Et Cetera

Volume 71 | Issue 1 Note

6-7-2023

Problems in the Copyright Industry: Making the Case for a Corrected CASE Act

Megan Grantham
Cleveland State University College of Law

CLEVELAND STATE LAW REVIEW ET CETERA
VOLUME 71 JUNE 7, 2023 PAGES 27-50

PROBLEMS IN THE COPYRIGHT INDUSTRY: MAKING THE CASE FOR A CORRECTED CASE ACT

MEGAN GRANTHAM*

ABSTRACT

In 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act, which established a small claims court system within the United States Copyright Office, called the Copyright Claims Board. This new board hears cases of copyright violations involving damages of $30,000 or less. President Donald Trump signed the bill into law on December 27, 2020, and the board officially began hearing claims in June 2022. This was meant to benefit smaller creators who do not have the means to pursue their copyright claims in costly federal court. While small or independent creators should indeed have access to a means of adjudicating their claims of copyright infringement in a way using less money, time, and resources than the costly federal litigation process, the CASE Act and corresponding Copyright Claims Board fails to accomplish that goal. This Note argues that that certain changes should be made to the current framework of the Copyright Claims Board to make it fairer for independent creators to enforce copyright protection on their work. First, this Note will examine the background of the traditional federal litigation process of copyright claims and explain why something like the CCB is necessary. Next, this Note will discuss the CCB and the points that are likely to help bring justice to smaller creators. After this, this Note will consider the problems and pitfalls of the CCB and detail the ways that it will likely hurt independent creators as it currently stands. Finally, this Note will propose changes that legislators considering amendments to the CASE Act and the CCB can incorporate to make the small claims tribunal process fairer.

* J.D., May 2023, Cleveland State University College of Law; B.A. in Political Science and Communications, May 2020, John Carroll University. Thanks to Professor Christa Laser for her help in editing this Note, as well as Professor Peter Garlock for teaching me how to think like a lawyer. Most importantly, I want to thank my mom, Terri Grantham, for her endless support and encouragement in everything I do.

CONTENTS

I. INTRODUCTION

> When you have wit of your own, it's a pleasure to credit other people for theirs.
>
> – *Criss Jami*[1]

Imagine that a young singer-songwriter, Margot Montgomery, has been trying to break into the music industry for years. She moved to Nashville at a young age to try and sell her songs to record labels and perform in the area in the hopes of one day

[1] CRISS JAMI, KILLOSOPHY 70 (Philosophy 2015).

getting a recording contract. After a few months of no opportunities coming her way, she decides to self-publish a few of her songs on Spotify. While she does not get that many streams on her songs, it is still a big step toward her dream.

Four months after one of her songs is posted to Spotify, she receives mail from something called the Copyright Claims Board ("CCB"). The letter states that country singer Dakota Dawn is filing a complaint against her for copyright infringement, due to the similarities in the lyrics and melody of Dakota's song "Let the light shine" and Margot's song "The shining lights." Margot listens to the song, and does not think they sound too similar, especially since she wrote her song years before it was ever published and years before Dakota's song came out. She even has available proof that such song was written previously, through dated voice memos and handwritten notes with written lyrics. Although Margot has such proof, she is unsure of the lawsuit's authority. Dakota Dawn is incredibly famous, and Margot thinks this could be someone impersonating her, just trying to make some money. She cannot afford to call a lawyer to look more into the case, but since there is no information about a federal court process, she decides it is probably fake, not a real lawsuit, and takes no action. If it is really important, someone will surely follow up with her, she thinks.

Sixty days later, she receives another correspondence alerting her that she owes $30,000 in damages, due to a CCB tribunal finding in favor of Dakota Dawn for her case of copyright infringement against Margot. Shocked and confused about how she could suddenly on the line for $30,000, she looks into the CCB. Discovering the sobering reality of her situation, she finally spends more money to hire a lawyer, only for him to find that her circumstances do not qualify for the limited appellate process of the CCB. Margot kisses her dreams of making it as a singer-songwriter goodbye as she tries to brainstorm ways she could possibly come up with $30,000.[2]

This sobering fictional tale could sadly be a reality for small and independent artists or creators who are not aware of the real and harsh consequences of the new CCB, created by the new Copyright Small-Claims Enforcement Act of 2020.[3] The new CCB will consist of a three-member tribunal of Copyright Claims Officers employed by the Copyright Office and appointed by the Librarian of Congress.[4] The CCB was created to provide a more accessible, efficient and cost-effective way to resolve certain

[2] Hypothetical used to introduce arguments later developed in the article. This situation could very likely be a real possibility for a small songwriter such as Margot, especially within the first months of enacting the CCB. It is worth noting that a downside such as this would not happen if the notice were to include sufficient and understandable information about the process, or a link to an official government website with more information. This hypothetical features the absolute worst-case scenario. *See Copyright Office Announces Claims Board is Open for Filing*, COPYRIGHT CLAIMS BD. (June 16, 2022), https://www.copyright.gov/newsnet/2022/969.html.

[3] Copyright Alternative in Small-Claims Enforcement ("CASE") Act Regulations: Expedited Registration and FOIA, 86 Fed. Reg. 21990 (Apr. 26, 2021).

[4] *About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., https://ccb.gov/about/ (last visited Feb. 28, 2023); Ryan Reynolds, *Just What is the Case with the CASE Act? A Brief Overview*, GEO. MASON UNIV. CTR. FOR INTELL. PROP. X INNOVATION POL'Y (June 14, 2021), https://cip2.gmu.edu/2021/06/14/just-what-is-the-case-with-the-case-act-a-brief-overview/.

copyright disputes involving up to $30,000.[5] This tribunal was set to begin hearing small claims in December 2021 and was later pushed back into June 2022.[6]

While small or independent creators should indeed have access to a means of adjudicating their claims of copyright infringement in a way using less money, time, and resources, the CASE Act and corresponding CCB fails to accomplish that goal. This Note argues that that certain changes should be made to the current framework of the CCB to make it fairer for independent creators to enforce copyright protection on their work. First, this Note will examine the background of the traditional federal litigation process of copyright claims and explain why something like the CCB is necessary. Next, this Note will discuss the CCB and the points that are likely to help bring justice to smaller creators. After, this Note will consider the problems and pitfalls of the CCB and detail the ways that it will likely hurt independent creators as it currently stands. Finally, this Note will propose changes that legislators considering amendments to the CASE Act and the CCB can incorporate to make the small claims tribunal process fairer.

II. BACKGROUND

> Only one thing is impossible for God: to find any sense in any copyright law on the planet.
>
> – *Mark Twain*[7]

Ordinarily, when a person makes a piece of art, be it music, a novel, dance or any other "original work[] of authorship" that is (1) "fixed in a tangible medium of expression," (2) original, and (3) possessing a modicum of creativity, that work is automatically protected by copyright.[8] Registration of a work is required to have a remedy in Federal Court.[9] In any case of infringement, copyright law requires that

---

[5] *About the Copyright Claims Board*, *supra* note 4.

[6] Although the Act advocates for the CCB to go into action and begin hearing claims one year following the date of passage of the Act, on December 27, 2021, legislators have provided a 6-month grace period, so the CCB will have to go into action absolutely no later than June 2022. Copyright Alternative in Small-Claims Enforcement ("CASE") Act Regulations: Expedited Registration and FOIA, 86 Fed. Reg. 21990 (Apr. 26, 2021); Reynolds, *supra* note 4. The new CCB officially came into action in June 2022, and has recently begun hearing claims. Copyright Claims Board: Active Proceedings and Evidence, 87 Fed. Reg. 30060 (May 17, 2022).

[7] MARK TWAIN, MARK TWAIN'S NOTEBOOK 381 (Harper & Brothers 1935).

