

RECENT DEVELOPMENTS

PICTURING A REMEDY FOR SMALL CLAIMS OF COPYRIGHT INFRINGEMENT

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INTRODUCTION

A photographer snaps a picture. The simplicity of those words fails to capture the work that goes into the act. For a professional photographer, it encompasses years of school, apprenticeship with another photographer or on a newspaper,¹ and the challenges of building a small business, all to reach a point where “snapping” pictures for a living pays an annual median wage of only \$29,130.² When a photographer takes a picture, years of study and practice coalesce into a reflexive action that is maximally efficient at composing a piece of art. It is also at that moment when a person who copies the photo³ takes not just the original expression of the image, but also full advantage of its author’s training.⁴ Sadly, the photographer is unlikely to find any remedy for infringement under our current copyright regime.⁵

Remedies for copyright infringement are found exclusively in federal court, but the high costs and delays of litigation effectively block creators without deep pockets from being able to protect their works from infringers. A growing criticism of the copyright system is that many small players who lack financial resources—and who most depend on the royalties their works provide—have no cost-effective, practical way to stop infringement.⁶

1. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, PHOTOGRAPHERS (2012), available at <http://www.bls.gov/oco/pdf/ocos264.pdf> (describing average education and training required for professional photographers).

2. *Id.* (specifying the 2010 annual median wage for professional photographers).

3. 17 U.S.C. § 106 (2006) (granting authors exclusive rights to reproduce, distribute, adapt, perform, and display their works).

4. *Id.* § 102(a) (defining subject matter protected by copyright as “original works of authorship fixed in any tangible medium of expression”).

5. *Id.* §§ 501–505 (creating a cause of action for copyright infringement and specifying remedies under the law).

6. Mickey H. Osterreicher & Alicia Wagner Calzada, *Comments of the National Press Photographers Association*, NAT’L PRESS PHOTOGRAPHERS ASS’N, at 7 (Oct. 27, 2011), http://blogs.nppa.org/advocacy/files/2012/01/final_Copyright-Small-Claims-Comments-

Individual photographers are just one category of authors who create copyrighted works that are easily infringed and who find remedies hard to come by.⁷

Yet the costs of intellectual property infringement—while hard to quantify—continue to rise.⁸ Business groups estimate that pirated and counterfeit intellectual property traded on international markets had a value of \$250 billion in 2007,⁹ and could be worth up to \$960 billion in 2015.¹⁰ In the field of photography, industry leaders suggest that photographers have suffered estimated losses as high as \$10 billion from online photo infringement.¹¹ The two largest stock photo companies report at least 112,000 incidents of online copyright infringement annually.¹² These incidents of pirating and infringement have a huge impact on the copyright industry, which represents eleven percent of the gross domestic product.¹³ The Copyright Alliance estimates that the United States loses

01-17-12-1.pdf (describing digital photo infringements as “right-click gone wild” and noting that, even if infringements are uncovered, “most will never be prosecuted because it is economically unfeasible for the creators to commence an action in federal court”).

7. *Legislation/Copyrights: Content Providers Not Keen About Small Claims Infringement Remedies*, 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 584 (Mar. 31, 2006) (quoting Authors Guild Executive Director Paul Aiken as saying his members would welcome a “small claims” process for infringement claims, but quoting Brad Holland of the Illustrators’ Partnership of America as strongly opposed to litigation reforms that could undermine authors’ rights under federal copyright law).

8. ORG. FOR ECON. CO-OPERATION & DEV., *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY* 9 (2007), available at <http://www.oecd.org/industry/industryandglobalisation/38707619.pdf> (noting the difficulty in assessing the impact of intellectual property counterfeiting and piracy because of the fragmented information available).

9. ORG. FOR ECON. CO-OPERATION & DEV., *MAGNITUDE OF COUNTERFEITING AND PIRACY OF TANGIBLE PRODUCTS: AN UPDATE 1* (2009), available at <http://www.oecd.org/sti/industryandglobalisation/44088872.pdf> (providing trade figures for all intellectual property, including patents, trademarks, and copyrighted works).

10. *See* BUS. ACTION TO STOP COUNTERFEITING AND PIRACY (BASCAP), *ESTIMATING THE GLOBAL ECONOMIC AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY* 8 (2011) (calculating projected values for 2015 based on an estimated increase of twenty-two percent each year). *But see* IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 74 (2011) (calling into question the methodology of the BASCAP report and suggesting that it overestimates the impact of intellectual property piracy).

11. Mikal E. Belicove, *Why Buy the Cow When You Can Get the Download for Free?*, *ENTREPRENEUR* (Sept. 17, 2009) <http://www.entrepreneur.com/blog/218532> (quoting Lawrence Gould, CEO of microstock photo service Vivotzoom, on the impact of online theft of stock and microstock photos). Gould based his projection on an estimate by image-tracking service PicScout that found 85% of rights-managed images on commercial websites were misused.

12. *Id.* (reporting numbers from Getty Images and Corbis, which closely track online use of their stock photos).

13. STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, *COPYRIGHT INDUSTRY*

\$58 billion in revenues annually from copyright piracy, including taxes and lost business profits.¹⁴

A right guaranteed in the U.S. Constitution,¹⁵ copyrights can only be enforced by federal district courts, which have exclusive jurisdiction over infringement complaints alleged by copyright owners.¹⁶ Yet if a copyright owner suffers only a small amount of economic damage from the infringement or lacks resources to pursue a claim, the time and cost of litigating in federal court can often outweigh the benefits.¹⁷ The most recent economic survey estimates that, in an intellectual property lawsuit with less than \$1 million at stake, the median cost was \$350,000 to litigate a case.¹⁸ In addition to high costs, a federal district court case takes an average of twenty-three months to conclude.¹⁹ A prominent copyright litigation guide recommends that attorneys first analyze a client's financial position before even considering potential jurisdiction or venue for a case.²⁰ There is currently no alternative to federal district court for addressing small infringements like that suffered by an individual photographer trying

IN THE U.S. ECONOMY: THE 2003–2007 REPORT 3 (June 2009), *available at* <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf> (reporting the 2007 estimate of \$1.52 trillion of value added to the gross domestic product by the U.S. copyright industry).

14. STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, *THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY* 11 (2007) *available at* http://www.copyrightalliance.org/files/siwekcopyrightpiracy_studypdf.pdf. Siwek also finds that copyright piracy domestically and abroad cost 373,375 jobs in the United States.

15. U.S. CONST. art. I, § 8.

16. 28 U.S.C. § 1338 (2006).

17. *See* LISA SHAFTEL, NAT'L ADVOCACY COMM. CHAIR, GRAPHIC ARTISTS GUILD, *Remedies for Small Copyright Claims Comments Submitted by the Graphic Artists Guild*, at 3 (Jan. 16, 2012),

http://www.copyright.gov/docs/smallclaims/comments/23_graphic_artists_guild.pdf (arguing that litigation in federal courts is “completely financially impractical” when an infringement causes damages less than \$30,000 and further noting that their members say that most infringing uses of their graphic images result in actual damages less than \$15,000).

18. STEVEN M. AUVIL, CHAIR, LAW PRACTICE MGMT. COMM., AM. INTELLECTUAL PROP. LAW ASS'N, *REPORT OF THE ECONOMIC SURVEY 2011*, 35 *available at* <http://www.aipla.org/members/Documents/AIPLA%202011%20Report-%20Summary%20102411.pdf>. The American Intellectual Property Law Association's (AIPLA's) report is drawn from the ranks of practitioners and is aimed at the intellectual property bar, so it is the best guide for assessing actual costs of intellectual property litigation.

19. OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMIN. OFFICE OF THE STATES COURTS, U.S. CTS., *FED. JUDICIAL CASELOAD STATISTICS*, tbl. C-5 (2010), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf>.

