

SCHOLARLY CONCERNS ABOUT A PROPOSED SMALL COPYRIGHT CLAIMS TRIBUNAL

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The U.S. Copyright Office (Office) has proposed legislation to create a small claims tribunal (Tribunal) within the Office to adjudicate copyright infringement claims, as well as abuse of notice-and-takedown claims under 17 U.S.C. § 512(f).¹ Two bills introduced in Congress in 2016 would have implemented this proposal.² A very similar bill was introduced in the House of Representatives in 2017.³

Because enactment of legislation of this sort may have profound effects on copyright in the U.S., the Berkeley Center for Law & Technology (BCLT) and UC Hastings College of the Law convened a workshop on February 3, 2017, of eighteen scholars (specializing in economics, civil procedure, and intellectual property) to discuss the Office's proposal and legislation to implement it. Participants in this workshop expressed a rather wide range of reservations about the Tribunal proposal. While there was some support among the workshop participants for a scaled-down, more carefully tailored small copyright claims procedure, the range and seriousness of concerns expressed at the workshop lead us to conclude that further consideration is warranted before moving forward with the proposed legislation.

Reservations expressed during the workshop fell into six principal categories: 1) constitutionality concerns; 2) breadth of jurisdiction; 3) process concerns about claiming, adjudicating, and appealing the outcomes if the proposal was enacted as is; 4) potential for abuses; 5) underexplored alternatives; and 6) larger questions about the proposal, including whether copyright is so special that it should

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1. U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> [hereinafter SMALL CLAIMS REPORT] [<https://perma.cc/VWB2-MFMJ>].

2. *See, e.g.*, Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2016, H.R. 5757, 114th Cong. (2016); Fairness for American Small Creators Act, H.R. 6496, 114th Cong. (2016); *see also* H.R. JUDICIARY COMM., REFORM OF THE U.S. COPYRIGHT OFFICE (2016), <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf> [<https://perma.cc/3M8C-6MAX>] (policy document proposing, inter alia, formation of a copyright small claims system).

3. On October 4, 2017, Reps. Hakeem Jeffries and Tom Marino introduced a small claims bill, which like one of its predecessors is called the Copyright Alternative in Small-Claims Enforcement (CASE) Act. *See* H.R. 3945, 115th Cong. (2017). This bill is nearly identical to the 2016 version, but with these additional provisions: (i) an expedited registration procedure for small claims (§ 1404(d)); (ii) barring for one year a claimant who brings multiple bad-faith claims within a year (§ 1405(x)(3)); (iii) allowing claims of \$5,000 or less to be heard and decided by only one Copyright Claims Officer (§ 1405(y)); (iv) outlining Tribunal subpoena power over ISPs (§ 1405(z)); and (v) upon district court confirmation of the relief awarded by the Tribunal, the court must award fees and costs, including attorney fees, to the prevailing party (§ 1407(a)). These provisions were, of course, neither considered nor discussed at the workshop. They are hence not discussed in this report. The authors of this document have some reservations about some of these changes.

have a tribunal of its own, given that many federal laws are underenforced because of the high costs of litigation.

I. CONSTITUTIONALITY CONCERNS

The Tribunal poses both separation of powers and due process concerns. Each is explored in turn below.

A. POWERS TO ADJUDICATE CLAIMS UNDER ARTICLES I & III OF THE U.S. CONSTITUTION

The Supreme Court has on a number of occasions ruled that Congress does not have power under Article I of the Constitution to establish tribunals to adjudicate certain types of claims because such claims can only be adjudicated by Article III courts.⁴ Boiled down to its essence, the Court has held that Article I tribunals can adjudicate claims involving “public rights,” but not those involving “private rights.”⁵ Whether copyrights are “private” or “public” rights is, under this jurisprudence, not entirely clear.

What is clear is that the Tribunal proposed by the Office would establish an Article I adjudication procedure. Some workshop participants thought that the Court’s jurisprudence on what can be adjudicated by Article I tribunals and what must be adjudicated by Article III courts calls into question the constitutionality of the Tribunal as proposed by the Office.

Questions about Congress’ power to establish administrative adjudication procedures, either under its own aegis or as part of an Executive agency, have become more salient since the Supreme Court’s decision to grant a petition of certiorari in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*.⁶ The question on which the Court agreed to review *Oil States* was whether Congress had the constitutional power to enable, as part of the 2011 America Invents Act (AIA),⁷ the Patent Trial and Appeal Board (PTAB) to review the validity of patent claims on novelty or nonobviousness grounds and to extinguish erroneously issued patent claims.⁸

Petitioner Oil States, whose patent was invalidated by PTAB under the AIA inter partes review process, has argued that once issued, patents are private rights and disputes over them must be resolved by Article III courts.⁹ It relies on *McCormick Harvesting Machine Co. v. C. Aultman & Co.* for its assertion that only Article III courts can adjudicate the validity of patents.¹⁰

The Court of Appeals for the Federal Circuit (Federal Circuit) affirmed PTAB’s invalidation of Oil States’ patent, but did not issue an opinion on the constitutionality issue raised by Oil States, seemingly because the year before it had addressed this constitutional challenge to PTAB’s powers in *MCM Portfolio LLC v. Hewlett-Packard Co.*¹¹ The Federal Circuit in *MCM* characterized patents as public rights because they were integral parts of a complex regulatory regime, and upheld the authority of

4. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

5. See, e.g., *Northern Pipeline*, 458 U.S. at 67-68; *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

6. 639 F. App’x 639 (Fed. Cir. 2016) (mem.), cert. granted, 137 S. Ct. 2239 (2017) (mem.).

7. America Invents Act of 2011, § 7, Pub. L. No. 112-29, 125 Stat. 284.

8. *Oil States*, 639 F. App’x at 639.

9. See, e.g., Petition for a Writ of Certiorari at 17–18, *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, 137 S. Ct. 2239 (2017) (mem.) (No. 16-712), 2016 WL 6995217.

