Before the
House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property
"Remedies for Small Copyright Claims"

March 29, 2006

Testimony of Paul Aiken on behalf of the
Authors Guild

Mr. Chairman, I represent the Authors Guild, the largest society of published authors in the country. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. Among our more than 8,000 current members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award, as well as United States Presidents, members of the Senate and, no doubt, distinguished members of the House of Representatives.

We have a 90-year history of contributing to debates before Congress on copyright law. It's an honor and a privilege to be here today, for the Authors Guild to continue to serve that role before this committee.

<u>The Public Interest in Copyright & Adjudicating Small Infringement Claims</u>

It recently seems inevitable in policy debates about copyright that someone will pit the interest of the public against the interests of authors and other rightsholders. This is an unfortunate and false division of interests. Copyright is merely a mechanism for creating a market, and markets — experience has taught us time and again — are the surest way to assure that the public is adequately supplied with a good. Just as the public has a strong

interest in efficient and rewarding energy, food and clothing markets, it has a strong interest in the creation and maintenance of an efficient and rewarding literary market. A robust literary market, which only copyright can secure, is the most effective way to assure that valuable literary works are made available to the reading public. Scientists, historians, economists, engineers, students and teachers all benefit, directly and incalculably, from the existence of this market. So do the legions of readers of popular fiction and nonfiction. Copyright benefits the public as surely as it benefits authors and other rightsholders.

Our nation's founders understood the power and efficiency of markets well, of course, and recognized the public benefit of a market for literature and inventions when they granted Congress authority to "promote the Progress of Science and useful Arts" by extending copyright protection to authors and patent protections to inventors.

We weaken markets for valuable goods at our collective peril. When we strengthen markets for such goods, we are working unambiguously in the public's interest. One way in which we strengthen markets — in which we tether supply and demand more closely together — is by providing appropriate enforcement mechanisms for property rights. The Authors Guild is pleased that this committee is, in the public's interest, examining such mechanisms in the context of small copyright infringement claims.

The Need for a Small Claims Court

Every year, Authors Guild staff attorneys advise members on nearly 1,000 separate matters pertaining to the business aspects of their writing careers. We doubt that any other legal department in the country is in such constant, day-to-day touch with the contractual and copyright concerns of American writers. These attorneys have long had strong anecdotal evidence that authors were frustrated in pursuing legitimate copyright infringement claims because of the costs and complications attending such litigation.

In preparation for today's hearing, we sought to quantify that evidence, and conducted a two-part survey of our membership of published authors.[1] We had an enormous response to the survey, more than 1,200 authors completed each part of the surveys — a response more than large enough to accurately predict the outcome of a presidential election. (We provide detailed results for Phase II of this survey in the appendix hereto; all statistics, unless otherwise noted, are from Phase II, the results of which are more relevant to our testimony and today's discussion.) The respondents appear to represent a fair cross-section of American writers: 828 authors of nonfiction books responded, as did 443 novelists, 285 authors of children's fiction, 209 published poets, and 831 writers of freelance articles (many writers, by choice or necessity, publish in more than one category of work).[2] The respondents are also prolific: 382 had published 10 or more books; 428 had published 50 or more freelance articles.[3]

The surveys confirmed our attorneys' anecdotal evidence: most authors do not have effective access to the courts for many of their copyright infringement claims. 55% of respondents agreed that creating such a small claims court was a good idea.[4] 17% of respondents did not think it was a good idea; the remaining 28% were neutral on the issue.[5]

Such a court isn't without risks for authors. Authors, particularly nonfiction authors, use others' copyrights frequently in their works. Much of that use is fair use, in the proper, traditional, genuinely transformative sense of fair use — excerpting a limited amount of another's work to assist in the creation of a new work. (In our sample, 44% of respondents "sometimes" or "frequently" make fair use of others' works.[6]) Authors could find themselves the defendants in small-claims copyright infringement suits if a

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[1] Authors Guild Survey of Copyright Infringement & Small Claims, conducted March 23 – 25, 2006. The survey was conducted in two parts: Phase I on March 23 – 24; Phase II on March 24 – 25. More than 1,200 published writers completed each phase.
[2] Appendix, Q1-01.
[3] Appendix, Q1-02, Q1-03.
[4] Appendix, Q3-01.
[5] Ibid.
[6] Appendix, Q2-01.

rightsholder deemed a use to be unfair, to exceed the bounds of the fair use doctrine.[7] By cross-tabulating our survey results, we see that even among authors who say they frequently make fair use of others' copyrighted works in their own, 49% favor the creation of a small claims infringement proceeding. 23% of such authors oppose the creation of a small claims court; the remaining 28% are neutral.