[8] 17 U.S.C. § 102. Things copyright does not protect include thoughts, ideas, or anything not written down in a tangible form. Copyright is different from other forms of intellectual property law like patents and trademarks, as copyright protects works of original authorship fixed in a tangible medium of expression, while a patent protects inventions, instructions, or discoveries. A trademark, conversely, protects symbols, words, idioms, or designs expressing the source of the goods or services of a party and differentiating it from other such symbols. *Copyright in General*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-general.html (last visited Feb. 28, 2023).

[9] *Copyright Infringement and Remedies*, U.S. COPYRIGHT OFF., https://www.copyright.gov/title17/chapter5.pdf (last visited Feb. 28, 2023).

lawsuits are brought in federal court, as opposed to state court.[10] Unfortunately, federal litigation like this requires significant time and money, which many small or independent creators do not have.[11] This means that smaller or independent creators often cannot afford to take action to recover damages when their work is infringed upon.[12]

For example, the case of *Cariou v. Prince* involved professional photographer Patrick Cariou, who published a book of photographs that was infringed upon by alleged appropriation artist Richard Prince.[13] The case took five years of costly litigation until it ultimately settled.[14] When such a straightforward case of infringement takes six years for justice to persevere, artists not as affluent or prominent as Patrick Cariou are in a difficult position: they must decide if getting justice for their work is worth the overwhelming time and money of taking the case through the federal court process.[15]

Recognizing this problem, Congress passed the Copyright Small-Claims Enforcement Act of 2020 ("CASE Act" or "Act") in December 2020, which directed the Copyright Office to form a Copyright Claims Board ("CCB" or "Board").[16] This Board will ideally provide a more accessible, efficient and cost-effective way to resolve certain copyright disputes involving up to $30,000.[17] The three-member panel

---

[10] Although all types of intellectual property are litigated through federal court, the CCB will only be operating for small claims of copyright, not patent, trademark, or any other intellectual property matter. *Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/small-claims/ (last visited Feb. 28, 2023); MARIA A. PALLANTE, U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013) [hereinafter SMALL CLAIMS REPORT].

[11] SMALL CLAIMS REPORT, *supra* note 10, at 1.

[12] *Id.*

[13] Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

[14] David Walker, *Richard Prince Settles with Photographer Patrick Cariou*, PDNPULSE (Mar. 19, 2014), https://pdnpulse.pdnonline.com/2014/03/richard-prince-settles-photographer-patrick-cariou.html.

[15] The founder and managing director of the Brooklyn-based Center for Art Law, Irina Tarsis, noted that artists regularly do not have the "courage, resources or time to bring a suit to court," and a small claims court could provide "a more accessible forum to that end." Daniel Grant, *US Copyright Law Comes Under Scrutiny as New Legislation Makes its Way Before Congress*, THE ART NEWSPAPER (Mar. 27, 2020), https://www.theartnewspaper.com/2020/03/27/us-copyright-law-comes-under-scrutiny-as-new-legislation-makes-its-way-before-congress.

[16] 17 U.S.C. § 1502. This Act was passed as part of a large, must-pass omnibus spending and COVID-19 relief bill, which many viewed as somewhat of a fly by night legislation. Emily Birnbaum, *Lawmakers are Cramming Controversial Copyright Provisions into a Must-Pass Spending Bill*, PROTOCOL (Dec. 4, 2020), https://www.protocol.com/Politics/copyright-provisions-in-spending-bill.

[17] Copyright Claims Board: Active Proceedings and Evidence, 87 Fed. Reg. 30060 (May 17, 2022).

is supposed to bring together multiple experts to make decisions to provide a comprehensive and fair process.[18]

The Act was first introduced by New York Democratic Representative Hakeem Jeffries in 2016 and 2017.[19] Negotiations and hearings first discussing small claims courts for copyright law arose as early as March 2006, when the House Committee on the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a hearing titled "Remedies for Small Claims Copyright."[20] The Act, H.R. 2426, was passed on October 22, 2019 by the House with a vote of 410-6.[21] The Senate Committee on the Judiciary approved the Act without amendment on September 12, 2019.[22] The CASE Act was officially passed on December 21, 2020 as part of the Consolidated Appropriations Act. Two other copyright protection acts were passed concurrently, the Trademark Modernization Act and the Protecting Lawful Streaming

[18] The number and makeup of the panel is similar to the Copyright Royalty Board, whose judges oversee the copyright law's statutory licenses, and can allow parties to use several copyright works without receiving separate licenses from each individual copyright owner. *About Us*, U.S. COPYRIGHT ROYALTY BD., https://www.crb.gov/ (last visited Mar. 1, 2023); s*ee also* 17 U.S.C. § 802 (2012). Interestingly, the 2017 draft of the CASE Act proposed that claims under $5,000 could be adjudicated by only one Tribunal member. However, that point did not make it into the final version of the Act. *See* H.R. 3945, 115th Cong. (2017).

[19] CASE Act of 2016, H.R. 5757, 114th Cong. (2016); H.R. 3945, 115th Cong. (2017); *Reps. Jeffries, Marino Lead Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work*, CONGRESSMAN HAKEEM JEFFRIES, https://jeffries.house.gov/2017/10/04/reps-jeffries-marino-lead-bipartisan-effort-to-help-musicians-and/ (last visited Mar. 1, 2023) ("The establishment of the Copyright Claims Board is critical for the creative middle class who deserve to benefit from the fruits of their labor. Copyright enforcement is essential to ensure that these artists, writers, musicians and other creators are able to commercialize their creative work in order to earn a livelihood. The CASE Act will enable creators to enforce copyright protected content in a fair, timely and affordable manner. This legislation is a strong step in the right direction.").

[20] These hearings ultimately concluded by Congress encouraging the United States Copyright Office to look into possible solutions for this issue. *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Cts., the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 2 (2006).

[21] *Final Vote Results for Roll Call 578* (2019), https://clerk.house.gov/evs/2019/roll578.xml. A broad coalition of bipartisan legislators co-sponsored the bill in the House in addition to advocating their support, including Democratic Congresswoman Judy Chu (CA-33), Democratic Congressman Ted Lieu (CA-33), Republican Congressman Doug Collins (GA-9), and Republican Congressman Lamar Smith (TX-21). *Reps. Jeffries, Marino Lead Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work*, *supra* note 19.

[22] S. REP. NO. 116-105, at 1 (2019); *Sen. John Kennedy (R-La.) Introduces Legislation to Strengthen Copyright Protections for Artists*, SEN. JOHN KENNEDY (May 2, 2019), https://www.kennedy.senate.gov/public/2019/5/sen-john-kennedy-r-la-introduces-legislation-to-strengthen-copyright-protections-for-artists ("It shouldn't cost you a fortune to protect your creativity from copyright infringement. This bill creates a legal avenue for artists to pursue copyright violations more quickly and less expensively. Louisiana's rich culture and history are rooted in the successes of talented artists, musicians and authors. We need to make sure that Americans' creative spirit is preserved and protected.").

