February 16, 2017

Honorable Robert W. Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

This letter is sent on behalf of the Section of Intellectual Property Law of the American Bar Association (the “Section”) to express its views on the House Judiciary Committee’s Reform of the U.S. Copyright Office policy proposal (the “Proposal”). These views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be considered as representing the position of the Association.

As you will recall, the Section’s then-Chair Lisa Dunner appeared before the Committee in February 2015 to discuss the U.S. Copyright Office. The Section has had several opportunities over the past two years to supplement her testimony, including in a letter in July 2015, meetings with the House Judiciary Committee’s staff in October 2015, and an additional letter in February 2016.

In the past two years, the Section’s position has remained constant with regard to the Copyright Office: the future success of the copyright system is contingent on the substantial improvement of the Office’s systems and services to effectuate fully electronic registration and recordation of works, enhanced security for electronic copyright deposits, and comprehensive, integrated publicly accessible databases. In addition, the Section believes the Office must have adequate resources and authority to implement these changes and others necessary to support the vital communities that the Office serves, including (1) rule-making authority; (2) its own IT system to serve the needs of the Office and the public for speed and flexibility; and (3) a budget to support modernization, as well as a budget process that allows the Office to make its own budget requests and carry over funds for capital expenditures from year to year.
When Ms. Dunner testified before the Committee, the Section’s written comments addressed the Copyright Office’s need for autonomy from the Library of Congress due to the foregoing essentials to a 21st Century Copyright Office, as well as the potential conflict of interest in having one of the Office’s stakeholders (the Library of Congress) review the Office’s studies, rulemakings, and recommendations. The Librarian of Congress’s abrupt removal of the Register of Copyrights put this issue into sharp relief. This unprecedented development highlights the need for renewed congressional oversight of the Copyright Office and, more importantly, demonstrates the need for autonomy from the Library. The Office needs sufficient independence to balance the interests of multiple stakeholders, including the Library of Congress, and to competently advise both the President and Congress on matters that concern both creators of original works of authorship and users of the services provided by the Office. The next Register of Copyrights should be a lawyer with substantial experience and expertise in domestic and international copyright law, significant familiarity with the operations of the Copyright Office, appropriate management skills to oversee and direct the operations of the Office, and sufficient knowledge to represent U.S. copyright interests domestically and abroad.

It is for these reasons that the Section applauds Chairman Goodlatte for listing among the top priorities in his agenda for the Committee for 115th Congress “granting the Copyright Office autonomy and requiring it to maintain an up-to-date digital, searchable database of all copyrighted works.”

With regard to the Register of Copyrights and the Copyright Office’s structure, whether the Office remains in the Legislative Branch or otherwise, the Section recommends that the Office be given autonomy as an independent agency with its head nominated by the President with the advice and consent of the Senate. As an independent agency, the Office would be able to manage its own budget (and prepare its own budget requests), make its own determinations about where funds are most needed to improve the Office’s functions and services, and obtain the IT support that is essential to its modernization. In making this change, the Section trusts that the House and Senate Judiciary Committees will continue to serve their historical and essential roles in providing oversight for the Office and receiving frank, unfiltered advice on the state of the copyright system.¹

With regard to Copyright Office Advisory Committees, the Section strongly believes that those stakeholders that routinely interface with the Copyright Office’s services should assist in providing advice and oversight to the Office. In creating such Committees, the Section believes that practitioners will be particularly valuable as it is the Section’s members and other similarly situated practitioners that most routinely engage in registration and recordation, using the Office’s systems, and interfacing with its staff. The Committees will be most useful if their role is focused on advising the Copyright Office on its administrative functions. Thus, the Section recommends that any proposed legislation make clear that the Committees are not intended to advise the Office

¹ The Section also trusts that any legislation can be enacted in a manner that does not affect the Law Library of Congress.
on substantive issues, instead allowing the Copyright Office to determine its own procedures for receiving opinions from stakeholders on such issues.

With regard to Information Technology Upgrades, the Section strongly supports the Copyright Office’s IT modernization plan and urges the Committee to provide the Office with sufficient financial resources and authority to implement it as quickly as possible. The Section submitted comments to the Office on its plan in March 2016, which are attached hereto.

With regard to Small Claims, the Section supports the creation of a copyright small claims tribunal within the Copyright Office. The Section submitted comments to the Office on this subject in October 2012, which are attached hereto.

