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# Overview of the CASE Act and Related Materials

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# THE CASE ACT: How It Will Work

## How the CASE Act Small Claims Court Will Work in Practice

The Copyright Alternative in Small-Claims Enforcement Act of 2019<sup>1</sup> (the “CASE Act”), H.R. 2426 and S. 1273, would create a low-cost, voluntary, streamlined tribunal within the U.S. Copyright Office to handle small copyright claims brought by copyright owners and users of copyrighted works. The relatively simple 10 step process for bringing and resolving a case before the CASE Act’s Copyright Claims Board is set forth below.

### STEP 1:

A claim is discovered and discussions between the parties fail to resolve the issue.

### STEP 2:

The Claimant files a claim (or claims) with the Copyright Claims Board (CCB).

### STEP 4:

If the claim meets the CASE Act requirements, the Claimant notifies the Respondent about his or her claim by serving the Respondent (consistent with the Federal Rules of Civil Procedure) and explaining the proceedings and the claim (as required by the CASE Act). The CCB sends a follow-up notification to make sure the Respondent understands the proceedings and the consequences of not responding.

### STEP 3:

The CCB attorneys examine the claim to make sure it meets the CASE Act’s requirements. If it does not, the Claimant has an opportunity to amend the claim.

### STEP 5:

The Respondent has 60 days to decide whether to opt out or participate in the proceeding.<sup>1</sup> If the Respondent opts out, the case is immediately terminated.

<sup>1</sup> This 60-day period may be extended for another 60 days under exceptional circumstances. If the Respondent does not timely respond there is a lengthy process before a default judgment can be entered. For a detailed discussion of when and whether a default judgment can be entered see the separate default judgment paper.

### STEP 6:

If the Respondent has not opted out, the CCB issues a scheduling order, supervises limited discovery relating to any claims and counterclaims, conducts conferences, and facilitates settlement conferences. The process is simplified and done remotely so that neither party needs to hire an attorney and travel is not necessary.

### STEP 7:

Any time before a decision is rendered the CCB can dismiss the case for various reasons, such as a lack of evidence. The CCB can also dismiss claims brought for harassing or other improper purposes (and can order the party acting in bad faith to pay the other party’s costs), or the claims exceed the competence of the CCB.

### STEP 8:

If the case is not dismissed and the parties have not settled, the CCB considers the facts and legal issues at stake in the case and renders a decision based on relevant federal court precedent.

### STEP 9:

The parties have 30 days to request reconsideration by the CCB and another 30 days to request review by the Register of Copyrights.

### STEP 10:

After reconsideration and review have been completed or the deadlines have passed without a request, the losing party has a limited right to appeal the decision to federal district court. If the losing party does not comply with the CCB’s judgment, the prevailing party can bring an action in federal court to enforce the CCB’s judgment.

The CASE Act is supported by creators and creators’ advocacy groups, including:



**AMERICAN BAR ASSOCIATION**  
**INTELLECTUAL PROPERTY LAW SECTION**  
**LITIGATION SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association supports legislation creating the  
2 establishment of a program within the U.S. Copyright Office with authority to adjudicate  
3 copyright small claims as a lower-cost, less-time-consuming alternative to federal court  
4 litigation of copyright claims, provided that participation in the program is voluntary for all  
5 parties to the dispute, the claim is limited to seeking the types of monetary relief permitted  
6 by the Copyright Act (including statutory damages, actual damages, and disgorgement of  
7 profits) and excludes injunctive relief, and the monetary relief is no more than a maximum  
8 set in accordance with the legislation (“Copyright Small Claims Program”); and
- 9 FURTHER RESOLVED, That the American Bar Association supports, in principle, that  
10 such legislation and any Copyright Small Claims Program reflect appropriate procedures  
11 and requirements, including:
- 12 (a) Requiring that adjudicators in the Copyright Small Claims Program have  
13 experience with copyright law and training in resolution of disputes;
  - 14 (b) Allowing claims and responses to be submitted electronically, and to the extent  
15 a proceeding may require a hearing, using videoconference and  
16 teleconference technology, rather than requiring personal appearances; and  
17 allowing but not requiring parties to be represented by an attorney;
  - 18 (c) Allowing parties to bring counterclaims in a Copyright Small Claims Program  
19 proceeding;
  - 20 (d) Authorizing the Copyright Office to adopt appropriate rules and procedures to  
21 prevent abuse of the Copyright Small Claims Program;
  - 22 (e) Allowing adjudicators in the Copyright Small Claims Program to consult with  
23 the Register of Copyrights on general issues of law; and
  - 24 (f) Permitting the Register of Copyrights to review decisions of adjudicators in the  
25 Copyright Small Claims Program in appropriate circumstances.

## REPORT

### I. Introduction

Copyright owners with small infringement claims essentially have a right without a remedy. The cost of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. So they must endure infringements of their work.<sup>1</sup> Congress, mindful of this problem, in 2011 requested the Copyright Office to undertake a study concerning new remedies to address copyright small claims, observing that “the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works . . . and deprives society of the benefit of new and expressive works of authorship . . .”<sup>2</sup> The Copyright Office Small Claims Report, issued in 2013, “documents the challenges of resolving copyright small claims in the current legal system,” observed that the problem of enforcing modest-sized copyright claims “appears to be especially acute for individual creators,” and recommended the creation of a small claims tribunal within the Copyright Office.<sup>3</sup>

Recently, bipartisan bills were introduced in both Houses of Congress to establish a Copyright Small Claims Program in the Copyright Office, with a cap on recovery of

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<sup>1</sup> See, e.g., Songwriters Guild of America testimony before the House Small Business Committee (May 14, 2018): [I]n order to enforce our rights against infringers, songwriters literally need to “make a Federal case out of it,” at an average cost of about \$350,000 to bring a lawsuit in federal court. Since only a precious few songs ever earn that much money in their entire existence, songwriters are left with no practical way to combat the theft of our works. We have a right with no remedy in the most classic sense. We simply cannot afford access to enforcement in a world of rampant infringement.

According to Representative Ted Lieu:

More than 2 million hardworking artists in the United States rely on the U.S. Copyright Office to protect their livelihoods. For too long, our legal system skewed in favor of low-volume, high-value industries. But for many independent artists, whose claims of infringement often total a few thousand dollars, it is far too expensive to sue in federal court – essentially forcing creators to forfeit their rights. The Small Claims Board is an important step toward ensuring that digital photographers, graphic artists, illustrators, and others have a way to resolve disputes quickly and affordably.

Press Release, “Reps. Jeffries, Marino Lead Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work” (October 4, 2017), available at <https://jeffries.house.gov/media-center/press-releases/jeffries-marino-lead-bipartisan-effort-to-help-musicians-and>.

<sup>2</sup> Letter from Lamar Smith, Chairman, U.S. House Judiciary Committee to Maria Pallante, Register of Copyrights (Oct. 11, 2011). Specifically, he requested that the Copyright Office:

[U]ndertake a study to assess: 1) the extent to which authors and other copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system; and 2) furnish specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution. Id.

<sup>3</sup> Copyright Small Claims, A Report of the Register of Copyrights 1 (Sept. 2013) (“Copyright Office Small Claims Report”), available at <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>

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\$30,000.<sup>4</sup> The ABA now has an opportunity to advocate in favor of a small claims program in the Copyright Office, which would provide small creators and copyright owners with effective access to justice, as well as benefits of the system intended for “the overall public good.”<sup>5</sup>

This resolution supports the creation of a copyright small claims program for low-value copyright disputes. Specifically, it supports the establishment of such a program within the Copyright Office, where claims could be asserted and responded to by electronic means, and proceedings would be conducted via telephone or video-conference to minimize the costs of resolving a dispute. Participation would be voluntary for all parties; claims would be decided by experienced and knowledgeable attorneys; and there would be a cap on the dollar value of recovery for all claims asserted by a party in the proceeding.

Copyright law in the United States is exclusively federal law, with exclusive federal jurisdiction. Any claims for infringement must therefore be brought in federal court. But it is unrealistic, and sometimes impossible, for some copyright owners to bring suit in federal court. Many copyright owners (e.g., photographers) license their works for modest amounts of money, but manage to make a living by licensing many users. So, in addition to the risk of litigation and high cost of litigating a claim in federal court, their recovery in a successful infringement suit is likely to be only a fraction of the costs of bringing the suit. They usually endure infringement in these circumstances; for them, copyright is a right without a remedy. This problem is exacerbated by the internet, which has made it easy and efficient to copy protected works without authorization; many do so recognizing that there is no likelihood that the copyright owner will assert a claim.

The ABA has an important role to play in this area. The Association’s members have a broad perspective on the role and benefits of copyrights, as well as familiarity with copyright litigation and concerns with counseling clients who sometimes have no realistic recourse when their works are infringed. The ABA is familiar with a wide range of individual and public interests. The legislation supported by the Resolution would enable claimants to achieve a recovery for a meritorious infringement claim when they could not realistically bring an action in federal court, and would benefit defendants who may choose to participate in the Copyright Small Claims Program to minimize the cost and time of resolving the dispute and ensure that they are protected from liability for any amount over the cap on recovery in a Copyright Small Claims Program proceeding.

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<sup>4</sup> See HR 2426, Copyright Alternative in Small-Claims Enforcement Act of 2019 (“CASE Act of 2019”), cosponsored by Rep. Hakeem Jeffries (D-NY), Rep. Jerry Nadler (D-NY), Rep. Hank Johnson (D-GA), Rep. Judy Chu (D- CA), Rep. Ted Lieu (D-CA), Rep. Doug Collins (R-GA), Rep. Martha Roby (R-AL), Rep. Benjamin Cline (R-VA), and Rep. Brian Fitzpatrick (R-PA); and S. 1273 (Senate companion bill), cosponsored by Sen. John Kennedy (R-LA), Sen. Tom Tillis (R- NC) , Sen. Richard Durbin (D-Il), and Sen. Mazie Hirono (D-HI).

<sup>5</sup> Copyright Office Small Claims Report, at 1.

## II. The Importance of a Copyright Small Claims Program

Federal court litigation can be expensive. Such expenses frequently prevent copyright owners from protecting their intellectual property from infringement. The high cost of legal counsel, the time-consuming nature of discovery, and the high likelihood of loss when proceeding *pro se* have all made copyright infringement claims essentially unavailable for litigants that lack resources necessary to bring federal litigation.<sup>6</sup>

Copyright owners who cannot afford to bring claims essentially must acquiesce to continued infringement. For all intents and purposes, they lose the protections of copyright. This, in turn, hinders copyright law from fulfilling its central function of incentivizing the creation of new expressive works. A Copyright Small Claims Program would solve this problem by allowing relatively small claims to be litigated in a forum designed to keep costs down and avoid lengthy litigation, giving individuals and other small-scale creators an effective means by which to take advantage of the rights afforded them by copyright law.

A Copyright Small Claims Program also would benefit defendants in small copyright suits. By allowing for expedited adjudication of small claims, a Copyright Small Claims Program would keep legal fees significantly lower than in a federal court adjudication. This would allow defendants to litigate against claims of infringement without risk of accumulating exorbitant fees—fees that can often exceed the cost of the claim at issue. It would also limit defendants' exposure to the amount of the cap on remedies in a Copyright Small Claims Program proceeding.

Small claims programs have worked well in other areas of the law. For example, the ICANN Uniform Domain Name Dispute Resolution (“UDRP”) allows parties to resolve disputes over cybersquatting or confusingly similar domain names using a streamlined dispute resolution process. Claims are brought online and parties need not make personal appearances. Parties are still able to file suit in federal court, should they desire to do so, but the UDRP provides a low-cost and quick procedure that enables many small-scale domain name owners to successfully protect their trademark rights. While the UDRP is not entirely analogous to a Copyright Small Claims Program in that the UDRP's authority to adjudicate claims arises from consent to UDRP policies of domain name registrars, its success nonetheless points to the benefits of creating low-cost, streamlined, and easy-to-use forums for adjudicating small claims.

## III. Constitutional Issues

Article III of the U.S. Constitution potentially poses constraints on Congress's ability to create tribunals to adjudicate civil claims when decision-makers in those tribunals are not granted lifetime appointments. Additionally, the Supreme Court has interpreted the Seventh Amendment as requiring that litigants have the option of having copyright claims heard before a jury. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). See Copyright Office Small Claims Report at 27-28.

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<sup>6</sup> See Copyright Office Small Claims Report, at 11-13 (particular challenges of *pro se* litigants).

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These constitutional constraints, however, can be addressed by requiring all parties to consent to adjudicating a claim using the Copyright Small Claims Program. Litigants are generally permitted to voluntarily waive their Article III right to have federal claims adjudicated in federal court by an Article III judge and their Seventh Amendment right to a civil jury. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986) (“[A]s a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.”) It is for this reason that parties may consent to have claims heard by magistrate judges. Requiring the affirmative consent of all parties would make it far more likely that the Copyright Small Claims Program would not be subject to constitutional challenges. See Copyright Office Small Claims Report, at 97-99.

## IV. Details of a Copyright Small Claims Program

Any potential Copyright Small Claims Program must be carefully crafted to ensure consistency with existing copyright law. The Resolution lists some important features of any potential Copyright Small Claims Program.

*Voluntary Participation.* A Copyright Small Claims Program should require the affirmative consent of all parties. By requiring parties to opt-in, there would be no doubt that all parties find Copyright Small Claims Program adjudication acceptable, thus avoiding potential challenges to Copyright Small Claims Program decisions down the line. Furthermore, an opt-in requirement would potentially remedy the constitutional issues that a Copyright Small Claims Program might generate, as discussed above.

*Remedies.* The recently-introduced bills call for an award cap of \$30,000 per Copyright Small Claims Program proceeding, which in many cases will allow a sufficient recovery to prevailing copyright holders, while lowering the potential risk to defendants. The cap would be applicable to all claims brought in a single proceeding. In its report, the Copyright Office has proposed the same cap, citing empirical evidence that a large percentage of lawyers would refuse to represent a client with a claim for \$30,000 or less. See Copyright Office Small Claims Report at 110. Certainly \$30,000 appears to be a reasonable and workable cap, although other limits might also be effective.

There is no reason, however, to restrict the type of monetary remedies that can be awarded in a Copyright Small Claims Program. If the program is to serve as an attractive substitute to adjudication in the federal courts, claimants should be able to recover the same types of monetary remedies they would be able to recover in federal court, including actual damages, statutory damages, and disgorgement of profits, as appropriate.

It would be ill advised to permit injunctive relief in a Copyright Small Claims Program. Injunctive relief, such as an order to destroy merchandise, might have an economic impact that far exceeds the jurisdictional cap, and the Copyright Small Claims Program adjudicators may not realistically be in a position to take evidence and properly evaluate such economic ramifications. Permitting injunctive relief might lead some parties to seek to use the Copyright Small Claims Program simply because of its streamlined

procedures. Accordingly, injunctive relief for a copyright infringement claim should be available only in federal court, which is better positioned to ensure that parties have met the high evidentiary burdens necessary to justify the remedy.

*Adjudicators.* To ensure the proper functioning of a Copyright Small Claims Program, it is important that adjudicators be experienced lawyers who are well-versed in copyright law and alternative dispute resolution techniques. Experienced adjudicators will make it more likely that the small claims process is efficient, effective, and fair, and will avoid rendering decisions that might disturb the stability and coherence of the copyright law principles that have been developed by Congress and the federal courts.

*Electronic filing.* One of the reasons that the UDRP has been successful is that its proceedings occur electronically. Accordingly, the Copyright Small Claims Program should adopt this model and allow all filings to be made electronically. If possible, oral arguments should take place via teleconference or videoconference. Adopting an exclusively electronic format will allow parties to keep costs down by avoiding expensive travel and paper printing, and will allow cases to proceed more efficiently, since scheduling in-person appearances would become unnecessary.

*Attorney representation.* The Copyright Small Claims Program should permit parties to proceed with counsel, if they so desire. While a primary goal of the Copyright Small Claims Program would be to avoid the excessive costs of federal court litigation, there are still likely situations where representation by counsel is desirable, or even necessary. For example, considering that a corporation cannot appear in federal court without counsel, it is likely that corporations will desire to be represented by counsel even in Copyright Small Claims Program adjudications. And attorney representation would likely prove helpful to the parties and the adjudicators when it comes to particularly complicated claims, thus allowing these claims to be resolved quickly and fairly.

*Counterclaims.* In the interests of fairness and efficiency, parties to a Copyright Small Claims Program proceeding should be permitted to assert counterclaims, such as those that arise from the same transaction or occurrence that is the subject of the asserted claim of infringement of section 106 or a claim of violation of section 512(f) of the Copyright Act.

*Rules to prevent abuse.* It is possible that some claimants might use the Copyright Small Claims Program on a frequent basis to pressure defendants into unreasonable settlements, just as they do in federal court. The Register of Copyrights should be empowered to issue appropriate rules and regulations to prevent abuse of the Copyright Small Claims Program.

*Review by the Register of Copyrights.* Finally, it is important that the adjudicators be authorized to consult with the Register of Copyrights on legal issues, as necessary. The Register should be able to review substantive decisions by Copyright Small Claims Program adjudicators in appropriate circumstances.



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The statute under which the Copyright Royalty Board operates offers useful precedent for allowing the adjudicators to consult with the Register of Copyrights on legal issues in connection with a Copyright Small Claims Program proceeding. Under 17 U.S.C. § 802(f)(1)(B), the Copyright Royalty Judges are required to “request a decision of the Register of Copyrights, in writing, to resolve” any “novel material question of substantive law concerning an interpretation of those provisions of [the Copyright Act] that are the subject of the proceeding.” Likewise, under 17 U.S.C. § 802(f)(1)(D), the “Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under [the Copyright Act] that underlies or is contained in a final determination of the Copyright Royalty Judges.”

## V. Conclusion

As this report demonstrates, many copyright owners have no effective access to justice since the cost of lawsuits in federal courts is prohibitive, particularly when damages from an infringement are relatively small. There is a pressing need for a voluntary Copyright Small Claims Program within the Copyright Office to provide an inexpensive and efficient means of resolving copyright disputes that do not exceed a particular dollar amount. The ABA supports legislation to achieve this goal and supports appropriate procedures and requirements in connection with such a Program, such as those listed in the Resolution.

Respectfully submitted,

Mark K. Dickson  
Chair, Intellectual Property Law Section  
August 2019

Palmer Gene Vance II  
Chair, Litigation Section  
August 2019

**GENERAL INFORMATION FORM**

Submitting Entities: ABA Section of Intellectual Property Law and Section of Litigation

Submitted By: Mark K. Dickson, Section Chair, and Palmer Gene Vance, II, Section Chair

1. Summary of Resolution

This Resolution addresses the reality that copyright owners with small infringement claims essentially have a right without a remedy and the related impact on public benefits of the copyright system. The costs of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. The Resolution supports legislation creating the establishment of a program within the U.S. Copyright Office with authority to adjudicate copyright small claims as a lower-cost, less-time-consuming alternative to federal court litigation of copyright claims, provided that participation in the program is voluntary for all parties to the dispute, the claim is limited to seeking the types of monetary relief permitted by the Copyright Act (including statutory damages, actual damages, and disgorgement of profits) and excludes injunctive relief, and the monetary relief is no more than a maximum set in accordance with the legislation (“Copyright Small Claims Program”), and supports such legislation including appropriate procedures and requirements, including those listed in the Resolution.

2. Approval by Submitting Entity:

Sponsorship of this Resolution was approved by the Section of Litigation in May 2019 and the Section of Intellectual Property Law in March 2019. This Resolution combines resolutions previously approved by the Council of the Section of Intellectual Property Law in February 2018, August 2017, December 2015, and February 2011.

3. Has this or a similar Resolution been submitted to the House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

None

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

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## 6. Status of Legislation.

HR 2426, Copyright Alternative in Small-Claims Enforcement Act of 2019 (“CASE Act of 2019”), and its Senate companion bill, S. 1273 were introduced on May 1, 2019. HR 2426 is cosponsored by Rep. Hakeem Jeffries (D-NY), Rep. Jerry Nadler (D-NY) (Chair, House Judiciary Committee), Rep. Hank Johnson (D-GA) (Chair, Courts, IP and the Internet Subcommittee of the House Judiciary Committee), Rep. Judy Chu (D- CA), Rep. Ted Lieu (D-CA), Rep. Doug Collins (R-GA) (Ranking Member, House Judiciary Committee), Rep. Martha Roby (R-AL) (Ranking Member, Courts, IP and the Internet Subcommittee of the House Judiciary Committee) , Rep. Benjamin Cline (R-VA), and Rep. Brian Fitzpatrick (R-PA); and S. 1273 , cosponsored by Sen. John Kennedy (R-LA), Sen. Tom Tillis (R- NC) (Chair, IP Subcommittee of the Senate Judiciary Committee) , Sen. Richard Durbin (D-IL), and Sen. Mazie Hirono (D-HI). A hearing was held on the House version of this bill during the previous Congressional session, and the sponsors have indicated that are hopeful that there will be a mark-up of the bill over the summer.

## 7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy would provide the basis for the Association advocating for the CASE Act of 2019 (HR 2426 and S 1273) or for other legislation establishing a Copyright Small Claims Program consistent with the Resolution.

## 8. Cost to the Association. (Both direct and indirect costs)

None.

## 9. Disclosure of Interest. (If applicable)

None

## 10. Referrals.

The Resolution and Report have been distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address):

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12. Contact Name and Address Information. (Who will present the Report to the House?)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution addresses the reality that copyright owners with small infringement claims essentially have a right without a remedy and the related impact on public benefits of the copyright system. The costs of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. The Resolution supports legislation creating the establishment of a program within the U.S. Copyright Office with authority to adjudicate copyright small claims as a lower-cost, less-time-consuming alternative to federal court litigation of copyright claims, provided that participation in the program is voluntary for all parties to the dispute, the claim is limited to seeking the types of monetary relief permitted by the Copyright Act (including statutory damages, actual damages, and disgorgement of profits) and excludes injunctive relief, and the monetary relief is no more than a maximum set in accordance with the legislation (“Copyright Small Claims Program”), and supports such legislation including appropriate procedures and requirements, including those listed in the Resolution.

