BEFORE THE
COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

Remedies for Small Copyright Claims, Additional Comments	Docket Number 2011-10

COMMENTS OF NEW MEDIA RIGHTS

New Media Rights submits the following comments in response to the Copyright Office's Notice of Inquiry into Remedies for Small Copyright Claims, Additional Comments.[1] In its Notice, the Copyright Office seeks further comment on how copyright holders and defendants address small copyright claims within the current legal system, the drawbacks and benefits of the current system, and potential alternative methods for handling such claims.

These comments will serve -to further reinforce New Media Rights' January 17th, 2012 *Comment on Small Claims* response to the Copyright Office's Notice of Inquiry.[2]

I. COMMENTING PARTY

New Media Rights (NMR) is an independently funded program of California Western School of Law. NMR provides expertise and advocacy on media, communications, and internet law as it applies to independent creators and internet users. NMR offers pro bono legal services to creators including artists, filmmakers, podcasters, citizen journalists, bloggers, open source software projects, as well as non-profit organizations. Further information regarding NMR's mission and activities can be obtained at http://www.newmediarights.org.

II. CURRENT STATE OF COPYRIGHT

As the Copyright Office considers proposals for a copyright small claims system, it's important to recognize that there are large at-risk classes of people who will be made more vulnerable by any system that does not give them due consideration. These at-risk classes are the independent creators, the artists, and internet users who already face a great deal of misuse and abuse of copyright law by plaintiffs both inside and outside of the court system. The concern is that the imbalances that exist in our current formal and informal systems of copyright enforcement will be even more prevalent in a new small copyright claims court. A small copyright claims system that fails to account for the challenges faced by small-scale defendants and those intimidated to remove content outside the court system, is bound to ensure their continued disadvantage in any copyright system.

Currently small infringement claims are numerous and varied. At best, a small infringement claim is a straightforward affair involving cooperative parties. However, at its worst, small copyright claims are exploitative of individuals without the resources or sophistication to properly defend themselves. Practically speaking, this imbalance has resulted in a "settling culture" in our current system. When a small-scale defendant runs afoul of a large-scale copyright holder, often the only rational economic choice is to settle out of court. Large-scale copyright holders usually have significantly more funds to put towards litigating a claim. Thus they are often able to intimidate small claims infringers into settling out of court, even when a valid defense may

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[1] 77 Fed. Reg. 51068 (August 23, 2012)

[2] Comments of New Media Rights, in the matter of remedies for small copyright claims, Docket No. 2011-10, at <http://www.newmediarights.org/sites/newmediarights.org/files/New_Media_Rights_Small_Claims_Copyright_Comment_final_d.pdf>, January 17, 2012, at 1.

exist.

These issues are discussed extensively in New Media Rights' January 17th, 2012 *Comment on Small Claims* response to the Copyright Office's Notice of Inquiry. New Media Rights reaffirms all statements made therein.[3]

Unfortunately, many of the current issues facing small-scale defendants could be amplified in a small claims setting. Without special consideration paid to the misuse and abuse of copyright that occurs on a daily basis, a new copyright small claims system without adequate safeguards risks serving only to provide another means to exploit defendants without the wealth or sophistication to defend themselves.

III. COPYRIGHT MISUSE AND ABUSE

A recent economic survey on copyright enforcement found that the median cost for litigating a copyright infringement lawsuit with less than $1 million in damages at issue is $350,000. [4] It's easy to see how a small-scale defendant would be discouraged from litigating a case even when a valid defense is present. This issue is compounded by the fact that courts award fees and costs to prevailing parties differently.

