphan works.

13 And I was just going to suggest that
14 whatever comes out of that, that there be a
15 requirement for someone who is claiming or registering
16 an orphan works user, whatever, consent to this court,
17 and that would be another way to bring people into the
18 personal jurisdiction of the court.

19 MS. ROWLAND: Well, that is something to
20 consider in a different context.

21 MS. CALZADA: Yes.

22 MS. ROWLAND: And so there is --

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1 MS. CALZADA: I know it is really not this
2 topic, but I sort of cross over, so I thought I would
3 --

4 MS. ROWLAND: And we are -- just for
5 everyone who is interested, we have a Federal
6 Register Notice out right now, and we are soliciting
7 comments on orphan works. So whoever wants to submit
8 their comments, I believe it was pushed back to
9 January. Don't quote me on that, because I don't have
10 it in front of me, but it -- so if you still have some
11 time, if you're interested in the issue, which many
12 people are -- and I'm sure many people in this room
13 are -- so definitely a big issue that people are
14 concerned about. So we will kind of cabin that for
15 another discussion, because I'm sure it will be an
16 extremely lively debate.

17 Does anyone else have any thoughts on
18 constitutional issues? Okay.

19 So then we are going to move along I think
20 to the moving forward panel, which is Panel VII. And
21 one of the big issues in this panel is about empirical
22 data. And we at the Copyright Office have been trying

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1 to learn more about how things work now and what would
2 change people's mind and how they would select certain
3 types of procedures for adjudicating their rights and
4 what not.

5 So we have really been very interested in
6 empirical data. And one of the questions is whether
7 or not anyone has any empirical data they would like
8 to share with us about whether or not small copyright
9 owners have been bringing claims, what they are doing
10 with their rights, how often they are discouraged, or
11 why are why not they are going to court.

12 And if anyone doesn't have empirical data,
13 we can talk about some anecdotal data if you want, but
14 the first question is if you have -- if anyone has
15 empirical data, any studies they would like to point
16 us to. Mr. Neil?

17 MR. NEIL: So we have actual folks that we
18 work with on the ground on a lot of these informal
19 disputes. And so one of the groups that we have dealt
20 with hundreds of folks is mass file-sharing
21 defendants. And I didn't bring it up in the previous
22 section on relief and appeals, but I think it's

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1 appropriate there as well.

2 There is a question that comes up for these
3 folks, a lot of whom are never named in a lawsuit, but
4 are filed against as John Does in these suits. They
5 may be dismissed even. Their IP address or their John
6 Doe number may be dismissed from a case, but they
7 continue to receive letters and harassing phone calls
8 and things like this. And this is a lot of people.

9 And, you know, obviously, some of these
10 suits, these John Doe suits, are not accurate because
11 they are suing the -- you are suing the IP address,
12 not the actual user who has down the downloading. So
13 some of these folks, this is an extremely stressful
14 situation for them.

15 No matter what you try to -- you know, how
16 much you can explain it to folks, they see letters
17 that sort of are requesting -- you know, saying that
18 they are liable for \$150,000 per work, and they are
19 sort of constantly being barraged with emails or phone
20 calls. And the question for some of them is, you
21 know, there is really no -- other than filing some
22 kind of maybe declaratory lawsuit in federal court,

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1 there is not really any option for them.

2 And one potential for a court like this is
3 to help folks, such as file-sharing defendants, by
4 providing at least a forum where they could get some
5 peace of mind. They are folks that are going to be
6 bringing massive damages in lawsuit, but they could
7 use a declaration of non-infringement from a court.

8 And so that is one group that we see. I haven't heard
9 them talked about too much, so I just wanted to
10 mention that those folks are out there.

11 We also see a fair amount of just small kind
12 of ownership disputes, a photographer or videographer
13 and, let's say, like a small business or a nonprofit
14 about who owns what, who actually owns the material.