### 2. Summary of the Issue that the Resolution Addresses

Mindful of the problems of access and the reality of a right without a remedy for copyright owners with small claims, Congress requested the Copyright Office undertake a study concerning new remedies to address small copyright claims, observing that “the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works . . . and deprives society of the benefit of new and expressive works of authorship.” The resulting Copyright Office report documents “the challenges of resolving small copyright claims in the current legal system” and observes that the problem of enforcing modest-sized copyright claims “appears to be especially acute for individual creators,” and recommends the creation of a small claims tribunal within the Copyright Office.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution supports legislation creating the establishment of a Copyright Small Claims Program, and supports including in such legislation appropriate procedures and requirements, including those listed in the Resolution.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No known opposition.

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**Before the  
U.S. Copyright Office  
Library of Congress**

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In the Matter of:

Section 512 Study: Notice and  
Request for Public Comment

Docket No. 2015 -7

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**JOINT SUPPLEMENTAL COMMENTS OF THE AMERICAN ASSOCIATION  
OF INDEPENDENT MUSIC AND FUTURE OF MUSIC COALITION IN  
RESPONSE TO REQUEST FOR EMPIRICAL RESEARCH**

The American Association of Independent Music (“A2IM”) and the Future of Music Coalition (“FMC”) are pleased to provide the following study results in response to the Copyright Office’s request for empirical research in connection with the Office’s Section 512 Study, submitted by Kevin Erickson of FMC.

**EXECUTIVE SUMMARY**

A2IM and FMC asked independent record labels to respond to a survey asking about their experiences with unauthorized online uses of their sound recordings and their experience with the DMCA. Based on the responses to that survey:

- 87% of the respondents knew of online infringements of their works, even though 30% did not actively search for infringements of their works.
  - 65% of the respondents who took action to have the infringing works removed from an online source reported that either it took longer than 24 hours for the infringing work to be removed or that the infringing work was never removed.
  - 68% of the respondents reported that an infringing copy of their music reappeared on the same service even after that music had previously been taken down—the so-called “whack-a-mole” problem.
  - 65% of those that did not actively search for unauthorized use attributed the reason to not having enough resources to search for infringing activity. In addition, 30% of the respondents also stated that they did not continue searching for infringements because previous enforcement efforts had been unsuccessful.
  - The three most frequently cited obstacles faced by the respondents in enforcing their rights online include that (i) they don’t have enough resources to pursue infringement of their works. (ii) they can’t find the contact information to request takedown, (iii) the sites ignore notices or other complaints.
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## Survey Methodology

The survey consisted of 10 questions, which were either in the form of multiple choice, or “check all that apply.” (See appendix for survey questions). Participants provided anonymous information about their companies’ experiences and typical practices. Data collection via Survey Monkey began on March 8, 2017 and closed March 16, 2017.

Invitations were distributed to A2IM’s independent label members and additional independent labels from FMC’s networks. In all, 73 companies responded to the survey; all but one identified themselves as from a company that derives income from sound recordings. Because a single company can release recordings under multiple label names, or house multiple label divisions, this survey does not attempt to quantify just how many labels are represented in the dataset.

## Risks and Limitations

Research that uses web-based surveys can be implemented quickly, and allows for the automation of much of the data processing. We do, however, recognize the inherent limitations of such surveys. We recognize the problem of defining our population of study, as companies that comprise the independent label sector are very diverse in their scale, operations, goals, and business models. Some labels operate as master rights owners, others as licensees, and many are operated by artists themselves. There can be no complete and accurate count of precisely how many independent labels exist in the US. Between our two organizations, we are able to access insights from a very broad array of companies, from tiny businesses focused on documenting local music communities to large and internationally recognized firms with broad commercial appeal. Yet because this survey does not include collection of detailed demographic information, we are unable to examine differences between different kinds of labels.

Additionally, we recognize the risk of self-selection bias in a survey like this. It is possible that labels who face perennial frustrations with the DMCA may be most likely to feel compelled to respond to surveys about their notice and takedown practices. Alternatively, it is possible that companies who feel most invested in leaving the DMCA untouched might feel especially motivated to respond. We made it clear in our communications to potential participants that we wanted to hear from as many labels as possible.

Finally, more study is needed to fully assess practices of services that use proprietary audio identification technologies, how well independent labels are served by this, and the terms under which independent labels are allowed to access such systems. This survey focuses on unlicensed content; it does not speak directly to certain issues with platforms where content is licensed, but these licenses may be procured from reluctant rightsholders at below-market rates because of the shortcomings of current §512 implementation.

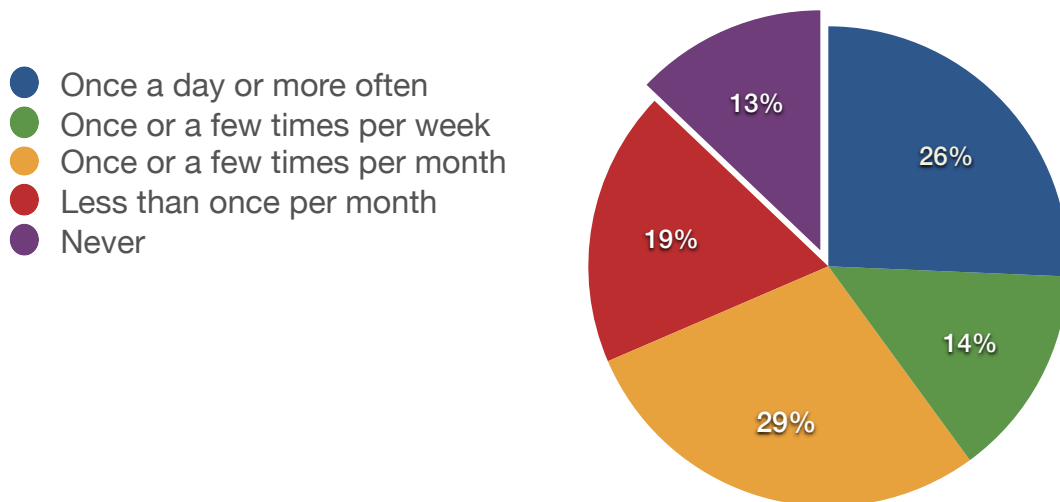
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## FINDINGS

### Awareness of Online Infringing Activities

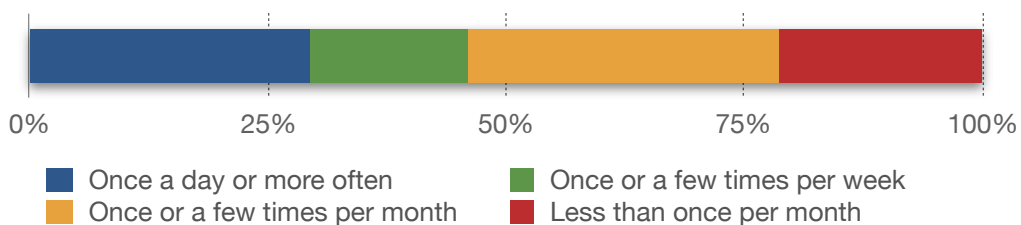
A supermajority of companies surveyed are aware that their music is being infringed online. 87% of the respondents (61/70) reported that they knew of unauthorized uses of their works in any typical 3 month period.

FREQUENCY WITH WHICH YOU FIND OR LEARN OF RECORDINGS YOUR COMPANY OWNS OR ADMINISTERS AVAILABLE FROM ONLINE SOURCES YOU BELIEVE TO BE UNAUTHORIZED? (N=70)



Of those aware of online infringement of their works 46% (28/61) knew their works were being infringed at least weekly.

FREQUENCY OF KNOWN UNAUTHORIZED USE (N=61)



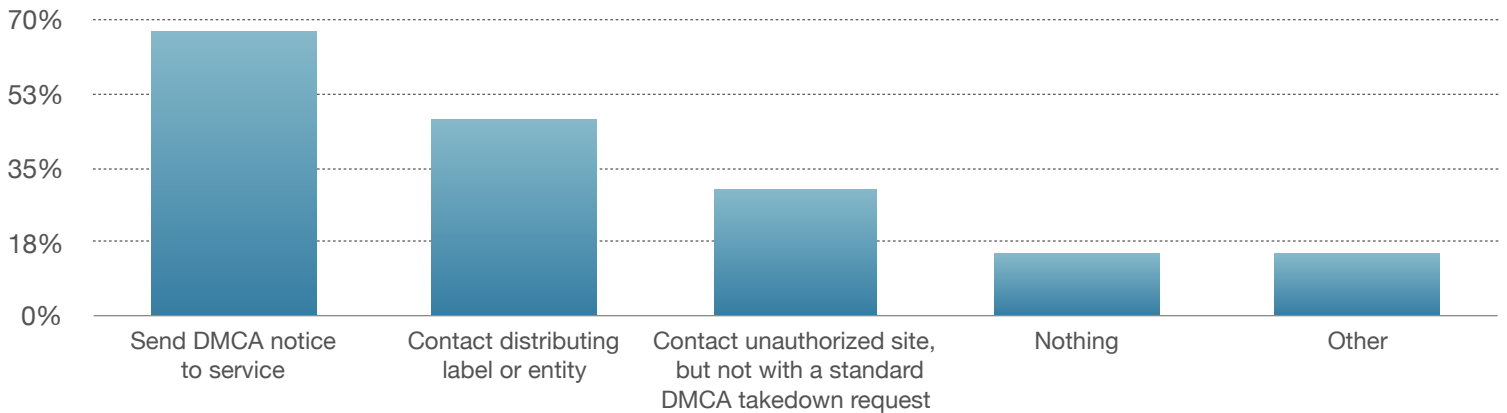
This awareness existed even though 30% of the companies surveyed (21/69) report that they do not proactively search for online infringements of their works.



## Impact of Take Down Requests

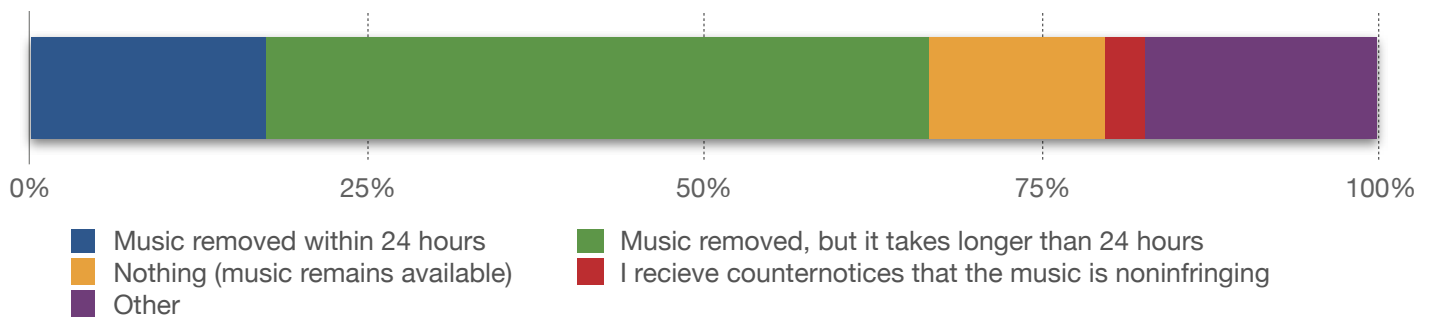
Upon discovering an unauthorized use, different companies may choose from a range of possible responses based on a variety of factors. (Answers do not add to 100% because a company may have more than one typical response.)

### WHAT DO YOU OR THOSE SEARCHING ON YOUR BEHALF TYPICALLY DO WHEN THEY FIND YOUR MUSIC AVAILABLE FROM UNAUTHORIZED SOURCES? (N=67)



18% of those surveyed (12/66) reported an infringing work was removed within 24 hours of sending a takedown notice or taking similar action. Conversely, a majority (51.5% - 34/66) reported that it took over 24 hours for the infringing work to be removed from the service after notice, and an additional 13.6% (9/66) reported that the infringing work was never removed.

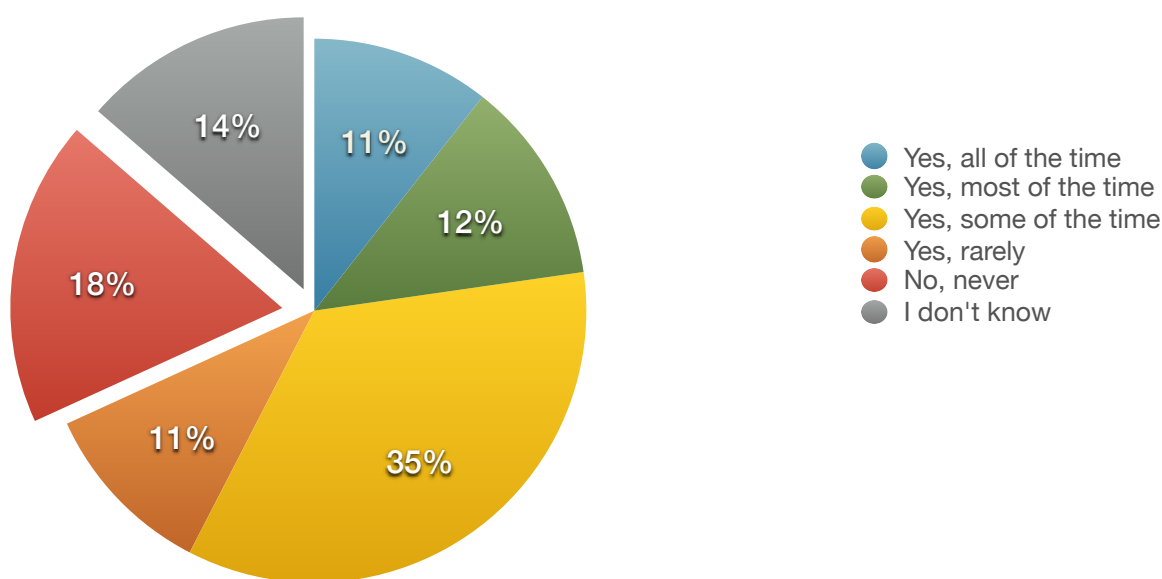
### WHAT RESULTS MOST TYPICALLY OCCUR AFTER YOU TAKE STEPS REGARDING THE UNAUTHORIZED MUSIC AVAILABLE? (N=66)



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In addition, 68% of the respondents (45/66) reported seeing infringing copy of their work reappear on the same service.

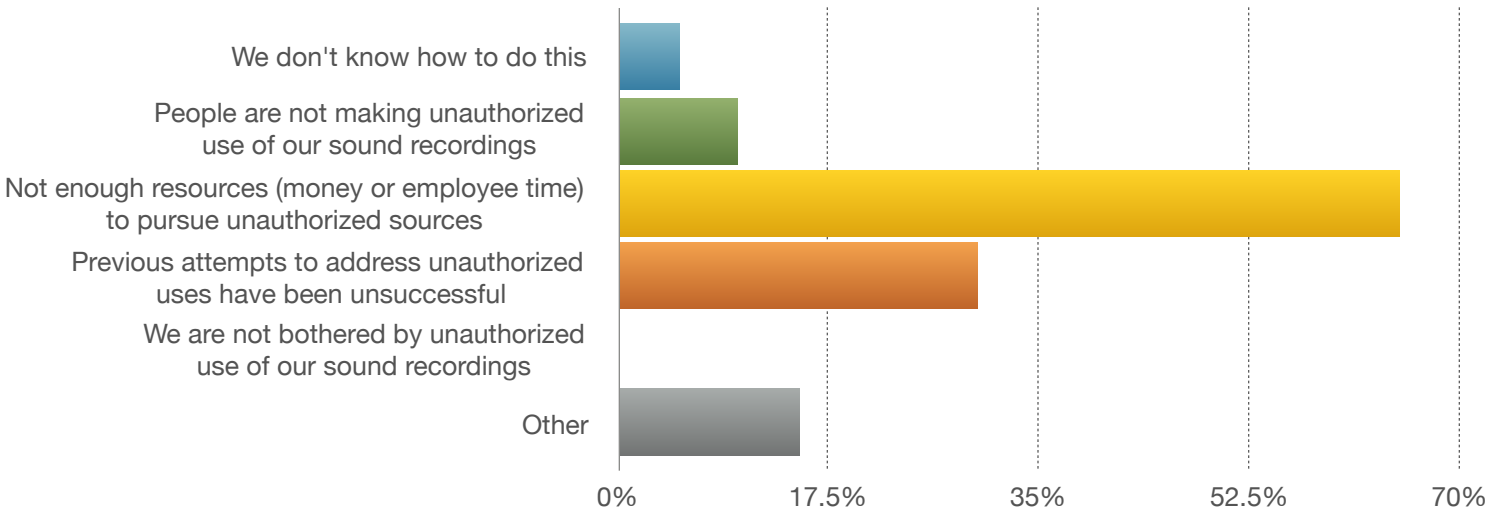
**HAVE YOU HAD MUSIC THAT WAS TAKEN DOWN, BUT THEN REAPPEARS ON THE SAME SOURCE (WEBSITE, APP, ETC)? (N=66)**



**Obstacles Faced by Companies in Using DMCA Take Down Processes**

Of those companies surveyed that do not actively search for unauthorized uses of their works, the most frequent reasons cited for not doing so included not having enough resources to engage in such enforcement activities (65% - 13/20) and that previous attempts to address unauthorized uses had been had been unsuccessful (30% - 6/20). No companies selected the response “we are not bothered by unauthorized uses of our sound recordings”, though one respondent used the “other” response box to draw a more subtle distinction: “as long as they’re not monetizing it (or using it to sell products), we’re not particularly concerned.” (Values do not add to 100% because multiple answers were permitted.)

**WHY DOES YOUR COMPANY NOT ACTIVELY SEARCH FOR UNAUTHORIZED USES? (N=20)**



Among all respondents, the three most frequently cited obstacles faced by companies in their attempts to remove their music from unauthorized services include that (i) they don't have enough resources to pursue infringement of their works (77% - 51/66) (ii) they can't find the contact information to request takedown (51% 34/66) and (iii) sites ignore their takedown notices or other complaints (45% 30/66).

**WHAT ARE THE MOST COMMON OBSTACLES YOU FACE IN TRYING TO REMOVE YOUR COMPANY'S MUSIC FROM UNAUTHORIZED SITES? (N=66)**



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## Analysis and Recommendations

These results confirm that independent labels face significant practical challenges in using the notice and takedown system to exercise meaningful control over where and how their sound recordings are used. When they use the process, they may encounter frustrations not only with the near term results but also with the ineffectiveness of the notice and takedown process to significantly deter infringing activity. As we have seen, a significant portion of independent labels surveyed have abandoned enforcement online, but generally not because they don't view unauthorized use as a problem.

As FMC noted in its additional comments previously submitted, care should be taken in developing copyright policy to align the interests of those engaged in cultural production and those that listen and engage with that music, as ultimately both are interested in stimulating artistic creativity for the public good. However, these results suggest that current implementation of DMCA has fallen short of that goal.

Several non-legislative and legislative solutions have been proposed by various actors within the music community to help address these challenges. In particular, we encourage you to consider possible solutions referenced in both the FMC and A2IM filings that address the unique needs of the independent music sector, which is responsible for sustaining and advancing so many of America's precious musical traditions.

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# Appendix: Survey Questions

**1. Does your company derive income from sound recordings, such as through sales of physical products like CDs, through digital downloads, or through ad-supported or paid streaming services?**

Yes

No (end survey)

I don't know. (end survey)

**2. During a typical 3-month period, which of the following best describes the frequency with which you find or learn of recordings your company owns or administers available from online sources you believe to be unauthorized (i.e. they do not pay you or your designated agents for use of your recordings)**

Never

Less than once per month

Once or a few times per month

Once or a few times per week

Once a day or more often

**3. Do you actively try to find (on the internet) unauthorized uses of sound recordings that your company owns or administers? (Check all that apply)**

Yes, my company does this directly

My company directly employs, relies on or otherwise engage other people, vendors, programs or organizations to do this on our behalf

No

I don't know

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**4. Why does your company not actively search for unauthorized uses? (Please check all that apply)  
(asked only of those who answered “No” on question 3)**

We don't know how to do this.

People are not making unauthorized use of our sound recordings

We are not bothered by unauthorized use of our sound recordings

Not enough resources (money or employee time) to pursue unauthorized sources

Previous attempts to address unauthorized uses have been unsuccessful

Other (please specify)

**5. How many hours per week does your company spend searching for unauthorized uses of your sound recordings?**

0

<5

6-10

11-15

My company employs at least one full-time employee to devote to anti-theft efforts

**6. On an annual basis, how much money does your company spend on anti-theft efforts?**

\$0

\$1-\$5000

\$5,001-\$10,000

\$10,000-\$50,000

>\$50,001

**7. What do you or those searching on your behalf typically do when they find your music available from unauthorized sources? (Check all that typically apply)**

Send DMCA notice to service where that music was found

Contact distributing label or entity (if distributed by another company)

Contact the unauthorized site but not with a standard DMCA takedown request

Nothing

Other (please specify)

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**8. What results most typically occur after you take steps regarding the unauthorized music available?**

Nothing (music remains available)

The unauthorized music is removed promptly (within 24 hours)

The unauthorized music is removed, but takes longer than 24 hours

I receive counterclaims that the music is non-infringing

Other (please specify)

**9. Have you had music that was taken down, but then reappears on the same source (website, app, etc)**

No

Yes, rarely.

Yes, some of the time.

Yes, most of the time.

Yes, all of the time.

