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**Re: Remedies for Small Copyright Claims: Response to Notice of Inquiry
(77 F.R. 51068) (Docket No. 2011-10): Additional Comments**

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Introduction:

American Photographic Artists (APA) thanks the Register and Copyright Office for its continued efforts in the research and investigation of a small claims system for the adjudication of copyright infringements that would have a high hurdle to jump in traditional federal copyright court due to the large expense incurred.

The American Photographic Artists (<http://www.apanational.com>) is a leading national organization run by and for professional photographers. With its culture that promotes a spirit of mutual cooperation, sharing and support, the APA offers outstanding benefits, educational programs and essential business resources to help its members achieve their professional and artistic goals. Recognized for its broad industry reach, the APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide

The APA has a core value of advocacy for its members, as well as for the benefit of all photographers. The APA is committed to achieving a fair system that provides more opportunity for copyright holders whose rights are infringed to be able to vindicate their rights in a court of law.

APA believes the Proposal for Small Copyright Infringement Claims submitted by David Nimmer on behalf of American Photographic Artists with Special Counsel Edward Greenberg on January 17, 2012 is a very detailed proposal. APA's approach was to keep the system in Federal Court with few changes or additions that would challenge constitutional issues. We still believe it is the best solution to make small infringement claims possible. Several comments below pull from the APA Proposal that David Nimmer and Special Counsel Edward Greenberg drafted and we thank them of their contributions.

Second Comments:

The request for Second Comments presents a series of specific numbered questions that we follow for our response. In an effort not to duplicate what has already been proposed several answers refer back to the APA Proposal from January 17, 2012.

1. Nature of tribunal/process

APA's proposal called for keeping the process in Federal Court but used the Magistrate Judges in the court structure, not a tribunal process. This would streamline the judicial system for small infringement claims and relieve the workload of Article III courts if both parties agreed to the process with a cap set as high as \$80,000. The magistrate process used in the Eastern District of Virginia incorporate "rocket docket" rules and would be applied for other eligible small infringement claims.

The APA proposal centers on the adoption of rules mandating offers of judgment from both sides. In the happy event that those figures converge, the case is resolved. Otherwise, each party is encouraged to make multiple offers narrowing the gap between

them. At the end of the day, each parties best offer forms the basis for the case's ultimate disposition by the Magistrate Judge.

2. Voluntary versus mandatory participation.

In APA's proposal both parties have to agree to the process so it is voluntary participation.

3. Arbitration

There is no arbitration in APA's proposal and we do not believe it should be an option.

4. Mediation

There is no mediation in APA's proposal and we do not believe it should be an option.

5. Settlement

Since the APA proposal centers on the adoption of rules mandating offers of judgment from both sides a settlement may be reached at anytime during that process.

6. Location of tribunal(s)

Not applicable in APA's proposal since we propose Magistrate Judges are used, not tribunals.

7. Qualifications and selection of adjudicators.

APA's proposal uses Magistrate Judges as the adjudicator.

8. Eligible works

APA is addressing the small infringement claim process for photographs. Illustrations would also fit into the process. It is not in APA's knowledge base to assume other or all classes of copyrighted works should be available for a small claims system.

9. Permissible claims

From APA's proposal: Page 7

...A significant part of the Proposal draws the applicable boundaries. In summary fashion, to be eligible for that status, a case must be brought solely for federal copyright infringement and/or final injunctive or other equitable relief in support thereof, as to a work that was timely registered (as discussed starting on page 24 below), in which the plaintiff seeks a maximum of \$80,000. A case is not eligible for small infringement claim status if it seeks preliminary equitable relief. If the defendant wishes to counterclaim along identical lines, then the case may still qualify as an eligible small infringement claim.

Those limitations place many cases outside the framework of eligible small infringement claims. The case does not so qualify if the plaintiff includes a Lanham Act cause of action; if the defendant counterclaims for an antitrust violation; if either party prays for more than \$80,000 total; if any of the plaintiffs or any of the defendants refuse to assent; or if other specified circumstances are present.

In all those events, the Proposal governs how to treat the resulting non-eligible claim. That inclusion is essential, for if a defendant could avoid the strictures of the Proposal simply by adding a non-meritorious counterclaim, then the Proposal could effectively be set at naught.

