REMEDIES FOR SMALL COPYRIGHT CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MARCH 29, 2006

Serial No. 109–92

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

26–767 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
CHRIS VAN HOLLEN, Maryland
DEBBIE WASSERMAN SCHULTZ, Florida

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

LAMAR SMITH, Texas, *Chairman*

HENRY J. HYDE, Illinois
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
WILLIAM L. JENKINS, Tennessee
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
RIC KELLER, Florida
DARRELL ISSA, California
CHRIS CANNON, Utah
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia

HOWARD L. BERMAN, California
JOHN CONYERS, JR., Michigan
RICK BOUCHER, Virginia
ZOE LOFGREN, California
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California

BLAINE MERRITT, *Chief Counsel*
DAVID WHITNEY, *Counsel*
JOE KEELEY, *Counsel*
RYAN VISCO, *Counsel*
SHANNA WINTERS, *Minority Counsel*

CONTENTS

MARCH 29, 2006

OPENING STATEMENT

	Page
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Subcommittee on Courts, the Internet, and Intellectual Property	1
The Honorable Howard L. Berman, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property	2

WITNESSES

Mr. Paul Aiken, Executive Director, Authors Guild	
Oral Testimony	4
Prepared Statement	6
Ms. Jenny Toomey, Executive Director, Future of Music Coalition	
Oral Testimony	21
Prepared Statement	23
Mr. Brad Holland, founding Board Member, Illustrators' Partnership of America	
Oral Testimony	28
Prepared Statement	31
Mr. Victor S. Perlman, General Counsel and Managing Director, American Society of Media Photographers, Inc.	
Oral Testimony	34
Prepared Statement	35

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Howard L. Berman, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property	45
Prepared Statement of the United States Copyright Office	45

REMEDIES FOR SMALL COPYRIGHT CLAIMS

WEDNESDAY, MARCH 29, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order, and I will recognize myself for an opening statement, then the Ranking Member, and then the gentleman from California for an opening statement if he has one, as well. We appreciate the attendance of the gentleman from California because there's so much going on this afternoon. I know it's hard for Committee Members to get here.

Before I make my introductory remarks, let me say to the panelists that this is, to my knowledge, the first time we have had a hearing on this particular subject. It is an important subject. It is almost a unique subject. But it also puts you in a good position because, as I mentioned to one of you a minute ago, you're not only expert witnesses, but you're also absolutely indispensable to the process. We probably will not have another hearing on this subject, so this is an important one and what you say will be considered by us as we move forward.

The possibility of copyright infringement is an issue for all copyright owners. Title 17 of the U.S. Code provides for remedies for copyright infringement that vary, depending on the registration status of the work, the willfulness of the activity, and the particular standing of the infringer. There are also a number of defenses to actions that would reduce or eliminate damages, such as fair use or innocent infringement.

However, the Copyright Act does not take into account an important issue for all copyright owners, the practicality of pursuing an infringement case when the infringer refuses to pay damages and the damage amount is likely low. In certain cases, the infringer refuses to pay any amount to compensate the owner for the infringement. In other cases, the infringer is willing to pay the proper amount of damages, but the two parties cannot agree on what is a reasonable amount. In either case, the cost of hiring an attorney and filing suit will easily exceed $5,000 and, of course, can be a lot higher.

When an infringer has stopped infringing use, what effective relief does the copyright have if the damages caused by the infringement is only, say, $500? While it would certainly be possible to hire an attorney to pursue the $500 in damages, it is simply not economically feasible for the copyright owner to pay $5,000 or more to recover only $500. Absent an effective remedy, many copyright owners with low-value infringement claims view this disparity as a, quote, "get out of jail free" card.

This issue appears most often in the context of a certain category of users where the amount of damages is often low. These categories of work include photographs, illustrations, graphic arts, short stories, and articles. Works in other categories of uses, such as movies and music, may also face this dynamic, but they are more likely to have larger value infringement claims, which makes hiring lawyers more economically feasible.

Some copyright owners with small value claims may simply want to be paid proper damages and have no interest in pursuing an effort to prove willful infringement or statutory damages. Why would someone not want to pursue statutory damages? The simple answer is that sometimes, it is better to turn a one-time infringer into a regular customer than to obtain a one-time payment and not have an ongoing customer.

Possible options to create alternatives to exclusive Federal court jurisdiction to copyright infringement claims include use of State courts, small claims or otherwise; creation of a Federal version of State small claims court; use of the Copyright Royalty Board; use of dedicated administrative law judges; and the collection of numerous small copyright claims into larger filing brought by trade associations or other groups' representatives.

Related to these five options are, one, whether any alternatives created are voluntary and/or mandatory for both the copyright owner and the infringer, and two, whether the defenses and possible infringement penalties, such as statutory damages, should apply to such alternatives.

I look forward to hearing about the issue of small value infringement cases generally and if any alternative to the existing Federal court system is a viable option.

I have been a longtime strong supporter of copyright owner rights. Payment for using the work of the copyright owner is crucial to promoting the continued development of new content for society's benefit.

That concludes my opening statement and the gentleman from California, Mr. Berman, is recognized for his.

Mr. BERMAN. Thank you very much, Mr. Chairman. I want to commend you for holding this hearing. I think the timing is especially good given our recently concluded hearing on the issue of orphan works.

Alternative dispute resolution was raised by some in the orphan works context as a way to begin addressing some of the inequities that could result from a statutory change. However, there are multiple instances in the copyright context, as well, in which parties could benefit from forums other than Federal court to resolve copyright infringement claims. Today will provide an opportunity to discuss the advantages of offering alternative methods of resolving

small copyright claims, even outside the scope of the orphan works provision.

As the cost of litigation rises, I was wondering where you could do it for $5,000. Oftentimes, a copyright owner has to make a calculation that is entirely independent from whether the owner will prevail on the merits of the case. The owner must ask, is it worth it to pursue full-scale litigation when the damages or remedies wouldn't even cover the cost of the proceeding, much less provide any relief from infringing conduct?

A number of proposals for resolving this dilemma have been suggested, ranging from the establishment of a small claims court to expanding the jurisdiction of the copyright royalty judges to determine copyright claims in an administrative dispute resolution proceeding. I caution that the goal here should not be to create an opportunity for forum shopping as a result of substance, but merely to create more simplified procedures that will resolve disputes at a lower cost.

I look forward to hearing the witnesses describe circumstances in which they may forego a remedy because of the cost of bringing suit and whether they have any suggestion for reform. I doubt this will be the last we hear on this issue.

I'd also like to work with the Chairman in pursuing a Copyright Office study on this issue. It's encouraging that in its written testimony, the office offers to study both how and to what extent copyright owners are injured from seeking relief due to the cost of litigation, and secondly, what changes in the law might be advisable to remedy the problem.

Thank you, Mr. Chairman, and I yield back.

Mr. SMITH. Thank you, Mr. Berman.

Does the gentleman from California wish to make an opening statement?

Mr. ISSA. No, Mr. Chairman. I just wish to thank you for holding this important hearing. I yield back.

Mr. SMITH. Thank you, Mr. Issa.

The gentleman from South Carolina, Mr. Inglis?

Mr. INGLIS. No thank you, Mr. Chairman, but thank you for holding the hearing.

Mr. SMITH. You know, maybe I'll recognize you all regularly just to be able to hear that. [Laughter.]

That sounds pretty good. I appreciate both of you all being here.

Before I introduce our witnesses, would you please stand and be sworn in. Would you raise your right hand, and do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. AIKEN. I do.

Ms. TOOMEY. I do.

Mr. HOLLAND. I do.

Mr. PERLMAN. I do.

Mr. SMITH. Thank you, and be seated.

Our first witness is Paul Aiken, the Executive Director of the Authors Guild since 1996. The Authors Guild is the nation's oldest and largest professional society of published authors, representing more than 8,000 writers. Mr. Aiken is a 1985 graduate of Cornell Law School.

Our next witness is Jenny Toomey, the Executive Director of the Future of Music Coalition. The Future of Music Coalition is a not-for-profit collaboration between members of the music technology, public policy, and intellectual property law communities. Ms. Toomey graduated from Georgetown University with an interdisciplinary major in philosophy, English, and women's studies. I have never heard of that combination before. It sounds good.

Our third witness is Brad Holland, a self-taught artist and writer. Mr. Holland is a board member of the Illustrators' Partnership of America, a nonprofit organization dedicated to helping its illustrator members protect their intellectual property. Mr. Holland's work has appeared in Time, Vanity Fair, the New Yorker, the New York Times, the Wall Street Journal, and the Weekly Standard. He has painted CD covers for Ray Charles, Stevie Ray Vaughn, and Billy Joel. Mr. Holland has also been elected both the Society of Illustrators' Hall of Fame and the Alliance Graphic International. He is currently a visiting scholar at Virginia Commonwealth University.

Our final witness is Victor Perlman, the General Counsel to the American Society of Media Photographers since 1995. In 1996, he formally joined ASMP staff as Managing Director and the Society's first in-house General Counsel. Mr. Perlman received his Bachelor's degree in English from Franklin and Marshall College in 1967 and his law degree from the University of Pennsylvania in 1972.

We welcome you all, and Mr. Aiken, we will hear your testimony first.

TESTIMONY OF PAUL AIKEN, EXECUTIVE DIRECTOR, AUTHORS GUILD

Mr. AIKEN. Thank you, Mr. Chairman, and thank you for the opportunity to testify today on a matter of vital importance to American writers. The Authors Guild has had a 90-year history of contributing to debates before Congress on copyright law. It is an honor and a privilege to be here today for the Guild to continue to serve that role before this Subcommittee.

I am here to make the case that a small claims court for copyright infringement, if properly done, is a good idea. The Guild has long had strong anecdotal evidence that writers had inadequate access to the courts to protect their property rights. We decided to try to quantify that evidence in preparation for today's hearing, so we conducted two surveys, a two-part survey of our membership, all of whom are published writers. We had a huge response. More than 1,200 completed each part of the survey.

The results of the survey are appended to my written remarks, but here is the key result. Fifty-five percent of all respondents believe that creating a small claims court for copyright is a good idea. Seventeen percent opposed it. Twenty-eight percent were neutral.

The reasons authors support creating such a court are important and enlightening. They, as you might expect, cited reduced costs, convenience, and the ability to proceed without an attorney. Many also cited the deterrent effect of such a court and that it would increase respect for copyright.

The reasons cited by those 17 percent of writers who did not think it was such a good idea are also enlightening. Sixty percent of these respondents said that such a procedure, a small claims procedure, would not be simple, effective, or inexpensive. That was their fear. Fifty-two percent also feared that it would increase their risk of being sued when they made fair use of someone else's work. Others cited the fear of frivolous and harassing suits, and many said the jurisdictional limit—we had proposed $2,000 to $3,000—was too low to be meaningful, and many also feared the competence of a small claims court to address copyright issues.

We believe all these concerns can be addressed effectively. First and most importantly, we can avoid harassment suits by requiring a prima facie showing of copyright infringement before the defendant is obliged to appear. Most frivolous and harassing claims would certainly be caught by compelling the plaintiff to make a prima facie documentary showing of infringement. Failing such a showing, the court should be obliged to dismiss the suit with no requirement that the defendant appear or respond.

Second, as a further jurisdictional prerequisite, there should be no substantial fair use defense apparent in the documents supporting plaintiff's prima facie case. Let's keep it simple. The small claims procedure should focus on clear copyright violations.

Third, we should minimize complexity and cost by using mail and telephone procedures to the greatest extent permissible within the bounds of due process. This is hugely important to our members. The travel costs to a special court could swamp any remedy they might receive.

Fourth, we should avoid delegating these procedures to inexperienced State courts. Instead, assure the competence of the court by affiliating it with the Copyright Office in some manner.

Fifth, we should assure the effectiveness of the court by giving it access to the full panoply of remedies available, including statutory damages and by permitting it to issue injunctions in limited cases. If a plaintiff demonstrates that a defendant has repeatedly infringed the plaintiff's copyright with no colorable defense of fair use, then the court should be empowered to enjoin the defendant against further infringement of the plaintiff's registered work. Such an injunction, enforceable in an appropriate Federal district court, would serve as a powerful deterrent to future infringement.

And finally, we believe that this should be the plaintiff's option to bring this sort of claim in small claims court. The defendant should not be able to opt out of it. That would render the court toothless. The defendant would tend to always run to the more expensive, burdensome procedure in order to avoid liability.

If created with care, a small claims court for copyright infringement would allow individual authors much greater access to the courts to protect their property rights, appreciably enhancing market incentive to create the very works that the public values.

I would like to thank this Subcommittee for holding this hearing and inviting us to participate. Thank you.

Mr. SMITH. Thank you, Mr. Aiken.

[The prepared statement of Mr. Aiken follows:]

PREPARED STATEMENT OF PAUL AIKEN

Before the
House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property
"Remedies for Small Copyright Claims"

March 29, 2006

Testimony of Paul Aiken on behalf of the
Authors Guild

Mr. Chairman, I represent the Authors Guild, the largest society of published authors in the country. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. Among our more than 8,000 current members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award, as well as United States Presidents, members of the Senate and, no doubt, distinguished members of the House of Representatives.