An imbalance exists in how fees and costs are awarded to prevailing parties

Under 17 U.S.C. §505, courts have the right to "award a reasonable attorney's fee to the prevailing party as part of the costs."[5] The attorney's fee provision was most famously discussed in the *Fogerty v. Fantasy, Inc.* case in 1990. In that case, the court found that in some circuits, like the 9th circuit, there had been a "dual" standard for awarding fees under §505.[6] Under the "dual" approach, prevailing plaintiffs were generally awarded attorney's fees without dispute, while defendants were generally asked to show that the original suit was frivolous or brought in bad faith in order for attorney's fees to be granted. [7] It was not until the decision in *Fogerty* that the Supreme Court held that prevailing plaintiffs and prevailing defendants should be treated alike when considering attorney's fees under §505 of the Copyright Act.[8] Prior to this decision, some circuit courts applied §505 according to the "dual" approach as described above, while others took the "evenhanded" approach, purportedly making no distinction between two sides in determining how to award attorney's fees.[9] Though the Supreme Court in *Fogerty* ultimately endorsed the "evenhanded" approach, it did not offer any specific guidance as to when and how lower courts were to exercise their discretion in awarding fees to the prevailing party. [10]

Despite the *Fogerty* decision, there has not been a fundamental alteration in the application of §505. Prevailing plaintiffs are routinely able to access attorney's fees simply by having

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[3] Id.
[4] Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, 35 (2011)
[5] 17 U.S.C.A. § 505
[6] Fogerty v. Fantasy, Inc. 510 U.S. 517, 521 (1994)
[7] Id. at 522.
[8] Jeffrey Edward Barnes, Attorney's Fee Awards in Federal Copyright Litigation After Fogerty v. Fantasy: Defendants Are Winning Fees More Often, but the New Standard Still Favors Prevailing Plaintiffs, 47 UCLA L. Rev. 1381, 1382 (2000)
[9] Id.
[10] Id.

registered the copyright according to the statute, whereas a prevailing defendant often must show that a plaintiff's claims or conduct during the litigation are frivolous or brought in bad faith in order to earn attorney's fees. Although *Fogerty* has made it somewhat easier for prevailing defendants to win fee awards, defendants are not on equal footing under §505 as currently interpreted.[11]

The imbalance in awards of attorney's fees plays a role for small-scale defendants who are considering whether to defend themselves in court or capitulate to a quick settlement. The current system disincentivizes small claims defendants who may have a legitimate fair use defense. It's simply not rational to choose an expensive and protracted legal battle over a relatively less expensive and quick settlement. This resulting "settlement culture" not only abuses small-scale defendants, but harms the progress of the law. Rather than reducing copyright bullying and advancing fair use precedent, defendants are forced to settle disputes out of court.

Copyright misuse is commonplace, but the recovery of attorneys fees for defendants rare

More often than not, small-claims defendants are denied recovery of attorneys fees, even when the case against them has been dismissed. This is particularly damaging in cases like mass file-sharing lawsuits, where unnamed Doe defendants identified only by IP addresses are included in overreaching suits with hundreds or thousands of defendants. [12]

In *Virgin Records America, Inc. v. Thompson*, the defendant, a single father, was sued for infringement for the sharing of copyrighted digital music files that were traced back to his computer's IP address. Though Thompson protested that he had not downloaded any infringing material, Virgin was able to push for a settlement without identifying the actual defendant by using Thompson's IP address. When Virgin eventually discovered that Thompson was not the infringing party, the case was subsequently dismissed. [13]

Despite the fact that Thompson was wrongfully identified and forced to pay to defend a suit for an infringement he did not commit, he was denied recovery of his attorney's fees. The court was more concerned with protecting the Plaintiffs incentive to bring future suits, rather than compensating a defendant forced to litigate poorly-grounded claims. Recovery by the defendant in cases like *Thompson* is rare. Only recently has a court even recognized the economic hardship defendants must endure in these overreaching suits by large-scale copyright holders. [14]

In *Capitol Records, Inc. v. Foster*, we saw another example of a case where a large-scale plaintiff filed an overreaching lawsuit naming the wrong defendant. Fortunately, the court recognized that "the plaintiffs did not offer to dismiss their claims against the defendant until after she had already undertaken the litigation of those claims and incurred substantial expense therefor."[15] The court recognized that in this case, the defendant was faced with the choice between litigating copyright infringement claims, or capitulating to a settlement for a violation she insisted she did not commit. The court in *Foster* has been one of the few to recognize the

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[11] Id. at 1384.
[12] Art Neill, Does A New Wave of Filesharing Lawsuits Represent A New Business Model for Copyright Owners?, 14 J. Internet L. 1 (2011)
[13] Virgin Records America, Inc. v. Thompson, 512 F.3d 724, 725 (5th Cir. 2008)
[14] Capitol Records, Inc. v. Foster, 2007 WL 1223826 (W.D. Okla., 2007)
[15] Id. at 2.

costs incurred by defendant in these scenarios.