Very truly yours,

Donna P. Suchy
Section Chair
American Bar Association
Section of Intellectual Property Law
March 28, 2016

Submitted by Online Submission Procedure

Hon. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559


Dear Register Pallante:

I write on behalf of the Section of Intellectual Property Law of the American Bar Association (“the Section”) in response to the Copyright Office’s March 1, 2016 Notice of Inquiry concerning information technology upgrades for a twenty-first century Copyright Office. These views have not been submitted to the American Bar Association’s House of Delegates or Board of Governors, and they should not be considered as views of the Association.

The Section appreciates the Copyright Office’s inquiry on this matter and applauds the Office’s efforts to modernize its IT infrastructure. As you are aware, the Section strongly believes that a key to the future success of the copyright system is the substantial improvement of the Office’s systems and services to effectuate fully electronic registration and recordation of works, enhanced security for electronic copyright deposits, and comprehensive, integrated publicly accessible databases. In addition, the Section believes the Office must have adequate resources and authority to implement these changes and others necessary to support the vital communities that the Office serves, including: (1) rule-making authority; (2) its own IT system to serve the needs of the Office and the public for speed and flexibility; and (3) a budget to support modernization, as well as a budget process that allows the Office to make its own budget requests and carry over funds for capital expenditures from year to year.

Indeed, the Section has advocated these types of changes before Congress on multiple occasions. The Section’s prior statements and letters to Congress on
this subject are enclosed. In addition, in 2013, the Section submitted comments in response to a Copyright Office Notice of Inquiry concerning technological upgrades to registration and recordation functions, which also are enclosed.

With regard to the implementation and funding of a modern copyright IT system, the Section makes the following observations, suggestions, and comments.

Inquiry No. 1: Please comment on the proposed five-year timeline for IT modernization based on the phases set forth in detail in the IT Plan, which incorporate best practices of the federal government.

The Section believes that the necessary modernization efforts should be made on an expedited basis, but defers to the Office’s expertly drafted report as to the specific timing.

Inquiry No. 2: Should the modernization be funded from fees, appropriated dollars, or a combination of both, and, if both, is there an ideal formula or ratio?

The Section recommends that Congress make an initial appropriation sufficient to develop the modernized systems described in the Copyright Office’s report. Due to inadequate funding over a number of years, the Office’s systems have become inadequate to the task ahead. An investment in modernization, however, will yield significant public benefits through better structured and organized records, and a fully electronic recordation and filing system. As many copyright holders are individuals or non-profit organizations, the burden of creating these societal benefits cannot be satisfied merely by registration fees.  

If Congress instead asks the Copyright Office to rely on a combination of appropriated dollars and fees to fund modernization, those monies should not be used to undermine the goals of modernization. As noted in the Section’s statement to the Committee on the Judiciary of the House of Representatives during its February 26, 2015, “The U.S. Copyright Office: Its Functions and Resources” hearing, the Section does not believe that the Office can raise fees “enough to make ends meet and engage in capital improvement projects. There comes a point at which higher fees will discourage registration and recordation, and undermine the important goal of providing a comprehensive, accurate database of copyright information.” Indeed, the Copyright Office hopes that copyright holders will be drawn to a 21st century registration system so that it can create a database of works that is as comprehensive as possible. Yet, forcing individual customers to pay for modernization will be unduly burdensome and disincentivize the very copyright holders that the Office hopes to attract, thereby resulting in less copyright information in the Office’s records.

The Section supports consideration by the Copyright Office of a fee-setting strategy that considers the services provided by the Office to a customer and that prices the Office’s fees

1 As discussed below, certain fees already exceed what is reasonable for individual creators.

accordingly. Thus, for example, consideration is warranted as to whether the Office could charge higher fees in exchange for faster or otherwise prioritized services. Similarly, further consideration is warranted as to whether high-volume, for-profit, corporate copyright holders could pay higher fees as long as precautions are taken to ensure that individuals who file through small corporate entities are protected. The Section, however, notes that some copyright holders feel that the Office’s fees already make registration unduly expensive and that care must be taken in going back to the same well to support modernization lest it run dry.