20. *See* JOHN W. HAZARD, JR., *COPYRIGHT LAW IN BUSINESS AND PRACTICE* § 9:1 (revised ed. 2011) (advising caution before bringing any suit “if counsel knows his claims for copyright infringement will not involve large demands for statutory damages or healthy (and provable) amounts of regular damages”).

to protect a single image.²¹

The Copyright Office has noted the high hurdles that small claimants face in halting copyright infringement.²² In October 2011, the Copyright Office issued an initial Notice of Inquiry into potential remedies for “small copyright claims.”²³ The Copyright Office conducted multiple public meetings in November 2012 and expects to submit recommendations for improving the remedy process to Congress in the fall of 2013.²⁴ Small copyright claims would include those suffered by copyright owners like individual authors and photographers who may not have significant resources to pursue a federal copyright infringement action.²⁵

This Article recommends the creation of an alternative administrative process to remedy small claims of copyright infringement. Part I discusses the challenges copyright owners face to halt infringements. This Part also analyzes prior proposals for remedying copyright infringement²⁶ with other administrative proceedings domestically²⁷ and abroad²⁸ to gather ideas for a new administrative copyright remedy process.

Part II advocates for the creation of an administrative panel in the Copyright Office to hear small claims of copyright infringement and applies the proposal to a hypothetical infringement of stock photographs to analyze

21. See *Frequently Asked Questions About Copyright*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-infringement.html> (last visited May 7, 2012) (noting that the Copyright Office does not enforce the laws it administers, and that copyright owners must enforce their rights by filing suit in federal district court).

22. See *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop., H. Comm. on the Judiciary*, 109th Cong. 92 (2006) (statement of the U.S. Copyright Office) (pointing out “that there are serious questions about the effectiveness of the current system that merit further study”).

23. Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,758 (Oct. 27, 2011). The Copyright Office issued a third request for comments in February 2013. 78 Fed. Reg. 13,094 (Feb. 26, 2013).

24. MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE: OCTOBER 2011–OCTOBER 2013, 5 (Oct. 25, 2011).

25. Remedies for Small Copyright Claims, 76 Fed. Reg. at 66,759.

26. See, e.g., Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410–25 (2003) (proposing a streamlined dispute resolution system).

27. See TRADEMARK TRIAL AND APPEAL BOARD (TTAB), TTAB ACCELERATED CASE RESOLUTION (ACR) FAQ (2011), <http://www.uspto.gov/trademarks/process/appeal/> (describing the accelerated administrative process for trademark *inter partes* proceedings).

28. See, e.g., INNOVATE LEGAL, GUIDE TO INTELLECTUAL PROPERTY DISPUTES IN THE PATENTS COUNTY COURT: A STEP BY STEP GUIDE TO THE PROCESS OF LITIGATION, http://www.innovatelegal.co.uk/Guide_to_the_Patents_County_Court.pdf (summarizing the process of the small claims court for hearing patent, copyright, and trademark infringement claims in England and Wales).

whether a new process would improve the chances of a copyright owner in finding a remedy for an infringement. This Article suggests that small copyright infringement claims could be brought before administrative law judges (ALJs) in the Copyright Office through an online submission process that would require a prima facie showing of infringement. This would be a simpler and more efficient process than filing a complaint for copyright infringement in federal district court. Remedies available would include monetary damages that are currently available under the copyright statute, but could include introduction of new remedies, such as enforcing licenses, requiring attribution, and designating frequent, willful copyright infringers as “repeat offenders” to warn Internet Service Providers (ISPs) of increased liability in providing copyright infringers with digital access. Part III examines the benefits of a streamlined administrative process, including better access to remedies for more copyright owners as well as more respect for the copyright laws. However, this Part also points out that potential problems still exist, including the inability to seek injunctive relief through an administrative proceeding and the challenges with hearing affirmative defenses such as fair use. Finally, the Article concludes by urging the Copyright Office to press for adoption of a new administrative proceeding to address more small copyright infringement claims.

I. BACKGROUND AND ANALYSIS

A. *Current Framework Creates Copyrights Without Remedies*

The federal courts enjoy exclusive jurisdiction over copyright cases to ensure uniformity of national copyright law.²⁹ But the benefits of national uniformity also come with high costs and lengthy delays in pursuing infringement complaints. When Congress completely overhauled the Copyright Act in 1976,³⁰ it explicitly preempted state law protection for original works of authorship.³¹ Even prior to the 1976 revisions, though,

29. 28 U.S.C. § 1338 (2006).

30. Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

31. 17 U.S.C. § 301 (2006); H.R. REP. NO. 94-1476, at 129–30, (1976). Drafters of the 1976 Act wanted it known in “the clearest and most unequivocal language possible” that § 301 was “one of the bedrock provisions of the bill . . .” Common law copyright predated the first U.S. copyright statute in 1790 and protected unpublished works. It coexisted alongside the statutory copyright system for published works and created a complicated body of case law to determine when a work was “published.” Section 301 abolishes rights available under common law and state statutes that are equivalent to the federal copyright provisions and declares that federal rights attach at the moment of fixation in a tangible medium, instead of at publication.

supremacy of federal copyright law was embedded in case law.³² This consolidation of copyright law in federal court came from a desire for uniform interpretation of copyright laws³³ and a perception of more sophisticated decisionmaking abilities at the federal level.³⁴

To make a federal claim for copyright infringement, the owner of a copyrighted work first must prove that she is the registered owner of the material.³⁵ The work must be original, exhibit a modicum of creativity, and be within the subject matter of copyright. The plaintiff also must show that the defendant has wrongfully exercised one or more of the six exclusive rights granted to the copyright holder under the Copyright Act.³⁶ Upon filing a complaint in federal district court, the plaintiff bears the burden of proving a prima facie case of infringement, but the defendant can then present affirmative defenses, including statutory defenses such as fair use and judicially-created defenses such as copyright misuse.³⁷

While consolidating jurisdiction in the federal courts has helped clarify and unify copyright law when compared to the earlier state and federal system, it has also led to a complicated body of *federal* case law interpreting what is a copyrighted work, when infringement occurs, and what are valid affirmative defenses. As copyright grew from its original function—

32. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231–32 (1964) (affirming that states may neither directly nor indirectly interfere with the objectives of federal patent law); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237–38 (1964) (declining to enforce states’ unfair competition laws when the states’ actions would interfere with federal patent and copyright laws).

33. See MARY LAFRANCE, *COPYRIGHT LAW IN A NUTSHELL* 393 (2008) (“The purpose of conflict preemption in the fields of copyright and patent law is to promote national uniformity in the regulation of these forms of intellectual property.”).

34. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (noting the “experience, solicitude, and hope of uniformity” offered by the federal forum). Justice Souter’s opinion in *Grable* relied on an often-cited American Law Institute (ALI) study that highlights federal courts’ “adeptness” at patent cases. AM. L. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–65 (1968). The ALI study found that federal question jurisdiction is necessary not only to preserve uniformity, but also “to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy.” *Id.* at 4.

35. 17 U.S.C. § 411 (2006). However, to comply with the U.S. adoption of the Berne Convention, foreign authors are exempted from the requirement to register their works before bringing a U.S. federal claim for infringement. See *id.*; Berne Convention for the Protection of Literary and Artistic Works, art. 18, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (forbidding signatory countries from requiring formalities like registration as a condition of copyright protection).

36. 9 M. ELAINE BUCCIARI, *Cause of Action for Copyright Infringement Under the Federal Copyright Act of 1976, as amended*, in 9 CAUSES OF ACTION 2D 81, at § 4 (1997).

