UCLA LAW REVIEW

David's Sling: How to Give Copyright Owners a Practical Way to Pursue Small Claims

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ABSTRACT

It is notoriously difficult for copyright owners to bring small infringement claims. Just finding an attorney willing to take the case can be a challenge. Then there is the high cost of litigating in United States District Court—the only court with jurisdiction. For many, the obstacles are so daunting that they do not even try. The U.S. Congress has recognized the problem and asked the Copyright Office to study it. Finding a solution is far more complex than one might first assume. There are constitutional issues, such as the right to a jury trial and the separation of powers. Questions of law and procedure also arise. Competing interests must be balanced; any change in the system will help some and hurt others. And the discussion is taking place in an ever-evolving media environment in which it is easier than ever to make and publish copies. This Comment examines some of the options that have been suggested, including the Copyright Office's proposal for a voluntary alternative system for the adjudication of small copyright claims. This Comment proposes that Congress instead establish a mandatory alternative system by creating an administrative agency to regulate such claims.

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For invaluable support and guidance, I am grateful to Professors Neil Netanel, David Nimmer, and Jon Michaels, as well as the board and staff of the *UCLA Law Review*. A special thanks to my wonderful wife and children for their enduring love and support.

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INTRODUCTION

Imagine the predicament of a photographer who discovers that someone is making money from his work by selling cheap reproductions without permission.[1] Or consider an illustrator who discovers that a small business has copied her illustrations from a paying client's website,[2] or a writer who discovers that a publisher has released her book in electronic form without permission.[3] In theory, a copyright owner in any of these situations might have a meritorious claim for infringement under U.S. copyright law. In practice, however, these people are not likely to have the resources to bring a federal lawsuit,[4] and as long as the alleged infringer refuses to cooperate in an alternative method of dispute resolution, each is likely to effectively be left without a remedy. The U.S. Congress has

1. Joe Beasley, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE, *available at* http://www.copyright.gov/docs/smallclaims/comments/09_beasley_joe.pdf; *see also Comments of the National Press Photographers Association: Request for Additional Comments Regarding Studies On Remedies for Small Copyright Claims Before the U.S. Copyright Office*, (Oct. 19, 2012) (statement of Mickey H. Osterreicher, Gen. Counsel, & Alicia Wagner Calzada, Att'y for NPPA), at ii, *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/NPPA.pdf ("As the news media have trimmed staff, more and more of our members are now working as independent contractors, licensing their images and footage for editorial use. Copyright infringement of this material has contributed to a devastating economic loss for our members. It takes a direct economic toll on these small business owners, who must shoulder the burden of policing infringements while at the same time seeking and fulfilling assignments, working on self-initiated projects and maintaining all of the tasks of running a 24/7 business. For many, losses due to infringement have been overwhelming.").
2. Emily S. Damstra, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE (Jan. 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/19_damstra_emily_s.pdf.
3. Miryam Ehrlich Williamson, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE (Jan. 16, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/54_williamson_miryam.pdf (referring to the Notice of Inquiry on "Remedies for Small Copyright Claims").
4. Comments on Small Claims from Joseph M. Potenza, Section Chair, Am. Bar Ass'n Section of Intellectual Prop. Law, to Maria A. Pallante, Register of Copyrights, U.S. Copyright Office, at 5 (Oct. 19, 2012*), available at* http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf (discussing the costs of litigating copyright infringement cases and indicating that the mean cost of pursuing such a case through discovery alone is $216,000); *see also* Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1006 (2008) ("Poor, start-up, or non-commercial individuals and entities also face significant obstacles when attempting to enforce their intellectual property rights against wealthy defendants. Wealthy defendants, like wealthy plaintiffs, when confronted with an opposing party of limited means, have a strong incentive to file unnecessary procedural motions and engage in other behavior that serves little purpose but to raise the opposing party's costs and induce a one-sided settlement.").

recognized this issue[5] and asked the Copyright Office to study it.[6] In September 2013, the Copyright Office gave Congress a report with recommendations, which Congress is, at the time of this writing, now considering.[7]

These scenarios raise the prospect of a David and Goliath situation, in which two opponents face each other, but one is much stronger and better equipped than the other.[8] In small copyright infringement cases, the smaller opponent might have plenty of stones to use as litigation weapons: a meritorious case, sufficient evidence, and the desire to pursue a claim. Yet he may lack a good sling with which to hurl them, since federal court is too expensive. What is the answer? This Comment proposes that the best solution is for Congress to create and empower an administrative agency auxiliary to the Copyright Office to regulate small copyright claims. The agency would function similarly to the Trademark Trial and Appeal Board. It would have an online system incorporating elements of the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Dispute Resolution Policy for addressing domain-name disputes.

The solution builds on recommendations that have been discussed in responses to the Copyright Office's Notices of Inquiry on this matter, as well as some of the Copyright Office's own recommendations. This Comment addresses how the recommended solution could overcome constitutional issues and how it would be superior in important respects to alternatives, such as giving jurisdiction for small copyright claims to state courts. Part I provides the context in which the debate is occurring. The Internet has created a proliferation of opportunities to infringe, and copyright owners may sense that they have less control than ever over how their works are used. The average copyright lawsuit in federal court, meanwhile, usually costs a minimum of five figures and can reach into six figures if it must be pursued through discovery and trial.

5. *See Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Hearing*], *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26767/pdf/CHRG-109hhrg26767.pdf.

6. *Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/smallclaims (last visited July 25, 2014).

7. U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (Sept. 2013) [hereinafter REPORT], *available at* http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf; *see also Copyright Small Claims with Jacquelyn Charlesworth Part 3*, COPYRIGHT ALLIANCE (Nov. 15, 2013), *available at* https://itunes.apple.com/us/podcast/copyright-alliances-podcast/id719655693?mt=2 (asking a member of the Copyright Office about recommendations in the report).

8. 1 *Samuel* 17.

Part II discusses this Comment's proposal: Congress should create an administrative agency to regulate small copyright claims. The Trademark Trial and Appeal Board could serve as a model for this system, and the new adjudicatory system might also draw on the experiences of the Uniform Dispute Resolution Policy and the Copyright Royalty Board. Part III discusses the benefits and drawbacks of a small-claims system and how those attributes inform the public policy discussion related to creating such a system to adjudicate copyright disputes.

Part IV begins by addressing the chief constitutional factors that any proposal must overcome: avoiding any infringement upon (1) separation of powers, also known as structural rights, and (2) individual rights, including the right to a jury trial and due process of law, as discussed in *Mathews v. Eldridge*.[9] Part IV addresses how the proposal could meet each of these constitutional challenges. Part IV also discusses complications that arise from this proposal, such as whether to allow affirmative defenses such as fair use. The Comment recommends incorporating the opportunity for a fair-use determination as part of the process.

Part V briefly examines some of the other proposals that commentators have offered and discusses why they are less workable. For example, creating an Article I court system rather than an agency would pose greater constitutional difficulties. Giving jurisdiction to the states would result in a hodgepodge of possible outcomes, depending on the jurisdiction where a claim is brought—and this would leave potential plaintiffs and defendants uncertain about their rights and duties. Adjudication in state courts also likely would involve judges with minimal knowledge of copyright law. In addition, a defendant might not be subject to the personal jurisdiction of a local court. Part VI discusses some of the tradeoffs necessary to implement a small claims system, recognizing that there will be winners and losers.

I. THE SCOPE OF THE PROBLEM

This is a time of immense change in the area of intellectual property. The continued expansion of the Internet and the development of more sophisticated content-sharing technologies and services have vested the ordinary consumer with a sense of ownership over—or at least free access to—songs, photographs, videos, articles, and just about any other type of expressive creation. For many,

9. 424 U.S. 319 (1976).

the speed of the Internet stands in stark contrast to the slow pace of litigation that might be necessary to enforce one's rights.[10]

On virtually every front, technology is replacing traditional media with electronic and digital forms that make things easy for infringers. For example, electronic books are a fast-growing and emerging segment of the publishing industry, giving self-publishers a quick way to make money on material that might not be sufficiently vetted for infringement.[11] These developments make infringing activity not only easier but also potentially more profitable.

Coupled with the growth of technology is a growing frustration among copyright owners that the current federal court system for litigating disputes is outmoded and increasingly ineffective. Many wonder if technological advancements can offer a possible solution, creating new tools for copyright owners to enforce their rights.[12] Amid all this change, governments are taking notice and trying new strategies, or at least contemplating what to do. For example, the U.S. Patent and Trademark Office has been considering the creation of a small-claims court.[13] The United Kingdom recently has started its small-claims court for copyright.[14] The time appears to be ripe for a new approach.

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10. *See, e.g.*, *Sinking the Copyright Pirates: Global Protection of Intellectual Property: Hearing Before the H. Comm. on Foreign Affairs*, 111th Cong. 28 (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48986/pdf/CHRG-111hhrg48986.pdf (statement of Steven Soderbergh, National Vice President, Directors Guild of America) ("Litigation is slow and the Internet is fast. . . . [I] don't think it makes much sense for us to ask the Government to be the police in this issue. What we would like is to be deputized to solve our own problems."). *See generally* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 83–84 (2010) (discussing the necessity and development of automated copyright enforcement tools).

11. *See, e.g.*, Garrett McCord, *Theft of a Food Blog: Copyright Infringement in the e-Book Marketplace*, THE HUFFINGTON POST (Aug. 3, 2012, 10:52 AM), http://www.huffingtonpost.com/garrett-mccord/food-blog-cookbook-copyright-infringement_b_1721929.html ("E-books have become hot commerce in recent years. Kindle is currently the number one selling item on Amazon's website, and Microsoft recently invested $300 million into Barnes and Noble's Nook subsidiary in order to claim a hefty share of the electronic reader market. With plentiful samples, prices that shame hardbacks, and content a simple push of a button away some people wonder if the e-books will make paper books extinct.").

12. *See* Part II.B *infra*.

13. David Kappos, *USPTO Co-Sponsors IP Small Claims Roundtable*, DIRECTOR'S FORUM: DAVID KAPPOS' PUBLIC BLOG (May 16, 2012), http://www.uspto.gov/blog/director/entry/uspto_co_sponsors_ip_small; *see also* Robert P. Greenspoon, *Is the United States Finally Ready for a Patent Small Claims Court?*, 10 MINN. J.L. SCI. & TECH. 549 (2009).

14. Press Release, Intellectual Property Office, New Small Claims Track for Businesses with IP Disputes (Oct. 1, 2012), *available at* http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20121001.htm ("A new small claims track has today been introduced to the Patents County Court (PCC), which will speed up the court process and make it cheaper and easier, particularly for small and medium sized businesses, to protect their intellectual property (IP) rights."). *See generally* George

A. Costs and Other Hurdles to Bringing a Federal Lawsuit

Finding and affording an attorney to litigate a small copyright infringement claim is no easy task. Contingency-fee arrangements are uncommon in copyright cases,[15] so a copyright owner who chooses not to proceed pro se generally needs to pay an attorney's hourly rate. This can quickly add up to tens of thousands of dollars.[16] Yet without an attorney, many litigants find it extremely difficult to navigate the procedure and the substantive law when trying to enforce their rights in federal courts.[17]

The actual costs of litigation can be staggering. The median cost of litigating through discovery is $200,000 for a case with less than $1 million at risk, according to a 2011 study.[18] The median cost of taking such a case through appeal is $350,000.[19] The length of time involved also can be daunting. The median time from filing to disposition in civil cases of all types in federal courts during the twelve-month period ending March 31, 2010 was more than twenty-three months for cases that went to trial.[20] The Copyright Office has recognized that "[t]his investment of time, not to mention the associated expenses, may not be feasible for individual authors, who may not be able to dedicate sufficient time to handle all of the litigation burdens."[21]

As one commenter wrote to the Copyright Office: "It would be nice if there were a procedure where you could get a small but not meaningless fine from an

Washington University School of Law, *IP Small Claims Roundtable: Plenary Session* (May 20, 2012), http://www.law.gwu.edu/Academics/FocusAreas/IP/Pages/Videos.aspx (presenting comments by Paul Storer of the United Kingdom Intellectual Property Office regarding the creation of the small-claims patent and copyright courts in that country).