Charging individual users for access to public records is not advisable for the same reason that unduly burdensome fees on individual creators are unhelpful. It would be appropriate, however, for users of the Copyright Office’s records through a modernized system to contribute to its development and maintenance. The Office’s modernization proposal contemplates providing access to the Office’s records through APIs and other mechanisms to potential high-volume users. These users will be exponentially bigger beneficiaries of a modernized Copyright Office than individual users or copyright holders, and likely will use such records for their own profit-making projects. In addition, their use will place a larger burden on the Office’s systems. As a result, it is proper to grant the Office authority to determine appropriate fees for such high-volume use that can fund the maintenance and further modernization efforts.

Inquiry No. 3: What authorities or flexibilities, if any, should be included in 17 U.S.C. 708 regarding whether and how the Office may recover its reasonable costs of operation (including in the aggregate as opposed to based upon individual services), differentiate between customers or users, and/or fund future investments, not only as to the five-year plan but on an ongoing basis?

In light of the Copyright Office’s interest in becoming a nimble and robust service provider, changes to its fee setting authority under 17 U.S.C. § 708 are warranted. Section 708 specifically delineates the services for which the Copyright Office may charge copyright holders fees. As discussed above, however, much of the benefit of the Office’s proposed modernization strategy will be to users of the Office’s records system. Consequently, and in keeping with the Office’s desire to act with alacrity, Congress should authorize the Office to set fees for access to the Copyright Office’s records in appropriate circumstances (e.g., use by high-volume users or those accessing multiple records through APIs). In determining such fees, the Office should be authorized to cover the reasonable costs incurred by the Copyright Office for the services as well as the development and maintenance of the Office’s modernized IT service overall. The Section acknowledges that to accomplish this goal may require amendment of 17 U.S.C. § 708(b)(2). As a result of such changes, the Office will have greater comfort in developing new services that it will be able to recover the costs of creating and running them.

In addition, Congress should permit the Copyright Office to consider new business models that may be useful to particular constituencies and amplify the quality of its modernized systems. For example, the Copyright Office could offer subscription rates to high-volume creators. As you may be aware, photographers create larger numbers of works in comparison to other types of authors and also frequently have considerable information about those works embedded in the original digital files. A modernized IT system could permit such photographers to automatically upload the files with all appropriate metadata to the Office’s systems for examination and
registration, thereby enhancing the Office’s records and simplifying the examination process. Photographers, however, are unlikely to do so unless the fees associated with registering their works accurately reflect their needs. Similarly, if Congress were to create a Copyright Small Claims Court within the Copyright Office, some copyright holders have requested that they be able to file a complaint in the Court and register the asserted works at the same time with one filing and one fee.

Subscription rates at different levels would encourage greater registration by that constituency without unduly burdening it, and the Office could ensure that the total subscription fees net out to its operating costs for providing the services.

As another example, many computer program developers and Internet content creators create new versions of their software and websites at frequent intervals. The Office currently requires that each version of such software or website be registered separately, which is neither practicable nor financially feasible. As a result, many software developers and Internet content creators simply do not register their computer programs or websites with the Office or, at best, only register major releases. If the Office, however, offered a subscription fee that permitted minor revisions to a computer program or a website (i.e., not major releases) to be added to the existing registration record without additional payment, the Office’s records for those works likely would better reflect the numerous works being created by an important sector of our economy.

**Inquiry No. 4:** Should the Copyright Office fund capital and operating expenses differently? If so, how?

The Section supports granting the Office the ability to build a reserve account from which funds can be drawn on a multi-year cycle. Our understanding is that at present, any monies retained by the Office at the end of a fiscal year are offset against its allocation for the following year. As a result, it is difficult, if not impossible, for the Office to secure sufficient funding for long-term projects. If, however, the Office were given the authority to manage its own budget in a manner that does not affect the Law Library of Congress, it may be able to build a sufficient reserve of monies such that it can limit the need for additional project-based appropriations. In addition, as discussed above, to the extent that certain uses of the modernized Copyright Office record systems will be more burdensome than others, section 708 should be modified to permit the Office not only to recover its operating expenses from such use, but also its capital expenditures.

**Inquiry No. 5:** Please identify anything else that the Copyright Office should consider in relation to the funding strategy, benefits, or implementation of IT modernization.

One of the goals of the Copyright Office’s modernization is to increase the Office’s efficiency, thereby shortening registration and recordation wait times. As a result, after modernization, it would be appropriate to reevaluate the Office’s fees for certain services. For instance, the Office

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3 Similarly, if Congress were to create a Copyright Small Claims Court within the Copyright Office, some copyright holders have requested that they be able to file a complaint in the Court and register the asserted works at the same time with one filing and one fee.