Taken together, the above cases demonstrate an all too common scenario in the current system where even small-scale defendants who have winning cases do not find it financially viable to defend themselves. Many of the individuals who are likely to wind up in the small claims system would be similarly situated to the defendants in the above cases. As recognized by the court in *Foster*, many defendants are forced to choose between costly litigation or settling a dispute where they may be innocent. If a small claims system is designed to make enforcement easier for plaintiffs, it must also ensure that there are appropriate protections in place to prevent abuse and misuse of copyright law as well.

When designing a small copyright claims system, it is important to recognize that the cost of wrongfully pursuing an anonymous Doe is miniscule to a plaintiff with significant resources like Virgin Records, Capitol Records, or the many adult entertainment companies driving the newer generation of filesharing litigation. As evidenced by the above cases, and the thousands of cases against individuals throughout the United States today, large-scale plaintiffs have no reservations about being over-inclusive in naming defendants. For small-scale defendants, however, the cost of litigating an infringement suit can be devastating. Even if they would be successful in their defense, many families can't afford the thousands of dollars in attorneys fees out of pocket. All too often copyright misuse tends to affect individuals who are vulnerable and less able to protect themselves.

IV. THE INADEQUACY OF DMCA 512(f) FOR ACTUAL RELIEF

Abuse of the Digital Millenium Copyright Act ("DMCA") notice and takedown process provides another set of challenges to creators and internet users, even those who may have a valid defense such as fair use.

Many of New Media Rights' clients and other small-scale defendants face, with increasing frequency, instances where plaintiffs misuse DMCA takedown notices. It is not uncommon to hear from artists and individuals who had a strong fair use claim, yet they still had their work improperly removed by a DMCA takedown request that failed to consider fair use. Still worse, many DMCA takedown notices are 1) sent by someone other than the copyright holder or their agent, 2) sent to remedy issues unrelated to copyright, or 3) simply used to suppress otherwise protected speech. These unfortunate practices are exploitative of creators and internet users who suffer real damages from the removal of content or their account from the internet. Additionally, under the *Rossi v. Motion Picture Association of America, Inc.* standard, a defendant in a 512(f) suit must only show a subjective good faith belief that the website in question was infringing to be able to defeat the claim of misuse.[16] This, along with the section 512 (f) standard of "knowingly materially misrepresents," and the time and cost limitations of filing a federal case, effectively creates an extremely high bar to meet for a plaintiff to successfully recover damages from a DMCA misuse, severely limiting the remedies for those who are damaged by a baseless takedown.[17]

The DMCA states that a party sending a takedown notice must include "a statement that the complaining party has a good faith belief that use of the material and matter complained of is not authorized by the copyright owner, its agent, or the law." [18] The Copyright Act explicitly

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[16] Rossi v. Motion Picture Ass'n of Am. Inc., 391 F.3d 1000, 1007 (9th Cir. 2004)
[17] 17 U.S.C. §512(f)
[18] 17 U.S.C. §512(c)(3)(A)

states that “the fair use of a copyrighted work … is not an infringement of copyright.”[19]