37. LAFRANCE, *supra* note 33, at 293.

preventing the literal copying of books—the challenge of balancing owners’ property interests in their works with reasonable public access also became more difficult. The digital revolution of the last fifteen years has made copying even easier, only intensifying the demand for better balancing between the property interests of copyright owners and the public’s access to information.³⁸

The number of intellectual property (IP) cases filed in federal court continues to rise, even as the cost and time required to litigate each case has risen in kind.³⁹ In direct correlation, the relevance of copyright also has increased for average Americans.⁴⁰ However, the unceasing demands on the federal courts for all types of cases mean that the copyright suits face a long wait and potentially high costs to be heard.⁴¹ Copyright practice guides point to avoiding court unless the value of the intellectual property at stake outweighs the attorneys’ fees and delays that inevitably attend an infringement action.⁴² High costs and delays may prevent some potential plaintiffs from even going to court, stymieing the development of copyright law as a whole.⁴³ Some scholars believe that when the general public lacks

38. See MICHAEL WEINBERG ET AL., *A COPYRIGHT OFFICE FOR THE 21ST CENTURY: RECOMMENDATIONS TO THE NEW REGISTER OF COPYRIGHTS, PUBLIC KNOWLEDGE* 11 (2011), <http://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf> (encouraging the Register of Copyrights to increase public participation in the Office decisionmaking process).

39. For the twelve-month period ending in March 2011, the Administrative Office of the U.S. Courts recorded a twelve-percent increase in the number of copyright cases commenced in the U.S. District Courts. See ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2011*, at 48 tbl. C-2 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf>. High litigation costs are driven in part by the costs of discovery. Sharon Cullars, *Trends in IP Litigation Costs*, LEGAL FIN. J. (Nov. 24, 2011), <http://legalfinancejournal.com/trends-in-ip-litigation-costs/>.

40. See John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539 (arguing that increased public consciousness of copyright issues highlights the differences between copyright law and copyright norms).

41. See AM. LAW INST., *supra* note 34, at 1 (decrying—even in the 1960s—the “continually expanding workload of the federal courts and the delay of justice resulting therefrom”).

42. See Jeremy Phillips, *Keep It Cheap—Ten Tips for Minimizing IP Dispute Settlement Costs*, WORLD INTELL. PROP. ORG. MAG., Feb. 2010, at 23 (advising clients to “[t]hink carefully before entering an IP dispute”); Alan Bamberger, *Art Copyright Infringement and Your Creative Health*, ARTBUSINESS.COM, <http://www.artbusiness.com/copfringe.html> (last visited May 7, 2013) (noting that the “overwhelming majority of infringement cases involve far less money than is cost effective to fight legal battles over”).

43. See Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1009 (2008) (highlighting that “[c]ourts have been unable to rule on many important copyright law questions” because plaintiffs and

investment in how the Copyright Act functions—both to protect owners’ rights and to protect users’ enjoyment of copyrighted materials—the public will reject the system by both ignoring the rules and advocating for changes in the law.⁴⁴

Photographers were one of the first groups to decry the barriers to copyright enforcement.⁴⁵ During a 2006 discussion of legislation to address the “orphan works” problem,⁴⁶ the Copyright Office noted that individual authors had little recourse for recovering for infringement of singular works. An affordable and timely process to obtain a remedy was not available.⁴⁷ A congressional hearing on the topic produced few recommendations, but writers echoed the photographers’ sentiment.⁴⁸ The Copyright Office offered to study the issue further, which led to the current

defendants who cannot afford federal litigation either do not bring a complaint or accept quick but inequitable settlements to end disputes).

44. See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS, 587, 598 (2008) (advocating for a recognition of users’ rights in the face of growing public disillusionment with the fairness of a copyright regime that appears to overly benefit rights holders). The public uproar over the Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011), and PROTECT IP Act of 2011 (PIPA), S. 968, 112th Cong. (2011), could be seen as a sign of growing disenchantment with entrenched copyright interests overreaching to protect their markets. See Eric Engleman, *Google Says 7 Million Signed Petition Against Anti-Piracy Bills*, BLOOMBERG BUSINESSWEEK, Jan. 20, 2012, <http://www.businessweek.com/news/2012-01-20/google-says-7-million-signed-petition-against-anti-piracy-bills.html>; Stephanie Condon, *PIPA, SOPA Put on Hold in Wake of Protests*, CBS NEWS (Jan. 20, 2012, 3:17 PM), http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests/.

45. Letter from Stephen P. Morris, Operations Manager, Prof1 Photographers of Am. to Jule L. Sigall, General Counsel, Copyright Office 11–13 (Mar. 25, 2005), <http://www.copyright.gov/orphan/comments/OW0642-PPA.pdf>. Within the photographers’ comments comes a call for an “alternative forum” to federal district court for orphan works and other types of infringement claims. *Id.* at 2.

46. The “orphan works” problem occurs when someone wants to use a copyrighted work but cannot find the owner to get permission. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS I (2006). Opposition from the content community killed prior attempts to legislate use of orphan works. See also Dugie Standeford, *Support Mixed for U.S. Orphan Works Bill As Issue Catches Global Attention*, INTELL. PROP. WATCH (May 7, 2008, 2:53 PM), <http://www.ip-watch.org/2008/05/07/us-orphan-works-bills-support-mixed-as-issue-catches-global-attention> (describing opposition from visual artists who feel that the legislation has been written too broadly). While outside the scope of this Article, orphan works are still a bone of contention between copyright owners and users.

47. U.S. COPYRIGHT OFFICE, *supra* note 46, at 114.

48. See *Legislation/Copyrights: Content Providers Not Keen About Small Claims Infringement Remedies*, 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 584 (Mar. 31, 2006) (presenting a survey by Authors Guild Executive Director Paul Aiken of the organization’s members that found 55% of the 2,100 respondents favored a type of small claims process for infringement claims, 28% were neutral, and 17% were opposed).

notice-and-comment rulemaking process.⁴⁹ That may, in turn, lay bare the intricacies of copyright for the public to weigh in on, and may help build momentum for a shift in the law.⁵⁰

B. *Academic Proposals to Change Copyright Infringement Remedy Procedures*

Many scholars have called for reforms to the copyright system to provide better access to remedies for copyright infringement. A comparative analysis of these suggestions illustrates the advantages of an administrative proceeding that would be an efficient, low-cost alternative to filing a copyright infringement claim in federal district court.

1. *Lemley–Reese Proposal*

The abrupt rise of file sharing on peer-to-peer (p2p) networks like Napster⁵¹ and Grokster⁵² sparked a discussion of how to improve copyright enforcement in the digital age.⁵³ Looking at copyright infringement through the lens of deterrence,⁵⁴ Professors Mark A. Lemley and R. Anthony Reese suggested a streamlined copyright dispute resolution process as an alternative to federal district court for some instances of copyright infringement over p2p networks.⁵⁵ Their proposal was an opening salvo in the debate on updating copyright enforcement to keep up with digital infringement and provides a number of process suggestions that could be adopted.

49. Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,759 (Oct. 27, 2011).

50. See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1177 (2010) (noting the “considerable stress” on copyright law from digital technologies as well as user-generated content, which raises awareness of copyright for “ordinary people”).

51. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–12 (9th Cir. 2001) (detailing the programming that permits Napster users to store, copy, and transfer MP3 music files from one user to another via the Internet).

52. See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005) (providing free software that allows peer-to-peer (p2p) sharing of electronic files).

53. See Lemley & Reese, *supra* note 26, at 1410–25 (proposing “[a] streamlined dispute resolution system” to lower the cost of enforcement for copyright owners).

54. See *id.* at 1391 (discussing criminal law research by Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968), that found that a rational actor will change her behavior based on a calculus of “the penalty that she will pay if caught multiplied by the probability that she will be caught”); see also Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 852 (2001) (noting that “an increase in the number of enforcement actions would increase the risk of a lawsuit for each private copier”).