We have a 90-year history of contributing to debates before Congress on copyright law. It's an honor and a privilege to be here today, for the Authors Guild to continue to serve that role before this committee.

The Public Interest in Copyright & Adjudicating Small Infringement Claims

It recently seems inevitable in policy debates about copyright that someone will pit the interest of the public against the interests of authors and other rightsholders. This is an unfortunate and false division of interests. Copyright is merely a mechanism for creating a market, and markets — experience has taught us time and again — are the surest way to assure that the public is adequately supplied with a good. Just as the public has a strong

interest in efficient and rewarding energy, food and clothing markets, it has a strong interest in the creation and maintenance of an efficient and rewarding literary market. A robust literary market, which only copyright can secure, is the most effective way to assure that valuable literary works are made available to the reading public. Scientists, historians, economists, engineers, students and teachers all benefit, directly and incalculably, from the existence of this market. So do the legions of readers of popular fiction and nonfiction. Copyright benefits the public as surely as it benefits authors and other rightsholders.

Our nation's founders understood the power and efficiency of markets well, of course, and recognized the public benefit of a market for literature and inventions when they granted Congress authority to "promote the Progress of Science and useful Arts" by extending copyright protection to authors and patent protections to inventors.

We weaken markets for valuable goods at our collective peril. When we strengthen markets for such goods, we are working unambiguously in the public's interest. One way in which we strengthen markets — in which we tether supply and demand more closely together — is by providing appropriate enforcement mechanisms for property rights. The Authors Guild is pleased that this committee is, in the public's interest, examining such mechanisms in the context of small copyright infringement claims.

The Need for a Small Claims Court

Every year, Authors Guild staff attorneys advise members on nearly 1,000 separate matters pertaining to the business aspects of their writing careers. We doubt that any other legal department in the country is in such constant, day-to-day touch with the contractual and copyright concerns of American writers. These attorneys have long had strong anecdotal evidence that authors were frustrated in pursuing legitimate copyright infringement claims because of the costs and complications attending such litigation.

In preparation for today's hearing, we sought to quantify that evidence, and conducted a two-part survey of our membership of published authors.[1] We had an enormous response to the survey, more than 1,200 authors completed each part of the surveys — a response more than large enough to accurately predict the outcome of a presidential election. (We provide detailed results for Phase II of this survey in the appendix hereto; all statistics, unless otherwise noted, are from Phase II, the results of which are more relevant to our testimony and today's discussion.) The respondents appear to represent a fair cross-section of American writers: 828 authors of nonfiction books responded, as did 443 novelists, 285 authors of children's fiction, 209 published poets, and 831 writers of freelance articles (many writers, by choice or necessity, publish in more than one category of work).[2] The respondents are also prolific: 382 had published 10 or more books; 428 had published 50 or more freelance articles.[3]

The surveys confirmed our attorneys' anecdotal evidence: most authors do not have effective access to the courts for many of their copyright infringement claims. 55% of respondents agreed that creating such a small claims court was a good idea.[4] 17% of respondents did not think it was a good idea; the remaining 28% were neutral on the issue.[5]

Such a court isn't without risks for authors. Authors, particularly nonfiction authors, use others' copyrights frequently in their works. Much of that use is fair use, in the proper, traditional, genuinely transformative sense of fair use — excerpting a limited amount of another's work to assist in the creation of a new work. (In our sample, 44% of respondents "sometimes" or "frequently" make fair use of others' works.[6]) Authors could find themselves the defendants in small-claims copyright infringement suits if a

---

[1] Authors Guild Survey of Copyright Infringement & Small Claims, conducted March 23 – 25, 2006. The survey was conducted in two parts: Phase I on March 23 – 24; Phase II on March 24 – 25. More than 1,200 published writers completed each phase.
[2] Appendix, Q1-01.
[3] Appendix, Q1-02, Q1-03.
[4] Appendix, Q3-01.
[5] Ibid.
[6] Appendix, Q2-01.

rightsholder deemed a use to be unfair, to exceed the bounds of the fair use doctrine.[7] By cross-tabulating our survey results, we see that even among authors who say they frequently make fair use of others' copyrighted works in their own, 49% favor the creation of a small claims infringement proceeding. 23% of such authors oppose the creation of a small claims court; the remaining 28% are neutral.

In fact, every subgroup of respondents we can identify favors the creation of a small claims court for copyright infringement. Even the tiny subgroup that had been sued for copyright infringement favors it — 54% of such respondents favor the creation of a small claims court for copyright infringement, while 38% of those respondents oppose it.

A substantial percentage of all respondents, 31%, said that they would have used such a small claims court if one were available.[8] We would expect that many of respondents who contemplate bringing such a claim in the abstract would not act on that notion and that, in reality, a far smaller percentage of authors would commence such actions.

Why Most Authors Favor a Small Claims Court (and Why Many Don't)

More than 75% of authors who favor the creation of a small claims court for copyright infringement cited three factors they saw as supporting their view: that such a court would reduce litigation costs, that it would be more convenient, and that they could

---

[7] Immediately before we asked respondents whether they favored the creation of a small claims court, we expressly alerted them that they might be defendants in such a court. The preamble to Q3-01 reads:

> Is a small claims court for copyright infringement cases a good idea? (Such a court might have jurisdiction over infringements valued at two or three thousand dollars.) Assume, for the purposes of this survey, that such a court would be federal.
>
> **Argument for:** If there were such a court, suing for copyright infringement would probably be simpler (no attorneys needed in most small claims courts), quicker and cheaper, and the existence of the court might act as a deterrent to certain types of infringement.
>
> **Argument against:** On the other hand, if you make what you believe to be fair use of other copyrighted works, excerpting them for your work, you might find yourself (or your publisher) sued in such a court if the rightsholder believed you overstepped the bounds of fair use.
>
> What do you think? We'll ask three questions about this.

[8] Appendix, Q3-04.

proceed without an attorney. (56% cited a fourth factor, that such a court was a good idea because of the increase in copyright infringement on the Internet.)[9] In completing an open-ended "other" reason for favoring the creation of a small claims court, many said that it would increase respect for copyright and serve as a deterrent to infringement.

The most frequently cited reason for opposing the creation of a small claims court for copyright infringement was that the respondent didn't believe the procedure would be "simple, effective and/or inexpensive."[10] 60% of those who opposed the creation of such a court cited this belief as a factor. 52% of those who opposed the creation of such a court feared that it would increase their risk of being sued when they made fair use of a work. In completing an open-ended "other" reason for opposing the creation of a small claims court, many thought that small claims would be inadequate to compensate for meaningful copyright violations. Many respondents feared that the creation of such a court would lead to frivolous and harassing lawsuits that would be costly to writers. A substantial number also had concerns about the competency of a small claims court to adjudicate copyright claims.

Simple, Effective, and Inexpensive Small Claims Proceedings

Most authors clearly favor the creation of a small claims court for copyright infringement. The minority who oppose the creation of such a court brings up valid concerns about such a court, however. The success of such a court depends on addressing those concerns — about the simplicity and expense of the court's proceedings, of the court's copyright expertise, and, perhaps most critically, of the avoidance of frivolous, harassing suits.

1. Avoid harassment suits by requiring a prima facie *showing of copyright infringement before the defendant is obligated to appear.* Most frivolous, harassing claims would almost certainly be caught by compelling the plaintiff to make a *prima facie* documentary

[9] Appendix, Q3-02.
[10] Appendix, Q3-03.

showing of infringement. Failing such a showing, the court should be obliged to dismiss the suit, with no requirement that defendant appear or respond.

2. Minimize complexity and cost by requiring the court to dismiss without prejudice claims where there's a substantial fair use defense. A fair use defense, where it's a close call, may require expert testimony on the effect of the use on the plaintiff's potential commercial market. Accepting such testimony should be beyond the scope of the small claims court's duties. Where the fair use defense does not fail or prevail by clear and convincing documentary evidence, then the small claims court must be required to dismiss the case without prejudice to the plaintiff's right to file the suit in an appropriate federal court.

3. Minimize complexity and cost by using mail and telephone procedures to the greatest extent permissible within the bounds of due process. The procedures, to the extent permissible within the requirements of due process, should be conducted by mail and telephone conference. Small copyright infringement claims can generally be adjudicated largely on documentary evidence — a submission of the plaintiff's registered work and the alleged infringing work. Such procedures will allow parties to press and defend claims without traveling to the court.

4. Avoid delegating these proceedings to inexperienced state courts; instead, assure the competence of the court by affiliating it with the Copyright Office. The court need not be a traditional federal court — it could be an administrative law procedure linked in some manner to the Copyright Office. This would help assure the competence of the court. We urge the committee not to turn small copyright claims over to the small claims courts of the states, which have no experience in copyright law.

5. Assure the effectiveness of the court by permitting it to issue injunctions in limited cases. If a plaintiff demonstrates that a defendant has repeatedly infringed the plaintiff's copyrights with no colorable defense of fair use, then the court should be empowered to enjoin the defendant against further infringement of the plaintiff's registered works.

Such an injunction, enforceable in an appropriate federal district court, would serve as a powerful deterrent to future infringement.

Conclusion

If created with care, a small claims court for copyright infringement would allow individual authors much greater access to the courts to protect their property rights, appreciably enhancing market incentives to create the literary works that the public values. Avoiding frivolous, harassing claims is a matter of routine, automatic rejection of claims that do not raise a *prima facie* case of infringement. Dismissal without prejudice of claims in which a substantial fair use defense is raised would greatly speed and simplify the court's proceedings, as would permitting most of the proceedings to be conducted by mail and phone. Affiliation with the Copyright Office would assure the court's competence in copyright law. Finally, granting the court limited power to issue injunctions would greatly and reasonably strengthen the court.

I would like to thank this Committee for holding this hearing and inviting us to participate.

APPENDIX:
Authors Guild Survey of
Copyright Infringement & Small Claims
Phase II

Conducted March 24-25, 2006

1,234 Completed Responses

PART ONE: PUBLICATION PROFILE OF RESPONDENTS

Q1-01. Respondents' Publication History, by Category.

My published work includes (check all that apply)

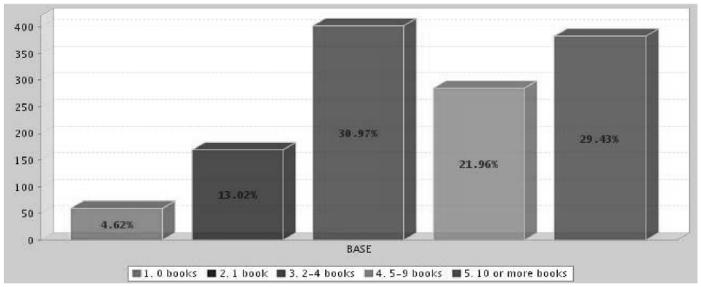
1. Nonfiction book(s) for adults	828	63.79%
2. Nonfiction book(s) for children or young adults	199	15.33%
3. Novel(s) for adults	443	34.13%
4. Fiction for children or young adults	285	21.96%
5. Freelance articles	831	64.02%
6. Short stories	352	27.12%
7. Poetry	209	16.10%

Note: Total appropriately exceeds number of respondents.

Q1-02. Respondents' Publication History, Books.

I have published

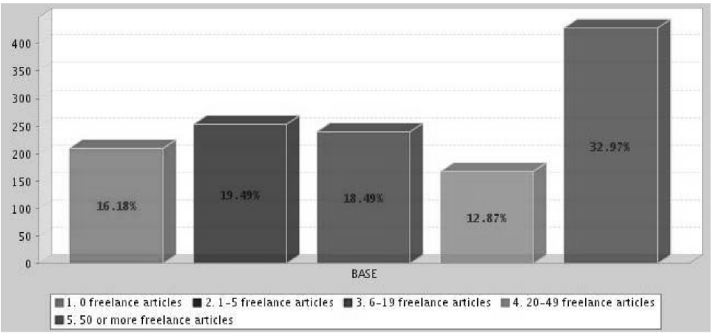
1. 0 books	60	4.62%
2. 1 book	169	13.02%
3. 2-4 books	402	30.97%
4. 5-9 books	285	21.96%
5. 10 or more books	382	29.43%
Total	1298	100.00%



Q1-03. Respondents' Publication History, Freelance Articles.

I have published

1. 0 freelance articles	210	16.18%
2. 1-5 freelance articles	253	19.49%
3. 6-19 freelance articles	240	18.49%
4. 20-49 freelance articles	167	12.87%
5. 50 or more freelance articles	428	32.97%
Total	1298	100.00%

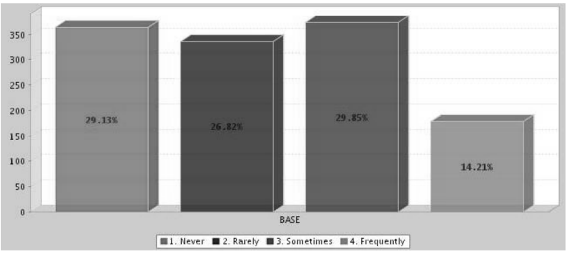


PART TWO: RESPONDENTS' EXPERIENCE WITH FAIR USE, PERMISSIONS & COPYRIGHT INFRINGEMENT

Q2-01. Experience with fair use.