15 And while it may seem like an extra -- kind
16 of an extra group of cases being added to a court like
17 this, to its docket, actually I think that dealing
18 with some of these disputes up front, or having a
19 forum for them to deal with them up front, can keep
20 them from festering into situations where someone goes
21 ahead, publishes a work that has the infringement in
22 it, all of these damages are accrued.

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1 So just in terms of actual work with folks,
2 those are the things that we see the most on the
3 ground.

4 And then, other than that, we do work a lot
5 on the defense side, so we do see a fair amount of
6 overreaching. And there are a lot of folks who get
7 accounts removed. A good example was somebody who I
8 recently dealt with who does their own original
9 illustrations and annotations to public domain works
10 and publishes books on Amazon for eBook, that you can
11 can buy as eBooks.

12 And that individual faced -- basically had
13 their Amazon account removed and that lasted for about
14 a month, month and a half, and that was, you know, a
15 takedown basically by the copyright owner, who was
16 saying, okay, we have the rights to this public domain
17 work, which they did not. And those folks really
18 have, you know, very little avenue for recovery
19 either.

20 You know, they are going to have to go maybe
21 across the country to try to sue that person, and
22 there may not be a lot of damages involved. But, you

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1 know, we are interested in any system -- you know,
2 obviously, what the system is going to do is allow a
3 lot of -- hopefully allow a lot of small claims
4 copyright holders to bring legitimate disputes against
5 defendants.

6 But there is also potential to kind of right
7 some of the wrongs that take place in the informal
8 enforcement of copyright right now, and to sort of
9 allow a forum for those issues to be heard. And so
10 those are some of the folks that we are most concerned
11 about.

12 MS. ROWLAND: And do you have any
13 information on how likely they would be? So it seems
14 like right now they don't really take advantage of any
15 sort of judicial process to exonerate themselves or do
16 anything like that. Do you think a small claims
17 procedure would be helpful for that?

18 MR. NEIL: If there was, you know, an
19 expedited procedure that they could take advantage of,
20 I think that -- I think they would be much more
21 likely. You know, there are certain, you know, file-
22 sharing defendants. You know, if the costs were not

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1 extensive, and I don't think that -- I don't think the
2 discovery would have to be that extensive in those
3 cases. So, yes, I think it would lower the bar for
4 them to be able to bring some of those actions.

5 MS. CHARLESWORTH: I mean, just so you know,
6 yesterday we did discuss the possibility of --

7 MR. NEIL: Sure.

8 MS. CHARLESWORTH: -- declaratory judgment
9 actions. And I think at least some people, if not
10 many of the commentators, thought that that might be
11 part of the system, you know, to seek a declaration of
12 non-infringement for example. So, and it is certainly
13 reflected in some of the written comments.

14 MR. NEIL: Right.

15 MS. CHARLESWORTH: Just to respond to one of
16 the points you raised.

17 MR. NEIL: Right. And there is a lot of
18 sort of smaller claims that are sort of in that vein,
19 and maybe it's not exactly a declaratory judgment.
20 But, for instance, 512(f) claims, I don't know if you
21 guys talked about those yesterday.

22 MS. ROWLAND: Briefly.

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1 MR. NEIL: Okay. Great. So --

2 MS. CHARLESWORTH: Do you want to comment
3 further on that, though?

4 MR. NEIL: So those are probably the people
5 we work with the most, I mean, folks who get letters
6 from -- and DMCA takedowns from folks who don't even
7 own the work, or in situations where there has been
8 absolutely no review in terms of whether something is
9 fair use or not. And I think it is important for --
10 that's a really high standard, 512(f). Knowingly,
11 materially mislead is the standard for 512(f). And I
12 think at the very least that it would be appropriate.

13 And I saw a couple of comments that seemed
14 to -- I think it was EF Dufferage, for instance,
15 supported any kind of -- all of the claims -- they
16 said all of the claims in the DMCA should be able to
17 be brought at this court. So 512(f) is one of those
18 claims. And it is something that we see a lot of,
19 sort of DMCA abuse.