In *Lenz v. Universal Music Corp*., the court recognized that fair use is a lawful use of a copyright, and as a result the complaining party has a good faith duty to evaluate whether the suspect material makes fair use of the copyright. Thus, the allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use is sufficient to justify a claim pursuant to DMCA 512(f). Furthermore, the court in *Lenz* found that as a result of the unjustified DMCA takedown, Lenz, the target of the takedown, suffered real and cognizable injury under the DMCA. The unfortunate reality is that cases along the lines of *Lenz*, where DMCA abuse is recognized and the abuser penalized, are simply too few in number to reduce the amount of abuse of the DMCA takedown process. Even in a number of the few 512(f) cases that have been brought, individual recipients of a DMCA takedown notices have sometimes been denied any avenue of recovery for wrongful takedowns, particularly under the aforementioned *Rossi* standard.[20][21]

Beyond the failure to take affirmative defenses into account, DMCA abuse manifests for reasons unrelated to copyright enforcement (e.g. to stifle publication, or to cyber-bully). In *Diehl v. Cook,* a case recently decided in California, the misrepresentation was so excessive that the court did not even address the question of whether the content that was the target of the takedown was a fair use. The defendant Crook participated in a televised news interview, from which screenshots were taken and posted online. The screenshots were later altered by users to make fun of Crook for his political point of view. After discovering the screenshots, Crook issued takedown notices to the complainant’s ISPs, and many of the websites were disabled as a result. Crook had no valid copyright claim to the screenshots and merely used the DMCA procedures to stifle free speech. [22] The court held that Crook had misused the DMCA and because he was indigent, ordered him to comply with several non-monetary remedies to atone for his abuse. Crook was barred from sending any further DMCA notices for five years, except under limited circumstances, ordered to withdraw all past notices sent, and ordered to complete online classes in copyright law. If Crook failed to meet any terms of the order, he would be forced to assign any and all of his website domain names to Diehl. The consideration of non-monetary remedies are a necessary step in the creation of small copyright claims system. Many small-scale plaintiffs and defendants do not have the economic resources to pay for damages, and incorporation of non-traditional remedies play a valuable role in rectifying the harms that come from DMCA abuse.

Similarly, New Media Rights has worked with individuals who have received improper takedown notices for issues beyond the scope of the DMCA. In one such example, a client of NMR, Chris Healey, was the target of DMCA abuse. Mr. Healey’s web page contained a digital copy of a Public Service Announcement, which was used as a flyer to advertise a group art exhibit. The complainant was one of the artists that participated in the group exhibit. The PSA at issue

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[19] 17 U.S.C. §107

[20] *See* Biosafe-one, Inc. v. Hawks, 524 F.Supp.2d 45 (Where defendants were unable to show knowing misrepresentation because plaintiffs submitted evidence that they believed, and continue to believe, defendants were copyright violators)

[21] *See* Rosen v. HSI, 771 F.Supp.2d 1219 (Where a photographer misidentified several links that were not copyright infringement, the blatant misidentifications were not “knowing misrepresentation” as a matter of law)

[22] See Complaint, Diehl v. Crook, No. C06-06800 SBA (N.D. Cal. 2007), available at http://www.eff.org/files/filenode/diehl_v_crook/crook_ complaint.pdf.

existed in many locations on the internet, and simply listed the complainant as one of several artists taking part in the event. The complainant sent a takedown notice, and successfully got content removed from the web, despite not having a valid legal claim. The intermediary complied without consideration and removed the PSA from the website. Mr. Healey's website, an important art history source, was stifled by an improper DMCA notice.

Abuses like those described above are a growing concern. A successful small claims system for copyright would need to ensure that when misuse does occur, there are processes in place that offset the harm resulting from the misuse. Since much of this abuse takes place outside of the purview of the courts, we recommend that, if a federal small claims court comes into being, it be empowered to provide a forum to address abuses of the DMCA process. This means that the court could hear 512(f) and similar copyright abuse cases, and provide remedies in the form of damages and attorneys fees. This is discussed further in our recommendations below.

V. ADDRESSING SMALL COPYRIGHT CLAIMS AT STATE LEVEL IS PROBLEMATIC

Small claims courts vary greatly from state to state. Yet while each state's small claims court differs in structure, financial claim limits, and procedure, the concept is essentially the same. Small claims courts provide a forum to settle relatively minor disputes involving dollar amounts that are insufficient to warrant processing the case through the normal court procedure. Unfortunately, many of the problems with the Federal system would inherently transfer to a state small copyright claim system, and a state system would have numerous additional problems as discussed below.