In fact, every subgroup of respondents we can identify favors the creation of a small claims court for copyright infringement. Even the tiny subgroup that had been sued for copyright infringement favors it — 54% of such respondents favor the creation of a small claims court for copyright infringement, while 38% of those respondents oppose it.

A substantial percentage of all respondents, 31%, said that they would have used such a small claims court if one were available.[8] We would expect that many of respondents who contemplate bringing such a claim in the abstract would not act on that notion and that, in reality, a far smaller percentage of authors would commence such actions.

Why Most Authors Favor a Small Claims Court (and Why Many Don't)

More than 75% of authors who favor the creation of a small claims court for copyright infringement cited three factors they saw as supporting their view: that such a court would reduce litigation costs, that it would be more convenient, and that they could

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[7] Immediately before we asked respondents whether they favored the creation of a small claims court, we expressly alerted them that they might be defendants in such a court. The preamble to Q3-01 reads:

> Is a small claims court for copyright infringement cases a good idea? (Such a court might have jurisdiction over infringements valued at two or three thousand dollars.) Assume, for the purposes of this survey, that such a court would be federal.
>
> **Argument for:** If there were such a court, suing for copyright infringement would probably be simpler (no attorneys needed in most small claims courts), quicker and cheaper, and the existence of the court might act as a deterrent to certain types of infringement.
>
> **Argument against:** On the other hand, if you make what you believe to be fair use of other copyrighted works, excerpting them for your work, you might find yourself (or your publisher) sued in such a court if the rightsholder believed you overstepped the bounds of fair use.
>
> What do you think? We'll ask three questions about this.

[8] Appendix, Q3-04.

proceed without an attorney. (56% cited a fourth factor, that such a court was a good idea because of the increase in copyright infringement on the Internet.)[9] In completing an open-ended "other" reason for favoring the creation of a small claims court, many said that it would increase respect for copyright and serve as a deterrent to infringement.

The most frequently cited reason for opposing the creation of a small claims court for copyright infringement was that the respondent didn't believe the procedure would be "simple, effective and/or inexpensive."[10] 60% of those who opposed the creation of such a court cited this belief as a factor. 52% of those who opposed the creation of such a court feared that it would increase their risk of being sued when they made fair use of a work. In completing an open-ended "other" reason for opposing the creation of a small claims court, many thought that small claims would be inadequate to compensate for meaningful copyright violations. Many respondents feared that the creation of such a court would lead to frivolous and harassing lawsuits that would be costly to writers. A substantial number also had concerns about the competency of a small claims court to adjudicate copyright claims.

Simple, Effective, and Inexpensive Small Claims Proceedings

Most authors clearly favor the creation of a small claims court for copyright infringement. The minority who oppose the creation of such a court brings up valid concerns about such a court, however. The success of such a court depends on addressing those concerns — about the simplicity and expense of the court's proceedings, of the court's copyright expertise, and, perhaps most critically, of the avoidance of frivolous, harassing suits.

1. Avoid harassment suits by requiring a prima facie *showing of copyright infringement before the defendant is obligated to appear.* Most frivolous, harassing claims would almost certainly be caught by compelling the plaintiff to make a *prima facie* documentary

[9] Appendix, Q3-02.
[10] Appendix, Q3-03.

showing of infringement. Failing such a showing, the court should be obliged to dismiss the suit, with no requirement that defendant appear or respond.

2. Minimize complexity and cost by requiring the court to dismiss without prejudice claims where there's a substantial fair use defense. A fair use defense, where it's a close call, may require expert testimony on the effect of the use on the plaintiff's potential commercial market. Accepting such testimony should be beyond the scope of the small claims court's duties. Where the fair use defense does not fail or prevail by clear and convincing documentary evidence, then the small claims court must be required to dismiss the case without prejudice to the plaintiff's right to file the suit in an appropriate federal court.