I don't know

**10. In your recent experience, what are the most common obstacles you face in trying to remove your company's music from unauthorized sites?**

Can't find where to contact site to request takedown

Can't determine where sites are located

Sites ignore notices or other complaints

Not enough resources (money or employee time) to pursue unauthorized sources

Music reappears nearly immediately after it has been removed

Other (please specify)



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# “Holds” in the Senate

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Analyst on Congress and the Legislative Process

January 24, 2017

**Congressional Research Service**

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[www.crs.gov](http://www.crs.gov)

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## Summary

The Senate "hold" is an informal practice whereby Senators communicate to Senate leaders, often in the form of a letter, their policy views and scheduling preferences regarding measures and matters available for floor consideration. Unique to the upper chamber, holds can be understood as information-sharing devices predicated on the unanimous consent nature of Senate decision-making. Senators place holds to accomplish a variety of purposes—to receive notification of upcoming legislative proceedings, for instance, or to express objections to a particular proposal or executive nomination—but ultimately the decision to honor a hold request, and for how long, rests with the majority leader. Scheduling Senate business is the fundamental prerogative of the majority leader, and this responsibility is typically carried out in consultation with the minority leader.

The influence that holds exert in chamber deliberations is based primarily upon the significant parliamentary prerogatives individual Senators are afforded in the rules, procedures, and precedents of the chamber. More often than not, Senate leaders honor a hold request because not doing so could trigger a range of parliamentary responses from the holding Senator(s), such as a filibuster, that could expend significant amounts of scarce floor time. As such, efforts to regulate holds are inextricably linked with the chamber's use of unanimous consent agreements to structure the process of calling up measures and matters for floor debate and amendment.

In recent years the Senate has considered a variety of proposals that address the Senate hold, two of which the chamber adopted. Both sought to eliminate the secrecy of holds. Prior to these rules changes, hold letters were written with the expectation that their source and contents would remain private, even to other Senators.

In 2007, the Senate adopted new procedures to make hold requests public in certain circumstances. Under Section 512 of the Honest Leadership and Open Government Act (P.L. 110-81), if objection was raised to a unanimous consent request to proceed to or pass a measure or matter on behalf of another Senator, then the Senator who originated the hold was expected to deliver for publication in the *Congressional Record*, within six session days of the objection, a "notice of intent to object" identifying the Senator as the source of the hold and the measure or matter to which it pertained. A process for removing a hold was also created, and a new "Notice of Intent to Object" section was added to both Senate calendars to take account of objection notices that remained outstanding.

An examination of objection notices published since 2007 suggests that many hold requests are likely to have fallen outside the scope of Section 512 regulation. In an effort to make public a greater share of hold requests, the Senate adjusted its notification requirements by way of a standing order (S.Res. 28) adopted at the outset of the 112<sup>th</sup> Congress (2011-2012). Instead of the six session day reporting window specified in Section 512, S.Res. 28 provides two days of session during which Senators are expected to deliver their objection notices for publication. The action that triggers the reporting requirement also shifted: from an objection on the basis of a colleague's hold request (under Section 512) to the initial transmission of a written objection notice to the party leader (under S.Res. 28). In the event that a Senator neglects to deliver an objection notice for publication and a party leader nevertheless raises objection on the basis of that hold, S.Res. 28 requires that the name of the objecting party leader be identified as the source of the hold in the "Notice of Intent to Object" section of the appropriate Senate calendar.

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## Background

Senate rules, procedures, and precedents give significant parliamentary power to individual Senators during the course of chamber deliberations. Many decisions the Senate makes—from routine requests for additional debate time, to determinations of how legislation will be considered on the floor—are arrived at by unanimous consent. When a unanimous consent request is proposed on the floor, any Senator may object to it. If objection is heard, the consent request does not take effect. Efforts to modify the original request may be undertaken—a process that can require extensive negotiations between and among Senate leaders and their colleagues—but there is no guarantee that a particular objection can be addressed to the satisfaction of all Senators.<sup>1</sup>

The Senate hold emerges from within this context of unanimous-consent decision-making as a method of transmitting policy or scheduling preferences to Senate leaders regarding matters available for floor consideration.<sup>2</sup> Many hold requests take the form of a letter addressed to the majority or minority leader (depending on the party affiliation of the Senator placing the hold) expressing reservations about the merits or timing of a particular policy proposal or nomination. An example of a hold letter is displayed in **Appendix A**.

More often than not, Senate leaders—as agents of their party responsible for defending the political, policy, and procedural interests of their colleagues—honor a hold request because not doing so could trigger a range of parliamentary responses from the holding Senator(s), such as a filibuster, that could expend significant amounts of scarce floor time.<sup>3</sup> Unless the target of a hold is of considerable importance to the majority leader and a supermajority of his colleagues—60 of whom might be required to invoke cloture on legislation under Senate Rule XXII—the most practical course of action is often to lay the matter aside and attempt to promote negotiations that could alleviate the concerns that gave rise to the hold.<sup>4</sup> With hold-inspired negotiations underway, the Senate can turn its attention to more broadly-supported matters.<sup>5</sup>

## Types of Holds

Holds can be used to accomplish a variety of purposes. Although the Senate itself makes no official distinctions among holds, scholars have classified holds based on the objective of the communication.<sup>6</sup> *Informational* holds, for instance, request that the Senator be notified or

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<sup>1</sup> For information on unanimous consent agreements, see CRS Report RL33939, *The Rise of Senate Unanimous Consent Agreements*, by Walter J. Oleszek.

<sup>2</sup> Senate leaders play an organizational role in the chamber by representing the interests and views of party colleagues during negotiations with one another over scheduling legislation and nominations for floor consideration.

<sup>3</sup> The linkages that exist among holds, filibusters, and the cloture process are described in CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Valerie Heitshusen.

<sup>4</sup> Senate leaders can act as intermediaries between Senators who place holds and bill sponsors who want to move legislation forward. Leaders may also negotiate directly with holding Senators for potential future consideration.

<sup>5</sup> As the Senate's chief scheduler, if unanimous consent to proceed to or pass a measure or matter cannot be obtained, the majority leader maintains the right to offer a motion to proceed to consider. This alternative method of bringing measures and matters to the floor can require the use of cloture, especially on items subjected to a hold. For information on the motion to proceed, see CRS Report RS21255, *Motions to Proceed to Consider Measures in the Senate: Who Offers Them?*, by Richard S. Beth and Mark J. Oleszek.

<sup>6</sup> See C. Lawrence Evans and Daniel Lipinski, "Holds, Legislation, and the Senate Parties," (prepared for delivery at the Conference on Senate Parties, University of Oxford, April 1-3, 2005) for an analysis of holds placed during the tenure of Republican Leader Howard Baker. For an account of hold operations during the period when Robert Dole (continued...)

consulted in advance of any floor action to be taken on a particular measure or matter, perhaps to allow the Senator to plan for floor debate or the offering of amendments. *Choke* holds contain an explicit filibuster threat and are intended to kill or delay action on the target of the hold. *Blanket* holds are leveled against an entire category of business, such as all nominations to a particular agency or department. *Mae West* holds intend to foster negotiation and bargaining between proponents and opponents.<sup>7</sup> *Retaliatory* holds are placed as political payback against a colleague or administration, while *rolling* (or *rotating*) holds are defined by coordinated action involving two or more Senators who place holds on a measure or matter on an alternating basis. Until recently, many holds were considered *anonymous* (or *secret*) because the source and contents of the request were not made available to the public, or even to other Senators.

## Recent Efforts to Regulate Holds

Written hold requests emerged as an informal practice in the late 1950s under the majority leadership of Lyndon B. Johnson as a way for Senators to make routine requests of their leaders regarding the Senate's schedule.<sup>8</sup> Early usage was largely consistent with prevailing expectations of Senate behavior at that time, such as reciprocity, deference, and accommodation of one's Senate colleagues.<sup>9</sup> Over time, holds have evolved to become a potent extra-parliamentary practice, sometimes likened to a "silent filibuster" in the press. "The hold started out as a courtesy for senators who wanted to participate in open debate," two Senators wrote in 1997. Since then, "it has become a shield for senators who wish to avoid it."<sup>10</sup> These and other Senators were concerned that keeping holds confidential tended to enable Senators who placed holds to block measures or nominations while leaving no avenue of recourse open to their supporters. Accordingly, rather than restricting the process itself, recent attempts to alter the operation of holds have focused on making the secrecy of holds less absolute.

The Senate has considered a variety of proposals targeting the Senate hold in recent years, two of which the chamber adopted. Both sought to eliminate the secrecy of holds by creating a process through which holds—formally referred to in the new rules as "notices of intent to object to proceeding"—would be made public within some period of time if certain criteria were met. Prior to these rules changes, hold letters were written with the expectation that they would be treated as private correspondences between a Senator and his or her party leader.

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(...continued)

served as Republican Leader, see Nicholas Howard and Jason Roberts, "The Politics of Obstruction: Republican Holds in the U.S. Senate," *Legislative Studies Quarterly*, vol. 40, no. 2 (May 2015), pp. 273-294. Both studies draw upon archival research conducted by the authors using the personal papers of former Republican Leaders Howard Baker and Robert Dole (respectively) and are available online at: <http://wmpeople.wm.edu/asset/index/clevan/oxford> and <http://onlinelibrary.wiley.com/doi/10.1111/lsq.12076/epdf>.

<sup>7</sup> In the Hollywood production *She Done Him Wrong* (1933), actress Mae West asks of her co-star Cary Grant: "Why don't you come up sometime and see me?" A similar motivation—to have a bill sponsor visit the holding Senator's office to negotiate the removal of the hold—defines a *Mae West* hold.

<sup>8</sup> On the evolution of Senate hold practices, see Gregory Koger, *Filibustering* (University of Chicago Press, 2010).

<sup>9</sup> See Donald R. Matthews, *U.S. Senators and Their World* (University of North Carolina Press, 1960) for an account of chamber norms and expectations of behavior during the 1950s.

<sup>10</sup> Senators Charles Grassley and Ron Wyden, "Let's Shed Light on a Senate Secret," *Washington Post*, November 17, 1997, p. A23.

## Notification Procedures Established by Section 512 of P.L. 110-81

The first proposal, enacted in 2007 as Section 512 of the Honest Leadership and Open Government Act (P.L. 110-81), established new reporting requirements that were designed to take effect if either the majority or minority leader or their designees, acting on behalf of a party colleague on the basis of a hold letter previously received, objected to a unanimous consent request to advance a measure or matter to the Senate floor for consideration or passage. If objection was raised on the basis of a hold letter, then the Senator who originated the hold was expected to submit a "notice of intent to object" to his or her party leader and, within six days of session thereafter, deliver the objection notice to the Legislative Clerk for publication in both the *Congressional Record* and the Senate's *Calendar of Business* (or, if the hold pertained to a nomination, the *Executive Calendar*).

Under Section 512, objection notices were to take the following form: "I, Senator \_\_\_\_, intend to object to proceeding to \_\_\_\_, dated \_\_\_\_ for the following reasons \_\_\_\_." To accommodate the publication of these notices, a new "Notice of Intent to Object to Proceeding" section was added to both Senate calendars as shown in **Appendix B**. Each calendar entry contained four pieces of information: (1) the bill or nomination number to which the hold pertained; (2) the official title of the bill or nomination; (3) the date on which the hold was placed; and (4) the name of the Senator who placed the hold. Publication was not required if a Senator withdrew the hold within six session days of triggering the notification requirement.<sup>11</sup> Once published, an objection notice could be removed from future editions of a calendar by submitting for inclusion in the *Congressional Record* the following statement: "I, Senator \_\_\_\_, do not object to proceed to \_\_\_\_, dated \_\_\_\_."

On October 3, 2007, roughly two weeks after the new disclosure procedures were signed into law, the first notice of an intent to object was published in the *Congressional Record*.<sup>12</sup> A total of 5 such notices appeared during the 110<sup>th</sup> Congress (2007-2008), and 12 were published during the 111<sup>th</sup> Congress (2009-2010), but these numbers should not be interpreted to reflect the entirety of hold activity that occurred during those two Congresses.<sup>13</sup> Instead, they represent the subset of holds that activated the notification requirements established in Section 512 of P.L. 110-81. Recall that notification is required when three conditions are met: (1) the majority or minority leader (or their designee) asks unanimous consent to proceed to or pass a measure or matter; (2) objection is raised on the basis of a colleague's hold letter; and (3) six days of session have elapsed since the objection was made.

Many holds lodged during the 110<sup>th</sup> and 111<sup>th</sup> Congresses (2007-2010) are likely to have fallen outside the purview of Section 512 regulation. At least two reasons account for this. First, the new notification requirements would not apply to holds placed on measures or matters the Senate did not attempt to proceed to or pass (perhaps on account of an implicit filibuster threat contained in a hold letter). When scheduling business for floor consideration, the content and quantity of hold

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<sup>11</sup> Some Senators announce their holds on the Senate floor at the time they are placed. If a hold is made public in this way, then the Senator is exempt from the formal procedures described in this report.

<sup>12</sup> The inaugural notice came in connection to S. 233, a bill that would have required Senate candidates to file election-related statements and reports in electronic form.

<sup>13</sup> This number is likely to understate the total number of holds placed during the 110<sup>th</sup> and 111<sup>th</sup> Congresses by at least one order of magnitude in comparison to historical rates of hold activity. For instance, between 1985 and 1996, Nicholas Howard and Jason Roberts identify 2655 unique hold requests made of Republican Leader Robert Dole, an average of about 220 per year. Evans and Lipinski find similar rates of hold activity during the tenure of Republican Leader Howard Baker.

letters received on a particular measure or matter are likely to factor into the negotiations and considerations Senate leaders make. Rather than take action that could have the effect of vitiating the confidentiality of a holding Senator, Senate leaders might simply decide to advance other matters to the floor instead (or at least try to).

A second reason the actual number of holds is likely to exceed the number published in the *Record* during these two Congresses has to do with the six session day window between an objection being raised and reporting requirements becoming mandatory. Designed to provide Senators with sufficient time to study an issue before deciding whether or not to maintain a hold beyond the six session day grace period, this provision may have encouraged the use of revolving (or rotating) holds. If one Senator removes his or her hold within six session days of activating the reporting requirement and another Senator puts a new hold in its place, the effect would be to reset the six session day clock each time a new hold was placed on a given measure or matter. In this way, two or more Senators could maintain the secrecy of their holds for an indefinite period without running afoul of the new disclosure procedures.

### **Notification Procedures Established by S.Res. 28 (2011)**

In response to the limited applicability of Section 512, the Senate established—by a 92-4 vote on January 27, 2011—a standing order (S.Res. 28) that extends notification requirements to a larger share of hold activity. Instead of a six day reporting window, S.Res. 28 provides two days of session during which Senators are expected to deliver their objection notices for publication. The action that triggers the reporting requirement also changed: from an objection on the basis of a colleague's hold request (under Section 512) to the initial transmission of a written objection notice to the party leader (under S.Res. 28).

The proper language to communicate a hold remained largely the same as before, except that holding Senators must now include a statement that expressly authorizes their party leader to object to a unanimous consent request in their name.<sup>14</sup> In the event that a Senator neglects to deliver an objection notice for publication within two session days and a party leader nevertheless raises objection on the basis of that hold, S.Res. 28 requires that the name of the objecting party leader be identified as the source of the hold in the "Notice of Intent to Object" section of the appropriate Senate calendar.<sup>15</sup> The process of removing an objection notice from either calendar remains unchanged.

During the 112<sup>th</sup> Congress (2011-2012), a total of 24 objection notices were published in accordance with the provisions of S.Res. 28. Nine notices were printed during the 113<sup>th</sup> Congress (2013-2014), and 34 were published in the 114<sup>th</sup> Congress (2015-2016).<sup>16</sup> See **Appendix C** for an example of how these notices appear in the *Congressional Record*. As before, caution should be exercised when interpreting these numbers. What looks like a drop-off in the use of holds could instead reflect broader challenges inherent in efforts to regulate this kind of communication.

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<sup>14</sup> S.Res. 28 specifies the following language hold letters should take: "I, Senator \_\_\_\_, intend to object to \_\_\_\_, dated \_\_\_\_. I will submit a copy of this notice to the Legislative Clerk and the *Congressional Record* within 2 session days and I give my permission to the objecting Senator to object in my name." Notice that the new form no longer requires a Senator to give reason for the hold.

<sup>15</sup> To date, no Senate leader has been identified as the source of a hold on the basis of this provision.

<sup>16</sup> Twenty-nine of the 34 objection notices issued during the 114<sup>th</sup> Congress (2015-2016) came from one Senator; 21 of the 29 concerned individual promotions within the Foreign Service. Appointments and promotions to the Foreign Service are typically submitted on lists and assigned a single presidential nomination (PN) number. The 21 promotions subjected to a written objection notice during the 114<sup>th</sup> Congress were presented to the Senate as a single list.

## Challenges Inherent in Regulating Hold Activity

Senate holds are predicated on the unanimous consent nature of Senate decision-making. The influence they exert in chamber deliberations is based primarily upon the significant parliamentary prerogatives individual Senators are afforded in the rules, procedures, and precedents of the chamber. As such, efforts to regulate holds are inextricably linked with the chamber's use of unanimous consent agreements to structure the process of calling up measures and matters for floor debate and amendment. While not all holds are intended to prevent the consideration of a particular measure, some do take that form, and Senate leaders justifiably perceive those correspondences as implicit filibuster threats.

As agents of their party, Senate leaders value the information that holds provide regarding the policy and scheduling preferences of their colleagues. For this reason, rules changes that require enforcement on the part of Senate leaders—as both efforts discussed here do—tend to conflict with the managerial role played by contemporary Senate leaders and the expectation on the part of their colleagues that leaders will defend their interests in negotiations over the scheduling of measures and matters for floor consideration.<sup>17</sup>

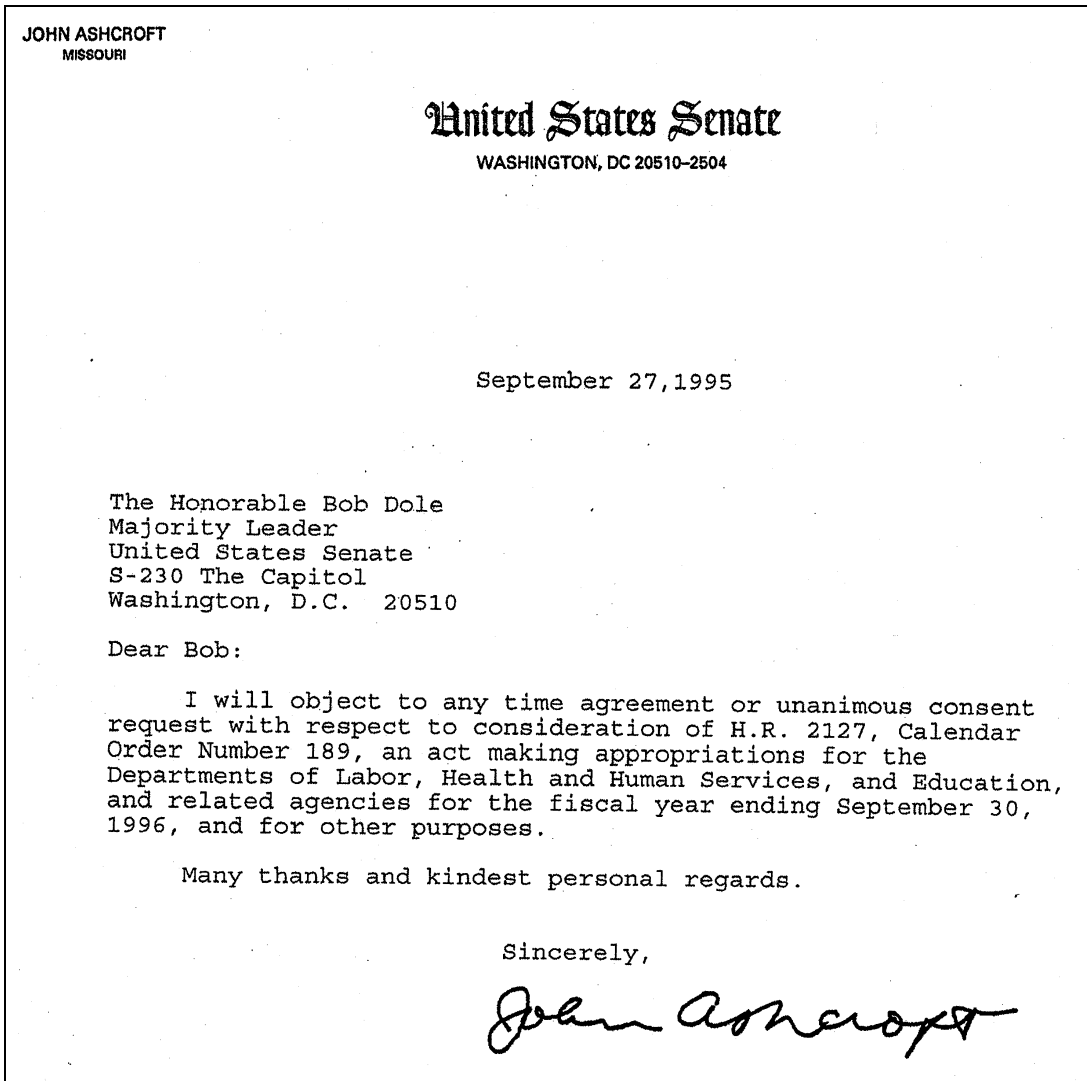
A second challenge to hold regulation involves the nature of the transmission itself. Both recent proposals address a particular kind of communication: a letter written and delivered to a Senator's party leader that expresses some kind of reservation about the timing or merits of a particular proposal or nomination. Hold requests might be conveyed in less formal ways as well; in a telephone call to the leader's office, for instance, or in a verbal exchange that occurs on or off the Senate floor. An objection to a unanimous consent request transmitted through the "hotline" represents another common method of communicating preferences to Senate leaders.<sup>18</sup> Some Senate offices have circulated "Dear Colleague" letters specifying certain requirements legislation must adhere to in order to avoid a hold being placed. It remains unclear, however, whether or not these alternative forms of communication fall within the purview of recent hold reforms.

