

## COPYRIGHT ADVISORY

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### **The CASE Act: Providing a Cost-Effective Remedy for Small-Stakes Copyright Infringement Actions**

*John Grimm and Hilary Gerzhoy*

On December 27, 2020 the Copyright Alternative in Small-Claims Enforcement Act of 2020 (the “CASE Act”) became law, creating a small claims court to adjudicate copyright claims below \$30,000.<sup>1</sup> The law provides a much-needed remedy for copyright holders claiming smaller damages amounts who would otherwise be precluded from enforcing their rights due to the high cost of litigating in federal court. Proceedings under the act are streamlined, with a limited ability to appeal the outcome. How the claims court will operate is not yet clear, because the regulations governing it have not been written.

***A voluntary small claims court within the Copyright Office.*** The CASE Act requires the U.S. Copyright Office, which is a department of the Library of Congress, to establish a voluntary tribunal—the Copyright Claims Board (“CCB”)—to adjudicate small-stakes copyright disputes. Use of the tribunal is voluntary. Neither the filer nor the respondent is required to adjudicate before the tribunal; either party can choose to litigate in federal court.<sup>2</sup> So while copyright holders can attempt to avail themselves of this cost-effective system of resolution, they may be precluded from doing so if the alleged infringer removes the case to federal court.

The CCB will not be the first copyright tribunal located within the Library of Congress. The Copyright Royalty Board, which sets certain royalty rates, has operated within the Library of Congress for years. In a 2012 case argued by HWG attorneys, the D.C. Circuit held it unconstitutional for the Librarian of Congress to appoint federal officials unless he has the power to remove them.<sup>3</sup> That principle is reflected in the CCB, whose claims officers are both appointed and removable by the Librarian of Congress.

<sup>1</sup> <https://nppa.org/sites/default/files/2020%20IP%20Package%20Language.pdf>

<sup>2</sup> Section 1504 (“§ 1504. Nature of proceedings 9 “(a) VOLUNTARY PARTICIPATION.—Participation in a Copyright Claims Board proceeding shall be on a voluntary basis in accordance with this chapter, and the right of any party to instead pursue a claim, counterclaim, or defense in a district court of the United States, any other court, or any other forum, and to seek a jury trial, shall be preserved.”)

<sup>3</sup> *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012).

***The previous system had a preclusive effect for those attempting to enforce smaller claims.***

Prior to the CASE Act, all copyright infringement cases—regardless of size—had to be pursued in federal court.<sup>4</sup> The U.S. Copyright Office estimated that “the median cost for a party to litigate a copyright infringement lawsuit with less than \$1 million at stake through appeal is \$350,000.”<sup>5</sup> That meant that for the average copyright claimant with a relatively small claim, the cost of litigation dwarfed whatever paltry payout they could hope to obtain.

***A law years in the making.*** Congress has long recognized the need for a cost-effective remedy for smaller copyright claims. The House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a hearing in March 2006, “Remedies for Small Claims Copyright,” which instructed the United States Copyright Office to study potential solutions to the matter.<sup>6</sup> The Copyright Office published a report in September 2013 on alternatives to federal litigation for copyright claims. The Copyright Office proposed that Congress “create a centralized tribunal within the Copyright Office” to administer proceedings for copyright owners seeking damages up to \$30,000.<sup>7</sup> Six years later, the CASE Act of 2019 was introduced, and ultimately passed, in the House of Representatives (H.R. 2426).<sup>8</sup>

***A cost-effective remedy for individuals and small businesses.*** Those seeking to enforce their rights before the new Copyright Claims Board can do so without a lawyer, and the system is designed to promote early settlements. The maximum damages per claim is \$30,000 including actual damages and profits, or statutory damages of up to \$15,000 per work for each work infringed if the work is timely registered, and up to \$7,500 per work if the work has not been timely registered (in federal court, statutory damages are not available at all if the work has not been timely registered). While the CCB will not issue injunctions, it may consider the infringer’s agreement to cease infringement in making any determination.

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<sup>4</sup> See 17 U.S.C. § 301; 28 U.S.C. § 1338.

<sup>5</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sep. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> (“Copyright Office Report”) (citing American Intellectual Property Law Association (“AIPLA”), *Report of the Economic Survey 2011*, at 35 (2011)).

<sup>6</sup> *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the Comm. on the Judiciary*, 109th Cong. 35 (2006), <https://www.govinfo.gov/content/pkg/CHRG-109hhr26767/pdf/CHRG-109hhr26767.pdf> (“For lawyers and professionals, litigation is just litigation. It is another day at the office. For photographers and illustrators, copyright infringement cases are intensely personal. There are lots of potential solutions here. They have been described and put forth in the Copyright Office report. I think it’s premature to try to deal with the details, but we would absolutely urge you to do what the Copyright Office report suggested and commission a study for the further investigation of this problem. This is probably the greatest legal challenge facing photographers today.”)

<sup>7</sup> Copyright Office Report at 4.

<sup>8</sup> H.R. 2426, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr2426/BILLS-116hr2426ih.pdf>.

***Streamlined proceedings and limited judicial review.*** The CCB is intended to provide a simple forum for claimants to resolve disputes. Discovery is generally limited to document production, interrogatories, and requests for admissions. The formal rules of evidence do not apply and, except in extraordinary circumstances, expert testimony is not allowed. Judicial review of CCB decisions is limited. A party challenging a determination by the CCB can seek an order from a federal district court vacating, modifying, or correcting a CCB determination in only three cases: (1) the determination was the result of fraud, corruption, misrepresentation or other misconduct; (2) the CCB exceeded its authority or failed to render a final determination; or (3) when the CCB determination was the result of a party's failure to prosecute its claim, that failure was based on excusable neglect.

***Open procedural questions.*** The CCB will operate according to regulations established by the Register of Copyrights. That work has not yet begun, so the ultimate procedures that will govern CCB proceedings have yet to be determined.

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For more information on CASE please contact John Grimm and Hilary Gerzhoy at [jgrimm@hwglaw.com](mailto:jgrimm@hwglaw.com) and [hgerzhoy@hwglaw.com](mailto:hgerzhoy@hwglaw.com).

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