3. Minimize complexity and cost by using mail and telephone procedures to the greatest extent permissible within the bounds of due process. The procedures, to the extent permissible within the requirements of due process, should be conducted by mail and telephone conference. Small copyright infringement claims can generally be adjudicated largely on documentary evidence — a submission of the plaintiff's registered work and the alleged infringing work. Such procedures will allow parties to press and defend claims without traveling to the court.

4. Avoid delegating these proceedings to inexperienced state courts; instead, assure the competence of the court by affiliating it with the Copyright Office. The court need not be a traditional federal court — it could be an administrative law procedure linked in some manner to the Copyright Office. This would help assure the competence of the court. We urge the committee not to turn small copyright claims over to the small claims courts of the states, which have no experience in copyright law.

5. Assure the effectiveness of the court by permitting it to issue injunctions in limited cases. If a plaintiff demonstrates that a defendant has repeatedly infringed the plaintiff's copyrights with no colorable defense of fair use, then the court should be empowered to enjoin the defendant against further infringement of the plaintiff's registered works.

Such an injunction, enforceable in an appropriate federal district court, would serve as a powerful deterrent to future infringement.

Conclusion

If created with care, a small claims court for copyright infringement would allow individual authors much greater access to the courts to protect their property rights, appreciably enhancing market incentives to create the literary works that the public values. Avoiding frivolous, harassing claims is a matter of routine, automatic rejection of claims that do not raise a *prima facie* case of infringement. Dismissal without prejudice of claims in which a substantial fair use defense is raised would greatly speed and simplify the court's proceedings, as would permitting most of the proceedings to be conducted by mail and phone. Affiliation with the Copyright Office would assure the court's competence in copyright law. Finally, granting the court limited power to issue injunctions would greatly and reasonably strengthen the court.

I would like to thank this Committee for holding this hearing and inviting us to participate.

APPENDIX:

Authors Guild Survey of

Copyright Infringement & Small Claims

Phase II

Conducted March 24-25, 2006

1,234 Completed Responses

PART ONE: PUBLICATION PROFILE OF RESPONDENTS

Q1-01. Respondents' Publication History, by Category.

My published work includes (check all that apply)

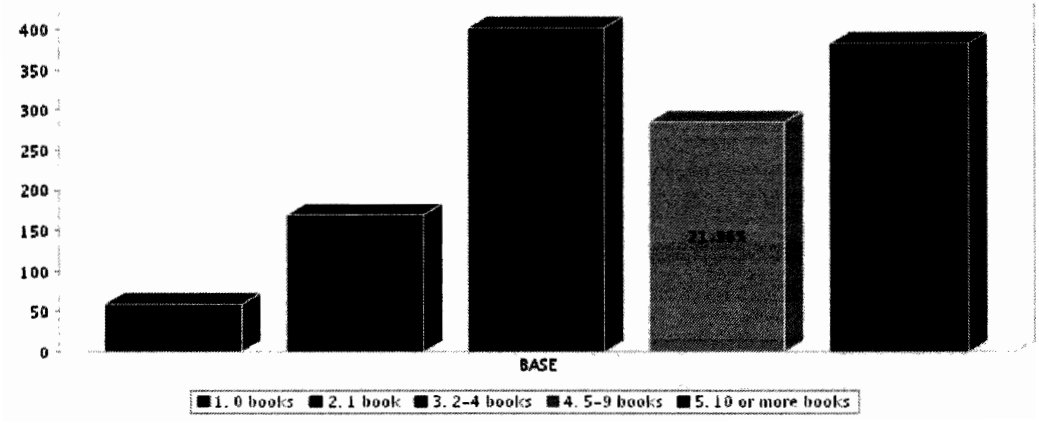
1. Nonfiction book(s) for adults	828	63.79%
2. Nonfiction book(s) for children or young adults	199	15.33%
3. Novel(s) for adults	443	34.13%
4. Fiction for children or young adults	285	21.96%
5. Freelance articles	831	64.02%
6. Short stories	352	27.12%
7. Poetry	209	16.10%

Note: Total appropriately exceeds number of respondents.

Q1-02. Respondents' Publication History, Books.