Act.[23] President Donald Trump signed the bill into law on December 27, 2020.[24] The CCB was originally scheduled to begin hearing claims on December 27, 2021, one year after the Act was officially signed into law.[25] However, the CCB was not officially launched until June 16, 2022.[26]

The bill allows for the CCB to hear copyright infringement claims, actions involving a declaration of noninfringement, claims that a party knowingly sent false takedown notices, and other related counterclaims and defenses.[27] The Board will also be allowed to facilitate settlement agreements among parties.[28] The Board can award money based on statutory or actual damages.[29] Statutory damages in the CCB are limited to $15,000, with actual damages of up to $30,000.[30] Statutory damages in a specific case depend on if the infringed upon piece of work was timely registered.[31] Timely registered work will be eligible for statutory damages up to $15,000, while works that were not timely registered with the U.S. Copyright Office are still eligible for up $7,500 in damages.[32]

The officers acting as judges in the CCB will be appointed by the Librarian of Congress.[33] There will be three full-time officers presiding over the CCB.[34] At least two of the three officers must have either presided over or represented a diversity of copyright interests, including both owners and users of copyrighted pieces of work.[35]

---

[23] Makena Kelly, *Sweeping New Copyright Measures Poised to Pass in Spending Bill*, THE VERGE (Dec. 21, 2020, 8:54 PM), https://www.theverge.com/2020/12/21/22193976/covid-relief-spending-congress-copyright-case-act-felony-streaming. The Consolidated Appropriations Act was a $2.3 trillion spending bill that combines stimulus relief for the COVID-19 pandemic with an omnibus spending bill for 2021. The bill is one of the largest actions ever enacted by Congress, and is the longest bill in history ever passed by Congress. Niv Elis, *Congress Unveils $2.3 Trillion Government Spending and Virus Relief Package*, THE HILL (Dec. 21, 2020, 2:40 PM), https://thehill.com/policy/finance/531164-congress-unveils-23-trillion-government-spending-and-virus-relief-package/.

[24] Ted Johnson, *Donald Trump Signs Covid-19 Relief and Government Funding Bill*, DEADLINE (Dec. 27, 2020, 5:19 PM), https://deadline.com/2020/12/trump-signs-covid-19-relief-and-government-funding-bill-1234661894/.

[25] Copyright Alternative in Small-Claims Enforcement ("CASE") Act Regulations: Expedited Registration and FOIA, 86 Fed. Reg. 21990 (Apr. 26, 2021).

[26] *Copyright Office Announces Claims Board is Open for Filing*, *supra* note 2.

[27] Susan N. Weller, *Congress Considers Creation of a "Copyright Claims Board" as an Alternative to Handle Small Copyright Claims*, NAT'L. L. REV. (Jan. 8, 2020), https://www.natlawreview.com/article/congress-considers-creation-copyright-claims-board-alternative-to-handle-small; 17 U.S.C. § 1503.

[28] 17 U.S.C. § 1503.

[29] *Id.* § 1504.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* § 1502.

[34] *Id.*

[35] *Id.*

The intention for the officers is that they will be fair and impartial, while also specifically knowledgeable in the area of copyright law.[36] Whereas in federal court, the judge might be hearing a case of copyright infringement for the first time, the CCB officers should be experienced and informed over copyright law.[37] If a party receives an unfavorable judgment, there is a limited basis for a party to try and appeal the CCB's final decision.[38] 90 days after the final judgement, a party can seek an order to vacate, modify, or correct the CCB decision if the result was reached through "fraud, corruption, misrepresentation, or other misconduct," or a few other limited and extreme circumstances.[39]

If a respondent does not want to take a claim through the CCB, they can choose to opt out of the proceeding by providing written notice of their decision to opt out within sixty days of their notice being served.[40] If a respondent chooses to opt out, the CCB will dismiss the claim, and the claimant can choose to litigate the dispute in the traditional arena of federal court, or simply drop their claim.[41] Additionally, there are different regulations for smaller claims of $5,000 or less, specifically that those will be decided by a single officer as opposed to three.[42]

A. Benefits of the Act and Support Given from Organizations

This Act and the corresponding small claims tribunal were created to make copyright infringements easier in a variety of ways.[43] Firstly, it was designed to be user-friendly, a more accessible way for creators to navigate obtaining relief from copyright infringement claims, and required no formal motions.[44] This will lead to fewer resources needed on the part of the plaintiff on their path to justice.[45]

---

[36] Terrica Carrington & Keith Kupferschmid, *CASE Act Signed into Law: What This Means*, COPYRIGHT ALLIANCE (Jan. 7, 2021), https://copyrightalliance.org/case-act-signed-into-law/.

[37] *Id.* In July 2021, the Register of Copyrights, Shira Perlmutter announced the three people appointed as the first officers in the CCB: David Carson, Monica P. McCabe, and Brad Newberg. All three have highly accomplished careers in copyright litigation. *Copyright Office Announces Appointments of Copyright Claims Board Officers*, U.S. COPYRIGHT OFF. (July 20, 2021), https://www.copyright.gov/newsnet/2021/906.html ("We are pleased to welcome these three experts with such substantial experience in copyright law and alternative dispute resolution . . . . Their combined deep knowledge and skills will help ensure the successful launch and operation of this important new tribunal."). These officers were confirmed and are currently presiding over the new and officially launched CCB as of June 2022. *About the Copyright Claims Board*, *supra* note 4.

[38] 17 U.S.C. § 1508(c)(1).

[39] *Id.*

[40] *Id.* § 1506.

[41] *Id.*

[42] *Frequently Asked Questions*, COPYRIGHT CLAIMS BD., https://ccb.gov/faq/ (last visited Mar. 5, 2023).

[43] Grant, *supra* note 15.

[44] 17 U.S.C. § 1506.

[45] Cydney A. Tune & Michael R. Kreiner, *Copyright Small-Claims Court Established by Congress in the CASE Act*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Jan. 27, 2021),

Additionally, this new small claims tribunal will cap monetary damages at $30,000, so respondents will be assured they will not have to face damages as high as possibly $150,000 damage claims in federal court.[46] Furthermore, taking a claim through the small claims tribunal will be purely voluntary, as respondents will have the option to opt out of the process.[47]

The Act and all its benefits were initially met with support from many.[48] U.S. Register of Copyrights Karyn A. Temple articulated the support of the U.S. Copyright Office in a statement to the House of Representatives Committee on the Judiciary.[49] Temple asserted that "low-dollar but still valuable copyrighted works often may be frequently infringed with impunity, and individual creators and small businesses often lacking an effective remedy . . . for this reason, the Copyright Office strongly supports a small claims tribunal."[50] The legislation was additionally met with support from professional organizations like the Copyright Alliance, the Authors Guild, the American Bar Association, and the U.S. Chamber of Commerce.[51] The agencies supporting the Act stated that the CCB could provide a more financially accessible substitute for federal litigation, especially for smaller creators.[52]

B. Despite the Benefits, Many Argue the Faults of the CASE Act Will Prove Harmful to Creators

Despite the public support of many organizations, other groups have been vocal about their opposition to the Act.[53] Groups that have publicly opposed the new CASE

---

https://www.pillsburylaw.com/en/news-and-insights/copyright-small-claims-court-congress-case-act.html.

[46] 17 U.S.C. § 1504; *Copyright Infringement Penalties*, PURDUE UNIV. COPYRIGHT OFF., https://www.lib.purdue.edu/uco/CopyrightBasics/penalties.html (last visited Mar. 1, 2023).

[47] 17 U.S.C. § 1504.

[48] *Statement of Karyn A. Temple*, BEFORE THE COMM. ON THE JUD. (June 26, 2019), https://www.copyright.gov/laws/hearings/testimony-of-karyn-temple-for-june-26-oversight-hearing.pdf.

[49] *Id.*

[50] *Id.*

[51] *CCB Alliance*, COPYRIGHT ALL., https://copyrightalliance.org/education/copyright-claims-board-explained/ (last visited Mar. 3, 2023); *The Authors Guild Supports a Copyright Small Claims Court*, THE AUTHORS GUILD (May 2, 2019), https://authorsguild.org/news/the-authors-guild-supports-a-copyright-small-claims-court/; Judy P. Martinez, *The Case for the CASE Act*, THE HILL (Oct. 21, 2019, 3:30 PM), https://thehill.com/blogs/congress-blog/judicial/466742-the-case-for-the-case-act ("This legislation would provide small businesses and creators with a less burdensome and costly option for defending their intellectual property rights."); Chamber of Com. of the U.S., Comment Letter Supporting S. 1273 & H.R. 2426, "CASE Act" (May 2, 2019), https://www.uschamber.com/intellectual-property/us-chamber-letter-supporting-s-1273-and-hr-2426-case-act.