10. 169 U.S. 606 (1898). *McCormick* is, however, perhaps more properly understood as a statutory interpretation case about the scope of authority granted under then-current statutes than as a constitutional case.

11. 812 F.3d 1284 (Fed. Cir. 2015), cert. denied, 137 S. Ct. 292 (2016).

PTAB to judge their validity.¹² The Federal Circuit also regarded PTAB as merely reviewing the PTO's own interpretation of the claims and clarifying patent issues.¹³ The Supreme Court's decision to review the constitutionality of PTAB's powers in *Oil States* suggests the Court may not be satisfied with the Federal Circuit's analysis in *MCM*.

The constitutional question about establishing an administrative tribunal to adjudicate copyright infringement claims is more serious than that of Congress' power to enable PTAB review of issued patents because the proposed Tribunal would adjudicate copyright infringement claims, over which Article III courts have long had exclusive jurisdiction.¹⁴ PTAB, by contrast, mainly reviews patent claims to determine if the USPTO made a mistake in approving certain claims.¹⁵ Thus, even if the Court ultimately upholds the Federal Circuit's ruling in *Oil States* on the authority of PTAB to review patent claims, the Tribunal presents a different and more challenging issue because it would be adjudicating infringement claims,¹⁶ not just reviewing the Office's registration decisions, which is the closest analogy to what PTAB does with patents. Adjudicating infringement claims is exactly what Article III courts are supposed to do.

Until the Supreme Court has resolved the issue whether determining the validity of issued patents is the exclusive jurisdiction of an Article III court in a patent case, it may be premature to proceed with legislation and formation of the copyright Tribunal. Although the Copyright Office suggests that any constitutional objection might be overcome by a voluntary submission to the Tribunal's jurisdiction,¹⁷ workshop participants were concerned that the opt-out regime under consideration (see "Due Process Issues" below) was not really voluntary enough to bypass the constitutional concerns.¹⁸

B. DUE PROCESS ISSUES

Workshop participants expressed several constitutional due process concerns, including questions about the assertion of nationwide personal jurisdiction and service of process issues.¹⁹ The Office is

12. *Id.* at 1290–91.

13. *Id.* Another dissatisfied patentee called the *MCM* ruling into question in *Cascades Projection LLC v. Epson America, Inc.*, wherein the owner of a patent invalidated by PTAB asked the Federal Circuit for en banc review but was denied. *Cascades Projection LLC v. Epson Am., Inc.*, No. IPR2015-01206, 2015 WL 9599218 (P.T.A.B. Dec. 1, 2015), *review denied*, *Cascades Projection LLC v. Epson Am., Inc.*, 864 F.3d 1309 (Fed. Cir. 2017). Sony also successfully challenged the validity of Cascade's '347 patent and is an appellee along with Epson in this consolidated case. *Sony Corp. v. Cascades Projection LLC*, No. IPR2015-01846 (P.T.A.B. Jan. 11, 2017), *review denied*, *Cascades Projection LLC v. Epson Am., Inc.*, 864 F.3d 1309 (Fed. Cir. 2017). In a split decision (which included four separate concurrences and dissents), the Federal Circuit denied Cascades' petition for an initial hearing en banc on the constitutionality issue. *Cascades Projection LLC v. Epson Am., Inc.*, 864 F.3d 1309 (Fed. Cir. 2017).

14. *See, e.g.*, SMALL CLAIMS REPORT, *supra* note 1, at 8, 9 (citing 28 U.S.C. § 1338 (2012)).

15. 35 U.S.C. § 6(b) (2012) (listing PTAB duties); *see also* SMALL CLAIMS REPORT, *supra* note 1, at 64–66 (describing PTAB).

16. *See* SMALL CLAIMS REPORT, *supra* note 1, at 137 (§ 1403(c) of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

17. SMALL CLAIMS REPORT, *supra* note 1, at 40–41.

18. Also of possible relevance to the constitutionality of the Tribunal proposal is the Supreme Court's recent line of cases regarding Article III interpretation with respect to defining the jurisdiction of the bankruptcy courts. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011) (Article III prohibited bankruptcy court from adjudicating certain state law claims raised in bankruptcy proceedings); *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014) (holding that a district court's judgment following de novo review cured a bankruptcy court's invalid entry of judgment); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) (holding that a bankruptcy court proceeding over claims entitled to Article III adjudication was permissible with parties' consent). The Office's Report gave some attention to these constitutionality issues. SMALL CLAIMS REPORT, *supra* note 1, at 36–38. However, that Report was issued before the *Executive Benefits* and *Wellness* rulings and the Court's decision to hear the *Oil States* case.

19. The Report discussed personal jurisdiction and service of process issues, *see* SMALL CLAIMS REPORT, *supra* note 1, at 44–47, but seemed to conclude that a voluntary small claims system that was available by remote means would largely

located in Washington, D.C., and adjudications would presumably take place there, although some proceedings might be carried out online.²⁰ Other concerns included limits on appeals, on grounds for appeal, transparency of documents pertaining to each proceeding, and Seventh Amendment jury trial rights.²¹

The most substantial due process issues, however, were those about the “voluntary” nature of the proceedings and whether Congress should adopt an opt-out or an opt-in regime for parties’ participation in the Tribunal. The Office recognized that a system in which alleged infringers voluntarily consent to submit to Tribunal proceedings to resolve disputes with claimants would present fewer constitutional questions than would a mandatory opt-out system.²²

Among the reasons an alleged infringer might be willing to participate in a small claims proceeding in some cases is because the process of adjudication would likely be faster and cheaper than in federal court.²³ The alleged infringer’s exposure for money damages would also be lower if it lost before a Tribunal. If the facts of the dispute were not complicated, the streamlined process and documentary evidence would provide a basis for a resolution without the need for discovery or motions practice. Moreover, participating in this process might also enable the disputants to more easily formulate arguments that would lead to an improved settlement outcome instead of going through a full adjudication.