20 And I guess one of the other things to think
21 about when you are talking about sort of DMCA letters
22 or cease and desist letters is how you may be able to

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1 design the system, shape the system, so that it does
2 encourage folks to maybe exhaust their -- or to use
3 some of their remedies before they come to the small
4 claims court, you know, whether that -- how
5 appropriate that is and what could even be done with
6 the system to encourage that.

7 Maybe there are certain, you know, benefits
8 or -- to folks for being -- if they have, you know,
9 already exhausted trying to send a cease and desist
10 letter or a DMCA notice, something like that.

11 And as far as declaratory judgments, I mean,
12 you may -- that may be the standard for declaratory
13 judgments, too, you know, for if -- rather than just
14 allowing any declaratory judgment, maybe in some of
15 these cases, you know, where you are talking about
16 more of a misuse or abuse case, maybe you would
17 require actual evidence of a cease and desist letter
18 or a DMCA to be able to bring a declaratory action.

19 MS. ROWLAND: Okay. Any thoughts on that?
20 That's a very important point, and it's something that
21 we only briefly talked about yesterday. So we
22 appreciate your comments on that.

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1 And as far as the issue of empirical data or
2 anecdotal information, does anyone have any thoughts
3 as to why -- I mean, aside from the obvious issues of
4 the cost and the time-consuming nature of federal
5 litigation what is going on with the small copyright
6 claimants? You know, if anyone wants to say anything
7 about that, why they are not taking advantage of the
8 federal court process. Anyone?

9 I know we have talked about a lot of these
10 issues, so I don't know if anyone has anything else to
11 say. But if anyone does, you know, let us know. And
12 especially if you know of any empirical data, that
13 would be great. Or if you are undertaking a study as
14 we speak, that would be great to know, too.

15 Ms. Wright?

16 MS. WRIGHT: Just taking what you said about
17 512(f) a step further, we have seen all sorts of
18 experiences where the copyright holder requests that
19 the photo be taken down through a DMCA takedown
20 notice. And then, there is a counter-notice filed,
21 and then the only way that you can resolve that is
22 filing a federal lawsuit.

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1 And the copyright owner at that point just
2 feels this is futile, I mean, there's nothing we can
3 do except file suit. And if it's difficult to find
4 that person, or it just seems overwhelming lots of
5 times, that they just -- the owners feel like that
6 they are at a brick wall at that point.

7 So a small claims court then would be
8 definitely more inviting to try to resolve the notice
9 and counter-notice under 512(f). But just generally,
10 the -- I think a lack of information, lack of
11 knowledge, intimidation factors are what we see stops
12 a lot of copyright owners from pursuing their rights.

13 And then, I would complain that fair use is
14 a pretty unknown gray area of the law, and it is very
15 frustrating to people to know whether it's a fair use.
16 And probably the use of the Prince song on the video
17 would be good anecdotal evidence of people don't know
18 if that's fair use, or it's the fight of 512(f) in
19 that case.

20 MR. NEIL: Yes. So --

21 MS. ROWLAND: Mr. Neil?

22 MR. NEIL: -- and, I mean, on a practical

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1 level, though, nearly -- I mean, almost nobody --
2 there is very few people that even know that they can
3 counter-notice. There are counter-notices, of course,
4 and at that point, if it's a legitimate claim, it does
5 allow one, you know, a legitimate option for a
6 copyright owner to pursue that further.

7 But most folks don't know that they can
8 counter-notice, and so I think what you find is that
9 the DMCA is extremely effective in terms of an out-of-
10 court injunctive kind of remedy. But, you know, it
11 doesn't deal with damages directly, and it doesn't
12 necessarily -- even consumers, sort of average
13 internet users, though, have the same type of issue
14 that you are describing from time to time. There are
15 a number of sites where photos are taken from people's
16 Facebook pages and used in ways that aren't
17 necessarily fair use.

