

Testimony of Nancy E. Wolff
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on
“Copyright Remedies”
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Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss copyright remedies as a part of your ongoing review of the American copyright system.

I. Introduction and Background

My name is Nancy Wolff and I am a Partner at Cowan DeBaets Abrahams and Sheppard, LLP. In my practice, I represent numerous visual artists, content licensing companies and counsel trade associations, such as PACA/Digital Media Licensing Association and PLUS, an organization aimed to create standardization amongst licensing to make it easier for both creators and users to license images. Clients come to me with potentially infringing matters on almost a daily basis.

These comments are submitted on behalf of myself, as well as a number of visual arts trade associations, including PACA, Digital Media Licensing Association (“PACA”), American Society of Media Photographers (“ASMP”), National Press Photographers Association (“NPPA”), Graphic Artists Guild (“GAG”), North American Nature Photography Association (“NANPA”) and Professional Photographers of America (“PPA”) (collectively the “Organizations”). Collectively these organizations represent the creators of most of the visual content that enrich your life every day, as well as the licensing entities that aggregate, distribute and make the content of these professional artists available to the media and others for licensing. This includes illustrators, graphic designers, videographers, photojournalists, press

photographers, advertising photographers, portraiture, wedding and event photographers and nature photographers. When you read the Washington Post, your favorite blog on an iPad or other tablet, or keep up with news and events on a smart phone, the content is enhanced with illustrations, photographs and videos created by members of these organizations. Visual images document history, illuminate our world, and give us insights into our world that cannot be adequately expressed by the written word.

These professionals are small business owners throughout America. Their livelihood depends on the ability to license content and receive fair compensation for the works they create. The underpinning of their business is a robust copyright system, including the ability to enforce their rights in the event users choose to use their works without obtaining a license. To have a right, without a remedy is an empty right. In my experience, federal court litigation, the exclusive venue for copyright infringement claims, is simply too expensive given the relatively lower monetary value of many image claims. Online infringement claims, in particular, do not justify the high cost of litigation that can exceed a \$100,000. As a consequence, many online uses that should be licensed with payments going to the creator and/or their licensing representatives are used without payment or license, based on the calculated risk that there will be no consequence. While there exists many options for legitimately licensing images for reasonable license fees, too many users simply forgo the license and assume that anything on the internet is available for free.

While infringement of content made available for licensing has always been present, even before digital photography when we lived in a predominantly print world, the frequency and ease with which images now can be redistributed and used without obtaining any license or paying a

license fee is causing measurable economic harm to the individual creators and their licensing organizations.

The reality for more than a decade now is that most images displayed on websites are not authorized or licensed. A few years ago, PicScout, a company known for its image recognition technology and ability to search the Internet for the use of images and compile reports, did a study of a sampling of commercial websites to determine whether the images displayed were licensed or not. The study results confirm that approximately 90% of the images on the commercial websites sampled were not properly licensed. The knowledge that most infringements will not be enforced by the copyright owner contributes to such a high rate of infringing uses.

II. Challenges in the Current Legal System

A. Registration

The ability for visual artists to use the federal court system to redress the harm is limited for several reasons, including: the difficulty of effectively registering large volumes of images, the relative smaller value of the claims and the resources and effort involved in bringing a claim in federal court. The first challenge to effective copyright enforcement is copyright registration. Photographers and other visual content creators are among the most prolific of creators, and in sheer numbers create more copyrightable works than musicians, writers, filmmakers and most other authors whose works are protected by copyright. The burden on resources, both financial and human, in registering large collections of works discourages these creators from taking advantage of the voluntary copyright registration system, when faced with the day to day challenges of making a living, and the understanding that under the current Copyright Act a work is protected from the moment of creation. While this is accurate, a U.S. author cannot commence

an action unless the work is registered, and if the work is not registered before the infringement or within three months of publication, statutory damages and the ability to seek attorneys' fees are unavailable, leaving the visual artist only with the opportunity to seek actual damages, often a relatively nominal amount. *See* 17 U.S.C. §§ 411,412. Consequently, the great majority of visual content creators do not hold the keys to the courthouse, even if they discover clearly infringing uses. The cost of an expedited copyright registration may often far exceed the value of the licensee fee that could be obtained. While the Copyright Office has worked with the photography community over the years in developing group registration solutions that take into consideration the large number of images that can be uploaded on a daily basis, the process still provides hurdles to most visual artists with the practical result that many works of visual arts are not registered. Reviewing ways in which visual artists can more effectively register their works and working with the Copyright Office in creating the 21st century registration system that can accommodate the submission of digital files as part of a photographer's daily workflow will certainly improve this challenge.