What matters, though, is how the parties would be understood to consent, or not, to participate in a small claims system. Under an opt-in model, adjudication could occur *only if* the alleged infringer expressly agreed to submit to the Tribunal’s jurisdiction. Under an opt-out model, the alleged infringer’s consent would be assumed and the Tribunal could proceed with adjudication *unless* the respondent expressly opted out within a certain short time frame.

The Office’s Small Claims Report discussed both opt-out and opt-in alternatives and characterized the opt-out model as “somewhat more ambitious” than the opt-in model.²⁴ Overall, the Office seemed to think that the opt-out process would be voluntary enough to pass constitutional muster, citing other rules of procedure recognizing consent premised on a failure to timely respond.²⁵

relieve due process concerns. *See id.* at 46, 102. These issues are perhaps more complex and substantial than the Report characterizes. *See, e.g.*, 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 15.1 (3d ed. 2005 & Supp. 2017) (discussing cases involving personal jurisdiction); 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 17:140 (2017) (discussing service of process). Moreover, the viability of nationwide personal jurisdiction in the federal courts is in doubt after the Supreme Court’s statement in *Bristol-Myers Squibb v. Superior Court of California* expressly “leav[ing] open” the question of Fifth Amendment limitations on personal jurisdiction of federal courts. 137 S. Ct. 1773, 1784 (2017).

20. *See* SMALL CLAIMS REPORT, *supra* note 1, at 98–99, 133, 140 (§§ 1401(a), 1405(c) of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

21. The Office proposal would allow parties to seek reconsideration by the Copyright Board and review by the Register of the reconsideration decision, *see* SMALL CLAIMS REPORT, *supra* note 1, at 149 (§§ 1405(v)–(w) of draft); would allow parties to challenge the decision on narrow grounds in the D.C. District Court, *id.* at 152 (§ 1407(c)); and would allow only limited discovery and evidence, *id.* at 145 (§§ 1405(m)–(n)). The Report also conveyed confidence that a voluntary system including consent and waiver could abate concerns about the Seventh Amendment right to a jury trial. *See id.* at 27–29. However, whether failure to respond in an opt-out scheme would truly be voluntary and constitute an effective waiver of that right is uncertain.

22. *See* SMALL CLAIMS REPORT, *supra* note 1, at 41, 97.

23. The streamlined nature of the Tribunal process is summarized in SMALL CLAIMS REPORT, *supra* note 1, at 4.

24. *See* SMALL CLAIMS REPORT, *supra* note 1, at 99.

25. *See id.*

In addition, the Office characterized the opportunity to have a default judgment set aside by an Article III judge as an additional safeguard.²⁶ The proposed legislation, however, took the opt-out approach.²⁷

Copyright owners and industry groups who submitted comments about a small claims procedure for copyright disputes prefer the opt-out model.²⁸ That is, these stakeholders prefer a system that requires alleged infringers to affirmatively decline to submit to the Tribunal's adjudication. They pointed to experiences with alleged infringers who fail to respond to cease-and-desist letters.²⁹ A small claims notification asking the alleged infringer to opt into Tribunal adjudication, they believe, would often be ignored.

Participants in the BCLT-Hastings workshop expressed concern that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster. A significant consequence of nonresponse in an opt-out model would be a high proportion of cases in which the Tribunal would enter default judgments and damage awards.³⁰ Following such defaults, claimants could ask a federal court for an order to enforce the Tribunal's ruling against the defaulting party.³¹ A large number of judicially enforceable default judgments could result, which would be difficult to overturn given the restrictions that the Office would place on grounds for appeal and overturning default judgments.³² Because the Office has yet to establish rigorous standards for filing claims and serving them on respondents, due process concerns loom large, since the existence of clear standards is a prerequisite to enabling alleged infringers to make informed judgments about their options in responding to Tribunal complaints.³³

II. BREADTH OF JURISDICTION

The Tribunal proposal would allow adjudication of all copyright infringement claims in which the total amount of damages claimed was \$30,000 or less.³⁴ Many workshop participants thought that the \$30,000 cap was too high and would dissuade many potential respondents from participating. Given the higher costs and evidentiary burdens required in federal courts, many defendants might instead prefer to take the chance that the plaintiff will not pursue the claim in federal courts. A cap that might make alleged infringers more willing to participate might be in the neighborhood of \$10,000–15,000.

26. *See id.*

27. Compare SMALL CLAIMS REPORT, *supra* note 1, at 142–51 (§§ 1405-1406 of draft) (offering opt-in and opt-out alternative provisions), with H.R. 5757, 114th Cong. § 2 (2016) (§§ 1405-1406; opt-out only (30 days to opt out)), and H.R. 6496, 114th Cong. § 2 (2016) (§§ 1405–06; opt-out only (60 days to opt out)).

28. *See* SMALL CLAIMS REPORT, *supra* note 1, at 98.

29. *See id.*

30. *See id.* at 147 (§ 1405(t) [Opt-Out Alternative] of draft).

31. *See id.* at 151–52 (§ 1407 of draft).

32. *See infra* note 45 (describing Report's proposed limits on appeals). An additional cause for concern is that default judgments issued under an opt-out scheme would likely be subject to numerous collateral attacks based on constitutional issues, such as the Seventh Amendment right to a jury trial under *Feltner v. Columbia Pictures*, 523 U.S. 340 (1998), *see supra* note 19; the due process requirements for providing adequate notice in an opt-out procedure, *see supra* note 30; and the exercise of proper personal jurisdiction, *see supra* note 19. The consequent litigation would obviously undermine the efficiency goals of a small claims system.

33. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), a class action, the Court held that notice must be “the best practicable” to bind an absent class member who has the right to opt out under § 23(b)(3). In the small claims context, the notice requirement arguably would need to be stricter than the class action setting to pass due-process muster, since the party receiving notice is a defendant who is not otherwise adequately represented in the Tribunal.