55. Lemley & Reese, *supra* note 26, at 1413.

Lemley and Reese adapted their proposal for an online dispute resolution system from the Uniform Dispute Resolution Policy⁵⁶ for trademark domain names that is run by the Internet Corporation for Assigned Names and Numbers.⁵⁷ Lemley and Reese suggested that a single ALJ in the Copyright Office could hear prima facie cases of infringement over p2p networks through an online proceeding with no in-person hearings and limited discovery.⁵⁸ The proposal anticipated that certain affirmative defenses could be heard and resolved by the ALJ, but that some factual disputes should be dismissed without prejudice and handled through a regular court proceeding.⁵⁹ A panel of ALJs would hear appeals of initial decisions, Lemley and Reese suggested, and unsuccessful appellants would have the further option to take the dispute to district court.⁶⁰ The professors concluded by recommending remedies that would include monetary damages and assessment of costs to unsuccessful defendants, as well as informing ISPs of “repeat infringers,” thereby ostracizing infringers and increasing the disincentives to infringe.⁶¹

The Lemley–Reese administrative model contains obvious advantages over a federal district court case for copyright infringement. Providing an online forum reduces the need for copyright owners to travel to the nearest federal district court to file a complaint and also reduces the likelihood that an attorney would be needed to navigate the procedural waters. Requiring the copyright owner to present a prima facie case of infringement encourages more straightforward, easy cases to self-select the administrative track. That provides benefits to the parties, who would achieve case

56. See Elizabeth C. Woodard, Note, *The UDRP, ADR, and Arbitration: Using Proven Solutions to Address Perceived Problems with the UDRP*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1180–83 (2009) (describing the process in the Uniform Dispute Resolution Policy).

57. See Lemley & Reese, *supra* note 26, at 1411; see also Rebecca Haas, Comment, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 251–52 (2010) (proposing that a streamlined administrative process would save time and money as compared to a civil suit in federal district court for Twitter users).

58. See Lemley & Reese, *supra* note 26, at 1413–15 (suggesting also that bringing a p2p infringement case before an Administrative Law Judge (ALJ) should also require a minimum number of infringements, e.g., fifty uploads during any thirty-day period).

59. See *id.* at 1415–17 (discussing how an ALJ could resolve or pass on claims of fair use, copyright misuse, and other defenses).

60. See *id.* at 1417 (further noting that courts could discourage fruitless appeals by forcing parties who lose frivolous appeals to pay the costs).

61. See *id.* at 1418–22. Informing an Internet service provider (ISP) that one of its customers was a “repeat infringer” could impact the ability of the ISP to claim the “safe harbor” provisions of the Digital Millennium Copyright Act, which requires ISPs to conform to a policy of terminating accounts of “repeat infringers” in some circumstances. 17 U.S.C. § 512 (2006).

resolution faster in an administrative proceeding, as well as benefits to the federal courts, which would see fewer copyright cases on the federal docket. The proposal to potentially “exile” repeat offenders from ISPs is a practical addition to the arsenal for copyright owners and a significant deterrent in an ever more digitally dependent world.⁶²

2. *Alternative Dispute Resolution Proposal*

Alternative dispute resolution (ADR) proceedings also provide a model for resolving small copyright infringement disputes.⁶³ After considering the fundamental and adversarial interests of both intellectual property owners and infringers,⁶⁴ IP attorney Kevin Lemley found that eight out of nine types of intellectual property disputes could best be handled by mediation or a mixed arbitration–mediation program, rather than litigation.⁶⁵ The mediation model would encourage parties to resolve their disputes by using a limited discovery process and holding the hearing before an experienced, neutral third-party who acts as a “settlement facilitator.”⁶⁶ In contrast, the arbitration–mediation model would put the dispute first before a neutral arbitrator who acts as a decisionmaker.⁶⁷ That decision would then be sealed while the parties undergo a mediation process that may be more quickly resolved, given the threat of the arbitrator’s decision hanging over them.⁶⁸ The process for both would be housed within the federal courts

62. The Center for Copyright Information recently created a Copyright Alert System that encourages content creators to contact ISPs to notify them of alleged infringements. The ISP will then warn its customer to halt the alleged infringement or else face further repercussions, such as slowing connection speeds. *See What Is a Copyright Alert?*, CENTER FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (last visited May 7, 2013).

63. Kevin. M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 325 (2004).

64. *See id.* at 293–94 (defining the fundamental interest of an owner as seeking to get value from his intellectual property asset and the adversarial interest of an owner as seeking to exclude others from using his intellectual property); *id.* at 296 (defining the fundamental interest of an infringer as desiring to freely use a piece of others’ intellectual property and the adversarial interest as expecting to freely use the intellectual property). These fundamental and adversarial motivations, Kevin Lemley argues, set up the range of disputes that copyright owners and infringers will engage in and may predetermine how best those disputes can be resolved. *Id.* at 297–98.

65. *See id.* at 319–20 (estimating a likelihood of agreement in cases based on whether the owner or infringer weighs his fundamental or adversarial interest more heavily).

66. *Id.* at 305.

67. *Id.* at 307.

68. *See id.* at 307–08 (describing the benefits of arbitration–mediation as opposed to mediation–arbitration).

and would be initiated upon the filing of an infringement complaint.⁶⁹ Along with the complaint, the plaintiff would submit an “ADR Brief” to the court’s board of mediators and arbitrators, who could then determine from the parties’ stated interests what forum best suited the dispute.⁷⁰

An ADR process shares some of the benefits of an administrative proceeding, including lower costs, faster resolution of cases, and an easing of the federal courts’ workload.⁷¹ Additionally, mediators with extensive copyright experience would be better able to resolve complex issues such as fair use.⁷² Foregoing protracted discovery would save time, money, and the intangible stress of the process, and the final settlement could remain confidential, unlike federal court cases.⁷³

There are, however, obstacles that likely would prevent the wide-scale adoption of mediation or arbitration—mediation in small copyright infringement cases. Since the process is voluntary, it is more likely to be chosen by parties who already have a relationship or see the value in creating a mutually beneficial agreement.⁷⁴ It is not likely to be as appealing for a copyright owner who wants to gamble on receiving statutory damages⁷⁵ or an alleged infringer who is only interested in free use and not paying a licensing fee.⁷⁶ Finally, since the process would only begin upon the filing of an infringement complaint, it still places a burden on small players with few resources to initiate a complaint.⁷⁷

69. *See id.* at 321 (noting that parties must voluntarily agree to mediation for it to work). Kevin Lemley points to the success rate of the Lanham Act Mediation Program in the U.S. District Court for the Northern District of Illinois as a model for how mediation can work in intellectual property disputes. The trademark mediation program reported successful resolution of two-thirds of the cases submitted to it. *Id.* at 309.

70. *Id.* at 323. The defendant would file its ADR Brief with its answer.

71. *See id.* at 312–13 (noting that mediation puts parties with fewer resources on more even ground with parties who have more financial resources).

72. *Id.* at 314; *see also* Elizabeth Champnoi, *Alternative Dispute Resolution for Copyright and Trademark Matters*, IP L. 360 (last visited May 7, 2013), <http://www.foreclosuremediationfl.adr.org/si.asp?id=4328> (touting the fifty trained “neutrals” who serve on the Copyright Panel of the American Arbitration Association and the expertise they provide).

73. *See* Lemley, *supra* note 63, at 313–14 (discussing the mental anguish caused by an “arduous litigation process” and the privacy and confidentiality mediation encourages).

74. *See* Ciolli, *supra* note 43, at 1017 (pointing out that parties will still need attorneys in a court-sponsored mediation and that some will not find it “socially optimal” to settle their disputes outside of court).

75. Lemley, *supra* note 63, at 316–17.

76. *Id.* at 318.

77. Ciolli, *supra* note 43, at 1017.

3. *Federal Small Claims Court Proposal*

Creation of a specialized federal small claims court for intellectual property cases could also create a forum that would encourage copyright protection. Two proposals suggest a model that could be used for copyright cases.