I have, in my work as a writer, relied on fair use to incorporate other's copyrighted works (texts or images) into my own

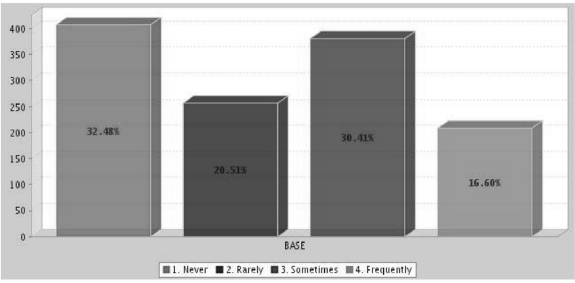
1.	Never	365	29.13%
2.	Rarely	336	26.82%
3.	Sometimes	374	29.85%
4.	Frequently	178	14.21%
	Total	1253	100.00%



Q2-02. Experience with copyright permissions.

I have, in my work as a writer, obtained permission to incorporate other's copyrighted works (text or images) into my own

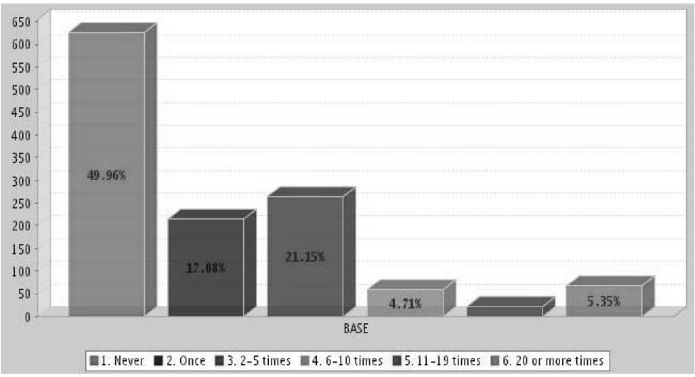
1.	Never	407	32.48%
2.	Rarely	257	20.51%
3.	Sometimes	381	30.41%
4.	Frequently	208	16.60%
	Total	1253	100.00%



Q2-03. Experience with infringement of respondents' works.

To my knowledge, my copyrighted works have been infringed by others, that is, others have made use of my creative expression without permission and in excess of what I believe to be fair use

1.	Never	626	49.96%
2.	Once	214	17.08%
3.	2-5 times	265	21.15%
4.	6-10 times	59	4.71%
5.	11-19 times	22	1.76%
6.	20 or more times	67	5.35%
	Total	1253	100.00%

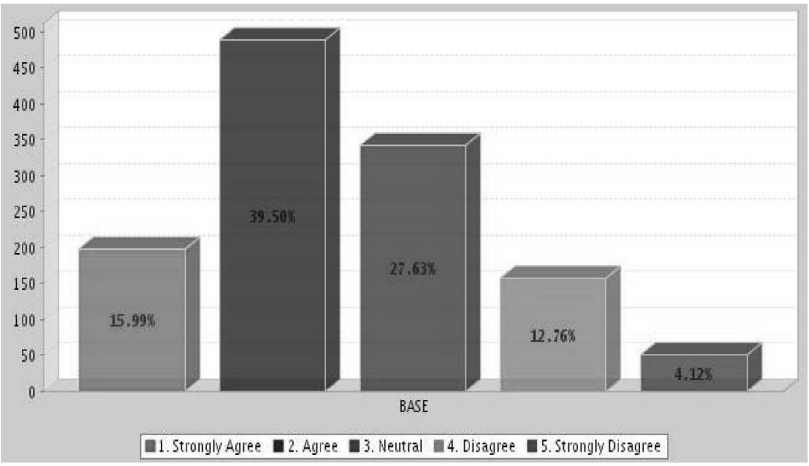


PART THREE: VIEWS ON ESTABLISHING A COPYRIGHT INFRINGEMENT SMALL CLAIMS COURT

Q3-01. Creation of a small claims court.

Creating a small claims court for copyright infringement is a good idea.

1.	Strongly Agree	198	15.99%
2.	Agree	489	39.50%
3.	Neutral	342	27.63%
4.	Disagree	158	12.76%
5.	Strongly Disagree	51	4.12%
	Total	1238	100.00%



Q3-02. Factors in favoring a small claims court.

Why do you believe creating a small claims court for copyright infringement is a good idea? (Check all that apply.)

1.	Reduce litigation costs	593	86.31%
2.	Increase convenience	536	78.02%
3.	No need for attorney	525	76.42%
4.	Increase in copyright infringement on the Internet	387	56.33%
5.	Increase in copyright infringement offline	181	26.34%
6.	Other	92	13.39%

Note: Total appropriately exceeds number of respondents.

Q3-03. Factors in disfavoring a small claims court.

Why do you believe creating a small claims court for copyright infringement is not a good idea? (Check all that apply.)

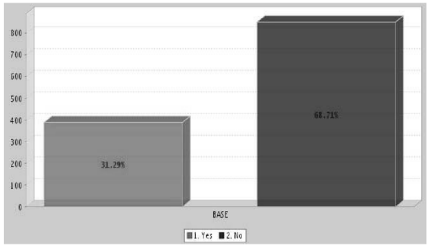
1.	Small claims shouldn't be resolved by litigation	30	14.35%
2.	Increases risk of being sued when I make fair use	106	52.15%
3.	Opposed to lawsuits, generally	50	23.92%
4.	Don't believe the procedure will be simple, effective and/or inexpensive	125	59.81%
5.	Other	77	36.84%

Note: Total appropriately exceeds number of respondents.

Q3-04. Utility of a small claims court.

If there were a small claims copyright court, do you believe you would have used it?

1.	Yes	387	31.29%
2.	No	850	68.71%
	Total	1237	100.00%

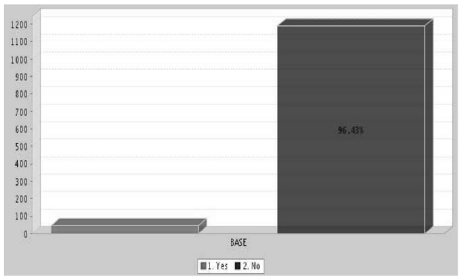


PART FOUR: RESPONDENTS' EXPERIENCES AS ALLEGED INFRINGERS

Q4-01. Respondents accused of copyright infringement.

Has a copyright holder ever accused you, by cease and desist letter or otherwise, of copyright infringement?

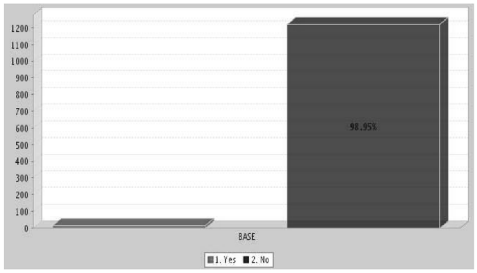
1.	Yes	44	3.57%
2.	No	1190	96.43%
	Total	1234	100.00%



Q4-02. Respondents sued for copyright infringement.

Have you or your publisher ever been sued for copyright infringement regarding one of your works?

1.	Yes	13	1.05%
2.	No	1221	98.95%
	Total	1234	100.00%



Mr. SMITH. Ms. Toomey?

TESTIMONY OF JENNY TOOMEY, EXECUTIVE DIRECTOR, FUTURE OF MUSIC COALITION

Ms. TOOMEY. Thanks. Good afternoon. My name is Jennifer Toomey. I am a musician, entrepreneur, and activist. I speak to you today as a working artist, a copyright owner, and the Executive Director of the Future of Music Coalition. On behalf of the Future of Music, it is my honor to testify today on our perspective.

FMC has not taken a firm position on this issue. We will, however, consider the question in the broader context of issues that are impacting the music community.

In the past 6 years, we have learned that the legal, technical, and legislative music environment is a delicate ecosystem. Remedies that serve musicians' allies and music business institutions may sometimes undermine the position of individual musicians. Solutions that serve one class of musician may underserve another class of musician. We have therefore learned we must always proceed with caution when advocating new structures that impact upon the livelihoods of creators.

Furthermore, musicians do not always have uniform views about the emerging digital marketplace and the opportunities and challenges therein. To illustrate this point, in the spring of 2004, Future of Music and the Pew Center for the Internet in American Life conducted an online survey to gauge musicians' opinions about copyright, file sharing, and music on the Internet. The results indicated that musicians are sharply divided about the impact of file sharing. Thirty-five percent of this sample agreed with the statement that file sharing services are not bad for artists because they help promote an artist's work. Twenty-three percent agreed with the statement that file sharing services are bad for artists because they allow people to copy an artist's work without permission or payment. Thirty-five percent of those surveyed agreed with both statements.

Considering these conflicting views, it is difficult to give a definitive answer regarding what musicians think about the possibility of a small claims arbitration court for copyright infringement. In preparation for the hearing, I read Mark Lemley and Anthony Reese's proposal regarding these copyright disputes as well as the testimony of all the panelists and it seems that people are offering very measured and reasonable solutions. Speaking specifically to Mark Lemley and Anthony Reese's proposal, I am a little hesitant to speculate that this specific model would benefit all copyright owners, especially creators.

First, the article addresses only one specific action, the filing of a suit against peer-to-peer file uploaders, a scope that is much narrower than even the positions of the individuals on this panel today. Since Lemley and Reese confine the argument to one context, we wouldn't want to speculate whether this legal procedure might also be practical in other contexts until we knew more.

Second, the authors of the article do not appear to contemplate individual artists using this procedure to file copyright claims. The potential benefit from this proposal for musicians would be uncertain and possibly indirect, not necessarily bad, but still uncertain.

Furthermore, the authors have not undertaken to analyze any of the potential harms to individual musicians from adopting this proposal or any variation to it.

My comments here do not diminish the problem of copyright infringement to the music community nor do I mean to dismiss this proposal as presented, but I can say that in the 6 years the Future of Music has existed, I have never been contacted by a musician about this specific issue. I have been contacted about hundreds of other issues, but not this one.

Therefore, a more important question for the hearing may be where the issue of copyright remedy falls within the hierarchy of current political issues facing musicians. Despite the diversity of views expressed by artists across the disciplines, there are some issues with very broad support and agreement. For example, the peer-to-peer haters and the peer-to-peer lovers would both likely be advocates for national health insurance for musicians and increased media diversity in low-power radio. This is why FMC has worked on those issues.

We have also worked on public performance rights, copyright reversion, payola, media ownership, and net neutrality, and these are all issues we are contacted about regularly. Also, orphan works, the database authentication and licensing solutions, and to these last three issues, FMC truly believes that centralized authentication structures must be created to give artists the ability to easily claim ownership of works in up-to-date, transparent, and publicly available databases and registries.

Databases help independent and amateur artists gain recognition within the established music industry. For one example, Sound Exchange, which is the performance rights organization that administers the distribution of royalties for the public performance of sound recordings on most digital services, recently compared its database of sound recording artists with unclaimed royalties with another database, that of a company called CD Baby that distributes the music for about 120,000 independent artists. When they compared their lists, they immediately identified 15,000 CD Baby artists with royalties to claim at Sound Exchange. This is just one example of the value of comparing two privately administered databases in the context of a clear licensing structure. Expanded public databases could greatly increase the identification of works and thus diminish the occurrence of orphan works.

In conclusion, experience has shown us that when copyright works are authenticated and transparent publicly accessible databases, it makes it easier for users to obtain licenses. The easier the licensing process, the more money flows to artists. Legal remedy is a valued tool that copyright owners have in defending their intellectual property. FMC is unwilling to publicly advocate for any changes to copyright law that would impact this right until we were absolutely sure that the changes would be positive for musicians.

Furthermore, it is unclear to FMC whether litigious or penalty-focused solutions would be more effective at compensating artists than solutions focused on this authentication and inexpensive licensing structures.

Thank you again for inviting us to be part of this hearing today. I look forward to your questions.

Mr. SMITH. Thank you, Ms. Toomey.

[The prepared statement of Ms. Toomey follows:]

PREPARED STATEMENT OF JENNY TOOMEY

Good afternoon. On behalf of the Future of Music Coalition, it is my honor to testify before the Subcommittee on Courts, the Internet, and Intellectual Property, and to add our perspective to this oversight hearing on "Remedies for Small Copyright Claims."

This subject is complex, and it is not an issue on which FMC has taken a firm position. In the recent past we have made some prudent suggestions regarding the related question of orphan works at the US Copyright Office. We believe there is some value in restating some of these here today. We will also consider the question of "remedies for small copyright claims" in the broader context of issues that are impacting the music community. Finally, we hope to articulate what we have learned from organizing disparate music communities around key policy issues.

To begin, I will provide a brief background about myself, and the Future of Music Coalition. My name is Jenny Toomey. I am a musician, entrepreneur and activist. I have released seven albums and toured extensively across the United States and Europe. For eight years, I co-ran an independent record label called Simple Machines. For the past six years I have run the Future of Music Coalition. I speak to you today both as a working artist and as Executive Director of that organization.