10. Permissible claim amount

From APA's proposal: Page 15

In addition, the hope is to avoid any need to revert frequently to Congress for additional amendments. For that reason, the Act defines a "small infringement claim" with a ceiling of \$150,000, notwithstanding that the supporting regulations limit eligibility at present to the \$80,000 level. The intent is to build leeway into the regulatory framework; if experience proves that more cases should be included than those maxing out at \$80,000 (or if future inflation so warrants), then the Copyright Office can simply adopt new regulations for that purpose, without the need to obtain further congressional approval. Of course, the Office could also lower the ceiling in the future, if circumstances so warrant.

11. Permissible defenses and counterclaims

APA's proposal outlines claims and counterclaims in Pages 15-20.

12. Registration

From APA's Proposal: Page 5

This Proposal does not change operative law with regard to registration. Only those claimants who have timely registered their works will be allowed to take advantage of the new procedural standards specified in this Proposal. The APA is redoubling efforts to inform its members of both the ease of copyright registration and the considerable benefits that flow from undertaking that step. At the same time, the APA would also like to continue to work with the Copyright Office, to streamline the procedures for electronic filing and ensure that they operate in the most user-friendly fashion for the benefit of photographers.

13. Filing fee

APA would endorse what is standard and usual practice of filing fees for current copyright infringement claims under Title 17, \$350.00.

14. Initiation of proceeding

The process of initiation of the proceeding is the same as it is now for copyright infringements. Go to court and check a box, but this one is called, copyright small infringement claims, pay the filing fee of \$350.00.

15. Representation

The plaintiff and defendant would be required to have legal representation by qualified attorneys.

16. *Conduct of proceedings*

APA's proposal assumes the parties would be represented before a Magistrate Judge. We would be open to not having a requirement of personal appearance but the procedures referred to in the "rocket docket" system of the Eastern District of Virginia should be followed as a standard.

17. *Discovery, motion practice and evidence*

Discovery, motion practice and evidence are allowed in APA's proposal but follow the system referred to in the "rocket docket" system of the Eastern District of Virginia.

18. *Damages*

From APA's proposal: Page 9

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs. *In any case initially filed as a small infringement claim, the court in its discretion may award the recovery of full costs and a reasonable attorney's fee by or against any party other than the United States or an officer thereof, pursuant to the regulations established for those claims by the Register of Copyrights, as provided in this Title.*

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(b) *Designation of an eligible small infringement claim*

(1) When one or more plaintiffs files a complaint in any United States District Court, then those plaintiffs, by their unanimous agreement, may designate the case as an eligible small infringement claim, provided that

(A) the complaint alleges one or more counts of copyright infringement under Title 17, United States Code;

(B) those counts are eligible for recovery of statutory damages and attorney's fees pursuant to 17 U.S.C. § 412;

(C) the complaint does not allege any causes of action other than copyright infringement under Title 17, United States Code;

(D) the complaint seeks no preliminary equitable relief; and

(E) the total amount of monetary damages sought by all plaintiffs does not exceed \$80,000.

19. *Equitable relief*

The seeking of equitable relief fails to qualify a suit as a small infringement claim in the APA Proposal.

20. *Attorneys' fees and costs*

From the APA Proposal: Page 3

The best protection for low-economic-value claims would arise from making *automatic* the recovery of attorney's fees and statutory damages by prevailing plaintiffs. By contrast, current law affords those remedies only for the benefit of copyright proprietors who, *prior to the commencement of infringement, have registered their work* in the records of the United States Copyright Office.

The automatic recovery of attorney's fees and statutory damages is a principle motivation for both parties to enter into our proposed small infringement claims system.

21. *Record of proceedings*

The record of proceedings would follow the system used in the recommended "rocket docket" system of the Eastern District of Virginia.

22. *Effect of adjudication*

There does not need to be any change from current practice. It is a decision on the merits under the very same set of criteria that are in place at this moment. Parties can agree to try any size/type case in front of a magistrate now. A Magistrate Judge's decision should be treated the same as the decision of any trial judge as is current law.

23. *Enforceability of judgment*

Enforcement would follow the existing record under Title 17 and the Federal Courts.