4 We also note that some courts disagree with the Office’s view, which may warrant reexamination. See *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 747 (2d Cir. 1998) (holding that registration of derivative work by copyright owner of pre-existing work is sufficient to permit owner to maintain infringement action based on infringement of pre-existing work); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 539 (4th Cir. 2007) (same).
currently charges $800 per claim for expedited registration processing, and $250 for the first reconsideration request ($500 for the second). Modernized IT systems should reduce the work associated with such services and allow these fees to be commensurately reduced.

* * *  

The Section appreciates the opportunity to comment on the Copyright Office’s inquiry and hopes that its comments will provide the Office with useful insights as it seeks to expand and develop its IT systems.

Very truly yours,

[Signature]

Theodore H. Davis, Jr.
Section Chair
American Bar Association
Section of Intellectual Property Law
October 19, 2012

Submitted By Online Submission Procedure
Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Re: Remedies for Small Copyright Claims: Response to Notice of Inquiry (77 F.R. 51068) (Docket No. 2011-10)

Dear Register Pallante:

I. Introduction

We are writing to express the views of the American Bar Association’s Section of Intellectual Property Law (“the Section”) responding to the Copyright Office’s August 23, 2012 Second Notice of Inquiry concerning adjudicating small copyright claims in alternative forums. These views have not been submitted to the American Bar Association’s House of Delegates or Board of Governors, and should not be considered the views of the Association.

The Section appreciates the Copyright Office’s inquiry regarding small copyright claims and supports the goal of assessing and mitigating the hindrances that currently exist in preventing copyright owners from pursuing copyright claims of relatively small economic value. In its response, the Section addresses the Office’s inquiries under four primary areas of consideration as follows: 1) Nature of the Tribunal and Process; 2) Attorney Representation; 3) Remedies for Small Copyright Claims; and 4) State Court Alternatives.

II. Nature of the Tribunal and Process

The Section recommends that the Small Claims Tribunal be virtual, allowing the parties to submit and respond to claims electronically without the need for personal appearances and that claims be decided by experienced copyright professionals specifically trained to administer and decide these claims. With respect to the Copyright Office’s Second Notice of Inquiry, these responses address sections 2, 6, 7, and 16.
- Inquiry No. 2: Voluntary Participation

The Section recommends that the process be voluntary with the parties agreeing to waive their right to a jury trial in federal district court to proceed in the Copyright Office’s Small Claims Tribunal. While all parties to a dispute involving a low monetary award should benefit from a less costly and streamlined process, additional incentives may need to be incorporated to encourage parties to adjudicate their claims using an alternate system to the federal courts.

The Section recommends that the Copyright Office provide appropriate public guidance that requests federal courts to consider a party’s willingness or lack of willingness to voluntarily participate in the small claims process as one of the many factors a federal court weighs in determining whether to award a prevailing party attorney fees under 17 U.S.C. § 505.

This may not be a strong incentive ultimately, but the Section recommends that the Copyright Office consider additional, meaningful incentives for an otherwise reluctant party to consent to the Small Claims Tribunal, while preserving the right to elect a jury trial in district court.

- Inquiry No. 6: Virtual Location of Tribunal

In keeping with a goal of fashioning a more efficient, faster and less expensive process for adjudicating small claims, the Section recommends that there be no requirement for personal appearances by any party, to eliminate the delay and expense of traveling to an inconvenient jurisdiction. All claims and responses could be submitted electronically, with appropriate proofs and declarations submitted in electronic format. If the adjudicator requires a hearing, the hearing could be conducted on a more informal basis and use generally available technology such as teleconferencing or videoconferencing technology to avoid the necessity of personal appearances.

- Inquiry No. 7: Qualifications of the Adjudicators

The Section recommends that the Small Claims Tribunal consist of adjudicators who have copyright experience and are trained in this type of dispute resolution, unlike generalist state court judges. Similar to a roster of mediators or arbitrators that are identified by expertise, the Small Claims Tribunal could have access to the names of various industry experts who have experience in copyright law and dispute resolution. Parties could mutually elect or the Copyright Office may assign an adjudicator from a roster of experts in copyright law, one who is knowledgeable about the types of works in question. Therefore, the Section recommends that the adjudicators in the Small Claims Tribunal should be lawyers with some copyright knowledge and experience in order to make the process effective.
- Inquiry No. 16: Conduct of the Proceedings