18 And for privacy reasons and things, folks
19 may want to try to pursue those folks, and sometimes
20 copyright is the only option, and some of those folks
21 ignore -- even if they are registered as a DMCA agent,
22 ignore the -- or whether they are registered as a DMCA

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1 agent or not, you know, the picture -- the photo
2 doesn't go down, and they don't really have any other
3 option in terms of the average consumer who is trying
4 to enforce a privacy right. And so they may not be
5 willing to bring a federal court case about it.

6 But that photo, the use of the photo, may be
7 quite damaging to them. You know, it may appear on a
8 site that they would, you know, much rather not have
9 it. And it may not be a fair use, so it could be --
10 this could also be a venue for those folks.

11 MS. ROWLAND: Ms. Wright?

12 MS. WRIGHT: But that goes back to your
13 comment about people don't know that they can file a
14 counter-notice under 512. Once they receive the
15 notice that it has been taken down, the instructions
16 are, well, this is what you've got to do to file a
17 counter-notice, and so people don't read. They are
18 intimidated by the process. They --

19 MR. NEIL: Well, that depends on the service
20 provider. I'm not sure that the statute requires that
21 -- actually, that they give --

22 MS. WRIGHT: Oh really?

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1 MR. NEIL: -- the actual counter-notice.
2 It's a lot of good, you know, service providers that,
3 you know, worth their salt usually give a procedure
4 and their terms of use and sometimes provide a
5 response. But a lot of service providers will just
6 take something down.

7 And, frankly, the process is quite difficult
8 to navigate through. I don't know if -- YouTube just
9 made some changes to their process. And if you want
10 to -- I just dealt with somebody who had basically a
11 quintessential example of fair use, like it's shown
12 worldwide all the time, but it got resold to a large
13 media company and now it is being -- facing all of
14 these content idea issues and questions about
15 copyright.

16 And the process is quite onerous, actually.
17 The individual copyright owner in the YouTube process
18 right now, believe it or not, has to actually -- I'm
19 sorry. The individual video uploader, the user, when
20 they are disputing -- you know, after a copyright
21 dispute has been filed, it comes to a point where they
22 actually have to describe their argument with regards

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1 to the four factors of fair use, which is -- it's a
2 very intimidating page.

3 When somebody gets there as a video creator,
4 I think most people would sort of turn the other
5 direction, and it sort of has language of when you do
6 this. And when you counter-notice -- there is
7 consequences to counter-notice. You know, if you
8 really look at it, there's serious consequences,
9 especially for foreign defendants. If they are going
10 to counter-notice, then they are giving jurisdiction,
11 and the jurisdiction of the service provider.

12 So counter-noticing is no joke. I mean,
13 even if you have a good argument, you are saying --
14 you are offering federal jurisdiction at that point.
15 It is not just I find a counter-notice and I get it
16 back up. I mean, you are agreeing to jurisdiction at
17 that point. So, you know, counter-noticing is a --
18 still is a bit of a hurdle.

19 MS. ROWLAND: And Ms. Knappen?

20 MS. KNAPPEN: I think I have only known
21 maybe three individual creators that have actually
22 filed an infringement and seen it through. It is just

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1 -- and I can't think of any creator that hasn't been
2 infringed upon that has been working for more than a
3 minute. So it is just the system, as it exists, is
4 unusable for the individual creator.

5 MS. ROWLAND: Okay. And as I mentioned, we
6 are very interested in any empirical data. So if you
7 know of any, or you are undertaking your own study, so
8 it would be great to know. Another issue we are
9 looking into is the cost of the litigation for both
10 the plaintiff and the defendant.

11 There are some statistics out there. The
12 Federal Judicial Center posts theirs as does AIPLA.
13 They have a survey that they do every couple of years
14 about it, but I was wondering if you have any ideas
15 about the average cost of litigation for a smaller
16 copyright claimant, or the defendant for that matter,
17 for defending it. Anyone have any thoughts on that,
18 or any anecdotal information they want to provide, for
19 the cost of the litigation?