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<sup>17</sup> See §512(a) of P.L. 110-81 and §1(a)(2) of S.Res. 28 (2011). Both sections include language specifying that Senate leaders only recognize hold requests that comport with the new disclosure requirements.

<sup>18</sup> The "hotline" is a special telephone and email system that connects Senate offices to the majority and minority cloakrooms. Senate leaders use the hotline to transmit notifications and unanimous consent requests regarding the Senate's legislative agenda and schedule.

## Appendix A. A Hold Letter<sup>19</sup>



<sup>19</sup> This hold letter is drawn from archival research conducted by scholars Nicholas Howard and Jason Roberts. Additional examples of hold letters can be found in their conference paper entitled "Holding Up the Senate: Bob Dole and the Politics of Holds in the U.S. Senate," *op. cit.*



## Appendix B. The "Notice of Intent to Object" section of the *Calendar of Business*<sup>20</sup>

NOTICE OF INTENT TO OBJECT		
<p style="font-size: small; margin: 0;">When a notice of intent to object is given to the appropriate leader, or their designee, and such notice is submitted for inclusion in the Congressional Record and the Senate Calendar of Business, or following the objection to a unanimous consent to proceeding to, and, or disposition of, a measure or matter on their behalf, it shall be placed in the section of the Calendar entitled "Notice of Intent to Object". (S. Res. 28, 112<sup>th</sup> Congress)</p>		
NUMBER	TITLE	DATE AND SENATOR
H.R. 359	An act to reduce Federal spending and the deficit by terminating taxpayer financing of presidential election campaigns and party conventions.	Feb. 14, 2011.—Mr. Kyl.
H.R. 359	An act to reduce Federal spending and the deficit by terminating taxpayer financing of presidential election campaigns and party conventions.	Feb. 14, 2011.—Mr. DeMint.
H.R. 359	An act to reduce Federal spending and the deficit by terminating taxpayer financing of presidential election campaigns and party conventions.	Feb. 14, 2011.—Mr. Paul.
S. 520	A bill to repeal the Volumetric Ethanol Excise Tax Credit.	June 7, 2011.—Mr. Grassley.
S. 530	A bill to modify certain subsidies for ethanol production, and for other purposes.	June 7, 2011.—Mr. Grassley.
S. 871	A bill to repeal the Volumetric Ethanol Excise Tax Credit.	June 7, 2011.—Mr. Grassley.
S. 1057	A bill to repeal the Volumetric Ethanol Excise Tax Credit.	June 7, 2011.—Mr. Grassley.
S. 1145	A bill to amend title 18, United States Code, to clarify and expand Federal criminal jurisdiction over Federal contractors and employees outside the United States, and for other purposes.	June 28, 2011.—Mr. Grassley.
S. 618	A bill to promote the strengthening of the private sector in Egypt and Tunisia.	June 29, 2011.—Mr. Coburn.
S. 1385	A bill to terminate the \$1 presidential coin program.	Oct. 17, 2011.—Mr. Grassley.
S. 1014	A bill to provide for additional Federal district judgeships.	Nov. 2, 2011.—Mr. Grassley.
S. 1793	A bill to amend title 28, United States Code, to clarify the statutory authority for the longstanding practice of the Department of Justice of providing investigatory assistance on request of State and local authorities with respect to certain serious violent crimes, and for other purposes.	Nov. 17, 2011.—Mr. Grassley.

<sup>20</sup> *Calendar of Business*, December 27, 2012, p. 82.

## Appendix C. A Notice of Intent to Object<sup>21</sup>

isting cooperative procedures (including memoranda of understanding)—

### NOTICE OF INTENT TO OBJECT TO PROCEEDING

I, Senator CHARLES E. GRASSLEY, intend to object to proceeding to S. 2415, a bill to implement integrity measures to strengthen the EB-5 Regional Center Program in order to promote and reform foreign capital investment and job creation in American communities; dated January 28, 2016.

### AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ARMED SERVICES

Ms. MURKOWSKI. Mr. President, I ask unanimous consent that the Com-

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<sup>21</sup> *Congressional Record*, daily edition, vol. 162 (January 28, 2016), p. S398.

## Calendar No. 266

116TH CONGRESS  
1ST SESSION**H. R. 2426**

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IN THE SENATE OF THE UNITED STATES

OCTOBER 23, 2019

Received; read twice and placed on the calendar

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**AN ACT**

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Copyright Alternative  
5 in Small-Claims Enforcement Act of 2019” or the “CASE  
6 Act of 2019”.

7 **SEC. 2. COPYRIGHT SMALL CLAIMS.**

8 (a) IN GENERAL.—Title 17, United States Code, is  
9 amended by adding at the end the following:

1           **“CHAPTER 15—COPYRIGHT SMALL**  
2                                                           **CLAIMS**

“Sec.  
“1501. Definitions.  
“1502. Copyright Claims Board.  
“1503. Authority and duties of the Copyright Claims Board.  
“1504. Nature of proceedings.  
“1505. Registration requirement.  
“1506. Conduct of proceedings.  
“1507. Effect of proceeding.  
“1508. Review and confirmation by district court.  
“1509. Relationship to other district court actions.  
“1510. Implementation by Copyright Office.  
“1511. Funding.

3   **“§ 1501. Definitions**

4           “In this chapter—

5                           “(1) the term ‘party’—

6                                   “(A) means a party; and

7                                   “(B) includes the attorney of a party, as

8                                   applicable;

9                           “(2) the term ‘claimant’ means the real party

10           in interest that commences a proceeding before the

11           Copyright Claims Board under section 1506(e), pur-

12           suant to a permissible claim of infringement brought

13           under section 1504(c)(1), noninfringement brought

14           under section 1504(c)(2), or misrepresentation

15           brought under section 1504(c)(3);

16                           “(3) the term ‘counterclaimant’ means a re-

17           spondent in a proceeding before the Copyright

18           Claims Board that—

1           “(A) asserts a permissible counterclaim  
2           under section 1504(c)(4) against the claimant  
3           in the proceeding; and

4           “(B) is the real party in interest with re-  
5           spect to the counterclaim described in subpara-  
6           graph (A); and

7           “(4) the term ‘respondent’ means any person  
8           against whom a proceeding is brought before the  
9           Copyright Claims Board under section 1506(e), pur-  
10          suant to a permissible claim of infringement brought  
11          under section 1504(c)(1), noninfringement brought  
12          under section 1504(c)(2), or misrepresentation  
13          brought under section 1504(c)(3).

14   **“§ 1502. Copyright Claims Board**

15          “(a) IN GENERAL.—There is established in the Copy-  
16          right Office the Copyright Claims Board, which shall serve  
17          as an alternative forum in which parties may voluntarily  
18          seek to resolve certain copyright claims regarding any cat-  
19          egory of copyrighted work, as provided in this chapter.

20          “(b) OFFICERS AND STAFF.—

21                  “(1) COPYRIGHT CLAIMS OFFICERS.—The Reg-  
22                  ister of Copyrights shall recommend three full-time  
23                  Copyright Claims Officers to serve on the Copyright  
24                  Claims Board in accordance with paragraph (3)(A).

25                  The Officers shall be appointed by the Librarian of

1 Congress to such positions after consultation with  
2 the Register of Copyrights.

3 “(2) COPYRIGHT CLAIMS ATTORNEYS.—The  
4 Register of Copyrights shall hire not fewer than two  
5 full-time Copyright Claims Attorneys to assist in the  
6 administration of the Copyright Claims Board.

7 “(3) QUALIFICATIONS.—

8 “(A) COPYRIGHT CLAIMS OFFICERS.—

9 “(i) IN GENERAL.—Each Copyright  
10 Claims Officer shall be an attorney who  
11 has not fewer than 7 years of legal experi-  
12 ence.

13 “(ii) EXPERIENCE.—Two of the Copy-  
14 right Claims Officers shall have—

15 “(I) substantial experience in the  
16 evaluation, litigation, or adjudication  
17 of copyright infringement claims; and

18 “(II) between those two Officers,  
19 have represented or presided over a  
20 diversity of copyright interests, includ-  
21 ing those of both owners and users of  
22 copyrighted works.

23 “(iii) ALTERNATIVE DISPUTE RESOLU-  
24 TION.—The Copyright Claims Officer not  
25 described in clause (ii) shall have substan-

1           tial familiarity with copyright law and ex-  
2           perience in the field of alternative dispute  
3           resolution, including the resolution of liti-  
4           gation matters through that method of res-  
5           olution.

6           “(B) COPYRIGHT CLAIMS ATTORNEYS.—

7           Each Copyright Claims Attorney shall be an at-  
8           torney who has not fewer than 3 years of sub-  
9           stantial experience in copyright law.

10          “(4) COMPENSATION.—

11          “(A) COPYRIGHT CLAIMS OFFICERS.—

12                 “(i) DEFINITION.—In this subpara-  
13                 graph, the term ‘senior level employee of  
14                 the Federal Government’ means an em-  
15                 ployee, other than an employee in the Sen-  
16                 ior Executive Service, the position of whom  
17                 is classified above GS–15 of the General  
18                 Schedule.

19                 “(ii) PAY RANGE.—Each Copyright  
20                 Claims Officer shall be compensated at a  
21                 rate of pay that is not less than the min-  
22                 imum, and not more than the maximum,  
23                 rate of pay payable for senior level employ-  
24                 ees of the Federal Government, including  
25                 locality pay, as applicable.

1           “(B) COPYRIGHT CLAIMS ATTORNEYS.—  
2           Each Copyright Claims Attorney shall be com-  
3           pensated at a rate of pay that is not more than  
4           the maximum rate of pay payable for level 10  
5           of GS–15 of the General Schedule, including lo-  
6           cality pay, as applicable.

7           “(5) TERMS.—

8           “(A) IN GENERAL.—Subject to subpara-  
9           graph (B), a Copyright Claims Officer shall  
10          serve for a renewable term of 6 years.

11          “(B) INITIAL TERMS.—The terms for the  
12          first Copyright Claims Officers appointed under  
13          this chapter shall be as follows:

14                 “(i) The first such Copyright Claims  
15                 Officer appointed shall be appointed for a  
16                 term of 4 years.

17                 “(ii) The second Copyright Claims Of-  
18                 ficer appointed shall be appointed for a  
19                 term of 5 years.

20                 “(iii) The third Copyright Claims Of-  
21                 ficer appointed shall be appointed for a  
22                 term of 6 years.

23          “(6) VACANCIES AND INCAPACITY.—

24                 “(A) VACANCY.—



1           “(i) IN GENERAL.—If a vacancy oc-  
2           curs in the position of a Copyright Claims  
3           Officer, the Librarian of Congress shall,  
4           upon the recommendation of and in con-  
5           sultation with the Register of Copyrights,  
6           act expeditiously to appoint a Copyright  
7           Claims Officer for that position.

8           “(ii) VACANCY BEFORE EXPIRA-  
9           TION.—An individual appointed to fill a  
10          vacancy occurring before the expiration of  
11          the term for which the predecessor of the  
12          individual was appointed shall be appointed  
13          to serve a 6-year term.

14          “(B) INCAPACITY.—If a Copyright Claims  
15          Officer is temporarily unable to perform the du-  
16          ties of the Officer, the Librarian of Congress  
17          shall, upon recommendation of and in consulta-  
18          tion with the Register of Copyrights, act expedi-  
19          tiously to appoint an interim Copyright Claims  
20          Officer to perform such duties during the pe-  
21          riod of such incapacity.

22          “(7) SANCTION OR REMOVAL.—Subject to sec-  
23          tion 1503(b), the Librarian of Congress may sanc-  
24          tion or remove a Copyright Claims Officer.

1           “(8) ADMINISTRATIVE SUPPORT.—The Register  
2 of Copyrights shall provide the Copyright Claims Of-  
3 ficers and Copyright Claims Attorneys with nec-  
4 essary administrative support, including techno-  
5 logical facilities, to carry out the duties of the Offi-  
6 cers and Attorneys under this chapter.

7           “(9) LOCATION OF COPYRIGHT CLAIMS  
8 BOARD.—The offices and facilities of the Copyright  
9 Claims Officers and Copyright Claims Attorneys  
10 shall be located at the Copyright Office.

11 **“§ 1503. Authority and duties of the Copyright Claims**

12 **Board**

13           “(a) FUNCTIONS.—

14           “(1) COPYRIGHT CLAIMS OFFICERS.—Subject  
15 to the provisions of this chapter and applicable regu-  
16 lations, the functions of the Copyright Claims Offi-  
17 cers shall be as follows:

18           “(A) To render determinations on the civil  
19 copyright claims, counterclaims, and defenses  
20 that may be brought before the Officers under  
21 this chapter.

22           “(B) To ensure that claims, counterclaims,  
23 and defenses are properly asserted and other-  
24 wise appropriate for resolution by the Copyright  
25 Claims Board.

1           “(C) To manage the proceedings before the  
2           Officers and render rulings pertaining to the  
3           consideration of claims, counterclaims, and de-  
4           fenses, including with respect to scheduling, dis-  
5           covery, evidentiary, and other matters.

6           “(D) To request, from participants and  
7           nonparticipants in a proceeding, the production  
8           of information and documents relevant to the  
9           resolution of a claim, counterclaim, or defense.

10          “(E) To conduct hearings and conferences.

11          “(F) To facilitate the settlement by the  
12          parties of claims and counterclaims.

13          “(G)(i) To award monetary relief; and

14          “(ii) to include in the determinations of  
15          the Officers a requirement that certain activi-  
16          ties under section 1504(e)(2) cease or be miti-  
17          gated, if the party to undertake the applicable  
18          measure has so agreed.

19          “(H) To provide information to the public  
20          concerning the procedures and requirements of  
21          the Copyright Claims Board.

22          “(I) To maintain records of the pro-  
23          ceedings before the Officers, certify official  
24          records of such proceedings as needed, and, as

1 provided in section 1506(t), make the records  
2 in such proceedings available to the public.

3 “(J) To carry out such other duties as are  
4 set forth in this chapter.

5 “(K) When not engaged in performing the  
6 duties of the Officers set forth in this chapter,  
7 to perform such other duties as may be as-  
8 signed by the Register of Copyrights.

9 “(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject  
10 to the provisions of this chapter and applicable regu-  
11 lations, the functions of the Copyright Claims Attor-  
12 neys shall be as follows:

13 “(A) To provide assistance to the Copy-  
14 right Claims Officers in the administration of  
15 the duties of those Officers under this chapter.

16 “(B) To provide assistance to members of  
17 the public with respect to the procedures and  
18 requirements of the Copyright Claims Board.

19 “(C) To provide information to potential  
20 claimants contemplating bringing a permissible  
21 action before the Copyright Claims Board about  
22 obtaining a subpoena under section 512(h) for  
23 the sole purpose of identifying a potential re-  
24 spondent in such an action.

1           “(D) When not engaged in performing the  
2           duties of the Attorneys set forth in this chapter,  
3           to perform such other duties as may be as-  
4           signed by the Register of Copyrights.

5           “(b) INDEPENDENCE IN DETERMINATIONS.—

6           “(1) IN GENERAL.—The Copyright Claims  
7           Board shall render the determinations of the Board  
8           in individual proceedings independently on the basis  
9           of the records in the proceedings before it and in ac-  
10          cordance with the provisions of this title, judicial  
11          precedent, and applicable regulations of the Register  
12          of Copyrights.

13          “(2) CONSULTATION.—The Copyright Claims  
14          Officers and Copyright Claims Attorneys—

15                 “(A) may consult with the Register of  
16                 Copyrights on general issues of law; and

17                 “(B) subject to section 1506(x), may not  
18                 consult with the Register of Copyrights with re-  
19                 spect to—

20                         “(i) the facts of any particular matter  
21                         pending before the Officers and the Attor-  
22                         neys; or

23                         “(ii) the application of law to the  
24                         facts described in clause (i).

1           “(3) PERFORMANCE APPRAISALS.—Notwith-  
2 standing any other provision of law or any regula-  
3 tion or policy of the Library of Congress or Register  
4 of Copyrights, any performance appraisal of a Copy-  
5 right Claims Officer or Copyright Claims Attorney  
6 may not consider the substantive result of any indi-  
7 vidual determination reached by the Copyright  
8 Claims Board as a basis for appraisal except to the  
9 extent that result may relate to any actual or alleged  
10 violation of an ethical standard of conduct.

11           “(c) DIRECTION BY REGISTER.—Subject to sub-  
12 section (b), the Copyright Claims Officers and Copyright  
13 Claims Attorneys shall, in the administration of their du-  
14 ties, be under the general direction of the Register of  
15 Copyrights.

16           “(d) INCONSISTENT DUTIES BARRED.—A Copyright  
17 Claims Officer or Copyright Claims Attorney may not un-  
18 dertake any duty that conflicts with the duties of the Offi-  
19 cer or Attorney in connection with the Copyright Claims  
20 Board.

21           “(e) RECUSAL.—A Copyright Claims Officer or Copy-  
22 right Claims Attorney shall recuse himself or herself from  
23 participation in any proceeding with respect to which the  
24 Copyright Claims Officer or Copyright Claims Attorney,

1 as the case may be, has reason to believe that he or she  
2 has a conflict of interest.

3 “(f) EX PARTE COMMUNICATIONS.—Except as may  
4 otherwise be permitted by applicable law, any party to a  
5 proceeding before the Copyright Claims Board shall re-  
6 frain from ex parte communications with the Copyright  
7 Claims Officers and the Register of Copyrights concerning  
8 the substance of any active or pending proceeding before  
9 the Copyright Claims Board.

10 “(g) JUDICIAL REVIEW.—Actions of the Copyright  
11 Claims Officers and Register of Copyrights under this  
12 chapter in connection with the rendering of any deter-  
13 mination are subject to judicial review as provided under  
14 section 1508(c) and not under chapter 7 of title 5.

15 **“§ 1504. Nature of proceedings**

16 “(a) VOLUNTARY PARTICIPATION.—Participation in  
17 a Copyright Claims Board proceeding shall be on a vol-  
18 untary basis in accordance with this chapter and the right  
19 of any party to instead pursue a claim, counterclaim, or  
20 defense in a district court of the United States, any other  
21 court, or any other forum, and to seek a jury trial, shall  
22 be preserved. The rights, remedies, and limitations under  
23 this section may not be waived except in accordance with  
24 this chapter.

25 “(b) STATUTE OF LIMITATIONS.—

1           “(1) IN GENERAL.—A proceeding may not be  
2 maintained before the Copyright Claims Board un-  
3 less the proceeding is commenced, in accordance  
4 with section 1506(e), before the Copyright Claims  
5 Board within 3 years after the claim accrued.

6           “(2) TOLLING.—Subject to section 1507(a), a  
7 proceeding commenced before the Copyright Claims  
8 Board shall toll the time permitted under section  
9 507(b) for the commencement of an action on the  
10 same claim in a district court of the United States  
11 during the period in which the proceeding is pend-  
12 ing.

13           “(c) PERMISSIBLE CLAIMS, COUNTERCLAIMS, AND  
14 DEFENSES.—The Copyright Claims Board may render de-  
15 terminations with respect to the following claims, counter-  
16 claims, and defenses, subject to such further limitations  
17 and requirements, including with respect to particular  
18 classes of works, as may be set forth in regulations estab-  
19 lished by the Register of Copyrights:

20           “(1) A claim for infringement of an exclusive  
21 right in a copyrighted work provided under section  
22 106 by the legal or beneficial owner of the exclusive  
23 right at the time of the infringement for which the  
24 claimant seeks damages, if any, within the limita-  
25 tions set forth in subsection (e)(1).



1           “(2) A claim for a declaration of noninfringe-  
2           ment of an exclusive right in a copyrighted work  
3           provided under section 106, consistent with section  
4           2201 of title 28.

5           “(3) A claim under section 512(f) for misrepre-  
6           sentation in connection with a notification of claimed  
7           infringement or a counter notification seeking to re-  
8           place removed or disabled material, except that any  
9           remedies relating to such a claim in a proceeding be-  
10          fore the Copyright Claims Board shall be limited to  
11          those available under this chapter.

12          “(4) A counterclaim that is asserted solely  
13          against the claimant in a proceeding—

14                 “(A) pursuant to which the counterclaim-  
15                 ant seeks damages, if any, within the limita-  
16                 tions set forth in subsection (e)(1); and

17                 “(B) that—

18                         “(i) arises under section 106 or sec-  
19                         tion 512(f) and out of the same trans-  
20                         action or occurrence that is the subject of  
21                         a claim of infringement brought under  
22                         paragraph (1), a claim of noninfringement  
23                         brought under paragraph (2), or a claim of  
24                         misrepresentation brought under para-  
25                         graph (3); or

1           “(ii) arises under an agreement per-  
2           taining to the same transaction or occur-  
3           rence that is the subject of a claim of in-  
4           fringement brought under paragraph (1),  
5           if the agreement could affect the relief  
6           awarded to the claimant.

7           “(5) A legal or equitable defense under this title  
8           or otherwise available under law, in response to a  
9           claim or counterclaim asserted under this subsection.

10           “(6) A single claim or multiple claims permitted  
11           under paragraph (1), (2), or (3) by one or more  
12           claimants against one or more respondents, but only  
13           if all claims asserted in any one proceeding arise out  
14           of the same allegedly infringing activity or contin-  
15           uous course of infringing activities and do not, in  
16           the aggregate, result in the recovery of such claim  
17           or claims for damages that exceed the limitations  
18           under subsection (e)(1).

19           “(d) EXCLUDED CLAIMS.—The following claims and  
20           counterclaims are not subject to determination by the  
21           Copyright Claims Board:

22           “(1) A claim or counterclaim that is not a per-  
23           missible claim or counterclaim under subsection (c).

24           “(2) A claim or counterclaim that has been fi-  
25           nally adjudicated by a court of competent jurisdic-

1       tion or that is pending before a court of competent  
2       jurisdiction, unless that court has granted a stay to  
3       permit that claim or counterclaim to proceed before  
4       the Copyright Claims Board.

