January 31, 2017

Hon. Bob Goodlatte, Chairman
Hon. John Conyers, Jr., Ranking Member
House Judiciary Committee
Washington, DC 20515

Re: CEA Comments on Copyright Office Reform, Small Claims System Proposal

The Consumer Technology Association (CTA)[1] appreciates the invitation to comment on issues raised in the Committee's White Paper on Reform of the U.S. Copyright Office. In addition to seeking comment on the future source of authority and reporting structure of the Office, the White Paper seeks comment on the Office's 2013 proposal for establishing a quasi-judicial "small claims system" under the administrative and policy aegis of the Register. This proposal is the focus of CTA's comments.

CTA opposes the small claims system proposal out of concern that however administered or supervised it would create a new arena for copyright "trolls" and generally would create uncertainty in the law, and would intimidate consumers and many small entrepreneurs. Moreover, in the form proposed it would project Office authority into the judicial realm at a time when the Office's structure, mission, oversight, and efficiency are under review and the Office's policy judgments and assertions of authority have been seriously challenged.[2]

CTA urges the Committee to put aside the small claims system idea and focus instead on addressing the *in terrorem* effect on innovation of the existing law's outmoded provision on statutory damages, 17 U.S.C. Section 504(c).

---

[1] CTA is the trade association representing the $292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. CTA also owns and produces CES – the world's gathering place for all those who thrive on the business of consumer technologies.

[2] *See, e.g.,* Public Knowledge, *Captured: Systemic Bias at the U.S. Copyright Office*, Sept. 8, 2016 (PK Report), https://www.publicknowledge.org/documents/captured-systemic-bias-at-the-us-copyright-office-1.

A Small Claims System Would Offer New Opportunities For Troll Harassment And Extortion of Small Businesses and Consumers.

Although a small claims system could offer some advantages to individuals and small businesses who believe they are exploited by larger enterprises, it would also offer out-of-scale opportunities to copyright "trolls" by enabling baseless and nuisance litigation by organizations set up specifically to exploit such a system. The problem already exists at the federal court level. For example, Prenda Law founders recently were charged with extortion for filing bogus lawsuits against hundreds of Internet users based on purported personal downloads.[3] Righthaven, which did not create, produce, or distribute content, brought hundreds of infringement lawsuits and was ordered to pay more than $200,000 in defendants' attorney fees and $5,000 in sanctions.[4] A small claims system in which consumers are vulnerable would offer new and vast opportunities to entities that the federal judicial system has begun to sanction.

Copyright troll behavior is a growing problem not limited to these two notorious plaintiffs. Troll plaintiffs threaten to use the discovery process to reveal personal behavior – for example, the embarrassment of being accused (accurately or not) of downloading explicit material is a great motivation to settle.[5] The small claims discovery practice would apparently enable such behavior; the statutory damages limit (up to $30,000) would still greatly exceed average troll case settlements, which are "usually in the range of $2000 - $4000."[6]

Any "Small Claims System" Would Establish A Quasi-Judicial Body Of Non-Reviewable Precedent.

It cannot be reasonably expected that the Copyright Office Judges could do their work without establishing a body of effective precedents that are widely known to the copyright bar and litigants. It seems likely that a large number of the suits brought to the "system" would be brought against consumers, complaining of conduct that consumers have taken for granted as fair use. Given the similarity and commonality of these cases, it is highly unlikely that the Copyright Office Judges would reach internally conflicting results or would fail to rely on analysis and determinations made in similar or identical small claims system cases. So whether or not considered legal "precedent," the quasi-judicial results, analysis, and reasoning of Copyright

---

[3] Joe Mullin, *Prenda Law "copyright trolls" Steele and Hansmeier arrested,* ars technica, Dec. 16, 2016, https://arstechnica.com/tech-policy/2016/12/breaking-prenda-law-copyright-trolls-steele-and-hansmeier-arrested/.

[4] *See, e.g.,* Eric Goldman, *The Righthaven Debacle, 5 Years Later*, Technology & Marketing Law Blog, March 17, 2015, http://blog.ericgoldman.org/archives/2015/03/the-righthaven-debacle-5-years-later.htm.

[5] *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108 – 1110 (2015), http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1530&context=facpubs (Sag study).

[6] *Id.*

Office Judges would become well known to major litigants, the copyright bar, and some segments of the public.