[52] *See id.*

[53] Kerry M. Sheehan, *Copyright Law has a Small Claims Problem. The CASE Act Won't Solve it*, AUTHORS ALL. (June 4, 2019), https://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it%EF%BB%BF/; Shiva Stella, *Public Knowledge Opposes Copyright Bill Creating Unaccountable "Small-Claims" Court*, PUB. KNOWLEDGE (May 1, 2019), https://publicknowledge.org/public-knowledge-opposes-

Act for not properly protecting small creators from copyright trolls and bigger corporations include the Authors Alliance, Public Knowledge, and digital rights group the Electronic Frontier Foundation.[54]

Critics of the CASE Act argue that the current framework of the CCB has some serious procedural issues that need to be addressed.[55] Specifically, the opt-out procedure could prove to be extremely problematic, both in procuring default notices to unknowing and potentially innocent respondents, and that bigger corporations or more legally knowledgeable petitioners could take advantage of the novel opt-in system. Also, the yet-to-be-written relaxed rules for claims smaller than $5,000 could lead to even more unnecessarily unjust results. Next, the CASE Act worsened the already bad problem of uncertain civil penalties in copyright litigation for small claims proceedings. Furthermore, judges functioning within an administrative body could lead to a pattern of injustice. Additionally, the limited appellate process, where appellants can only appeal back to the CCB. Lastly, the breadth of jurisdiction is incredibly wide-sweeping for the CCB, and a few other smaller procedural issues.

C. Assessing the Constitutionality of a Small Claims Tribunal

One other major concern with the passage of the CASE Act was the constitutionality of the new small claims tribunal. The Supreme Court previously ruled that Congress lacks power under Article I of the Constitution to establish tribunals that adjudicate certain types of claims because certain claims can only be adjudicated by Article III courts.[56] The Court has held that Article I tribunals can adjudicate claims related to "public rights," but not those related to "private rights."[57] Whether issues of copyright involve "private" or "public" rights, is unclear under this current judicial framework.

The Berkeley Center for Law & Technology and UC Hastings Law School (hereinafter "BCLT-Hastings") arranged a workshop where scholars from fields of intellectual property, economics, and civil procedure came to examine different aspects of the proposed small claims tribunal in 2018.[58] One of the points they considered was that the proposed small claims tribunal will establish a largely Article

---

copyright-bill-creating-unaccountable-small-claims-court/; Mitch Stoltz & Corynne Mcsherry, *Congress Shouldn't Turn the Copyright Office into a Copyright Court*, ELEC. FRONTIER FOUND. (Nov. 29, 2017), https://www.eff.org/deeplinks/2017/11/creating-copyright-court-copyright-office-wrong-move.

[54] Sheehan, *supra* note 53 ("For many independent authors, creators, and users of copyrighted content, copyright litigation in federal court is not worth the candle; the high cost of litigation keeps many independent authors and creators from enforcing their copyrights. A well-designed copyright small claims process could fix this but, unfortunately, the deeply flawed CASE Act isn't that.").

[55] *Id.*

[56] *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 484 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co. 458 U.S. 50, 87 (1982).

[57] *See, e.g.*, 458 U.S. at 67–68; Den ex dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855).

[58] Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 689 (2018).

I adjudication type proceeding.[59] Some scholars at the workshop "thought that the Court's jurisprudence on what can be adjudicated by Article I tribunals and what must be adjudicated by Article III courts calls into question the constitutionality of the Tribunal as proposed by the Office."[60]

The Supreme Court has recently considered Congress's power to establish administrative adjudicative procedures under its own authority or the power of an Executive agency in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[61] The Court there considered the question of whether Congress had the power to authorize the Patent Trial and Appeal Board ("PTAB") to review the validity of patent claims on novelty or nonobviousness grounds and to quash erroneously-issued patent claims, as part of the 2011 America Invents Act ("AIA").[62]

Petitioner Oil States' patent was nullified by PTAB as part of the AIA inter partes review process.[63] On appeal, Oil States argued that once a patent is issued, they are private rights and disputes over them must accordingly be handled in Article III courts.[64] In their argument, they utilized *McCormick Harvesting Machine Co. v. C. Aultman & Co.* for its contention that only Article III courts can adjudicate the validity of a patent.[65] The Supreme Court ultimately upheld the constitutionality of the *inter partes* process by PTAB, noting that *inter partes* review "falls squarely within the public-rights doctrine."[66] The Court defined public rights as matters emerging "between the government and others, which from their nature do not require judicial determination."[67] The Court further articulated that its ruling was confined to inter partes review, and did not speak to "whether other patent matters, such as infringement actions, can be heard in a non-Article III forum."[68]

Scholars at the BCLT-Hastings workshop asserted that the question of constitutionality of Congress forming an administrative tribunal adjudicating copyright infringement claims is more serious than the question of constitutionality of Congress establishing a PTAB review of already-issued patents.[69] They argued that a new tribunal adjudicating claims of copyright infringement would take power away

---

[59] *Id.* at 692.

[60] *Id.*

[61] Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1368 (2018).

[62] *Id.* at 1370, 1372; America Invents Act of 2011, § 7, Pub. L. No. 112–29, 125 Stat. 284.

[63] 138 S. Ct. at 1372.

[64] 138 S. Ct. at 1373; *see, e.g.*, Petition for Writ of Certiorari, Oil States Energy Servs., 137 S. Ct. 17 (No. 16-712). The Court of Appeals for the Federal Circuit had affirmed PTAB's invalidation of Oil States' patent, although it did not issue an opinion on the constitutionality issue raised by Oil States, likely because the year before it had addressed this constitutional challenge to PTAB's powers. MCM Portfolio v. Hewlett-Packard Co., 812 F.3d 1284 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 292 (2016).

[65] McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U.S. 606, 609 (1898).

[66] 138 S. Ct. at 1373.

[67] *Id.*

[68] *Id.* at 1379.

[69] Samuelson & Hashimoto, *supra* note 58, at 693.

from Article III courts that have essentially always had exclusive jurisdiction over such claims, whereas the PTAB primarily only reviews already-approved patent claims made by USPTO and decides if the patent was mistakenly issued.[70] Even if the Supreme Court continued to uphold the ruling in *Oil States*—that the PTAB had the authority to review patent claims— they may be presented with a more complicated issue with respect to the new copyright claims board. Such a board would be adjudicating novel infringement claims, as opposed to doing something more analogous to what the PTAB does, like reviewing the registrations decisions of the Copyright Office.[71] Some scholars believe that only Article III courts should be empowered to decide claims of infringement.[72]

Although the CCB officially launched in June 2022, there has been no concrete updates regarding if it has been successful or brought any benefits in the time that it has been hearing claims.[73]

III. ANALYSIS

You stole my story and something's got to be done about it.

– *Stephen King*[74]

For smaller and independent creators, the main beneficiaries for whom the CASE Act was enacted, taking claims through the new CCB will be a newer and more accessible way of bringing a claim and ultimately getting justice on actual cases of copyright infringement.[75] However, there are many procedural problems with the current framework of the CCB that should be addressed. While the CASE Act was born out of a place of helpfulness and genuine concern from legislators hoping to help smaller creators, the current framework is too problematic to be of legitimate help to small-scale creators whose work has been infringed upon.[76] Although the CCB has already launched as of June 2022, it can still realistically enact certain changes to maximize helpfulness for creators.

---

[70] *Id.*; 35 U.S.C. § 6(b) (listing PTAB duties); *see also* SMALL CLAIMS REPORT, *supra* note 10, at 65 (describing PTAB).

[71] Samuelson & Hashimoto, *supra* note 58, at 693.