5           “(3) A claim or counterclaim by or against a  
6       Federal or State governmental entity.

7           “(4) A claim or counterclaim asserted against a  
8       person or entity residing outside of the United  
9       States, except in a case in which the person or entity  
10      initiated the proceeding before the Copyright Claims  
11      Board and is subject to counterclaims under this  
12      chapter.

13      “(e) PERMISSIBLE REMEDIES.—

14           “(1) MONETARY RECOVERY.—

15           “(A) ACTUAL DAMAGES, PROFITS, AND  
16      STATUTORY DAMAGES FOR INFRINGEMENT.—

17      With respect to a claim or counterclaim for in-  
18      fringement of copyright, and subject to the limi-  
19      tation on total monetary recovery under sub-  
20      paragraph (D), the Copyright Claims Board  
21      may award either of the following:

22           “(i) Actual damages and profits deter-  
23      mined in accordance with section 504(b),  
24      with that award taking into consideration,  
25      in appropriate cases, whether the infring-

1 ing party has agreed to cease or mitigate  
2 the infringing activity under paragraph  
3 (2).

4 “(ii) Statutory damages, which shall  
5 be determined in accordance with section  
6 504(c), subject to the following conditions:

7 “(I) With respect to works timely  
8 registered under section 412, so that  
9 the works are eligible for an award of  
10 statutory damages in accordance with  
11 that section, the statutory damages  
12 may not exceed \$15,000 for each  
13 work infringed.

14 “(II) With respect to works not  
15 timely registered under section 412,  
16 but eligible for an award of statutory  
17 damages under this section, statutory  
18 damages may not exceed \$7,500 per  
19 work infringed, or a total of \$15,000  
20 in any one proceeding.

21 “(III) The Copyright Claims  
22 Board may not make any finding  
23 that, or consider whether, the in-  
24 fringement was committed willfully in

1 making an award of statutory dam-  
2 ages.

3 “(IV) The Copyright Claims  
4 Board may consider, as an additional  
5 factor in awarding statutory damages,  
6 whether the infringer has agreed to  
7 cease or mitigate the infringing activ-  
8 ity under paragraph (2).

9 “(B) ELECTION OF DAMAGES.—With re-  
10 spect to a claim or counterclaim of infringe-  
11 ment, at any time before final determination is  
12 rendered, and notwithstanding the schedule es-  
13 tablished by the Copyright Claims Board under  
14 section 1506(k), the claimant or counterclaim-  
15 ant shall elect—

16 “(i) to recover actual damages and  
17 profits or statutory damages under sub-  
18 paragraph (A); or

19 “(ii) not to recover damages.

20 “(C) DAMAGES FOR OTHER CLAIMS.—  
21 Damages for claims and counterclaims other  
22 than infringement claims, such as those  
23 brought under section 512(f), shall be subject  
24 to the limitation under subparagraph (D).

1           “(D) LIMITATION ON TOTAL MONETARY  
2 RECOVERY.—Notwithstanding any other provi-  
3 sion of law, a party that pursues any one or  
4 more claims or counterclaims in any single pro-  
5 ceeding before the Copyright Claims Board may  
6 not seek or recover in that proceeding a total  
7 monetary recovery that exceeds the sum of  
8 \$30,000, exclusive of any attorneys’ fees and  
9 costs that may be awarded under section  
10 1506(y)(2).

11           “(2) AGREEMENT TO CEASE CERTAIN ACTIV-  
12 ITY.—In a determination of the Copyright Claims  
13 Board, the Board shall include a requirement to  
14 cease conduct if, in the proceeding relating to the  
15 determination—

16           “(A) a party agrees—

17           “(i) to cease activity that is found to  
18 be infringing, including removing or dis-  
19 abling access to, or destroying, infringing  
20 materials; or

21           “(ii) to cease sending a takedown no-  
22 tice or counter notice under section 512 to  
23 the other party regarding the conduct at  
24 issue before the Board if that notice or  
25 counter notice was found to be a knowing

1 material misrepresentation under section  
2 512(f); and

3 “(B) the agreement described in subpara-  
4 graph (A) is reflected in the record for the pro-  
5 ceeding.

6 “(3) ATTORNEYS’ FEES AND COSTS.—Notwith-  
7 standing any other provision of law, except in the  
8 case of bad faith conduct as provided in section  
9 1506(y)(2), the parties to proceedings before the  
10 Copyright Claims Board shall bear their own attor-  
11 neys’ fees and costs.

12 “(f) JOINT AND SEVERAL LIABILITY.—Parties to a  
13 proceeding before the Copyright Claims Board may be  
14 found jointly and severally liable if all such parties and  
15 relevant claims or counterclaims arise from the same ac-  
16 tivity or activities.

17 “(g) PERMISSIBLE NUMBER OF CASES.—The Reg-  
18 ister of Copyrights may establish regulations relating to  
19 the permitted number of proceedings each year by the  
20 same claimant under this chapter, in the interests of jus-  
21 tice and the administration of the Copyright Claims  
22 Board.

23 **“§ 1505. Registration requirement**

24 “(a) APPLICATION OR CERTIFICATE.—A claim or  
25 counterclaim alleging infringement of an exclusive right

1 in a copyrighted work may not be asserted before the  
2 Copyright Claims Board unless—

3 “(1) the legal or beneficial owner of the copy-  
4 right has first delivered a completed application, a  
5 deposit, and the required fee for registration of the  
6 copyright to the Copyright Office; and

7 “(2) a registration certificate has either been  
8 issued or has not been refused.

9 “(b) CERTIFICATE OF REGISTRATION.—Notwith-  
10 standing any other provision of law, a claimant or counter-  
11 claimant in a proceeding before the Copyright Claims  
12 Board shall be eligible to recover actual damages and prof-  
13 its or statutory damages under this chapter for infringe-  
14 ment of a work if the requirements of subsection (a) have  
15 been met, except that—

16 “(1) the Copyright Claims Board may not  
17 render a determination in the proceeding until—

18 “(A) a registration certificate with respect  
19 to the work has been issued by the Copyright  
20 Office, submitted to the Copyright Claims  
21 Board, and made available to the other parties  
22 to the proceeding; and

23 “(B) the other parties to the proceeding  
24 have been provided an opportunity to address  
25 the registration certificate;



1           “(2) if the proceeding may not proceed further  
2           because a registration certificate for the work is  
3           pending, the proceeding shall be held in abeyance  
4           pending submission of the certificate to the Copy-  
5           right Claims Board, except that, if the proceeding is  
6           held in abeyance for more than 1 year, the Copy-  
7           right Claims Board may, upon providing written no-  
8           tice to the parties to the proceeding, and 30 days to  
9           the parties to respond to the notice, dismiss the pro-  
10          ceeding without prejudice; and

11           “(3) if the Copyright Claims Board receives no-  
12          tice that registration with respect to the work has  
13          been refused, the proceeding shall be dismissed with-  
14          out prejudice.

15          “(c) PRESUMPTION.—In a case in which a registra-  
16          tion certificate shows that registration with respect to a  
17          work was issued not later than 5 years after the date of  
18          the first publication of the work, the presumption under  
19          section 410(c) shall apply in a proceeding before the Copy-  
20          right Claims Board, in addition to relevant principles of  
21          law under this title.

22          “(d) REGULATIONS.—In order to ensure that actions  
23          before the Copyright Claims Board proceed in a timely  
24          manner, the Register of Copyrights shall establish regula-  
25          tions allowing the Copyright Office to make a decision,

1 on an expedited basis, to issue or deny copyright registra-  
2 tion for an unregistered work that is at issue before the  
3 Board.

4 **“§ 1506. Conduct of proceedings**

5 “(a) IN GENERAL.—

6 “(1) APPLICABLE LAW.—Proceedings of the  
7 Copyright Claims Board shall be conducted in ac-  
8 cordance with this chapter and regulations estab-  
9 lished by the Register of Copyrights under this chap-  
10 ter, in addition to relevant principles of law under  
11 this title.

12 “(2) CONFLICTING PRECEDENT.—If it appears  
13 that there may be conflicting judicial precedent on  
14 an issue of substantive copyright law that cannot be  
15 reconciled, the Copyright Claims Board shall follow  
16 the law of the Federal jurisdiction in which the ac-  
17 tion could have been brought if filed in a district  
18 court of the United States, or, if the action could  
19 have been brought in more than one such jurisdic-  
20 tion, the jurisdiction that the Copyright Claims  
21 Board determines has the most significant ties to  
22 the parties and conduct at issue.

23 “(b) RECORD.—The Copyright Claims Board shall  
24 maintain records documenting the proceedings before the  
25 Board.

1       “(c) CENTRALIZED PROCESS.—Proceedings before  
2 the Copyright Claims Board shall—

3           “(1) be conducted at the offices of the Copy-  
4 right Claims Board without the requirement of in-  
5 person appearances by parties or others; and

6           “(2) take place by means of written submis-  
7 sions, hearings, and conferences carried out through  
8 internet-based applications and other telecommuni-  
9 cations facilities, except that, in cases in which phys-  
10 ical or other nontestimonial evidence material to a  
11 proceeding cannot be furnished to the Copyright  
12 Claims Board through available telecommunications  
13 facilities, the Copyright Claims Board may make al-  
14 ternative arrangements for the submission of such  
15 evidence that do not prejudice any other party to the  
16 proceeding.

17       “(d) REPRESENTATION.—A party to a proceeding be-  
18 fore the Copyright Claims Board may be, but is not re-  
19 quired to be, represented by—

20           “(1) an attorney; or

21           “(2) a law student who is qualified under appli-  
22 cable law governing representation by law students  
23 of parties in legal proceedings and who provides  
24 such representation on a pro bono basis.

1       “(e) COMMENCEMENT OF PROCEEDING.—In order to  
2 commence a proceeding under this chapter, a claimant  
3 shall, subject to such additional requirements as may be  
4 prescribed in regulations established by the Register of  
5 Copyrights, file a claim with the Copyright Claims Board,  
6 that—

7               “(1) includes a statement of material facts in  
8 support of the claim;

9               “(2) is certified under subsection (y)(1); and

10              “(3) is accompanied by a filing fee in such  
11 amount as may be prescribed in regulations estab-  
12 lished by the Register of Copyrights.

13       “(f) REVIEW OF CLAIMS AND COUNTERCLAIMS.—

14              “(1) CLAIMS.—Upon the filing of a claim under  
15 subsection (e), the claim shall be reviewed by a  
16 Copyright Claims Attorney to ensure that the claim  
17 complies with this chapter and applicable regula-  
18 tions, subject to the following:

19                      “(A) If the claim is found to comply, the  
20 claimant shall be notified regarding that com-  
21 pliance and instructed to proceed with service of  
22 the claim under subsection (g).

23                      “(B) If the claim is found not to comply,  
24 the claimant shall be notified that the claim is  
25 deficient and be permitted to file an amended

1 claim not later than 30 days after the date on  
2 which the claimant receives the notice, without  
3 the requirement of an additional filing fee. If  
4 the claimant files a compliant claim within that  
5 30-day period, the claimant shall be so notified  
6 and be instructed to proceed with service of the  
7 claim. If the claim is refiled within that 30-day  
8 period and still fails to comply, the claimant  
9 shall again be notified that the claim is defi-  
10 cient and shall be provided a second oppor-  
11 tunity to amend the claim within 30 days after  
12 the date of that second notice, without the re-  
13 quirement of an additional filing fee. If the  
14 claim is refiled again within that second 30-day  
15 period and is compliant, the claimant shall be  
16 so notified and shall be instructed to proceed  
17 with service of the claim, but if the claim still  
18 fails to comply, upon confirmation of such non-  
19 compliance by a Copyright Claims Officer, the  
20 proceeding shall be dismissed without prejudice.  
21 The Copyright Claims Board shall also dismiss  
22 without prejudice any proceeding in which a  
23 compliant claim is not filed within the applica-  
24 ble 30-day period.

1           “(C)(i) Subject to clause (ii), for purposes  
2 of this paragraph, a claim against an online  
3 service provider for infringement by reason of  
4 the storage of or referral or linking to infring-  
5 ing material that may be subject to the limita-  
6 tions on liability set forth in subsection (b), (c),  
7 or (d) of section 512 shall be considered non-  
8 compliant unless the claimant affirms in the  
9 statement required under subsection (e)(1) of  
10 this section that the claimant has previously no-  
11 tified the service provider of the claimed in-  
12 fringement in accordance with subsection  
13 (b)(2)(E), (c)(3), or (d)(3) of section 512, as  
14 applicable, and the service provider failed to re-  
15 move or disable access to the material expedi-  
16 tiously upon the provision of such notice.

17           “(ii) If a claim is found to be noncompliant  
18 under clause (i), the Copyright Claims Board  
19 shall provide the claimant with information con-  
20 cerning the service of such a notice under the  
21 applicable provision of section 512.

22           “(2) COUNTERCLAIMS.—Upon the filing and  
23 service of a counterclaim, the counterclaim shall be  
24 reviewed by a Copyright Claims Attorney to ensure  
25 that the counterclaim complies with the provisions of

1 this chapter and applicable regulations. If the coun-  
2 terclaim is found not to comply, the counterclaimant  
3 and the other parties to the proceeding shall be noti-  
4 fied that the counterclaim is deficient, and the  
5 counterclaimant shall be permitted to file and serve  
6 an amended counterclaim within 30 days after the  
7 date of such notice. If the counterclaimant files and  
8 serves a compliant counterclaim within that 30-day  
9 period, the counterclaimant and such other parties  
10 shall be so notified. If the counterclaim is refiled and  
11 served within that 30-day period but still fails to  
12 comply, the counterclaimant and such other parties  
13 shall again be notified that the counterclaim is defi-  
14 cient, and the counterclaimant shall be provided a  
15 second opportunity to amend the counterclaim with-  
16 in 30 days after the date of the second notice. If the  
17 counterclaim is refiled and served again within that  
18 second 30-day period and is compliant, the counter-  
19 claimant and such other parties shall be so notified,  
20 but if the counterclaim still fails to comply, upon  
21 confirmation of such noncompliance by a Copyright  
22 Claims Officer, the counterclaim, but not the pro-  
23 ceeding, shall be dismissed without prejudice.

24 “(3) DISMISSAL FOR UNSUITABILITY.—The  
25 Copyright Claims Board shall dismiss a claim or

1 counterclaim without prejudice if, upon reviewing  
2 the claim or counterclaim, or at any other time in  
3 the proceeding, the Copyright Claims Board con-  
4 cludes that the claim or counterclaim is unsuitable  
5 for determination by the Copyright Claims Board,  
6 including on account of any of the following:

7 “(A) The failure to join a necessary party.

8 “(B) The lack of an essential witness, evi-  
9 dence, or expert testimony.

10 “(C) The determination of a relevant issue  
11 of law or fact that could exceed either the num-  
12 ber of proceedings the Copyright Claims Board  
13 could reasonably administer or the subject mat-  
14 ter competence of the Copyright Claims Board.

15 “(g) SERVICE OF NOTICE AND CLAIMS.—In order to  
16 proceed with a claim against a respondent, a claimant  
17 shall, within 90 days after receiving notification under  
18 subsection (f) to proceed with service, file with the Copy-  
19 right Claims Board proof of service on the respondent. In  
20 order to effectuate service on a respondent, the claimant  
21 shall cause notice of the proceeding and a copy of the  
22 claim to be served on the respondent, either by personal  
23 service or pursuant to a waiver of personal service, as pre-  
24 scribed in regulations established by the Register of Copy-



1 rights. Such regulations shall include the following re-  
2 quirements:

3           “(1) The notice of the proceeding shall adhere  
4 to a prescribed form and shall set forth the nature  
5 of the Copyright Claims Board and proceeding, the  
6 right of the respondent to opt out, and the con-  
7 sequences of opting out and not opting out, includ-  
8 ing a prominent statement that, by not opting out  
9 within 60 days after receiving the notice, the re-  
10 spondent—

11                   “(A) loses the opportunity to have the dis-  
12 pute decided by a court created under article  
13 III of the Constitution of the United States;  
14 and

15                   “(B) waives the right to a jury trial re-  
16 garding the dispute.

17           “(2) The copy of the claim served on the re-  
18 spondent shall be the same as the claim that was  
19 filed with the Copyright Claims Board.

20           “(3) Personal service of a notice and claim may  
21 be effected by an individual who is not a party to  
22 the proceeding and is older than 18 years of age.

23           “(4) An individual, other than a minor or in-  
24 competent individual, may be served by—

1           “(A) complying with State law for serving  
2 a summons in an action brought in courts of  
3 general jurisdiction in the State where service is  
4 made;

5           “(B) delivering a copy of the notice and  
6 claim to the individual personally;

7           “(C) leaving a copy of the notice and claim  
8 at the individual’s dwelling or usual place of  
9 abode with someone of suitable age and discre-  
10 tion who resides there; or

11           “(D) delivering a copy of the notice and  
12 claim to an agent designated by the respondent  
13 to receive service of process or, if not so des-  
14 ignated, an agent authorized by appointment or  
15 by law to receive service of process.

16           “(5)(A) A corporation, partnership, or unincor-  
17 porated association that is subject to suit in courts  
18 of general jurisdiction under a common name shall  
19 be served by delivering a copy of the notice and  
20 claim to its service agent. If such service agent has  
21 not been designated, service shall be accomplished—

22           “(i) by complying with State law for serv-  
23 ing a summons in an action brought in courts  
24 of general jurisdiction in the State where serv-  
25 ice is made; or

1           “(ii) by delivering a copy of the notice and  
2           claim to an officer, a managing or general  
3           agent, or any other agent authorized by ap-  
4           pointment or by law to receive service of proc-  
5           ess in an action brought in courts of general ju-  
6           risdiction in the State where service is made  
7           and, if the agent is one authorized by statute  
8           and the statute so requires, by also mailing a  
9           copy of the notice and claim to the respondent.

10          “(B) A corporation, partnership or unincor-  
11          porated association that is subject to suit in courts  
12          of general jurisdiction under a common name may  
13          elect to designate a service agent to receive notice of  
14          a claim against it before the Copyright Claims  
15          Board by complying with requirements that the Reg-  
16          ister of Copyrights shall establish by regulation. The  
17          Register of Copyrights shall maintain a current di-  
18          rectory of service agents that is available to the pub-  
19          lic for inspection, including through the internet,  
20          and may require such corporations, partnerships,  
21          and unincorporated associations designating such  
22          service agents to pay a fee to cover the costs of  
23          maintaining the directory.

24          “(6) In order to request a waiver of personal  
25          service, the claimant may notify a respondent, by

1 first class mail or by other reasonable means, that  
2 a proceeding has been commenced, such notice to be  
3 made in accordance with regulations established by  
4 the Register of Copyrights, subject to the following:

5 “(A) Any such request shall be in writing,  
6 shall be addressed to the respondent, and shall  
7 be accompanied by a prescribed notice of the  
8 proceeding, a copy of the claim as filed with the  
9 Copyright Claims Board, a prescribed form for  
10 waiver of personal service, and a prepaid or  
11 other means of returning the form without cost.

12 “(B) The request shall state the date on  
13 which the request is sent, and shall provide the  
14 respondent a period of 30 days, beginning on  
15 the date on which the request is sent, to return  
16 the waiver form signed by the respondent. The  
17 signed waiver form shall, for purposes of this  
18 subsection, constitute acceptance and proof of  
19 service as of the date on which the waiver is  
20 signed.

21 “(7)(A) A respondent’s waiver of personal serv-  
22 ice shall not constitute a waiver of the respondent’s  
23 right to opt out of the proceeding.

24 “(B) A respondent who timely waives personal  
25 service under paragraph (6) and does not opt out of

1 the proceeding shall be permitted a period of 30  
2 days, in addition to the period otherwise permitted  
3 under the applicable procedures of the Copyright  
4 Claims Board, to submit a substantive response to  
5 the claim, including any defenses and counterclaims.

6 “(8) A minor or an incompetent individual may  
7 only be served by complying with State law for serv-  
8 ing a summons or like process on such an individual  
9 in an action brought in the courts of general juris-  
10 diction of the State where service is made.

11 “(9) Service of a claim and waiver of personal  
12 service may only be effected within the United  
13 States.

14 “(h) NOTIFICATION BY COPYRIGHT CLAIMS  
15 BOARD.—The Register of Copyrights shall establish regu-  
16 lations providing for a written notification to be sent by,  
17 or on behalf of, the Copyright Claims Board to notify the  
18 respondent of a pending proceeding against the respond-  
19 ent, as set forth in those regulations, which shall—

20 “(1) include information concerning the re-  
21 spondent’s right to opt out of the proceeding, the  
22 consequences of opting out and not opting out, and  
23 a prominent statement that, by not opting out with-  
24 in 60 days after the date of service under subsection  
25 (g), the respondent loses the opportunity to have the

1 dispute decided by a court created under article III  
2 of the Constitution of the United States and waives  
3 the right to a jury trial regarding the dispute; and

4 “(2) be in addition to, and separate and apart  
5 from, the notice requirements under subsection (g).

6 “(i) OPT-OUT PROCEDURE.—Upon being properly  
7 served with a notice and claim, a respondent who chooses  
8 to opt out of the proceeding shall have a period of 60 days,  
9 beginning on the date of service, in which to provide writ-  
10 ten notice of such choice to the Copyright Claims Board,  
11 in accordance with regulations established by the Register  
12 of Copyrights. If proof of service has been filed by the  
13 claimant and the respondent does not submit an opt-out  
14 notice to the Copyright Claims Board within that 60-day  
15 period, the proceeding shall be deemed an active pro-  
16 ceeding and the respondent shall be bound by the deter-  
17 mination in the proceeding to the extent provided under  
18 section 1507(a). If the respondent opts out of the pro-  
19 ceeding during that 60-day period, the proceeding shall  
20 be dismissed without prejudice, except that, in exceptional  
21 circumstances and upon written notice to the claimant, the  
22 Copyright Claims Board may extend that 60-day period  
23 in the interests of justice.