The potential for a sea of overreaching copyright claims

A new small copyright claim system at the state level would likely see such a high volume of cases, that without thoughtful safeguards in place against copyright and DMCA abuses, courts will find themselves lost among a sea of overreaching and complicated copyright claims. As discussed above, misuse of various aspects of copyright law is an epidemic. Given the sheer volume of overreaching informal copyright infringement claims currently, any small claims system which does not take steps to keep plaintiffs honest in their claims, is bound to sacrifice judicial efficiency as a result. Additional safeguards that reduce overreaching complaints will limit the burden on the system and ensure timely resolution for all parties.

State jurisdictional limits in small claims courts vary and may be preempted by copyright law

Small claims courts are generally limited in the amount of damages they can award by the jurisdictional limit set by the state. In our initial response to the Copyright Office's Notice of Inquiry for Remedies for Small Copyright Claims, NMR highlighted the discrepancy between California's average small claims jurisdictional limit of $5,000, and the fact that statutory damages on a single infringing use of a copyrighted work is can be as much as $30,000 ($150,000 if shown to be willful). For small copyright claims, there is a need for a nationally established jurisdictional limit. Different jurisdictional limits between states creates significant inequity for defendants. Moreover, because copyright is governed by federal law, state-imposed jurisdictional limits are likely to be preempted by federal law.

State small claims court judges are not copyright law experts

Furthermore, a state small claim system would inconsistent because Copyright law is notoriously complex, and decisions frequently rest on ambiguous doctrines like "originality" and "fair use." State small claims courts that typically deal with contract and tort law are not prepared to navigate the nuanced waters of copyright law. The problem is compounded because most small-scale plaintiffs and defendants would be representing themselves. Without an experienced judge to help navigate the specialized legal issues that even fully trained attorneys struggle with, how will the average small-scale plaintiff or defendant successfully represent themselves? This concern is discussed extensively in New Media Rights' initial comment regarding small copyright claims. [23] The lack of sophistication in representation also suggests the need for some kind of system or network of public interest defense attorneys to represent defendants sued in any copyright small claims court.

Many states' small claims courts don't have protections against malicious and fraudulent prosecution

Lastly, in light of the above outlined abuses, it is necessary to allow for an appropriate recovery measure in cases of fraudulent or malicious prosecution. However, some states, like California, do not allow malicious prosecution claims to arise out of small claims cases on the basis that it "would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts."[24] The complexity of copyright claims, more so than other areas of the law, lends itself to both misuse and abuse. Without adequate avenues for remedies, a state small copyright claim system has a chance to exacerbate the problems in the current system.

VI. RECOMMENDATIONS FOR AN IMPROVED SMALL CLAIMS SYSTEM

While a small claims system for copyright clearly has potential pitfalls, the concept is not without merit. There are a number of ways to improve the system and ensure it provides an even playing field. The following considerations should be taken into account when designing any new copyright system:

Deter misuse and abuse by empowering a small claims system to provide attorneys fees and costs to prevailing small-scale defendants

A successful system must deter blatant copyright misuse. As previously discussed, the dynamic of the current copyright infringement environment heavily favors wealthy large-scale plaintiffs. Prevailing defendants are frequently held to a high standard to recover costs incurred for copyright misuse, making such recovery extremely difficult. Even defendants who appear Pro Se incur real harm and costs in defending themselves against a meritless complaint.