20 MS. WRIGHT: One question is whether you
21 consider the attorney's fees to be part of the cost.
22 Are you talking about fees and costs?

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1 MS. ROWLAND: Yes. Fees and costs,
2 everything, the whole thing. Okay.

3 Well, it is interesting. And if you guys
4 are interested, there are some statistics out there.
5 There is one on the Federal Judicial Center that is
6 about the number of cases filed, not on attorney's
7 fees. But the AIPLA study does have some information
8 on it, but I think it's only really available to their
9 members, unless you go to a library and check it out.

10 So that's an interesting issue to us as
11 well, to kind of weigh how much it costs, because we
12 do hear a lot about how much it costs. But it would
13 be nice to get -- to pinpoint a little bit more the
14 ranges on that.

15 And another issue we wonder about is how
16 often attorney's fees are granted in either direction.
17 I know that Ms. Wright was talking about she thinks
18 that they have increased recently. So does anyone
19 have any empirical data or thoughts on the frequency
20 of attorney fee awards? No? Okay.

21 And taking a turn -- oh, Ms. Bristol?

22 MS. BRISTOL: I have something very

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1 tangential. I'm sorry, it just -- it arose as a result
2 of going to one of the IP -- the State Bar's IP
3 Institute. I don't know if this is a factor or
4 feature of being able to get counsel, but the
5 availability of insurance.

6 So for some of the smaller copyright
7 holders, this may not be an issue. They might not be
8 operating a business where they have insurance. But
9 for some that may actually have, I have heard some
10 discussions about whether or not certain activities
11 are covered by insurance or not, and whether you would
12 have counsel by way of your insurance.

13 I don't know if this is something that is
14 interesting to the Copyright Office as to the
15 availability of counsel in some of these -- in the
16 small claims in the mini trial, the possibility of
17 having defense counsel at least by way of insurance
18 coverage.

19 MS. ROWLAND: That is an interesting point.
20 And I think it is not just business insurance, but,
21 oddly, sometimes homeowner's insurance, depending on
22 what type you have. I know of someone who had a

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1 defamation lawsuit filed against him, and his
2 homeowner's insurance actually covered the whole
3 thing, which is something you wouldn't think about.

4 MS. BRISTOL: There was a presentation about
5 checking policies and checking coverage, because there
6 may be instances where you can argue IP infringement
7 coverage where you otherwise wouldn't think you have
8 it. And so maybe there is a possibility of having
9 representation that way. I don't know if this is
10 really pertinent to your discussion.

11 MS. ROWLAND: Well, it's a good thing to
12 know. Mr. Neil, when you're talking to defendants,
13 they should check their insurance policies and see if
14 anything could fall under there.

15 Anyone else? Mr. Brennan?

16 MR. BRENNAN: Just as general matter. Many
17 general liability policies have coverage for sometimes
18 advertising injury. So sometimes -- I'd say about 25
19 percent of the cases we see, you have advertising
20 injury covered, and so you make an advertising claim
21 and it gets covered by -- picked up by a general
22 liability carrier there.

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1 The other thing to realize is that in many
2 of these cases many of the defendants also have
3 indemnity agreements between other suppliers.

4 MS. ROWLAND: Okay. And moving along to the
5 next topic, which is how to fund -- funding
6 considerations for a small copyright tribunal. And
7 does anyone have any thoughts on how it would be
8 funded, if there should be -- a filing fee should make
9 up a certain percentage of the cost, or if they should
10 just be kept low to encourage filers to be able to
11 take advantage of it? If there should be any kind of
12 relationship between any fees and the funding of a
13 tribunal? Does anyone have any thoughts on that?
14 No? Mr. Hasbrouck?

15 MR. HASBROUCK: I would just point out in
16 that respect that small creators have been paying
17 registration fees in the hope that they might
18 eventually be able to make use of those registrations
19 as a prerequisite to litigation and getting nothing
20 for it, because they haven't actually been able to
21 litigate for years.