B. Alternate Tribunal for Smaller Claims

In order to continue to obtain license fees for the use of images on behalf of the copyright owners, there needs to be an efficient, effective and viable means for image creators and licensors to enforce their rights. Otherwise, there is no incentive to license images and visual artists will always be competing against the use of images obtained by infringement for free. The Organizations' members take seriously the responsibilities of enforcing copyright in the imagery they represent and many licensing companies have departments dedicated to copyright compliance in order to resolve infringements and secure licensing fees on behalf of copyright holders. Indeed, visual artists' economic livelihood depends on a robust copyright system. As

such, many artists, as well as the Organizations, have had to enter into the business of tracking down infringers to enforce their copyright. While the first step is to resolve claims without resorting to litigation, some claims cannot be resolved, either because the infringer refuses to respond, believes that simply removing the infringing content is sufficient, or refuses to pay adequate licensing fees.

Statutory damages remain an important remedy to visual artists and their representatives. Without statutory damages, it is often difficult to establish actual damages. Frequently however, because many works are not registered for the infringing use, visual artists are only able to seek actual damages as a remedy, often limited to the amount of the license fee. Moreover, they cannot seek attorneys' fees, which can have the effect of encouraging claims to settle early, often without resorting to litigation. If the claim cannot be resolved informally, a decision must be made as to whether an infringement action is warranted. The current system fails when the relief sought is actual damages because standard license fees for many noncommercial uses on the Internet are relatively low, in the hundreds of dollars, and even commercial uses may only be in the thousands of dollars. Using federal court to try to enforce copyright infringement on many of the online abuses is like using a sledgehammer, when a flyswatter is all that is needed. The high cost of filing and prosecuting a copyright claim in federal court often forces copyright owners to greatly increase their demands to cover the cost of litigation and to cover the cost of attorneys' fees. This places undue pressure on all sides of the matter, including the judicial system, causing more funds and energy to be expended than necessary. In most instances, it does not make commercial sense to pursue an action unless there are numerous registered images infringed by a single infringer. As a result, individual artists and smaller companies are at a disadvantage because they do not have the same capabilities and resources that larger corporations possess to

prevent their works from being taken advantage of. Unfortunately, the inability to enforce copyrights only encourages infringement and disrespect for copyright in general and, absent a practical remedy, deprives visual artists of their rights.

In addition to the obvious financial deterrents in bringing an action, including attorneys' fees and other costs, such as obtaining a court filing index number (a fee that may itself exceed the license value of an image use), expert fees, document production and deposition costs, it is often difficult to finding attorneys throughout the country who are willing to handle these type of actions, where the economic value, even with the of availability of statutory damages and/or attorneys' fees, may be relatively low. Even if a copyright owner has the benefit of an in-house lawyer or a local lawyer that is willing to work with them, strict jurisdictional requirements may prevent the company from being able to bring a claim in its local federal district. This is an additional deterrent to pursuing claims against a defendant who resides at a distance to the copyright owner, adding additional costs and inconvenience, particularly in the case of the individual who may not be able to afford the costs of, or to take the time off to, travel. In some cases, the inconvenience of litigation is enough to prevent an individual copyright owner from bringing a lawsuit, as it detracts too greatly from the artists' ability to work and create. Further, there is a risk that the copyright owner could lose based on defenses such as fair use, an area of the law for which it is very difficult to predict outcomes. The small copyright owner often cannot take the risk that the defendant might prevail and be faced with the possibility of paying the defendant's attorney's fees.

On almost a daily basis, we counsel clients as to the risk of bringing a copyright action and, in most instances, the client is deterred based on the cost of litigation and the risk of fees.

III. Support of the Copyright Office Report on Small Claims Recommendations

The Organizations collectively favor a system that would enable rights holders to elect to bring a copyright infringement claim using a form of alternate dispute resolution and support the Copyright Office Study on Remedies for Copyright Small Claims. Each of the organizations have provided comments to the United States Copyright Office in connection with their study on remedies for copyright small claims and support the United States Copyright Office Report On Copyright Small Claims published in September 2013. While each of the Organizations submitted individual responses, the issue of effective remedies for copyright infringement is a priority, and the Organizations have met over the years to collectively discuss and respond to questions posed by the Copyright Office. Specifically, the Organizations support an alternate dispute resolution system that would provide:

- The ability to bring a small claim without the need of legal representation;
- A forum and procedures that are cost effective and do not require expensive travel, costs or expert fees;
- The ability to have a claim adjudicated timely by a tribunal that is knowledgeable about copyright;
- A resolution that offers finality and ease of enforcement of any judgment; and
- Incentives to avoid having the defendant's rejecting the forum and demanding that the claim be brought in a federal court of general jurisdiction.

