RESOLVED, That the American Bar Association 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

FURTHER RESOLVED, That the American Bar Association supports, in principle, that such legislation and any Copyright Small Claims Program reflect appropriate procedures and requirements, including:

(a) Requiring that adjudicators in the Copyright Small Claims Program have experience with copyright law and training in resolution of disputes;
(b) Allowing claims and responses to be submitted electronically, and to the extent a proceeding may require a hearing, using videoconference and teleconference technology, rather than requiring personal appearances; and allowing but not requiring parties to be represented by an attorney;
(c) Allowing parties to bring counterclaims in a Copyright Small Claims Program proceeding;
(d) Authorizing the Copyright Office to adopt appropriate rules and procedures to prevent abuse of the Copyright Small Claims Program;
(e) Allowing adjudicators in the Copyright Small Claims Program to consult with the Register of Copyrights on general issues of law; and
(f) Permitting the Register of Copyrights to review decisions of adjudicators in the Copyright Small Claims Program in appropriate circumstances.
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.\(^1\) 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.”\(^2\) 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.\(^3\)

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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\(^1\) See, e.g., Songwriters Guild of America testimony before the House Small Business Committee (May 14, 2018): “In 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.


\(^2\) 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.

$30,000. 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.”

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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5 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.6

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.

6 See Copyright Office Small Claims Report, at 11-13 (particular challenges of pro se litigants).
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.
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
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 outstrip 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
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 there will be a markup 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 outstrip 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.