

LOWERING THE STAKES: TOWARD A MODEL OF EFFECTIVE COPYRIGHT DISPUTE RESOLUTION

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The digital revolution, the popularization of the internet, and the proliferation of file sharing applications have caused some to question the effectiveness of American copyright law. While lawsuits by the Recording Industry Association of America, the Motion Picture Association of America, and other organizations against both technological innovators and individual file sharers have put a spotlight on the inadequacies of traditional federal litigation as a method of resolving copyright infringement disputes, such problems are not unique to the digital environment.

Rather than crafting potential solutions that focus exclusively on digital infringement, policymakers should consider reforming the underlying problems that have contributed to the current situation. The federal government could best accomplish this goal of facilitating an inexpensive, fair, and humane method of copyright enforcement by creating a federal small claims court that would allow litigants to resolve copyright infringement disputes equitably and efficiently.

I. PROBLEMS WITH THE CURRENT COPYRIGHT LAW SYSTEM

Copyright law, for most of this nation's history, "developed along two parallel tracks: federal (statutory) and state (common law)."¹ Under this parallel track system, federal law protected copyright owners from unauthorized "copying of their work once published" while state law "provide[d] only limited protection for the first publication,"² including an author's right to prevent or obtain damages for "the copying, publication, or use of such unpublished work without [the author's] consent."³

These parallel tracks "converged" when the Copyright Act of 1976⁴ went into effect on January 1, 1978.⁵ Congress, drawing on its constitutional authority to grant "authors and inventors the exclusive right

¹ DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 1-OV (2006).

² *Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1224 n.1 (9th Cir. 1998).

³ 17 U.S.C. § 2 (repealed 1978).

⁴ 17 U.S.C. § 101 et. seq.

⁵ *NIMMER*, *supra* note 1.

to their respective writings and discoveries,”⁶ pre-empted state law copyright protection for all “works of authorship that are fixed in a tangible medium of expression” that “come within the subject matter of copyright as specified by sections 102 and 103, whether... published or unpublished.”⁷ Although some vestigial state law copyright protections remain,⁸ Congress, through the 1976 act, effectively granted the federal courts exclusive jurisdiction over all copyright infringement disputes.

While federal pre-emption of most state copyright law and limiting the litigation of copyright infringement disputes to federal courts has resulted in some benefits, such as a standardized copyright registration process and one statute that controls copyright disputes nationwide, it has also created a significant number of efficiency and equity concerns. The following sub-sections will discuss these problems.

A. Costs to the Parties: Greater Expense and Delay Relative to State Courts

The structure of the current copyright litigation system has made it difficult both for certain copyright owners to enforce their exclusive rights and for members of the public to defend themselves when faced with a copyright infringement claim. Most notably, granting federal courts exclusive jurisdiction over these disputes has made copyright infringement litigation significantly more expensive, for “[l]itigating in federal court is more expensive than in state court.”⁹ Further, because of the “backlog in the federal courts and the fact that federal courts are obligated to resolve criminal matters before civil matters where doing so is reasonable,” it often takes longer to obtain a civil trial on the merits in federal court than in state court.¹⁰

⁶ U.S. Const., art I, § 8 cl. 8.

⁷ 17 U.S.C. § 301(a).

⁸ For instance, protection of sound recordings fixed prior to February 15, 1972, remains the province of state law. See NIMMER *supra* note 1, § 1.01(B)(2)(d)(ii).

⁹ John Conyers, Jr., *Class Action “Fairness”—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 506 (2003). See also Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U.L. REV. 369, 404 (finding that most plaintiff lawyers, when given the choice, prefer filing a claim against a defendant in federal court rather than state court because it “imposes higher litigation costs upon the opposing party.”); Gregory M. Cesarano and Daniel R. Vega, *So You Thought a Remand Was Imminent?: Post-Removal Litigation and the Waiver of the Right to Seek a Remand Grounded on Removal Defects*, 74 FLA. BAR J. 22, 23-24 (2000) (“Litigation in federal court is also generally more expensive and time consuming than most state court actions.”).

¹⁰ Conyers, *supra* note 9, at 506-07. See also Charles A. Carlson, *Removal to Federal Court on the Basis of Diversity Jurisdiction: The “Amount in Controversy” Controversy*, 69 FLA. BAR J. 77, 77 (1995) (stating that nonresident defendants in state court civil actions

But not all parties in copyright infringement suits are equally impacted by having to potentially incur greater costs in order to pursue their claims. As a result of these higher expenses and long delays, poor, start-up, and non-commercial plaintiffs and defendants in copyright disputes will have a significantly greater incentive to reach an unfavorable settlement agreement or to not initiate a lawsuit at all, particularly when the opposing party is wealthy. Conversely, wealthy plaintiffs and defendants will have a greater incentive to litigate—or at least threaten to litigate—a dispute, knowing that poor, start-up, or non-commercial opposing parties will lack the resources to pursue their claims or defenses. Both of these scenarios may lead to many unjust outcomes that are at odds with the goals of copyright legislation.

1. Wealthy Plaintiffs v. Poor, Start-up, or Non-Commercial Defendants

Although copyright infringement lawsuits between wealthy plaintiffs and poor, start-up, or non-commercial defendants may occur in a wide variety of contexts, many of the most recent and well-publicized lawsuits where such a disparity between parties has been present have occurred in the digital file-sharing context. Wealthy copyright owners, such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), have filed thousands of lawsuits against individuals who have allegedly downloaded copyrighted music, movies, and television shows from peer-to-peer (p2p) networks without permission.¹¹ These individuals, ranging from pre-teens¹² to college students¹³ to the elderly,¹⁴ are significantly less wealthy than the organizations suing them, and many lack the resources necessary in order to litigate a lawsuit to a final judgment.

who possess a resource advantage over their opponents prefer to remove their cases to the “slower and more expensive federal forum.”).

¹¹ See John Borland, *Studios Mine P2P Logs to Sue Swappers*, ZDNET NEWS, Aug. 25, 2005, http://news.zdnet.com/2100-9588_22-5843082.html (announcing 286 lawsuits filed by the MPAA against BitTorrent users); Press Release, Recording Industry Association of America, *New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers*, <http://www.riaa.com/News/newsletter/012104.asp> (Jan. 21, 2004) (announcing 532 lawsuits filed by the RIAA against users of various file sharing networks).

¹² *Music Industry Settles Copyright Lawsuit Against 12-Year-Old Girl*, USA TODAY, Sept. 9, 2003, http://www.usatoday.com/tech/news/techpolicy/2003-09-09-kid-pays-riaa_x.htm.

¹³ Press Release, Recording Industry Association of America, *Latest Round of Music Industry Lawsuits Targets Internet Theft at 17 College Campuses*, <http://www.riaa.com/News/newsletter/092905.asp> (Sept. 25, 2005).

¹⁴ See Jefferson Graham, *RIAA Lawsuits Bring Consternation, Chaos*, USA TODAY, Sept. 10, 2003, http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm (reporting that the RIAA sued a 71 year old grandfather during its first wave of lawsuits).

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.¹⁵ Most defendants, rather than challenging their claims in court, have settled with the RIAA for amounts usually ranging from \$4,000 to \$5,000.¹⁶ In addition to the high general costs of copyright litigation,¹⁷ 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.¹⁸

These obstacles have forced many of the small number of defendants who have challenged the RIAA to pursue their claims pro se. For instance, Patricia Santangelo, the first file sharer defendant to challenge an RIAA lawsuit, had to represent herself after her law firm, Beldock Levine & Hoffman, could no longer afford to represent her pro bono after her motion to dismiss was denied.¹⁹ Other pro se defendants, such as Jacob Conklin, have been unable to obtain pro bono representation and have had to defend themselves without the assistance of counsel from the beginning.²⁰

Such a large number of defendants settling their cases or representing themselves pro se is not surprising. The cost of litigating even a “low stakes” copyright dispute just through discovery typically exceeds \$100,000.²¹ Given the limited means of the typical file sharing defendant, as well as the fact that such a defendant is unlikely to receive any monetary compensation even if he or she were to prevail in court, defendants in such lawsuits have many incentives to settle even if they have a valid fair use or mistaken identity defense. Similarly, wealthy plaintiffs such as the RIAA and MPAA have an incentive to file lawsuits against individuals even when there is little evidence of their guilt, knowing that most defendants will agree to pay \$4,000 to \$5,000 due to their inability to afford a lawyer. For similar reasons, wealthy plaintiffs have little incentive to actually negotiate

¹⁵ See Ray Beckerman, *How the RIAA Litigation Process Works*, <http://info.riaalawsuits.us/howriaa.htm> (last visited Oct. 11, 2006) (stating that, as of September 18, 2006, defendants in only twelve RIAA lawsuits have filed motions to dismiss, motions for summary judgment, or made challenges to pretrial discovery).

¹⁶ Tresa Baldas, *Music Piracy Defendants Fighting Back*, NAT'L LAW J, Oct. 10, 2005, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1128675912177>.