I have published

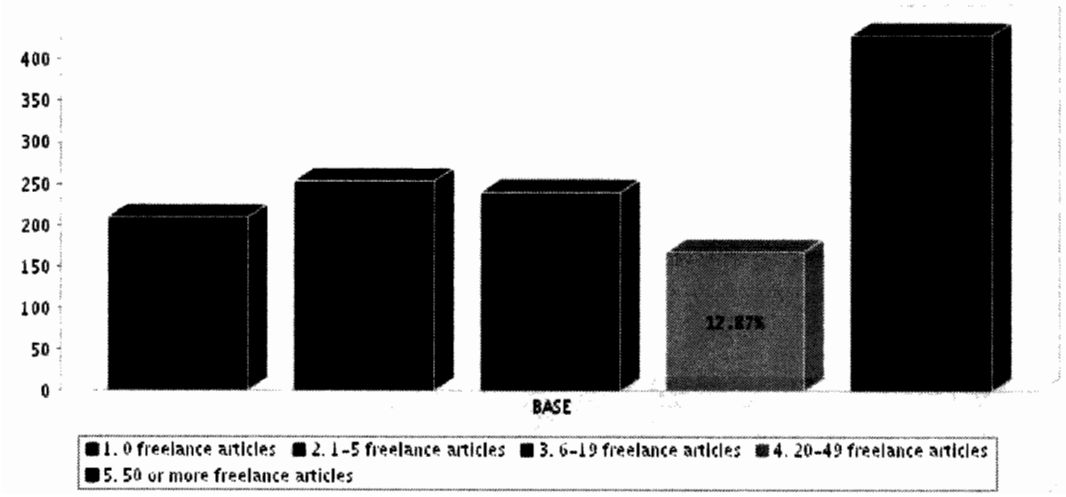
1. 0 books	60	4.62%
2. 1 book	169	13.02%
3. 2-4 books	402	30.97%
4. 5-9 books	285	21.96%
5. 10 or more books	382	29.43%
Total	1298	100.00%



Q1-03. Respondents' Publication History, Freelance Articles.

I have published

1. 0 freelance articles	210	16.18%
2. 1-5 freelance articles	253	19.49%
3. 6-19 freelance articles	240	18.49%
4. 20-49 freelance articles	167	12.87%
5. 50 or more freelance articles	428	32.97%
Total	1298	100.00%



PART TWO: RESPONDENTS' EXPERIENCE WITH FAIR USE, PERMISSIONS & COPYRIGHT INFRINGEMENT

Q2-01. Experience with fair use.

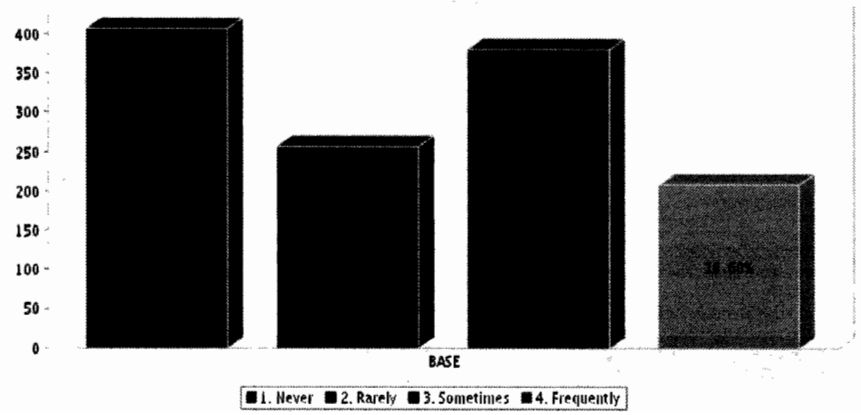
I have, in my work as a writer, relied on fair use to incorporate other's copyrighted works (texts or images) into my own

1.	Never	365	29.13%
2.	Rarely	336	26.82%
3.	Sometimes	374	29.85%
4.	Frequently	178	14.21%
	Total	1253	100.00%

Q2-02. Experience with copyright permissions.