FMC is a national nonprofit education, research and advocacy organization that identifies, examines and translates the challenging issues at the intersection of music, law, technology and policy. Recent history has shown that technology has vastly increased opportunities for both artists and consumers, and facilitated the creation of efficient methods for promoting, distributing and selling music. FMC was founded in the midst of this technological paradigm shift, based on the strong belief that, in order to avoid replicating inefficient or unequal structures of the past, artists and artist advocates must be at the policymaking table to balance the traditional major label, technology and commercial radio players. This is our organizational mission and we are, therefore, quite honored to have our views included in today's discussion.

ORGANIZING ARTISTIC COMMUNITIES AROUND KEY POLICY ISSUES

In the past six years we have recognized that the legal, technical and legislative environment surrounding musicians is a delicate ecosystem. Remedies that serve musicians' allies and music business institutions may serve to undermine the position of individual musicians. Even less obvious, solutions that serve *one* class of musician may undermine or under serve *another* class of musician. We have, therefore, learned that there are very few black and white answers to the broad grey space we inhabit, and despite our deep desire for remedy and clarity, we must proceed with caution when establishing new structures that impact the livelihood of creators.

Let me give you an example of the range of differences within the music community. FMC has had the opportunity to speak all over this country and the world. Generally, we are included in panel discussions with experts from other artistic and academic disciplines as the musicians' voice and are often asked, "What do musicians think about...x?" This question is simultaneously impossible and simple to answer. Impossible, as it would take years to document the variety of perspectives held by musicians on any issue. Simple, as the concept of complexity is easy to convey.

For example, in response to the question, "What do musicians think about the new digital marketplace?" I can say:

> "At this very moment there is one musician in an online chat room collaborating with another musician on the other side of the globe. That musician is recording synthetic sounds created exclusively on her computer. These sounds are digitally recorded and sent across the internet, and the completed compositions are fixed in a flexible copyright with a Creative Commons license and made available exclusively as free digital tracks distributed through peer to peer networks.
>
> "At the same time, there is another musician recording his spinet on a turn-of-the-century Edison cone recording machine that he purchased at a thrift store. He will fix these compositions using an analog tape machine and the re-

lease the album as a vinyl record with formally registered copyrights, for sale only in brick and mortar record stores. When interviewed, this artist will decry the technological innovation that allows music fans to listen to his compositions digitally in any order other than the one he established on the record."

However disparate and extreme, these examples are an attempt to convey the range of valid perspectives held by individual members of the music community that we represent. They are also a means of implying the increased complexities that arise when legal or legislative solutions are proposed to serve the needs of more than one artistic discipline. Copyright law lives not only at the complex intersection of commerce and art, commerce and speech, commerce and ideas—but also at the complex intersection of art and art. Laws that protect illustrators must also serve composers and choreographers. We urge the committee to recognize this complexity as you proceed and include as many stakeholders as possible in the process.

SMALL COPYRIGHT CLAIMS AND MUSICIANS

Second is the question of where the issue of small copyrights claims falls in the spectrum of complex policy issues musicians face. In preparation for this hearing I have read "A Quick and Inexpensive System for Resolving Peer to Peer Copyright Disputes," by Mark Lemley and Anthony Reese. It seems to me a measured and reasonable proposal; however, I am hesitant to speculate that this model for small claims copyright disputes would benefit all copyright owners, especially creators. First, the article addresses one specific action—filing suit against P2P file uploaders—a scope that is much narrower than even the individuals represented on this panel. Since Lemley and Reese confine their argument to one context, we would not want to speculate whether this legal procedure might also be practical in the context of orphan works.

Second, the authors of this article do not appear to contemplate individual artists using this procedure to file copyright claims. The potential benefits from this proposal for musicians would be uncertain and possibly indirect. Furthermore, the authors have not undertaken to analyze any potential harm to individual musicians from adopting this proposal or a variation of it.

My comments do not mean to diminish the importance of the issue of illegal file trading or copyright infringement to the music community, nor do I mean to dismiss the proposal as presented. But I can say that in the six years that FMC has existed as an organization, hosting national policy summits and speaking about these issues, I have never once been contacted by an artist or an artist advocate about the problem of legal fees associated with copyright infringement cases. As such, we are unwilling to speculate on the benefits for our constituency. This proposal may serve as the platform for such future discussion and, if such an action is necessary, FMC would recommend the full public participation of the arts community before any such solutions be applied.

ISSUES THAT UNITE THE ARTISTIC COMMUNITY

Despite the diversity of views expressed by artists across disciplines it is also quite possible to find areas of common interest and platforms for collaborative change. There are many issues with broad support across disparate communities. For example, our digital musician and our musical Luddite from the previous example would both likely be advocates for national health insurance, increased media diversity, and low power radio. This is why FMC has worked on issues such as:

Support for Public Performance Right for Sound Recordings. Royalties are generated when a song is performed publicly; whether on a radio station, at a sports event, on a jukebox, or in a movie. In the US, these royalties are collected by ASCAP, BMI and SESAC and distributed to the member songwriters, publishers and/or composers. As an indication of the significance of this revenue stream for musicians and the industries that they support, ASCAP reported distributing over $645 million to its members in 2005.[1]

While PRO royalties are distributed to songwriters and composers for public performances for terrestrial radio play, this right does not extend to the performers, recording artists or the sound recording copyright owner.[2] For exam-

[1] "ASCAP Revenues up $50M in 2005" *Billboard,* March 13, 2006

[2] There are two copyrights assigned to a musical work: the underlying musical composition and sound recording. The composition (lyrics and music) has a public performance right, which is the right administered by the performance rights organizations ASCAP, BMI and SESAC. The sound recording (ie the performance of the musical work) does not have a performance right for non-digital performances in the US.

ple, when you hear Patsy Cline singing "Crazy" on the radio, the songwriter Willie Nelson is compensated through BMI, but the estate of Patsy Cline is not compensated for that performance, nor are the studio musicians and backing vocalists, nor the record label, that brought that song to life.

This arrangement is the result of a long standing argument made by terrestrial broadcasters that performers benefit from the free promotion that they get by having their music played on the radio, which broadcasters contend increases sales. As a result, broadcasters have avoided paying a public performance royalty to performers for decades.

Contrast this with a performance on a digital platform. Just as in traditional media, broadcasters of digital performances—webcasters, satellite radio, cable subscriber channels—must obtain licenses from ASCAP, BMI, SESAC which compensate the songwriters and publishers of the music they play. But because of the Digital Performance in Sound Recording Act of 1995, they also pay royalties to the performers. SoundExchange—the performance rights organization established by the DPRA—issues licenses to cable and satellite subscription services, non-interactive webcasters, and satellite radio stations, then distributes the royalty payments directly to artists (45%) and to the copyright owner (45%).

As US broadcasters migrate to digital radio, harmonizing the licensing rules that apply to various platforms offering analogous products is more important than ever. As radio switches from broadcasting in analog to digital signals, industry engineers predict that incumbent radio station licensees will be able to program an additional two to four side-channels on their slices of spectrum, thus at least tripling their opportunity to generate revenue. Despite the digital nature of HD radio, the DPRA does not apply.[3] Therefore, all musical performances on these new HD radio stations will not have a public performance right for sound recordings. Unless Congress acts, incumbent broadcasters will continue to exploit their exempt status that sets them apart from other media providers.

FMC calls on Congress to modify the US Copyright Act to establish a broad public performance right for sound recordings, but it in a way that will not diminish existing royalty structures that compensate composers, songwriters and publishers. This modification would benefit creators, compensate performers, establish licensing parity among media providers and bring the United States' copyright standards in line with other developed nations.

Supporting Copyright Reversion and the Right to Reacquire: Copyright reversion is a negotiable clause in contracts that states the date when the copyrights revert to the creator. Section 304(c) of the 1976 Copyright Act made US copyrights revert to artists 35 years after creation despite contract length. This law was passed to protect the rights of artists who had made disadvantageous deals. In some European countries, copyrights revert if a label fails to keep a record in print.

An estimated 75 percent of the back catalog copyrights owned by major record labels are currently out of print. This practice reduces artists' ability to make a living by functionally removing their essential right to make their work available for sale. Artists who have signed away their copyrights have no legal recourse. Signing away copyrights is a basic condition of most record contracts.

A 2005 report by the Council on Library and Information Resources expressed the magnitude of this problem when it found that significant numbers of historic recordings are not easily accessible to scholars, students, and the general public for noncommercial purposes. While some recordings are limited because they only play on out-of-date technologies (cylinder players, wire machines), copyright law also adds to this problem since it allows only rights holders to make these recordings accessible using current technologies (CD re-issues, digital files), yet the rights holders appear to have few real-world commercial incentives to reissue many of their most significant recordings.[4]

While there are many barriers to copyright reversion in major label contracts, there are a number of musicians, archivists, and public domain advocates that have asked for more efficient laws that would allow authors and creators to assert their ownership rights when copyright owners fail to meet their contracted obligations. In 2005, recording artist groups, including FMC, called for reason-

[3] DRPA does not apply unless the terrestrial broadcaster chooses to use a side-channel to create a subscription service or an interactive service. In those cases, the radio station will pay the digital performance right to SoundExchange.

[4] "Survey of Reissues of U.S. Recordings", Tim Brooks, Council on Library and Information Resources and Library of Congress, August 2005. *http://www.clir.org/pubs/reports/pub133/contents.html*

able legislation that would give recording artists the right to reacquire their copyrighted works if their record label had stopped making their records commercially available.

Updating Radio Payola Regulations: While various laws and hearings from the 1960s-1970s muted the prominence of payola, payola-like practices resurfaced in recent decades, but in a more indirect form. Standardized business practices employed by many broadcasters and independent radio promoters resulted in what many consider a *de facto* form of payola.

Under more recent payola-like practices, radio station group owners established exclusive arrangements with "independent promoters," who acted as middle agents between the stations and the record labels. On the station side, the indie promoter guaranteed a fixed annual or monthly sum of money to the radio station group or individual station. In exchange for this payment, the radio station group agreed to give the independent promoter first notice of new songs added to its playlists each week. On the label side, the labels hired the indie promoters to promote their records to certain stations and groups, since they were aware that stations in the group also tended to play mostly records that had been suggested by the independent promoter. As a result of the standardization of this practice, record companies and artists generally had to hire and pay these independent promoters if they wanted to be considered for airplay on those stations.

The primary problem with payola for musicians is its distorting effect on what gets played on the radio. Instead of being judged on the merits of the performance and recording, various forms of paid consideration and business relationships determine what gets played on the air. In addition, payola serves as a barrier to access to the public airwaves; the only musicians that can benefit from radio airplay are those that can afford to participate in this label/indie promoter/radio station relationship.

NY Attorney General Eliot Spitzer has been the most aggressive at combating payola. Using the subpoena power of his office to acquire evidence, his 2004–2006 investigation uncovered *quid pro quo* relationships that were suspected to be blatant violations of payola laws, including bribery in the form of lavish gifts and trips given by labels to radio stations and their employees in return for airplay of the labels' songs. As a result of his investigation, two of the four major labels have settled out of court, paying a total of $15 million. Spitzer's investigation will continue in 2006.

Senator Feingold has also attempted to address the problem. In 2003, he introduced S. 221, the Competition in Radio and Concert Industries Act. The bill addressed the anti-competitive practices of some radio corporations that allegedly leveraged their market power to shake down the music industry in exchange for playing their songs. While this bill did not make it out of committee, it delivered a message to the radio and concert industry that any business practices that leveraged one corporate arm against another at the expense of artists would not be tolerated. FMC believes that Feingold's bill forced the industry to move away from the independent promoter structure, and create more firewalls between concert and radio divisions.

FMC believes that payments made or consideration provided to radio stations to influence playlists—other than legitimate and reasonable promotional expenses—must be prohibited, unless such payments are announced over the air. This includes payments made through independent radio promoters and considerations like free concerts or other services provided to radio stations.

FMC urges Congress to support the passage of S. 2058, the Radio and Concert Disclosure and Competition Act, introduced by Senator Feingold in November 2005. The bill extends definition of payola to include pay for play practices and forces breakage of links between concert promoters, venues and airplay. We also urge the FCC to hold radio stations found accepting payola accountable and apply appropriate penalties or fines.

Media Ownership and Net Neutrality: One of the most significant aspects of the transformation to a digital music economy is rooted in the "common carrier" underpinnings of the Internet. Because the Internet is essentially open, the creator/artist has the right and the ability to make their work available to potential consumers, and consumers. These consumers, in turn, are able to access that work via a number of legitimate, licensed platforms and services.

This fundamental shift has revolutionized the music economy, as artists are no longer forced to enter into negotiations with record labels or participate in illegal payola-like practices in order to access the marketplace. Similarly, music fans now have a wide range of opportunities to access music, information and

content. This dynamic is one of the core reasons that music released by independent labels has grown to an estimated 28 percent market share.

The music community has very legitimate reasons to be concerned both with the ownership rules that govern traditional media and the new framework being developed by Congress to govern broadband and other "post-media" technologies.

Technology ensures that the traditional bottlenecks separating artists from consumers can be overcome; now Congress must ensure that innovation will continue, a competitive marketplace for high speed services will develop and the basic ability of the artist to access the Internet as a way of reaching potential consumers will be written into law. FMC urges Congress to: hold the line on radio consolidation; expand and protect noncommercial media; ensure the transition to HD radio benefits musicians and citizens and; understand the value of network neutrality to copyright owners and music fans.