¹⁷ AM. INTELL. PROP. ASS'N, 2003 REPORT OF ECONOMIC SURVEY, 96-97 tbl.22 (2003).

¹⁸ Katie Dean, *New Flurry of RIAA Lawsuits*, WIRED, Feb. 17, 2004, <http://www.wired.com/news/digiwood/0,1412,62318,00.html>.

¹⁹ Jon Newton, *Santangelo Loses Lawyer, To Defend Herself in File Share Trial*, MP3 NEWSWIRE, Dec. 7, 2005, http://www.mp3newswire.net/stories/5002/santangelo_trial.htm.

²⁰ Beckerman, *supra* note 15.

²¹ AM. INTELL. PROP. ASS'N, *supra* note 17.

during settlement “negotiations,” for they know poor defendants, even those represented by lawyers, will face enormous pressure to accept heavily one-sided settlement agreements offered on a “take it or leave it” basis.²² Even when a defendant has pro bono representation, wealthy plaintiffs know that “few law firms can hope to carry that kind of burden forever,” and thus can pursue such lawsuits until the defendant is pressured to finally settle or continue pro se—sending a message to other defendants (and law firms and public interest organizations contemplating pro bono representation) that a quick settlement is the only option worth considering.²³

Individuals with limited resources are not the only group of defendants who are induced into accepting heavily one-sided settlement agreements when sued by wealthy plaintiffs. Start-up companies and small businesses, while generally able to afford attorneys and possessing access to greater financial resources than individuals, are still often unable to litigate a copyright infringement lawsuit filed by a wealthy plaintiff to a truly final judgment. Most notably, *Grokster Ltd.*, the lead defendant in *MGM Studios, Inc. v. Grokster*,²⁴ accepted a settlement agreement that “require[d] the company to stop giving away its software,” pay \$50 million, send anti-piracy messages to its current users,²⁵ and change its website to read, “There are legal services for downloading music and movies. This service is not one of them.... Don’t think you can’t get caught. You are not anonymous.”²⁶ *Grokster* did not agree to such a settlement due to a perceived weakness with its defense—rather, *Grokster* settled simply because it “could not afford a protracted legal battle.”²⁷ *Sharman Networks*, the owners of *Kazaa*, another p2p application targeted by movie studios and the music industry, reached a similar settlement,²⁸ as have *BearShare*, *iMesh*, and *MetaMachine*.²⁹

These settlements are also not surprising. *Grokster* and *Kazaa*, while generating a significant amount of revenue, possessed resources that are virtually insignificant when compared to the organizations suing them. Though industry estimates indicate that *Grokster* and others may have

²² Baldas, *supra* note 16.

²³ Newton, *supra* note 19.

²⁴ 545 U.S. 913 (2005).

²⁵ Gary Gentle, *Details of Grokster Settlement Emerge*, LAW.COM, Nov. 9, 2005, <http://www.law.com/jsp/article.jsp?id=1131457369803>.

²⁶ *Grokster*, <http://www.grokster.com> (last visited Oct. 10, 2006).

²⁷ Gentle, *supra* note 25.

²⁸ Eric Pfanner, *Kazaa Deal Ends P2P Lawsuits*, INT’L HERALD TRIBUNE, July 28, 2006, <http://www.ihf.com/articles/2006/07/27/yourmoney/music.php>.

²⁹ Thomas Mennecke, *LimeWire Countersues RIAA*, SLYCK NEWS, Sept. 26, 2006, <http://www.slyck.com/news.php?story=1299>.

generated millions in annual revenue at their peak,³⁰ such resources pale in comparison to the RIAA, whose member companies control 84 percent of an industry that in 2005 generated more than \$11.1 billion in domestic sales alone.³¹ Given such vast resource disparities, even the most successful for-profit start-up companies have a very large incentive to settle rather than litigate a fair use or other defense to a truly final judgment.

Such resource disparities have an even larger impact on non-commercial defendants. Unlike the owners of Grokster and other p2p applications, those who have created p2p technologies or other innovations and have not sought a profit are, like individual users, often unable to put up any significant resistance to a lawsuit by a wealthy copyright owner.

The few that have tried to resist have been largely unsuccessful. For example, Edward Webber, the owner of LokiTorrent—a web site that provided links to BitTorrent files hosted on other servers that allowed users to download pirated copies of movies, music, and TV shows—announced on his website that he would fight a lawsuit the MPAA filed against his site, unlike similar websites that shut down immediately after being sued.³² Webber requested donations from the site’s users in order to subsidize the costs of a defense, which he estimated would cost approximately \$30,000 month in legal fees.³³ However, despite receiving \$40,000 in donations in one month, Webber reached a settlement agreement with the MPAA, which required shutting down the LokiTorrent website and providing the MPAA with “all BitTorrent activity logs of its former users,” presumably to assist the MPAA with filing future lawsuits against individual downloaders.³⁴ Though Webber has not officially explained why he settled despite his declaration to fight, a former LokiTorrent staff member stated that Webber “had no choice but to give in” because, despite the donations, “continuing the fight would both bankrupt him as well as jeopardize his freedom.”³⁵

³⁰ *P2P Millionaires on the Increase*, SLYCK NEWS, Nov. 15, 2003, <http://www.slyck.com/news.php?story=298>.

³¹ Recording Industry Association of America, 2005 U.S. Manufacturers’ Unit Shipments and Value Chart, <http://www.riaa.com/news/newsletter/pdf/2005yrEndStats.pdf>.

³² Robert Lemos, *LokiTorrent fights MPAA Legal Attack*, CNET NEWS, Dec. 30, 2004, http://news.com.com/2100-1025_3-5508073.html.

³³ *Id.*

³⁴ Michael Ingram, *LokiTorrent Caves to MPAA*, SLYCK NEWS, Feb. 10, 2005, <http://www.slyck.com/news.php?story=661>.

³⁵ Posting of CLSXMEDIA to <http://www.slyck.com/forums/viewtopic.php?t=9471> (Feb. 10, 2005, 21:44 EST).

2. Poor, Start-up, or Non-Commercial Plaintiffs v. Wealthy Defendants

Not all copyright litigation inefficiencies due to wealth disparities result from wealthy copyright owners filing suit against poorer defendants. 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.³⁶

Though wealthy defendants may employ similar cost-raising strategies in tort cases, poor plaintiffs pursuing tort claims are less likely to accept an unfair early settlement due to the contingent fee system, which "gives the poor plaintiff meaningful access to the courtroom by giving a lawyer an incentive to pursue a meritorious claim that will produce a substantial settlement or judgment."³⁷ Poor plaintiffs in intellectual property disputes, for a variety of reasons, are unlikely to find attorneys willing to represent them on a contingency fee basis, particularly against a wealthy defendant seeking to raise costs, and thus will often lack the resources to pursue otherwise meritorious claims.³⁸

Poor plaintiffs, however, may find it difficult to pursue meritorious copyright infringement claims against any defendant, even similarly situated defendants who lack the financial resources to engage in a long litigation battle. Many cases where a poor plaintiff's copyright has been infringed are "low stakes" disputes where the plaintiff's damages are relatively modest. A common "low stakes" dispute between poor plaintiffs and defendants involves website piracy, where one webmaster may copy another webmaster's design, layout, and/or content without permission and then earn a small profit by placing paid advertising on the copied site or selling the copied site on eBay or other auction websites.³⁹

³⁶ See discussion *supra* part I.A.1.

³⁷ Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1117 (1991).

³⁸ IP Litigation Law Blog, <http://www.iplitigationblog.com/contingent-fee-alternative-billing-in-defense-of-contingent-fee-patent-lawyers.html> (Sept. 14, 2005).

³⁹ See, e.g., Posting of cliffjumper100 to <http://www.sitepoint.com/forums/showthread.php?t=400323> (July 5, 2006, 12:16 EST) (asking for advice on how to deal with an individual who has copied his site and is selling it on eBay without permission); Posting of Alex0r to <http://www.sitepoint.com/forums/showthread.php?t=391896> (June 12, 2006, 14:19 EST) (stating that another individual has copied his website virtually verbatim and has profited off of it).

Such disputes, while “low stakes” in that damages might only amount to a few thousand dollars or even just a few hundred dollars, often represent a significant amount of money to the plaintiff—while many may view \$1,500 as a trivial amount of damages that is not worth suing over, to a relatively poor plaintiff that \$1,500 may represent three months of rent payments. However, under the current system plaintiffs are unable to recover damages for such small infringements, since the expense of hiring an attorney to even write and file a complaint may exceed the total amount of damages. Thus, potential infringers, knowing that most webmasters cannot afford to enforce their intellectual property rights due to the costs of litigation exceeding the amount of damages, have little incentive to comply with the relevant provisions of the Copyright Act.