34. *See* SMALL CLAIMS REPORT, *supra* note 1, at 139 (§§ 1403(d)(1)(D) of draft); H.R. 5757, 114th Cong. § 2 (2016) (§ 1403(e)(1)(D)); H.R. 6496, 114th Cong. § 2 (2016) (§ 1403(e)(1)(D)).

Workshop participants reached consensus that Tribunal awards should be compensatory only. That is, a successful claimant should get monetary compensation for her lost profits (e.g., the license fee she was owed), but should not be able to disgorge the defendant’s direct or indirect profits. Disgorgement would require extensive discovery, possible expert testimony, and other litigation-intensive work, which are unsuitable for a small claims procedure.

Workshop participants also expressed skepticism about enabling the Tribunal to award statutory damages, except perhaps in circumstances when damages actually were too difficult to prove. (The particular problems with statutory damages are discussed further in Part IV below.)

There was also general agreement at the workshop that neither secondary liability nor nonliteral infringement claims should be within the Tribunal’s jurisdiction. These claims typically involve complex factual issues that do not lend themselves to summary adjudications by an administrative tribunal on documentary evidence.

There was also skepticism about the utility of making § 512(f) claims be part of the Tribunal’s jurisdiction. While it is likely true that any money damages that users might claim for bad-faith assertions of copyright infringement and abuse of the notice-and-takedown procedure would be “small,” § 512(f) claims are very different in character than the infringement claims that the Tribunal will mainly be dealing with. To adjudicate § 512(f) claims would require proof of mental states that are not susceptible to documentary evidence in a small claims procedure.

Some workshop participants were also skeptical about whether to allow corporate authors of works-for-hire and assignees of copyrights to bring small claims in this forum. (*See also infra* Part IV, Use by Corporate Owners and Assignees.) The most sympathetic “use case” for a small claims process for copyright infringement are those individual creators who are trying to make a living from their creative work; a small claims process would enable these individuals to seek a remedy for infringing uses of their photographs, images, or stories. Currently, many potential infringers are not deterred from infringing copyrights because they know that individual creators cannot afford to sue to get the \$1,500 license fee that they would have charged. A more narrowly drawn proposal designed to address this type of use case would have found more support among workshop participants.

Workshop participants also reached consensus that if respondents raised defenses or counterclaims that would require discovery and more elaborate fact-finding than was suitable for adjudication through a small claims process, the Tribunal should be able to inform the parties that the matter was unsuitable for resolution by the Tribunal. The Office’s Small Claims Report acknowledges the need to confine a small claims system to less complex cases and recommends that the Tribunal could dismiss without prejudice any claim that it concludes could not be adequately adjudicated within the constraints of a small claims process.³⁵ However, the Office also seems more confident than perhaps is warranted that adjudicators with the necessary copyright expertise could successfully navigate a streamlined proceeding including defenses and related counterclaims.³⁶

III. PROCESS CONCERNS RE CLAIMING AND ADJUDICATION

Much of the workshop discussion focused on civil procedure-related issues raised by the proposed small claims tribunal, such as establishing standards for judging the facial validity of claims

35. *See* SMALL CLAIMS REPORT, *supra* note 1, at 142 (§§ 1405(f)(3) of draft (“Dismissal for Good Cause”)); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

36. *See, e.g.*, SMALL CLAIMS REPORT, *supra* note 1, at 107 (asserting that in the “unusual case” where the SCT decisionmaker could not evaluate a claim of fair use due to lack of evidence, the case could be dismissed without prejudice to be litigated in federal court).

and response documents, the scope of eligible claims, whether or the extent to which the Tribunal would allow discovery and hear expert witnesses, panel compositions, and appeal and review procedures.

Facial Validity of Claims: The Office envisions that many small claims would be made by individual creators/copyright-owners without the aid of legal representation.³⁷ Claims would be initiated by the creator's filing a claim with the Tribunal (after paying the appropriate fee). The Office recognizes that unrepresented creators may not have sophistication about how to draw up a viable claim document. Its Report suggests that Tribunal staff would help unrepresented creators formulate facially viable claims.³⁸ Workshop participants thought that the staff who aided claimants should not be the eventual adjudicators of the claims. The Office envisions that the Tribunal staff would review claims and attest to their facial validity before the claimant could serve the document of complaint on the party alleged to be the infringer.³⁹ But because the standards for determining facial validity of a claim are not fully specified and are potentially minimal, workshop participants thought it important for there to be more explicit confirmation that such regulations would be sufficiently rigorous to give the alleged infringer adequate notice about the claim and the Tribunal's intention to adjudicate it.⁴⁰

Response Documents: Workshop participants were concerned with the apparently complainant-focused nature of the proposed system. To create a fair process, Congress should require that the Tribunal process ensure that all response documents submitted by the alleged infringer should be filed with the Tribunal clerk just as the complaint would be. Response documents should also be reviewed by Tribunal staff for legal sufficiency.⁴¹ If unrepresented by legal counsel, the respondent should be given advice about how to frame a viable defense (assuming there was one). Tribunal staff should not be in the business of only helping claimants.

Filing Fees: A system that is geared towards modest-sized copyright claims should likewise be concerned with ensuring that filing fees are sufficiently low so as not to be a barrier to court access for lower-income individuals. The Office Report and draft legislation suggests that filing fees for the Tribunal should be set at a minimum of \$100 per filing.⁴² Workshop participants noted that many

37. See SMALL CLAIMS REPORT, *supra* note 1, at 120–21 (but allowing litigants the opportunity to be represented by counsel if desired); *id.* at 140 (§ 1405(d) of draft (permitting parties to be represented by an attorney)) see also H.R. 5757, 114th Cong. § 2 (2016) (§ 1405(d) (permitting parties to be represented by an attorney or a law student)); H.R. 6496, 114th Cong. § 2 (2016) (same).