24 “(j) SERVICE OF OTHER DOCUMENTS.—Documents  
25 submitted or relied upon in a proceeding, other than the

1 notice and claim, shall be served in accordance with regu-  
2 lations established by the Register of Copyrights.

3 “(k) SCHEDULING.—Upon confirmation that a pro-  
4 ceeding has become an active proceeding, the Copyright  
5 Claims Board shall issue a schedule for the future conduct  
6 of the proceeding. The schedule shall not specify a time  
7 that a claimant or counterclaimant is required make an  
8 election of damages that is inconsistent with section  
9 1504(e). A schedule issued by the Copyright Claims Board  
10 may be amended by the Copyright Claims Board in the  
11 interests of justice.

12 “(l) CONFERENCES.—One or more Copyright Claims  
13 Officers may hold a conference to address case manage-  
14 ment or discovery issues in a proceeding, which shall be  
15 noted upon the record of the proceeding and may be re-  
16 corded or transcribed.

17 “(m) PARTY SUBMISSIONS.—A proceeding of the  
18 Copyright Claims Board may not include any formal mo-  
19 tion practice, except that, subject to applicable regulations  
20 and procedures of the Copyright Claims Board—

21 “(1) the parties to the proceeding may make re-  
22 quests to the Copyright Claims Board to address  
23 case management and discovery matters, and submit  
24 responses thereto; and

1           “(2) the Copyright Claims Board may request  
2           or permit parties to make submissions addressing  
3           relevant questions of fact or law, or other matters,  
4           including matters raised sua sponte by the Copy-  
5           right Claims Officers, and offer responses thereto.

6           “(n) DISCOVERY.—Discovery in a proceeding shall be  
7           limited to the production of relevant information and doc-  
8           uments, written interrogatories, and written requests for  
9           admission, as provided in regulations established by the  
10          Register of Copyrights, except that—

11           “(1) upon the request of a party, and for good  
12           cause shown, the Copyright Claims Board may ap-  
13           prove additional relevant discovery, on a limited  
14           basis, in particular matters, and may request spe-  
15           cific information and documents from participants in  
16           the proceeding and voluntary submissions from non-  
17           participants, consistent with the interests of justice;

18           “(2) upon the request of a party, and for good  
19           cause shown, the Copyright Claims Board may issue  
20           a protective order to limit the disclosure of docu-  
21           ments or testimony that contain confidential infor-  
22           mation; and

23           “(3) after providing notice and an opportunity  
24           to respond, and upon good cause shown, the Copy-  
25           right Claims Board may apply an adverse inference



1 with respect to disputed facts against a party who  
2 has failed to timely provide discovery materials in  
3 response to a proper request for materials that could  
4 be relevant to such facts.

5 “(o) EVIDENCE.—The Copyright Claims Board may  
6 consider the following types of evidence in a proceeding,  
7 and such evidence may be admitted without application  
8 of formal rules of evidence:

9 “(1) Documentary and other nontestimonial  
10 evidence that is relevant to the claims, counter-  
11 claims, or defenses in the proceeding.

12 “(2) Testimonial evidence, submitted under  
13 penalty of perjury in written form or in accordance  
14 with subsection (p), limited to statements of the par-  
15 ties and nonexpert witnesses, that is relevant to the  
16 claims, counterclaims, and defenses in a proceeding,  
17 except that, in exceptional cases, expert witness tes-  
18 timony or other types of testimony may be permitted  
19 by the Copyright Claims Board for good cause  
20 shown.

21 “(p) HEARINGS.—The Copyright Claims Board may  
22 conduct a hearing to receive oral presentations on issues  
23 of fact or law from parties and witnesses to a proceeding,  
24 including oral testimony, subject to the following:

1           “(1) Any such hearing shall be attended by not  
2 fewer than two of the Copyright Claims Officers.

3           “(2) The hearing shall be noted upon the record  
4 of the proceeding and, subject to paragraph (3), may  
5 be recorded or transcribed as deemed necessary by  
6 the Copyright Claims Board.

7           “(3) A recording or transcript of the hearing  
8 shall be made available to any Copyright Claims Of-  
9 ficer who is not in attendance.

10          “(q) VOLUNTARY DISMISSAL.—

11           “(1) BY CLAIMANT.—Upon the written request  
12 of a claimant that is received before a respondent  
13 files a response to the claim in a proceeding, the  
14 Copyright Claims Board shall dismiss the pro-  
15 ceeding, or a claim or respondent, as requested,  
16 without prejudice.

17           “(2) BY COUNTERCLAIMANT.—Upon written re-  
18 quest of a counterclaimant that is received before a  
19 claimant files a response to the counterclaim, the  
20 Copyright Claims Board shall dismiss the counter-  
21 claim, such dismissal to be without prejudice.

22           “(3) CLASS ACTIONS.—Any party in an active  
23 proceeding before the Copyright Claims Board who  
24 receives notice of a pending or putative class action,  
25 arising out of the same transaction or occurrence, in

1 which that party is a class member may request in  
2 writing dismissal of the proceeding before the Board.  
3 Upon notice to all claimants and counterclaimants,  
4 the Copyright Claims Board shall dismiss the pro-  
5 ceeding without prejudice.

6 “(r) SETTLEMENT.—

7 “(1) IN GENERAL.—At any time in an active  
8 proceeding, some or all of the parties may—

9 “(A) jointly request a conference with a  
10 Copyright Claims Officer for the purpose of fa-  
11 cilitating settlement discussions; or

12 “(B) submit to the Copyright Claims  
13 Board an agreement providing for settlement  
14 and dismissal of some or all of the claims and  
15 counterclaims in the proceeding.

16 “(2) ADDITIONAL REQUEST.—A submission  
17 under paragraph (1)(B) may include a request that  
18 the Copyright Claims Board adopt some or all of the  
19 terms of the parties’ settlement in a final determina-  
20 tion in the proceeding.

21 “(s) FACTUAL FINDINGS.—Subject to subsection  
22 (n)(3), the Copyright Claims Board shall make factual  
23 findings based upon a preponderance of the evidence.

24 “(t) DETERMINATIONS.—

1           “(1) NATURE AND CONTENTS.—A determina-  
2           tion rendered by the Copyright Claims Board in a  
3           proceeding shall—

4                   “(A) be reached by a majority of the Copy-  
5                   right Claims Board;

6                   “(B) be in writing, and include an expla-  
7                   nation of the factual and legal basis of the de-  
8                   termination;

9                   “(C) set forth any terms by which a re-  
10                  spondent or counterclaim respondent has  
11                  agreed to cease infringing activity under section  
12                  1504(e)(2);

13                  “(D) to the extent requested under sub-  
14                  section (r)(2), set forth the terms of any settle-  
15                  ment agreed to under subsection (r)(1); and

16                  “(E) include a clear statement of all dam-  
17                  ages and other relief awarded, including under  
18                  subparagraphs (C) and (D).

19           “(2) DISSENT.—A Copyright Claims Officer  
20           who dissents from a decision contained in a deter-  
21           mination under paragraph (1) may append a state-  
22           ment setting forth the grounds for that dissent.

23           “(3) PUBLICATION.—Each final determination  
24           of the Copyright Claims Board shall be made avail-  
25           able on a publicly accessible website. The Register

1 shall establish regulations with respect to the publi-  
2 cation of other records and information relating to  
3 such determinations, including the redaction of  
4 records to protect confidential information that is  
5 the subject of a protective order under subsection  
6 (n)(2).

7 “(4) FREEDOM OF INFORMATION ACT.—All in-  
8 formation relating to proceedings of the Copyright  
9 Claims Board under this title is exempt from disclo-  
10 sure to the public under section 552(b)(3) of title 5,  
11 except for determinations, records, and information  
12 published under paragraph (3).

13 “(u) RESPONDENT’S DEFAULT.—If a proceeding has  
14 been deemed an active proceeding but the respondent has  
15 failed to appear or has ceased participating in the pro-  
16 ceeding, as demonstrated by the respondent’s failure,  
17 without justifiable cause, to meet one or more deadlines  
18 or requirements set forth in the schedule adopted by the  
19 Copyright Claims Board under subsection (k), the Copy-  
20 right Claims Board may enter a default determination, in-  
21 cluding the dismissal of any counterclaim asserted by the  
22 respondent, as follows and in accordance with such other  
23 requirements as the Register of Copyrights may establish  
24 by regulation:

1           “(1) The Copyright Claims Board shall require  
2           the claimant to submit relevant evidence and other  
3           information in support of the claimant’s claim and  
4           any asserted damages and, upon review of such evi-  
5           dence and any other requested submissions from the  
6           claimant, shall determine whether the materials so  
7           submitted are sufficient to support a finding in favor  
8           of the claimant under applicable law and, if so, the  
9           appropriate relief and damages, if any, to be award-  
10          ed.

11          “(2) If the Copyright Claims Board makes an  
12          affirmative determination under paragraph (1), the  
13          Copyright Claims Board shall prepare a proposed  
14          default determination, and shall provide written no-  
15          tice to the respondent at all addresses, including  
16          email addresses, reflected in the records of the pro-  
17          ceeding before the Copyright Claims Board, of the  
18          pendency of a default determination by the Copy-  
19          right Claims Board and of the legal significance of  
20          such determination. Such notice shall be accom-  
21          panied by the proposed default determination and  
22          shall provide that the respondent has a period of 30  
23          days, beginning on the date of the notice, to submit  
24          any evidence or other information in opposition to  
25          the proposed default determination.

1           “(3) If the respondent responds to the notice  
2 provided under paragraph (2) within the 30-day pe-  
3 riod provided in such paragraph, the Copyright  
4 Claims Board shall consider respondent’s submis-  
5 sions and, after allowing the other parties to address  
6 such submissions, maintain, or amend its proposed  
7 determination as appropriate, and the resulting de-  
8 termination shall not be a default determination.

9           “(4) If the respondent fails to respond to the  
10 notice provided under paragraph (2), the Copyright  
11 Claims Board shall proceed to issue the default de-  
12 termination as a final determination. Thereafter, the  
13 respondent may only challenge such determination to  
14 the extent permitted under section 1508(c), except  
15 that, before any additional proceedings are initiated  
16 under section 1508, the Copyright Claims Board  
17 may, in the interests of justice, vacate the default  
18 determination.

19           “(v) CLAIMANT’S FAILURE TO PROCEED.—

20           “(1) FAILURE TO COMPLETE SERVICE.—If a  
21 claimant fails to complete service on a respondent  
22 within the 90-day period required under subsection  
23 (g), the Copyright Claims Board shall dismiss that  
24 respondent from the proceeding without prejudice. If  
25 a claimant fails to complete service on all respond-

1       ents within that 90-day period, the Copyright Claims  
2       Board shall dismiss the proceeding without preju-  
3       dice.

4           “(2) FAILURE TO PROSECUTE.—If a claimant  
5       fails to proceed in an active proceeding, as dem-  
6       onstrated by the claimant’s failure, without justifi-  
7       able cause, to meet one or more deadlines or require-  
8       ments set forth in the schedule adopted by the Copy-  
9       right Claims Board under subsection (k), the Copy-  
10      right Claims Board may, upon providing written no-  
11     tice to the claimant and a period of 30 days, begin-  
12     ning on the date of the notice, to respond to the no-  
13     tice, and after considering any such response, issue  
14     a determination dismissing the claimants’ claims,  
15     which shall include an award of attorneys’ fees and  
16     costs, if appropriate, under subsection (y)(2). There-  
17     after, the claimant may only challenge such deter-  
18     mination to the extent permitted under section  
19     1508(e), except that, before any additional pro-  
20     ceedings are initiated under section 1508, the Copy-  
21     right Claims Board may, in the interests of justice,  
22     vacate the determination of dismissal.

23           “(w) REQUEST FOR RECONSIDERATION.—A party  
24     may, within 30 days after the date on which the Copyright  
25     Claims Board issues a final determination in a proceeding



1 under this chapter, submit a written request for reconsid-  
2 eration of, or an amendment to, such determination if the  
3 party identifies a clear error of law or fact material to  
4 the outcome, or a technical mistake. After providing the  
5 other parties an opportunity to address such request, the  
6 Copyright Claims Board shall either deny the request or  
7 issue an amended final determination.

8       “(x) REVIEW BY REGISTER.—If the Copyright  
9 Claims Board denies a party a request for reconsideration  
10 of a final determination under subsection (w), that party  
11 may, within 30 days after the date of such denial, request  
12 review of the final determination by the Register of Copy-  
13 rights in accordance with regulations established by the  
14 Register. Such request shall be accompanied by a reason-  
15 able filing fee, as provided in such regulations. The review  
16 by the Register shall be limited to consideration of whether  
17 the Copyright Claims Board abused its discretion in deny-  
18 ing reconsideration of the determination. After providing  
19 the other parties an opportunity to address the request,  
20 the Register shall either deny the request for review, or  
21 remand the proceeding to the Copyright Claims Board for  
22 reconsideration of issues specified in the remand and for  
23 issuance of an amended final determination. Such amend-  
24 ed final determination shall not be subject to further con-  
25 sideration or review, other than under section 1508(c).

1 “(y) CONDUCT OF PARTIES AND ATTORNEYS.—

2 “(1) CERTIFICATION.—The Register of Copy-  
3 rights shall establish regulations requiring certifi-  
4 cation of the accuracy and truthfulness of state-  
5 ments made by participants in proceedings before  
6 the Copyright Claims Board.

7 “(2) BAD FAITH CONDUCT.—Notwithstanding  
8 any other provision of law, in any proceeding in  
9 which a determination is rendered and it is estab-  
10 lished that a party pursued a claim, counterclaim, or  
11 defense for a harassing or other improper purpose,  
12 or without a reasonable basis in law or fact, then,  
13 unless inconsistent with the interests of justice, the  
14 Copyright Claims Board shall in such determination  
15 award reasonable costs and attorneys’ fees to any  
16 adversely affected party of in an amount of not more  
17 than \$5,000, except that—

18 “(A) if an adversely affected party ap-  
19 peared pro se in the proceeding, the award to  
20 that party shall be for costs only, in an amount  
21 of not more than \$2,500; and

22 “(B) in extraordinary circumstances, such  
23 as where a party has demonstrated a pattern or  
24 practice of bad faith conduct as described in  
25 this paragraph, the Copyright Claims Board

1           may, in the interests of justice, award costs and  
2           attorneys' fees in excess of the limitations  
3           under this paragraph.

4           “(3) ADDITIONAL PENALTY.—If the Board  
5           finds that on more than one occasion within a 12-  
6           month period a party pursued a claim, counterclaim,  
7           or defense before the Copyright Claims Board for a  
8           harassing or other improper purpose, or without a  
9           reasonable basis in law or fact, that party shall be  
10          barred from initiating a claim before the Copyright  
11          Claims Board under this chapter for a period of 12  
12          months beginning on the date on which the Board  
13          makes such a finding. Any proceeding commenced  
14          by that party that is still pending before the Board  
15          when such a finding is made shall be dismissed with-  
16          out prejudice, except that if a proceeding has been  
17          deemed active under subsection (i), the proceeding  
18          shall be dismissed under this paragraph only if the  
19          respondent provides written consent thereto.

20          “(z) REGULATIONS FOR SMALLER CLAIMS.—The  
21          Register of Copyrights shall establish regulations to pro-  
22          vide for the consideration and determination, by at least  
23          one Copyright Claims Officer, of any claim under this  
24          chapter in which total damages sought do not exceed  
25          \$5,000 (exclusive of attorneys' fees and costs) that are

1 otherwise consistent with this chapter. A determination  
2 issued under this subsection shall have the same effect as  
3 a determination issued by the entire Copyright Claims  
4 Board.

5 **“§ 1507. Effect of proceeding**

6       “(a) DETERMINATION.—Subject to the reconsider-  
7 ation and review processes provided under subsections (w)  
8 and (x) of section 1506 and section 1508(c), the issuance  
9 of a final determination by the Copyright Claims Board  
10 in a proceeding, including a default determination or de-  
11 termination based on a failure to prosecute, shall, solely  
12 with respect to the parties to such determination, preclude  
13 relitigation before any court or tribunal, or before the  
14 Copyright Claims Board, of the claims and counterclaims  
15 asserted and finally determined by the Board, and may  
16 be relied upon for such purpose in a future action or pro-  
17 ceeding arising from the same specific activity or activi-  
18 ties, subject to the following:

19               “(1) A determination of the Copyright Claims  
20 Board shall not preclude litigation or relitigation as  
21 between the same or different parties before any  
22 court or tribunal, or the Copyright Claims Board, of  
23 the same or similar issues of fact or law in connec-  
24 tion with claims or counterclaims not asserted or not  
25 finally determined by the Copyright Claims Board.

1           “(2) A determination of ownership of a copy-  
2           righted work for purposes of resolving a matter be-  
3           fore the Copyright Claims Board may not be relied  
4           upon, and shall not have any preclusive effect, in  
5           any other action or proceeding before any court or  
6           tribunal, including the Copyright Claims Board.

7           “(3) Except to the extent permitted under this  
8           subsection and section 1508, any determination of  
9           the Copyright Claims Board may not be cited or re-  
10          lied upon as legal precedent in any other action or  
11          proceeding before any court or tribunal, including  
12          the Copyright Claims Board.

13          “(b) CLASS ACTIONS NOT AFFECTED.—

14                 “(1) IN GENERAL.—A proceeding before the  
15                 Copyright Claims Board shall not have any effect on  
16                 a class action proceeding in a district court of the  
17                 United States, and section 1509(a) shall not apply  
18                 to a class action proceeding in a district court of the  
19                 United States.

20                 “(2) NOTICE OF CLASS ACTION.—Any party to  
21                 an active proceeding before the Copyright Claims  
22                 Board who receives notice of a pending class action,  
23                 arising out of the same transaction or occurrence as  
24                 the proceeding before the Copyright Claims Board,  
25                 in which the party is a class member shall either—

1           “(A) opt out of the class action, in accord-  
2           ance with regulations established by the Reg-  
3           ister of Copyrights; or

4           “(B) seek dismissal under section  
5           1506(q)(3) of the proceeding before the Copy-  
6           right Claims Board.

7           “(c) OTHER MATERIALS IN PROCEEDING.—Except  
8           as permitted under this section and section 1508, a sub-  
9           mission or statement of a party or witness made in connec-  
10          tion with a proceeding before the Copyright Claims Board,  
11          including a proceeding that is dismissed, may not be cited  
12          or relied upon in, or serve as the basis of, any action or  
13          proceeding concerning rights or limitations on rights  
14          under this title before any court or tribunal, including the  
15          Copyright Claims Board.

16          “(d) APPLICABILITY OF SECTION 512(g).—A claim  
17          or counterclaim before the Copyright Claims Board that  
18          is brought under subsection (c)(1) or (c)(4) of section  
19          1504, or brought under subsection (c)(6) of section 1504  
20          and that relates to a claim under subsection (c)(1) or  
21          (c)(4) of such section, qualifies as an action seeking an  
22          order to restrain a subscriber from engaging in infringing  
23          activity under section 512(g)(2)(C) if—

24                 “(1) notice of the commencement of the Copy-  
25          right Claims Board proceeding is provided by the

1 claimant to the service provider’s designated agent  
2 before the service provider replaces the material fol-  
3 lowing receipt of a counter notification under section  
4 512(g); and

5 “(2) the claim brought alleges infringement of  
6 the material identified in the notification of claimed  
7 infringement under section 512(c)(1)(C).

8 “(e) FAILURE TO ASSERT COUNTERCLAIM.—The  
9 failure or inability to assert a counterclaim in a proceeding  
10 before the Copyright Claims Board shall not preclude the  
11 assertion of that counterclaim in a subsequent court action  
12 or proceeding before the Copyright Claims Board.

13 “(f) OPT-OUT OR DISMISSAL OF PARTY.—If a party  
14 has timely opted out of a proceeding under section 1506(i)  
15 or is dismissed from a proceeding before the Copyright  
16 Claims Board issues a final determination in the pro-  
17 ceeding, the determination shall not be binding upon and  
18 shall have no preclusive effect with respect to that party.

19 **“§ 1508. Review and confirmation by district court**

20 “(a) IN GENERAL.—In any proceeding in which a  
21 party has failed to pay damages, or has failed otherwise  
22 to comply with the relief, awarded in a final determination  
23 of the Copyright Claims Board, including a default deter-  
24 mination or a determination based on a failure to pros-  
25 ecute, the aggrieved party may, not later than 1 year after

1 the date on which the final determination is issued, any  
2 reconsideration by the Copyright Claims Board or review  
3 by the Register of Copyrights is resolved, or an amended  
4 final determination is issued, whichever occurs last, apply  
5 to the United States District Court for the District of Co-  
6 lumbia or any other appropriate district court of the  
7 United States for an order confirming the relief awarded  
8 in the final determination and reducing such award to  
9 judgment. The court shall grant such order and direct  
10 entry of judgment unless the determination is or has been  
11 vacated, modified, or corrected under subsection (c). If the  
12 United States District Court for the District of Columbia  
13 or other district court of the United States, as the case  
14 may be, issues an order confirming the relief awarded by  
15 the Copyright Claims Board, the court shall impose on the  
16 party who failed to pay damages or otherwise comply with  
17 the relief, the reasonable expenses required to secure such  
18 order, including attorneys' fees, that were incurred by the  
19 aggrieved party.

20 “(b) FILING PROCEDURES.—

21 “(1) APPLICATION TO CONFIRM DETERMINA-  
22 TION.—Notice of the application under subsection  
23 (a) for confirmation of a determination of the Copy-  
24 right Claims Board and entry of judgment shall be  
25 provided to all parties to the proceeding before the



1 Copyright Claims Board that resulted in the deter-  
2 mination, in accordance with the procedures applica-  
3 ble to service of a motion in the district court of the  
4 United States where the application is made.