Some may argue that the existence of statutory damages already alleviates this problem, for statutory damages may allow a plaintiff to recover his or her attorney’s fees and court costs, which purportedly “helps to ensure that all litigants have equal access to the courts to vindicate their statutory rights.”⁴⁰ Furthermore, since statutory damages may often greatly exceed the plaintiff’s actual damages, some believe that an award of statutory damages, court costs, and attorney’s fees “prevents copyright infringements from going unchallenged where the commercial value of the infringed work is small and there is no economic incentive to challenge an infringement through expensive litigation.”⁴¹ However, many plaintiffs are unable to claim statutory damages due to the registration requirement, which only allows a plaintiff to receive statutory damages—as well as attorney’s fees and costs—if the plaintiff registered the work with the Copyright Office prior to the defendant’s infringement.⁴²

Why would the creator of a copyrightable work not formally register his or her creation with the Copyright Office when registration is a prerequisite for certain important statutory benefits? Many individuals do not register their copyrights simply because they do not understand the importance of registration—perhaps because they know little about copyright law and do not have access to (or cannot afford) sufficient legal advice.⁴³ Given that individuals who cannot afford legal advice prior to an infringement are those most likely to require statutory damages and an award of attorney’s fees and court costs in order to pursue a claim, the

⁴⁰ *Quinto v. Legal Times of Wash., Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981).

⁴¹ *Id.*

⁴² 17 U.S.C. § 412(2). *But see* *X-It Products, LLC v. Walter Kidde Portable Equip., Inc.*, 227 F. Supp. 2d 494 (E.D. Va. 2002) (awarding attorney’s fees to a plaintiff who did not timely register the work at issue).

⁴³ Even relatively well-off plaintiffs that should be able to afford legal advice may fail to register their works on a timely basis. *See, e.g., id.* at 527 (noting that the plaintiff company did not register its copyright until six months after the defendant’s infringement).

registration requirement, rather than enabling poor plaintiffs or owners of copyrights with little commercial value to pursue their infringement claims, actually prevents many of these individuals from filing suit against those who have violated their intellectual property rights.

Another subset of individuals fails to register their works not because they are ignorant of the law, but because registration prior to infringement is simply not economically feasible. The Copyright Office requires that those who wish to register a copyright pay a \$45 fee.⁴⁴ Although the Copyright Office allows an individual to register multiple works for a single fee in certain limited circumstances, in most cases the Office requires that an individual pay a separate \$45 fee for every registered work.⁴⁵

This \$45 fee requirement prevents many creators of works with low profit margins from registering their works. Internet graphic designers, for example, often find the \$45 registration fee prohibitive. Many of these designers, who often work on a freelance and contingent fee basis, only expect payment for their creations if their work is actually selected by a client. Such designers often participate in design contests, where a potential client describes the types of banners or graphics he or she needs, states a deadline, and provides information on the number of graphics the client expects to purchase and how much money the winning designers will receive if selected. As a result, many internet designers will create a large number of distinct and unrelated banners and other graphic materials that the designer will never receive compensation for, due to the client not selecting the designs.⁴⁶

Registering such unused designs with the Copyright Office for \$45 each is simply not economically feasible, particularly when a winning design might only result in a \$50 payment.⁴⁷ Under the current system, a designer who creates five unrelated banners and only sells one would have to register all five banners separately, at a cost of \$225, in order to remain eligible for statutory damages in case of an infringement—even though the one banner that sold might only have generated \$50 in revenue for the designer. Thus, an internet graphics designer who wishes to preserve the

⁴⁴ U.S. Copyright Office, Current Fees, <http://www.copyright.gov/docs/fees.html> (last visited Oct. 15, 2006).

⁴⁵ For information on some of these exceptions in the visual arts, see U.S. Copyright Office, Copyright Registration for Works of the Visual Arts, <http://www.copyright.gov/circs/circ40.html> (last visited Oct. 14, 2006).

⁴⁶ For an example of such a design contest, see Posting of domino66 to <http://www.namepros.com/design-contests/223069-2-x-banner-ad-contest-85-a.html> (Aug. 1, 2006, 7:33 EST) (offering \$85 to the designers who will produce the best two banner ads for lawschoolpoker.com).

⁴⁷ *Id.*

option of statutory damages in case a non-paying client uses a rejected banner without payment or permission would have to incur a \$175 loss in order to remain eligible for attorney's fees and court costs—providing a strong disincentive against registration prior to infringement.

B. Costs to the General Public and Harm to the Public Interest

These unjust outcomes not only harm the parties that felt forced to enter into such agreements, but also go against the public interest, for “[j]udicial interpretation of statutes that are important to large numbers of people,” such as the Copyright Act, “can be rendered only in the context of resolving cases or controversies.”⁴⁸ The development of copyright law is significantly inhibited when parties in copyright infringement disputes are induced to accept inequitable settlements—or in some cases to not even pursue claims against infringers—because they cannot afford the high costs of federal litigation or accept the long delays before a federal court renders a final judgment. Courts have been unable to rule on many important copyright law questions, particularly relating to the fair use defense, as a result of financial and other disparities between many copyright infringement plaintiffs and defendants.⁴⁹

Additionally, even when parties are able to litigate their disputes in federal court, the greater costs of federal litigation borne not just by the litigants, but also by the court system itself and the taxpayers that fund it. For instance, one study has shown that the cost to the court system of hearing an average tort case is more than three times higher in federal court than in state court.⁵⁰ Congress, by granting the federal courts virtually exclusive jurisdiction over copyright infringement actions, has raised the costs of resolving copyright disputes not just to the litigants, but also to the general public.

II. PROPOSED ALTERNATIVES TO TRADITIONAL LITIGATION AND WHY THEY FALL SHORT

Recognizing the problems with the current system, copyright owners, government officials, and scholars have proposed several reforms to traditional copyright litigation that seek to reduce the expense of copyright litigation and lessen the incidence of lawsuits against file sharing

⁴⁸ Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U.L. REV. 267, 274 (1985).

⁴⁹ See discussion *supra* part I.A.

⁵⁰ Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1222 n.86 (1996).

companies and other intermediaries. This section will examine three of those proposed reforms: digital rights management, court-sponsored mediation, and the Lemley/Reese administrative dispute resolution proposal.

A. Digital Rights Management

1. Definition

Digital Rights Management (DRM) technologies are systems that “restrict the use of digital files in order to protect the interests of copyright holders.”⁵¹ DRM can limit or outright prevent users from “altering, sharing, copying, printing, and saving” digital files, as well as restrict the number of times users can access or view files.⁵² For example, an online music provider might use DRM technology to prevent individuals from playing a downloaded MP3 file on any computer but their own, or to automatically make the file inaccessible after one year.⁵³

2. Purpose

Proponents have praised DRM as a potentially effective means of reducing the many costs associated with digital copyright infringement. Copyright owners, by using DRM to “prohibit[] possibly-detrimental and economically inefficient misuses” of their intellectual property, may not only incur reduced costs due to less piracy and less copyright infringement litigation, but may also pass these savings on to their consumers in the form of lower prices.⁵⁴ Scholars have identified two distinct types of infringement threats that copyright owners hope to reduce or eliminate through DRM: casual copying and Napsterization.

⁵¹ Electronic Privacy Information Center, Digital Rights Management, <http://www.epic.org/privacy/drm/> (last visited Oct. 12, 2006).

⁵² *Id.*

⁵³ One such provider, Ruckus, has been used by many colleges and universities in order to avoid potential copyright infringement lawsuits against their students. *See* University of Pennsylvania, Ruckus at Penn: FAQ, <http://www.upenn.edu/computing/music/faq.html> (last visited Oct. 15, 2006).

⁵⁴ Declan McCullagh and Milana Homsy, *Leave DRM Alone: A Survey of Legislative Proposals Relating to Digital Rights Management Technology and Their Problems*, 2005 MICH. ST. L. REV. 1, 2 (2005).

a. The Casual Copying Threat

Copyright owners may view DRM as an effective solution to the threat of casual copying. Casual copying takes place when a product's ordinary consumers make copies of that copyrighted work and distribute those copies to a small group of other individuals.⁵⁵ For example, an individual who purchases a software program, makes a couple of copies of it, and then gives those copies to two of his friends in violation of the software's end user license agreement is engaged in casual copying.