22 So there is a large burden of debt, I would

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1 say, on behalf of those who have been paying for
2 justice and not getting it. Not that you ought to
3 have to pay for justice in the first place.

4 MS. ROWLAND: Okay. Anyone else have any
5 thoughts? Ms. Knappen?

6 MS. KNAPPEN: I think this was mentioned
7 yesterday, but the fees should be high enough that
8 somebody -- a small creator has to think about it.
9 But that would be like \$100. It shouldn't be anything
10 that would come anywhere near covering the cost.

11 MS. ROWLAND: Okay. And if there was a
12 system that has arbitration or mediation components,
13 would it be something that a party should bear the
14 burden of those costs, or how would you envision that
15 happening? Subsidized/unsubsidized situation? Does
16 anyone have thoughts on that? No? Okay.

17 And another issue that we have come up with
18 is how to evaluate a small claims process. So there
19 has been the idea of a pilot program, you know, maybe
20 starting small and seeing how it works. But perhaps
21 we would start, if there was a program at all, it
22 would start with everything. So it depends on how

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1 that shakes out.

2 But the question is: how should it be
3 evaluated, if at all? So if there is a new small
4 claims procedure, should it be evaluated on, you know,
5 a biannual, triennial, you know, way? How would that
6 work? Just is that even something that should happen?
7 Does anyone have thoughts on that?

8 Ms. Calzada?

9 MS. CALZADA: Sure. I absolutely think it
10 should be evaluated. I think the criteria for
11 evaluating it should be, is it used, first and
12 foremost. And is it -- you know, how often is it
13 overturned on appeal? You know, because if we've got
14 these cases that are being overturned on appeal on a
15 regular basis, then we have to ask ourselves, is there
16 something wrong with this system that it leads to an
17 incorrect result?

18 But I think the primary question is, is it
19 going to be used? Because the problem right now is
20 the federal court system isn't being used for these
21 claims. And so if we're solving that problem, that's
22 the question, is it being used?

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1 MS. ROWLAND: Okay. Does anyone else have
2 thoughts on that? Does anyone have thoughts on
3 whether it should be, if there is anything in a small
4 claims tribunal, if it would be launched as a pilot
5 program or not? Does anyone have thoughts on that?
6 No one is in favor of pilot program?

7 Ms. Knappen?

8 MS. KNAPPEN: I don't have specific
9 thoughts, but I know that pilot programs have been
10 used successfully to try different versions of
11 programs, federal programs. I think it was in the
12 '30s when we were trying to work with how we move food
13 around the country there were pilot programs in
14 various areas to figure out what was actually working,
15 and then that was implemented. The ones that were
16 working were kept, and the ones that didn't work were
17 shed when it went to national implementation. That
18 might be a useful thing to think about.

19 MS. ROWLAND: Okay. Anyone else have any
20 thoughts on that?

21 MR. NEIL: I think a pilot program is
22 probably a good idea, and I know -- I was talking to

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1 the folks in -- at the Northern District of
2 California, in that self-help program that I was
3 talking about, and I know that that district in
4 particular sees quite a bit of copyright-related
5 claims. And not just copyright, but other IP-related
6 issues.

7 They have seen thousands of file-sharing
8 John Doe -- or at least hundreds of file-sharing John
9 Doe lawsuits against thousands of defendants. And
10 then, they have, like I said, a number of sort of
11 small-time streaming, both, you know, copyright and
12 communication. Fortunately, those cases are actually
13 wrapped up in both copyright and communications law --
14 Communications Act issues.

15 So, but a court like that, they have -- you
16 know, they see quite a few of these kinds of issues,
17 and they also have -- I would recommend, you know, a
18 jurisdiction that has expertise in this area as well,
19 might have some judges that have good expertise
20 available.