[72] *Id.*

[73] *See generally* Stefan Mentzer & Tim Keegan, *The Copyright Claims Board Goes Live: Early Trends*, WHITE & CASE (July 6, 2022), https://www.whitecase.com/insight-alert/copyright-claims-board-goes-live-early-trends; Robert E. Browne, Jr. & Michael D. Hobbs, Jr., *Copyright Claims Board: A New State for Copyright Infringement Claims*, TROUTMAN PEPPER (Nov. 9, 2022), https://www.troutman.com/insights/copyright-claims-board-a-new-stage-for-copyright-infringement-claims.html.

[74] STEPHEN KING, *Two Past Midnight: Secret Window, Secret Garden, in* FOUR PAST MIDNIGHT 325 (Pocket Books, 2017).

[75] *CASE ACT, Part of the Consolidated Appropriations Act, 2021 – Passes*, AM. PHOTOGRAPHIC ARTISTS (Dec. 22, 2020), https://apanational.org/advocacy/entry/case-act-part-of-the-consolidated-appropriations-act-2021-passes.

[76] *See* Luca Provenzano, *A Remedy for Every Melody: The Procedural Positives and Negatives of the Copyright Claims Board and Why this New Tribunal Will Benefit Music Copyright Holders*, 53 SETON HALL L. REV. 613, 615 (2022).

There are certain specific problems that should be addressed and fixed to make the CCB a more beneficial option for creators.[77] First, the opt-out provision should be replaced with an opt-in provision to give respondents adequate notice of the action being brought against them. Second, relaxed procedural restrictions on claims at or below $5,000 should be heightened to meet the same standard as the rest of the procedures of the CCB. Third, the civil penalties provisions should become more stringent than regular federal copyright litigation, instead of less stringent. Fourth, there needs to be a way to ensure fairness to CCB officers, who will be making judgments while functioning from a purely administrative body. Next, the appellate process should become more accessible, and proceed in district courts as a first line of appeal. Additionally, the breadth of jurisdiction sweeps very broadly, arguably too much so. Lastly, there are several smaller procedural matters that should be addressed before the CCB takes effect.

A. The Problematic Opt-Out Provision Should be Changed to an Opt-In Provision Instead

One major pitfall in the current setup of the CCB is the opt-out provision, in which a legally-unaware person could not understand the seriousness of the CCB process, and the potential $30,000 in damages, and simply ignore the notice. In such a case, the CCB possesses the authority to issue a default judgment in favor of the petitioner – without any action by the respondent.[78] The current set-up of the CASE Act requires the Copyright Office to send a notice to a person accused of infringement with information about how to opt out within ninety days if they so choose.[79] If a person does not opt out within sixty days of the notice, in the specific procedural manner required by the Copyright Office, the respondent is bound by default to whatever decision the CCB makes, which likely will not be in favor of the respondent if the respondent makes no argument on his or her behalf.[80]

This system is dangerous because a respondent could not recognize the significance of the process, especially in the first few years of the CCB's enactment, and then suddenly be on the hook for thousands of dollars. While the CASE Act giving the option to opt out might seem beneficial, as it allows a respondent to choose to respond to a claim through the CCB rather than through the more formal federal court proceeding, it does not account for the fact that, especially in the first few years of operation, it may not adequately signal to the respondent that by ignoring the notice, they are consenting to a default judgement of up to $30,000.[81] A plaintiff usually receives a default judgment in the amount specified in their complaint if the defendant

---

[77] It should be noted that for each procedural issue mentioned, it would logistically be necessary for legislators to push back implementation, then negotiate and pass an amendment to the CASE Act. This process could unfortunately take years. *See* Mitch Stoltz, *Copyright "Small Claims" Quasi-Court Opens. Here's Why Many Defendants Will Opt Out*, ELEC. FRONTIER FOUND. (June 17, 2022), https://www.eff.org/deeplinks/2022/06/copyright-small-claims-quasi-court-opens-heres-why-many-defendants-will-opt-out.

[78] Cicely Wilson, *New Legislation: The CASE Act*, STAN. LIB. (June 7, 2021), https://fairuse.stanford.edu/2021/06/07/new-legislation-the-case-act/.

[79] 17 U.S.C. § 1506(h)–(i).

[80] *Id.*

[81] *See* Mentzer & Keegan, *supra* note 73; 17 U.S.C. § 1506(u)(4).

fails to take minimal steps to defend themselves. However, the CCB process is too novel for a similar standard to apply.[82] Additionally, this tribunal is marketed as being a different, relaxed option compared to typical court processes, and getting rid of harsh default judgments would match the more informal and less rigid procedure the CCB purports to embody.[83]

There needs to be some sort of formalized way of communicating the importance of this proceeding, or some type of declaration to all people who could potentially engage in copyright infringement to be aware of this new, more casual proceeding. For example, the notices could be very detailed and include information and a link to the government website, and if creators were aware of this new system of non-federal litigation that held potentially equal importance to federal litigation, creators could protect themselves more justly against being liable for wrongful damages.

Another way to solve the problem of the messy and potentially unfair opt-out approach would be to instead have a mandatory opt-in option. Having some sort of mandatory affirmative consent to participate in the CCB would allow for both petitioners and respondents to clearly understand and consent to what they are participating in. Because participating in the CCB is a unique, novel, and new option for copyright lawsuits, having both petitioners and respondents affirmatively consent or opt into the abnormal procedure seems a better way to go about the process.

If the regular way of responding to a claim for copyright litigation is still going through the federal court system, then participants should be actively signing up and engaging with this new, unique way of receiving judgment on a claim. Having an opt-in system would also provide a safeguard to keep bad faith claimants from abusing the new, more informal system to receive inexpensive default judgments that can only be appealed on an extremely limited basis.

B. The Opt-Out Provision Could be Taken Advantage of by Legally-Knowledgeable Respondents

An additional problem with the opt-in provision in the CASE Act is that when a smaller creator's work has legitimately been infringed upon, and he or she makes the hefty decision to pursue it through the novel CCB instead of federal court, a legally-savvy respondent could simply opt out.[84] "'Most infringers know that, if they opt out, the artist won't be able to pursue it in regular court' because of the cost of litigation, and 'simply won't agree to it.'"[85] After filing through the CCB, which is still at minimum $100, a creator will be out the cost of the CCB filing fee, and simply in the same position he or she was in before filing, where her work is being infringed upon and her only option is to go the costly route of federal litigation.[86] Oftentimes, the creator might not believe his or her work being copied is worth the time and trouble, and simply live with the fact that someone out there is stealing their art.

---

[82] *Setting Aside a Small Claims Default Judgment*, CIV. L. SELF-HELP CTR., https://www.civillawselfhelpcenter.org/self-help/small-claims/being-sued-in-small-claims/117-setting-aside-a-small-claims-default-judgment (last visited Dec. 1, 2021).

[83] *See* Browne & Hobbs, *supra* note 73.

[84] 17 U.S.C. § 1506(i).

[85] Grant, *supra* note 15.

[86] 17 U.S.C. § 1510(c).