Normally, a copyright owner will only suffer a relatively small amount of actual damages from one individual's casual copying. However, such small losses can become very substantial if casual copying of a product becomes widespread.⁵⁶ Thus, those who own the rights to products that are particularly susceptible to casual copying, such as music and software, may turn to DRM in order to prevent a significant number of potential infringements.⁵⁷

b. The Napsterization Threat

Although certain copyright owners may view casual copying as a threat to their profits, casual copying has existed in some form for decades, yet DRM is a relatively recent phenomenon. Though copyright owners may wish to reduce the level of casual copying, the threat of casual copying is not the most serious concern to copyright owners. Rather, copyright owners most fear the threat of "Napsterization," which according to one scholar "assumes that there are many people, some of them technically skilled, who want to distribute [a copyrighted] work via peer-to-peer networks," and "once [the digital] content appears on a p2p network, there is no stopping these people from infringing."⁵⁸

For DRM to successfully defend against the Napsterization threat, the DRM technology must be so effective that it "must ultimately prevent even *one* copy of a digital file from breaking the security of the DRM system, because one copy may be widely distributed and used over the

⁵⁵ Ryan Roemer, *Locking Down Loose Bits: Trusted Computing, Digital Rights Management, and the Fight for Copyright Control on Your Computer*, 2003 UCLA J.L. & TECH. 8 (2003), http://www.lawtechjournal.com/articles/2003/08_040223_roemer.php.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (quoting Ed Felten, *DRM, and the First Rule of Security Analysis*, FREEDOM TO TINKER (Mar. 19, 2003), <http://www.freedom-to-tinker.com/archives/000317.html>).

internet.”⁵⁹ In other words, the “DRM technology must be strong enough to stymie even the most clever and determined adversary.”⁶⁰

3. Limitations as an Alternative to Litigation

Despite its widespread use among music and video manufacturers, DRM is unlikely to ever serve as a true alternative to copyright litigation. First, DRM, as the name implies, only seeks to prevent certain forms of digital infringement. Even if DRM were to completely eliminate both the threats of casual copying and Napsterization, it would have no impact on infringement of non-digital works. Therefore, all of the problems of the current system discussed earlier⁶¹ would remain when dealing with the infringement of non-digital works such as photographs.

Furthermore, many of the wealth disparities that impact litigation⁶² would also impact the use of DRM by digital copyright owners. Wealthy copyright owners, just as they can afford to litigate even the most tenuous copyright infringement claims, have the resources to purchase or develop the very best DRM technology available and use it to protect all the digital files they own. Poor copyright owners, however, are unlikely to afford the best DRM technology. In fact, some may not afford any DRM technology at all. Thus, even if DRM technology developed to the point where DRM protections could never be circumvented, it is unlikely that digital copyright infringement would disappear altogether. While infringement of RIAA and MPAA music and videos may stop, independent content producers, particularly those who develop their work for non-commercial purposes, would still have to struggle with protecting their intellectual property rights.

Finally, and perhaps most importantly, it is highly unlikely that DRM technology will ever develop to the point where circumvention is completely impossible, for “[t]o date, most DRM systems have been circumvented with trivial effort.”⁶³ Though the music and video content industry continues to devote considerable resources towards the “holy grail” of DRM that can never be circumvented, there is no indication that the industry will ever reach this goal.⁶⁴ Since all it takes is one individual to circumvent a DRM technology to open the floodgates of Napsterization, it appears that more effective DRM will not “plug the copyright holes of the digital age,” but only, at best, delay Napsterization and prevent a majority

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See discussion *supra* part I.A & B.

⁶² *Id.*

⁶³ Roemer, *supra* note 55.

⁶⁴ *Id.*

infringements stemming from casual copying.⁶⁵ Thus, DRM, at least in its current incarnation, is unlikely to provide an effective alternative to the traditional copyright litigation system.

B. Court-Sponsored Mediation

1. What is Mediation?

Mediation is a form of alternative dispute resolution where a disinterested third party—referred to as a “neutral” or “mediator”—helps the parties involved in a dispute “design their own resolution by means of a mutually agreed-upon solution.”⁶⁶ Throughout the mediation process, the neutral “serves as a translator, guiding the parties to reach an agreement,” and “expands the parties’ available resources by providing an understanding of the complicated issues at hand as well as an unemotional analysis of the underlying problem.”⁶⁷ In other words, “[m]ediation deflects the focus of the dispute away from rights, winners, and losers,” and instead “focuses on the parties’ interests and mutual gains,” which provides the disputants with an opportunity to “strengthen relationships of trust and respect or terminate the relationship altogether in a manner that minimizes mental anguish as well as monetary costs.”⁶⁸ In order to promote candid and open discussion between the parties, information disclosed and statements made during mediation proceedings are held confidential.⁶⁹

Although mediation has traditionally been a voluntary process where neither party is compelled to participate,⁷⁰ many state and federal courts, recognizing mediation’s potential to amicably resolve disputes without costly litigation, have established court-sponsored mediation programs for certain types of civil disputes.⁷¹ As of 1996, 51 federal district courts had created such court-sponsored mediation programs;⁷² it is believed that the passage of the Alternative Dispute Resolution Act of

⁶⁵ *Id.*

⁶⁶ Kevin M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 305-06 (2004).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ United States Court of Appeals for the Fourth Circuit, Fourth Circuit Mediation Program, <http://www.ca4.uscourts.gov/jabout.htm> (last visited Dec. 3, 2006).

⁷⁰ Bar Association of San Francisco, Mediation Services Program, <http://www.sfbar.org/adr/vem.aspx> (last visited Dec. 3, 2006).

⁷¹ *See, e.g.*, 4TH CIR. R. 33 (instituting a mandatory mediation program).

⁷² ELIZABETH PLAPINGER AND DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 17 (1996).

1998,⁷³ which requires every federal district court to implement at least one court-sponsored alternative dispute resolution program, has caused even more federal district courts to consider court-sponsored mediation. In fact, some courts, such as the Northern District of Illinois, have compelled certain civil litigants to submit their disputes to the mediation process prior to trial.⁷⁴

2. Mediation and Intellectual Property Disputes

Some have argued that mediation is the process best suited to handle many intellectual property disputes.⁷⁵ Intellectual property disputes—whether rooted in copyright, trademark, or patent law—are often more complex and difficult to comprehend than other types of litigation.⁷⁶ However, many important figures in the civil litigation process, such as judges and jurors, may not understand the issues before them due to an inability to understand confusing scientific or technical issues.⁷⁷ By participating in mediation, parties in intellectual property disputes can select neutrals that possess the expertise necessary to “concentrate on the details and specifics of the cases, as opposed to trying to learn or better understand the technical process,” which should “result in a fairer resolution to both parties.”⁷⁸

Economic concerns, however, likely explain why mediation and other forms of alternative dispute resolution are often promoted as alternatives to traditional litigation in intellectual property disputes. Due to their highly complex nature, intellectual property disputes are among the most costly to litigate, with the typical intellectual property lawsuit costing more than \$400,000.⁷⁹ While copyright lawsuits are often less expensive to litigate than trademark or patent disputes,⁸⁰ they remain costly—for instance, the median cost to litigate a “low stakes” copyright dispute

⁷³ 28 U.S.C. § 651.

⁷⁴ See discussion *infra* Part II.B.3.

⁷⁵ See, e.g., David Allen Bernstein, Note, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 CARDOZO J. CONFLICT RESOL. 139, 140 (2005) (arguing that mediation is the process best suited to guide parties to mutually beneficial solutions in trademark disputes).

⁷⁶ See Scott Blackmand and Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716 (1998) (“Frequently, the legal issues require an arbiter to develop an understanding of the underlying technology involved.... Highly technical issues also present a substantial economic incentive to favor ADR methods.”).

⁷⁷ Bernstein, *supra* note 75, at 154-55.

⁷⁸ *Id.* at 155.

⁷⁹ Lemley, *supra* note 66, at 311.

⁸⁰ Bernstein, *supra* note 75, at 156.

(defined as damages less than \$1 million) through discovery is \$101,000, with the median cost of litigating a “low stakes” dispute through trial and appeal is \$249,000.⁸¹ In contrast, the average cost of resolving a dispute through mediation is \$50,000.⁸² Furthermore, intellectual property disputes, particularly patent litigation, often take a significant amount of time to litigate. Although copyright and trademark disputes, unlike patent disputes, rarely face the danger of a very lengthy trial, the parties often will have “a genuine concern for swift resolution” in order to “prevent companies from experiencing devastating financial setbacks.”⁸³ Mediation, “by allowing the parties to begin negotiations immediately, without having to wait months or years to appear on a court docket,” may greatly reduce economic costs by resulting in a speedier resolution than traditional civil litigation.⁸⁴

3. The U.S. District Court for the Northern District of Illinois: A Case Study in Court-Sponsored Mediation

The U.S. District Court for the Northern District of Illinois has been a pioneer in implementing court-sponsored mediation in certain intellectual property disputes. On September 30, 1996, this district court amended its local rules⁸⁵ to create the Lanham Act Mediation Program. This mediation program, which was “the result of collaboration between the intellectual property bar and the judicial leadership in the U.S. District Court for the Northern District of Illinois,”⁸⁶ sought to provide speedier and more cost-effective resolutions to trademark disputes arising under the Federal Trademark Act of 1946 (the “Lanham Act”).⁸⁷

a. Program Structure

Under the local rules, all Lanham Act cases in the Northern District of Illinois are automatically assigned to the Lanham Act Mediation Program.⁸⁸ Despite this initial assignment, the program is voluntary, for the

⁸¹ AM. INTELL. PROP. ASS’N, *supra* note 17, at 96-97 tbl.22 (2003).

⁸² Stephen Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 449-50 (2003).

⁸³ Bernstein, *supra* note 75, at 157.

⁸⁴ *Id.*

⁸⁵ N.D. Ill. L.R. 16.3.

⁸⁶ Jennifer Shack and Susan M. Yates, *Mediating Lanham Act Cases: The Role of Empirical Evaluation*, 22 N. ILL. U. L. REV. 287, 288 (2002).