At least some of these expected outcomes will vary from or disagree with outcomes reached in U.S. district courts and circuit courts of appeals – particularly on "grey area" issues where the circuits are "split."[7] In such cases the Copyright Judges would choose to "back" one circuit or another – or there will then exist *three* bodies of law – Circuit A, Circuit B, and the Copyright Office small claims system. It is hard to foresee any other outcome. It also seems likely, based on positions taken by the Copyright Office to date, that these outcomes will be less favorable for consumers, entrepreneurs, and innovation than the outcomes reached in federal courts.[8] This presents a systemic problem which, as we discuss further below, aggravates the over-reach already occurring in the projection of Office opinion beyond its assigned mission and responsibilities, all of which the Committee is now re-evaluating.

A Chilling Prospect for Consumers and Innovators

For consumers and for innovators, the prospect of a separate and non-judicial "consumer fair use court" must be chilling. An Office-administered small claims system removes much of the proprietor risk inherent in suing consumers, small businesses, and innovators. Fear of establishing an adverse judicial precedent (such as on consumer in-home fair use) has protected consumers from being personally sued for activities confined to their own home.[9] A "small claims system" lessens this concern because (1) the results are not binding on courts, and (2) in any case, the "system" is administered by a Register whose views are likely to be favorable to proprietors. Consumers and small business will likely be aware that the Copyright Office Judges will be more inclined to rule for proprietors, and against fair use and other defenses, than have been the federal courts. So consumers and small innovators would have to choose between a forum likely to be unfavorable, and one in which they cannot afford to litigate.

That the proposals (thus far) would make the system "voluntary" in allowing removal to the federal courts is likely to be of no or limited comfort to consumers receiving notice of a suit. To persuade consumers and innovators to stay in the "small claims system," major proprietors would be likely to pursue into federal court *some* of the consumers who choose to opt out of the small claims system – a number sufficient to persuade other consumers to remain. Whether or not such cases ultimately succeed or are dropped, the prospect of attorneys' fees and expanded

[7] Draft legislative provisions guiding the Copyright Office Judges to endeavor to follow the law of the circuit where the case *might* have been brought are likely to be of little comfort, especially where arguments are fact-based and application of doctrine is arguable.

[8] *See* PK Report at 11 - 19.

[9] Some consumers were initially made defendants in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("Sony"), but were dropped from the case in response to public and press reaction. Subsequent consumer suits have focused on on-line activity potentially involving many other households.

discovery will be sufficient to face these consumers with the choice of a system aligned against them, or a federal court system in which it is too expensive for them to sustain litigation, even if they would expect to prevail.[10]

The Proposals Fail To Provide For Judges' Independence From The Register's Policy Choices and Office Policy Or Ministerial Duties.

The Copyright Office's 2013 small claims proposal[11] and the two bills introduced on this subject in the last Congress[12] would unavoidably extend the Register's influence into the realm and prerogatives of the Judiciary. CTA has already expressed concern that the Office has assumed prerogatives delegated by the Congress to the Executive branch and to administrative agencies.[13] The Committee should not further blur lines of constitutional and delegated authority by setting up a quasi-judicial small claims system within the legislative branch, or indeed any system not otherwise accountable to the courts.

As described in the 2013 Copyright Office proposal and the bills introduced in the last Congress, no effort would be made to insulate the judges or staff attorneys from ordinary policy and ministerial tasks in the Copyright Office. Rather, these would explicitly be a part of their jobs, at the discretion and direction of the Register. This seems a bad idea, even if the status, appointment, and good behavior expected of a Register were clearer than at present. That *nobody* seems entirely comfortable with the present structure and reporting obligations of the Copyright Office is a reason the Committee published its White Paper, seeking comment on fundamental

---

[10] It also seems likely that some consumers and small businesses would miss the deadline for "opting out" of the system or would misunderstand the nature or source of the complaint and would fail to do so. A truly voluntary system would inform defendants on an "opt-in" basis.

[11] Materials are collected at U.S. Copyright Office, Remedies for Small Claims, https://www.copyright.gov/docs/smallclaims/.

[12] 114th Congress, H.R. 5757, https://www.congress.gov/bill/114th-congress/house-bill/5757?q=H.R.+%205757; 114th Congress, Fairness for American Small Creators Act, https://www.congress.gov/bill/114th-congress/house-bill/5757?q=H.R.+%205757.