ORPHAN WORKS AND DATABASE AUTHENTICATION

Finally, on orphan works. While there may be unmeasured enthusiasm in the music community for remedies for small copyright claims such as the ones suggested by Lemley and Reese, it may be premature to address this issue before we solve the Copyright Office's larger question regarding orphan works. This is particularly important to FMC as orphan works is an issue that many of our constituents have raised and discussed in the recent years. In March 2005, FMC, AFTRA and AFM filed joint comments in the Orphan Works proceeding at the US Copyright Office.[5] Our comments recommended that the US consider adopting a modified version of the Canadian Unlocatable Copyright Statute to allow creators and the public to use copyrighted works that are unavailable because the copyright owner is either unidentifiable or unlocatable. In addition, we asked the Copyright Office to issue a notice of inquiry examining the status of out-of-print sound recordings, something that is particularly important for musicians whose prior albums may not be available for sale.

FMC also believes that much more must be done to increase authentication structures to give artists the ability to publicly and easily claim ownership of works in up-to-date, transparent, and publicly available databases and registries. Databases have recently helped identify independent and amateur artists who traditionally would have slipped through the cracks of recognition of the terrestrial music industry. For example, SoundExchange, which is the performance rights organization that administers the collection and distribution of royalties for the public performance of sound recordings on most digital services, compared its database of sound recording artists with unclaimed royalties with the database of a company called CD Baby that distributes the music of over 120,000 independent artists. When they compared their lists, they identified 15,000 CD Baby artists with royalties to claim. CD Baby then urged its members to sign up with SoundExchange to collect their royalties. This is just an example of the effectiveness of comparing two privately administered databases. Databases with similar qualities could greatly benefit with the identification of various works, thus diminishing the occurrence of orphaned works, and allowing for the continued circulation and use of existing copyrighted material.

CONCLUSION

Experience has shown us that when ownership of copyrighted works is documented in transparent, publicly-accessible databases, it makes it easier for users to obtain licenses. The easier the licensing process, the more money that flows to artists. FMC continues to support systems that both respect copyright owners right to control their works while also incentivizing the maximum circulation of copyrighted works.

Legal remedy is a valued tool that copyright owners have in defending their intellectual property. FMC is unwilling to publicly advocate for changes that would impact this right until we were sure that the impact would be positive for musicians. That said, it is unclear to FMC whether litigious, penalty-focused solutions would be more effective at compensating artists than solutions focusing on authentication and inexpensive licensing structures.

Thank you again for inviting us to be part of today's hearing and I look forward to your questions.

Mr. SMITH. Mr. Holland?

[5] *http://www.futureofmusic.org/news/orphanworks.cfm*

TESTIMONY OF BRAD HOLLAND, FOUNDING BOARD MEMBER, ILLUSTRATORS' PARTNERSHIP OF AMERICA

Mr. HOLLAND. Thank you, Mr. Chairman. Chairman Smith, Ranking Member Berman, and Members of the Committee, last year, the Illustrators' Partnership filed a submission to the Copyright Office about the orphan works study. This was endorsed by 42 international arts organizations which represented a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists, and educators who work both in the United States and overseas, so I am pleased to have an opportunity to say a few words about the subject of remedies for small copyright infringement.

Wherever possible, artists have attempted to work on a traditional business model. Our work is commissioned by clients to whom we license initial rights for one-time usage for an agreed-upon price. Most artists retain their secondary rights, which with the advent of the digital era have been recognized as a potential stream of income and, therefore, a contested prize for any party that can obtain access to them.

Now comes a proposal that risks transferring a vast body of these rights into an orphan works limbo by legalizing the infringement of any work whose creator is said to be hard to find. This would harm artists and photographers disproportionately because images are often published without identifying information, signatures may be illegible, and information can be removed by others.

We have been told that this Committee plans to move ahead to create a small claims court—I'm missing part of my statement here. I'll move ahead to where—I've been told the Committee plans to consider the creation of a small claims court or arbitration mechanism to try to litigate the infringement cases that will follow.

We strongly oppose the creation of such courts. The orphan works report states that a good faith, reasonably diligent search for a copyright holder will be, "a very general standard," defined solely by the users themselves, many of whom may well have an interest in an unsuccessful search for the copyright holder. Absent a settlement by negotiation after the infringement has taken place, the copyright owner's sole recourse would be to bring an action before one of these courts.

Copyright law is a Federal law, and as we understand it, there are only 11 Federal circuits in the country with 97 United States district circuits. Would copyright holders have to travel to one of them every time we need to file a small-dollar infringement claim? If so, we wouldn't be able to add travel and lodging expenses, and under the proposed limitation on remedies, the copyright owner would not even be able to obtain court costs or attorneys' fees, not even if the work had been preregistered. The orphan works amendment virtually guarantees that the cost of suing an infringer would exceed whatever sum the copyright owner would recover in a successful small claims action.

By limiting remedies, the orphan works amendment will create a no-fault license to infringe, so let us look at a hypothetical small claims action that I might be obliged to bring in the future. In the 1990's, I licensed a series of pictures for one-time use for a corporate annual report. Copyright notice and credit are almost al-

ways omitted by art directors for annual reports and almost always for advertisements, in spite of the wishes of the artist to preserve his credit. Now, let's say I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States and I make it a practice never to license my work for inexpensive or distasteful products.

But let's say an infringer finds the annual report. He likes the pictures, sees no credit, and does a good faith search that fails to identify me as the owner of the copyright. He begins selling cheap t-shirts bearing my art. Under current copyright law, my remedies would include statutory damages, attorneys' fees, impoundment, and injunction for this flagrant infringement because it's damaged my exclusive right to license my work in high-end markets.

But in small claims court, my remedy would be what? Reasonable compensation for use of my work on cheap t-shirts, and even this would be limited by whatever maximum the small claims court might set, and it would be constructed not to deprive the infringer of the profits he made in reliance on a so-called failure to locate me.

Without the deterrent of statutory damages and attorneys' fees, and without a permanent injunction against repeat offenses by the same t-shirt seller, this experience would now act as an incentive for the infringer to exploit other uncredited, and therefore effectively orphaned, images by other artists. In effect, he has discovered that infringing artists is a rational business decision, and this, in turn, could inspire still more infringers.

This clearly violates the three-step test of the Berne Convention, which states that exceptions to an author's exclusive rights should apply only to certain special cases, should not conflict with the author's normal exploitation of the work, and should not prejudice the author's legitimate interests. As legal scholars Jane Ginsburg and Paul Goldstein noted in their submission to the orphan works study, "Compliance with Berne/TRIPs is required by more than punctilio. These rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries and the public. Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time."

Creating a new form of legalized infringement without statutory remedies, even for registered copyrights, and then offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask that this Committee consider the negative effects that orphan works legislation would have on free market transactions. The attempt to limit the damage by adding a burden of small claims court to our overworked Federal judiciary is simply not a viable approach.

Now, after I submitted the written testimony, I got an e-mail from Mr. Keely asking me to consider the issue simply as an ab-

stract issue and not in the context of orphan works. We did consider it in the——

Mr. SMITH. Actually, he was also asking you to change your position on the small claims court, as well. [Laughter.]

Mr. HOLLAND. To be—let me explain for 1 second. We considered the issue of small claims court in the light of orphan works legislation because this Committee has already indicated its intent to move orphan works legislation quickly, and it seemed simply a rational thing to consider the possibility of the two in conjunction. Considered in the abstract, we'd have more questions, I think, than answers about how a small claims court would work for infringement cases.

One question, for example, is it possible to fund and operate an entirely new Federal court system just to administer infringement cases?

Two, if cases were scarce, would competent administration be affordable?

Three, if cases were common, wouldn't it be settling in court issues that should be settled in the marketplace?

Four, without discovery, how could a plaintiff be sure that the scope of an infringement was limited to a small-dollar issue?

Five, how many authors would favor a small claims infringement court because they mistakenly think it would speed the resolution of small-dollar contractual claims, which as I understand it can already be handled in ordinary courts?

And six, how many small claims cases would break down in meaningless resolution simply because of disputed or inconclusive testimony by the participants?

We believe that copyrights as a form of private property should be protected as exclusive rights. Unlike, say, dry cleaning disputes or unpaid babysitter bills, copyright cases require special knowledge of Federal law and international treaties and they involve market decisions that no single judge, let alone many judges, would be qualified to decide, nor justified to resolve except in ordinary—when market solutions fail. In a burgeoning world of online libraries, databases, subscription services, and the like, the just resolution of even simple-seeming cases may require more than splitting the difference between contending parties.

We are afraid that the creation of a small claims court would only lead down a slippery slope to a system where the seller is increasingly forced to deal with the user after the fact and creators would have to go to court more and more often just to get paid for the routine use of their work, which in some cases would simply mean the routine theft of their work.

That is all I have to say, and I thank the Committee for your indulgence and the opportunity to express our opinion.

Mr. SMITH. Thank you, Mr. Holland. I was about to send you an e-mail asking you to conclude and you did, so thank you.

[The prepared statement of Mr. Holland follows:]

PREPARED STATEMENT OF BRAD HOLLAND

ILLUSTRATORS'
PARTNERSHIP

845 MORAINE STREET MARSHFIELD, MASSACHUSETTS USA 02050
T (781)837-9152 www.illustratorspartnership.org F(781)837-9152

Statement of Brad Holland
Founding Board Member
Illustrators' Partnership of America

Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

March 29th, 2006

Re: Oversight Hearings on Remedies for Small Copyright Claims

Chairman Smith, Ranking Member Berman, members of the Subcommittee: My name is Brad Holland. I've been a freelance artist since I was 17 and I'm here to represent the Illustrators' Partnership of America. The IPA is the outgrowth of a grassroots movement started by artists in 2000 for the specific purpose of adapting our cottage industry to the challenges of the digital era. In that capacity, we filed a submission last year to the Orphan Works Study. It was endorsed by 42 international arts organizations, representing a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists and educators who work in the U.S. and overseas. The Illustrators' Partnership is a non-profit, self-funded organization and an associate member of the International Federation of Reproduction Rights Organizations. I'm pleased to have the opportunity to say a few words about the subject of Remedies for Small Copyright Infringement Claims.

Wherever possible, artists have attempted to work on a traditional business model. Our work is commissioned by clients to whom we license *initial rights* for one-time usage for an agreed-upon price. Most artists retain their *supplementary rights*, which with the advent of the digital era, have been recognized as a potential stream of income – and therefore a contested prize - for any party that can obtain access to them.

Now comes a proposal that risks transferring a vast body of those rights into an orphan works limbo by legalizing the infringement of any work whose creator is said to be hard to find. This would harm artists and photographers disproportionately because images are often published without identifying information, signatures may be illegible and information can be removed by others. We've been told that this committee plans

BRAD HOLLAND, ILLUSTRATOR
ELENA PAUL, ATTORNEY AT LAW
DAVID LESH, ILLUSTRATOR
C.F. PAYNE, ILLUSTRATOR
CYNTHIA TURNER, ILLUSTRATOR
DUGALD STERMER, ILLUSTRATOR

rights holders little or no compensation for the work they solicit, government should not infer that such charitable donations by artists to non-profits reflect the commercial *market* to pass Orphan Works legislation quickly, but will consider the creation of a small claims courts or arbitration mechanism to try to litigate the infringement cases that will follow.

We strongly oppose the creation of such courts. The Orphan Works Report states that a "good faith reasonably diligent search" for a copyright holder will be "a very general standard" defined solely by the users themselves, many of whom may well have an interest in an unsuccessful search for the copyright holder. Absent a settlement by negotiation after the infringement has taken place, the copyright owner's sole recourse will be to bring an action before the courts.

Copyright law is a Federal law. There are only 11 Federal Circuits in the country with 97 U.S. District Courts. Would copyright holders have to travel to one of them every time we need to file a small dollar infringement claim? If so, we wouldn't be able to add travel and lodging expenses. And under the proposed "limitations on remedies," the copyright owner could not obtain court costs or attorneys' fees, not even if the work had been pre-registered. The Orphan Works amendment virtually guarantees that the cost of suing an infringer would exceed whatever sum the copyright owner could recover in a successful small claims action.

By "limiting remedies," the Orphan Works amendment will create a no-fault license to infringe. Let's look at a hypothetical small claims action that I might be obliged to bring in the future.

In the 1990's, I licensed a series of pictures for one-time use in a corporate annual report. Copyright notice and credits are most often omitted by art directors for annual reports, and almost always for advertisements notwithstanding the wishes of the artist to preserve his credit. I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States, and I make it a practice never to license my work for inexpensive or distasteful products.

But let's say an infringer finds the annual report. He likes the pictures, sees no credit, and does a "good faith" search that fails to identify me as the owner of the copyright. He begins selling cheap t-shirts bearing my art. Under current copyright law, my remedies would include statutory damages, attorney's fees, impoundment and injunction for this flagrant infringement because it's damaged my exclusive right to license my work in high-end markets. But in small claims court my remedy would be what? Reasonable compensation for use of my work on cheap t-shirts. And even this would be limited to whatever maximum the small claims court might set and would be constructed not to deprive the infringer of the profits he made "in reliance" on his so-called failure to locate me.