15. *See, e.g.*, *Hearing*, *supra* note 5, at 46 ("[I]t is our understanding that contingency fee arrangements in copyright cases are relatively rare."); *see also* Megan E. Gray, Comment on *Comments on Small* Claims, U.S. COPYRIGHT OFFICE (Jan. 17, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/24_gray_matters.pdf ("[I]t is not often possible for a copyright owner to hire a contingency fee lawyer."); *Hearing*, *supra* note 5, at 34 (statement of Victor S. Perlman) ("Usually there is not enough money in controversy. . . . That means that lawyers won't take the case on a contingent fee basis.").
16. Notice of Inquiry: Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,759–60 (Oct. 27, 2011) [hereinafter First Notice of Inquiry] ("Lawyers charge hundreds of dollars per hour, which could reach a total of tens or hundreds of thousands of dollars when a case does not immediately settle and instead requires discovery, motion practice, and trial.").
17. *See* Part VI.C *infra*.
18. Potenza, *supra* note 4, at 5.
19. *Id.* at 6; REPORT, *supra* note 7, at 8.
20. OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, tbl. C-5, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf.
21. First Notice of Inquiry, *supra* note 16, at 66,760.

infringer in a small case, like $1000 or $1500, without having to hire a lawyer and jump through all the hoops and delays of a lawsuit."[22]

B. The Copyright Office Notices of Inquiry and Report

These problems received close scrutiny in 2006, during a hearing before the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property.[23] In October 2011, the chairman of the House Judiciary Committee asked the Copyright Office to study the issue and propose solutions.[24] The Copyright Office's First Notice of Inquiry resulted in fifty-five responses submitted by the January 17, 2012 deadline.[25] The Copyright Office sought additional comments in August 2012,[26] enumerating thirty-one specific areas upon which it sought feedback, including some areas where there has been disagreement about how best to proceed.[27] This resulted in twenty-five additional comments submitted by October 19, 2012.[28]

In November 2012, the Copyright Office held hearings on this matter at Columbia Law School in New York and at UCLA School of Law in Los Angeles.[29] During those hearings, Jacqueline Charlesworth, then senior counsel, Office of the Register, announced that the Copyright Office was considering a Third Notice of Inquiry. The Copyright Office published its Third Notice of Inquiry on February 26, 2013,[30] seeking comments about "how a small copyright claims system might be structured and function, including from parties who have not previously addressed these issues."[31] The notice listed seventeen subjects of

22. Jean Finley, Donald A. Gardner Architects, Inc., Comment on *Comments on Small Claims*, U.S. COPYRIGHT OFFICE (Nov. 1, 2011), *available at* http://www.copyright.gov/docs/smallclaims/comments/20_donald_gardner.pdf.
23. *Hearing*, supra note 5 (including the oral testimony by Paul Aiken, Executive Director, Authors Guild; Jenny Toomey, Executive Director, Future of Music Coalition; Brad Holland, founding board member, Illustrators' Partnership of America; and Victor S. Perlman, general counsel and managing director, American Society of Media Photographers, Inc.).
24. First Notice of Inquiry, *supra* note 16, at 66,759.
25. *Comments on Small Claims*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/smallclaims/comments (last visited July 26, 2014).
26. Notice of Inquiry: Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51,068 (Aug. 23, 2012) [hereinafter Second Notice of Inquiry].
27. *Id.*
28. *Comments on Small Claims*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/index.html (last visited July 26, 2014).
29. *November 2012 Public Hearings*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/smallclaims/public-hearings-112012.html (last revised Apr. 29, 2013).
30. Remedies for Small Copyright Claims: Third Request for Comments, 78 Fed. Reg. 13,094 (Feb. 26, 2013) [hereinafter Third Notice of Inquiry].
31. *Id.* at 13,095.

inquiry, as well as a general invitation to address other issues.[32] Among them are constitutional issues, the role of attorneys, whether the process should be mandatory or voluntary, and what law should control. There were twenty-seven responses.

The responses to all three Notices of Inquiry offered a wide range of suggestions, including variations on mediation and arbitration, as well as different permutations of small-claims courts. Few of the responses addressed the constitutional issues that would need to be addressed as a preliminary matter before Congress could reallocate judicial authority.

In its report in September 2013, the Copyright Office recommended a voluntary system involving a tribunal within the Copyright Office that would administer proceedings as an alternative to federal court.[33] While this Comment likewise recommends an alternative tribunal system, it proposes that the system be mandatory rather than voluntary. Defendants should not be permitted to opt out once a complaint is filed and notice is served.[34] A mandatory system would enable claimants to proceed pro se in a process that is accessible, affordable, quick, and binding. The solution offered here is a synthesis of alternatives that have been discussed, organized in a manner that addresses some of the most important questions posed by the Copyright Office.

The landscape is challenging. As this Part has discussed, federal court is expensive and difficult to navigate without an attorney. Yet forms of adjudication and dispute resolution used in other areas of law may point the way toward solutions. The next Part discusses some of the possibilities.

II. POTENTIAL MODELS FOR AN ADMINISTRATIVE AGENCY TO REGULATE SMALL COPYRIGHT CLAIMS

The most effective way to address the concerns that have been raised is to create a small-claims court through an administrative agency. The proposed Copyright Complaints Board (CCB) could be a body within the Library of Congress, working in close association with the Copyright Office. It would be responsible for hearing and deciding copyright disputes in which the amount at issue is less than $30,000.[35] The CCB would have administrative judges ap-

32. *Id.* at 13,095–97.
33. REPORT, *supra* note 7, at 3–4.
34. *See* Part IV.B.3 *infra*.
35. The U.S. Copyright Office recommends a $30,000 cap. REPORT, *supra* note 7, at 4. The specific dollar amount is somewhat arbitrary. Limits proposed by those who responded to the Copyright Offices Notices of Inquiry generally were in the five-figure range. The American Bar Association, for example, suggested $30,000, noting that state small-claims courts have limits of up to $25,000,

pointed by the Librarian of Congress in consultation with the register of copyrights. These judges would be experts in copyright law.

The filing, briefing, and hearing procedures of the CCB would be organized with an eye toward enabling access and speeding up adjudication. The CCB would establish an Electronic System for Copyright Complaints (ESCC), in which parties would need to convert their paper filings into JPEG or PDF formats for submission through electronic dialogue boxes. Documents also could be accepted by mail, courier, or hand-delivery. Page limitations would be imposed; for example, briefs would be limited to twenty-five pages, and replies would be limited to ten pages.

The opportunity for oral argument would be available upon request, but the administrative judges would be encouraged to decide cases on the briefs when possible. To the extent that hearings or other consultations would be necessary, telephone conferences and other methods of remote appearance should be encouraged.

The creation of such an agency would not be a foray into wholly uncharted territory. Existing agencies and adjudicatory processes offer some insights into how the CCB might be structured, and how it might make its procedures accessible and efficient.

A. The Trademark Trial and Appeal Board as a Model

One example for the CCB is the Trademark Trial and Appeal Board (TTAB).[36] The TTAB is an administrative tribunal with limited jurisdiction, in which administrative judges decide matters related to trademark law.[37] In partic-

and two-thirds of attorneys it surveyed would take a case with an amount at issue of $60,000, so that a $30,000 limit "would not leave too big a gap between the small claims limit and the bottom end of economically viable litigation." Potenza, *supra* note 4, at 7–8; *see also* note 196 *infra* and accompanying text.

36. U.S. PAT. & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§ 102.01, .02 (3d ed., rev. 1, 2012) ("The Trademark Trial and Appeal Board is an administrative tribunal of the United States Patent and Trademark Office. . . . The Board has jurisdiction over four types of inter partes proceedings, namely, oppositions, cancellations, interferences, and concurrent use proceedings."). The U.S. Copyright Office also recognizes the Trademark Trial and Appeal Board (TTAB) as a model. REPORT, *supra* note 7, at 67–70.

37. 15 U.S.C. § 1067(a) (2012) ("In every case of interference, opposition to registration, application to register as a lawful concurrent user, or application to cancel the registration of a mark, the Director shall give notice to all parties and shall direct a Trademark Trial and Appeal Board to determine and decide the respective rights of registration."); *see also* Rosenruist-Gestao E Servicos LDA v. Virgin Enterprises Ltd., 511 F.3d 437, 443 (4th Cir. 2007) ("The TTAB is an administrative tribunal of the PTO with jurisdiction over *inter partes* challenges to the registration of trademarks.").

ular, the TTAB hears disputes over whether a trademark is registrable. The TTAB personnel include the director and deputy director of the U.S. Patent and Trademark Office, the commissioners for trademarks and patents, and administrative judges.[38]

The TTAB has twenty-three judges.[39] The United States commerce secretary appoints the judges in consultation with the director of the United States Patent and Trademark Office.[40] In addition, interlocutory attorneys help with nondispositive matters.[41] Most of the TTAB's work is done in writing.[42] The TTAB maintains the Electronic System for Trademark Trials and Appeals, through which papers can be filed electronically with the help of dialogue boxes.[43] Litigating before the TTAB is similar to litigating in district court, and the TTAB incorporates the Federal Rules of Civil Procedure.[44] Yet its proceedings are less complicated than in a traditional district court matter, because of differences such as the lack of witness testimony and the lack of a jury.[45] In addition, TTAB cases are based on a written record, so that an oral hearing is not necessary.[46] And as the Copyright Office has noted, "the TTAB offers an accelerated adjudication option that relies upon party stipulations and abbreviated procedures."[47] A party who is dissatisfied with the outcome may appeal to district court or to the Court of Appeals for the Federal Circuit.[48] The TTAB model also would allow the CCB to adjust the number of its judges according to docket

38. David J. Kera, *Strategic Considerations for TTAB-Contested Proceedings: A TTAB Proceeding Versus a Court Action*, *in* A LEGAL STRATEGIST'S GUIDE TO TRADEMARK TRIAL AND APPEAL BOARD PRACTICE 1, 5 (Jonathan Hudis ed., 2010).
39. John L. Welch, *Updated Roster of TTAB Administrative Trademark Judges*, THE TTABLOG (Oct. 30, 2012), http://thettablog.blogspot.com/2012/10/updated-roster-of-ttab-administrative.html; REPORT, *supra* note 7, at 68.
40. Thomas G. Field, Jr., *Limits to Administrative Appointments*, 50 IDEA 121, 122 (2009).
41. Kera, *supra* note 38, at 5.
42. U.S. PAT. & TRADEMARK OFFICE, *supra* note 36, § 104 ("With the exceptions of discovery conferences with Board participation . . . [and] telephone conferences . . . all business with the Board should be transacted in writing. The personal attendance of parties or their attorneys or other authorized representatives at the offices of the Board is unnecessary, except in the case of a pretrial conference . . . or upon oral argument at final hearing, if a party so desires. . . . Decisions of the Board will be based exclusively on the written record before it.").
43. *Id.* § 110.09.
44. Robert A. Kearney, *What Trademark Law Could Learn From Employment Law*, 12 J. MARSHALL REV. INTELL. PROP. L. 118, 127–28 (2012).
45. *Id.*
46. Virginia Knapp Dorell, *Picturing a Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 464 (2013).
47. REPORT, *supra* note 7, at 68.
48. Kelly Lee, *Where to Go With a TTAB Final Decision: Two Options*, 19 J. CONTEMP. LEGAL ISSUES 157, 157 (2010).

size and workload. The number of TTAB judges has grown over the years.[49] In general terms, the organization and setup of the CCB could be similar to that of the TTAB.

B. The Example of the Uniform Dispute Resolution Policy

The Uniform Dispute Resolution Policy (UDRP)[50] offers another possible model for the CCB—not in terms of its organizational structure, but rather in terms of the ease with which complaints can be made.[51] The UDRP is a voluntary arbitration process, yet its successes in enabling access and streamlining disputes might provide some guidance for the proposed CCB.

The UDRP is a system organized by the Internet Corporation for Assigned Names and Numbers (ICANN) for addressing cybersquatting disputes between domain name registrants and trademark holders.[52] Cybersquatting disputes involve a conflict between the owner of a trademark and the person who has registered a domain name that is similar to or identical with the trademark. One of the earliest cases of cybersquatting ever litigated involved an effort by Panavision to register a domain name, only to discover that an Illinois man by the name of David Toeppen already had registered the name.[53] In fact, Toeppen had registered more than 200 well-known trademarks as domain names, including Delta Airlines, Eddie Bauer, Neiman Marcus, and Lufthansa.[54]

While such disputes can be litigated, ICANN's UDRP provides an avenue for resolution outside the courts. It is "a mandatory, but non-binding arbitration procedure for any party that registers a domain name in the .com, .net, or .org environments."[55] For the purposes of this copyright small-claims proposal, the important part of UDRP is its accessibility. The American Bar Association's Intellectual Property Law Section has recommended that the UDRP be adopted

49. As recently as 2006, the TTAB had only fifteen judges. John L. Welch, *Current Roster of TTAB Administrative Trademark Judges*, THE TTABLOG (May 5, 2006), http://thettablog.blogspot.com/2006/05/current-roster-of-ttab-administrative.html.

50. *Uniform Domain-Name Dispute-Resolution Policy*, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, http://www.icann.org/en/help/dndr/udrp (last visited July 26, 2014). For a discussion of the Internet Corporation for Assigned Names and Numbers (ICANN), see LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 6 UCLA J.L. & TECH. 1, 1 (2002).