[13] In the context of the 2015 round triennial review of DMCA Section 1201(a)(1) exemptions, CTA expressed sharp disagreement with the Office's substantive judgments and its view of its own authority and scope for decision-making. One concern voiced by CTA and others was the Register's assertion of authority over matters delegated by the Congress to other agencies and its rejection of advice from the Commerce Department's NTIA, which had been tasked specifically by the Congress with guiding the Office. *See* U.S. Copyright Office, Docket No. 2015-8, Section 1201 Study: Notice of Inquiry and Request for Additional Comments, Comments of the Consumer Technology Association, March 3, 2016, https://www.regulations.gov/document?D=COLC-2015-0012-0044; Further Comments of the Consumer Technology Association, Oct. 27, 2016, https://www.regulations.gov/document?D=COLC-2015-0012-0119.

issues of appointment, structure and reporting obligations. With the Copyright Office already extending its reach into Executive Branch matters and now, as proposed, into quasi-judicial ones, "judges" should not be part and parcel of ordinary Office business.[14]

Statutory Damage Reform Should Be The Focus Instead.

Any legislation that would review or revise the Copyright Act should address the impossibility of applying Section 504(c) of the Act in cases in which secondary infringement or direct infringement in an on-line or cloud context is alleged. The notion of up to $150,000 in damages for *each work infringed* cannot be accommodated by judges or litigants when a connected product or on-line service might or might not (depending on the circuit where the case is brought) be judged to be willfully or knowingly infringing unknown thousands or millions of copyrights. Litigants and the judiciary deserve a more realistic and predictable measure.

CTA has urged statutory damages reform ever since a member risked its continued existence by introducing the first home video recorder. Cases in which digital devices or on-line or cloud services are charged with secondary or mass direct infringement involve "grey area" legal judgments in which secondary liability can turn on fine legal determinations pertaining to a will or imputed intent to infringe, for which the statutory remedy is up to $150,000 *per work infringed*. Depending on such fine legal conclusions, the result may be either billions in damages or, as the Supreme Court ultimately decided in *Sony* after two oral arguments and a five to four vote, zero liability.[15]

The risk to innovators of a possible finding of secondary (contributory, induced, or vicarious) infringement has become only more daunting in the era of on-line services, conduits and intermediaries, and "cloud" storage. The potential for out-of-scale awards grows along with the scale of the Internet itself. Copyright attaches to most works and expressions. As CTA advised the PTO in 2013,[16] the most mundane businesses and services rely on "Big Data" analysis for efficiency, planning, and marketing. This may entail access to and temporary or transformative storage of or linking to a great many works – even for a service offered directly or indirectly by a small business. Even where there are strong fair use or other defenses, many defendants, as happens with patent trolls, cannot afford to mount or risk a defense. Indeed,

---

[14] CTA also questions whether establishing a quasi-judicial small claims system in the legislative branch would be constitutional. *See Intercollegiate Broadcasting System v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), in which the appointment process for setting rates – not even for determining the rights of the parties – was found unconstitutional.

[15] The VCR and its DVR successors ultimately survived litigation, but one of the DVR pioneers was essentially sued out of business. *See* Katie Dean, *Bankruptcy Blues for PVR Maker,* Wired, Mar. 24, 2003, http://www.wired.com/entertainment/music/news/2003/03/58160.

[16] USPTO Docket No.: 130927852-3852-01, Comments of the Consumer Electronics Association, Nov. 13, 2013, https://www.ntia.doc.gov/files/ntia/consumer_electronics_association_comments.pdf.

Professor Sag identifies statutory damages, as presently constituted, as making the risk of being sued "intolerable for anyone who is not completely insolvent or staggeringly wealthy."[17]

The "small claims system" proposal does nothing to address or even ameliorate this problem. Reducing the maximum award to $30,000 will not protect most consumers and small entrepreneurs. Better funded entrants would still be vulnerable to judicial suit for up to $150,000 per work infringed, which in the extreme case *no* company could survive. In the Internet age this is no longer a tenable provision of law.

CTA is aware that the Committee intends to offer additional potential legislative measures for comment. CTA urges that statutory damage reform be made a priority, and that consideration of any small claims system should await the completion and enactment of statutory damage reform, particularly in the context of Internet-based or enabled devices and services.

CTA appreciates this opportunity to provide its views.

Respectfully submitted,

Michael E. Petricone
Senior Vice President
Government Affairs

[17] Sag study at 1120.