Without the deterrent of statutory damages and attorneys fees – and without a permanent injunction against repeat offenses by the same t-shirt seller, this experience would now act as an incentive for the infringer to exploit other uncredited (and therefore,

effectively orphaned) images by other artists. He's discovered that infringing art is just a rational business decision. In turn, this would inspire yet other infringers.

This clearly violates the Three-step test of the Berne Convention, which states that exceptions to an author's exclusive rights should apply only to certain special cases, should not conflict with the author's normal exploitation of the work and should not prejudice the author's legitimate interests. As legal scholars Jane Ginsburg and Paul Goldstein stated in their submission to the Orphan Works Study:

> "Compliance with Berne/TRIPs is required by more than punctilio; these rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. *Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time.*" 1., p. 1, OWR0107-Ginsburg-Goldstein (emphasis added)

Creating a new form of legalized infringement without statutory remedies - even for registered copyrights - and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask this committee to consider the negative effects that OW legislation will have on free market transactions. The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach.

Mr. SMITH. Mr. Perlman?

TESTIMONY OF VICTOR S. PERLMAN, GENERAL COUNSEL AND MANAGING DIRECTOR, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.

Mr. PERLMAN. Mr. Chairman, Ranking Member Berman, distinguished Members of the Subcommittee, good afternoon. I thank you and your hard-working staff for the opportunity to present the views of professional photographers on this vital subject.

I'm speaking today not only for the American Society of Media Photographers, but with the backing of virtually every major trade organization representing professional photographers in this country as well as the Graphic Artist Guild, which represents commercial illustrators and graphic artists. Anecdotally, I should mention that today marks the first time I can ever remember that my good friend and colleague, Brad Holland, and I have been on opposite sides of any issue affecting photographers and illustrators.

Mr. Chairman, you described the problem perfectly in your introductory remarks. The facts here are really simple. Photographers and commercial artists produce huge numbers of copyrighted works. Infringements are constant, but suits are rare. Why? Because there is either not enough money at stake and/or the costs of litigating are too high.

The Copyright Office has long recognized how disenfranchised photographers are under our copyright system. In my job, every year, I get hundreds, perhaps thousands of telephone calls and e-mails from photographers and members. The scenario is almost always the same. They discovered an infringement, they have made a demand, the infringer basically says, "Sue me." The question is, "What can I do?" As a practical matter, my answer is usually "nothing." Why not? Because the photographer can't get into court.

Usually there is not enough money in controversy. The fees for licensing photographs and graphic images are typically in the hundreds perhaps to the thousands of dollars, depending on the level of usage required. All you have to do is go online to the websites of Corbis or Getty Images, register as a potential use customer, pick a picture, pick a use that you want to make for it, and click on the right boxes and you will get a license fee, and you'll find that those numbers are astonishingly low. That means that lawyers won't take the case on a contingent fee basis.

It also means that the photographers and illustrators cannot afford to pay the hourly rates of copyright litigators. The numbers that I've heard so far today strike me as astonishingly low. The numbers that I see are typically in the mid- to high-five-figure and low-six-figure range to take a copyright infringement case through to completion.

Even if they could get the lawyer to take the case on a contingent fee basis, most photographers can't afford to pay the out-of-pocket costs, including witness fees, expert witness fees, discovery, depositions, travel, et cetera, and many States have ethical rules that would prohibit the attorney from advancing those.

Even if you got all the way past all of those hurdles, you still have the basic problem that you are going to have a huge invest-

ment of time, effort, and money and get back a small amount, and that's assuming that you have a solvent defendant.

Eligibility for attorneys' fees is illusory. The promise of a refund somewhere down the line a couple of years later after you get on the train isn't worth anything if you can't afford a ticket to get on that train in the first place.

Those are the hard costs. There are substantial soft costs. Photographers are basically sole proprietors. They have the choice of spending their time working or litigating. They can't do both. They don't have any back-office support to be able to do the work that is lost while they are dealing with the litigation matters.

A classic example of that in the copyright context was the case of *Rock and Roll Hall of Fame v. Chuck Gentile,* which is a landmark case involving—a suit by the Rock and Roll Hall of Fame against Gentile because of a poster he took showing the building. He eventually won in the Sixth Circuit. Because of insurance and his assistance from ASMP, he didn't have to pay any money out of pocket. But the process of going through that litigation over a couple of years cost him his marriage, cost him his business, and drove him out of the photography business entirely.

For lawyers and professionals, litigation is just litigation. It is another day at the office. For photographers and illustrators, copyright infringement cases are intensely personal.

There are lots of potential solutions here. They have been described and put forth in the Copyright Office report. I think it's premature to try to deal with the details, but we would absolutely urge you to do what the Copyright Office report suggested and commission a study for the further investigation of this problem. This is probably the greatest legal challenge facing photographers today.

Thank you for your time and consideration.

Mr. SMITH. Thank you, Mr. Perlman.

[The prepared statement of Mr. Perlman follows:]

PREPARED STATEMENT OF VICTOR S. PERLMAN

Mr. Chairman, Ranking Member Berman, and distinguished members of the Committee, I thank you for this opportunity to testify regarding the desperate need of professional photographers for some sort of structure that will give them the access to enforce their copyrights that they do not possess under the current system. I cannot think of any other issue that is of potentially greater importance to or impact on professional photographers.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. However, it is important to note that my testimony today is made on behalf, not of just itself and its members, but of virtually every major trade association in the United States that represents the interests of freelance photographers.

Freelance photographers create vastly larger numbers of copyrighted works than any other class of creators, yet they are the group that is the least able to access the protections theoretically afforded by the Copyright Act. The primary reasons for that sad fact are the extremely high cost of federal court litigation; the typically low amounts in controversy, when compared to the costs of litigation; the fact that most freelance professional photographers earn comparatively modest incomes; and the fact that many infringers are aware of this situation and use it to their advantage.

Freelance professional photographers are small businesspeople who are typically sole proprietors. Their training and education often extend beyond college, and with the constant and meteoric changes occasioned by developments in technology, their costs of and need for continuing training are a demanding fact of life.

Those same changes in technology also make the investment necessary to become and remain a professional photographer a staggering and constant burden. Where once a few camera bodies, lenses and strobes might be enough to get started, now multiple computers, monitors, scanners, and storage devices are absolute requirements, in addition to cameras, lenses and lights. Further, while a professional camera body used to cost a thousand dollars or so, new professional quality, digital camera bodies now cost many thousands of dollars, even after adjusting for inflation. For all of these reasons, professional photographers typically have limited financial resources at their disposal. The movie image of professional photographers based on David Hemmings driving a Rolls-Royce in *Blow-Up* is just that: a movie image. It is as close to reality as the bar scene in the first *Star Wars*.

Every year, I receive hundreds of telephone calls and e-mails from our members and other professional photographers reciting similar stories: They have discovered an unauthorized use of a photograph. The image was registered before the infringement. The photographer has contacted the infringer and issued a demand. The infringer has refused to pay a licensing fee and/or cease the infringement. In essence, the infringer has said, "So, sue me." The photographer wants to know what to do.

In most cases, the practical answer is, sadly, "nothing" for the following reasons. First, and most importantly, the amount in controversy is likely to be only a few hundred to several thousand dollars. One need only go to the websites of major stock image houses like Getty Images or Corbis, (located respectively at *http://creative.gettyimages.com/source/home/home.aspx* and *http://www.corbis.com* for confirmation: Simply register as a potential customer and go through the process of selecting an image and asking for the price for a hypothetical use.

The relatively small size of the claim makes it next to impossible, as a practical matter, to find an attorney who will take the case. Although the Copyright Act provides for the possibility of an award of counsel fees against the defendant if and when the photographer wins, there is simply not enough money at stake for a decent copyright attorney to be interested in pursuing the case:

1. He or she does not want to antagonize a judge by taking up the court's time with a case that would be in a municipal small claims court if it were not for the fact of exclusive federal jurisdiction over the subject matter.
2. There is no guarantee that the defendant will actually be able to pay any award of attorney's fees.
3. The eligibility for statutory damages is of illusory value: The court will always try to match the statutory damage award to its best guess of the actual damages. And no matter whether actual or statutory damages are at stake, proving them may cost more in expert and consultant fees than the amount at issue.
4. There is always the risk of not winning. That is always a consideration for attorneys trying to decide whether to take a particular case, especially where a contingent fee arrangement is being considered; however, in this situation there is nowhere nearly enough potential reward to counterbalance any risk of loss.
5. The client/photographer cannot afford to pay the attorney's fees up-front, and the amount in controversy means that contingent fee arrangements are not available.
6. The client/photographer cannot afford to pay the costs of litigation, separate from and in addition to attorney's fees, such as expert witness fees, depositions, travel, etc. In many states, even if the photographer is lucky enough to find a lawyer who will take the case on a contingent fee basis, the ethical rules prohibit the attorney from advancing the out-of-pocket costs.
7. Even if none of the above factors were true, the disruption to the photographer's business and the emotional drain of years of litigation are simply more than most sole proprietors can afford. Attorneys are in the business of dealing with litigation, and we are used to living with it—it is our job, no more, no less. We often lose sight of the soft costs of litigation. However, to individual creators who are parties to litigation, the experience is intensely personal and emotional, and it stays at the front of their minds every minute from the beginning of the case to the end, and even long after. In addition, the time spent working on the case is time that cannot be spent on making or marketing photographs.

As an example of the last point, you may recall the landmark case of Rock and Roll Hall of Fame v. Chuck Gentile. The case involved trademark and related claims asserted by the Rock and Roll Hall of fame based on the photographer's poster

showing a photo of the Hall of Fame building. The photographer won in the 6th Circuit. Between the photographer's insurance and help from some fund-raising by ASMP, the photographer did not have to pay any costs of defense, himself. Despite that, when the case was over, the time and emotional demands of the litigation had destroyed his marriage, ruined his business, and forced him out of the photography profession entirely. The costs of federal litigation for an independent contractor are not limited to money—years of investing time and energy in a single case are crippling to people whose sole source of income is their ability to create and market their work.

Obviously, the time that it takes to litigate a case in the federal court system, from start to finish is, by itself, a major source of both hard and soft costs to photographers. The sheer passage of long periods of time forces the parties and their lawyers repeat many tasks. This requires the photographer to pay additional legal fees that would not be incurred if the case were disposed of quickly. It also forces the photographer to spend time unnecessarily repeating various tasks and meetings, time that would otherwise be spent making and/or marketing photographs.

Another major source of both high legal fees and lost time is the vast amount of discovery that is available under our current system. That, combined with the interstices of procedure, allow a defendant with a deep pocket to put a sole proprietor plaintiff in the poor house through endless discovery requests, depositions and motions. The wealthy and/or corporate defendant is in a position to drive up the plaintiff's legal fees while forcing the plaintiff to choose between searching for and copying documents, on one hand, or working for a living, on the other.

The Copyright Office has long recognized the particular needs of individual creators of copyrighted works and acknowledged the general unavailability of the protections of copyright to those people, as a practical matter. What ASMP would like to see, to correct that situation, is a revision to the system of copyright enforcement that would accomplish the following goal: Create a system of enforcement that would be efficient and affordable enough to allow the practical redress of claims involving a few thousand dollars or less.

There are many possible ways to accomplish this and variations on how such a system could be structured. ASMP would support virtually any arrangement that would accomplish the desired goal. However, as a starting point for your consideration, we offer the following. In our view, to make the system truly efficient and affordable, it should be structured to require the parties to proceed pro se; lawyers should not be permitted to represent either side. Once attorneys enter the picture, the potential complexities and resultant costs escalate. This would essentially be "People's Court" for smaller copyright claims.

The system should also permit only limited pre-trial discovery, if any. All relevant documents should be submitted by the parties to the court and each other before the hearing date. Discovery makes litigation more extended, complex and expensive.

There should be a (comparatively) short time frame from complaint to answer to hearing to disposition.

Hearings would be tightly controlled and of short duration. Where the parties are in distant locations from each other, hearings might even be conducted over videoconferencing systems rather than in person.

Appeals should require the appellant to post a bond sufficient to cover the appellee's estimated attorney's fees for the appeal, in the event that the appellant lost the appeal.

We are open to all possible ways of structuring a small copyright claims court system. However, our wish list would cap jurisdiction at $10,000., which is the limit for many large-city small claims courts.

Our preference would also be that the judge be (or become) a copyright specialist by virtue of his or her assignment to a copyright-specific small claims court or to an administrative law judge position affiliated in some fashion with the Copyright Office, perhaps along the lines of the Copyright Royalty Judge system. One of the big problems facing small copyright owners is the fact that many judges do not have much familiarity with copyright, and they are particularly unfamiliar with the customs and practices of pricing usage of commercial photographs and other commercial works of art. Presumably, having an adjudicator who deals with these areas of the law repeatedly would help to eliminate that problem.

An alternative, although less desirable in our view, approach would be to change the jurisdictional provisions of the Copyright Act to allow state courts to hear copyright cases involving less than some specified figure, such as $10,000. That would solve some of the problems. However, if such cases were to be heard in state courts of general jurisdiction, much of the delay, expense and complexity of federal court litigation would remain. In addition, that approach would not address, and indeed would exacerbate, the problems of insufficient judicial copyright experience and ex-

pertise mentioned above. In addition, it would raise issues of obtaining jurisdiction over defendants outside the state.