The Section proposes that the proceedings could be handled in a manner similar to ICANN Uniform Domain Name Dispute Resolution ("UDRP") which provides a good example of an effective alternative to federal litigation. The UDRP allows papers to be filed online or by email. The UDRP complaint must reflect that: 1) the domain name is confusingly similar to complainant's trademark; 2) the registrant has no legitimate interest in the domain name; and 3) the domain name was registered and is being used in bad faith. The defendant then has the opportunity to file an answer. There are no personal appearances, amendments, discovery, motions or trials and this decreases the cost of the UDRP. If no party files additional submissions, the matter then goes to an arbitrator or an arbitration panel experienced in trademark law. The UDRP process functions well to resolve domain name disputes and is an example that the Copyright Office could model a Small Claims Tribunal after.

Following the UDRP model, a plaintiff in an action alleging copyright infringement should be required to identify the work and verify ownership of a copyrightable work. While a copyright registration in a work is useful to clarify ownership and to identify the work at issue, it is acknowledged that many copyright owners may not have registered the allegedly infringed work prior to utilizing the Small Claims Tribunal. Because the expedited registration process is costly and may be prohibitive to those copyright owners who would benefit from this alternative, the Copyright Office might consider incorporating simultaneous submission of a copyright application on an expedited basis, but at the standard filing fee, as part of the claim process. The Copyright Office would then provide the tribunal with the Copyright Office’s evaluation. Should the Copyright Office refuse to register the claimant’s application, then the claim would no longer be eligible for the small claims treatment.

The Section also recommends that the Copyright Office plan to provide a guide for the Small Claims Tribunal, much like the WIPO Guide to the UDRP. The guide would include instructions on how to file a claim as well as explain the necessary elements of a claim, and possible defenses in order to facilitate the process. Sample claim forms and responses would be useful in creating a more streamlined process. Plaintiffs could be required to declare that they have read and understood the guide before filing a claim.

III. Attorney Representation

- Inquiry 15: Representation

The Section recommends that the Small Claims Tribunal allow, but not require, an attorney to represent any of the parties.

Given that one of the very reasons for considering an alternative forum for resolving small copyright disputes is to avoid the expense of traditional proceedings, it would be
counterproductive to require a party to incur the substantial expense of legal representation.

However, there may be situations where a party cannot avoid the expense of counsel, because, for example, a corporation or other business entity may appear in federal court only through legal counsel. Although a voluntary proceeding akin to arbitration avoids this problem in many states, it does not do so everywhere. In some jurisdictions, a corporate officer, director, or employee who is not an attorney licensed in that state engages in the unauthorized practice of law when he or she represents a corporation in an arbitration proceeding even if the arbitration rules do not prohibit such representation.¹

Presumably, the parties would submit their positions for ruling to the tribunal, virtually based in Washington, D.C. Unfortunately, it is not clear that the unlicensed advocate would be subject only to the DC rules concerning unauthorized practice and not subject to the rules in force in the jurisdiction where he/she is physically located or where his/her client is physically located or domiciled. Absent clarification, business entities may feel compelled to use legal counsel to avoid potential concerns of engaging in the unauthorized practice of law.

Therefore, although the Section recommends that the Small Claims Tribunal allow the parties to decide for themselves whether they would like to proceed with or without legal counsel, there may be some instances in which representation is desirable or unavoidable.

IV. Remedies for Small Copyright Claims

- Inquiry No. 29: Empirical Data

The Section's comments on the subject of the permissible claim amount have been informed by two sources of empirical data. First, the Section consulted the Report of the Economic Survey 2011 of the American Intellectual Property Law Association (the "AIPLA Report"). Second, the Section conducted a poll of the members of its Copyright Division by e-mail as described below.

The AIPLA 2011 Economic Report

With respect to the AIPLA 2011 Report, the data described and analyzed there is based on an email survey of 14,524 AIPLA members and non-members, with 2,577 (17.7%) responding. The survey was conducted in early 2011, gathering data from respondents' experiences in 2010.

The data reported in the table below are for copyright cases with less than $1 million at risk. Presented are the costs of prosecution/defense by sellers (litigators) and

¹ See e.g., Nisha, LLC v. Tribuilt Construction Group, LLC, No. 11-927, 2012 WL 1034641 (Ark. 3/29/2012) (noting that Florida and Ohio also follow the same rule).
buyers (corporate counsel) of copyright litigation services. The survey instructions asked participants to respond only if they had personal knowledge of the costs incurred for the type of work to which the question pertains. The question which produced the data relevant to our inquiry was the following:

45. What is your estimate of the total cost of a copyright infringement suit (i) through the end of discovery, and (ii) inclusive of discovery, motions, pre-trial, post-trial, and appeal?