I have, in my work as a writer, obtained permission to incorporate other's copyrighted works (text or images) into my own

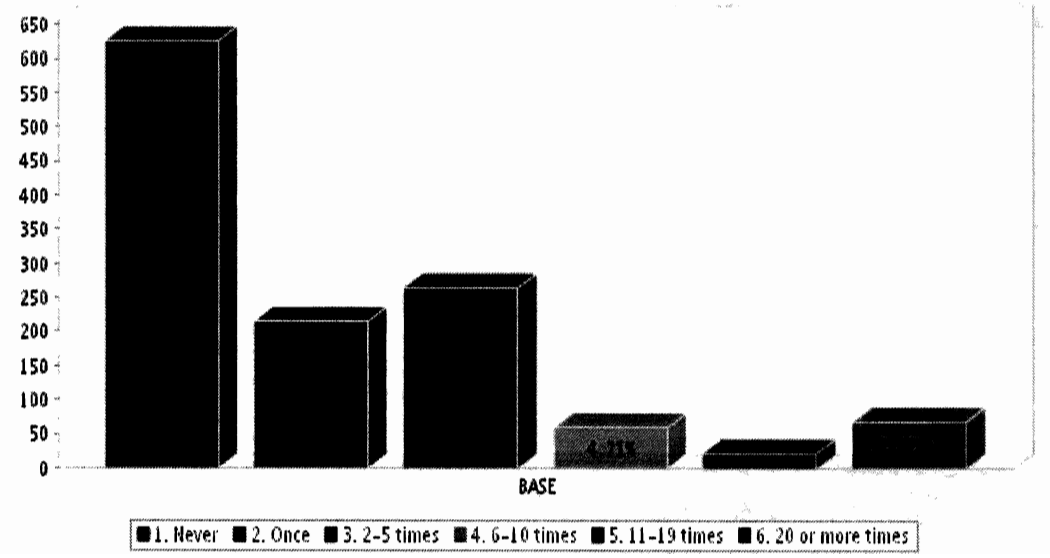
1.	Never	407	32.48%
2.	Rarely	257	20.51%
3.	Sometimes	381	30.41%
4.	Frequently	208	16.60%
	Total	1253	100.00%



Q2-03. Experience with infringement of respondents' works.

To my knowledge, my copyrighted works have been infringed by others, that is, others have made use of my creative expression without permission and in excess of what I believe to be fair use

1.	Never	626	49.96%
2.	Once	214	17.08%
3.	2-5 times	265	21.15%
4.	6-10 times	59	4.71%
5.	11-19 times	22	1.76%
6.	20 or more times	67	5.35%
	Total	1253	100.00%

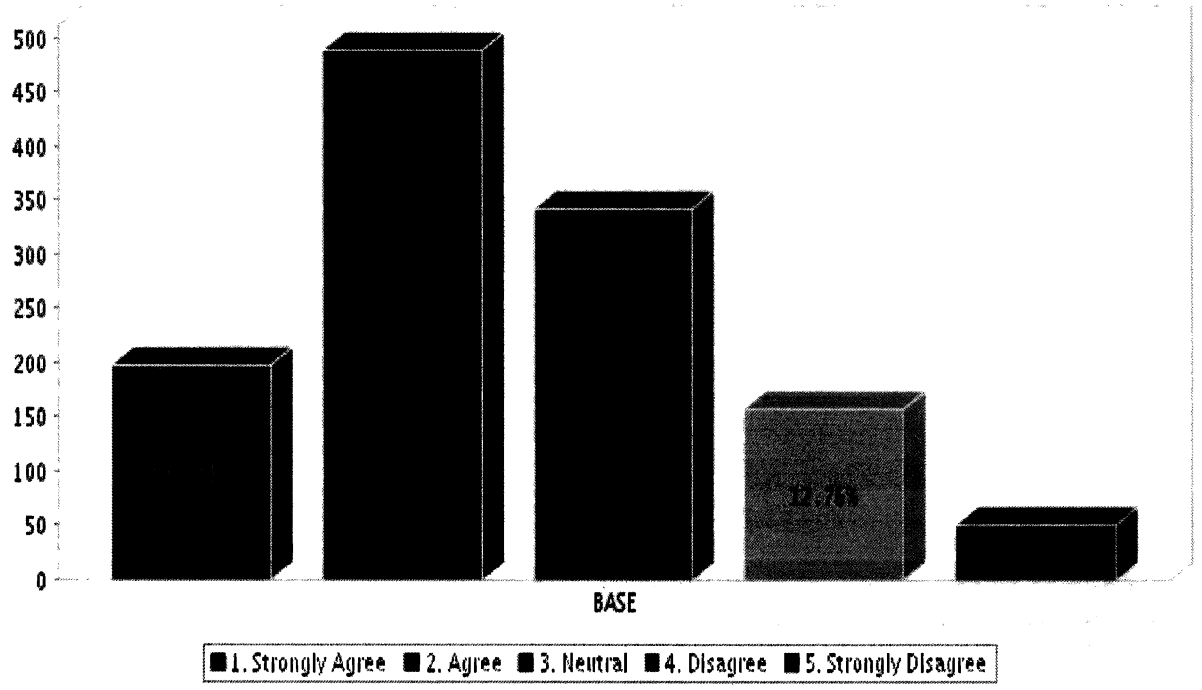


PART THREE: VIEWS ON ESTABLISHING A COPYRIGHT INFRINGEMENT SMALL CLAIMS COURT

Q3-01. Creation of a small claims court.