51. The Copyright Office examined the Uniform Dispute Resolution Policy (UDRP) in formulating its recommendations. REPORT, *supra* note 7, at 73–78.

52. Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 376 (2003).

53. Brian W. Borchert, Note, *Imminent Domain Name: The Technological Land-Grab and ICANN's Lifting of Domain Name Restrictions*, 45 VAL. U. L. REV. 505, 517 (2011).

54. *Id.*

55. Hughes, *supra* note 52, at 378.

as a model because it is "a good example of an effective alternative to federal litigation."[56] It notes that the UDRP allows papers to be filed electronically or by email.[57] This ease of access would address some of the concerns that small copyright claimants have raised.

Under the UDRP, the complainant begins by filing a complaint. The complaint must allege that:

> (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
>
> (ii) you have no rights or legitimate interests in respect of the domain name; and
>
> (iii) your domain name has been registered and is being used in bad faith.[58]

Personal appearances are not required.[59] The policy also provides a list of some of the evidence that may be offered by either side in the dispute.[60] In setting up the alternative system for small copyright claims, similar guidance could be offered, so that claimants could, without the assistance of an attorney, understand what they need to allege in order to bring a claim. This would address a major issue that the Copyright Office has identified, namely that federal court litigation is too complex and time-consuming for many potential litigants.[61]

C. The Example of the Copyright Royalty Board

Congress established the Copyright Royalty Board (CRB) in 2004 to replace the Copyright Arbitration Royalty Panels.[62] It has three copyright royalty judges appointed by the Librarian of Congress, and its responsibility is to "determine rates for statutory licenses and rule on the distribution of royalties collected by the Copyright Office."[63]

56. Potenza, *supra* note 4, at 3.
57. *Id.*
58. INTERNET CORP. FOR ASSIGNED NAMES AND NOS., *Uniform Domain Name Dispute Resolution Policy* (Oct. 24, 1999), ¶¶ 4a(i)–(iii), *available at* http://www.icann.org/en/help/dndr/udrp/policy.
59. *See* Potenza, *supra* note 4, at 3.
60. *See* INTERNET CORP. FOR ASSIGNED NAMES AND NOS., *supra* note 58, at ¶ 4(b).
61. *See* First Notice of Inquiry, *supra* note 16, at 66,759.
62. 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, 193–94 (2010).
63. Cassondra C. Anderson, Recent Development, *"We Can Work It Out:" A Chance to Level the Playing Field for Radio Broadcasters*, 11 N.C. J.L. & TECH. 72, 78 n.34 (2009).

The experience of the CRB also provides a cautionary example for the CCB. The authority of the CRB judges has been challenged in court because the judges are appointed by the Librarian of Congress, in apparent violation of the Appointments Clause of the U.S. Constitution.[64] In 2012, the U.S. Court of Appeals for the D.C. Circuit held the CRB to be unconstitutional on these grounds.[65]

To solve the constitutional issue, the D.C. Circuit invalidated and severed the restrictions on the ability of the Librarian of Congress to remove board judges.[66] The panel noted: "With such removal power in the Librarian's hands, we are confident that the Judges are 'inferior' rather than 'principal' officers, and that no constitutional problem remains."[67] Another proposed solution would have been to "amend title 17 of the United States Code to provide direct presidential appointment of copyright royalty judges independent of the legislative branch."[68]

On the basis of the experience of the CRB, the proposed CCB judges would be appointed by the Librarian of Congress, with the proviso that the Librarian of Congress may remove the judges, in accordance with the holding of the D.C. Circuit. This structure would allow for a close association among the CCB, the Librarian of Congress, and the Copyright Office, while still meeting the requirements of the Appointments Clause.[69]

D. Other Agency Adjudication of Private Disputes

The proposed CCB would differ from the CRB and the TTAB in the degree to which it would adjudicate claims that might appear to be matters of private dispute. For example, the CRB adjudicates disputes regarding statutory

64. U.S. CONST. art. II, § 2, cl. 2 (requiring that Article III judges be appointed by the president and confirmed by the Senate); *see also* Louer *supra* note 62, at 184 n.8 ("*See* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 571 F.3d 69, 75–76 (D.C. Cir. 2009) (per curiam) (describing an appellant's argument that copyright royalty judges are inferior officers inappropriately appointed under the Appointments Clause, but declining to resolve the question); Complaint for Declaratory & Injunctive Relief at 2–3, Live365, Inc. v. Copyright Royalty Bd., 698 F. Supp. 2d 25 (D.D.C. 2010) (No. 09-01662 (RBW) (seeking a preliminary injunction against the Copyright Royalty Board on the basis that the Librarian unconstitutionally appoints copyright royalty judges)."); *id.* at 209.

65. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012); *see also* Jonathan H. Adler, *D.C. Circuit Holds Copyright Royalty Board Unconstitutional*, VOLOKH CONSPIRACY (July 6, 2012, 11:27 AM), http://www.volokh.com/2012/07/06/d-c-circuit-holds-copyright-royalty-board-unconstitutional.

66. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012).

67. *Id.*; *see also infra* Part IV.A.

68. Louer, *supra* note 62, at 185.

69. *See* REPORT, *supra* note 7, at 42–43 (discussing the Copyright Royalty Board (CRB) and the Appointments Clause).

licenses for various types of uses of copyrighted works; the CCB would adjudicate a broader scope of disputes. One might wonder whether the nature of proceedings in the CCB would render the CCB indistinguishable from an actual court. The U.S. Supreme Court has long recognized, however, that it can be permissible in some circumstances for administrative agencies to decide on matters that courts have adjudicated in the past. A good example is the system of workers' compensation, in which state agencies adjudicate disputes that courts historically had resolved.

In *Crowell v. Benson*,[70] the Supreme Court affirmed that Congress could give an agency the authority to adjudicate workers' compensation law for maritime workers, even though that authority traditionally had been a matter of tort law adjudicated by courts. While the Court has moved away from some of the reasoning in its 1932 decision in *Crowell*,[71] it has continued to recognize that there are times when private disputes may be subject to agency adjudication.

In *Commodity Futures Trading Commission v. Schor*,[72] for example, the Supreme Court affirmed "the constitutionality of the Commodity Futures Trading Commission's rule permitting the Commission to entertain common law counterclaims, arising under state law, in agency proceedings a broker's client had initiated to recover reparations for alleged violations of the Commission's regulations."[73] This is a type of dispute associated with courts rather than an agency.[74] Yet the Supreme Court deemed it to be permissible, drawing in part on some of the reasoning it had expressed in *Crowell*, namely, that "practical attention to substance rather than doctrinaire reliance on formal categories" would guide the Court in determining whether to permit agencies to adjudicate disputes previously adjudicated by courts.[75]

E. The Agency Proposed by the Copyright Office

In its September 2013 report, the Copyright Office recommends that Congress "create a centralized tribunal within the Copyright Office, which would administer proceedings through online and teleconferencing facilities without the requirement of personal appearances."[76] This tribunal would have three ad-

70. 285 U.S. 22 (1932).
71. *See infra* Part IV.A.1.
72. 478 U.S. 833 (1986).
73. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 502 (1987).
74. *Id.* ("Ordinarily, such issues would be decided by state courts or in diversity actions.").
75. *Schor*, 478 U.S. at 848 (citations omitted); *see also infra* Part IV.A.1.
76. REPORT, *supra* note 7, at 4.

judicators, including two with "significant experience in copyright law" and one with "a background in alternative dispute resolution."[77]

Proceedings would be based on written submissions from the parties.[78] Discovery would be limited, and there would be no formal motion practice.[79] The Copyright Office envisions a system that would be "streamlined"[80] as in UDRP proceedings.[81] The agency proposed by the Copyright Office thus is similar in important respects to the proposed CCB.[82]

The streamlined procedures and accessibility of the venues discussed in this Part illustrate that the proposed CCB likewise could be a workable alternative to traditional court. Indeed, the CCB would follow in the footsteps of other successful attempts to provide small claimants with more options, as the next Part discusses.

III. THE EFFICACY OF THE SMALL-CLAIMS COURT MODEL AND POLICY CONSIDERATIONS

There is nothing new about the notion that a small-claims court can address the problems litigants face in terms of access, expense, and complexity. When small-claims courts began to emerge in the United States during the early 1900s, one goal was to address criticism that the existing courts were "cumbersome, slow, and expensive out of proportion to the matter involved."[83] The idea proved popular. Six states and twelve large cities had such courts by 1923; thirty-four states and the District of Columbia had them by 1959.[84] A motivating factor behind the so-called "people's court" always has been to provide affordable access to the courts.[85]

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 102.
82. *Id.* at 99–103 (discussing the structure, location, and format of the proposed agency).
83. REGINALD HEBER SMITH, JUSTICE AND THE POOR 41 (2d ed. 1919); *see also* Suzanne E. Elwell, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 438 (1990); ROBERT L. SPURRIER, JR., INEXPENSIVE JUSTICE: SELF-REPRESENTATION IN THE SMALL CLAIMS COURT 70–71 (1980).
84. Elwell *supra* note 83, at n.49; *see also, e.g.*, Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 358 (noting that plaintiffs won 85 percent of cases in Denver Small Claims Court).
85. *See, e.g.*, Tal Finney & Joel Yanovich, *Expanding Social Justice Through the "People's Court"*, 39 LOY. L.A. L. REV. 769 (2006) ("[F]ull access to the justice system has always been (and is likely to remain) reserved for those who can afford it.").

By many accounts, small-claims courts have been successful not only in providing consumers with better access to the courts but also in helping plaintiffs to obtain judgment in their favor.[86] Yet the courts have not been without their problems. For example, the courts very often are used by businesses to sue consumers, turning the "people's court" into something more akin to a judicial collection agency.[87] This "Goliath's thumb" effect—in which a venue intended to help consumers is used by deep-pocketed business plaintiffs against defendants of limited means—may be an unavoidable consequence of a small-claims court.[88]

Some states have tried to limit this effect in their small-claims venues by denying access to certain types of business parties, or by placing limits on the number of such claims a party may file in a given time period.[89] Such limitations themselves can have a negative effect on consumers by, for example, forcing business plaintiffs to use more expensive venues.[90] In the copyright context, the CCB would be available to any party who is subject to its jurisdiction. Providing easy access, after all, would have the effect of subjecting more copyright disputes to adjudication—and that would help to address recurring questions about rights and duties under copyright law that are relevant to parties of any size.[91]

One benefit of creating a small-claims venue for copyright disputes is that the mere availability of a small-claims action could spur alleged infringers to be more responsive when copyright owners contact them. The strategy of ignoring complaints may become less effective when it is easier for those with small claims to sue. This could encourage more good-faith settlement efforts.[92] While this

86. *See* Elwell, *supra* note 83, at n.81 ("Indeed, all studies show plaintiffs winning most often.").

87. Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 940–41 (1976) (discussing studies that show a predominance of businesses using small-claims courts); *see also* SPURRIER, *supra* note 83, at 74–75; Elwell, *supra* note 83, at 443–44 ("This disparity in usage by these two types of users goes to the heart of a central criticism of the small claims courts continually voiced—that small claims courts act as 'judicial collection agencies.' Rather than providing a means of redress for individuals, the courts primarily serve the debt-collection needs of businesses." (footnote omitted)).

88. *See infra* Part VI.A.

89. *See, e.g.*, Elwell *supra* note 83, at nn.75–76.

90. SPURRIER, *supra* note 83, at 75 ("As a practical matter, forcing the business plaintiff out of small claims court also could have the detrimental impact on the consumer of raising the costs of litigation . . . .").

91. *See* Laci Ehlers, Comment, *Limiting the Foreclosure Power of Texas HOAs with A Percentage Threshold*, 43 ST. MARY'S L.J. 187, 217 (2011) ("[A] small claims court can provide a fair resolution, deter self-help methods, and solve recurring social issues by allowing a plaintiff the opportunity to bring a small claim without high court costs, while providing a defendant the opportunity to establish a valid defense.").

92. The same benefit arguably supports creating a small-claims venue for patent disputes. *See* Greenspoon *supra* note 13, at 551–52 ("The very option for a patentee to file in small claims court would motivate good faith pre-suit negotiations. That is, if it were no longer effective for an

might initially increase the amount of litigation,[93] in the long run it may help to remove more such disputes from court dockets by providing parties on each side with a good understanding of likely outcomes to litigation, further encouraging settlement.[94]

A small-claims venue also might reduce the risk to large entities of unnecessarily costly litigation—and the possibility of disproportionately large settlements—in those cases involving claimants who have the means to sue and who seek to extract settlements based on litigation costs rather than on the underlying merits of the claim.[95] The ability to defend such claims in a small-claims setting would reduce the settlement value in those types of cases, because it would be less expensive to defend such cases and the defendant would have less to gain by settling. This might also help change the dynamics in cases in which large entities seek to extract settlements from consumers accused of infringement, making such efforts potentially less profitable for the plaintiffs.[96]

For all these reasons, the creation of a small-claims system to adjudicate copyright disputes would have a beneficial effect on the court system, and on large as well as small parties, supporting the public policy goals of access and efficient use of judicial resources. The discussion then turns to practical considerations, namely how to implement such a system in a manner that would survive constitutional scrutiny, and how to make sure it would be as fair as possible to all parties, as the next Parts discuss.

accused infringer to ignore, or delay resolution of, a small-scale notice of infringement, the accused infringer would be required to credit the merits of such a claim.").

93. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 62 (1996) ("[A] procedure that lowers the cost of litigation—for example, a small-claims court—will increase the volume of litigation and the number of trials (albeit cheaper, quicker trials)." (parenthesis in original)).

94. *See* Greenspoon *supra* note 13, at 552 ("A small claims court would do just that—provide a wealth of data on how similarly situated cases resolve—although one might expect a transitional period of increased litigation while parties test the new forum.").

95. *See id.* at 553.

96. *See, e.g.*, Ciolli, *supra* note 4, at 1003 ("Of the thousands of lawsuits filed by the RIAA against individual file sharers since September 2003, only twelve have resulted in legal challenges by a defendant. Most defendants, rather than challenging their claims in court, have settled with the RIAA for amounts usually ranging from $4,000 to $5,000. In addition to the high general costs of copyright litigation, the RIAA has imposed additional expenses on defendants by suing them in the jurisdictions where their internet-service providers are based, thus forcing defendants to either litigate a dispute far from where they live or to challenge venue.").

IV. CONSTITUTIONAL HURDLES AND PROCEDURAL CONSIDERATIONS

A copyright dispute is a question of federal law within the exclusive jurisdiction of an Article III court.[97] Congress could create a system for small claims in many different ways, but generally these methods belong to one of three categories: (1) grant authority to the states to adjudicate copyright cases, (2) create a new Article III court, or (3) allocate authority to an Article I court or agency.

While the notion of granting authority to state courts may be tempting, there are compelling reasons not to do so, as is discussed further in Part V.B below.[98] With regard to creating a new Article III court, there is general agreement that Congress would be extremely unlikely to do so.[99] Article III courts are regarded as special, and it is rare for Congress to create a new one.[100] The Appointments Clause requires that Article III judges be appointed by the president and confirmed by the U.S. Senate.[101] In 1990, the Federal Courts Study Committee "rejected a proposal to create an Article III court to adjudicate all Social Security appeals."[102] The committee recognized that such cases "do not form a major percentage of the caseload of the federal courts of appeals."[103] This suggests that there is general resistance to creating an Article III court for very limited purposes.[104]

97. 28 U.S.C. § 1338(a) (2006) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.").

98. *See infra* Part V.B.

99. Congress created an Article III court when it created the Federal Circuit in 1982. *See* The Federal Circuit Historical Society, *History of the United States Court of Appeals for the Federal Circuit*, http://www.federalcircuithistoricalsociety.org/historyofcourt.html. The Federal Circuit is one of only two Article III courts "staffed by full-time, specialized judges," the other being the Court of International Trade. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990). There are a few specialized courts staffed by part-time, generalist judges. *Id.* at 1111–12. The possibility of Congress creating a specialized Article III court for copyright disputes is regarded by some scholars as an unrealistic option. *See* George Washington University School of Law, *supra* note 14, at 1:18:00–1:18:30 ("There's no possibility of getting Congress to create an Article III court." (quoting Professor Richard J. Pierce, Jr.)).

100. *See* Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 581 (1985) ("Federal courts and their judges, as created by Article III, are special."); *see also infra* Part IV.

101. U.S. CONST. art. II, § 2, cl. 2.

102. Robert J. Axelrod, *The Politics of Nonacquiescence: The Legacy of Stieberger v. Sullivan*, 60 BROOK. L. REV. 765, 825 (1994).

103. *Specialized Review of Administrative Action*, ADMINI. CONFERENCE OF THE U.S. (Dec. 31, 1991), http://www.acus.gov/recommendation/specialized-review-administrative-action.

104. For example, constitutional concerns have surfaced in connection with the proposed creation of "national security courts." *See* Stephen I. Vladeck et al., *The Constitution Project: A Critique of "National Security Courts"* (2008), *available at* http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf.

Allocating authority to an Article I court or agency, on the other hand, is an approach that has worked—and survived legal challenges—in other contexts.[105] Indeed, it is a leading possibility among proposals submitted in response to the Copyright Office's Notices of Inquiry. Such a proposal raises several constitutional issues that must be addressed.

A. Constitutional Limitations

These constitutional issues may appear to be such a great obstacle that they are sometimes set aside in discussions on the topic of creating a new small-claims venue so that people may feel more free to brainstorm on solutions without worrying whether they will work.[106] Ultimately, however, the obstacles must be confronted. They fall broadly into two categories of rights that Congress must not infringe upon: (1) separation of powers (sometimes referred to as "structural rights") and (2) individual rights.[107] The proposed CCB would do neither.

1. Structural Rights: Separation of Powers

Article III of the U.S. Constitution vests federal judicial power in courts where judges enjoy special protections such as life tenure.[108] If Congress acts to

105. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (holding that the Commodity Futures Trading Commission jurisdiction over common-law counterclaims does not violate Article III); Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568 (1985) (holding that binding arbitration under the Federal Insecticide, Fungicide, and Rodenticide Act does not violate Article III); Crowell v. Benson, 285 U.S. 22, 51 (1932) ("Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.").

106. *See, e.g.*, George Washington University School of Law, *IP Small Claims Roundtable: Copyright, Session 2* (May 20, 2012), http://www.law.gwu.edu/Academics/FocusAreas/IP/Pages/Videos.aspx.

107. *Schor*, 478 U.S. at 848 ("Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." (internal citations and quotation marks omitted)); *see also* Magistrate Judges Div., Admin. Office of the U.S. Courts, *A Constitutional Analysis Of Magistrate Judge Authority*, 150 F.R.D. 247, 283 (1993) ("The Court stated that Article III protects two distinct interests: (1) the 'structural' interest of maintaining an 'independent judiciary within the constitutional scheme of tripartite government,' and (2) the 'personal' interest of individual litigants in preserving their 'right to have claims decided before judges who are free from potential domination by other branches of government.'" (citing *Schor*, 478 U.S. at 848)).

108. U.S. CONST. art. III, § 1; *see also* Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 582–83 (1985) ("Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation. These requirements protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts." (citations omitted)).

take away certain powers from an Article III court and vests some other non-Article III court or agency with those powers instead, that action may be subject to constitutional challenge as a potential affront to the integrity of the Article III courts.[109]

The difference between an Article III court and an Article I court is addressed in the constitutional provision under which the court is established.[110] Article III, section 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.[111]

Thus, the judicial power of the United States can only be given to judges who enjoy the protections of no diminution of salary and tenure contingent upon good behavior. Article I, meanwhile, confers power on Congress to "constitute Tribunals inferior to the supreme Court."[112] Judges who are appointed for terms, such as magistrate judges appointed for eight years or bankruptcy judges appointed for fourteen years, are not considered Article III judges; they are Article I judges.[113] Bankruptcy court is an example of an Article I court, sometimes called a "legislative" court.

In the context of copyright law, the question is whether Congress may take the power to adjudicate copyright disputes away from federal district courts and give that power instead to an administrative agency. The Supreme Court has recognized that under Article I of the U.S. Constitution, Congress may "vest decisionmaking authority in tribunals that lack the attributes of Article III courts."[114] The Court has been divided on when this is appropriate, however.[115] The Supreme Court discussed the basic framework for such questions in *Crowell v. Benson*, in which the Court upheld Congress' authority to vest decisionmaking

109. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.8 (5th ed. 2010); *see also* Kenneth G. Coffin, *Limiting Legislative Courts: Protecting Article III from Article I Evisceration*, 16 BARRY L. REV. 1 (2011).

110. *See generally* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

111. U.S. CONST. art. III, § 1.

112. U.S. CONST. art. I, § 8, cl. 9.

113. *See generally* David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101 (2005).

114. *Thomas*, 473 U.S. at 583.

115. *See, e.g.*, *id.* at 586.

in an Article I agency so long as those decisions were subject to review by an Article III court.[116] While the Court has shifted away from *Crowell* in some respects,[117] any small-claims solution for copyright adjudication would have to meet this basic requirement for review. This means that if a party disagreed with the CCB's decision, it could appeal to federal district court.[118]

a. Public Rights Versus Private Rights

Apart from the issue of whether an Article I agency may properly decide on a matter traditionally adjudicated in Article III courts is the issue of what constitutes a proper subject for reallocation to an agency. Are copyright claims the type of matter that may properly be adjudicated by an agency? The answer depends on whether such claims are treated as concerning a private right or a public right. That is a question the Supreme Court might ultimately be asked to resolve if Congress were to create an agency such as the CCB.

The difference between private rights and public rights is not clearly defined,[119] but generally, private rights are rights that arise between individuals, and

116. Crowell v. Benson, 285 U.S. 22 (1932) (affirming that Congress could give an agency the authority to adjudicate workers' compensation law for maritime workers, even though that authority traditionally had been a matter of tort law adjudicated by courts); *see also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943 (2011) ("*Crowell* reasoned that Article III is satisfied as long as all questions of law and key 'jurisdictional' facts are subject to de novo review by an Article III court."); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 248 (1985) ("In recognizing a wide area for the operation of public administration, *Crowell* removed both article III and the due process clause as meaningful barriers to the use of administrative agencies to establish and enforce, at least initially, all of the rights and duties created by the emerging administrative state."); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659 (2004) ("In *Crowell*, the Court permitted an agency to hear a dispute between private parties over the amount of compensation due to an injured maritime worker, but sought to preserve a role for Article III courts in reviewing questions of law and certain questions of constitutional and jurisdictional fact. The suggestion in *Crowell* that agencies may play a role in the adjudication of federal matters notwithstanding the fact that their judges lack Article III protections has provided the foundation for much of the modern administrative state." (footnote omitted)).

117. For example, the Court has moved away from the approach it appears to have adopted in *Crowell* by distinguishing between public rights and private rights in more recent cases. *Thomas*, 473 U.S. at 585–86 (1985) ("This theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856), provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in [*N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)]. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree.").

118. Some have suggested that this is an unsatisfactory solution. *See infra* Part IV.B.3.

119. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) ("The distinction between public rights and private rights has not been definitively explained in our precedents.").

public rights are those that arise between the government and others.[120] As agency adjudication developed in the United States, Congress essentially took matters that traditionally had been private rights and redefined them as public rights. This has occurred, for example, with agencies that administer workers' compensation cases, which previously would have been the subject of tort law in court. The Supreme Court generally accepted this reallocation, as long as there were due process safeguards.[121]

In *Northern Pipeline Co. v. Marathon Pipeline Co.*,[122] a plurality of the Supreme Court decided that Congress had given the Article I bankruptcy court system too much power to decide private rights, such as liens, in a public-rights dispute.[123] In doing so, the plurality adopted a formalistic approach. It drew a distinction between private rights, which may not be allocated to Article I tribunals, and public rights, which may be so allocated. It noted that the contract rights at issue in *Northern Pipeline* were inherently judicial because they were matters traditionally left for judicial determination.[124] Some believe that this same formalistic reasoning could apply to other areas where Congress had allocated adjudicatory powers to Article I tribunals.[125]

In subsequent cases, the Supreme Court adopted a more pragmatic approach, rejecting the formalism of *Northern Pipeline*. Notably, in *Schor*, the Court allowed for counterclaims that were necessary "to ensure the effectiveness" of the regulatory scheme subject to adjudication.[126] Likewise, in copyright disputes, Congress may deem it necessary to ensure the effectiveness of the CCB that the

120. *Id.*

121. *See, e.g.*, PIERCE, *supra* note 109, at 135 ("[T]he Court welcomed Congress' decision to relieve the courts of a set of tasks they were institutionally incapable of performing. The Court acquiesced in Congress' redefinition of previously "private rights" as "public rights," to be enforced exclusively through the administrative process, as long as Congress incorporated adequate safeguards to protect the due process rights of the private parties affected by agency action.").

122. 458 U.S. 50 (1982).

123. *Id.* at 87 ("We conclude that 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.").

124. *See id.* at 68–71.

125. *See* PIERCE, *supra* note 109, at 135 ("The Court's definition of such 'private rights' as rights with an antecedent in the common law was broad enough to encompass a high proportion of all disputes now resolved by agencies.").

126. *Schor*, 478 U.S. at 856 ("It also bears emphasis that the CFTC's assertion of counterclaim jurisdiction is limited to that which is necessary to make the reparations procedure workable. . . . The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.").