⁸⁷ 15 U.S.C. § 1051-1127.

⁸⁸ N.D. Ill. L.R. 16.3.

parties can decline to participate.⁸⁹ However, if the parties do not wish to participate, they must submit a joint written statement to the court outlining the reasons for non-participation, without disclosing which party in the dispute did not want to enter mediation.⁹⁰ If the parties do wish to commence mediation through the program, they must submit a joint written notice to the court confirming their intent to participate.⁹¹ The parties must submit a joint written notice regarding their participation in the program by the first scheduling conference or within sixty days of the filing of the complaint, whichever occurred earlier.⁹²

Parties choosing to mediate their dispute through the program would commence mediation within 45 days of submitting the joint written notification to the court.⁹³ The court would choose mediators from a roster of neutrals who have practiced law related to the Lanham Act for at least five years or who have served as neutrals for three or more years.⁹⁴ Mediation would end within 30 days of its commencement, at which point the mediator would have ten days to report the outcome of the mediation to the district court.⁹⁵

b. Empirical Measure of Performance

The Center for Analysis of Dispute Resolution Systems (CAADRS), in response to concerns from the district court and the Illinois bar that the program was rarely used and a potentially a failure, conducted a research study to evaluate the Lanham Act Mediation Program's effectiveness.⁹⁶ CAADRS conducted its study by surveying 202 lawyers and 30 mediators who had been affected by the Lanham Act Mediation Program,⁹⁷ as well as reviewing court dockets for all Lanham Act cases filed between January 6, 1997, and December 31, 1999.⁹⁸

The CAADRS study resulted in several key findings. Though the relatively rare use of court-sponsored mediations was primarily attributed to many Lanham Act cases settling before mediation could have realistically

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² For more information on the structure of the Lanham Act Mediation Program, see Shack and Yates, *supra* note 86, at 289.

⁹³ N.D. Ill. L.R. 16.3, App. B.

⁹⁴ N.D. Ill. L.R. 16.3, App. B, § III.A.

⁹⁵ N.D. Ill. L.R. 16.3, App. B.

⁹⁶ Shack and Yates, *supra* note 86, at 290.

⁹⁷ *Id.* at 295.

⁹⁸ *Id.* at 294.

taken place⁹⁹ as well as attorneys and mediators failing to comply with the local rules by not submitting the proper forms to opposing counsel or the court,¹⁰⁰ the lawyer survey indicated that many attorneys did not believe mediation was a viable option given their client's needs. For instance, 63.96 percent of lawyers stated that a client's need for injunctive relief made a case inappropriate to mediate,¹⁰¹ with 46.85 percent concluding that "the need to establish legal precedent made mediation unsuitable."¹⁰² Lawyers found that cases were most amenable to mediation when there was a need to avoid the expense of litigation, quickly resolve the dispute, or preserve an ongoing business relationship.¹⁰³ Mediators who were surveyed expressed virtually identical sentiments.¹⁰⁴ Finding that the program was "sufficiently effective," few changes to the program were recommended.¹⁰⁵

4. Problems with Mediating Copyright Disputes

Despite assertions to the contrary by proponents of mediation, court-sponsored mediation in copyright disputes is unlikely to resolve the underlying problems with the current copyright system. Many copyright disputes are not easily amenable to mediation. Just as a large percentage of Lanham Act disputes involve a request for injunctive relief, plaintiffs in copyright disputes also often ask for remedies that are difficult to obtain in mediation, including injunctions.¹⁰⁶

More importantly, many plaintiffs, even those in copyright infringement lawsuits that do not request injunctive relief, have little incentive to choose mediation over litigation. Lanham Act disputes, by their very nature, often involve businesses as parties, many of whom have pre-existing relationships that they wish to preserve. Many copyright litigants, however, do not even have a relationship with each other prior to the lawsuit, let alone have an incentive to preserve such a relationship. For instance, the RIAA and similar organizations have little incentive to submit their disputes with individual infringers to court-sponsored mediation, particularly when the facts are straightforward or the defendant cannot afford a lawyer. In such situations, wealthy plaintiffs—particularly wealthy plaintiffs who have sued many individuals for copyright infringement and have expert knowledge of the relevant law and the process—may believe

⁹⁹ *Id.* at 298.

¹⁰⁰ *Id.* at 300-01.

¹⁰¹ *Id.* at 306.

¹⁰² *Id.*

¹⁰³ *Id.* at 305.

¹⁰⁴ *See id.* at 308 ("Mediator responses differed little from those of attorneys.").

¹⁰⁵ *Id.* at 322.

¹⁰⁶ *See generally id.*

they have little to gain from mediation, since the defendant would likely accept any settlement offer made by the plaintiff or risk a default judgment. Wealthy plaintiffs, rather than viewing mediation as a cost-effective method of resolving disputes, may consider it a hindrance, for participating in mediation may cause defendants who would otherwise settle immediately after being sued to hold out until the mediation process has concluded, thus causing the plaintiff to incur additional costs.¹⁰⁷

But perhaps even more significantly, court-sponsored mediation programs such as those in the Northern District of Illinois only apply to lawsuits that have actually been filed. Court-sponsored mediation will do nothing to protect the intellectual property rights of individuals who are too poor to afford an attorney, or whose damages do not justify the cost of hiring an attorney to litigate the dispute in federal court.¹⁰⁸ Furthermore, it is not socially optimal for litigants in certain disputes to settle their disputes out of court, for an excessive number of settlements, particularly when certain issues are ambiguous, may inhibit the development of copyright law.¹⁰⁹ Thus, one must move beyond mediation and consider other alternatives to the traditional copyright litigation system.

C. *The Lemley/Reese Administrative Dispute Resolution Proposal*

Professors Mark Lemley and R. Anthony Reese have recently argued that lowering the costs of enforcing intellectual property rights may reduce instances of copyright infringement on the internet—particularly infringement stemming from widespread use of peer-2-peer (p2p) distribution systems—without restricting technological innovation.¹¹⁰ Finding a p2p levy system impractical and undesirable,¹¹¹ Lemley and Reese have proposed a streamlined copyright dispute resolution system modeled after the Uniform Dispute Resolution Policy (UDRP) for internet domain name disputes.¹¹²

¹⁰⁷ See discussion *supra* Part I.A.1.

¹⁰⁸ See discussion *supra* Part I.A.2.

¹⁰⁹ See discussion *supra* Part I.B.

¹¹⁰ See Mark Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1405 (2004) (“A more palatable alternative to raising sanctions by putting a small number of college students in jail (or bankrupting them) in order to deter their peers is to lower the cost of enforcement.”).

¹¹¹ *Id.* at 1410-11.

¹¹² *Id.* at 1410-25.

1. The Lemley/Reese Proposal: A Brief Summary

Under the alternative dispute resolution system proposed by Lemley and Reese, copyright owners could enforce their intellectual property rights “either by pursuing a civil copyright infringement claim in federal court or by pursuing a claim in an administrative dispute resolution proceeding before an administrative law judge in the Copyright Office.”¹¹³ However, just as the UDRP “is designed to resolve only straightforward cases of bad-faith cybersquatting,”¹¹⁴ the Lemley/Reese dispute resolution system “would be available only for relatively straightforward claims of copyright infringement.”¹¹⁵ Thus, Lemley and Reese argue that these administrative dispute resolution proceedings “should be available only in cases where evidence shows that the person targeted has uploaded to a p2p network at least one copy of at least 50 copyrighted works during any 30-day period.”¹¹⁶ Furthermore, Lemley and Reese’s proposed system would automatically exclude from the administrative dispute resolution system any case where the defendant may raise a plausible mistaken identity or fair use defense,¹¹⁷ for Lemley and Reese believe that “[r]esolution of such disputes is better handled in an ordinary court proceeding.”¹¹⁸

The copyright infringement cases accepted into this administrative dispute resolution system would be litigated with very little, if any, discovery, and no face-to-face argument. Rather, both parties “would present their evidence and argument online.”¹¹⁹ During arguments, the copyright owner would first establish a *prima facie* case for copyright infringement, and the uploader would then “have the opportunity to rebut or defend against the claim.”¹²⁰ Since raising a non-frivolous mistaken identity or fair use defense would force the administrative law judge to remove the case from the administrative dispute resolution process and into the traditional court system, accused uploaders would only have a small number of legal defenses available. For instance, uploaders may argue that “the copyright owner is engaged in copyright misuse and is therefore not entitled to enforce the copyrights until the misuse has been purged,” or that

¹¹³ *Id.* at 1413.

¹¹⁴ *Id.* at 1411.

¹¹⁵ *Id.* at 1413.

¹¹⁶ *Id.* Lemley and Reese also state that “the procedure could be available only if the uploader has made available on a p2p network fifty copyrighted works of the complaining copyright owners,” in order to “provide an incentive for copyright owners to cooperate in bringing a single suit.” *Id.* at 1419.

¹¹⁷ *Id.* at 1416.