Thus, many defendants are hindered from providing a proper defense, even when a valid defense is present. As previously discussed, without an adequate path to attorneys fees and costs, small-scale defendants are forced to choose between settling out of court (often involving

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[23] Comments of New Media Rights, in the matter of remedies for small copyright claims, Docket No. 2011-10, at <http://www.newmediarights.org/sites/newmediarights.org/files/New_Media_Rights_Small_Claims_Copyright_Comment_final_d.pdf>, January 17, 2012, at 10.
[24] Bruce Zucker & Monica Her, The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System, 37 U.S.F. L. Rev. 315, 335 (2003).

payment and/or eliminating otherwise legal content), or incurring extensive costs by hiring an attorney to properly litigate the case. Any small claims system must establish a reasonable standard that provides a real opportunity to recover attorney's fees and costs. This would avoid a great deal of copyright abuse and misuse by ensuring a) otherwise legal content is not removed from the internet by discouraging abuse of out of court processes like the DMCA b) plaintiffs use the new process for meritorious claims rather than a tool to extract out of court remedies, c) defendants are encouraged to litigate worthy cases, furthering the development of copyright law in response to the quickly changing technologies of the digital age.

Any small claims system must provide jurisdiction and attorneys fees and costs in cases of copyright misuse and abuse, particularly regarding DMCA takedown notices.

In addition to curbing misuse and abuse of the system by providing avenues for defendants to recover attorneys fees and costs, a successful small claims system must also provide a forum for those being bullied outside the court system. This means that a small claims system must offer the ability to bring actions to address copyright misuse and abuse.

In particular this arises with DMCA takedown notice misuse and abuse, as discussed above. A small claims system must be empowered to handle 512(f) related cases, as well as additional out-of-court cases of abuse. Much of the overreaching and abuse of copyright law is taking place outside the purview of courts, in the form of DMCA takedown notices, cease and desist letters, and other methods of content and account removal. Now, prohibitive costs make it difficult to achieve a remedy for those being bullied out of court. Indeed, some courts have cut off avenues of recovery outside of the Copyright Act.[25]

A small claims system should be empowered to award a full array of damages and injunctive relief, as well as attorneys fees and costs. However, even a more limited small claims system that provided simply injunctive relief to stop abusive behavior, along with attorneys fees and costs, could make a huge difference to the many innocent independent creators and internet users who regularly face copyright abuse and misuse.

At first glance, this approach may seem to simply add cases to a potential small claims court's docket. On the contrary, the deterring effect of such an approach in reducing illegitimate formal complaints and abusive out-of-court campaigns would compensate for the handling of misuse and abuse cases.

A small claims system could also limit the number of offensive and declaratory misuse and abuse actions by requiring such actions be preceded by out-of-court claims of copyright infringement. Evidence of such claims could be DMCA takedown notices, cease and desist letters, and demands for payment and injunctive relief by email or letter.

Unsophisticated small claims defendants will need representation

As discussed, it is unreasonable to ask average individuals to defend themselves against complicated copyright questions. This lack of sophistication in representation suggests the need for some kind of system of public defense, and/or network of public interest defense attorneys to represent defendants sued in any copyright small claims court. Here the growing number of law school clinics focused on internet and IP law could provide a network of advocates for copyright defendants.

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[25] Amaretto Ranch Breedables, LLC v. Ozimals, Inc., 2011 WL 2690437 (N.D. Cal. July 8, 2011)

Any copyright small claims court would need to be a federal court system, not part of local state court systems

Due to the challenges of implementing a small claims system on the state level (discussed here as well as in our previous comments to this proceeding), any small copyright claims court would have to be established at the federal level. This effectively sidesteps the claim limit and jurisdictional issues of a state small claims copyright court, and embraces the fact that copyright law is a federal issue, requiring specialized expertise.

VII. CONCLUSION

Abuses of copyright are rampant in the current system. Creators and internet users regularly face baseless content removals and settlement demands. Right now, much of this misuse and abuse takes place outside of the formal court system. A small claims system for copyright would naturally lower the bar for plaintiffs to bring formal actions against defendants. Many of the defendants in the new system will be these same vulnerable independent creators and internet users already facing abuse in our informal system. When considering such a significant change to the current copyright system, the Copyright Office must ensure that the new playing field that is created allows defendants an adequate opportunity to defend themselves and pursue those who abuse and misuse copyright law.

Respectfully submitted

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