21 And then, who also -- you know, in those
22 five jurisdictions -- I think it is in New York,

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1 Illinois, San Francisco, San Jose, and there is one in
2 L.A. -- that provide these kind of self-help IP
3 places, those might be not -- you know, good places to
4 look for pilot programs because there are a number of
5 folks that -- there is a little bit of an
6 infrastructure there in terms of assisting those kind
7 of small-time claimants.

8 MS. ROWLAND: Okay. Does anyone else have
9 thoughts on that?

10 And I think that's the end of our list of
11 topics. Is there -- oh, Mr. Brennan?

12 MR. BRENNAN: Just before we conclude, I
13 just wanted to sort of amend or elaborate something we
14 discussed yesterday about registration, if I can go
15 back there for a minute.

16 MS. ROWLAND: Okay.

17 MR. BRENNAN: One of the things about
18 registration that I have -- I was concerned about here
19 before was that registration becomes a mini trial in
20 itself, but I didn't want to imply that I don't think
21 that the registration or recordation system in the
22 Copyright Office isn't valuable.

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1 Recordation is incredibly valuable,
2 especially in the motion picture industry. We use
3 recordation and search the chain of title on the
4 Copyright Office all the time. And it's good to
5 filter out claims. It's also especially valuable for
6 bona fide purchasers. We have asserted that a number
7 of times.

8 So I don't want to imply that any statements
9 about the registration system means we shouldn't have
10 registration here. I just question whether or not
11 registration, specifically in the context of a small
12 claims litigation, is valuable, because what happens
13 is the registration certificate becomes a mini trial,
14 because every defendant is going to say there is a
15 technical error in the registration certificate.

16 I didn't want that to imply that we had any
17 disagreement with the utility of registration as a
18 procedure or the recording system, because we both
19 think those are -- I personally think those are very
20 valuable. I just wanted to amend that to make sure
21 we're clear.

22 MS. ROWLAND: Okay. Mr. Hasbrouck has s

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1 something to say.

2 MR. HASBROUCK: Yeah. One issue that we
3 raised in our comments that has not come up and that
4 we believe should have been closer to the start or the
5 end of this is the issue of criminal remedies. The
6 vast majority of grievances that our members have are
7 both commercial and willful. That is to say, they are
8 criminal, and they are virtually never prosecuted.

9 That's not something we should just shrug
10 our shoulders at. The reason that we are even talking
11 about improving measures that people can take,
12 essentially themselves -- civil, private rights of
13 action -- is that policing has failed completely, and
14 that's not something we should, you know, take for
15 granted.

16 If you are a victim of small thievery, you
17 don't have to sue the thief to get your property back.
18 You call the police. They investigate. They track
19 down the thief. They often do this -- even in small
20 cases of thievery, often when they find the thief,
21 they find that they have stolen from a lot of people.
22 They are able, often, to obtain recovery of the

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1 property. If they don't, often, as a result of the
2 criminal prosecution, there is restitution ordered.

3 We are here because the police aren't doing
4 their job. We are greatly disappointed that there is
5 nobody here from the Department of Justice, nobody
6 here from the Intellectual Property Enforcement
7 Coordinator, no discussion of why the priorities of
8 prosecutorial discretion and investigative policy so
9 disfavor the small victims of copyright infringement
10 crimes who should be the priority, particularly when
11 they are infringed by large, sophisticated criminal
12 infringers.

13 It appears that this is the result of a
14 perhaps unwritten policy that prosecutions will not be
15 brought in cases where there is some kind of license
16 granting some rights in the work to the infringer.
17 And in our discussions with the Intellectual Property
18 Enforcement Coordinator, although it's clear they
19 understand that that -- having some kind of a license
20 doesn't give you a free pass to infringe, it appears
21 that in practice that is the way this is interpreted.

22 And in the rare cases in which any of our

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1 members have tried to go to the FBI to report
2 infringement by a publisher infringer, they have
3 basically been laughed off as though they either don't
4 understand that this is a crime at all, dismiss it as
5 merely a contract dispute.