Responses were as follows:

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</table>

* San Francisco logged two responses, but that was deemed insufficient data to report and so those results were omitted from this table.

By definition, this data emanates from cases that are substantial enough for the parties to have engaged in litigation, but presumably they are at the bottom end of the scale. One can see that the first quartile in several regions around the country is at or below $50K in costs through discovery; and at or below $100K in total costs through trial (data points highlighted in the table above, this range incorporates 45 of the 118 responses, or 38%).

#### The Email Poll of Copyright Division Members

Inasmuch as the data provided in the *AIPLA Report* provides cost information on only those copyright cases that were big enough to litigate and inasmuch as it sweeps together costs for the smallest of cases and costs for cases with up to $1MM at risk, the Section sought to gather data more precisely targeted at identifying the range below which litigation is commonly not an economically viable option.

Accordingly, on September 26, 2012, the Section polled by email the approximately 500 members of its Copyright Division, asking a single question. The poll requested responses in two days. Twenty-seven responses were received, a response rate of just over 6%. However, although the email poll was distributed to all members of the Division who had provided an email address and authorized its use for communications from the Division, responses were invited only from a subset of distributees whose practice has included the litigation of copyright claims. So the Section does not have an accurate measure of the number who responded in relation to the total population of Division members whose practices include litigation of copyright claims. Presumably, the actual response rate was higher than 6%, but the Section does not know how much higher.

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2 Time constraints forced this poll to be conducted with a very short turnaround time, which was certainly a factor in the response rate. If the Office would consider additional data, the Section would be willing to re-run this poll under more favorable conditions and would also be willing to poll Section members on other questions that might be of interest to the Office.
The question posed by email was as follows:

At what value of likely recovery (and disregarding the potential for also recovering attorneys' fees) would you consider litigation of an uncomplicated copyright claim economically justifiable (please check the range that most closely reflects your experience in evaluating potential recovery against the cost of proceeding):

- A-- a likely recovery of some amount less than $10,000
- B-- a likely recovery of $10,000 to $19,999
- C-- a likely recovery of $20,000 to $29,999
- D-- a likely recovery of $30,000 to $39,999
- E-- a likely recovery of $40,000 to $49,999
- F-- a likely recovery of $50,000 to $59,999
- G-- it would take a likely recovery of more than $60,000

The 31 responses were arrayed as follows:

<table>
<thead>
<tr>
<th>Choice</th>
<th>Range</th>
<th># of Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>&lt; $10K</td>
<td>3</td>
</tr>
<tr>
<td>B</td>
<td>$10K-$19,999</td>
<td>3</td>
</tr>
<tr>
<td>C</td>
<td>$20K-$29,999</td>
<td>4</td>
</tr>
<tr>
<td>D</td>
<td>$30K-$39,999</td>
<td>2</td>
</tr>
<tr>
<td>E</td>
<td>$40K-$49,999</td>
<td>4</td>
</tr>
<tr>
<td>F</td>
<td>$50K-$59,999</td>
<td>3</td>
</tr>
<tr>
<td>G</td>
<td>&gt;$60K</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>31</td>
</tr>
</tbody>
</table>

A-C = the 1/3 that would accept a case with an under $30,000 recovery.

A-F = the 2/3 that would accept a case with an under $60,000 recovery.

G = the 1/3 who would turn away a case with a projected recovery less than $60,000.

Approximately one-third of the respondents would turn away a copyright case where the likely recovery would be less than $60,000. But about two-thirds of the respondents would accept an uncomplicated case with a likely recovery of less than $60,000. Only about one-third of respondents would accept an uncomplicated case with a likely recovery of less than $30,000.

- Inquiry No. 10: Permissible Claim Amount

In setting a jurisdictional limit for an alternative Small Claims Tribunal focused on speedy, low cost resolution of claims, the limit needs to be low enough so that the adopted procedural compromises are palatable and high enough so as not to leave too big a gap between, on the one hand, those cases that fall within the jurisdictional limits of the alternative tribunal, and on the other, those cases that are practically speaking big enough to litigate.