The Copyright Office, in their 2013 Small Claims Report ("Report"), discussed the possibilities of both an opt-out and opt-in procedure.[87] In the Report, they described the opt-out method as "somewhat more ambitious" than the opt-in model.[88] In normal district court proceedings, a party served per Federal Rule 4 can have a default judgment granted in favor of their opponent if they fail to respond to the action.[89] Similarly, a party sued in state court on a claim that can also go to federal court has only a limited amount of time to remove the case to the federal level; failure to timely file for removal forfeits the right to try the case in federal court.[90] In the Report, the Copyright Office also noted that respondents would have the safeguard of having a default judgment reviewed to possibly be set aside by an Article III judge.[91]

The majority of industry groups and copyright owners who submitted comments about a small claims court for potential copyright infringements favored the opt-out model.[92] Members of the BCLT-Hastings workshop articulated a concern that the opt-out procedure would, in practice, not be voluntary enough to maintain constitutionality.[93] They pointed specifically to the main problem with it: that the tribunal would likely be entering a high number of default judgments and damage awards.[94] Other concerns members of the workshop highlighted were that these default judgments would be hard to appeal and overturn, as well as due process concerns stemming from the lack of public knowledge of the adjudicative standards for filing and serving claims in the new tribunal.[95]

A way to solve this problem would be to cut the costs for a plaintiff to re-file their claim in federal court if they tried to file the claim through the CCB and the respondent opted out. As very limited court costs would have been utilized in the CCB action, since nothing ever came to fruition due to the respondent opting out, there is no reason why all, or at least part, of the cost could be transferred to filing the same claim in federal court. Implementing some sort of safeguard like this would also prevent respondents from simply opting out when they believe a plaintiff would not go through the hassle of filing in federal court. This would help balance the power differences

---

87 SMALL CLAIMS REPORT, *supra* note 10, at 98.

88 *Id.* at 99.

89 Fed. R. Civ. P. 55.

90 28 U.S.C. § 1446(b)(1) ("The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.").

91 SMALL CLAIMS REPORT, *supra* note 10, at 99.

92 Samuelson & Hashimoto, *supra* note 58, at 696. ("That is, these stakeholders prefer a system that requires alleged infringers to affirmatively decline to submit to the Tribunal's adjudication. They pointed to experiences with alleged infringers who fail to respond to cease-and-desist letters. A small claims notification asking the alleged infringer to opt into Tribunal adjudication, they believe, would often be ignored.").

93 *Id.*

94 *Id.*; *see* SMALL CLAIMS REPORT, *supra* note 10, at 111.

95 Samuelson & Hasimoto, *supra* note 58, at 696.

between knowledgeable and non-knowledgeable accused infringers. With this safeguard implemented, there could be a more accessible streamline from the CCB to federal court despite the time-filled filing hindrances, and the plaintiff could still receive justice if the respondent opts out.

C. Making Due Process Optional in a 'Small Small Claims' Situation Defeats the Ideals of Fairness Advocated in the CASE Act

Although the CASE Act establishes some procedures to mimic that of other traditional courts, the Copyright Office has permission to use more relaxed procedures in cases involving damages of $5,000 or less.[96] This is the same or above the maximum amount of damages allowed in small claims cases in twenty-one states.[97] For small claims like this, the Copyright Office is directed from the CASE Act to make different and more lenient procedural rules.[98] When the CCB was officially launched in June 2022, they announced that these relaxed rules would include consideration and ruling from one tribunal member, as opposed to all three.[99] An unfortunate and likely outcome of this situation will be a more accelerated process where the CCB will be handing out largely unappealable damages awards of up to $5,000, that some scholars have deemed "copyright parking tickets."[100] The implications of this are that legally-knowledgeable respondents accused of infringement could opt out of the process, realizing that they could be deprived of valuable procedural rights by entering such an accelerated 'small small claims' process, and that less legally knowledgeable respondents might find themselves bound to an unfair, speedy process paying thousands of dollars in damages for something under which they did not even receive a full and thorough adjudication. These 'small small claims' could be taken serious advantage of by copyright trolls pursuing hundreds of judgments with small damage amounts based on inadequate copyright infringement claims.

While the full process of federal litigation might not always be necessary for copyright claims involving small monetary amounts, such as those at issue involving $5,000 or less, the CCB as a whole was created to circumvent the excess burdens and proceedings of federal litigation.[101] Creating a miniature track within the CCB with less rigorous and less fair protocol seems nonsensical. If the more relaxed procedure of only one officer hearing a case does not account for the same level of due process and fairness given to those on the ordinary track of an infringement claim in the CCB, there is no reason to have an accelerated track at all.

---

[96] *See* 17 U.S.C. § 1506(z).

[97] Stoltz & McSherry, *supra* note 53.

[98] 17 U.S.C. § 1506(z); *Frequently Asked Questions*, *supra* note 42.

[99] *Id.*

[100] Stoltz & McSherry, *supra* note 53.

[101] *See* David Ludwig, *The CASE Act Makes Copyright Enforcement More Accessible to Independent Artists… Sort of*, JDSUPRA (June 23, 2021), https://www.jdsupra.com/legalnews/the-case-act-makes-copyright-8873901/.

D. Shaky Determinations of Civil Penalties for Copyright Infringement Could Become Even Worse Under the CCB

In normal, non-CCB federal copyright infringement proceedings, the monetary amount of damages awarded to a successful petitioner can be given with no real measure of actual harm to explain the amount of awarded money.[102] The awards, called "statutory damages," are decided by a jury from anywhere between $750 to $30,000.[103] Furthermore, if the judge finds the infringement to have been "willful," the damages can rise to up to $150,000.[104] To obtain statutory damages, the holder of the copyright has to register work with the copyright office before the infringement, or within three months of the first publication of the work.[105] Copyright holders additionally do not have to introduce any evidence showing how they have been harmed by an infringement, or that the infringer has benefitted or profited from use of the copyrighted work.[106] There are few real substantive guidelines controlling how much to ask for in damages, ranging from $750 - $150,000.[107] Statutory damages vary so significantly from case to case that one commentator called it a "financial game of Russian roulette for defendants."[108] Perhaps repaying a person for their art is a benefit of large statutory damages, even if hard to prove. But the aforementioned dangers are more severe, especially in something like the CCB.

Furthermore, this structure is not analogous to any other area of litigation in the United States.[109] "In most areas of the law, we try to avoid this kind of unfairness and uncertainty by making sure that we tie penalties to the harm caused, with additional penalties where someone seems to have caused harm deliberately. But that's not what we do when it comes to copyright infringement."[110] The Copyright Act, which establishes the law on this matter, does not give judges or juries any guidance on how to choose a number within the wide monetary range, only that the amount should be decided "as the court considers just."[111] This current system of great discretion is almost wholly exclusive to the United States. Only two other advanced economies have statutory damages for cases of copyright infringement, and of those countries, only the United States does not impose limits or safeguards to avoid those problems.[112]

This current system of federal copyright with such wide discretion for statutory damages is obviously a huge restriction in innovative digital technology. Although

---

[102] Mitch Stoltz, *Collateral Damages: Why Congress Needs to Fix Copyright Law's Civil Penalties*, ELEC. FRONTIER FOUND. (July 24, 2014), https://www.eff.org/wp/collateral-damages-why-congress-needs-fix-copyright-laws-civil-penalties.

[103] *Id.*

[104] *Id.*

[105] 17 U.S.C. § 412.

[106] Stoltz, *supra* note 102.

[107] 17 U.S.C. § 504.

[108] Stoltz & McSherry, *supra* note 53.

[109] Stoltz, *supra* note 102.

[110] *Id.*

[111] 17 U.S.C. § 504.