¹¹⁸ *Id.* at 1415-16.

¹¹⁹ *Id.* at 1417.

¹²⁰ *Id.* at 1415.

“the copyrights are unenforceable because of alleged fraud in registering the works as works made for hire.”¹²¹

However, even these defenses would have their limits—under the Lemley/Reese proposal, the administrative law judge would not be permitted to consider misuse or fraud defenses unless the uploader obtained a declaratory judgment from a federal district court within 30 days of the administrative law judge’s decision on all aspects of the case other than such defenses.¹²² Any party dissatisfied with an administrative law judge’s decision would have the right to appeal the decision to a panel of administrative judges, and any party dissatisfied with such an appeal may then bring the dispute to a federal district court, though “a party that brings an unsuccessful appeal could be required to pay the costs of the appeal.”¹²³

Lemley and Reese argue that their proposed dispute resolution system would “provide a quicker, lower-cost alternative for copyright owners to enforce their rights against individual large-scale infringers on p2p networks.”¹²⁴ Since their proposed system “avoids the obvious mistakes of the UDRP,” such as the “lack of an administrative appeal, and a tendency to resolve difficult questions best left for the courts,” Lemley and Reese believe their system would “prove an attractive alternative to litigation for copyright owners and not unfair to accused infringers.”¹²⁵ Although this proposed administrative dispute resolution system would cap statutory damages at \$250 per work infringed,¹²⁶ Lemley and Reese argue that the significantly reduced costs of litigation through the administrative procedure “would make enforcement quicker, cheaper, and easier and would allow copyright owners to bring claims against greater numbers of uploaders,” which would more than offset the lower damages.¹²⁷ By making it cheaper and easier to sue direct infringers, Lemley and Reese believe copyright owners will become significantly less likely to sue technological innovators, such as p2p network creators, since such lawsuits would be more costly to pursue.¹²⁸

¹²¹ *Id.* at 1417.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1418.

¹²⁶ Lemley and Reese argue that a higher cap, or no cap at all, is not necessary, for many of the worst infringers, such as those who uploaded 1000 or more songs, would not be able to afford to pay higher damages. *Id.*

¹²⁷ *Id.* at 1418-19.

¹²⁸ *Id.* at 1434.

2. How Lemley/Reese Falls Short

The Lemley/Reese proposal, if enacted as described, would do very little to improve the current flawed copyright litigation system. In fact, virtually all of the current system's flaws would remain intact even if Lemley and Reese's proposed reforms were implemented.

a. Wealthy Plaintiffs Have No Incentive to Use the Lemley/Reese System

Lemley and Reese correctly observe that one of the primary goals of organizations such as the RIAA and MPAA is to reduce the level of digital infringement of their copyrighted works. Lemley and Reese also acknowledge that these organizations may choose to further this goal through two strategies: suing the innovators who create applications such as Grokster and Kazaa that are used to share copyrighted works, or suing individual file sharers who use these services to share copyrighted works. According to Lemley and Reese, copyright holders have a greater incentive to sue innovators, even though such lawsuits are socially undesirable, because the tactics they would need to employ to sue a critical mass of individual file sharers are too expensive. Thus, Lemley and Reese believe that reducing the costs of suing individual file sharers would induce the RIAA and the MPAA to further their goal of reducing digital piracy by suing individuals rather than innovators.¹²⁹

But are Lemley and Reese correct that cost has prevented the RIAA and MPAA from filing more lawsuits against individual file sharers? Contrary to the bleak picture Lemley and Reese paint, litigation against file sharers has not been a financial drain on the RIAA and MPAA—these organizations have been able to break even on their litigation costs.¹³⁰ The RIAA and MPAA, as repeat players in the copyright litigation process, each having sued thousands of file sharers, have mastered the art of “assembly line” litigation, where large numbers of individuals are sued in waves on virtually identical grounds. These organizations use boilerplate complaints which do not explain how, when, or where the defendant's alleged infringement took place, but just provide a list of songs.¹³¹ In the very few instances where such boilerplate complaints have been challenged for sufficiency, the RIAA has always prevailed.¹³²

¹²⁹ See discussion *supra* part II.C.1.

¹³⁰ Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM, Sept. 29, 2004, <http://www.law.com/jsp/article.jsp?id=1095434496352>.

¹³¹ Beckerman, *supra* note 15.

¹³² *Id.*

The Lemley and Reese dispute resolution system, while attempting to make litigation against individual file sharers more efficient, would actually cause such litigation to become significantly less efficient for the RIAA and MPAA. The assembly line litigation model is dependent on quick settlements obtained at a low cost. Since the overwhelming majority of file sharers settle or default shortly after being identified due to an inability to afford a defense, these organizations are able to quickly recoup their litigation costs and in effect have one wave of lawsuits fund the next wave of lawsuits.¹³³ But the dispute resolution system, if chosen by the plaintiffs, would raise costs for the RIAA and MPAA and lower costs for the defendants. The RIAA and MPAA, rather than using boilerplate complaints and other aspects of assembly line litigation in order to reduce costs, would, at some point, have to produce more specific information about the facts surrounding a defendant's alleged infringement, thus increasing their costs.

Furthermore, by holding such hearings online, the RIAA and MPAA can no longer use venue as a method of inducing a settlement. Holding such proceedings online and conducting a large number of them in a relatively short amount of time would, instead of encouraging defendants to settle, give them a greater incentive to fight the lawsuit at least through the initial hearing. The high cost of traditional litigation is thus not a disadvantage of suing individual file sharers, but an advantage, in that it induces file sharers to accept heavily one-sided settlement agreements with little or no resistance. Given that it is in the RIAA and MPAA's interest to place as many barriers as possible to prevent the defendant from pursuing a defense, these organizations would have little reason to choose to initiate proceedings in the administrative dispute resolution system instead of in district court.

b. Lemley/Reese Does Not Further the Public Interest

Since use of the alternative system is entirely at the discretion of the plaintiff, poor defendants sued by wealthy plaintiffs such as the RIAA will still face considerable difficulties putting on a defense, for wealthy plaintiffs would find it in their best interest to choose district court over the administrative proceeding. But even if a plaintiff chose to sue a file sharer in an administrative proceeding rather than district court, the Lemley/Reese proposal would continue to disadvantage defendants by automatically removing all cases involving mistaken identity and fair use defenses to the district court. Given the limited means of the typical file sharer defendant,

¹³³ von Lohmann, *supra* note 130.

requiring that these defenses only be raised in district court is the equivalent of precluding such defenses entirely.

Such outcomes are clearly unjust, for individuals falsely accused of digital copyright infringement, as well as those who make fair use of copyrighted works, should not have to pay relatively large settlements due to the high costs of litigation. However, the parties themselves are not the only victims of such a system. Since the Lemley/Reese system, like the current system, would preclude those with valid defenses from pursuing them to a final judgment, many important controversies of copyright law will remain unresolved.¹³⁴

c. File Sharing Networks are Not the Only Source of Digital Infringement

The Lemley/Reese system, like DRM,¹³⁵ does nothing to resolve disputes relating to infringement of non-digital works. However, Lemley/Reese has the added distinction of not even attempting to resolve many cases of digital copyright infringement. Although Lemley and Reese correctly observe that much infringement takes place on p2p networks, their proposal does not provide an expedited dispute resolution system for works that are distributed on Usenet newsgroups, in IRC chat rooms, and regular websites. Even if the RIAA and MPAA did use the Lemley/Reese system to sue a greater number of individual users, the system's exclusion of Usenet, IRC, websites, and other non-p2p sources of infringement would merely induce potential infringers to use these other methods of obtaining copyrighted works for free.¹³⁶

Similarly, many types of digital works are rarely infringed through p2p, but are infringed through more traditional methods. Internet graphics and website layouts, for instance, are very rarely, if ever, infringed through file sharing programs, but often are infringed when one webmaster simply copies another webmaster's design and places it on his or her website without permission. Another common example of infringement includes webmasters copying and pasting articles and other content from a competing site and then claiming it as their own.¹³⁷ However, given the low

¹³⁴ See discussion *supra* part I.A.

¹³⁵ See discussion *supra* part II.A.3.

¹³⁶ In fact, such a phenomenon has already happened in the p2p context—when the RIAA began to file mass lawsuits against Kazaa users, file sharers merely migrated to other file sharing programs where it was more difficult for the RIAA to obtain identifying information and pursue a lawsuit. See Thomas Mennecke, *The Eventual Fall of Kazaa*, SLYCK NEWS, Dec. 4, 2005, <http://www.slyck.com/news.php?story=1014> (discussing Kazaa's decline).

¹³⁷ Online content theft has become such a widespread problem that Indigo Stream Technologies has created a search engine that allows webmasters to search the internet for

economic value of most online graphics and content, owners who have had their works infringed are rarely able to pursue their claims against the infringer.¹³⁸ Since the Lemley/Reese administrative dispute resolution system would exclude online infringements that have not taken place on a p2p network, such individuals, who are truly in need of a fast and cheap alternative to traditional copyright litigation, would remain unable to protect their intellectual property against infringers.