The benefits of an “expedited and simplistic” process under a small claims model are extolled by Anthony Ciolli.⁷⁸ Ciolli suggested using ALJs to hear disputes under a relaxed set of rules of evidence and procedure and housing the small claims proceeding in the federal courts where it would be a mandatory first step before a district court hearing.⁷⁹ Although Ciolli analogized the proposed IP small claims court to state small claims courts, he did not support the idea of a blanket jurisdictional limit on “small” copyright claims because of the potential for statutory damages that could range from \$750 to \$30,000 for each infringement.⁸⁰ Ciolli contrasted his proposal with the Lemley–Reese proposal by noting that a federal small claims court could hear all the affirmative defenses as well as consider injunctive relief—a remedy not available in an administrative setting.⁸¹ Ciolli also argued for allowing parties who participate in a federal small claims proceeding to agree to make it nonbinding.⁸²

Proposals for a patent small claims court also have been advanced, building off proposals from the American Bar Association and American Intellectual Property Law Association in the 1990s and a small claims intellectual property court in Great Britain.⁸³ Patent Attorney Robert P. Greenspoon proposed a trial experiment at one federal district court for patent claims, but the idea also could be used with other forms of intellectual property. The court would have a \$1 million ceiling for damages and the potential for a streamlined discovery process and jury trial before a federal judge.⁸⁴ Greenspoon also suggested making the court mandatory upon the request of either party.⁸⁵

Greenspoon drew ideas from the Patents County Court (PCC) of England and Wales, which hears claims not just of patent infringement but

78. *Id.* at 1023.

79. *Id.* at 1024.

80. *Id.* at 1025–26.

81. *Id.* at 1024–25.

82. *See id.* at 1026 (suggesting that to do so would make the proceeding more attractive for wealthy litigants).

83. Robert P. Greenspoon, *Is the United States Finally Ready for a Patent Small Claims Court?*, 10 MINN. J.L. SCI. & TECH. 549, 549–50 (2009).

84. *See id.* at 563–66 (describing a framework for a federal patent small claims court).

85. *Id.* at 563.

also of trademark and copyright infringement.⁸⁶ Trials last for no more than two days, and the PCC carefully controls the cross-examination of witnesses.⁸⁷ There is no formal cap on damages, but the court recommends that cases valued at more than £500,000 be heard in the High Court.⁸⁸ Copyright scholars in the United Kingdom also have suggested creating a small claims process within the PCC for even lower value claims of copyright infringement than are already heard within the PCC.⁸⁹ Time limits are set on the written presentation of evidence in the case, and non-attorneys can represent individuals before the PCC.⁹⁰ Even at the PCC, however, ADR is encouraged as another way to reduce costs of pursuing intellectual property infringers.⁹¹

Keeping the small claims court within the federal court system could be a small step closer to providing a more efficient forum for small copyright owners. The process would preserve the option to seek injunctive relief and could act as a “mini-trial” that would entice even wealthy plaintiffs to use the proceeding as a tryout for large cases.⁹² Providing a bench of dedicated judges would ensure the cases were handled by a court competent and familiar with the nuances of copyright law.⁹³ If non-attorneys could successfully handle cases, as at the PCC, then some cost-savings would be realized.⁹⁴ The downside would be that even minimally restricted discovery rules still place a hefty financial burden on small plaintiffs and defendants.⁹⁵ Housing a small claims proceeding in the federal courts also does nothing to decrease the burden on the federal judiciary or the delays litigants face in resolving disputes. An additional logistical problem would be choosing

86. CHANCELLOR OF THE HIGH COURT, *THE PATENTS COUNTY COURT GUIDE* 5 (May 2011) (parsing the allocation of responsibilities between the High Court for Patents and the Patent County Court, which was created to hear “smaller, shorter, less complex, less important, lower value actions”).

87. *See id.* at 5–6 (explicitly referencing the court’s purpose of providing “access to justice” for small- and medium-sized businesses).

88. *Id.*

89. HARGREAVES, *supra* note 10, at 13. The independent report, commissioned by U.K. Prime Minister David Cameron, endorses streamlined procedures, a fixed scale of recoverable costs, and a cap on damages.

90. CHANCELLOR OF THE HIGH COURT, *supra* note 86, at 10.

91. *Id.* at 15–16.

92. Ciolli, *supra* note 43, at 1026.

93. *Cf.* Greenspoon, *supra* note 83, at 565–66 (describing the costs and benefits of drawing from the ranks of senior judges for a specialized patent court and the level of expertise that they could bring to bear in making rulings).

94. CHANCELLOR OF THE HIGH COURT, *supra* note 86, at 15.

95. *See* Ciolli, *supra* note 43, at 1029 (anticipating that poorer litigants will be forced into inequitable settlements by wealthier parties who can drive up the costs of discovery and pre-litigation motions).

whether to locate a federal small claims court in each federal district or just in a few districts close to major intellectual property centers (e.g., New York, Nashville, Los Angeles, and Washington, D.C.).

C. *Other Administrative Proceedings Provide Useful Analogies*

Federal administrative agencies provide some ideas that could be employed in a copyright infringement administrative proceeding. An examination of procedures in fields as diverse as veterans' benefits and trademarks highlights potential benefits and drawbacks for an administrative proceeding in the Copyright Office.

1. *Trademark Trial and Appeal Board*

Within the intellectual property arena, the Trademark Trial and Appeal Board (TTAB) provides a ready model for the Copyright Office to consider. The TTAB is a panel of ALJs in the U.S. Patent and Trademark Office that hears challenges to the registration of trademarks as well as petitions to cancel trademark registrations on the basis that a mark has become generic or infringes on a prior mark.⁹⁶ The TTAB's remedy is limited to determining whether a mark can be registered or canceled, but if a trademark owner seeks damages or injunctions, he must go to federal court.⁹⁷ Nevertheless, the cancellation of a registered mark or blocking of a proposed mark is a protective wall for a trademark owner who wants to stop goods entering the market with a confusingly similar mark that infringes his own.

The cost of a TTAB proceeding is generally less than that of a federal court dispute over a trademark, but TTAB proceedings take more time.⁹⁸ To help remedy this delay, the TTAB recently instituted an Accelerated Case Resolution (ACR) process to handle smaller, less complicated cases with fewer disputed facts.⁹⁹ The parties must stipulate that the TTAB can resolve any disputed facts and must rely on a written record to settle their claims. In exchange, the ALJs are to make a decision on the merits within

96. Lanham Act § 17, 15 U.S.C. § 1067 (2006).

97. 3 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 20:99 (4th ed. 2013).

98. David J. Kera, *Inter Partes Matters: General Background and Prefiling Considerations*, in A LEGAL STRATEGIST'S GUIDE TO TRADEMARK TRIAL AND APPEAL BOARD PRACTICE 2 (Jonathan Hudis, ed. 2010).

99. TRADEMARK TRIAL & APPEAL BOARD MANUAL OF PROCEDURE §§ 528.05(a)(2), 702.04 (3d ed. 2011); TTAB, U.S. PATENT & TRADEMARK OFFICE, ACCELERATED CASE RESOLUTION (2011) available at http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution__ACR__notice_from_TTAB_webpage_12_22_11.pdf.

fifty days of considering the written record.¹⁰⁰ The ACR provides a simplified process for trademark owners who wish to settle their business disputes and move on with their trade.

The written record that is at the heart of each case is a central benefit of the TTAB procedure. The process does not require parties to go through an oral hearing, which saves time and money. There is typically the same amount of discovery in a TTAB case as there is in federal district court, though; parties must invest the same—or more—time and money as in litigation. With their specialized knowledge of trademark law and expertise in interpreting complicated case law surrounding “likelihood of confusion” between similar marks, the TTAB judges can be a resource for the parties.¹⁰¹ On the other hand, the TTAB is hamstrung by its inability to grant injunctive relief, which for trademark owners can make a significant difference in the market.