38. See SMALL CLAIMS REPORT, *supra* note 1, at 121.

39. See SMALL CLAIMS REPORT, *supra* note 1, at 141 (§ 1405(f) of draft); see also H.R. 5757, 114th Cong. § 2 (2016) (§ 1405(f)(1)); H.R. 6496, 114th Cong. § 2 (2016) (same). The Office draft and the bills provide that if the original claim is deemed deficient, the claimant would have two opportunities to refile an amended claim, and if still deficient, the proceeding would be dismissed without prejudice.

40. See SMALL CLAIMS REPORT, *supra* note 1, at 122 (recommending that the claimant be required to include material facts to support the claim and to certify the facts alleged, and beyond that to be subject to review for “certain minimum requirements,” such as ownership information); *id.* at 141 (§ 1405(f) (review by an attorney to ensure compliance with “applicable regulations”)); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same). Procedurally, the notice/service requirements for the Tribunal also seem less rigorous than those for standard small claims courts. For example, many small claims courts require that the claimant send a demand letter or otherwise contact the adversary before filing suit. See, e.g., *Ask for Payments*, CALIFORNIA COURTS, <http://www.courts.ca.gov/9739.htm> [<https://perma.cc/Y4EN-UNBY>]. This provides both notice of the claim as well as some detail so that the defendant can prepare for settlement and/or disputing it.

41. As presently drafted, proposed provisions detail the procedure for review and the opportunity to amend claims and counterclaims only. See Small Claims Report, *supra* note 1, at 141–42 (§§ 1405(f) of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

42. See SMALL CLAIMS REPORT, *supra* note 1, at 140 (§§ 1405(e) of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

small claims courts have set differential fees for different kinds of claimants. This should be given consideration by the Office if the Tribunal is established. Fees could, for instance, be set on a sliding scale: \$50 for a claim of \$1,000 or less; \$100 for claims up to \$2,500; etc. Fees could be higher for companies than for individuals, higher for those who have brought a certain number of claims within a set time period, or higher for creators who had not registered their claims of copyright before filing a claim with the Tribunal. The filing fees will not cover the costs of adjudication, so Congress will need to be prepared to subsidize the costs of these Tribunals.

Eligible Infringement Claims: The Tribunal, as initially envisioned by the Office, would open the door to nonliteral infringement claims and other types of claims as to which factual disputes would be significant and not easy to resolve through a streamlined process (see *supra* Part II, Breadth of Jurisdiction).⁴³ There was general consensus at the workshop that the Tribunal should only adjudicate relatively straightforward infringement claims (i.e., claims of exact or near-exact copying or of public performance). These types of disputes are most readily susceptible to being adjudicated through a small claims process.

Discovery & Expert Witnesses: To adjudicate claims of infringement on a largely or wholly documentary record (what we used to call a “paper record”), there should be no—or extremely limited—discovery. Similarly, if a matter is complex enough that expert witnesses are needed to resolve it, the claim is probably one that should not be resolved through a small claims process.

Federal Rules of Civil Procedure (FRCP): The Office Small Claims Report mentions some specific rules that it envisions would be followed, even if simplified, in Tribunal proceedings.⁴⁴ While recognizing that the small claims procedure is typically informal by design and simplified to expedite the process, the workshop participants were concerned about how Tribunal adjudicators would decide which FRCP should apply and which should not. There was some concern that these decisions might unfairly favor one party or type of litigant over another, or otherwise call into question compliance with due process requirements.

Three-Member Panels: The Report proposes that each Tribunal proceeding be adjudicated by a three-member panel, seemingly so that multiple decision-makers could collectively bring a breadth of expertise and experience to help ensure a holistic, balanced process.⁴⁵ Workshop participants surmised an additional explanation that this would mitigate the need for a robust appeal process. It may well be the case that three people on a panel would reach more considered decisions on the merits and on remedies than solo judges would. Consistency of adjudications may be achievable with three adjudicators hearing every case. Given the breadth of jurisdiction and process of adjudication envisioned in the Report, the volume of claims made to the Tribunal could be very substantial, likely in the thousands and possibly more than that per year. This is considerably more than one or a small number of panels of three could plausibly hear. There is also concern about consistency of three-

43. See SMALL CLAIMS REPORT, *supra* note 1, at 137 (§ 1403(c) (permissible claims)); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same). The Office also recommended that all types of works be covered by the system, although it recognized that some claims, for example those involving computer software, might require in-depth analysis beyond the capabilities of the Tribunal. See SMALL CLAIMS REPORT, *supra* note 1, at 119.

44. See, e.g., SMALL CLAIMS REPORT, *supra* note 1, at 122–23 (recommending that rules regarding related claims and joinder of parties be permissive rather than mandatory); see also *id.* at 125 (making discovery rules more flexible).

45. See SMALL CLAIMS REPORT, *supra* note 1, at 100–01, 133 (§ 1401 of draft (providing for three Copyright Claims Officers each serving 6-year terms, two with copyright experience and one with ADR experience)); H.R. 6496, 114th Cong. § 2 (2016) (same); H.R. 5757, 114th Cong. § 2 (2016) (same, except all three must have copyright experience). The number and makeup of the panel resembles the Copyright Royalty Board, which by statute comprises three judges, each with varied, specific expertise. See 17 U.S.C. § 802(a)(1) (2012). But see H.R. 3945, 115th Cong. (2017) (allowing claims under \$5,000 to be adjudicated by one Tribunal member).

member panel adjudications. The Federal Circuit is an example of a specialized court that has experienced serious intra-circuit conflicts. The same problem might well arise in respect of Tribunal panels as well.

Appeal Process & Judicial Review: It is commendable to aim for streamlined Tribunal proceedings. It is consistent with that aim to limit the process and grounds on which to appeal adverse rulings. The proposed Tribunal would, however, unduly limit the grounds on which appeals could be made, both to the Register and also to a District Court, when a successful Tribunal claimant seeks a court order to enforce the Tribunal's award.⁴⁶

Declaratory Judgments: The Office proposal includes a provision requiring a federal district court to order a stay of proceedings or other appropriate relief of any claim brought before it that is the subject of a pending active Tribunal proceeding.⁴⁷ If the potential respondent were to decide to file a declaratory judgment of noninfringement in federal court instead of agreeing to participate in a Tribunal proceeding, it would seem that a Tribunal proceeding that commenced within the given time frame of an opt-out regime should be suspended. There is currently no provision in the proposed legislation to accomplish this.