As I said at the beginning of this statement, virtually everyone in the copyright world has long recognized that photographers are uniquely disenfranchised from access to the copyright protections to which they are legally entitled. Anything that this Committee can do to help correct that situation would be of great benefit to photographers and greatly appreciated by them. Perhaps more importantly, this is one of those all too rare situations where Congress can really do "the right thing," help the little guy, and make our legal system move a bit closer to a system of justice, not just of laws.

Thank you for your time and consideration.

Mr. SMITH. Mr. Aiken, let me address a couple of questions to you, but before doing so say that I thought that the survey that you conducted of the 1,200 authors was particularly useful. I know it took a lot of time and probably cost some money, but I thought that was very informative in a lot of ways and appreciate you all doing so.

You answered my first question, which is did you think that small claims court should be voluntary for both the copyright owner and the accused infringer and you said, no, you thought it ought to be mandatory. Otherwise people can abuse the system.

My second question, though, is do you think there ought to be a cap on damages or not in a small claims court?

Mr. AIKEN. I think there should be a cap on damages. When we presented to our members in the survey, we suggested $2,000 or $3,000 might be the cap. The comments several made on that was that, while a small claims court is a good idea, that's too small to be useful, and they suggested something like $10,000 might be a more appropriate limit.

The first part of the survey, which was not appended to my remarks because a lot of it was not that useful, but there was some useful information and of those members who had wanted to file suit but hadn't, they valued their claims—59 percent valued their claims at $10,000 or less.

Mr. SMITH. It gives you an idea of where it might be.

Mr. AIKEN. Exactly.

Mr. SMITH. What would you do, if attorneys were involved, what would you do about attorneys' fees? Would you have them as part of the——

Mr. AIKEN. That should be available as a remedy in the small claims court, just as it is in Federal district court.

Mr. SMITH. Okay. Thank you, Mr. Aiken.

Ms. Toomey, I know you feel that we should cast our net wider than just this one remedy, but let me focus on the small claims court for the time being. Do you feel, and actually some similar questions, do you feel that it should be voluntary or mandatory if we did have the small claims court as a remedy?

Ms. TOOMEY. I think Mr. Aiken made a good case for that, for the idea that it would have to be mandatory if you were going to do it.

Mr. SMITH. And would you agree generally with the cap, as well?

Ms. TOOMEY. It's very, very hard to say. Again, the music is used in a very different way than written works are and images are and illustrators are and so I'm not sure that I would say that——

Mr. SMITH. It may be that one size doesn't fit all in that regard.

Mr. Holland, I know you opposed the idea of the small claims court for some, I think, tenable reasons, but what I was going to do was ask you to respond to the poll that Mr. Aiken took where the vast majority, for instance, of authors agreed that creating a small claims court was a good idea. They can't all be wrong, can they?

Mr. HOLLAND. If I remember Mr. Aiken's statistics, 55 percent of them favored a small claims court.

Mr. SMITH. And 17 percent opposed——

Mr. HOLLAND. Seventeen percent disfavored it, and there was 28 percent that was neutral, am I correct?

Mr. SMITH. That's pretty good memory. That's exactly right.

Mr. HOLLAND. Okay. I would think that some of them who are neutral on the subject probably just don't know what to think. I would also wonder—I know, first of all, there's a difference between, say, illustrators and writers. If someone is infringing Doris Kearns Goodwin, they will be infringing her probably in the same area that she writes in. They're not going to take Doris Kearns Goodwin's work and put it on an annual report cover. Illustrators have a totally different situation. Our infringement is more likely to be taken into the commercial market.

Mr. SMITH. My guess, though, is if you had a small claims court for authors and others, that illustrators might well want to jump on the bandwagon.

Mr. HOLLAND. May I respond?

Mr. SMITH. Sure.

Mr. HOLLAND. Because I think Vic Perlman did an excellent job of explaining what most of us feel about this. I have no question that if you were to go to most illustrators, they would probably—first of all, a lot of illustrators would confuse infringement cases with contractual disputes. Most of the artists that I know aren't so much infringed as they have problems getting paid by some cheapskate client, and a lot of them think that they would have to go to court—I mean, they think an infringement court might do them benefit in that area.

Mr. SMITH. Okay, thank you. Good answers.

Mr. Perlman, after what you said about attorneys' fees, I now know why you recommended what you did, and you're probably right. You talked about five or possibly six figures. I used a four-figure example. I think that was wishful thinking, because I think attorneys' fees charge a lot and oftentimes too much.

But your suggestion for the small claims court excludes any role for attorneys, and like I say, I think I know why. Don't you think there are going to be some instances where that should—if the party wants legal advice, should be able to get legal advice?

Mr. PERLMAN. Conceptually, yes. The problem is as soon as we start bringing attorneys in, the complexity increases, the costs increase. And what I was looking at was basically People's Copyright Court. However, we would absolutely support virtually any relief that we could get in this area, except perhaps changing the jurisdictional laws so as to allow State courts to handle copyright claims. We simply don't believe they have the expertise for that.

Mr. SMITH. Thank you, Mr. Perlman.

I am going to squeeze in one last question to Mr. Holland. Mr. Holland, is there anything we could do to a small claims court concept that would make you more comfortable with it or not?

Mr. HOLLAND. Well, my comfort or discomfort wouldn't speak on behalf of thousands and tens of thousands of illustrators, designers, medical illustrators, popular artists, sign artists. I wouldn't presume to even comment on something that would affect the careers of so many different people without first finding out how they would respond to it and explaining it to them in rational ways. It's one thing to go to people and say, yes, you're having trouble getting paid by clients. Would a small claims court benefit you? Yes. Everyone will say, sure, of course because some might take advantage of it.

I think your surveys, Mr. Aiken, indicated that, what was it, 33 percent of those said they would actually use the court if it existed?

Mr. SMITH. I think it was, yes, it was about a third said they would use it.

Mr. HOLLAND. Yes, something like that.

Mr. SMITH. My time is up. The figure that I liked the best, of course, was that over three times as many supported it as opposed it. That's, I think, somewhat interesting.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. It's so tough, because on the one hand, the attorneys charge too much, but when they decide to charge based on a percentage of the recovery, they try to outlaw it. [Laughter.]

There's an interesting juxtaposition between the illustrators and the photographers as represented here. The illustrators, Mr. Holland doesn't like the small claims procedure because he sees it primarily as tied to an orphan works proposal that he really can't stand. The photographers have some concerns about the orphan works proposals, but they're so unsatisfied with their access to the copyright law that they're looking for a way apart from the orphan works issue to be able to get a recovery. So even though you both have some real concern about orphan works, you come down differently on this issue. Anyway——

I guess I have one question, but it's a long one. Ms. Toomey, on page 11 of your testimony, you note that it's premature to address remedies for small copyright claims before we solve the Copyright Office's larger question regarding orphan works, and many of your members have raised the orphan works issue. So I am wondering, do your members envision that they will be a resurfacing owner in the orphan works context? Is that what they're concerned about, or are they comfortable with pursuing any resulting dispute from such resurfacing in Federal court?

Along the same lines for Mr. Perlman, we've heard members of your association say that a small claims court or ADR proceeding must be developed in conjunction with any orphan works proposal. So I guess for the whole panel, what's the time line for this Committee? Is there a time line to address a legislative solution for remedies for small copyright claims in the context of orphan works?

Mr. AIKEN. First, I'd like to say that we have major problems with the orphan works proposal, as well. We see this as a separate issue and we think it should move on a completely separate track

from the orphan works proposal. We would agree with a lot of the criticisms we've heard of orphan works as proposed, but we think that this is a completely separate issue.

Ms. TOOMEY. I agree. I agree with that. I also think that, for us, orphan works have a number of different issues. One of the ways that orphan works tends to come up at, say, the Future of Music Conference or when we're—in our testimony with AFTRA and the AF of M earlier this year is the way that orphan works has made uncertainty in the marketplace about using certain types of copyrights and also recognition of some copyrights. That's why I talked a lot about the authentication database.

The fact of the matter is that it's not simply whether you can find the owners of licensed orphan works, but also who actually has the right to execute them. There are works that are orphaned simply because the owner of the copyright doesn't make them available. So we have actually—we had a very long list of issues with regards to the orphan works proceeding.

Mr. BERMAN. Well, that shouldn't be within the definition of orphan works, that the creator decides not to make it available.

Ms. TOOMEY. It's not the creator, it's the copyright owner. So if an artist licenses their record to a label and the label allows it to go out of print and the artist wants to put it back in print and the public would like to get it but——

Mr. BERMAN. I hear a work for hire issue underlying all of this.

Mr. HOLLAND. Yes. My question would be whether we would be considering this issue at all if it weren't for the concurrent orphan works legislation. Our main concern is that——

Mr. BERMAN. The photographers would say we should be.

Mr. HOLLAND. I would agree, but it hasn't come up previously. I mean, as the Chairman indicated, this is the first time this has been brought up, and to me, it doesn't seem like it can be an accident that it came up at the same time as orphan works, because our problem with orphan works is that it's not exclusively limited——

Mr. BERMAN. No, no, I think there's no doubt that—I think in large part because of the photographers, this issue of resolving disputes in a way that's effective for certain kinds of copyright owners in the orphan works context led to a discussion of this, but that doesn't mean it's automatically and necessarily linked to it. I mean, that's what I'm wondering. Should it be?

Mr. HOLLAND. I think it's inevitable that it will be, because if this Committee proceeds as indicated to move this legislation along, then I think we have to consider the small claims court in light of the potential passage of orphan works legislation. To consider it as a totally isolated incident—a totally isolated circumstance, we would have to know whether we're applying existing copyright law or the copyright law as it will be once orphan works legislation is passed, because the orphan works legislation is somewhat misnamed. A true orphan works amendment would apply only to old work whose authors were hard to find. This will literally apply to any work, any artist's work that can't be identified or where names have been removed.

This will mean artists who do work next year, who are doing work right now, it will be retroactive and apply to all the people

who did work ever since 1978, when they were promised by the Copyright Office that their work would receive protection whether they marked it and identified it and registered it or not. I mean, we were guaranteed basic protections for the last 30 years.

In a sense, this becomes a "never mind" provision, saying that everything that we've said for the last 30 years is off the books now and your work can be exposed if someone can't find you. So it's not exactly an orphan works legislation.

In the Netherlands, for example, I think the Auteursvid [sic.—Autersrecht], if I remember correctly, it's article 19.1 or something, makes a specific provision for the copyrights dealing with family photos, for example. So that particular issue of copyright infringement is simply taken off the table by a precise carve-out for that. I don't see why that couldn't be done for orphan works without exposing the work of everybody who's working right now.

Mr. PERLMAN. I'm trying not to use the "O" word. [Laughter.]

I believe that the two need to work in parallel. Unless there were a guarantee that there would be an overall solution of the small claims court/ADR problem for copyrights generally, I think there also needs to be the pursuit of the same issue in connection with the orphan works discussions that we have ongoing right now. I would imagine that if there were, in fact, solutions provided in both, that the orphan works having started first would probably have its provisions overridden by a repeal of the ADR/small claims court provision of whatever orphan works legislation might become enacted, that it would be repealed by the enacting legislation for an overall copyright ADR/small claims court.

Mr. SMITH. Thank you, Mr. Perlman.

The gentleman from California, Mr. Issa, is recognized for his questions.

Mr. ISSA. Thank you, Mr. Chairman.

Well, it's very clear that although the Chairman has announced that this may be the only hearing on small claims, we're clearly going to have another hearing at some point on orphan works, and perhaps we did today. [Laughter.]

The level of concern is duly noted, though, and I share the fact that orphan works and how to fix the problem is complex, to say the least.

But going back to the small claims part of it, and this is a broad question because I don't know that it was answered, if in a perfect world you had an administrative agency rather than a small claims court, one that would be similar to, for example, International Claims, where you have patents who make something outside the United States, you have in additional the ITC, an additional court you can go to to get an injunctive relief, and it's strictly administrative, would this be of value?

And I'm not suggesting another piece of legislation, but I'm hearing your concerns, particularly Ms. Toomey, your concerns that you have some people that like it, but they're just as afraid they'll be sued under it as the other direction. Is it, in fact, the administrative details that bothers you and if hypothetically it was an administrative remedy, would that suit your purposes just as well?

Ms. TOOMEY. For me?

Mr. ISSA. I'll start with you, please.

Ms. TOOMEY. I think the danger here is that copyright exists at a very complicated intersection, not simply of art and culture, or art and speech, or art and a million other things. It also rests at the very complicated area of art and art, and creating a law that's going to solve this for illustrators, photographers, musicians, and authors, I think is going to be very difficult and I think it would be premature to suggest anything until we knew a lot more about it, and I think almost everyone on the panel has said something to that effect.

I would say specifically as an example, within music, within the exact same band, depending on the different laws, copyright laws as well as the administration structures that pay artists for different aspects of their work, a law that helps a songwriter might hurt a side man. A law that helps an orchestra might hurt an individual artist. And these kinds of——

Mr. ISSA. Right, but if I can interrupt you——

Ms. TOOMEY. Oh, I'm sorry.