III. FEDERAL SMALL CLAIMS COURT: AN EFFECTIVE ALTERNATIVE

Lemley and Reese, despite their proposal's flaws, correctly observe that reforms to the traditional copyright litigation system are necessary. However, creating a completely new system to handle such disputes is not necessary. The federal government could resolve many of the problems with digital (and non-digital) copyright infringement by establishing an institution that states have used with great success for almost a century: small claims court.

A. State Small Claims Courts: History and Purpose

The first small claims court was created in the state of Kansas in 1912.¹³⁹ Since then, every state has created at least one type of small claims court.¹⁴⁰ While each state small claims court differs in structure, financial claim limits, and procedure, "the concept is essentially the same: relatively minor disputes involving dollar amounts that are insufficient to warrant processing the case through the normal court procedure justify expedited and simplistic handling."¹⁴¹ Small claims courts are known for taking "holistic approaches to problem solving and dispute resolution,"¹⁴² and "allow maximum access to the courts by individuals unable to afford an attorney" by simplifying many rules of evidence and civil procedure.¹⁴³ Today, "[s]mall claims courts are a fundamental component of the

stolen copies of their articles, layouts, graphics, and other content. See Copyscape, Website Plagiarism Search, <http://www.copyscape.com/> (last visited Oct. 15, 2006).

¹³⁸ See discussion *supra* part I.A.2.

¹³⁹ Samuel Schwarz, *Should a Lawyer be Allowed in Small Claims Court? Some Empirical Light*, 39 AM. ECONOMIST 65 (1995).

¹⁴⁰ *Closing Arguments*, CONN. L. TRIB., Apr. 22, 2002, at 18.

¹⁴¹ Bruce Zucker and Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 317 (2003).

¹⁴² *Id.*

¹⁴³ Marc Anthony Douthit, *Humbling Experiences: Trials of Small Claims*. 27 LITIG. 27 (2000).

American legal system.”¹⁴⁴ While some organizations have criticized the small claims court system, such organizations have been “primarily critical of the low dollar limits throughout the country,” which in some states can be as low as \$1,000.¹⁴⁵

B. The Structure of a Federal Copyright Small Claims Court

1. Similarities to Lemley/Reese

A federal copyright small claims court would share many of the same structural elements as the Lemley/Reese administrative dispute resolution system. Given the potential for large geographic distances between litigants, parties should have the opportunity to participate in the hearings through the internet or telephone or, if both parties are not geographically distant, an in-person hearing at a mutually agreed upon location.¹⁴⁶ To further the goal of an expedited dispute resolution process, administrative law judges who possess the appropriate expertise will hear these disputes, and while either party may be represented by a lawyer, the rules of evidence and civil procedure would be relaxed to allow a pro se litigant to proceed without a significant disadvantage.

2. Departures from Lemley/Reese

In order for a federal small claims court to serve as an effective dispute resolution mechanism, several key elements of the Lemley/Reese proposal must be abandoned. Most importantly, the plaintiff must not have the sole right to determine whether initial adjudication takes place in the small claims court or the district court, for wealthy plaintiffs who wish to sue poor defendants will file in district court to strengthen their bargaining position and ensure the most favorable settlement possible.¹⁴⁷ Rather, either the plaintiff or the defendant should have the right to compel the small claims court to hear the dispute rather than a district court.

By allowing either party to force the initial litigation to take place in the small claims court, wealthy litigants will find it more difficult to use their greater resources and expertise to compel an unjust settlement from the other party. Wealthy plaintiffs such as the RIAA, for instance, could no

¹⁴⁴ Zucker and Herr, *supra* note 141, at 316.

¹⁴⁵ *Id.* at 318.

¹⁴⁶ Although Lemley and Reese do not address the issue of service of process in their article, it does not seem necessary for any streamlined copyright dispute resolution system to adopt different service of process requirements than those used in traditional litigation.

¹⁴⁷ See discussion *supra* part II.B.2.a.

longer use venue or unnecessary discovery motions as a means of making a defense more expensive. Similarly, poor plaintiffs could pursue their claims against any defendant, regardless of the defendant's wealth or the economic value of the infringed work, without the high costs of litigating a dispute in federal district court.¹⁴⁸

Unlike the Lemley/Reese system, the federal small claims court would consider all of a defendant's potential defenses, including mistaken identity, fair use, and copyright misuse. This will not only ensure that individuals who have not truly infringed are forced to accept one-sided settlements solely for economic reasons,¹⁴⁹ but also further the public interest by providing technological innovators and the general public with an indication of how courts may react to certain fair use and other defenses that have not yet reached a final judgment.¹⁵⁰

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,¹⁵¹ 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. Such an allowance for attorney's fees and costs on appeal may also reduce the wealth disparity, for plaintiffs and defendants of limited means who have had their claims or defenses validated at the small claims court level may be more likely to obtain counsel on a pro bono, contingency, or reduced-fee basis, and thus deter wealthy plaintiffs or defendants from drawing on their greater resources to file frivolous appeals.

Finally, the small claims court system would have jurisdiction to hear all cases involving copyright infringement, regardless of whether infringement took place online or offline. Though digital infringement—particularly infringement on p2p networks—has brought many of the needs for reform to light, those who have had their works infringed in a non-digital environment should also possess the right to an inexpensive and expedited hearing process. Similarly, poor defendants who have been accused of infringing non-digital works by wealthy plaintiffs should have the right to put on a defense without being pressured to accept a one-sided or unfair settlement agreement due to an inability to afford a lawyer.

¹⁴⁸ Because litigants would retain the right to a de novo trial in the federal district court, a litigant's 7th Amendment right to a jury trial would not be impacted.

¹⁴⁹ See discussion *supra* part I.A.1.

¹⁵⁰ See discussion *supra* part I.B.

¹⁵¹ U.S. Const., amend. VII.

3. Departures from the State Small Claims Court Model

Although many elements of the state small claims court model is easily transferable to a federal small claims court, the unique nature of copyright law requires that a copyright small claims court abandon the very concept of jurisdictional limits that are used in every state small claims court. Proponents of jurisdictional limits generally argue that cases that exceed a certain amount of damages—commonly \$5,000—“should be directed to the regular civil track” so that defendants may “maintain their procedural due process rights,” which often involves the “opportunity to conduct discovery.”¹⁵² Many copyright actions, however, may involve astronomical damage amounts due to the existence of statutory damages, which generally range from \$750 to \$30,000 for every time one work has been infringed.¹⁵³ A jurisdictional limit, especially one as low as \$5,000, would likely preclude many cases from the small claims court system, particularly lawsuits against file sharers that should require little or no discovery.

There are certain safeguards a federal small claims court could implement in order to preserve a party’s right to discovery and other safeguards without a blanket jurisdictional limit. For instance, if a party in a dispute compels participation in the small claims court despite a clear need for extensive discovery, the district court may require that such a party pay the discovery costs of the opposing party if, on appeal, the district court determines that it was inappropriate to compel small claims court proceedings without first going through discovery.

Furthermore, a federal small claims court could still play an important role in dispute resolution between two wealthy parties engaged in multi-million dollar litigation. Small claims court greatly resembles a form of alternative dispute resolution known as a “minitrial,” which is defined as “a structured settlement process in which the parties agree to a procedure for presenting their case in an abbreviated version (usually no more than a few hours or days)” to an uninvolved neutral who presides over the hearing and then helps the parties to evaluate the strengths and weaknesses of their case.¹⁵⁴ The parties, after seeing “how their case and that of the other party play out” in an abbreviated trial and obtaining initial reactions from the neutral, can now enter into “more fruitful” settlement negotiations with the neutral acting as a mediator.¹⁵⁵ If these settlement negotiations fail, “the

¹⁵² Zucker and Herr, *supra* note 141, at 347.

¹⁵³ 17 U.S.C. § 504(c)(1).

¹⁵⁴ Major Patrick E. Tolan, Jr., USAF, *The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes*, 40 A.F. L. REV. 89, 92 (1996).

¹⁵⁵ *Id.*

neutral would be required to render a detailed evaluation of the strengths and weaknesses of each side's case and the likely outcome of litigation."¹⁵⁶

Thus, litigants in more "traditional" copyright infringement actions may voluntarily agree to an initial round of litigation in the small claims court, with or without extensive discovery, in order to evaluate and potentially settle their cases without expensive litigation in district court. The small claims court, in order to promote greater settlement in traditional copyright litigation suits, may allow both parties to agree beforehand that the small claims court judgment would be non-binding on the parties.

4. Criticisms and Unresolved Issues

Of course, a federal small claims court system would not solve all efficiency and equity concerns relating to copyright litigation. This subsection will discuss some potential criticisms of such a system.

a. Would a Federal Small Claims Court Lead to Frivolous Lawsuits?

Some may fear that instituting a federal copyright small claims court may create new problems. In particular, critics may argue that creating a small claims court—or any system that makes it very inexpensive to initiate and pursue a lawsuit—would lead to a significant increase in the number of frivolous copyright infringement lawsuits filed. In effect, some may fear that creating a small claims court would eliminate one problem by creating another.