Public Record Transparency: The Office Small Claims Report recommends that the outcome of Tribunal proceedings be nonprecedential.⁴⁸ Workshop participants agreed with this recommendation. Yet, there was a strong sense within the group that the outcomes of Tribunal adjudications should be explained in written opinions and that any filings in adjudicated cases, including any declarations filed in support of claims and defenses in addition to documents offered in support of claims or defenses, as well as the written opinion of findings and remedies ordered, should be matters of public record and available for public inspection.⁴⁹ Other transparency mechanisms could include internal interpretive guidelines, externally vetted training materials, and periodic audits of decided cases, to minimize the possibility of systemic bias in the Tribunal's decisions.

46. The Office proposal would allow parties to seek reconsideration by the Tribunal and, upon payment of an additional fee, review by the Register of the reconsideration decision. *See* SMALL CLAIMS REPORT, *supra* note 1, at 149 (§§ 1405(v)-(w) of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (§§ 1405(x)-(y)). Proposed provisions also would allow parties to apply to the D.C. District Court to have the tribunal decision vacated, modified, or corrected, but only where the decision was issued as a result of fraud or similar misconduct, where the Board exceeded or imperfectly executed its authority, or in the case of a default judgment or one based on failure to prosecute, upon a showing of excusable neglect. *See* SMALL CLAIMS REPORT, *supra* note 1, at 152 (§ 1407(c)); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (§ 1407(b)).

47. *See* SMALL CLAIMS REPORT, *supra* note 1, at 151 (§ 1406(d) of draft); H.R. 6496, 114th Cong. § 2 (2016) (same). In H.R. 5757, such action by the district court was at the court's discretion. *See* H.R. 5757, 114th Cong. § 2 (2016) (§ 1403(d)(2)).

48. *See* SMALL CLAIMS REPORT, *supra* note 1, at 130, 150 (§ 1406 of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same). If, however, a Tribunal determined that a work alleged to be infringed had entered the public domain, it seems reasonable that such determination ought at least to be precedential within the Tribunal, so that in future claims brought involving the same work, the work's copyright status would not have to be resolved de novo each time.

49. *See* SMALL CLAIMS REPORT, *supra* note 1, at 140 (§ 1405(b) of draft (requiring the Tribunal to maintain records documenting the proceedings)); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same). The Office proposal would require the Tribunal decision and all relief awarded or any settlement terms to be in writing, and it provides for the publication of its final determination on its website. *See* SMALL CLAIMS REPORT, *supra* note 1, at 146–47 (§ 1405(s) of draft); H.R. 6496, 114th Cong. § 2 (2016) (§ 1405(u)). H.R. 5757 provided for the publication of other records, subject to redaction. *See* H.R. 5757, 114th Cong. § 2 (2016) (§ 1405(s)).

IV. POTENTIAL FOR ABUSES

Overuse by Corporate Owners & Assignees: The principal rationale for establishing a small claims procedure for copyright infringement is many creators are deterred from filing infringement suits to seek damages for small claims due to the high costs of federal court litigation. As noted earlier, *supra* Part II, the most sympathetic potential claimant is the individual, independent author who is struggling to make a living. Of course, companies, whether big, medium, or small in size, might also want to use the small claims process to lower their costs of adjudicating copyright claims. Some workshop participants recognized that many companies can afford federal court litigation and noted that corporate plaintiffs are not a good fit within the distributive objectives of a Tribunal. Assignees of copyrights, whether individual or corporate, may abuse the Tribunal procedure by buying up small claims and seeking excessive damages before Tribunal panels. Overall, a small claims system tailored to the claims of actual creators of copyrightable works would better serve its intended purposes.

Statutory Damages: The most convincing rationale for adoption of statutory damages as a remedy for copyright infringement is two-fold: when it is impossible, as a practical matter, to prove actual damages and when it would be cost-prohibitive to prove them. The Tribunal proposal would not confine the award of statutory damages to only those circumstances. It would instead enable claimants to ask for \$15,000 per infringed work (up to the \$30,000 cap) if the owner promptly registered the copyright or, departing from the copyright statute, \$7,500 per work for those who had not timely registered their copyrights (up to a \$15,000 cap).⁵⁰

Given the well-known vagaries in the award of statutory damage under the current copyright regime,⁵¹ the likelihood is strong that virtually every claimant will demand statutory damages in the maximum amount. While the total statutory damage risk would be less than in federal court, the risks of excessive and arbitrary awards are still quite substantial under the proposed Tribunal regime. When a creator would have charged \$50 or \$500 for a license fee, an award of \$15,000 per work as statutory damages seems difficult to justify. Unless the Office was willing to develop guidelines and principles for awards of statutory damages, it is difficult to support creating another statutory damage regime for the Tribunal. Furthermore, removing statutory damages from the small claims process could be a strong incentive for potential defendants to participate in this system rather than opting out and waiting to see whether the plaintiff has the determination and financial means to pursue the matter in a federal district court.

Copyright Trolls: An additional reason to be concerned both about statutory damages as well as corporate and assignee claimants is that this combination in regular copyright cases has given rise to opportunistic claims in federal court that are used to extract settlements from alleged infringers who choose to pay a few thousand dollars rather than having to undergo the expense of litigating a case in federal court. Copyright troll cases have been cluttering up federal court dockets.⁵²

If corporate owners and assignees can demand maximum statutory damages in Tribunal proceedings and obtain default judgments unless a person alleged to infringe affirmatively opts out, there will be a new venue in which this kind of opportunistic behavior will likely be manifest. There

50. See SMALL CLAIMS REPORT, *supra* note 1, at 110–12, 138 (§ 1403(d) of draft); H.R. 5757, 114th Cong. § 2 (2016) (§ 1403(e)); H.R. 6496, 114th Cong. § 2 (2016) (§ 1403(e)).