5 “(2) CONTENTS OF APPLICATION.—The appli-  
6 cation shall include the following:

7 “(A) A certified copy of the final or  
8 amended final determination of the Copyright  
9 Claims Board, as reflected in the records of the  
10 Copyright Claims Board, following any process  
11 of reconsideration or review by the Register of  
12 Copyrights, to be confirmed and rendered to  
13 judgment.

14 “(B) A declaration by the applicant, under  
15 penalty of perjury—

16 “(i) that the copy is a true and cor-  
17 rect copy of such determination;

18 “(ii) stating the date it was issued;

19 “(iii) stating the basis for the chal-  
20 lenge under subsection (c)(1); and

21 “(iv) stating whether the applicant is  
22 aware of any other proceedings before the  
23 court concerning the same determination  
24 of the Copyright Claims Board.

25 “(c) CHALLENGES TO THE DETERMINATION.—

1           “(1) BASES FOR CHALLENGE.—Not later than  
2           90 days after the date on which Copyright Claims  
3           Board issues a final or amended final determination  
4           in a proceeding, or not later than 90 days after the  
5           date on which the Register of Copyrights completes  
6           any process of reconsideration or review of the deter-  
7           mination, whichever occurs later, a party may seek  
8           a court order vacating, modifying, or correcting the  
9           determination of the Copyright Claims Board in the  
10          following cases:

11                   “(A) If the determination was issued as a  
12                   result of fraud, corruption, misrepresentation,  
13                   or other misconduct.

14                   “(B) If the Copyright Claims Board ex-  
15                   ceeded its authority or failed to render a final  
16                   determination concerning the subject matter at  
17                   issue.

18                   “(C) In the case of a default determination  
19                   or determination based on a failure to pros-  
20                   ecute, if it is established that the default or fail-  
21                   ure was due to excusable neglect.

22          “(2) PROCEDURE TO CHALLENGE.—

23                   “(A) NOTICE OF APPLICATION.—Notice of  
24                   the application to challenge a determination of  
25                   the Copyright Claims Board shall be provided

1 to all parties to the proceeding before the Copy-  
2 right Claims Board, in accordance with the pro-  
3 cedures applicable to service of a motion in the  
4 court where the application is made.

5 “(B) STAYING OF PROCEEDINGS.—For  
6 purposes of an application under this sub-  
7 section, any judge who is authorized to issue an  
8 order to stay the proceedings in an any other  
9 action brought in the same court may issue an  
10 order, to be served with the notice of applica-  
11 tion, staying proceedings to enforce the award  
12 while the challenge is pending.

13 **“§ 1509. Relationship to other district court actions**

14 “(a) STAY OF DISTRICT COURT PROCEEDINGS.—  
15 Subject to section 1507(b), a district court of the United  
16 States shall issue a stay of proceedings or such other relief  
17 as the court determines appropriate with respect to any  
18 claim brought before the court that is already the subject  
19 of a pending or active proceeding before the Copyright  
20 Claims Board.

21 “(b) ALTERNATIVE DISPUTE RESOLUTION PROC-  
22 ESS.—A proceeding before the Copyright Claims Board  
23 under this chapter shall qualify as an alternative dispute  
24 resolution process under section 651 of title 28 for pur-

1 poses of referral of eligible cases by district courts of the  
2 United States upon the consent of the parties.

3 **“§ 1510. Implementation by Copyright Office**

4 “(a) REGULATIONS.—

5 “(1) IMPLEMENTATION GENERALLY.—The Reg-  
6 ister of Copyrights shall establish regulations to  
7 carry out this chapter. Such regulations shall include  
8 the fees prescribed under subsections (e) and (x) of  
9 section 1506. The authority to issue such fees shall  
10 not limit the authority of the Register of Copyrights  
11 to establish fees for services under section 708. All  
12 fees received by the Copyright Office in connection  
13 with the activities under this chapter shall be depos-  
14 ited by the Register of Copyrights and credited to  
15 the appropriations for necessary expenses of the Of-  
16 fice in accordance with section 708(d). In estab-  
17 lishing regulations under this subsection, the Reg-  
18 ister of Copyrights shall provide for the efficient ad-  
19 ministration of the Copyright Claims Board, and for  
20 the ability of the Copyright Claims Board to timely  
21 complete proceedings instituted under this chapter,  
22 including by implementing mechanisms to prevent  
23 harassing or improper use of the Copyright Claims  
24 Board by any party.

25 “(2) LIMITS ON MONETARY RELIEF.—

1           “(A) IN GENERAL.—Subject to subpara-  
2 graph (B), not earlier than 3 years after the  
3 date on which Copyright Claims Board issues  
4 the first determination of the Copyright Claims  
5 Board, the Register of Copyrights may, in order  
6 to further the goals of the Copyright Claims  
7 Board, conduct a rulemaking to adjust the lim-  
8 its on monetary recovery or attorneys’ fees and  
9 costs that may be awarded under this chapter.

10           “(B) EFFECTIVE DATE OF ADJUST-  
11 MENT.—Any rule under subparagraph (A) that  
12 makes an adjustment shall take effect at the  
13 end of the 120-day period beginning on the  
14 date on which the Register of Copyrights sub-  
15 mits the rule to Congress and only if Congress  
16 does not, during that 120-day period, enact a  
17 law that provides in substance that Congress  
18 does not approve the rule.

19           “(b) NECESSARY FACILITIES.—Subject to applicable  
20 law, the Register of Copyrights may retain outside vendors  
21 to establish internet-based, teleconferencing, and other fa-  
22 cilities required to operate the Copyright Claims Board.

23           “(c) FEES.—Any filing fees, including the fee to com-  
24 mence a proceeding under section 1506(e), shall be pre-  
25 scribed in regulations established by the Register of Copy-

1 rights. The sum total of such filing fees shall be in an  
 2 amount of at least \$100, may not exceed the cost of filing  
 3 an action in a district court of the United States, and shall  
 4 be fixed in amounts that further the goals of the Copyright  
 5 Claims Board.

6 **“§ 1511. Funding**

7 “There are authorized to be appropriated such sums  
 8 as may be necessary to pay the costs incurred by the Copy-  
 9 right Office under this chapter that are not covered by  
 10 fees collected for services rendered under this chapter, in-  
 11 cluding the costs of establishing and maintaining the  
 12 Copyright Claims Board and its facilities.”.

13 (b) CLERICAL AMENDMENT.—The table of chapters  
 14 for title 17, United States Code, is amended by adding  
 15 after the item relating to chapter 14 the following:

“15. **Copyright Small Claims** ..... **1501”.**

16 **SEC. 3. IMPLEMENTATION.**

17 Not later 1 year after the date of enactment of this  
 18 Act, the Copyright Claims Board established under section  
 19 1502 of title 17, United States Code, as added by section  
 20 2 of this Act, shall begin operations.

21 **SEC. 4. STUDY.**

22 Not later than 3 years after the date on which Copy-  
 23 right Claims Board issues the first determination of the  
 24 Copyright Claims Board under chapter 15 of title 17,  
 25 United States Code, as added by section 2 of this Act,

1 the Register of Copyrights shall conduct, and report to  
2 Congress on, a study that addresses the following:

3           (1) The use and efficacy of the Copyright  
4           Claims Board in resolving copyright claims, includ-  
5           ing the number of proceedings the Copyright Claims  
6           Board could reasonably administer.

7           (2) Whether adjustments to the authority of the  
8           Copyright Claims Board are necessary or advisable,  
9           including with respect to—

10                   (A) eligible claims, such as claims under  
11                   section 1202 of title 17, United States Code;  
12                   and

13                   (B) works and applicable damages limita-  
14                   tions.

15           (3) Whether greater allowance should be made  
16           to permit awards of attorneys' fees and costs to pre-  
17           vailing parties, including potential limitations on  
18           such awards.

19           (4) Potential mechanisms to assist copyright  
20           owners with small claims in ascertaining the identity  
21           and location of unknown online infringers.

22           (5) Whether the Copyright Claims Board  
23           should be expanded to offer mediation or other non-  
24           binding alternative dispute resolution services to in-  
25           terested parties.

1           (6) Such other matters as the Register of Copy-  
2           rights believes may be pertinent concerning the  
3           Copyright Claims Board.

4 **SEC. 5. SEVERABILITY.**

5           If any provision of this Act, an amendment made by  
6 this Act, or the application of such provision or amend-  
7 ment to any person or circumstance is held to be unconsti-  
8 tutional, the remainder of this Act and the amendments  
9 made by this Act, and the application of the provision or  
10 the amendment to any other person or circumstance, shall  
11 not be affected.

          Passed the House of Representatives October 22,  
2019.

Attest:

CHERYL L. JOHNSON,

*Clerk.*





Calendar No. 266

116<sup>TH</sup> CONGRESS  
1<sup>ST</sup> Session

**H. R. 2426**

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**AN ACT**

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

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OCTOBER 23, 2019

Received; read twice and placed on the calendar



# **COPYRIGHT SMALL CLAIMS**

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A REPORT OF THE REGISTER OF COPYRIGHTS

SEPTEMBER 2013

## I. EXECUTIVE SUMMARY

It appears beyond dispute that under the current federal system small copyright claimants face formidable challenges in seeking to enforce the exclusive rights to which they are entitled. The Copyright Office therefore recommends that Congress consider the creation of an alternative forum that will enable copyright owners to pursue small infringement matters and related claims arising under the Copyright Act.

In light of the state court tradition of referring to claims of modest economic value as “small claims,” many have adopted that term to reference the nature of the claims that are the focus of this Report, as does the Report itself. Such claims, however, are not small to the individual creators who are deprived of income or opportunity due to the misuse of their works, and the problem of addressing lower-value infringements is not a small one for our copyright system.

But how would we structure an alternative process? Concerns of pragmatism and efficiency are core considerations, but they are not the only ones, and they must be viewed in the larger context of federal powers. Our Constitution protects both the role of the federal judiciary and the rights of those who participate in adjudicatory proceedings. These principles are enshrined in Article III and the Fifth and Seventh Amendments, and in judicial interpretations of these and other constitutional provisions. Any alternative process must fit comfortably within the constitutional parameters.

In light of the existing constitutional landscape, the challenges of the current system, and the views and insights of those who participated in this study, it appears that the most promising option to address small copyright claims would be a streamlined adjudication process in which parties would participate by consent. Perhaps not surprisingly, a number of the commenting parties viewed the Copyright Office as the logical and appropriate home for such a small claims system.

In recent years, many have emphasized the potential of voluntary solutions to certain problems of copyright enforcement.<sup>11</sup> In this case, a voluntary approach necessarily will fall short of a full-fledged judicial process, offering the complete panoply of copyright remedies, to which small copyright claimants could turn reliably and affordably to pursue infringers. Such a process is what our legal system would provide in an ideal world. But in the real world of constitutional and institutional limitations, a voluntary system with strong incentives for participation on both sides seems more attainable, at least in the near term. Importantly, such a voluntary approach would retain a mandatory backstop; parties who declined to consent to the alternative small

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<sup>11</sup> See *The Role of Voluntary Agreements in the U.S. Intellectual Property System Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (discussing various voluntary initiatives to combat copyright infringement); Center for Copyright Information, *The Copyright Alert System*, <http://www.copyrightinformation.org/the-copyright-alert-system/> (click on embedded video) (explaining recently implemented U.S. Copyright Alert System, a voluntary system established by content owners and internet service providers (“ISPs”) by which consumers are warned against infringing conduct through participating ISPs); see also THE DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY App. A at 102-03 (July 2013) (noting Task Force’s desire to support development of voluntary enforcement initiatives).

claims proceeding could still be summoned to federal district court by a claimant who was able to take that path.

In brief summary, the Report makes the following recommendations:

- Congress should create a centralized tribunal within the Copyright Office, which would administer proceedings through online and teleconferencing facilities without the requirement of personal appearances. The tribunal would be staffed by three adjudicators, two of whom would have significant experience in copyright law – together having represented or presided over the interests of both owners and users of copyrighted works – with the third to have a background in alternative dispute resolution.
- The tribunal would be a voluntary alternative to federal court. Its focus would be on small infringement cases valued at no more than \$30,000 in damages. Copyright owners would be required to have registered their works or filed an application before bringing an action. They would be eligible to recover either actual or statutory damages up to the \$30,000 cap, but statutory damages would be limited to \$15,000 per work (or \$7,500 for a work not registered by the normally applicable deadline for statutory damages).
- Claimants who initiated a proceeding would provide notice of the claim to responding parties, who would need to agree to the process, either through an opt-out mechanism or by affirmative written consent. Respondents would be permitted to assert all relevant defenses, including fair use, as well as limited counterclaims arising from the infringing conduct at issue. Certain DMCA-related matters relating to takedown notices, including claims of misrepresentation, could also be considered, and parties threatened with an infringement action could seek a declaration of noninfringement.
- Parties would provide written submissions and hearings would be conducted through telecommunications facilities. Proceedings would be streamlined, with limited discovery and no formal motion practice. A responding party's agreement to cease infringing activity could be considered by the tribunal and reflected in its determination. The tribunal would retain the discretion to dismiss without prejudice any claim that it did not believe could fairly be adjudicated through the small claims process.
- Determinations of the small claims tribunal would be binding only with respect to the parties and claims at issue and would have no precedential effect. They would be subject to limited administrative review for error and could be challenged in federal district court for fraud, misconduct, or other improprieties. Final determinations could be filed in federal court, if necessary, to ensure their enforceability.

## II. STUDY HISTORY

Congress identified the problem of small copyright claims in 2006 as an outgrowth of its consideration of orphan works.<sup>12</sup> As Congress considered potential solutions to the problem of orphan works, it became clear that certain claims for copyright infringement – in particular, those involving lesser amounts of damages – could not practically be pursued within the existing federal court structure. Recognizing that this concern was not limited to orphan works, in March 2006, the House of Representatives’ Subcommittee on Courts, the Internet, and Intellectual Property held a separate hearing on the question of small copyright claims.<sup>13</sup> The hearing focused on possible alternative dispute resolution systems such as a copyright “small claims court.”<sup>14</sup> At the hearing, witnesses, including representatives of authors, musicians, illustrators, photographers, and graphic artists, testified about the challenges of the current system and the inability to address smaller infringement matters. The Copyright Office submitted a statement to the Subcommittee in which it also observed these difficulties and suggested possible avenues to be considered.<sup>15</sup>

In October 2011, the House Judiciary Committee revisited the question of small copyright claims, requesting that the Copyright Office conduct a study to evaluate the issue.<sup>16</sup> In a letter to the Register, then-Chairman Lamar Smith asked the Office to review “the extent to which authors and other copyright owners are effectively prevented from seeking relief from infringement due to constraints in the current system.”<sup>17</sup> Additionally, the Office was tasked to “furnish specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution.”<sup>18</sup>

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<sup>12</sup> “Orphan works” is a term used to describe the situation where the owner of a copyrighted work cannot be identified or located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf> (“Orphan Works Report”).

<sup>13</sup> See *Remedies for Small Copyright Claims, Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26767/pdf/CHRG-109hhrg26767.pdf> (“2006 Hearing”). The statement submitted by Register of Copyrights Marybeth Peters on behalf of the Copyright Office is attached as Appendix A.

<sup>14</sup> 2006 Hearing at 2.

<sup>15</sup> *Id.* at 45 (statement of the United States Copyright Office). The Office also identified “small claims” challenges in its Orphan Works Report, and proposed orphan works legislation in 2006 and 2008 included provisions that specifically directed the Copyright Office to conduct a study addressing remedies for small claims. See Orphan Works Report at 114; Shawn Bentley Orphan Works Act of 2008, S. 2913, § 5, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, § 6, 110th Cong. (2008); Orphan Works Act of 2006, H.R. 5439, § 4, 109th Cong. (2006).

<sup>16</sup> See Smith Letter.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

In response to the October 2011 request, the Office published an initial Notice of Inquiry in the Federal Register (“First Notice of Inquiry”).<sup>19</sup> There, the Office requested public comment on how copyright owners have handled small copyright claims and the obstacles they have encountered, as well as potential alternatives to the current legal system that might better accommodate such claims. The Office received fifty-five substantive responses to its notice from a broad spectrum of interested parties, including industry associations, public interest groups, technology companies, publisher representatives, legal scholars, and individual creators.<sup>20</sup> Commenting parties expressed frustration with the inaccessibility of the current system, as well as concern over defendants’ rights in any alternative system.

In May 2012, the Copyright Office, along with the U.S. Patent and Trademark Office (“PTO”), participated in a roundtable event sponsored by the George Washington University School of Law regarding small claims.<sup>21</sup> There, legal scholars and other interested parties helped to frame the issues and debated the merits of potential small claims solutions in both the copyright and patent contexts. The PTO, which is conducting its own inquiry into the area of patent small claims, has been supportive of the Copyright Office study and followed it with close interest.

The Office published a second Notice of Inquiry in August 2012 (“Second Notice of Inquiry”).<sup>22</sup> This additional notice focused on potential alternatives to federal court litigation and identified a host of issues raised by commenting parties and the Office’s own research. The Second Notice of Inquiry asked for public comment on the nature of an alternative tribunal or process, qualifications of the adjudicators, discovery parameters, available relief, treatment of frivolous claims, appeal mechanisms, and constitutional concerns, among other topics. The Office received twenty-five additional comments addressed to these issues, which provided helpful guidance as the Office continued to contemplate alternatives to federal court litigation.<sup>23</sup>

In November 2012, the Office held two two-day public hearings regarding the copyright small claims issue at Columbia Law School in New York City and UCLA School of Law in Los Angeles. Each hearing was divided into seven panels addressed to the following broad topics: forum, jurisdiction, and decisionmakers; subject matter, claims, and defenses; practice and procedure; litigation alternatives; relief and appeals; constitutional issues; and moving forward (which included empirical data, funding considerations, and future assessments). At each

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<sup>19</sup> Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758 (Oct. 27, 2011). This Notice of Inquiry is attached, along with the Office’s two additional Federal Register notices, as Appendix B.

<sup>20</sup> These comments are posted on the Office’s website at <http://www.copyright.gov/docs/smallclaims/comments/>. Additionally, lists of the parties who responded to each of the Office’s Notices of Inquiry, as well as the participants in the Office’s public hearings, can be found in Appendix C.

<sup>21</sup> See The George Washington University Law School, *Event Videos*, <http://www.law.gwu.edu/Academics/FocusAreas/IP/Pages/Videos.aspx> (hyperlinks for videos of the proceedings are under the heading “The IP Small Claims Roundtable, May 20, 2012”).

<sup>22</sup> Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51,068 (Aug. 23, 2012) (included in Appendix B).

<sup>23</sup> These comments are posted on the Office’s website at [http://www.copyright.gov/docs/smallclaims/comments/noi\\_10112012/index.html](http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/index.html). A list of parties who responded to the Second Notice of Inquiry is included in Appendix C.

hearing, participants representing a range of views and interests participated in lively discussions regarding potential alternative systems.<sup>24</sup>

Finally, the Office published a third Notice of Inquiry in February 2013 (“Third Notice of Inquiry”)<sup>25</sup> which requested additional comments on some of the subjects raised in earlier comments and at the hearings. This Notice focused on whether an alternative system should be voluntary or mandatory, the types of copyrighted works that should be covered, the types of claims that would be appropriate, whether injunctive relief should be available, the role of attorneys, the enforceability of judgments, and other pertinent issues. The Office received twenty-seven further comments, again representing a wide variety of viewpoints, on these subjects.<sup>26</sup>

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<sup>24</sup> Transcripts of the hearings are available on the Office’s website at <http://www.copyright.gov/docs/smallclaims/transcripts/>. A list of participants in the public hearings is included in Appendix C.

<sup>25</sup> Remedies for Small Copyright Claims: Third Request for Comments, 78 Fed. Reg. 13,094 (Feb. 26, 2013) (included in Appendix B).

<sup>26</sup> These comments are posted on the Office’s website at [http://www.copyright.gov/docs/smallclaims/comments/noi\\_02263013/](http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/). A list of parties who responded to the Third Notice of Inquiry is included in Appendix C.



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Attorneys for Defendant  
GOOGLE INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,  
  
Plaintiff,  
  
v.  
  
GOOGLE INC.,  
  
Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE'S RESPONSE TO ORDER TO  
SUPPLEMENT**

Dept.: Courtroom 8, 19<sup>th</sup> Floor  
Judge: Hon. William Alsup

**SUPPLEMENTAL DISCLOSURE**

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In response to the Court’s August 20, 2012 Order to Supplement (Dkt. 1238), Google again states that neither it nor its counsel has paid an author, journalist, commentator or blogger to report or comment on any issues in this case. Pursuant to the Court’s clarifications in the Order to Supplement, the required disclosure does not include advertising revenue, disclosed experts, or gifts to universities. *Id.* at 1-2. It does, however, include (a) “all commenters known by Google to have received payments as consultants, contractors, vendors, or employees”; and (b) employee-commenters at organizations who receive money from Google. *Id.* With that in mind, Google provides the following supplemental disclosure.

As Google indicated in its initial Response (Dkt. 1237) Google supports a wide range of individuals and organizations, many of whom regularly comment on issues relevant to technology, often taking positions adverse to Google. *See, e.g.*, <http://www.google.com/publicpolicy/transparency.html>. Google has conducted a reasonable and diligent search, and has identified specific individuals and organizations in this supplemental disclosure who have commented on the issues in this case. Google did not pay for comments from any of the commenters listed in this disclosure. Nor did Google cite or rely on any of these commenters in its briefing in this case.<sup>1</sup>

**I. CONSULTANTS, CONTRACTORS, VENDORS, OR EMPLOYEES.**

Besides the specific individuals listed below, Google is not aware of any other consultants, contractors, vendors, or employees having commented on the litigation. Google did not pay for comments from any of these commenters.