If, then, there are parts of the country where copyright cases can be, and are being, resolved, by settlement, summary judgment, or trial, for between $50K-$100K
(representing 45 out of 118 respondents to the AIPLA Survey), and if two-thirds of respondents to the Section’s poll of Copyright Division members would accept an uncomplicated copyright case with a likely recovery of $60,000, then it seems that a jurisdictional limit in the $25,000-$30,000 range would not leave too big a gap between the small claims limit and the bottom end of economically viable litigation.

Moreover, a cap at $30,000 would have the additional advantage of encompassing the entire available range of statutory damages for infringement that is not willful.

Finally, as an additional point of reference, the Section notes that twelve states have small claims limits of $10,000 or more and one state, Tennessee, has a small claims limit of $25,000.3

Wherever the jurisdictional limit might finally be set, it is of no consequence whether it is applicable to one claim or to multiple claims asserted in the same proceeding. Counterclaims should be permitted, but should not be compulsory, especially if they exceed the jurisdictional limit.

- Inquiry No. 18: Damages

Apart from establishing a jurisdictional limit, the Section identified no reason or purpose that would justify otherwise altering existing law and policy on recoverable damages. Both actual damages proved and statutory damages at the discretion of the tribunal should be allowed, subject to the cap. Because the process is voluntary and contractually based, no statutory changes are needed if the Copyright Office limits monetary awards and other relief.

- Inquiry No. 19: Equitable Relief

The Section recommends that the Small Claims Tribunal be limited to adjudication of claims for damages. The Section is concerned that under some circumstances, certain forms of equitable relief might well have an economic impact that far exceeds the jurisdictional limit ultimately established for this alternative tribunal—e.g., a seizure and destruction order for inventory of the accused work with a value that exceeds the established cap or an order to remove or change material in a completed production. There does not seem to be any justification for permitting a party to evade the jurisdictional limit by requesting equitable relief. The expedited and streamlined procedures likely to be incorporated in a Small Claims Tribunal are antithetical to the sort of evidentiary inquiry and record necessary to support an award of equitable relief.

The Section does not envision that the tribunal would have the power to enforce equitable orders.

- **Inquiry No. 20: Attorneys’ Fees and Costs**

As with damages generally, the Section identified no reason that would justify altering existing law or policy with respect to the award of attorneys’ fees and costs, subject of course to the jurisdictional cap.

As discussed earlier, the Section recommends that the Copyright Office issue guidance encouraging federal courts to consider a party’s willingness or lack thereof to participate in the Small Claims Tribunal as a factor in awarding attorney fees to a prevailing party. This may encourage plaintiffs to participate in the Small Claims Tribunal, but it might not encourage defendants to participate if the plaintiff has not previously registered the work at issue in sufficient time to make attorney fees available as required under 17 U.S.C. § 412.

The Section considered a statutory change that would entitle a party in federal court to attorney fees if the other party refused to voluntarily participate in the Small Claims Tribunal and ultimately lost in federal court. The Section did not adopt this recommendation because: (1) a legislative change may significantly delay the implementation of the Small Claims Tribunal and (2) the assurance of attorney fees in that instance may be too great a deviation from existing law for multiple stakeholders to embrace.

V. **State-Court Alternatives**

- **Inquiry Number 28: State Court Alternative**

The Section recommends against asking state courts to address copyright issues whether in established Small Claims Tribunals or otherwise. As federal courts have exclusive jurisdiction over copyright issues, the state courts have not had the opportunity to develop sufficient expertise to handle these cases. The Section is skeptical that state courts would uniformly welcome a request to now address a new specialized area given the demands that state judges at all levels be familiar with an array of civil and criminal matters.

Further, as the notice of inquiry states, statutory changes would be necessary to change the jurisdiction of the courts over copyright issues. The Section’s recommendation to first attempt a voluntary process that offers incentives for the parties to participate is attractive in that it avoids or minimizes the implementation of statutory changes.

VI. **Conclusion**

The Section appreciates the opportunity to comment on the Copyright Office’s inquiry regarding the creation of a possible new adjudication process for small copyright
claims. The Section’s recommendations are based on the vast experience of its many members as well as empirical data that exists, and the Section believes that its comments will provide the Copyright Office with better insight in its efforts to create a much needed avenue for small copyright claims adjudication.

Respectfully Submitted,

[Signature]

Joseph M. Potenza
Section Chair
ABA Section of Intellectual Property Law