Mr. ISSA [continuing]. We're not talking about changing the law here. We're simply talking about bringing small claims to a small claims court or to an administrative law judge specifically designed to bypass the normal Federal court if it is below a certain amount. We cannot fix the questions of orphan works here. We cannot fix the contractual problems that exist within your industry. I've never met a songwriter who didn't hate the people he took his royalties from. [Laughter.]

I once had dinner with Francis Ford Coppola, and trust me, he hated the people that brought Godfather I, II, and III to the market and said so in very, very specific ways of how they had tried to destroy his art. We're not going to solve those here today.

The question really is, when you have what to someone is de minimis in damages but to an artist is significant—let's call it $500 to $50,000—we are looking at whether or not there's a way to give relief that would not involve $35,000 in attorneys for a $2,500 claim. My question, very narrowly, is if not the small claims court, then how do you feel about an administrative, paper-only type of procedure if the dollars are below a certain amount?

Mr. Aiken? Thank you for your head-shaking. It allowed me to call on you. [Laughter.]

That sounds precisely like what we need here, that a paper-only approach makes a lot of sense. It would be accessible to authors across the country by mail. It could make decisions based on whether or not there's a prima facie showing, pretty much what we had laid out in our testimony could be handled very effectively and efficiently, we believe, by an administrative proceeding like that.

Mr. ISSA. Now, since I got a head-shake there, I'll do the follow-up question, which is, as we all know, when you have an administrative procedure, the losing party, particularly the defendant, has a right to remove it in an appeal or some other process to the next level. I would assume that your follow-up would be that there would have to be a safeguard that if you choose that remedy, you pay for that remedy as the person not taking the administrative remedy and that that also would meet your concerns, that if they take it to the next level and it does cost $35,000, it'll be borne by

the losing party. Let me rephrase that. The person who removed it.

Mr. AIKEN. Precisely. You've made my argument well. Thank you.

Mr. ISSA. Okay. If the Chairman will indulge, if anyone else wanted to answer to that, otherwise, I will yield back my non-remaining time. [Laughter.]

Mr. PERLMAN. I would like to comment. I'm sort of like the kid in the candy shop here because we've been so desperate for so long to get some kind of access to the legal system that there is a wide panoply of relief, all of which would be wonderful for us, and certainly the administrative law proceeding is something that we put forth in our prepared statement as one of the alternatives. Absolutely, we would love that.

Mr. ISSA. Okay. Thank you, Mr. Chairman. Once again, thank you for holding this hearing.

Mr. SMITH. Thank you, Mr. Issa.

Mr. Holland, let me just revisit one subject real quickly. I don't want to leave a wrong impression. You read something into our having a hearing on orphan works in close time to having this hearing today. That was not intentional. It may have been subconscious, but it wasn't necessarily intentional, so don't read too much into that.

In any case, we thank you all for your testimony today. It's very helpful on a subject, like I say, which is a first impression for us, but nevertheless an important one. Thank you again.

We stand adjourned.

[Whereupon, at 3:02 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

It is especially good timing to have this hearing on alternative dispute resolution mechanisms immediately after the orphan works hearing. ADR was raised by some in the orphan works context as a way to begin addressing some of the inequities that could result from a statutory change. However, there are multiple instances in the copyright context as well in which parties could benefit from forums other than federal court to resolve copyright infringement claims. Today will provide an opportunity to discuss the advantages of offering alternative methods of resolving small copyright claims even outside the scope of the orphan works provision.

As the cost of litigation rises, oftentimes a copyright owner has to make a calculation that is entirely independent from whether the owner will prevail on the merits of the case. The owner must ask: Is it worth it to pursue full scale litigation when the damages or remedies wouldn't even cover the cost of the proceeding, much less provide any relief from infringing conduct?

A number proposals for resolving this dilemma have been suggested, ranging from the establishment of a small claims court to expanding the jurisdiction of Copyright Royalty Judges to determine copyright claims in an administrative dispute resolution proceeding. I would caution that the goal here should not be to create an opportunity for forum-shopping as a result of substance, but merely a to create more simplified procedures that will resolve disputes at a lower cost. I look forward to hearing the witnesses describe circumstances in which they may forgo a remedy because of the cost of bringing suit, and whether they have any suggestions for reform. I doubt this is the last we will hear on this issue.

I also would like to work with the Chairman in pursuing a Copyright Office study on this issue. It is encouraging that in its written testimony, the Office offers to study both 1) how and to what extent copyright owners are hindered from seeking relief due to the cost of litigation, and 2) what changes in the law might be advisable to remedy the problem.

PREPARED STATEMENT OF THE UNITED STATES COPYRIGHT OFFICE

The Copyright Office is pleased to present the Subcommittee with its observations on the issue of remedies for small copyright claims.

In preparing the Report on Orphan Works which the Office released two months ago, the Office was told by a representative of photographers that a new mechanism is needed to adjudicate small copyright infringement claims because the cost of litigating in federal courts is prohibitively expensive in many cases.[1] While the Office did not believe that this issue relates directly to the problem of orphan works or to the Office's proposed solution to that problem, the Office observed in its Report on Orphan Works that:

> We are sympathetic to the concerns of individual authors about the high cost of litigation and how, in many cases, the individual creator may have little practical recourse in obtaining relief through the court system, particularly against

[1] See Comment of Professional Photographers of America, March 25, 2005, pp. 11–13, submitted in Copyright Office Study on Orphan Works [available on the Copyright Office website at *http://www.copyright.gov/orphan/comments/OW0642-PPA.pdf*] [hereinafter "PPA Comment"].

> infringements involving small amounts of actual damages. This problem, however, has existed for some time and goes beyond the orphan works situation, extending to all types of infringement of the works of individual authors. While there are some mechanisms in place to help address the problem, such as enforcement by collective organizations or timely registration to secure the availability of statutory damages and attorneys fees, we believe that consideration of new procedures, such as establishment of a "small claims" or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress. It is not, however, within the province of this study on orphan works.[2]

In subsequent discussions over proposed legislation to address the orphan works problem, photographers have repeated their assertion that a new procedure and forum for adjudicating small copyright claims is necessary. While the Office does not believe that it is necessary or even advisable to address this issue in the context of orphan works legislation, the Office continues to believe that the issue deserves the attention of Congress. If the Subcommittee believes it would be helpful, the Office would be pleased to study the issue in a way similar to the way in which the Office studied the orphan works problem itself, and to report to Congress its findings as to (1) whether, how, and to what extent authors and copyright owners are hindered or even prevented from seeking relief for infringements of their copyrights due to the cost of litigation under the current system, and (2) if the current system does not provide adequate procedures and remedies for the adjudication of small copyright claims, what changes in the law would be advisable to ensure that authors and copyright owners are able, as a practical matter, to seek remedies for infringements of their works.

Anyone who has litigated a case—whether as a party or as counsel—in the federal courts knows that the costs of litigation are beyond the means of many Americans. Attorneys typically charge hundreds of dollars per hour for their services, and it is our understanding that contingency fee arrangements in copyright cases are relatively rare. In a typical civil case, after pleadings, discovery, motion practice and trial (as well as possible appeals), attorney's fees can run to tens of thousands of dollars or more, and other costs can run to thousands of dollars or more.[3] If, as the Professional Photographers of America have told us, photographers generally earn about $30,000 a year,[4] then assertions that they are unable to take advantage of the remedies offered by the federal courts may well be credible.[5] It is legitimate to ask whether the federal courts are hospitable to most small claims.

Of course, there are provisions built into the copyright law that are designed in part to provide even the copyright owner of modest means with a reasonable prospect of recovering not only compensation for infringement but also the expenses of litigation in a successful infringement suit. Unlike most areas of the law, copyright law permits a court to award a reasonable attorney's fee to a successful plaintiff (or defendant).[6] Moreover, a copyright owner may elect to receive an award of statutory damages of up to $30,000 per infringed work—and up to $150,000 per work in cases of willful infringement—in lieu of actual damages and profits.[7]

It is reasonable to ask whether these provisions offer sufficient incentive and sufficient assurance that the copyright owner will be able to afford the cost of litigation. In the past couple of weeks we have asked representatives of authors and "small" copyright owners about their experience in litigating infringement claims. We have heard assertions that in many cases it simply is not worthwhile to bear the expense of federal litigation no matter how meritorious the claim may be. We are not in a position at this time to evaluate the accuracy of those assertions, but it is not difficult to imagine that in many cases an author or copyright owner engaging in a rational analysis of the costs and benefits of litigation will conclude that in light of the modest value of his or her infringement claim and the relatively high cost of litigation, it makes no sense to pursue that claim.

Although the copyright law offers the advantages described above to copyright owners who pursue claims of infringement, another provision of the law arguably

---

[2] United States Copyright Office, *Report on Orphan Works* 114 (Jan. 2006)

[3] If expert witnesses are used, as is not uncommon in copyright cases, additional thousands of dollars or more in expenses can be incurred.

[4] PPA Comment 10.

[5] It may be worth noting that in diversity actions, the minimum amount in controversy required to invoke the jurisdiction of the federal courts is $75,000. 28 U.S.C. § 1332(a).

[6] 17 U.S.C. § 505.

[7] 17 U.S.C. § 504(c). Attorney's fees and statutory damages are available to plaintiffs only in cases where the copyright in the work was registered prior to the commencement of the infringement or within three months after first publication of the work. 17 U.S.C. § 412.

provides a disincentive to pursue small claims. Section 1338 of Title 28 of the United States Code confers upon the federal district courts exclusive jurisdiction over claims of copyright infringement. As a general proposition, the longstanding exclusive jurisdiction of the federal courts in this area is an important and positive feature of our system. Copyright law is federal law, and confining copyright cases to the federal courts is more likely to ensure consistency of decision-making. It is probably also fair to say that, as a general proposition, the quality of decision-making in the federal courts exceeds that found in many state courts.

But, as noted above, federal litigation tends to be expensive. While pro se litigation is possible in the federal courts, as a practical matter in most cases it requires the assistance of an attorney to navigate the civil procedure and substantive law. Although state court systems offer small claims courts, which handle claims of up to a few thousand dollars and are more congenial to pro se litigation, the federal courts offer no such alternative. As a result, because authors and copyright owners, unlike most other litigants, have no choice but to pursue their claims in federal court, the costs of federal litigation may weigh more heavily on them than on most others.

The Copyright Office expresses no definitive views on the extent to which the current system hinders the ability of authors and copyright owners to pursue small infringement claims, but from the foregoing discussion it is clear that there are serious questions about the effectiveness of the current system that merit further study.

Some have also asserted that the existing system for adjudication of copyright infringement claims can in some cases be too burdensome for defendants who are accused of infringement. While it is not difficult to imagine that a wealthy plaintiff in a copyright infringement suit could make the litigation very costly for a defendant of modest means, the Office is not aware whether this has in fact been a significant problem.

If it is the desire of the Subcommittee, the Office would be pleased to conduct a study—in a way similar to the way in which it conducted its study on orphan works—that would seek and evaluate information on the nature and scope of the problem and, if the problem appears to require further Congressional attention, would recommend possible solutions. Among the information that such a study might seek would be:

- Statistical (if it exists) and anecdotal evidence as to the extent to which authors and copyright owners have foregone asserting claims of infringement due to the cost of litigation or other factors relating to the currently available fora and remedies.
- Information about the range of amounts in controversy in suits for copyright infringement filed in the federal courts.
- Information relating to the range of costs that authors and copyright owners have borne in pursuing claims of infringement, especially in cases involving relatively modest amounts in controversy.
- Information about the practice of the courts in awarding attorney's fees in copyright suits, especially in cases involving relatively modest amounts in controversy, including the frequency with which attorney's fees are awarded, the extent to which the awards are equal to the actual attorney's fees expended by the prevailing party and the extent to which such awards are collected.
- Information about existing use of alternative dispute resolution mechanisms in addressing copyright infringement claims.
- The extent to which collective administration and licensing resolves problems related to enforcement of copyright in cases involving relatively small amounts in controversy, and where such activity has been successful in ameliorating the high costs of litigation in federal court.
- The extent to which trade associations, guilds, professional associations and other groups of copyright owners have been able to provide legal services or otherwise assist members in resolving copryight disputes involving relatively small claims.

To the extent that such a study might find problems that need to be addressed, the study would consider possible legislative or other action. Possible alternatives might include:

- Amending the statute that confers exclusive jurisdiction over copyright matters on the federal courts, in order to permit state courts (*e.g.,* small claims courts) to hear copyright infringement claims where the amount in controversy is small.

- Providing for an administrative proceeding, perhaps in the Copyright Office, for determination of small copyright infringement claims.
- Establishing streamlined procedures for adjudication of small copyright infringement claims in the federal courts.
- Measures to facilitate the use of alternative dispute resolution, such as arbitration and mediation.

The fact that the Copyright Office has identified such possible solutions does not mean that the Office would necessarily endorse any of them following a careful study. Indeed, even without the benefit of further study it is apparent that there are benefits as well as disadvantages to each of these approaches.

As always, the Copyright Office stands ready and eager to assist the Subcommittee on this and other copyright matters.