2. *Department of Veterans Affairs*

Another model for the Copyright Office is the U.S. Department of Veterans Affairs (VA), which has—at least on paper—a “nonadversarial, informal system” for the determination of benefits for veterans and their dependents.¹⁰² Critics, however, insist that even a pro-claimant system such as the one at the VA requires strong advocates.¹⁰³ Initial hearings are held at regional offices closer to claimants, and in some facilities, videoconferencing is available.¹⁰⁴ The style of the hearing highlights the Department’s intention to make it open and approachable for non-attorneys. Hearings are typically conducted in “unimposing” rooms in standard government buildings, and the decisionmaker sits on the same level as the claimant. Formal rules of evidence do not apply, so the claimant and representative gain a significant amount of control over the organization, scope, and duration of the hearing.¹⁰⁵ The Board of Veterans Appeals reviews agency decisions *de novo* before appeal to federal district

100. *Id.*

101. *See* Lanham Act § 17, 15 U.S.C. § 1067 (2006). “Likelihood of confusion” is the test that determines whether one trademark infringes on another by causing consumer confusion in the marketplace.

102. VETERANS BENEFITS MANUAL 7 (Barton F. Stichman et al., eds., 2012). The manual points out that the biggest obstacle in winning a Veterans Affairs benefits claim is determining which evidence is needed and tracking the evidence down.

103. *Id.*

104. *Id.* at 959–61. Despite the availability of videoconferencing, the manual recommends that claimants try to make an in-person hearing because “it is more difficult to deny a claim after meeting face-to-face with the claimant.” *Id.*

105. *Id.* at 962.

court.¹⁰⁶

The Copyright Office could adopt a similar style in creating administrative procedures that are easy to use for creators and authors less adept at handling legal issues. The VA hearings encourage pro se applicants to take initiative in their own cases and encourage cooperation between administrators and claimants. If the Copyright Office were to use similar strategies for its hearings, it could foster more equitable outcomes regardless of the depths of the parties' pockets.

3. *Social Security Administration*

The Copyright Office could also look to the example set by the Social Security Administration (SSA) with claims for disability benefits. Appeals take place in a nonadversarial hearing before an ALJ. Like the VA hearings, federal rules of evidence are not applied.¹⁰⁷ As a matter of policy, the Agency will hold hearings within seventy-five miles of a claimant's home, and if the claimant cannot travel, the ALJ can meet at the claimant's home, hospital, or a nearby institution.¹⁰⁸ If the claimant does not have an attorney, the ALJ has a positive duty to the parties in front of him to develop the record.¹⁰⁹ The ALJ can compel production of documents and appearances of witnesses, who must testify under oath.¹¹⁰

The SSA hearings demonstrate another example of creating a procedure intended to assist the parties involved. Were the Copyright Office to follow a similar path, it could schedule voluntary hearings for copyright infringement actions at the request of both parties. It could also consider permitting videoconferencing or allowing "circuit rider" ALJs from the Copyright Office to hold regional hearings of cases, if the parties agree to coordinate schedules so as to maximize the ALJs' time in the region. For instance, if there were a number of cases that were filed from New York, an ALJ based in the Copyright Office could hold a week of hearings there to make them more convenient to both parties and to resolve a number of cases in the same trip. Unfortunately, holding regional hearings or setting up videoconferencing would require either that the Copyright Office invest more in hardware and facilities, or that the Copyright Office partner with other agencies or courts around the country with the necessary resources

106. *Id.* at 879.

107. 20 C.F.R. § 404.950(c) (2012).

108. *See* CHARLES E. SAMUELS, VIRGINIA LAW FOUNDATION, ESTABLISHING AND MAINTAINING A SUCCESSFUL SOCIAL SECURITY DISABILITY BENEFITS PRACTICE I-15 (2011) (offering continuing legal education on the Social Security Administration's hearing process).

109. *Fessler v. Matthews*, 417 F. Supp. 570, 574 (S.D.N.Y. 1976).

110. 20 C.F.R. § 404.950(d)–(e) (2012).

and facilities to conduct these hearings.

II. RECOMMENDATIONS

A. *Creation of a Copyright Infringement Remedy Panel (CIRP)*

This Article proposes the creation of a new Copyright Infringement Remedy Panel (CIRP) at the Copyright Office. The CIRP would provide an administrative remedy for the smallest claims of copyright infringement, giving more value to copyright creators and inspiring more respect from users of copyrighted material by creating an additional deterrent to infringement.¹¹¹

The CIRP would be composed of a panel of three ALJs based in the Copyright Office.¹¹² The CIRP judges would be similarly qualified and recruited to the office in the same manner as the three Copyright Royalty Judges (CRJs) who currently hear statutory licensing cases under Title 17.¹¹³ Because an administrative staff already exists to support the CRJs, a support structure would be in place to provide assistance to CIRP judges. These CIRP judges would initially assess an infringement claim online but, like SSA or VA judges, could travel to hold voluntary hearings in regional federal facilities, which would improve access to the hearings for copyright

111. The role of administrative agencies in copyright law has been limited, but there are good arguments for increasing the use of agencies for copyright adjudication. See Sapna Kumar et. al., Panel Discussion, *An Uncomfortable Fit?: Intellectual Property Policy and the Administrative State*, 14 MARQ. INTELL. PROP. L. REV. 441, 448, 458–59 (2010) (recording comments by Professor Jason Mazzone encouraging Congress to delegate more power to an administrative agency to oversee copyright law).

112. Constitutional separation of powers questions about housing a tribunal of administrative law judges in the Copyright Office are beyond the scope of this Article, but are a large concern for the Office. See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–41 (D.C. Cir. 2012) (holding that the position of the Copyright Royalty Judges (CRJs) violates the Appointments Clause and granting the Librarian of Congress the power to remove the CRJs from their offices in order to alleviate the constitutional question); *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (raising a separation of powers question about the appointment of CRJs by the Librarian of Congress instead of by the President under the Appointments Clause); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1131–32 (2007) (suggesting that a separation of powers argument against ALJs in the Copyright Office should be considered through a functional, rather than formalist, analysis); Greg Louer, Comment, *Copyright at a Crossroad: Why Improper Appointment of Copyright Royalty Judges Could Undermine American Copyright Law, and How Congress Can Solve the Problem*, 60 CATH. U. L. REV. 183, 205 (2010) (advocating that Congress amend Title 17 to give the President authority to appoint Copyright Royalty Judges in order to avoid the separation of powers problem).

113. 17 U.S.C. §§ 801–802 (2006).

owners around the country.¹¹⁴

Infringement claims brought before the CIRP could remain “small claims” by capping damage awards at some number that incentivizes participation in the CIRP process.¹¹⁵ That amount could be set at a hard-and-fast number, perhaps fewer than \$30,000,¹¹⁶ or it could be indexed to inflation or some other annually escalating number. Calculations of damages could be determined based on the proven value of the work,¹¹⁷ though some groups representing artists emphasize the need for any administrative procedure to continue to award statutory damages, costs of the action, and attorney’s fees.¹¹⁸ If the CIRP process remains simple, there may be little need to hire an attorney to pursue a claim. Costs of pursuing an infringement claim through the CIRP also should be minimal if discovery is limited and the proceeding takes place primarily online or in regional hearings.

A key feature of the CIRP would be the ability of copyright owners to bring an initial infringement claim online. A centralized website linked to the Copyright Office site would allow copyright owners to provide proof of registration for their work and to present a prima facie case of infringement. The plaintiff’s evidence could be reviewed online by the Copyright Office support staff members, who would ensure that the correct defendant was served with notice of the infringement action. If the plaintiff presents a prima facie case of infringement, the defendant would be required to participate in the administrative proceeding online, instead of being allowed to remove the case immediately to district court.

An initial ruling would be made by a single CIRP judge within sixty days of the complaint. Presentation of any affirmative defenses that the CIRP

114. See discussion *supra* Part I.C.2–3.

115. See Comments from the Copyright Alliance, to Library of Congress, Copyright Off. (Jan. 17, 2012) https://copyrightalliance.org/sites/default/files/sites/all/files/u8/small_claims_-_comments_011712.pdf; Initial Comments from Microsoft Corporation, to Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/34_microsoft_corporation.pdf. These groups do not suggest a specific number but encourage the Copyright Office to pick an amount that would allow appropriate recovery for plaintiffs.