24. *Review/appeals*

From APA's Proposal: Page 24

The Magistrate Judge's ultimate resolution constitutes final judgment by the district court. As such, it is subject to appeal to the pertinent circuit. To the extent that the judgment comports with the statute and regulations, as amended by the Proposal, it should be sustained on appeal.

25. *Group claims*

APA believes the small infringement claims system is for individual copyright holders, not groups. We would be open to exploring this option however, if part of a final proposal.

26. *Frivolous claims*

Frivolous claims are avoided in APA's proposal in the sense that only registered images with the US Copyright Office are permitted to use the system and both parties have a agree to engage in the small infringement claims system.

27. Constitutional issues

APA's Proposal approached a small infringement claims system to work within the framework of constitutional rights. The proposal has in principle that both parties agree to the system with a Magistrate Judge adjudicating and would give up the right to a trial by jury.

28. State court alternative

APA does not believe a small infringement claims system should leave the federal court system and therefore does not believe a state court or a traditional small claims court should be incorporated.

29. Empirical data

From APA's Proposal: Page 3.

Photographers tend to be small business owners; most are sole proprietors earning \$50,000 dollars or less each year. The cost of doing business can be staggering for photographers, due to dramatic and constant improvements in the technology of the trade. When the traditional legacy workflow of photographers shifted from film and silver halide processes to digital capture and electronic devices for processing and moving images, a sea change occurred: The cost of staying current and competitive escalated astronomically.

While the intrinsic cost of doing business has increased for photographers, the advent of the digital age has, at the same time, engendered a dramatic increase in the volume of copyright infringement of graphic works. Purloining of such works, whether produced for use by multi-national corporations for advertising purposes, use on apparel, product packaging or reportage, has become routine. Infringers include, at times, large corporations with substantial resources, including legal counsel well versed in the ins and out of civil litigation, as well as the substance of copyright law. On the other hand, the creators of such works tend to be sole proprietors with limited financial resources and even less legal sophistication.

The Copyright Office's Notice of Inquiry for Remedies for Small Copyright Claims perceptively states:

... while a copyright owner may want to stop an infringement that caused a relatively small amount of economic damage, that owner may be dissuaded from filing a lawsuit because a potentially small award may not justify the potentially large expense of litigation.

APA appreciates the insight that went into that formulation. Even when the possible rewards of statutory damages and attorney fees are present, the process of initiating litigation, and its upfront costs, too often pose an insurmountable hurdle to prospective plaintiffs. Under the current system, it may take years to reach resolution of an infringement case. The result is that most photographers cannot even attempt to bring an

action against an infringer. Potential defendants know that fact full well, and often do all they can to drag a plaintiff along until there is no recourse but to give up.

Litigators who represent photographers, illustrators, artists, and the like have observed that that the current system deters authors from asserting their rights, renders these cases difficult for any attorney to take on, and encourages copyright infringement by all phases of society. Systems to tailor court resources to the complexity of the case before it are in effect in many busy state courts, such as the Supreme Court of the State of New York in New York County. The economic benefits to those already overloaded courts are substantial.

30. Funding considerations

One main principle under the APA Proposal is this system would be a court savings. Shortened proceedings and following the “rocket docket” systems under a Magistrate Judge would not increase any costs to the court. No additional funding considerations need to be made under the APA Proposal.

31. Evaluation of small claims system

As with all systems the evaluation of a small infringement claims system should be present. Periodic review and adjustments should be under the guidance of the US Copyright Office. APA would not be opposed to a pilot program.

Conclusion:

APA greatly appreciates the Copyright Office’s request to submit comments on the issue of small infringement claims. Towards that end, the APA has participated with other visual art organizations in discussions on the subject of Remedies for Copyright Small Claims. Those organizations include Graphic Artists Guild (GAG), Professional Photographers of America (PPA), Picture Archive Council of America (PACA), North American Nature Photography Association (NANPA), Editorial Photographers (EP) and National Press Photographers Association (NPPA).

As is often the case, others may express divergent recommendations from those of APA. We all agree to the goal of protecting the copyright of every visual artist, along with all copyright holders in general. APA relishes the ability to work with the Copyright Office and the other associations to achieving a fair system that provides more opportunity for copyright holders whose rights are infringed to be able to vindicate their rights in a court of law.