CCB be permitted to adjudicate disputes arising under federal copyright law. This would be distinguishable from the situation in bankruptcy court, where the Supreme Court was more concerned that the scope of disputes allocated to the bankruptcy courts was too broad[127]—arguably, such would not be the case with the CCB, which would consider only copyright law disputes. In *Thomas v. Union Carbide Agriculture Products Co.*, the Court highlighted that the opinion in *Northern Pipeline* was divided, and thus *Northern Pipeline*'s reasoning was not dispositive.[128] The *Thomas* Court rejected a challenge to Congress' requirement of binding arbitration for some disputes. Its ruling seemed to leave the doors open to agency adjudication of matters that Congress redefined as "public rights."

The question for copyright law is which approach the Supreme Court would most likely take in reviewing any reallocation to an Article I agency: a formalistic approach or a more pragmatic approach. The recent case of *Stern v. Marshall*[129] suggests that such an allocation would withstand Supreme Court scrutiny as long as Congress is very clear that the authority vested in the CCB is integrally related to the regulatory function that Congress intends it to perform.

b. *Stern v. Marshall*

The basic issue in *Stern v. Marshall* was an estate dispute between former Playboy Bunny Anna Nicole Smith and her husband's son, E. Pierce Marshall. Smith had prevailed in Bankruptcy Court on a state-law claim that Marshall had tortiously interfered with her expected gift from her husband. A Texas probate court decided the same matter but found in favor of Marshall. The question was whether the Bankruptcy Court's decision was final, and the issue was whether it was proper for the Bankruptcy Court to make the final determination. The Supreme Court decided that it was not.

In a 5–4 decision, the Supreme Court took a formalistic approach to determining whether the right at issue was a private right or a public right. The Court decided: "The claim is . . . one under state common law between two private parties. It does not depend on the will of [C]ongress; Congress has nothing to do with it."[130] In addition, the right involved "does not flow from a federal statutory scheme," "[i]t is not completely dependent upon adjudication of a claim created

127. *See supra* note 124 and related discussion.
128. *Thomas*, 473 U.S. at 584 ("The Court's most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III's limitations.").
129. 131 S. Ct. 2594 (2011).
130. *Id.* at 2614 (citation and internal quotation marks omitted).

by federal law," and "the asserted authority to decide [the] claim is not limited to a particularized area of the law."[131]

While *Stern* turned on the fact that there was an issue of state law, the Article III issues discussed in *Stern* are relevant to any proposed non-Article III body that might consider matters of copyright law, even though copyright is entirely a matter of federal law.[132] This is because *Stern* provides the framework within which the creation of an authority such as the CCB would be constitutional. The key language in *Stern* regarding the difference between a public right and a private right is that "what makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action."[133] This defines the task for creating an alternative system for copyright. In order for a new Article I tribunal to withstand constitutional scrutiny, it must adjudicate matters that are integrally related to its regulatory functions.

Professor Richard J. Pierce, Jr., highlighted the importance of the *Stern* decision in his presentation regarding constitutional issues during the George Washington University Law School roundtable discussion on copyright small claims in May 2012. Professor Pierce noted that in its 5–4 decision, the Supreme Court emphasized that when authority is delegated to an agency, it must be closely related to the regulatory functions.[134] This, he noted, would support the idea of expanding the power of an agency such as the Copyright Office and creating an auxiliary to that agency to regulate small claims.[135]

The task, then, would be to define the CCB's regulatory functions in such a way that deciding small copyright claims would be integrally related to those functions. This would appear to be something that Congress could do.

131. *Id.* at 2614–15 (citations and internal quotation marks omitted).

132. *See, e.g.*, Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v Marshall, 2011 SUP. CT. REV. 183, 184 (2011) ("Moreover, if bankruptcy courts cannot issue final judgments because their judges lack the life tenure required by Article III of the Constitution, what about other non-Article III judges, such as federal magistrate judges, and their ability to issue final judgments?").

133. 131 S. Ct. at 2613; *see also* Stephanie J. Bentley, Comment, *Responding to* Stern v. Marshall, 29 EMORY BANKR. DEV. J. 145, 185–92 (2012) (noting that "the Court declined to give much guidance" on how to determine whether a right is a public right and proposing a seven-factor analysis).

134. George Washington School of Law *supra* note 14, at 1:30:45–1:32:40.

135. *Id.* Professor Pierce also noted that reallocating power based solely on the size of the claim might be problematic. *Id.*; *see also infra* note 196 and accompanying text.

2. Individual Rights

In considering whether the allocation of authority to an Article I court or agency infringes upon individual rights, the Supreme Court examines the effect on the right to a jury trial and due process of law.[136]

a. The Seventh Amendment Right to a Jury Trial

The Seventh Amendment right to a jury trial[137] applies in copyright cases, even when it comes to determining the amount of statutory damages.[138] Obviously, however, it would not be practical to impanel a jury whenever an agency seeks to decide a copyright dispute involving damages. The question is whether, by redefining such disputes as "public rights" disputes, Congress would be able to give an agency the authority to make a decision without a jury. There is precedent for doing so.[139] In *Atlas Roofing Co.*, the Supreme Court held:

> At least in cases in which 'public rights' are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[140]

In a more recent case, however, the Supreme Court seemed to lean in the other direction. In *Granfinanciera, S.A. v. Nordberg*,[141] another bankruptcy case, the Court held that a jury trial was required in a dispute over an allegedly fraudulent money transfer. A jury trial was required even though Congress had allocat-

136. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (discussing the right to a jury trial); Mathews v. Eldridge, 424 U.S. 319 (1976) (discussing due process of law). *See generally* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986) (discussing "personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried").

137. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

138. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); *see also* Second Notice of Inquiry, *supra* note 26, at 51,070 (seeking comments that discuss the right to a jury trial and that address whether a small-claims system would implicate this constitutional issue).

139. *See generally* Paul K. Sun, Jr., *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury*, 1988 DUKE L.J. 539, 564 (1988) (discussing the approach the Court took in *Atlas Roofing Co.*, 430 U.S. 442).

140. *Atlas Roofing Co.*, 430 U.S. at 450.

141. 492 U.S. 33 (1989). This Comment proposes that the Copyright Complaints Board (CCB) would not have jurisdiction to hear claims that seek statutory damages. *See infra* Part VI.A.

ed adjudication of that type of issue to the Article I court to act without a jury as part of the core proceedings of bankruptcy.[142] The distinction between public rights and private rights was once again important to the Court: The Court said Congress can only allocate public rights for adjudication without juries by Article I tribunals.[143] The Court also stated that Congress may allocate adjudication of private rights to agencies if the adjudication is an "integral part[] of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity."[144]

If the holding of *Granfinanciera* were strictly applied, it could threaten a broad range of administrative adjudications that are well established.[145] The decision does not necessarily stand in the way of allocating copyright adjudications to an agency; *Granfinanciera* involved court adjudication, not agency adjudication, and thus the Court could distinguish it in reviewing a decision by Congress to allocate copyright adjudication to an agency. The pragmatic approach to allocating authority to agencies could well prevail, and that would bode well for the CCB process proposed here.[146]

On the other hand, the Court also considers whether parties have consented to adjudication before a non-Article III court. For example, with regard to individual rights, the outcome in *Schor* was based partly on the fact that the Court found Schor had consented to adjudication before a non-Article III tribunal.[147] *Schor* cited to *Northern Pipeline* and noted that "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on [in *Northern Pipeline*] as a significant factor in determining that Article III forbade such

142. *Granfinanciera*, 492 U.S. at 35.
143. *Id.* at 50–53.
144. *Id.* at 55 n.10.
145. The dissent noted the potential pitfalls. *See, e.g.*, *id.* at 81–82 (White, J., dissenting) ("The Court's decision also substantially cuts back on Congress' power to assign selected causes of action to specialized forums and tribunals (such as bankruptcy courts), by holding that these forums will have to employ juries when hearing claims like the one before us today—a requirement that subverts in large part Congress' decision to create such forums in the first place.").
146. Allowing appeal to the district court might also protect the right to jury trial. *See* Ciolli, *supra* note 4, at 1025 ("To protect against errors of the law by the administrative judge, and to preserve a litigant's Seventh Amendment right to a trial by jury, a losing party would retain the right to appeal the judgment to the federal district court—however, should the district court affirm the administrative judge's holding, the losing party would be compelled to pay the prevailing party's attorney's fees and costs.").
147. *Schor*, 478 U.S. at 849.

adjudication."[148] The Copyright Office cites this factor as a reason for recommending a voluntary system based on consent rather than a mandatory system.[149]

b. Due Process

Since the point of a small-claims venue would be to simplify proceedings, due process considerations arise: Would the proceedings still be fair to the parties if they are abbreviated and do not give parties the same opportunities available in district court?

Mathews v. Eldridge enumerates three factors courts must weigh in making due process determinations:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.[150]

Determining how the private interest will be affected by the official action is a subjective question rather than one based on the dollar amount of the dispute. Small copyright claims would not necessarily be small private interests. Indeed, the liberty interests involved in some copyright disputes—such as free-speech rights in cases where fair use is an issue—might cause this factor to weigh against abbreviated proceedings.[151]

On the other hand, the risk of an erroneous deprivation of such interest likely would not be an issue with copyright adjudication, particularly considering that the decisions would be made by hearing officers who have special knowledge of copyright law. The government's interest in having this procedure, meanwhile, would seem to be high. Given the increasing caseload burden in federal courts[152] and the time involved in adjudicating a copyright claim,[153] a streamlined

148. *Id.*
149. REPORT, *supra* note 7, at 28 (discussing the ability to waive a right to a jury trial); *id.* at 34 (discussing the importance of consent in *Schor*).
150. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
151. It can be difficult to show a deprivation of liberty when there is no physical deprivation of property. *See* Paul v. Davis, 424 U.S. 693, 712 (1976) (holding "that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law.").
152. *See Judicial Caseload Indicators 12—Month Periods Ending March 31*, U.S. COURTS, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/front/March12Indicators.pdf (last visited July 26, 2014) (showing an 11.1 percent increase in civil cases filed since 2003).

process arguably would save time and money. Therefore, the due process issues involved in establishing this streamlined adjudication process may be the least difficult of the constitutional issues to overcome in creating the CCB.

B. Other Important Issues

In its Second Notice of Inquiry, the Copyright Office listed thirty-two subjects of inquiry, including the previously discussed constitutional issues and the possible nature of the process.[154] While every one of the subjects of inquiry is important, and the list is not exhaustive, some subjects have received greater attention and appear to have greater importance in determining the contours of an alternative small-claims venue. These include (1) whether, or to what extent, discovery should be permitted, (2) whether fair use and other defenses should be permitted, and (3) whether defendants should be able to opt out of the small-claims venue, or at least appeal.

1. Discovery

The CCB should allow limited discovery.[155] Discovery is a crucial part of modern civil litigation, providing parties with an opportunity to obtain material facts that might otherwise not be available. Yet it also is expensive and time-consuming.[156] In federal district court, discovery disputes usually are adjudicated by a magistrate judge, and they may involve briefing and oral argument. Some have suggested that the broad scope of discovery allowed in federal court should be pared back in a streamlined small-claims process. The Graphic Artists Guild, for

153. *See generally* Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal District Courts*, U. DENV. (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf (discussing concerns that federal civil cases generally take too long to resolve).

154. *See* Second Notice of Inquiry, *supra* note 26, at 51,069–71.

155. Limitations would not need to violate due process rights, as the Volunteer Lawyers for the Arts, Inc., points out in its response to the Third Notice of Inquiry. *See* Kathryn E. Wagner, Exec. Dir., & David Leichtman, Chairman, Volunteer Lawyers for the Arts, Comment *to Comment on Small* Claims, U.S. COPYRIGHT OFFICE at 9 (Apr. 12, 2013), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/VLA.pdf ("A limited discovery procedure in a small claims setting would not violate due process requirements. An individual's right to conduct discovery exists to the extent that the evidence underlying a claim against him must be sufficiently disclosed to afford him an opportunity to show that such evidence is untrue." (citing Greene v. McElroy, 360 U.S. 474, 496–97 (1959))).