6 And, you know, if I said -- I sold you my
7 car and you came and took my boat out of my driveway
8 as well, the police would not say, "Oh, it's just a
9 contract dispute about the sale of the car." That's
10 theft of the boat, and it would be pursued as such.

11 So I think that one of the things that you
12 could do -- you know, there are serious constitutional
13 issues, serious difficulties with getting this to
14 work, even if we all want it to, in terms of setting
15 up a new process. We have a process of criminal
16 enforcement which should be working, which should be
17 bringing justice to small victims of criminal
18 copyright infringement. And I hope that you will work
19 with the DOJ and the Intellectual Property Enforcement
20 Coordinator to get that process working, regardless of
21 what else you do in terms of new legislation.

22 MS. ROWLAND: Okay. Mr. Hasbrouck, thank

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1 you. Does anyone else have anything to say about that
2 or anything else? Okay.

3 Last call for issues that we haven't
4 covered?

5 MR. NEIL: I just wanted to --

6 MS. ROWLAND: Mr. Neil?

7 MR. NEIL: -- talk about in terms of
8 reviewing the process and seeing if it is actually
9 working. I think that Ms. Calzada's ideas about, you
10 know, is it actually being used, is it being reversed
11 on appeal, those are really important benchmarks.

12 Other things to look at are, is it actually
13 -- does it actually end up being more efficient? I
14 mean, Mr. Brennan just raised an issue with regards to
15 registration that could, you know -- it could be that
16 if we are waiting five, six months for registrations,
17 and then, you know, that the process could be taking
18 just as long as the typical process or -- and there
19 could be scenarios where it could be costing just as
20 much, so we should be looking at that. Are we really
21 doing it more efficiently? And we have to talk about
22 what the specific benchmarks are for those.

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1 But also, I think, again, benchmarks would
2 have to be looked at to see, you know, are pro se
3 defendants actually being able to defend themselves or
4 not? Most of the commenters, not everybody, but most
5 of the commenters that I read seemed to suggest that
6 most of the defenses that are available to folks,
7 notably fair use and other things like DMCA, Section
8 512, safe harbor defense, would be available.

9 But those are complicated defenses, and I
10 think we would have to really look at some of the
11 cases and see are defendants actually accessing -- you
12 know, able to kind of adequately defend themselves or,
13 you know, is this a process where we have created some
14 kind of imbalance.

15 MS. ROWLAND: Okay. Anyone else? Ms.
16 Calzada? You can --

17 MS. CALZADA: I just wanted to touch on that
18 for a second and say I think that comes back to the
19 importance of having an expert tribunal. If we have
20 pro se plaintiffs, or maybe even pro se defendants,
21 and there are these complicated questions about fair
22 use and other issues, you really need a panel -- one

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1 of the roles of attorneys is to educate the judges on
2 the law.

3 And if we don't have attorneys educating the
4 judges on the law, I think they need to be well
5 versed, and that brings home that point.

6 MS. ROWLAND: Okay. Anyone else? Okay.
7 Well, we really appreciate everyone coming and
8 participating in this. We will take your comments
9 under advisement, and we will give them consideration
10 while we are working on our report and our study that
11 is due out in September.

12 And as we mentioned, we may be reopening a
13 comment period, so keep an eye out for that. And we
14 would love to hear more from you, if you have more
15 thoughts, if we do reopen the comment period.

16 And I don't -- I'll just take a moment to
17 let you know that we have something called the
18 NewsNet. I don't know if everyone is aware of it, but
19 on our website, if you go to our news part of our
20 website, you can sign up for NewsNet and you can learn
21 what we do. We don't bombard you with emails or
22 anything; we only send a few. But it is helpful for

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1 people who want to comment on various things.

2 So, again, thank you very much for your
3 participation, and I think that adjourns our second
4 day of our hearing.

5 Thank you.

6 MS. CHARLESWORTH: I just want to echo that,
7 and also thank UCLA again for hosting us here. It was
8 very generous of them.

9 (Whereupon, at 12:33 p.m., the public
10 hearing was adjourned.)

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