51. See, e.g., Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 355–57 (2013) (describing a statutory damages regime that incentivizes plaintiffs to bring claims for a possible windfall, but not defendants to challenge them); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480–91 (2009).

52. See, e.g., Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1107 (2015).

are at present insufficient mechanisms for deterring this opportunistic (and perhaps extortionate) conduct and possibly unfair settlements in the shadow of the risk of excessive statutory damage awards.⁵³

V. UNDEREXPLORATION OF ALTERNATIVES

The Office Small Claims Report mentions but gives short shrift to alternative ways to enable copyright owners to be able to obtain compensation for small-scale infringements. The BCLT–Hastings workshop participants thought the Office should have given more attention to other alternatives, at least some of which may be worthy of greater support than the Tribunal proposal.

We understand that the Office is enthusiastic about expanding its role to address what it regards as a pressing need to provide meaningful remedies for infringement claims that are too expensive to litigate in federal court.⁵⁴ Cases can be too expensive for at least two reasons. First, some claims are just plain small. If the reasonable recovery to be expected is only \$1,000 or so, it is not a good use of the federal court system to adjudicate such claims. Moreover, few attorneys would be willing to take such cases. The cost/benefit ratio is too modest to make bringing such claims worthwhile. Second, many creators whose works are infringed have not registered copyright claims promptly in order to be eligible for awards of statutory damages and attorney fees.⁵⁵ Even if the amount potentially recoverable in federal court would be, for example, multiple tens of thousands of dollars, the costs of litigation would likely swamp the potential recovery for those ineligible for attorney fee or statutory damage awards.

Yet, there are other ways to address the small claims problem. Congress could, for instance, enable more creators to bring copyright infringement lawsuits for low-value claims by amending § 412 so that copyright owners would always be eligible for statutory damages and attorney fees. Lawyers who knew that a successful claim for \$1,000 or less would also result in attorney fee awards would have plenty of incentives to bring those small claim cases. (There would, of course, be a kind of inequity issue if the client ended up with \$1,000 and her attorney took home \$10–20,000, but this would address the lawyer incentives to bring claims.) This may be an undesirable alternative from the standpoint of flooding federal courts with low-value claims, as well as reducing the incentives for prompt registration of copyright claims, or further extending statutory damages (see earlier discussion in Part IV), but it is an alternative.

The Report mentions mediation and arbitration as other possibilities to the Tribunal proposal, but noted a lack of enthusiasm for these processes among rights holders.⁵⁶ The Report nevertheless recommends considering those alternatives to some extent within the proposed small claims regime.⁵⁷ Perhaps a more thorough and neutral assessment of these options should get more attention.

53. *See, e.g.*, Depoorter & Walker, *supra* note 51, at 343–45.

54. *See, e.g.*, SMALL CLAIMS REPORT, *supra* note 1, at 3–4.

55. 17 U.S.C. § 412 (2012).

56. *See* SMALL CLAIMS REPORT, *supra* note 1, at 131–32.

57. *See* SMALL CLAIMS REPORT, *supra* note 1, at 153 (§ 1408 of draft) (designation as ADR process upon referral from district court); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

Another alternative would be using the Uniform Domain Name Dispute Resolution Policy (UDRP) as a model for adjudicating copyright claims.⁵⁸ There was considerable skepticism about this approach at the workshop.⁵⁹

A more promising alternative would be demonstration projects using magistrates to address small copyright infringement claims in U.S. district courts.⁶⁰ An advantage of this approach would be that it would be a lower cost way to resolve claims and the due process concerns noted above would more likely be avoided without the need for new legislation. Another advantage would be that the parties could resolve their disputes in the districts where they resided or did business instead of being forced to adjudicate their claims through one D.C.-based regime.⁶¹

A primary driver of the proposal for a small-claims tribunal seems to be that claims with a relatively low maximum expected recovery are not currently brought because the copyright owner would have to pay more in attorney's fees than she could recover in damages. One alternative to address this concern is to increase the availability of free or low-cost legal assistance to copyright owners with small claims. Copyright owners with small claims, especially individual independent authors and creators, already benefit to some degree from pro bono representation and advice from lawyer organizations such as the California Lawyers for the Arts.⁶² Bar associations in major copyright industry cities could organize projects to provide more pro bono help to creators. Numerous clinics at law schools might also provide useful representation. Indeed, the federal funding that would presumably be needed to subsidize a small claims system (which is expected to cost more to run than would be paid for by filing fees) could instead be allotted towards legal representation for authors with small claims.

The Office Report examined the small claims court systems of various U.S. states⁶³ and concluded that state courts would not be the optimum forum for a copyright small claims process.⁶⁴ Workshop participants thought that further examination of state and local small claims courts might yield some useful lessons for how to devise standards, procedures, and practices for the copyright Tribunal. Some of these procedures might help to streamline Tribunal adjudications in the event that the Office did become the home of adjudication of small copyright claims.

58. The Report described UDRP proceedings and noted that the Office received comments suggesting that UDRP could serve as a model for a copyright small claims system. SMALL CLAIMS REPORT, *supra* note 1, at 73–78; *see also* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1411–25 (2004) (proposing a p2p copyright dispute resolution system modeled on UDRP). The jurisdiction of the UDRP over trademark claims is extremely narrow, regarding cybersquatting claims only.

59. As well, the issue of pro-complainant bias has dogged the UDRP process from the outset. WIPO reports that for all years the UDRP has been active (circa 1999), 86% of disputes have resulted in the transfer of the domain name to the complainant. Registrants have prevailed in only 12% of cases. *See* Annemarie Bridy, *Notice and Takedown in the Domain Name System: ICANN's Ambivalent Drift into Online Content Regulation*, 74 WASH. & LEE L. REV. (forthcoming 2017) (manuscript at 10), <https://ssrn.com/abstract=2920805>. Some of the same transparency concerns around public availability of filings have been raised about the UDRP as well. *Id.* (manuscript at 11).