116. See Letter from Michael Traynor, Katherine C. Spelman, & Sophie Cohen, to Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Jan. 13, 2012), http://www.copyright.gov/docs/smallclaims/comments/52_traynor_michael.pdf. This amount also mirrors the limit on statutory damages for infringement of a single work. 17 U.S.C. § 504(c)(1) (2006).

117. Letter from Robert C. Gilmartin, Attorney, to Copyright Off. (Dec. 28, 2011), http://www.copyright.gov/docs/smallclaims/comments/21_gilmartin.pdf.

118. Memorandum from The American Society of Composers, Authors and Publishers and SESAC, Inc., to U.S. Copyright Off. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/03_ascap.pdf.

judge finds persuasive would result in the complaint being dismissed without prejudice for the plaintiff to re-file in federal court. If the CIRP judge finds the defendant infringed, the defendant would be able to appeal to any federal district court. Consistent with CRJ rulings and other cases concerning decisions by the Register of Copyrights, an appeal would face a *de novo* standard of review.

If an infringement ruling were granted, the CIRP would have a few remedies to choose from. Although as an administrative body it could not issue injunctions, the CIRP would be able to set monetary damages.¹¹⁹ These would be based on the CIRP's educated estimates of licensing fees in the industry relevant to the infringed work, as well as a demonstration by the plaintiff of either actual profits lost or the amount the defendant was unjustly enriched, or both.¹²⁰ The CIRP could also assess the cost of the administrative proceeding—as limited as it may be compared to traditional litigation—to the infringer.¹²¹

Novel remedies that the CIRP could consider would be enforcing a Creative Commons license for attribution,¹²² if the plaintiff distributed the copyrighted material that was infringed under that license.¹²³ The Creative Commons attribution license provides broad permissions from copyright creators for others looking to build on the original content so long as the follow-up work gives proper attribution to the initial creator.¹²⁴ Enforcing a right of attribution would bring the United States more in line with international copyright and domestic social norms between creators and

119. See discussion *infra* Part III.B (outlining the Supreme Court's test for issuing injunctions).

120. See RUSSELL L. PARR, INTELLECTUAL PROPERTY INFRINGEMENT DAMAGES 107–19 (2d ed. 1999) (listing the fifteen factors for determining a reasonable royalty rate for patents outlined in *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified*, 446 F.2d 295 (2d Cir. 1971)). Some of the *Georgia Pacific* factors easily translate into the copyright realm. They include: prior royalties the licensor has received, rates previously paid by the licensee for similar work, the nature and scope of the license to the work, the commercial relationship between the parties, the profitability and popularity of the work, the portion of the infringer's profit attributable to the work at issue, and the price the parties would have likely agreed to had they negotiated.

121. See Lemley & Reese, *supra* note 26, at 1422–23 (noting that award of costs is also routine in civil litigation).

122. *Attribution 3.0 Unported*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by/3.0/> (last visited May 7, 2013).

123. See Samuelson et al., *supra* note 50, at 1208 (proposing that the system vindicate breaches of attribution conditions in copyright licenses).

124. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited May 7, 2013) (“The infrastructure we provide consists of a set of copyright licenses and tools that create a balance inside the traditional ‘all rights reserved’ setting that copyright law creates.”).

users.¹²⁵ The CIRP could interpret the attribution right under a reasonableness standard, based on the context of how the copyrighted material is displayed; it could also rule on whether attribution could be waived by contract.¹²⁶ Additionally, the CIRP could issue letters to ISPs alerting them of infringers who are designated “repeat offenders” after a certain number of actions before the panel.¹²⁷ These letters would serve as a warning of increased liability to the ISPs if they continue to provide access to repeat digital infringers. The potential increase in contributory liability could encourage ISPs to block or monitor infringers who may use the ISP’s services to sell or post infringing works.¹²⁸

Creating a new administrative process to make findings of copyright infringement and giving the CIRP judges the power to enforce rights of attribution would require Congress to amend the Copyright Act. While the Copyright Office will send its final report and recommendations to Congress in September,¹²⁹ the timeline for action is unclear. Congress has been bogged down with difficult budget and economic concerns, and copyright issues may not be a huge priority in 2013. The willingness to act will depend on the pressure from copyright interest groups, but it is not yet clear whether the large industry groups will have an incentive to use a small copyright claims system and, by extension, support changes to the copyright laws.

B. *A Hypothetical Enforcement Action by the CIRP*

This Part exemplifies how the CIRP remedy would apply to a hypothetical copyright infringement of stock photography. Let us follow a photographer down the rabbit hole to “recover” for infringement of her photo under the current system. For example, imagine that an adventure photographer captured a dynamic shot of whitewater kayakers running a river and added the image to the portfolio on her website. A few weeks

125. Samuelson, et al., *supra* note 50, at 1243–45. There is a limited right of attribution protected under the Visual Artists Rights Act, 17 U.S.C. § 106A (2006), but it is only available to visual artists of works in limited production. The Berne Convention, the international copyright treaty created in 1886 that the United States signed in 1989, also provides for a right of attribution. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, *opened for signature* Sept. 9, 1886, 1 B.D.I.E.L. 715, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P23_530.

126. Samuelson, et al., *supra* note 50, at 1244.

127. *See* discussion *supra* Part I.B.1.

128. Lemley & Reese, *supra* note 26, at 1421–22.

129. *See Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/docs/smallclaims/> (last updated Apr. 29, 2013) (outlining the process for recommending changes to Congress).

later, while looking online for customers who might be interested in purchasing her photos or licensing them for their own use, she found one of her photographs with the watermark removed being used as a background on a website advertising rafting trips. The photographer may not morally object to the use of the photo, but since she makes a living licensing her work, she will seek to stop the unlicensed use of the picture. In fact, like many creative professionals, the photographer's intellectual property is the single most valuable asset of her business.¹³⁰

Under the current system, our photographer would hire a lawyer at an average rate of \$340 an hour to pursue the infringer.¹³¹ The lawyer may first send a cease-and-desist letter, but with a recalcitrant infringer reaping the benefits from this dramatic picture on his website, the letter would likely be ineffective. The next step would be for the lawyer to file a complaint in federal district court, where the photographer would face the time delays and costs already outlined.¹³²

But if, instead, the photographer could call upon the CIRP, she may not even need a lawyer to prosecute her infringement complaint. After logging into the CIRP webpage hosted by the Copyright Office, a clear interface that mirrors the updated registration system of the U.S. Patent and Trademark Office¹³³ would allow the photographer to submit a copy of her registration and a written record of the infringement, as well as electronically sign an affidavit swearing that she is submitting a prima facie claim of copyright infringement.¹³⁴ Upon receipt of her claim, CIRP staff would notify the alleged infringer and issue a subpoena to require a written submission of any potential defenses to the infringement within thirty days of notification of the case.¹³⁵ By the end of sixty days after the initial submission, a CIRP judge would have reviewed both the complaint and the written record from the defendant and issued an initial ruling.

Since the photographer does not protest the general use of the photo, but instead is only seeking to get paid for her work, the CIRP judge could remedy the case by requiring the website owner to pay a reasonable

130. See *Business Intellectual Property Theft*, BUSINESSTHEFT.COM, <http://www.business-theft.com/businesstheftintellectualproperty.html> (last visited May 7, 2013) (citing U.S. Department of Justice statistics from 2002 that found more than half of intellectual property theft defendants were convicted of infringement valued at more than \$70,000).

131. AIPLA, REPORT OF THE ECONOMIC SURVEY 2011, 8 (2011), available at <http://www.aipla.org/members/Documents/AIPLA%202011%20Report-%20Summary%20102411.pdf>.