156. *See, e.g.*, Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 (1998) ("Among attorneys reporting any discovery expenses, the proportion of litigation expenses attributable to discovery is typically fairly close to 50% . . . . Half estimated that discovery accounted for 25% to 70% of litigation expenses.").

example, argues that in any proposed small-claims process for copyright disputes, "[d]iscovery of evidence would need to be simplified, conducted remotely by mail or teleconferencing, and more accessible to both parties without legal representation."[157] Others have argued that discovery should not be permitted at all.[158]

To disallow discovery entirely would be problematic for some small-claims plaintiffs, however. For example, a plaintiff who is trying to address infringement that occurred on a website might need discovery to determine who is behind the website. The small-claims adjudicatory process for copyright disputes ought to incorporate a controlled and limited discovery process. The National Press Photographer's Association provides some recommendations for how this might be accomplished through the requirement of a discovery control plan.[159] The plan would include a set discovery period, as well as limits on depositions, interrogatories, and requests for production.[160] "Experienced copyright attorneys should be consulted in the crafting of this option to ensure that truly necessary discovery is still permissible and the most egregious types of discovery delays are foreclosed. The parties could make a motion to impose a plan of this type or the court could impose it *sua sponte*."[161]

The Association of American Publishers (AAP) proposes similar limitations.[162] That organization further suggests limiting discovery to written materials and requiring resolution through telephone conference.[163] The AAP notes that the Trademark Trial and Appeal Board has incorporated discovery limits that may serve as a model for the copyright small-claims process.[164] These recommendations should be adopted so that the CCB can most effectively balance the needs of litigants with the goal of streamlining the proceedings. The officers

157. Lisa Shaftel, Nat'l Advocacy Comm. Chair, Graphic Artists Guild, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 7 (Jan. 16, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/23_graphic_artists_guild.pdf.

158. Oliver Metzger, Senior Copyright Counsel, Google, Inc., Comment to *Comment on Small Claims*, U.S. COPYRIGHT OFFICE at 8 (Jan. 17, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/22_google_inc.pdf ("Discovery is expensive and time-consuming: we thus do not see a workable way for it to be incorporated into a small claims court procedure.").

159. Mickey H. Osterreicher, Gen. Counsel, & Alicia Wagner Calzada, Att'y, Nat'l Press Photographers Ass'n, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 12 (Jan. 16, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/36_nppa.pdf.

160. *Id.*

161. *Id.* at 12–13.

162. Allen Adler, Gen. Counsel, Ass'n of Am. Publishers, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 7 (Oct. 19, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/AAP.pdf.

163. *Id.*

164. U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE, ch.400 (2014), *available at* http://www.uspto.gov/trademarks/process/appeal/tbmp_3rd_ed_rev_1_chapter_400.pdf; *see also supra* Part II.A.

who conduct hearings for the CCB would have the necessary expertise to know what forms of discovery would be appropriate to each claim and to limit that discovery appropriately.[165]

2. Fair Use and Other Defenses

The CCB should allow for fair use and other defenses. Some have argued that fair use is not an appropriate topic to be adjudicated outside of federal district court in light of the complexity of fair use determinations.[166] Yet the task of making fair use determinations is not insurmountable, and streamlined approaches have been proposed.[167] The key here is that the CCB would utilize the services of adjudicators who are familiar with copyright law and fair use defenses.[168]

Moreover, if fair use determinations were not part of the small-claims adjudication process, then defendants might correctly assert that they have not had a proper opportunity to litigate their disputes and that the due process requirements are not met. In particular, if the tribunal is not permitted to make a fair use determination, and if the defendant cannot opt out, then the risk of an "erroneous deprivation" of the interest of the defendant would arguably be quite high.[169] While this might not be an issue if the defendant could opt out and insist on district court adjudication, a voluntary system would do little to ensure that those with small claims can have their claims heard.

3. The Possibility of Defendants Opting Out and Appeals

Defendants should not be permitted to opt out because CCB adjudication should not be voluntary once a complaint is filed and notice is served. This is

165. The Copyright Office also recommends a process with limited discovery. REPORT *supra* note 7, at 124–125.

166. *See, e.g.*, *Public Hearing on Small Copyright Claims 11-15-2012*, U.S. COPYRIGHT OFFICE 161:2–9 (Nov. 15, 2012) ("A lot of people were saying the more complex a claim, the less likely it should be in a small claims procedure because of the lack of the same safeguards you have in federal district court. And often people said, oh, if it is fair use, it should be kicked out to the normal federal district court litigation." (quoting Catherine Rowland, Counsel, Office of Policy and International Affairs, U.S. Copyright Office)).

167. *See, e.g.*, David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); *see also* Justin Hughes, *Introduction to David Nimmer's* Modest Proposal, 24 CARDOZO ARTS & ENT. L.J. 1, 2 (2006) ("Professor Nimmer proposes a statutorily-established board of 'fair use arbiters' who, upon request from a prospective user of a copyright work, issue advisory yea/nay opinions on whether the person's proposed use is 'fair.'").

168. The Copyright Office also recommends that fair use and other defenses be permitted. REPORT, *supra* note 7, at 105–07.

169. *See supra* Part IV.A.2.

contrary to the Copyright Office recommendation for Congress to create a voluntary system under which defendants could opt out.[170] But even the Copyright Office acknowledges that a voluntary system would not be satisfactory. The Copyright Office noted that "a voluntary approach necessarily will fall short of a full-fledged judicial process, offering the complete panoply of copyright remedies, to which small copyright claimants could turn reliably and affordably to pursue infringers. Such a process is what our legal system would provide in an ideal world."[171]

The Copyright Office believes, however, that "in the real world of constitutional and institutional limitations, a voluntary system with strong incentives for participation on both sides seems more attainable, at least in the near term."[172] Yet the obstacles that the Copyright Office cites—perhaps most notably the right to a jury trial recognized in *Feltner*[173]—are not insurmountable.[174]

In order to address the shortcomings of a voluntary system, some have proposed incentives to encourage parties to take an optional small-claims track with their litigation rather than going to federal district court. For example, one proposal suggests attorney fee-shifting as an incentive.[175] The problem with any incentives, however, is that they might or might not encourage reluctant defendants to participate. If defendants choose not to participate despite the incentives, that would leave those with small claims in the problematic situation they currently face—without a good alternative to federal district court. For claimants who have asked for a practical small-claims venue, the venue that would work best is one that is mandatory for defendants.[176]

170. REPORT, *supra* note 7, at 3 ("In light of the existing constitutional landscape, the challenges of the current system, and the views and insights of those who participated in this study, it appears that the most promising option to address small copyright claims would be a streamlined adjudication process in which parties would participate by consent.").
171. *Id.*
172. *Id.*
173. *Id.* at 28–29 (discussing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998)).
174. *See supra* Part IV.A.2.a.
175. Professor Nimmer discussed this idea at a roundtable session at George Washington University. He and Michael Grecco, National VP American Photographers Assoc., proposed an approach that would define the category of small infringement claims, authorize the Copyright Office to make regulations about that new category of small infringement claims, and modify provisions for the awarding of attorney fees. The attorney fees would incentivize parties to take this track; it would essentially be a winner-take-all system for attorney fees. Juries would be waived. *See* George Washington University School of Law, *supra* note 14. This proposal would do little to help claimants who would prefer to proceed as pro se litigants, however.
176. This may be most important for plaintiffs with the least ability to pay for the costs of a traditional lawsuit. A system that is voluntary for defendants would most likely shut such plaintiffs completely out, as the Volunteer Lawyers for the Arts has noted. *See* Wagner & Leichtman, *supra* note 155, at

On the other hand, parties unhappy with the outcome in the proposed CCB would have the option to appeal to an Article III court. This appears to be necessary for the proposal to be constitutional.[177] It also raises an additional concern: If big-money defendants can simply appeal any adjudication in the new forum, then what is the point of creating the small-claims tribunal?

There is no perfect response to this objection. Regardless, though, adjudication in the small-claims forum would give each party a better sense of the merits of its respective case. Moreover, in many cases, the claimant may simply want an opportunity to present a case in a forum where the alleged infringer must respond. And if the experience of state small-claims courts is any indication, judgments from a copyright small-claims adjudication may be unlikely to be appealed and, if appealed, may tend to end in the same result.[178]

While the constitutional hurdles to the creation of the CCB are challenging, they are not insurmountable, as this Part has discussed. Through careful drafting, Congress could allocate authority over small copyright disputes to an Article I agency in a manner that likely would stand up to legal challenges. As the next Part discusses, allocating such disputes to an Article I agency would be more effective than other approaches.

V. ALTERNATIVES, AND WHY THEY WOULD NOT BE AS EFFECTIVE

If voluntary arbitration and mediation alternatives are taken out of the mix, and if one wants to create a system that is mandatory, then the remaining solution—other than creating an administrative agency—would be to create a court. There are two alternatives: creating an Article I court or giving jurisdiction over small copyright claims to state courts. Neither is satisfactory.

A. Creating an Article I Court, Similar to Bankruptcy Court

The obstacles standing in the way of creating an Article I court system for small copyright claims include constitutional issues and pure logistics. The constitutional issues are similar to those involved with creating an Article I agency, but the Supreme Court appears to take a more formal approach with courts than

2 ("A path is seriously needed in the current system for those copyright owners such as our low-income artists to pursue their copyright infringement claims.").

177. *See supra* Part IV.A.1.

178. *See, e.g.*, Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 345 (2003) ("Only eight defendants appealed their cases, which usually resulted in an affirmation of the trial court decisions.").

with agencies when it comes to reallocating matters to Article I tribunals that previously had been handled by Article III courts.

The *Granfinanciera* decision is a good example.[179] The formalistic approach that the Court adopted with regard to court adjudication tends to suggest that an Article I small-claims court for copyright would face similar formal treatment. Formal treatment probably would result in a requirement for jury trials.[180] Creating an agency, on the other hand, would leave the door more open for the Court to find that *Granfinanciera* does not apply.[181] Professor Pierce highlighted the difficulty in creating an Article I court that would pass constitutional muster, noting that an agency is a much more workable solution.[182]

Apart from the constitutional hurdles, the logistics of creating a court system for small copyright claims may be unnecessarily complicated. Would the court system resemble the Article I bankruptcy courts, with judges located across the country and hearing cases by reference from district courts in the same jurisdiction?[183] If that is the model, would such a court system be justified in handling only small copyright claims? On the other hand, if a more limited court system were created, where would it be located? Where would claimants file cases, and where would they appear before a judge? An agency model seems to lend itself more naturally to this type of adjudication than a traditional courtroom model.[184]

B. Giving Jurisdiction for Small Claims to State Courts

Nothing prevents Congress from giving jurisdiction over small copyright claims to state courts.[185] One benefit of this approach is that states have ample experience with small-claims courts.[186] Yet this approach has its own set of problems, including the expertise of judges, the claim limits in state small-claims courts, and consistency of outcomes.[187] In order to mitigate the venue and personal jurisdiction obstacles raised by small-claims courts when parties do not re-

179. *See supra* Part IV.A.2.
180. *Id.*
181. *Id.*
182. George Washington School of Law, *supra* note 14, at 1:30:45–1:32:40.
183. *See* 9 AM. JUR. 2D BANKRUPTCY § 742 (2006) ("[T]he subject-matter jurisdiction of the bankruptcy courts is derived from that granted to the district courts.").
184. *See supra* Part II.
185. For example, David Carson of the Copyright Office has discussed how a viable solution might be to allow state small-claims courts to handle these cases through a congressional act giving states jurisdiction for small claims. George Washington University School of Law, *supra* note 14.
186. *See generally supra* Part III.
187. The Copyright Office also recognizes these potential problems. REPORT, *supra* note 7, at 94–97.

side in the same place,[188] the proposed CCB would have nationwide service of process.

With regard to the expertise of judges, some have argued that federal judges also often lack copyright expertise.[189] The lack of expertise among small-claims judges may be even more pronounced, however, because small-claims judges in many states are not full-time judges. Instead, they often are lawyers who help out in small-claims court,[190] and they hear matters on a wide variety of subjects. Generally they do not have specialized training in copyright law, and some have argued that this would make state small-claims courts a particularly ineffective venue for adjudicating copyright claims.[191]

In addition, the limits in most small-claims courts are much smaller than the limits that typically have been proposed for small copyright claims.[192] In many states, the limit is $5000 or less.[193] If Congress were to give jurisdiction for small copyright claims to the states, then each state would need to ascertain the

188. The same is true in federal court. For plaintiffs who are suing large corporations, general jurisdiction likely would apply. A court may exercise general jurisdiction when the defendant has "substantial," "continuous," and "systematic" contacts with the forum state. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952); Int'l Shoe Co. v. Washington, Office of Unemployment Comp. & Placement, 326 U.S. 310, 318 (1945) (observing that general jurisdiction lies where "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities."). But otherwise specific jurisdiction would be needed. That is a more difficult hurdle and generally requires that the defendant purposefully avail itself of the privilege of conducting business in the forum, that the claim arise out of those forum-related activities, and that exercise of jurisdiction is reasonable. *See, e.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F. 3d 797, 802 (9th Cir. 2004).

189. *See, e.g.*, William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 3 (2006) ("With a few exceptions, federal judges are generalists who have jurisdiction over an enormous range of legal disputes: copyright law one day, environmental law the next, antitrust the day after that.").