60. The Office Report considered but quickly discounted the use of magistrate judges for small claims cases. *See* SMALL CLAIMS REPORT, *supra* note 1, at 93 (“Thus, absent a more general overhaul of existing procedures, the use of magistrate judges does not in itself present an obvious solution.”).

61. Another approach, not discussed at the workshop, was recently advanced by a practitioner that also involves the possible use of magistrate judges. *See* Morgan E. Pietz, *Copyright Court: A New Approach to Recapturing Revenue Lost to Infringement*, 64 J. COPYRIGHT SOC'Y USA 1 (2017). It calls for using existing federal court rules to create a copyright small claims procedure particularly with BitTorrent and photography cases in mind. *Id.* A magistrate resolution approach would also avert the implicit bias issues raised in Part VI.

62. *See, e.g.*, SMALL CLAIMS REPORT, *supra* note 1, at 82–83.

63. *See* SMALL CLAIMS REPORT, *supra* note 1, at 52–61.

64. *See id.* at 94–97.

VI. LARGER ISSUES POSED BY THE TRIBUNAL PROPOSAL

Lack of a Cost/Benefit Analysis of the Proposed Tribunal Regime: A significant flaw of the Office Small Claims Report is that it fails to address cost/benefit issues posed by the proposed regime. It makes no effort to estimate how much it would cost for the Office to take on the ambitious role that the Tribunal proposal recommends. Nor does it indicate how those costs would be recouped. Because the claims would be small, the Office expects the filing fee to be very modest (\$100). It is thus clear that costs cannot be recouped from filing fees. If the proposal is enacted, the Tribunal would consist of three adjudicators and no fewer than two full-time staff attorneys to handle all the cases in the Tribunal system.⁶⁵ But if the number of infringement claims is quite high, the Office would have to assign hundreds of people, if not more, to enable the envisioned Tribunal to operate on an ongoing basis. Furthermore, if demand should warrant a larger system over time, some escalation of costs needs to be projected at the outset. A realistic cost/benefit analysis should be undertaken before enactment of the proposed legislation.

What's So Special About Copyright? The high costs of federal court litigation deter many persons and firms from vindicating their rights when they suffer modest levels of harm from violations of many types of federal laws. The Office Report does not recognize that the high-cost-of-litigation-deters-small-claims problem is a more general phenomenon. Nor does it try to make a case for why copyright violations are so special that a regime should be created that would address just these types of small claims and none others. Workshop participants noted a lack of empirical data in the Report about the scope of the problem that the Tribunal is supposed to address. One of the benefits of commissioning empirical research would be to better understand the normative position of defendants and plaintiffs, in order to create more effective incentives for opt-in participation. It would be helpful to have empirical data about defendants' incentives, including the likely impact of limitations on potential remedies applicable to them (e.g., caps on recoverable damages, attorney fee awards, etc.), more so than a generalized ABA survey from 2009 on which the Report relied.

Social Policy Favoring Precedents: Many copyright owners and lawyers who represent copyright owners are very supportive of the Tribunal proposal. If enacted as proposed, it may lead to a flood of cases being filed with the Office, perhaps even as to claims that are arguably worth much more than \$30,000, because the process is expected to be a quick and easy way to get an award. A countervailing social interest lies in the existence of a substantial body of judicial adjudication of copyright claims that will result in some precedent-setting decisions. If incentives to use the Tribunal process are very high, there will be fewer precedents set and copyright law will become less transparent. Prospective users of copyrighted works and their lawyers will then have fewer precedents from which to assess the plausible legality of the users' plans. While proposed legislation provides for written decisions by the Tribunal and their publication, their lack of precedential value or persuasive weight would surely diminish the overall body of copyright law, particularly with regard to specific works and areas of the law.

Implicit Bias? Another larger issue posed by the Tribunal proposal considered at the workshop was whether setting up this tribunal would implicitly lead to outcomes biased against respondents. The main justification for establishing this new regime is said to be overcoming the difficulty that copyright owners with modest-sized claims have in vindicating their rights and getting some compensation for infringing uses of their works.⁶⁶ Would Tribunal adjudicators be more receptive to

65. See *id.* at 100–01, 133 (§ 1401 of draft); H.R. 5757, 114th Cong. § 2 (2016) (same); H.R. 6496, 114th Cong. § 2 (2016) (same).

66. See, e.g., SMALL CLAIMS REPORT, *supra* note 1, at 1, 3.

claims made by copyright owners than to defenses raised by respondents? It is hard to know, but it is plausible that the adjudicators would want to demonstrate that they are helping authors get compensation by finding in favor of claims.

Separation of Adjudication and Policy: The Office’s Tribunal proposal does not address how or whether the Office would separate Tribunal adjudication functions and the Office’s policy functions. It is easy to imagine that there would be some spillovers unless the Office established a firm policy requiring a “wall” between these parts of the Office. Suppose, for instance, that a copyright owner made a claim for \$15,000 against an Internet Service Provider (ISP) on a novel secondary liability theory relevant to a legislative proposal on which Congress asked the Office to comment. If the tribunal found in favor of the ISP on the novel theory of secondary liability, policy staff preparing the Office’s response to Congress might be inclined to defer to the theory its Tribunal had accepted. The Office Report does not address this issue.

VII. CONCLUSION

The BCLT–Hastings Workshop delved into the small claims regime proposed for adoption by the Copyright Office’s Small Claims Report. For reasons stated above, workshop participants had some serious reservations about the legislation contemplated in the Report and the bills introduced in 2016. The most pressing concerns of the group focused on the scope of the Tribunal’s jurisdiction, on making the system more truly voluntary than the opt-out regime currently envisioned would, on adopting more procedural and substantive protections for respondents, and on ensuring that available remedies are commensurate with the lost profits that creators sustained.