[112] Stoltz, *supra* note 102.

this can get largely speculative, as there is no way for definitively knowing that certain products or services were not put out into the market due to the fear of statutory damages, specific innovators in VCR, audiotape, portable music players, and digital video distribution have all been vocal about being threatened by statutory damages.[113]

Obviously, this current system of federal copyright litigation needed to be addressed in the new CASE Act, and it was, but not in a beneficial way.[114] The most logical way this issue could have been addressed was to implement some sort of more rational and foreseeable way to get civil damages in copyright cases to allow creators to assess their risks before putting a creation out into the market. However, the CASE Act took away one safety measure currently within the federal copyright litigation system.[115] Currently, copyright registration is required to receive damages in federal court.[116] This limitation keeps works eligible for statutory damages within a fixed universe of registered pieces.[117] The new CASE Act, while limiting the damages available in a single proceeding to $30,000, still allows for statutory damages of up to $7,500 for works even if they are not timely registered with the copyright office.[118] This increases the number of works available for an infringement suit by literally millions.[119] Managing Partner of Carter Ledyard & Milburn, Judith Wallace, asserted that while the CASE Act cuts "costs by streamlining the process" it also lessens "certain safeguards built into litigation."[120]

Congress not only needs to generally address the flimsy standards for statutory damages resulting from federal copyright infringements but should have at the very least fixed this issue in the new small claims copyright court created by the CASE Act. Instead of implementing more discretion for small claims that can come before the CCB, the CASE Act lowered the threshold for damages by allowing for unregistered pieces of work to be infringed upon. Putting the federal problem aside to be decided another day, Congress needs to alter the CASE Act before putting the CCB into action to at least match the federal threshold of only seeking damages for only works registered in the Copyright Office.[121] This could prevent millions of suits where people accused of infringement would have no way of accurately knowing they are infringing on someone else's work. A person taking full precautions and going through the process of checking to see whether something is infringed upon could still be liable for $7,500 in damages for using an unregistered piece of art.[122] The unjustness of this is clear, as someone cannot know they are infringing on someone's work if that work

---

113 *Id.*

114 17 U.S.C. § 1504(e).

115 *Frequently Asked Questions*, *supra* note 42.

116 17 U.S.C. § 412.

117 *Id.*

118 17 U.S.C. § 1504.

119 Stoltz & McSherry, *supra* note 53.

120 Grant, *supra* note 15.

121 17 U.S.C. § 412; Stoltz & McSherry, *supra* note 53.

122 17 U.S.C. § 1504(e)(2)(II).

is not timely registered. Furthermore, we should be putting the onus on creators to register their works with the Copyright Office to be protected from infringement.

E. There Should be a Check on the Tribunal Judges to Ensure Justice

The new Act sets up the CCB as a working part of the Copyright Office, with three permanent officers acting as judges.[123] While admirable that these judges have expertise in the field of copyright complaints, there are some serious ethical concerns in having a judicial system function out of an administrative body.[124] The Copyright Office in the United States has a history of oftentimes placing the interests of copyright holders ahead of other significant legal and policy matters.[125] The new decision-makers at the tribunal may be too entrenched in the somewhat partisan nature of the Copyright Office to be able to make clear-minded and totally unbiased decisions.

To solve this issue of potential bias from unelected officers serving as judges, there needs to be some sort of check on the CCB officers. Especially since they are not elected, but simply appointed by the Librarian of Congress, they could make impartial or ill-motivated judgments, with no real consequences.[126] There needs to be a well-thought-out system in place before the CCB goes into action that puts some sort of check on those that will be presiding over the hearings. One specific solution to this could be an alternating system of federal judges coming for specific terms so as the system itself could continually remain neutral in cases. Another solution could be to have the officers being elected for renewable terms by a group of prominent members of the legal copyright community. Having the officers be elected and continually re-elected could incentivize the officers to remain neutral and make unbiased and just decisions.

An additional issue stemming from the three-member panel of judges comes up when considering the vast multitude of cases the CCB is likely to receive. With its incredibly wide breadth of jurisdiction, the three officers could be receiving thousands

---

[123] 17 U.S.C. § 1502(b)(1).

[124] *See* Mary E. Roy & Andrew W. Coffman, *Does the Arthrex Ruling Answer This Question About the CASE Act's Constitutionality?*, PHELPS (July 16, 2021), https://www.phelps.com/insights/does-the-lessigreaterarthrexlessigreater-ruling-answer-this-question-about-the-case-acts-constitutionality.html.

[125] Meredith Rose et al., *Captured: Systemic Bias at the U.S. Copyright Office*, PUB. KNOWLEDGE (Sept. 8, 2016), https://publicknowledge.org/policy/captured-systemic-bias-at-the-u-s-copyright-office/. Other commentators have noted that the Copyright Office has often placed the interests of larger copyright owners, like large entertainment and media giants, ahead of the others. One former Register of Copyrights notoriously stated, "copyright is for the author first and the nation second." Kerry Sheehan, *Let's Make the Copyright Office Less Political, Not More*, ELEC. FRONTIER FOUND. (Mar. 27, 2017), https://www.eff.org/deeplinks/2017/03/lets-make-copyright-office-less-political-not-more. In 2016, the Copyright Office even worked discreetly with major entertainment companies to undermine the FCC's attempts at trying to improve competition in cable boxes. Some appellate Courts have even looked into the Copyright Office to decide legal questions of extreme significance. *Id.*

[126] Rose et al., *supra* note 125; Sheehan, *supra* note 125.

of claims or more each year.[127] This is obviously more than three people can plausibly hear and could lead to hearings and adjudications being seriously delayed.[128] A solution for this issue could be to have multiple sets of officers able to make judgments on claims. Although this particular solution could mean that the different claims boards could reach potentially differing conclusions, this would not be a new phenomenon. Federal Circuit Courts are specialized courts that experience intra-circuit conflicts not infrequently.[129]

F. The Appellate Process Should be Expanded for Parties Who Receive Unfavorable Outcomes

The CASE Act provides that a party believing the decision of the CCB to have been wrongly decided can go through an appellate process, but on a rigidly limited basis.[130] A party can ask the CCB to reconsider their own decision in certain situations, including if the CCB makes a technical mistake or clear legal or factual error that is material to the decision.[131] If the CCB denies a petitioner's request for reconsideration, a party can ask the Register of Copyrights to review the decision to adjudicate if the CCB abused its discretion in denying the request for reconsideration. [132] The Register of Copyrights is the acting director of the Copyright Office within the Library of Congress.[133] This means that a party receiving an unfavorable decision could not simply appeal straight to a federal court, but only to another member of the Copyright Office, which, as previously mentioned, has a track record of occasionally acting in a biased manner.

A change the CASE Act should make to the current framework is to add a direct line into the federal appellate court; a party who receives an unfavorable outcome in the CCB should have the opportunity to petition for the applicable federal appellate court to review their case. One would be "hard pressed" to find another area of law in which a person files a petition for review to a particular court and judges of that court review the exact same issue. This seems wrong on many levels and would logically seem to be prohibited by the concept of res judicata.[134] The officers sitting as judges on the small claims tribunal would likely be extremely hesitant to agree with a petitioner that they have erred in their decision making, and should reconsider the issue. A neutral third party should act as a fair and unpartisan reviewer, and a federal district court could feasibly act as that reviewer.

---

[127] *See* Riddhi Setty, *New Copyright Venue Fields Hundreds of Claims, Evoking Optimism*, BLOOMBERG L. (Jan. 13, 2023), https://news.bloomberglaw.com/ip-law/new-copyright-venue-fields-hundreds-of-claims-evoking-optimism.

[128] *See* Alan Shimp, *Inside the New Copyright Claims Board*, MEDIA & ENT. SERV. ALL. (July 18, 2022), https://www.mesaonline.org/2022/07/18/inside-the-new-copyright-claims-board-2/.

[129] Samuelson & Hashimoto, *supra* note 58, at 701.

[130] 17 U.S.C. § 1506(w).

[131] *Id.*

[132] 17 U.S.C. § 1506(x).

[133] 17 U.S.C. § 701.

[134] Rose et al., *supra* note 125.

While the Act does provide for a federal district to vacate or modify certain decisions, it can only do so on extremely limited bases: "if (1) the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct, (2) the CCB exceeded its authority or failed to issue a final determination, or (3) in the case of a default or failure to prosecute, excusable neglect was the cause of the default or failure to prosecute."[135] While good that petitioners can appeal decisions of the CCB to a federal district court in extreme cases, petitioners need and deserve the option to petition for federal review in all cases, as a check on if the CCB acted erroneously. This does not mean that a federal district court will have to take on, hear, and make a decision of modification on each and every case from the CCB where a petitioner is dissatisfied with their decision, but only that a petitioner has the option to petition to a federal district court for review. A federal district court will not be obliged to hear every case, but only to look at the decision the CCB made and decide whether to hear it for review, just like a normal appellate process. This is a logical, fair, and judicial option that parties going through the CCB deserve.