190. *See, e.g.*, *Court Process*, SACRAMENTOO SUPERIOR CT., http://www.saccourt.ca.gov/small-claims/process.aspx (last visited July 22, 2014) ("The Small Claims court uses temporary judges to hear the cases. A temporary judge is an attorney who has been licensed to practice law in California for a minimum of five years and who volunteers to assist the court by hearing certain cases. They meet the same minimum qualifications as a judge or commissioner. The temporary judge is required to take a training program before hearing cases.").

191. *See, e.g.*, William G. Barber, *Comments Submitted Pursuant to Notice of Inquiry Regarding "Remedies for Small Copyright Claims," 76 Fed. Reg. 66,758 (Oct. 27, 2011)*, COPYRIGHT 2 (Jan. 16, 2012), http://www.copyright.gov/docs/smallclaims/comments/01_aipla.pdf ("State courts, in contrast, lack expertise in adjudicating copyright matters, and state small claims courts have no experience whatsoever. Making state courts the venue to hear such matters carries a number of significant risks, including the potential for incorrect and inconsistent decisions and burdening those courts with having to learn—and more likely the litigants with having to teach—the applicable copyright law.").

192. *See 50-State Chart of Small Claims Court Dollar Limits*, NOLO, http://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html (last visited July 23, 2014); *see also infra* note 196.

193. NOLO, *supra* note 192.

appropriate way to incorporate this new area of law into its small-claims court system. States court systems, already facing budget problems of their own,[194] are unlikely to respond favorably to this new responsibility. State legislative bodies are unlikely to devote resources to determining appropriate dollar limits for copyright small claims, or other issues for that matter. Indeed, if Congress were to impose the cost of adjudicating copyright cases on state governments without providing funding to do so, that action could implicate the Unfunded Mandates Reform Act of 1995 (UMRA).[195] The UMRA requires the federal government to provide information to states about the costs of a mandate imposed on states.

If Congress does give jurisdiction for small copyright claims to state small-claims courts, it may be difficult for copyright owners or alleged infringers to know what to expect. If inexperienced judges in small courthouses across the country decide these cases, there may be a greater likelihood of inconsistent outcomes. For all these reasons, it would be more effective to have an agency with expertise in copyright law as the clearinghouse for small copyright claims.

The alternatives to Article I agency adjudication are unsatisfactory, as this Part has shown. Yet allocating small copyright disputes to an agency such as the proposed CCB would help some more than others. The next Part identifies some of the advantages and disadvantages.

VI. WINNERS AND LOSERS: A DIFFICULT BALANCING ACT

No system will be perfect, and the model proposed here has its weaknesses. For example, it would be necessary to set a threshold dollar amount for what would constitute a small claim appropriate for adjudication in this new forum. Proposals tend to range in the mid-five figures.[196] But it is unclear where to set

194. *See* Heather Rogers, *Business-Killing Cuts to State Court Systems*, REMAPPING DEBATE (Oct. 3, 2012), http://www.remappingdebate.org/article/business-killing-cuts-state-court-systems ("Due to increasingly severe budget cuts, more and more state court systems have become dysfunctional in the last few years.").

195. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

196. *See, e.g.*, June M. Besek, Exec. Dir., Kernochan Ctr. For Law, Media, & the Arts, to Maria A. Pallante, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 4 (Oct. 19, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/kernochan center.pdf (suggesting a cap of $20,000 to $30,000); Stephen Best, CEO, Am. Photographic Artists, to Maria A. Pallante, Register of Copyrights, Comment to *Comments on Small* Claims, U.S. COPYRIGHT OFFICE (Oct. 16, 2012), *available at* http://www.copyright.gov/docs/small claims/comments/noi_10112012/APA_SecondComments_SmallClaims.pdf (proposing an $80,000 cap); Victor S. Perlman, Gen. Counsel & Managing Dir., Am. Soc'y of Media Photographers, Inc., Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE (Jan. 16, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/04_asmp.pdf

that threshold, and the arbitrary nature of setting a dollar limit may present problems if the system is ever challenged on constitutional grounds: How is a dollar limitation consistent with the assertion that these claims are integrally related to the regulatory function of the agency proposed here? Why would the regulatory function be limited according to the dollar amount of the claim?[197] The answer may simply be that, as a matter of public policy, Congress has determined it has an interest in helping claimants overcome the problems they face in bringing their small claims.[198]

Yet this one question illustrates the myriad ways in which any proposal is likely to leave some parties dissatisfied, and to raise additional questions. That the Copyright Office embarked on a Third Notice of Inquiry after conducting public hearings and receiving dozens of responses illustrates the complexity of the problem.

Adding to the complexity are the conflicting interests of the various parties who would anticipate being haled before the CCB. Throughout the responses to the Notices of Inquiry, for example, a broad difference in perspective has emerged between copyright owners of musical works and sound recordings, and other types of copyright owners. This division was evident even during the 2006 hearing before the Subcommittee on Courts, the Internet, and Intellectual Property. Jennifer Toomey, executive director of the Future of Music Coalition, testified that she has never fielded a complaint on the issue of difficulty with small claims.[199] In contrast, Victor Perlman, general counsel to the American Society of Media Photographers, characterized the issue as "the greatest legal challenge facing photographers today" and said he received hundreds and perhaps thousands of phone calls each year regarding problems with small claims.[200]

Members of the music industry amplified this difference in perspectives in a joint response to the Second Notice of Inquiry. Six industry-leader entities, identified as "Music Industry Parties," stated that "we believe on the whole that the existing federal court system suffices for the prosecution and defense of music industry copyrights."[201] They also noted:

(suggesting a cap between $10,000 and $25,000). This Comment proposes a cap of $30,000. *See supra* note 35 and accompanying text.

197. *See supra* Part IV.A.1.

198. *See supra* Part I.A.

199. *Hearing*, *supra* note 23, at 22 ("[I]n the 6 years the Future of Music has existed, I have never been contacted by a musician about this specific issue. I have been contacted about hundreds of other issues, but not this one.").

200. *Id.* at 34–35.

201. Comments on Small Claims from Sam Mosenkis, Dir. Of Legal Affairs, Am. Soc'y of Composers, Authors & Publishers et al., to U.S. Copyright Office, at 1 (Oct. 19, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/RIAA.pdf.

> The comments submitted in this proceeding earlier this year in large part reflect the difficulties photographers in particular have in seeking remedies for unauthorized uses of their photographs. No other industry expressed a similar need for a small claims system. . . . [A]t this time the Music Industry Parties urge the Copyright Office to define the jurisdiction of any small copyright claims tribunal to exclude, initially, federally protected sound recordings and musical works. Finally, the Music Industry Parties note that should the Copyright Office decline our request to exclude sound recordings and musical works from the proposed jurisdiction of the new tribunal, we reserve the right to address our concerns regarding the logistics and establishment of such a court with the Copyright Office at a later time.[202]

In its comment submitted in response to the Third Notice of Inquiry, however, the Songwriters Guild of America responded with an opposite position, noting:

> We disagree with the key comments filed by the National Music Publishers' Association and the Harry Fox Agency, Inc. (hereafter, the "NMPA Comments").
>
> Critically, musical works should not be exempt from any small copyright claims process. It is because of the precise factual setting described in the NMPA Comments—complex questions of ownership, authorship, copying, and damages assessments—that songwriters would benefit from a small claims process. A small claims process could encourage smaller copyright owners to bring valid claims that may not be asserted today because the prospect of advancing claims involving copyright issues in federal court is so daunting.[203]

The Music Industry Parties, meanwhile, reiterated their opposition to being subject to jurisdiction in a small-claims system, insisting that "musical works should be clearly and unequivocally exempt from such a small-claims court system."[204] Among the reasons to exclude musical works, according to these parties, is the difficulty of the legal analysis on issues such as fair use, the risk of frivolous claims, and the complications of contractual obligations.[205] Another

202. *Id.* at 1–2.

203. Comments on Small Claims from Rick Carnes, President, & Charles J. Sanders, Counsel, The Songwriters Guild of Am., to U.S. Copyright Office (Apr. 12, 2013), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/SGA.pdf.

204. Comments on Small Claims from Jay Rosenthal, Senior Vice President & Gen. Counsel, Nat'l Music Publishers Ass'n et al., to U.S. Copyright Office, at 4 (Apr. 12, 2013), *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/NMPA.pdf.

205. *Id.* at 6, 8–9.

consequence of a small-claims system that the Music Industry Parties did not discuss is that such a system might change the dynamics of "Goliath's thumb" actions, perhaps making such actions potentially less costly for individual consumer defendants.[206]

In considering the public-policy arguments for and against the creation of a small-claims tribunal, relevant parties are impacted in very different ways, and any system will have winners and losers. These areas may well benefit from additional research and consideration.

A. Goliath's Thumb and the Question of Damages

If the goal of creating a small-claims venue for copyright owners is to provide a more practical way to bring complaints, then the same benefit would accrue to big-money plaintiffs as to small-money plaintiffs. The CCB could just as easily be used by wealthy copyright owners to bring easy claims against small-money defendants.

This, coupled with the threat of statutory damages, suggests that David's sling might be turned into Goliath's weapon—by which big-pocketed copyright owners could seek to squash everyday Internet users who engage in infringing conduct. The organization New Media Rights, a public interest project of the non-profit Utility Consumers' Action Network, recognized this danger in its comments to the Copyright Office, noting that "large-scale copyright holders have increasingly undertaken low-cost, high-volume litigation campaigns focused on early private settlement rather than court awarded damages."[207]

Copyright law allows plaintiffs to elect statutory damages instead of actual damages any time before final judgment, and these can range from $750 to $30,000, or even as high as $150,000 in the case of willful infringement.[208] This means that small defendants might well be vulnerable to large damage awards, even if they are engaging in conduct that they believe everyone else is doing, and even if their conduct results in very small actual damages.[209]

206. *See supra* note 90 and accompanying text; *infra* Part VI.A.

207. Comments on Small Claims from New Media Rights to U.S. Copyright Office, *available at* http://www.copyright.gov/docs/smallclaims/comments/38_new_media_rights.pdf (last visited July 24, 2014); *see also* Part III *supra*.

208. 17 U.S.C. § 504(c) (2012).

209. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009) ("In the modern world in which the average person in her day-to-day life interacts with many copyrighted works in a way that may implicate copyright law, the dangers posed by the lack of meaningful constraints on statutory damage awards are acute."); Jeffrey Stavroff, Comment, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 CAP. U. L. REV. 659, 660–61 (2011) ("In an era where downloading a song

Perhaps the most well-known example is the case of Jammie Thomas-Rasset, who "willfully infringed copyrights of twenty-four sound recordings by engaging in file-sharing on the Internet."[210] In her first jury trial, she was found liable for statutory damages of $222,000.[211] She was awarded a new trial because of an incorrect jury instruction, and a jury in her second trial awarded statutory damages of $1,920,000.[212] Ultimately, after yet another jury award, the case went to the Eighth Circuit, which directed the district court to award damages of $222,000.[213] At the time of her original trial in 2007, many such defendants were settling such cases for about $4000 each.[214] New Media Rights argues that if the small-claims system makes it even easier to bring a lawsuit, then small defendants could potentially be at even greater risk.[215] Some, such as the AAP, have argued that statutory damages should not be available at all in the small-claims system.[216]

It could be argued that statutory and actual damages both should continue to be available, because the availability of damages is not an issue in access to federal courts for small copyright claimants. And it is true that if the threat of statutory damages is removed, many copyright complaints are less threatening, in part because actual damages can be difficult to prove.

Yet in order to mitigate the threat of Goliath's thumb, it may make more sense to disallow statutory damages in the small-claims system. For many with small claims, statutory damages are unlikely to be available at all, because of the requirement that the work be registered before the infringement occurred, to give the alleged infringer sufficient notice.[217] Many such claimants never bother to register their works in the first place, and in the case of some works, such as webpages or news products for which the content frequently changes, it can be

is as simple as double-clicking a mouse, individuals who download music from file-sharing networks have been and continue to be subjected to severe statutory damages penalties.").

210. Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 901 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1584 (2013).
211. *Id.*
212. *Id.*
213. *Id.* at 910.
214. Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES (Oct. 5, 2007), http://www.nytimes.com/2007/10/05/business/media/05music.html.
215. New Media Rights, *supra* note 207.
216. *See, e.g.*, Adler, *supra* note 162, at 8 ("Although higher damages awards, such as statutory damages, are available in federal court, it is AAP's position that such potentially high damages should not be allowed in an expedited proceeding that establishes a relatively thin evidentiary record.").
217. Derek Andrew, Inc. v. Poof Apparel Corp., 528 F.3d 696, 699 (9th Cir. 2008) ("Section 412(2) mandates that, in order to recover statutory damages, the copyrighted work must have been registered prior to commencement of the infringement, unless the registration is made within three months after first publication of the work.").

impractical to register each separate work.[218] That means statutory damages are more likely to be available to the big-money plaintiffs who are wealthier and more sophisticated and thus more likely to avail themselves of registration. If the goal is to provide a better opportunity to bring small claims, and yet avoid creating a system that would potentially do more harm than good for small-money parties, then it makes sense to take statutory damages out of small-claims adjudication altogether.