**A. William Patry**

William Patry is currently a Google employee, and was a Google employee during the pendency of the lawsuit. In 1996, well over a decade before this lawsuit was filed, Mr. Patry authored an article entitled *Copyright and Computer Programs: It’s All in the Definition*, 14

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<sup>1</sup> Google referenced Jonathan Band’s book, *Interfaces on Trial 2.0* (MIT Press 2011), in its April 3, 2012 Copyright Liability Trial Brief. As explained in Section II.B., below, Mr. Band’s book is not a “comment” on this case—it was accepted for publication before Oracle filed this lawsuit.

1 Cardozo Arts & Ent. L.J. 1. Oracle cited Mr. Patry's article in its April 3, 2012 Brief Regarding  
2 Copyright Issues (Dkt. 853).

3 **B. Timothy Bray**

4 Tim Bray is currently a Google employee, and was a Google employee during the  
5 pendency of the lawsuit. On August 12, 2010, Mr. Bray wrote a post on his personal Twitter  
6 account in response to Oracle's filing of the lawsuit. *See* Ex. A (available at  
7 <https://twitter.com/timbray/status/21023407881>). In that post Mr. Bray noted that he was  
8 speaking only for himself as an individual. *Id.*

9 **C. Bruce Perens**

10 Bruce Perens served as a consulting expert related to the lawsuit for Google. Mr. Perens  
11 commented on the lawsuit during its pendency, but before being engaged by Google. *See* Ex. B  
12 ("Oracle Sues Google For Infringing Java Patents," available at  
13 <http://web.archive.org/web/20110104025930/http://perens.com/blog/d/2010/8/13/32/>); Ex. C  
14 ("Oracle v. Google Java Lawsuit - Rationale Becoming More Clear," available at  
15 <http://web.archive.org/web/20110104031315/http://perens.com/blog/d/2010/8/13/33/>); *see also*  
16 (<http://news.slashdot.org/story/10/08/13/0255205/oracle-sues-google-for-infringing-java-patents>).

17 **D. Prof. Mark Lemley**

18 Professor Mark Lemley serves as outside counsel to Google in unrelated cases, as does the  
19 law firm at which he is a partner: Durie Tangri.<sup>2</sup>

20 Prof. Lemley provided commentary for press reports related to the lawsuit. For example,  
21 Prof. Lemley was quoted in a San Francisco Chronicle article by James Temple dated April 25,  
22 2012. *See* Ex. D (available at [http://www.sfgate.com/business/article/Oracle-Google-case-shows-](http://www.sfgate.com/business/article/Oracle-Google-case-shows-patent-system-flaws-3507618.php)  
23 [patent-system-flaws-3507618.php](http://www.sfgate.com/business/article/Oracle-Google-case-shows-patent-system-flaws-3507618.php)). Prof. Lemley was also quoted in a May 7, 2012 article by  
24 Brendan Bailey in the Mercury News. *See* Ex. E (available at  
25 [http://www.mercurynews.com/business/ci\\_20566834/google-oracle-trial-verdict-ruling-](http://www.mercurynews.com/business/ci_20566834/google-oracle-trial-verdict-ruling-)  
26

27 <sup>2</sup> Google does not interpret the Court's initial Order nor the Order to Supplement as requiring a  
28 response regarding Google's counsel in the litigation.

1 [copyright-jury-mistrial?IADID=Search-www.mercurynews.com-www.mercurynews.com](http://www.mercurynews.com/copyright-jury-mistrial?IADID=Search-www.mercurynews.com-www.mercurynews.com)). And  
2 Prof. Lemley provided commentary regarding the lawsuit for a May 7, 2012 KQED report by Cy  
3 Musiker. *See* Ex. F (text available at  
4 [http://www.kqed.org/news/story/2012/05/07/93195/mixed\\_ruling\\_in\\_oracle\\_google\\_infringemen](http://www.kqed.org/news/story/2012/05/07/93195/mixed_ruling_in_oracle_google_infringemen)  
5 [t\\_case?category=bay+area](http://www.kqed.org/news/story/2012/05/07/93195/mixed_ruling_in_oracle_google_infringement_case?category=bay+area)).

6 Prof. Lemley also provided commentary via his personal Twitter account. For example,  
7 on May 7, 2012, Prof. Lemley posted a comment regarding the copyright verdict. *See* Ex. G  
8 (available at <https://twitter.com/marklemley/statuses/199605924862771200>). On May 23, 2012,  
9 Prof. Lemley also re-tweeted another Twitter post related to an interview with the foreperson for  
10 the jury in this lawsuit. *See* Ex. H (available at  
11 <https://twitter.com/marklemley/statuses/205429756366307331>)

#### 12 **E. James Gosling**

13 James Gosling left Oracle America, Inc. in April 2010, before the filing of the lawsuit.  
14 Mr. Gosling was employed by Google from March 2011 to August 2011. Mr. Gosling maintains  
15 a personal blog: <http://nighthacks.com/roller/jag/>. Google is not aware of Mr. Gosling blogging  
16 about the lawsuit during his employment at Google. Out of an abundance of caution, because Mr.  
17 Gosling was at one time paid by Google (as a Google employee), Google notes that Mr. Gosling  
18 did blog about the lawsuit before he was employed by Google, *see, e.g.*, Ex. I  
19 ([http://nighthacks.com/roller/jag/entry/the\\_shit\\_finally\\_hits\\_the](http://nighthacks.com/roller/jag/entry/the_shit_finally_hits_the)). Mr. Gosling also blogged about  
20 the lawsuit after his employment with Google ended. Specifically, during trial, Mr. Gosling  
21 wrote a blog post about the case. *See* Ex. J (available at  
22 [http://nighthacks.com/roller/jag/entry/my\\_attitude\\_on\\_oracle\\_v](http://nighthacks.com/roller/jag/entry/my_attitude_on_oracle_v)). And Mr. Gosling also  
23 commented about the outcome of the trial. *See* Ex. K (available at  
24 [http://nighthacks.com/roller/jag/entry/ovg\\_it\\_s\\_finally\\_almost](http://nighthacks.com/roller/jag/entry/ovg_it_s_finally_almost)). Google does not know whether  
25 and to what extent Mr. Gosling may have been receiving compensation from Oracle during the  
26 pendency of the lawsuit under the terms of any agreement between Mr. Gosling and Oracle.  
27  
28

**F. Timothy B. Lee**

1 Timothy Lee is a former engineering intern at Google. He left Google in late August  
2 2010, shortly after Oracle filed the lawsuit. Mr. Lee has been writing for the website Ars  
3 Technica since late 2010, and began writing about this lawsuit in 2011. At that time he was no  
4 longer employed (or being paid) by Google. Mr. Lee's articles about this lawsuit include recent  
5 articles about the Court's orders seeking disclosure of the parties' relations with commentators.  
6 *See* Ex. L ("Judge: Google didn't follow 'show your skills' order," Aug. 20, 2012, available at  
7 <http://arstechnica.com/tech-policy/2012/08/judge-google-didnt-follow-show-your-shills-order/>);  
8 Ex. M ("Oracle, Google still bickering over paid shills long after trial," Aug. 17, 2012, available  
9 at <http://arstechnica.com/tech-policy/2012/08/shill-count-oracle-1-google-0/>); Ex. N ("With anti-  
10 shill order, Google/Oracle judge enters 'uncharted territory,'" Aug. 7, 2012, available at  
11 [http://arstechnica.com/tech-policy/2012/08/with-anti-shill-order-googleoracle-judge-enters-  
12 uncharted-territory/](http://arstechnica.com/tech-policy/2012/08/with-anti-shill-order-googleoracle-judge-enters-uncharted-territory/)); and Ex. O ("Name your shills,' judge orders Oracle, Google," Aug. 7,  
13 2012, available at [http://arstechnica.com/tech-policy/2012/08/name-your-shills-judge-orders-  
14 oracle-google/](http://arstechnica.com/tech-policy/2012/08/name-your-shills-judge-orders-oracle-google/)). Mr. Lee's articles about the lawsuit also include commentary regarding the  
15 Court's requests for further briefing regarding copyrightability issues. *See* Ex. P ("Oracle v.  
16 Google judge asks for comment on EU court ruling," May 3, 2012, available at  
17 [http://arstechnica.com/tech-policy/2012/05/oracle-google-judge-asks-for-comment-on-eu-court-  
18 ruling/](http://arstechnica.com/tech-policy/2012/05/oracle-google-judge-asks-for-comment-on-eu-court-ruling/)).

19  
20 Mr. Lee has also published posts via his personal Twitter account. For example, on  
21 August 7, 2012, Mr. Lee re-tweeted a post linking to his Ars Technica article "'Name your shills,'  
22 judge orders Oracle, Google." *See* Ex. Q (available at  
23 <https://twitter.com/arstechnica/status/232927734421143552>). Subsequently, Mr. Lee posted that  
24 he might be on Google's list of disclosed persons because he finished his internship for Google  
25 shortly after Oracle filed this lawsuit. *See* Ex. R (available at  
26 <https://twitter.com/binarybits/status/232936371529060352>). In a separate post on Twitter that  
27 same day Mr. Lee noted that, while he had received some money from Google while in graduate  
28 school, he had received no money from Google since becoming a full-time journalist. *See* Ex. S

1 (available at <https://twitter.com/binarybits/status/233008099500380160>). On August 17, 2012,  
2 Mr. Lee also re-tweeted a Twitter post authored by Paul Alan Levy. *See* Ex. T (available at  
3 <https://twitter.com/paulalanlevy/status/238020508682174464>). On August 8, 2012, Mr. Lee  
4 posted a message on Twitter that quoted from a Twitter post by Mr. Levy. *See* Ex. U (available at  
5 <https://twitter.com/binarybits/status/233332071257501696>).

## 6 **II. EMPLOYEE-COMMENTERS AT ORGANIZATIONS WHO RECEIVE MONEY** 7 **FROM GOOGLE**

8 Besides the specific individuals listed below, Google is not aware of any other employee-  
9 commenters having commented on the litigation. Google did not pay for comments from any of  
10 these commenters.

### 11 **A. Computer and Communications Industry Association**

12 Oracle's falsely suggests that Ed Black of the Computer and Communications Industry  
13 Association ("CCIA") was acting under the influence of Google money when he wrote a column  
14 stating the position that APIs are not copyrightable. Oracle and its counsel had to have known  
15 that CCIA's position on APIs pre-dated Google's membership in CCIA—and in fact predated  
16 Google's incorporation in 1998.

17 Mr. Black has publicly stated that Google did not ask him to write in support of its  
18 position, and that CCIA's position that APIs are not copyrightable "goes back to the 1990s." *See*  
19 Ex. V ("Google: No Paid Bloggers Here, Your Honor," Aug. 17, 2012, available at  
20 <http://allthingsd.com/20120817/google-no-paid-bloggers-here-your-honor/?mod=googlenews>).

21 In fact, in December 1995, CCIA, with Mr. Black on brief, joined an amicus brief filed by the  
22 American Committee for Interoperable Systems ("ACIS") in the Supreme Court case *Lotus v.*  
23 *Borland*, arguing that interface specifications are not copyrightable. Ex. W (amicus brief cover  
24 page). The counsel of record on that brief was Peter M.C. Choy, who at the time was a Deputy  
25 General Counsel for Sun Microsystems. *Id.* Mr. Choy was also chairman of the ACIS. Ex. W-1  
26 (November 5, 1992 letter from Sun). Sun was an ACIS member and "play[ed] a leading role" in  
27 the organization. *Id.* at 1. ACIS's Statement of Principles, as attached to the November 5, 1992  
28 letter, stated: "The rules or specifications according to which data must be organized in order to

1 communicate with another program or computer, i.e., interfaces and access protocols, are not  
2 protectable expression under copyright law.” *Id.* at 4. Oracle too was an ACIS member. *Id.* at 5;  
3 *see also* Ex. V (All Things Digital article dated Aug. 17, 2012). Professor Paul Goldstein, who  
4 was also on the ACIS amicus brief, was then, as he is now, of counsel at Morrison & Foerster.<sup>3</sup>  
5 Ex. W (amicus brief cover page).

6 The CCIA has commissioned studies by Mike Masnick, CEO of Floor64. *See*  
7 <http://www.floor64.com/about.php>. Mr. Masnick has commented on the case on the TechDirt  
8 website and on his personal friendfeed.com account. *See* Ex. X (available at  
9 [http://www.techdirt.com/articles/20120523/11050519050/boom-jury-says-no-patent-](http://www.techdirt.com/articles/20120523/11050519050/boom-jury-says-no-patent-infringement-google-oracle-case.shtml)  
10 [infringement-google-oracle-case.shtml](http://www.techdirt.com/articles/20120523/11050519050/boom-jury-says-no-patent-infringement-google-oracle-case.shtml) and at [http://friendfeed.com/mmasnick/a3a94012/jury-](http://friendfeed.com/mmasnick/a3a94012/jury-google-did-not-infringe-on-oracle-patents)  
11 [google-did-not-infringe-on-oracle-patents](http://friendfeed.com/mmasnick/a3a94012/jury-google-did-not-infringe-on-oracle-patents)).

## 12 **B. Jonathan Band**

13 Likewise, Oracle falsely suggests that Jonathan Band’s book *Interfaces on Trial 2.0* was  
14 influenced by Google money. Here, too, Oracle and its counsel had to have known that its  
15 accusations were off base.

16 Mr. Band has publicly stated that *Interfaces on Trial 2.0* was accepted for publication in  
17 2009—before Oracle acquired Sun Microsystems, and before the complaint in the case at bar was  
18 filed. Ex. V (All Things Digital article dated Aug. 17, 2012). Moreover, much of the book was  
19 based on even older articles, in some cases with other Morrison & Foerster lawyers as co-authors.  
20 *Id.*; *see also* *Interfaces on Trial 2.0* at 50 n.100 (subsection based on 1996 article by Mr. Band  
21 and Noah Levine, then a Morrison & Foerster summer associate); *id.* at 64 n.144 (subsection  
22 based on 1999 article by Mr. Band and Taro Isshiki, then a Morrison & Foerster associate); *see*  
23 *also id.* at 22 n.3, 34 n.46, 37 n.50 56 n.117 & 60 n.132 (subsections based on 1995, 1996, 2000  
24 and 2006 articles by Mr. Band).

25 In addition, as the title suggests and as is confirmed in the introduction, *Interfaces on Trial*  
26 *2.0* is a follow-up to a previous book by Mr. Band and his co-author. The prior book, *Interfaces*  
27

28 <sup>3</sup> The brief lists Professor Goldstein’s affiliation with Stanford Law School.

1 on *Trial: Intellectual Property and Interoperability in the Global Software Industry*, was  
 2 published in 1995, years before the case at bar was filed. In the acknowledgements to that book,  
 3 the authors thank, among others, Oracle’s lead counsel Michael Jacobs, as well as then Sun  
 4 Microsystems Deputy General Counsel Peter Choy, and Professor Goldstein. *See Interfaces on*  
 5 *Trial: Intellectual Property and Interoperability in the Global Software Industry* at xiii. At the  
 6 time, Mr. Band was a Morrison & Foerster partner. *Id.* at 361.<sup>4</sup>

### 7 C. Electronic Frontier Foundation

8 The Electronic Frontier Foundation (“EFF”) is a non-profit organization whose mission is  
 9 to “defend[] free speech, privacy, innovation, and consumer rights,” *see*  
 10 <https://www.eff.org/about>, with long-standing public views on the importance of interoperability.  
 11 *See, e.g.,* <https://www.eff.org/cases/blizzard-v-bnetd>. Google has contributed to the EFF for  
 12 years before the complaint in the case at bar was filed.

13 Michael Barclay, now a volunteer fellow for the Electronic Frontier Foundation,  
 14 commented on the case on his blog, IP Duck.<sup>5</sup> *See* Ex. Y (available at  
 15 <http://ipduck.blogspot.com/2012/05/judge-alsup-rules-that-java-apis-are.html>); Ex. Z (available at  
 16 <http://ipduck.blogspot.com/2012/05/phase-one-verdict-in-oracle-v-google.html>). Mr. Barclay’s  
 17 interest in the copyrightability of software interfaces, however, long predates his association with  
 18 EFF, and in fact predates Google’s existence—Mr. Barclay represented Borland in *Lotus v.*  
 19 *Borland*. Ex. AA (Borland’s Supreme Court merits brief).

20 Julie Samuels is a Staff Attorney at the EFF focusing on intellectual property issues. *See*  
 21 <https://www.eff.org/about/staff/julie-samuels>. In that capacity, Ms. Samuels frequently  
 22 comments on intellectual property cases of note, including this case. *See* Ex. BB (“No  
 23 Copyrights on APIs: Judge Defends Interoperability and Innovation,” May 31, 2012, available at  
 24 [https://www.eff.org/deeplinks/2012/05/no-copyrights-apis-judge-defends-interoperability-and-](https://www.eff.org/deeplinks/2012/05/no-copyrights-apis-judge-defends-interoperability-and-innovation)  
 25 [innovation](https://www.eff.org/deeplinks/2012/05/no-copyrights-apis-judge-defends-interoperability-and-innovation)); Ex. CC (“Oracle v. Google and the Dangerous Implications of Treating APIs as

26 \_\_\_\_\_  
 27 <sup>4</sup> His co-author worked for Fujitsu.

28 <sup>5</sup> Mr. Barclay, before retiring, was a partner at Wilson Sonsini Goodrich & Rosati, which represents Google in various matters, but not the case at bar.



1 Copyrightable,” May 7, 2012, available at [https://www.eff.org/deeplinks/2012/05/oracle-v-](https://www.eff.org/deeplinks/2012/05/oracle-v-google-and-dangerous-implications-treating-apis-copyrightable)  
2 [google-and-dangerous-implications-treating-apis-copyrightable](https://www.eff.org/deeplinks/2012/05/oracle-v-google-and-dangerous-implications-treating-apis-copyrightable)); Ex. DD (“Oracle v. Google  
3 Shows the Folly of U.S. Software Patent Law,” April 23, 2012, available at  
4 <http://www.wired.com/wiredenterprise/2012/04/opinion-samuels-google-oracle/>); Ex. EE (“Could  
5 an Oracle Win Against Google Blow Up the Cloud?,” May 7, 2012, available at  
6 [http://www.wired.com/wiredenterprise/2012/05/oracle\\_clou/](http://www.wired.com/wiredenterprise/2012/05/oracle_clou/)); Ex. FF (“What’s at stake in Oracle  
7 v. Google?,” May 11, 2012, available at  
8 [http://www.computerworld.com.au/article/424370/what\\_stake\\_oracle\\_v\\_google\\_/#closeme](http://www.computerworld.com.au/article/424370/what_stake_oracle_v_google_/#closeme)); Ex.  
9 GG (“Legal experts decipher Oracle-Google Verdict,” May 7, 2012, available at  
10 [http://news.cnet.com/8301-1001\\_3-57429590-92/legal-experts-decipher-oracle-google-verdict/](http://news.cnet.com/8301-1001_3-57429590-92/legal-experts-decipher-oracle-google-verdict/));  
11 Ex. HH (“Google Beats Oracle Patent Claim,” May 23, 2012, available at  
12 [http://www.informationweek.com/software/operating-systems/google-beats-oracle-patent-](http://www.informationweek.com/software/operating-systems/google-beats-oracle-patent-claim/240000926)  
13 [claim/240000926](http://www.informationweek.com/software/operating-systems/google-beats-oracle-patent-claim/240000926)).

#### 14 **D. Public Knowledge**

15 Public Knowledge is a non-profit organization whose mission is to “preserv[e] the  
16 openness of the Internet and the public’s access to knowledge; promot[e] creativity through  
17 balanced copyright; and uphol[d] and protect[t] the rights of consumers to use innovative  
18 technology lawfully.” See <http://www.publicknowledge.org/about>. Google has contributed to  
19 Public Knowledge for years before the complaint in the case at bar was filed. Public Knowledge  
20 has commented on the case. See Ex. II (available at  
21 <http://www.publicknowledge.org/blog/copyright-compatibility>); Ex. JJ (available at  
22 <http://www.publicknowledge.org/blog/gpl-does-not-depend-copyrightability-apis>).

#### 23 **E. Center for Democracy and Technology**

24 Jon Miller is at the Center for Democracy and Technology (“CDT”) as a 2012 Google  
25 Public Policy Fellow. His fellowship focuses on digital copyright, government surveillance, and  
26 cybersecurity policy. On June 13, 2012, Mr. Miller authored a blog post on the CDT website  
27 commenting on the outcome of the lawsuit. See Ex. KK (“Oracle v. Google: A Win for Software  
28

1 Everywhere,” available at [https://www.cdt.org/blogs/cdt/1306oracle-v-google-win-software-](https://www.cdt.org/blogs/cdt/1306oracle-v-google-win-software-everywhere)  
2 [everywhere](https://www.cdt.org/blogs/cdt/1306oracle-v-google-win-software-everywhere)). Google is not aware of any other posts or commentary by Mr. Miller.

3 **F. Lauren Weinstein at Vortex Technology**

4 Lauren Weinstein is affiliated with Vortex Technology, an organization that has  
5 conducted research for Google. Mr. Weinstein has commented on the case on his personal  
6 Google+ feed. *See, e.g.*, Ex. LL (available at  
7 <https://plus.google.com/s/Lauren%20weinstein%20%26%20google%20%26%20oracle>).

8 **G. Competitive Enterprise Institute**

9 Competitive Enterprise Institute (“CEI”) is “a non-profit public policy organization  
10 dedicated to advancing the principles of limited government, free enterprise, and individual  
11 liberty.” *See* <http://cei.org/about-cei>. Google has contributed to CEI for years before the  
12 complaint in the case at bar was filed. CEI has commented about the case. *See* Ex. MM  
13 (available at <http://cei.org/citations/apple-samsung-chiefs-pick-their-marbles-and-go-home>).

14  
15  
16 Dated: August 24, 2012

KEKER & VAN NEST LLP

17 By: /s/ Robert A. Van Nest  
18 ROBERT A. VAN NEST

19 Attorneys for Defendant  
20 GOOGLE INC.