The submissions of the various Organizations to the Copyright Office in response to three separate notices of inquiry regarding copyright small claims and remedies provide greater detail as to the complex issues that arise when considering an alternate system than federal court. Some

highlights of submission on behalf of PACA/the Digital Media Licensing Association may be helpful in framing the issues.

Nature of the Process

We envision the process of submitting a claim under a small copyright claims system as an alternative dispute process with guidance and oversight from the Copyright Office. The adjudicators should have copyright law experience and some training in dispute resolution. The process should be virtual, meaning that claims should be submitted electronically without the need for any party to travel to any location in order to testify or to provide other evidence. The award should be timely, and, absent abuse, should not be entitled to an appeal.

Voluntary Versus Mandatory

We acknowledge that any alternative tribunal to federal court will most likely be voluntary. In order for the system to be successful, participants should be offered a cost effective and streamlined dispute resolution process. There should be incentives to encourage the use of the system, to discourage more well-healed infringers from refusing to participate in the hopes that the claimant would not have the financial means to bring any claim, thereby avoiding any risk of paying damages for infringing activity. Possible incentives could include an increase in the prevailing plaintiff's damages if the defendant rejects the plaintiff's election to proceed in the small copyright claim forum and the plaintiff prevails in the general federal system. In this event, the plaintiff should be entitled to costs and attorneys' fees, regardless of whether attorneys' fees would be available under Section 412 of the Copyright Act.

Permissible Claim Amount

We support the Copyright Office recommendation that the jurisdictional limit for a small copyright claims system be up to \$30,000. This amount is consistent with the statutory limit of

damages for non-willful infringement under the Copyright Act. In addition, this amount would cover many cases that are not brought because the recovery is too low, such that claimants are not able to find representation and are not able to navigate the federal system without an attorney. The American Bar Association Section of Intellectual Property Law conducted a poll of its members in connection with the Copyright Office Notice Of Inquiry on Remedies for Small Claims Copyright Claims and only one third of the attorneys polled stated they would accept an uncomplicated case with a likely recovery of less than \$30,000.

Representation

In the spirit of an affordable, less formal process, the parties should not be required to retain an attorney. Whether one is entitled to retain an attorney should be at the election of the party, but not prohibited, whether the party is either an individual or an entity. Rules regarding whether a corporation or business entity may appear without legal counsel should be relaxed for small copyright claims, similar to arbitration proceedings in which a corporate officer or employee may appear and represent the corporation.

Discovery

In order to have a less expensive, streamlined and quicker resolution, discovery and other procedures will necessarily be limited.

Damages

Apart from establishing a jurisdictional limit, the Organizations do not recommend altering existing law and policy on recoverable damages. Both actual damages if proven and statutory damages and attorneys' fee should be allowed, subject to the jurisdictional cap.

Effect of Adjudication

Similar to an arbitration award, the award of the adjudicator in a small copyright claim forum should be final and enforceable. Decisions should not be published or carry any precedential weight and should be limited to the specific activities in question.

Enforceability of Judgment

Congress may want to consider the model for enforcing arbitration awards with respect to awards rendered in a small copyright claim tribunal. If a party is awarded damages, that party should have 30 days to pay. If the party does not pay, the award may be converted into a judgment and any applicable court with jurisdiction will enforce any award if payment has not been made.

Limitations on Relief Offered

Whether damages other than monetary damages should be part of the small copyright claims system should be considered carefully. An injunction to prevent the continued infringement or to enforce the removal of content online may be appropriate if a work is not so incorporated within another creative work that it would cause disproportionate economic harm to the new work. If, however, the infringing work is merely displayed on a website, in addition to damages, it would be appropriate in order to enjoin continued use of the infringing work by the defendant, to avoid multiple claims for the same use by a plaintiff against the same party. This would address a problem that is rampant with notice and takedown under Section 512 of the Copyright Act, where works may be taken down after notice to the service provider, but are then immediately reposted by users, requiring copyright owners to repeatedly send notice and takedown letters for the same infringing content.

IV. Conclusion

The Organizations support the efforts of the Copyright Office in its study of a Copyright Small Claims Court. They actively participated in the Office's study by responding to inquiries on this issue. More details regarding the Organizations' recommendations can be found on the Copyright Office's website at: <http://www.copyright.gov/docs/smallclaims>. We encourage Congress to implement the recommendations summarized here and described in the comments filed by the Organizations. These proposed solutions will create a vastly more suitable venue for small claims for both statutory and actual damages and will benefit users, copyright owners, licensing agencies, and visual artists (especially those who earn a substantial portion of their livelihood from licensing fees) alike. Without an effective remedy, visual artists do not have a right, and infringement will continue in an unconstrained manner.

Thank you for inviting me to testify today. We look forward to assisting the Subcommittee as it continues to consider this issue and the overall process of copyright review.