Such concerns, while valid, can be laid to rest relatively easily. One must remember that all the procedural mechanisms that currently prevent a flood of frivolous litigation in the federal courts, such as the sanctions available under Rule 11 of the Federal Rules of Civil Procedure,¹⁵⁷ would also apply to the federal small claims court system. If Rule 11 is insufficient to deal with the problem, Congress may pass additional legislation to reduce the incidence of frivolous claims, just as it did when it created the Prison Litigation Reform Act to reduce the number of frivolous lawsuits filed by incarcerated individuals.¹⁵⁸

For instance, Congress may ban plaintiffs with a history of filing frivolous or unfounded lawsuits from bringing future actions in the small claims court, forcing such litigants to initiate any future lawsuits in federal district court. A federal small claims court could also deviate from the state

¹⁵⁶ Catherine Cronin-Harris, *ADR and Beyond: Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 854 (1996).

¹⁵⁷ Fed. R. Civ. P. 11.

¹⁵⁸ 18 U.S.C. § 3626.

small claims court model by allowing defendants who have been victimized by nuisance lawsuits to pursue malicious prosecution claims.¹⁵⁹

b. The Small Claims Court and Lawsuits against Intermediaries

Others may question whether this federal small claims court, if implemented, would lessen the incidence of copyright infringement lawsuits against technological innovators. After all, reducing the number of expensive copyright infringement lawsuits against intermediaries such as Grokster was one of the primary goals behind the Lemley/Reese proposal.¹⁶⁰ While Lemley and Reese believed that reducing the number of lawsuits against intermediaries would happen only if the government made it cheaper and easier for the RIAA and MPAA to recover from direct infringers, this proposed federal small claims court would significantly interfere with the “assembly line litigation” practiced by these organizations as well as negate many of the advantages these organizations have enjoyed due to the very large wealth disparity between themselves and the individuals they file suit against.¹⁶¹ As a result, some may argue that creating the federal small claims court may result in more, not less, lawsuits against intermediaries.

But such a criticism is based on the false premise that copyright infringement lawsuits filed against intermediaries are inherently harmful to society. As discussed earlier, lawsuits filed against intermediaries under the current copyright litigation regime are harmful because the wealth disparities between plaintiffs such as the RIAA and defendants such as Grokster are so large that the chances of an actual trial on the merits ever taking place are remote. One should not mourn Grokster because the MGM litigation forced its service to shut down—rather, one should mourn Grokster because the MGM litigation forced it to shut down *because the high costs of litigation prevented it from defending itself against MGM’s claims of infringement in a trial on the merits.*¹⁶²

A grant of summary judgment or a jury verdict finding Grokster guilty of copyright infringement would not necessarily impair further

¹⁵⁹ State small claims courts often do not allow defendants who have been victimized by nuisance lawsuits to file suit for malicious prosecution because “parties are encouraged to file small claims court actions to resolve their minor disputes as opposed to resorting to self-help or forcible means to seek their remedy,” and thus “[t]o permit an action for malicious prosecution to be grounded on a small claims proceeding would frustrate the intent of the Legislature in adopting an expeditious and informal means of resolving small disputes.” Zucker and Herr, *supra* note 141, at 333-34.

¹⁶⁰ Lemley and Reese, *supra* note 110, at 1405.

¹⁶¹ See discussion *supra* Part I.A.1.

¹⁶² Gentle, *supra* note 25.

technological innovation even if the decision caused Grokster to shut down, for presumably the decision would clarify a nebulous area of copyright law, thus providing innovators with some guidance as to how they can structure future technological innovations in a way that will not make them liable for the copyright infringements of their users. But MGM, by initiating prolonged litigation against a defendant with relatively low resources who saw no possibility of ever recouping its attorney's fees and court costs even if it did win in court, was able to eliminate a developer of a disruptive technology before obtaining a truly final judgment clarifying the state of the law.

It is the threat of *those* sorts of lawsuits that impair development and harm society, for companies may not wish to create innovative file-sharing or other technologies if they may be forced out of business by a lawsuit before even getting their day in court. And it is exactly those lawsuits that the federal small claims court would prevent. The small claims court, as discussed earlier, would not have any monetary jurisdictional limit, and either the plaintiff or the defendant could compel that litigation originate in that court.¹⁶³ Intermediaries who, like Grokster, do not have the resources to engage in protracted litigation but strongly believe their technology does not infringe may benefit from having the dispute initially heard in the small claims court, for a favorable judgment at the small claims level would allow for the recovery of attorney's fees and court costs if the judgment is upheld upon de novo review by the federal district court. Intermediaries, by having the possibility of recovering attorney's fees from the plaintiffs, will be more likely to continue to defend themselves throughout the litigation, particularly since at least one judge would have found their defense persuasive. In fact, plaintiffs may not even wish to continue to pursue such litigation.

Of course, not all intermediaries would win at the small claims level. But even these initial losses would result in greater benefits to society than maintaining the status quo. Judicial rulings on various issues, particularly in the federal court system, often come very slowly, and this slow rate of judicial decision making may have a negative impact on developing industries where judicial clarity is needed. Some industries may delay the adoption of industry standards there has been some decision rendered on an important issue, while other industries may have less development take place than would otherwise due to certain actors wishing not to enter the market until courts have clarified uncertain areas of the law.

The swift administration of justice in the federal small claims court would promote greater development of and investment in technologies that

¹⁶³ See discussion *supra* Part III.B.3.

are highly dependent on the state of copyright law, such as p2p applications. One would expect the small claims court to serve as a bellwether, providing early signals as to how courts may view various technologies, and how they may draw the line between infringement and non-infringement, or what constitutes or does not constitute fair use of a copyrighted work.

c. Inappropriate Discovery Requests and Other Methods of Intimidation

Some may argue that wealthy litigants may circumvent the spirit of the copyright small claims court by demanding that an excessive amount of discovery take place prior to adjudication in the small claims court. Since fees and costs through discovery account for more than 40 percent of the total cost of pursuing even a low stakes copyright infringement lawsuit,¹⁶⁴ wealthy litigants could continue to coerce poorer litigants into inequitable one-sided settlement agreements by forcing them to bear the significant costs of discovery prior to the informal and inexpensive small claims hearing.

But courts may prevent abuse of pre-hearing discover by applying many of the same safeguards they may use to prevent an insufficient level of discovery before initial adjudication, such as carefully examining whether extensive discovery is truly necessary for an informal small claims hearing, and sanctioning those who abuse the process.¹⁶⁵ Of course, sanctions imposed after the fact may have no deterrent effect if going through the discovery process at all may force a poor litigant to settle or drop her case. However, courts and Congress could tailor rules to address such situations. For instance, the small claims court may compel litigants with a history of filing unnecessary discovery requests against significantly less wealthy parties to pay for the cost of a poor or indigent party's discovery, with such costs refunded if discovery truly was necessary. Alternatively, when one party refuses to undergo discovery prior to the hearing, the small claims court may—for purposes of the small claims court hearing only—treat disputed facts in the way most favorable to the other party.

That said, one cannot expect any litigation reform to fix all problems with the existing dispute resolution system. Wealthy litigants, regardless of whatever rules a court may implement, will always have an advantage over poor litigants and will try to exploit that advantage to the detriment of the poorer party. When evaluating whether Congress should create a federal copyright small claims court, policymakers should not compare the small claims court to an idealized copyright litigation system, but benchmark it

¹⁶⁴ AM. INTELL. PROP. ASS'N, *supra* note 17.

¹⁶⁵ See discussion *supra* Part III.B.3.

against the system currently in place. Given the simple nature of many of the copyright disputes involving poor litigants, it is unlikely that participation in the discovery process would pose a burden for either party except under very narrow circumstances. In fact, many disputes, such as those involving website design theft, may not require discovery at all.¹⁶⁶

Even if the small claims court does not eradicate the impact of litigant wealth disparities in every situation, it is difficult to argue that adopting this system would make poor litigants as a group *worse* off than under the current system—though some poor litigants may continue to face the same obstacles as before, the majority of poor litigants will no longer be priced out of the copyright litigation system, and thus have the opportunity to defend themselves in court against copyright infringement allegations as well as enforce their own intellectual property rights even if the stakes are low.

IV. CONCLUDING REMARKS

A federal small claims court would provide a more effective dispute resolution system by addressing both efficiency and equity concerns. A small claims court, by relaxing the rules of civil procedure and evidence as well as allowing litigants to appear *pro se* without suffering significant disadvantage, would result in savings to both the litigants and the taxpayers through reducing the costs of adjudication. Further, by eliminating many of the economic barriers that have for decades prevented poor defendants and plaintiffs from pursuing meritorious defenses and claims, a small claims court would create a more equitable distribution of justice by reducing a wealthy litigant's ability to coerce a poorer party into an unfair settlement agreement.

¹⁶⁶ See discussion *supra* Part I.A.2.