

Comments on “Study on Ancillary Copyright Protections for Publishers”

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We submit the following comments in response to the Library of Congress Notice of Inquiry published in the Federal Register on October 12, 2021 (Docket #2021-5).

The American Arbitration Association (AAA) is a not-for-profit public service organization, and not an industry or trade representative organization. Since its creation in 1926, the AAA has been written into hundreds of federal and state statutes, regulations, and executive orders to provide fair and efficient dispute prevention and resolution under government agency oversight. With nearly a century of experience and expertise in the development and implementation of alternative dispute resolution (ADR) mechanisms, we feel we can provide information and insight on an element of this Study.

Specifically, we are commenting on question 6, *“Would an approach similar to Australia’s arbitration requirement work in the United States? Why or why not?”*

An arbitration mechanism, perhaps under Federal Trade Commission (FTC) oversight, would provide a fast, fair, and efficient means to resolve compensation disputes between online platforms and news publishers. An approach similar to that used in Australia could resolve this type of disputes in a fair, expeditious, and efficient manner. Congress, in establishing such a mechanism, would ideally specify the criteria the arbitrator(s) would weigh in considering claim brought to arbitration.

If the nature of ancillary copyright disputes lends itself to the use of final-offer arbitration (also known as “baseball arbitration”), incorporation of such a requirement generally results in greater likelihood of settlement prior to arbitral decision. In baseball arbitration, each party would be required to submit a final offer at the initiation of the arbitral phase, and the arbitrator or arbitrators would be authorized to select the most reasonable of two final offers. It is worth noting that many of these programs are designed not just to resolve disputes through an arbitral decision, but also to encourage settlement and negotiation among the parties, backstopped by the availability of an efficient and fair arbitration process.

There are a number of precedents in the United States for the use of a neutral, independent nongovernmental arbitral mechanism to determine appropriate compensation, valuation, or compensation. The AAA has played a role in a number of domestic examples of successful projects that utilize arbitration to resolve similar disputes, often under government authority. Examples include several media merger approval orders by the Federal Communications Commission (FCC) and merger settlements/final judgments by the U.S. Department of Justice (DOJ), which require the use of arbitration through the AAA to establish retransmission compensation rates. For an example, see U.S. District Court for the District of Columbia, Modified Final Judgment, Case 1:11-cv-00106.

Other programs of the U.S. government that use an arbitration mechanism to resolve disputes in a similar manner include:

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Data Compensation Arbitration --

The AAA, through a regulation issued by the Federal Mediation and Conciliation Service, provides arbitrators to resolve disputes among pesticide producers under our specialized FIFRA Arbitration Rules, which govern these proceedings. The constitutionality of this process was upheld by the United States Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.* [105 S. Ct. 3325 (1985)]. For additional details, see Code of Federal Regulations 29 CFR 1440.

Pension Benefit Guaranty Corporation Multiemployer Pension Plan Liability Arbitration --

The AAA administers arbitrations to determine liability in pension plan withdrawal disputes under specialized rules under PBGC authority. For additional details see 84 FR 67484.

Federal Trade Commission FRAND Disputes -- The FTC, in approving the merger of Google and Motorola Mobility, included an arbitration provision for the resolution of potential disputes regarding Fair, Reasonable, and Non-Discriminatory (FRAND) pricing/compensation through the AAA. Implemented through FTC Decision and Order, Docket No. C-4410.

Department of Interior Land Valuation Claims -- Disputes between the Department of Interior and private land owners arising from land valuation claims are to be resolved by arbitrators provided by the AAA and in accordance with AAA rules. See 43 USC 1716(d)(2).

Internal Revenue Service International Tax Treaty Arbitration -- The Internal Revenue Service contracted the AAA's international division, the International Centre for Dispute Resolution (ICDR), for the administration of arbitration cases arising from international income tax treaties with France, Germany, Belgium, and Canada.

U.S. Department of Commerce/International Trade Administration Privacy Shield Program --

The AAA and ICDR (International Centre for Dispute Resolution, a division of the AAA) were selected by the Department of Commerce's International Trade Administration to develop and implement the EU-U.S. Privacy Shield arbitral program. This multi-year contract includes development of arbitral rules and procedures, administration of arbitral cases, and management of the Arbitral Fund, which has as of 2020 received over \$5 million in mandatory contributions from over 5000 U.S. businesses. In 2018, the contract was expanded to include the Swiss-U.S. Privacy Shield program.

Key elements of effective arbitration mechanisms include the availability of arbitrators with relevant subject matter expertise, procedures and timelines customized for the nature of the disputes, appropriate transparency and confidentiality requirements, and public reporting provisions.

The AAA does not take a position or offer views on any other aspect of this study.

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