The AAP proposes that damages in the small-claims system be limited to what it describes as "reasonable compensation," which would "represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced."[219] This may not be a satisfactory outcome for the small-money plaintiffs, however. If the result of a suit is that the plaintiff gets the fair value for his or her work, then what is the incentive not to infringe? Any defendant might feel free to infringe and risk a lawsuit if the potential liability were limited to what the copyright owner would have charged anyway. Perhaps the answer would be to impose some multiple of the fair use value as a deterdeterrent to infringement.[220] For example, Congress might determine that a plaintiff who prevails in a small claim is entitled to triple damages. In that case, if a plaintiff established that he or she suffered $1000 in actual damages, then the potential recovery in the CCB could be $3000. This could create more of an incentive not to infringe. Regardless, it will be important to guard against unintended consequences of a small-claims system.

If statutory damages were to be retained under the new system, the total damages would have to be limited to the jurisdictional maximum of the small-claims court. That would avoid the problem that Jammie Thomas faced.[221]

B. Registration

The registration requirement of 17 U.S.C. § 411 must be met in order for jurisdiction to exist over copyright claims.[222] In order to meet this requirement, it

218. *See infra* Part VI.B.

219. Adler *supra* note 162, at 8 (alteration in original) (quoting U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 115-16 (2006)) (internal quotation marks omitted).

220. Congress may create the ability for plaintiffs to recover some multiple of damages, as it has done in other areas, such as in the Racketeer Influenced and Corrupt Organizations Act (RICO), which allows for threefold damages for injuries to business or property. 18 U.S.C. § 1964(c) (2012).

221. Some also have suggested that statutory damages should have a reasonable relation to estimated actual damages. *See, e.g.*, Stavroff, *supra* note 209, at 721 ("Congress must rethink statutory damages for copyright infringement and amend the Copyright Act so that single mothers and graduate students will not find themselves drowning in million-dollar penalties.").

is enough for the Copyright Office to receive an application.[223] The fact remains, however, that many small copyright owners do not register their works, and if an application is required before a claim may be made, then the new small-claims system might not be accessible for many.

A photographer, for example, might create as many as 20,000 works eligible for copyright protection in a single year.[224] In a recent survey of members of the Professional Photographers of America, 84 percent of respondents said they never registered their work.[225] Of those, 25 percent said they had never heard of registration, 24 percent said it was too time-consuming to register their works, and 13 percent said it was too expensive.[226]

In addition, the very nature of modern communications makes it increasingly impractical to register every single work that might qualify for copyright protection. The National Writers Union stated the problem well in its response to the Copyright Office's First Notice of Inquiry:

> It remains unclear how writers of certain increasingly common types of work, such as dynamically generated blogs and other Web content, are supposed to register their copyrights. Must copyright be registered in each discrete component of a Website, each page of which is dynamically assembled and potentially customized each time it is viewed? Is the entity in which copyright must be registered the Web page? The content element on the page? Or the back-end database of content components from which the viewed Web pages are dynamically constructed by the Web server software? What is the proper way to register copyright in a Twitter feed or a frequently updated Facebook page? Such uncertainties—and the possibility that an attempted registration will turn out to have been made in the wrong manner and thus not to be valid for purposes of entitlement to attorney's fees and statutory damages—make it more difficult for writers of these types of works to justify the investment of time in trying to regis-

222. *See, e.g.*, *Conan Properties, Inc. v. Mattel, Inc.*, 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984) (Duffy, J.) ("Although recitation of the fact that copyrights have been registered appears to be a mere technicality, it is a prerequisite to this court's jurisdiction.").

223. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 621 (9th Cir. 2010).

224. David P. Trust, Chief Exec. Officer, & Maria D. Matthews, Manager of Copyright and Gov't Affairs, Alliance of Visual Arts, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE (Jan. 17, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/02_alliance_of_visual_artists.pdf.

225. *Id.*, attach. A.

226. *Id.*

> ter their copyrights when their works are created and before they are infringed.[227]

One solution would be to permit claimants to register their works within a certain length of time after filing a claim in the CCB in order to meet the jurisdictional requirement. This could be built into the regulatory scheme. Indeed, this is what the Copyright Office recommends.[228]

A better solution might be to alter the jurisdictional requirement for statutorily defined small claims, so that registration is not a requirement for jurisdiction. Instead, the owner of a copyright could be required to show evidence of ownership, perhaps by providing a copy of the original creation along with a sworn affidavit. The increasing quantity of copyrightable works in the digital age weighs in favor of crafting an approach that recognizes the impractical nature of registering every creation.

C. Frivolous Claims

Some have expressed concerns that if access to the small-claims system is too easy, the natural result would be a proliferation of meritless and frivolous claims.[229] One solution might be to require a prima facie case before a defendant is required to answer.[230]

As part of its adjudicatory process, the CCB could first evaluate claims to assess them for their sufficiency. If a complaint does not meet the requirements, then it could be rejected by the agency. This would be the equivalent of dismissal without prejudice; a complainant would have the opportunity to try again. This would benefit plaintiffs as well—particularly pro se plaintiffs who do not understand that their claims might be facially meritless. While a perception might exist that certain claims are "harassing,"[231] many such claims might in fact have merit if the plaintiffs plead them correctly. By imposing automatic dismissal on claims

227. Larry Goldbetter, President, Nat'l Writers Union et al., Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 7 (Jan. 16, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/37_nwu_org.pdf.

228. REPORT, *supra* note 7, at 108 ("The Office recommends that registration be required, but that the registration may be issued any time before the tribunal renders a determination.").

229. *See, e.g.*, Sam Mosenkis, Am. Soc'y of Composers, Authors & Publishers, & Pat Collins, SESAC, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 5–6 (Jan. 17, 2012), *available at* http://www.copyright.gov/docs/smallclaims/comments/03_ascap.pdf; Rosenthal, *supra* note 204, at 9–11.

230. *See, e.g.*, Paul Aiken, Authors Guild, Comment to *Comments on Small Claims*, U.S. COPYRIGHT OFFICE at 5, *available at* http://www.copyright.gov/docs/smallclaims/comments/08_authors_guild.pdf (last visited July 25, 2014) ("Avoiding frivolous, harassing claims is a matter of routine, automatic rejection of claims that do not raise a *prima facie* case of infringement.").

231. *Id.* at 4.

that do not plead a prima facie case, the CCB would save those plaintiffs the time and trouble of briefing and a new hearing on a motion to dismiss.

The Copyright Office also recommends creating a monetary disincentive against frivolous claims. The Copyright Office "suggests that, upon a proper showing, the tribunal be authorized to award aggrieved parties reasonable attorneys' fees and costs—up to a total amount of $5,000—when a litigant has pursued a claim or defense for a harassing or improper purpose, or without a reasonable basis in fact or law."[232] It is possible, however, that such fee-shifting provisions would be a general disincentive to participation in the small-claims system—particularly for pro se litigants who are uncertain of how to proceed and fearful of making any mistakes that might make matters even worse. The negative perception that might exist of pro se litigants[233] should not be a hurdle to creating a small-claims option to address legitimate concerns about access to the court system.[234]

D. Which Circuit's Law to Apply

Copyright law is not uniform from circuit to circuit. Google, Inc., noted some of these differences in its comment responding to the Copyright Office's First Notice of Inquiry.[235] For example, in the Sixth Circuit, there is no de minimis defense for infringement of the reproduction right in a sound recording.[236] Google asked: "[I]f a plaintiff were to bring an action in a federal small claims court for reproduction of a tiny portion of a sound recording, should the court dismiss the action as *de minimis*, or award damages under *Bridgeport*?"[237]

The solution would be for the CCB to apply the law of the circuit which would review its decision. If the case would potentially be reviewable in district courts in more than one circuit, and if those circuits apply the law differently, then the CCB should apply the law as seems correct in its judgment, and the appropriate district court would apply the law of its circuit.

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232. REPORT, *supra* note 7, at 127.
233. *See, e.g.*, Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005) (citing descriptions of pro se litigants as uneducated "pests" and "nuts" who clog the judicial system and "clutter up cases with rambling, illogical pleadings, motions, and briefs").
234. That a plaintiff does not know how to communicate his or her concerns effectively does not mean that the concerns themselves are not valid. *See, e.g.*, Jona Goldschmidt, *Strategies for Dealing With Self-Represented Litigants*, at 2, CAN. BAR ASS'N 2 (2004), *available at* http://www.cba.org/cba/annualmeeting/pdf/2004_goldschmidt.pdf ("Self-represented litigants are for the most part sincerely trying to present a claim or defense but simply do not know how to do so.").
235. Metzger, *supra* note 158, at 3.
236. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005).
237. Metzer, *supra* note 158, at 3.

One might object that the CCB then would be in the position of not following binding precedent in the cases of parties from certain circuits. This would not be a new phenomenon in the realm of agency adjudication. The Social Security Administration and the Internal Revenue Service are among agencies that have engaged in nonacquiescence, or "the deliberate refusal of an administrative agency, exercising adjudicatory authority, to follow relevant judicial precedent in deciding another matter presenting the same question of law."[238] Defenders of nonacquiescence argue that the Supreme Court legitimized the practice in *United States v. Mendoza*,[239] in which the Court "recognized that the government plays a distinctive role in the national lawmaking process, 'both because of the geographic breadth of its litigation and also, most importantly, because of the nature of the issues it litigates.'"[240]

Particularly in cases in which it is not clear which circuit's law might apply on appeal, the CCB would be well justified in arriving at its own conclusions of law, based on its good-faith effort to apply the law correctly.[241]

E. Equitable Relief

In some cases, those with small claims might desire a declaration of their rights and an injunction preventing future infringement. This is not the type of relief the CCB would be in a position to provide without judicial review, however.[242] The Copyright Office likewise recognizes that even if its proposed tribu-

238. Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1816 (1989) ("Important federal agencies, including the Social Security Administration, the National Labor Relations Board, and the Internal Revenue Service, today practice some form of nonacquiescence.").

239. 464 U.S. 154 (1984).

240. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 684 (1989) (alterations in original) (quoting *Mendoza*, 464 U.S. at 159). *But see* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 828 (1990) (describing the harm that can result from agency nonacquiescence and explaining that "[o]ur system of judicial review of agency action depends upon oversight by the lower Federal courts").

241. *See* Estreicher & Revesz, *supra* note 240, at 687.

242. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) ("[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts . . . ."); *see also* Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1288–89 (1999) ("Occasionally, Congress will create an administrative scheme which permits the responsible agency to seek judicial orders on an accelerated basis prohibiting conduct which the agency believes will violate regulatory standards, often in conjunction with special scheduling requirements imposed on the judiciary. . . . Furthermore, almost any agency with authority to enforce a statutory scheme can also invoke general preliminary injunction procedures. Such procedures appear to bear some of the hallmarks of *ex ante* regulation, since they permit an agency to regulate and prevent conduct believed to violate substantive norms

nal were to find that an injunction is appropriate, "the claimant would have difficulty securing compliance without the enforcement powers of a federal district court."[243] Under this Comment's proposal, the CCB would not provide equitable relief, such as an injunction to prevent future infringement. This is not a satisfactory outcome for all plaintiffs, and it means that some would still be limited to federal district court in order to pursue their claims, if damages were insufficient.

On the other hand, for many copyright owners, having access to a small-claims venue where their complaint can be heard on its merits, and where they have the opportunity to obtain damages—and perhaps vindication—might be enough. In any case, it would still be better than having no readily accessible venue at all.

CONCLUSION

The current federal court system does not provide copyright owners with an effective venue to pursue small copyright infringement claims. Filing a federal lawsuit is too expensive, and it is difficult to find an attorney willing to represent a client with a small claim. It would be impractical to create a new Article III court or to allocate responsibility to state courts. While reallocating responsibility to an Article I court or agency is possible, constitutional hurdles would have to be overcome. The most effective way to overcome these hurdles is for Congress to give authority to an administrative agency to adjudicate small copyright infringement claims. This would give pro se plaintiffs as well as industry leaders—the "Davids" and the "Goliaths"—an accessible venue to resolve copyright disputes. An effective mechanism for administering this new process could be modeled after the Trademark Trial and Appeal Board, adopting elements of ICANN's Uniform Domain-Name Dispute Resolution Policy. While this solution would not be perfect, it would give those with small claims a system in which to pursue their claims, and in many cases to resolve them.

before the conduct occurs. Nonetheless . . . *judicial review remains available* before a firm becomes subject to any coercive prohibitions." (emphasis omitted)).

243. REPORT, *supra* note 7, at 114 (citing FED. R. CIV. P. 65).