G. The CCB's Breadth of Jurisdiction Spans Exceedingly Broadly and Should be Narrowed

Another potential issue with the new CCB is the amount of damages available for copyright infringement disputes: up to $30,000.[136] Members of the BCLT-Hastings workshop expressed concern that that amount was too high and could deter respondents from not opting out and participating in the CCB.[137] Due to the higher monetary cost and other factors of taking the action to federal court, a respondent might decide to opt out of the CCB with the hope that the plaintiff will not or cannot afford to take the claim through federal court.[138] A cap that might make respondents more willing to participate in the new tribunal could be "in the neighborhood of $10,000-15,000."[139]

Another problem stemming from the new CCB's wide breadth of jurisdiction is that the CCB will have the power to hear secondary liability and nonliteral infringement claims.[140] Such claims usually involve complicated factual issues that are ill-suited for adjudications of summary judgment from a tribunal based on often-simplified documentary evidence.[141] Additionally, a copyright infringement dispute might ask new or novel questions on which the law is not clearly established, and deserves to be litigated in a more extensive and comprehensive manner rather than a summary adjudication from an administrative tribunal.[142]

Something that could solve this issue, as articulated by participants in the BCLT-Hastings workshop is that if a respondent raises a defense that seems to require more

---

135 17 U.S.C. § 1508(c)(1)(A)–(C).

136 17 U.S.C. § 1508(e)(2)(D).

137 Samuelson & Hashimoto, *supra* note 58, at 697.

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

extensive discovery or a more in-depth fact-finding process than the CCB would allow, the adjudicators should be able to alert the parties that the particular dispute is unsuitable for adjudication in the CCB.[143]

H. Smaller Procedural Problems

In addition to the larger, more over-arching problems with the new CCB, there are several smaller-scale procedural problems with the incoming CCB that can manageably be addressed before the small claims court goes into effect. These problems include the process being too oriented around complainants, the minimum filing fee being potentially too costly for small creators, certain evidentiary proceedings being too time-consuming and complex for a small claims tribunal, and a lack of publicly posted precedent from the judgments.

1. Heavy Focus on Complainant

One minor problem with the CCB as it currently stands is the unbalanced focus on the complainant and an adequate amount on the respondent in comparison. While a complaint must be filed based on stringent guidelines with the tribunal clerk, and may be denied or given a thirty day period to fix the claim, no such detail or procedural check is required of response documents.[144] To ensure a fair judicial process on all sides, all response documents should be required to be filed and reviewed by staff members of the tribunal to check for validity. Tribunal staff members should not be giving help to claimants, nor should they be allowing respondents to bypass a procedural checkpoint.[145]

2. Filing Fees

Another minor procedural issue comes from the minimum filing fee of $100.[146] For a system that is aiming to help smaller creators, it should be designed to ensure that the cost of filing does not prevent a lower-income person whose work has been infringed upon from filing a claim.[147] BCLT-Hastings workshop participants expressed that many other small claims courts have set different fees for different claimants.[148] This system could translate well into claimant filing fees in the CCB. There are a multitude of ways Congress could tailor the filing fee to make it more accessible for every possible type of creator.[149] One possibility that has been suggested is as follows:

---

[143] *Id.* at 698.

[144] 17 U.S.C. § 1506(f)(1).

[145] Currently, the CASE Act only details the methods for reviewing claims and counterclaims. While good that respondents work will be procedurally checked if they file counterclaims, any and all response documents should be required to ensure compliance with specifically outlined methods. *Id.*

[146] 17 U.S.C. § 1510(c).

[147] *See* Jessica Sobhraj, *The CASE Act is Leveling the Playing Field for All Creators*, DIY MUSICIAN (Mar. 21, 2021), https://diymusician.cdbaby.com/music-rights/case-act-for-musicians-copyright/.

[148] Samuelson & Hashimoto, *supra* note 58, at 700.

[149] *See id.*

> For instance . . . $50 for a claim of $1,000 or less; $100 for claims up to $2,500; etc. Fees could be higher for companies than individuals, higher for those who have brought a certain number of claims within a set time period, or higher for creators who had not registered their claims of copyright before filing a claim with the tribunal.[150]

3. Discovery and Evidence

The CASE Act currently allows for a process of discovery and consideration of multiple types of evidence, even including expert witnesses.[151] While such time-consuming procedures are undoubtedly necessary in many cases to get justice, small claims adjudications should not be getting bogged down by excessive and costly additions to the record. Furthermore, the three-member panel of officers sitting on the CCB should not be in such a position as to assess witness credibility, which seems more reasonably a job for a jury in a more fully litigated trial – not a markedly quick small claims proceeding.[152] Lastly, if a matter is intricate enough to be dependent on the testimony of experts, it is likely too multi-faceted for the smaller-scale CCB process. There should be more thoroughly outlined caps on discovery, evidence, and witness testimony for the CCB, and expert witness testimony should not be allowed at all.

4. Precedential Opinions

The CASE Act asserts that CCB determinations should be nonprecedential, meaning they should not be publicly released to be relied on as legal precedent "in any other action or proceeding before any court or tribunal, including the Copyright Claims Board."[153] Although officer determinations and records of proceedings will be made available to the public via a publicly accessible website, this will be of little help without any basis for why the officers made the decision they did.[154] Making officers publicly post their rationale for coming to decisions could also minimize the possibility for systematic bias by ensuring that the officers are logically and rationally thinking through the disputes and making well-reasoned problems.

---

[150] *Id.*

[151] Although the CASE Act only says that expert witness testimony is admissible "in exceptional cases," it gives no specific measures as to what good cause means, making it a slippery slope for a party to potentially drag out the length of a case that should more reasonably be litigated by jury. § 1506(n); § 1506(o).

[152] *See* Emilio Nicolas, *Congress Makes the "CASE" for a New Copyright Tribunal, While Dissenters Express Concern*, JACKSON WALKER (Dec. 9, 2019), https://www.jw.com/news/emilio-nicolas-case-act-copyright-tribunal/.

[153] 17 U.S.C. § 1507(a)(3). When Congress was doing research on the CCB in 2013, one commenter explained his reasoning for making judgments non-precedential: "The goals of a small claims court . . . should not include influencing the direction of copyright law: decisions of the court will often be made quickly, based on a superficial record, without the benefit of briefing by counsel." SMALL CLAIMS REPORT, *supra* note 10, at 130.

[154] 17 U.S.C. § 1506(t)(3).

IV. CONCLUSION

> I've come too far to watch some namedropping sleaze / tell me what are my words worth.
>
> – *Taylor Swift, The Lakes*[155]

Creators in the United States unquestionably need a more accessible and equitable way to adjudicate claims of copyright infringement using less time, money, and resources than going the long and costly route of federal litigation. While Congress recognizes this issue, and admirably tried to address it with the passage of the CASE Act of 2020, the current framework of the Act is deeply flawed, and the CCB it establishes has some serious problems that could do more harm than good to creators seeking justice for their copyright claims. Ultimately, fixing problems including the opt-out provision for respondents, the relaxed procedures in the small small claims' process, the lowered threshold for works eligible for civil penalties, judges functioning out of an administrative body, an inequitable appellate process; the wide-sweeping jurisdiction; and some minor procedural problems would make the CASE Act a fairer and more beneficial route for creators to seek true justice for copyright infringement. Congress came close to hitting the right note with this legislation, and with just a few fine tunes, can match pitch to become a successful anthem, helping creators nationwide.

[155] TAYLOR SWIFT, *The Lakes*, *on* FOLKLORE (Republic Records 2020).