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**Before the Copyright Office**

**Library of Congress**

In the Matter of )  
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**Remedies for Small Copyright Claims** ) Docket No. 2011-10  
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**Comments of the Authors Guild**

**Submitted by Paul Aiken**

The Authors Guild (“Authors Guild”) submits these comments on the above-captioned Request for Comments on Remedies for Small Copyright Claims.

The Authors Guild is the largest society of published authors in the U.S. 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.

We have a long history of contributing to debates before the Legislative Branch on copyright law, and it’s our pleasure to continue to serve that role now by submitting these comments on Remedies for Small Copyright Claims to the Copyright Office.

## **The Public Interest in Copyright & Adjudicating Small Infringement Claims**

It 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 often the surest way to assure that the public is adequately supplied with a good or service. The public and the Authors Guild, both, have 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 the Copyright Office is, in the public's interest, examining such mechanisms in the context of small copyright infringement claims.

### **Authors Survey on the Need for a Small Claims Court**

On March 29, 2006, the House Judiciary Committee Subcommittee on Courts, the Internet and Intellectual Property held a hearing on "Remedies for Small Copyright Claims." In preparation for the Authors Guild's testimony at this hearing, we conducted a two-part survey of our membership of published authors. We had an enormous response to the survey; more than 1,200 authors completed each part of the surveys. (We provided detailed results for Phase II of this survey to the House Judiciary Committee and would be happy to provide such to the Copyright Office; all statistics, unless otherwise noted, are from Phase II.) 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). The respondents are also prolific: 382 had published 10 or more books; 428 had published 50 or more freelance articles.

The surveys confirmed our own 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. 17% of respondents did not think it was a good idea; the remaining 28% were neutral on the issue.

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.) Authors could find themselves the defendants in small-claims copyright infringement suits if a rightsholder deemed a use to be unfair, to exceed the bounds of the fair use doctrine. 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 works, 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. 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 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.) 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. 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, 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. The following are some suggestions from the Authors Guild on how to address such concerns:

*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 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 plaintiffs 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.

*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.