Creating a small claims court for copyright infringement is a good idea.

1.	Strongly Agree	198	15.99%
2.	Agree	489	39.50%
3.	Neutral	342	27.63%
4.	Disagree	158	12.76%
5.	Strongly Disagree	51	4.12%
	Total	1238	100.00%



Q3-02. Factors in favoring a small claims court.

Why do you believe creating a small claims court for copyright infringement is a good idea? (Check all that apply.)

1.	Reduce litigation costs	593	86.31%
2.	Increase convenience	536	78.02%
3.	No need for attorney	525	76.42%
4.	Increase in copyright infringement on the Internet	387	56.33%
5.	Increase in copyright infringement offline	181	26.34%
6.	Other	92	13.39%

Note: Total appropriately exceeds number of respondents.

Q3-03. Factors in disfavoring a small claims court.

Why do you believe creating a small claims court for copyright infringement is not a good idea? (Check all that apply.)

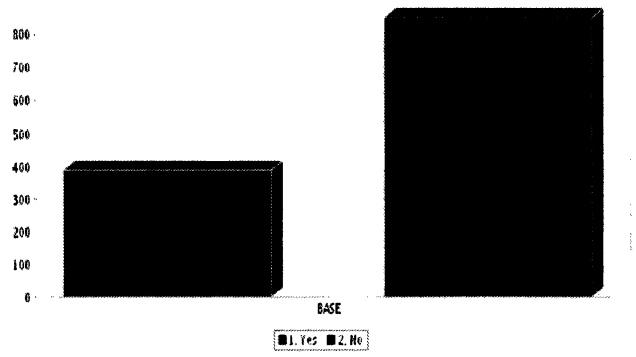
1.	Small claims shouldn't be resolved by litigation	30	14.35%
2.	Increases risk of being sued when I make fair use	106	52.15%
3.	Opposed to lawsuits, generally	50	23.92%
4.	Don't believe the procedure will be simple, effective and/or inexpensive	125	59.81%
5.	Other	77	36.84%

Note: Total appropriately exceeds number of respondents.

Q3-04. Utility of a small claims court.

If there were a small claims copyright court, do you believe you would have used it?

1.	Yes	387	31.29%
2.	No	850	68.71%
	Total	1237	100.00%

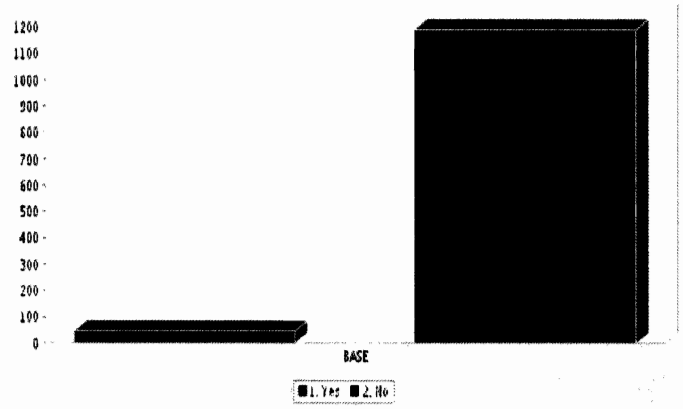


PART FOUR: RESPONDENTS' EXPERIENCES AS ALLEGED INFRINGERS

Q4-01. Respondents accused of copyright infringement.

Has a copyright holder ever accused you, by cease and desist letter or otherwise, of copyright infringement?

1.	Yes	44	3.57%
2.	No	1190	96.43%
	Total	1234	100.00%



Q4-02. Respondents sued for copyright infringement.

Have you or your publisher ever been sued for copyright infringement regarding one of your works?

1.	Yes	13	1.05%
2.	No	1221	98.95%
	Total	1234	100.00%