132. See discussion *supra* Introduction and Part I.A.

133. U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov> (last visited May 7, 2013).

134. See Lemley & Reese, *supra* note 26, at 1413–14.

135. See discussion *supra* Part II.A.

licensing fee for the photo, as well as the photographer's costs for pursuing the CIRP action.¹³⁶ In addition, the CIRP judge could mandate that the website owner attribute the photo to the copyright owner so that she gets her due on the Internet.¹³⁷ With minimal time and cost, the CIRP would have remedied a copyright infringement that would have gone unchallenged under the current copyright regime.

III. BENEFITS AND UNRESOLVED PROBLEMS

A. *Efficient Remedies Improve Copyright Protection and Increase the Value of Copyright*

A system that provides better access to remedies for copyright infringement could increase the perceived legitimacy of copyright and garner larger public support for copyright protections.¹³⁸ Increasing the likelihood that any individual copyright owner may pursue an infringement claim could cause infringers to recalculate the risks involved in stealing a photo or copying and pasting from a website.¹³⁹ It also would alleviate the burden on the federal courts.¹⁴⁰

Creating a system that relies more heavily on damage awards rather than injunctive relief for copyright infringement could bring the system

136. See WESTON ANSON, *IP VALUATION AND MANAGEMENT* 119 (2010) (pointing out that "commercial valuation tends to seek a true midpoint in value," while "[t]he very nature of litigation alters the perception of value" by placing parties in adversarial positions as to the value of the intellectual property at issue).

137. See Mike Linksvayer, *Creative Commons Attribution—ShareAlike License Enforced in Germany*, CREATIVECOMMONS.ORG (Sept. 15, 2011), <http://creativecommons.org/weblog/entry/28644> (mentioning that cases involving Creative Commons licenses have rarely been taken to court).

138. See HARGREAVES, *supra* note 10, at 513 ("Widespread disregard for the law erodes the certainty that underpins consumer and investor confidence. In the most serious cases, it destroys the social solidarity which enables the law abiding majority to unite against a criminal minority."); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 17 (2010) (arguing that the public may withdraw its support for the copyright system if it sees copyright protections as illegitimate); Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1076–79 (2008) (suggesting that citizens are engaging in a frontal challenge to public policy and the rule of law by flouting copyright).

139. CARSTEN FINK, ADVISORY COMM. ON ENFORCEMENT, WORLD INTELLECTUAL PROP. ORG., *ENFORCING INTELLECTUAL PROPERTY RIGHTS: AN ECONOMIC PERSPECTIVE* 18 (2009) ("Each individual's decision to break the law depends on the expected pay off (the profit from selling counterfeit goods), the costs of escaping punishment, the wage rate in an alternative legitimate activity, the probability of apprehension and conviction, the prospective penalty if convicted, and the individual's (dis-)taste for breaking the law (consisting of a combination of moral values and preference for risk).").

140. See Greenspoon, *supra* note 83, at 549–552 (suggesting that having a small claims court would "encourage negotiated resolutions for good faith small-scale disputes," at least in the patent arena, as well as motivate lawsuit avoidance).

more in line with Supreme Court preferences. In *Campbell v. Acuff-Rose Music, Inc.*, the Court suggested that the purposes of copyright law could be better served by granting damage awards instead of injunctions.¹⁴¹ Scholars have suggested that alternative remedies for copyright violations are appropriate in many scenarios because of the disproportionate leverage that copyright owners gain through threats of injunctions.¹⁴² Emphasizing monetary damages through the CIRP could facilitate better use of licensing and expand the lawful use of copyrighted works.

B. Lack of Injunctive Relief and Fair Use Challenges Could Be Stumbling Blocks

A potentially huge stumbling block for plaintiffs is that the CIRP would be unable to grant injunctive relief that would remove infringing material from the marketplace and off the Internet. Defendants, on the other hand, may dislike an administrative process that is less adept than the federal courts at handling complicated affirmative defenses like fair use.

Equitable relief such as injunctions are available through the courts if plaintiffs meet the four-factor test the Supreme Court set out in *eBay Inc. v. MercExchange, LLC*.¹⁴³ In the case of some copyrighted material, such as DVDs, mp3s, or books, the plaintiff may be more concerned with removing infringing material from the marketplace than recovering monetary damages for harm. However, courts are often reluctant to grant injunctions based on the “onerous nature” of the remedy.¹⁴⁴ Justice Anthony Kennedy recognized in the *eBay Inc.* case that “the threat of an injunction [can be] employed simply for undue leverage in negotiations.”¹⁴⁵

In cases where an injunction is truly the only solution to remedy the market harm of a copyright infringement, federal court would still remain an option. The CIRP would not be a mandatory process for copyright owners, but rather an alternative for those who would naturally gravitate

141. 510 U.S. 569, 578 n.10 (1994).

142. Samuelson, et al., *supra* note 50, at 1226. The Copyright Principles Project (CPP) suggests that if courts considered remedies such as payment of a licensing fee or ongoing royalties for use of copyrighted material, then copyright owners and potential infringers may enter into “more appropriate bargaining.” *Id.* at 1225. The group also notes, however, that alternative remedies could be seen as encouraging infringement by imposing a “compulsory license” that defendants will simply calculate in as part of the infringement risk equation. *Id.*

143. 547 U.S. 388, 391 (2006) (stating that the plaintiff must demonstrate he suffered irreparable injury, monetary damages are inadequate to compensate him for the injury, a remedy in equity is warranted—after balancing the hardships between plaintiff and defendant—and the public interest would not be disserved by a permanent injunction).

144. HOWARD C. ANAWALT, IP STRATEGY: COMPLETE INTELLECTUAL PROPERTY PLANNING, ACCESS AND PROTECTION § 1:2 (2012).

145. *eBay Inc.*, 547 U.S. at 396 (Kennedy, J., concurring).

toward the forum that would provide the most efficient remedy at the lowest cost. The CIRP is more likely to provide relief to digital copyright owners. Still, a copyright owner who wanted to have pirated CDs or physical objects removed from the market could still obtain relief in federal court.

Affirmative defenses to claims of copyright infringement include fair use.¹⁴⁶ Fair use analyses can be complicated and fact specific.¹⁴⁷ Prominent consumer protection groups note that the fair use defense “touch[es] on free expression, privacy, and competition policy”—larger, more complex issues that may not be fully heard in a shortened dispute hearing timeframe.¹⁴⁸ Defendants in an administrative proceeding, however, would have the benefit of the CIRP judges’ expertise in copyright law, which should increase the likelihood that even a fact-specific defense like fair use would receive a full hearing. Also, the CIRP process would contain a *de novo* appeal to federal district court, which would give defendants another opportunity to raise a fair use defense.

CONCLUSION

Scholars have noted the challenges in moving past the rhetoric espoused by both content owners and content users to address the toughest, most controversial parts of copyright law.¹⁴⁹ This Article takes aim at the challenge of fairly providing remedies for copyright infringement by advocating for the creation of a small claims remedy process. This process would deter infringements, resolve complaints more quickly, and lower the cost of remedying infringements. Providing for an administrative proceeding within the Copyright Office would take advantage of the substantive knowledge in the office and existing support staff. By realigning remedies for infringement—damages based on licensing calculations, required attribution, and denial of digital access for “repeat infringers”—with social norms for copyright law, the CIRP would increase the value and relevance of copyright law by putting copyrights back in the hands of the creators who most need them.

146. 17 U.S.C. § 107 (2006).

147. See Carroll, *supra* note 112, at 1099–1106 (noting that “[t]he scope of the fair use defense is sufficiently uncertain in light of the potential penalties to scare away a sizeable portion of potential users” before discussing judicial application of fair use factors).

148. Memorandum from Public Knowledge, Electronic Frontier Foundation, and Future of Music Coalition, to U.S. COPYRIGHT OFF. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/46_pk_eff_fm.pdf.

149. Samuelson, et al., *supra* note 50, at 1179. Despite the differences between participants in the CPP that Samuelson describes, the group did agree that a small claims procedure within the Copyright Office was one of its top recommendations.

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