

## Congress Establishes New Copyright Small Claims Court

The Copyright Alternative in Small Claims Enforcement Act (CASE Act) was signed into law on December 27, 2020, as part of the Omnibus COVID-19 Relief Bill. The CASE Act establishes a completely new forum for resolution of small copyright disputes, the Copyright Claims Board (CCB), in which parties may voluntarily resolve copyright disputes in front of a three-judge panel of officers appointed by the librarian of Congress. The CCB is intended to provide a streamlined and less expensive forum for small copyright disputes, with civil claims and counterclaims capped at \$30,000 in actual or statutory damages. For example, an act of infringement of a single photograph may not always be worth the expense of a district court lawsuit; it could be resolved by the CCB instead.

Importantly, a defendant can object to adjudication by the CCB and force a plaintiff to sue in district court. In that case, unless the plaintiff files a federal complaint, the claim might not be litigated at all. The CCB must begin operations by December 27, 2021, unless the Copyright Office seeks to delay implementation. The Copyright Office is also required under the CASE Act to conduct rulemaking proceedings to implement the Act and make the CCB operational. Until then, content owners and content users should begin thinking about whether and when they will want to use the CCB, as it is not a one-size-fits-all forum.

### How Will the CCB Operate?

**Scope of Claims:** The CCB will adjudicate claims of infringement, counterclaims, or declarations of non-infringement arising under the exclusive rights under 17. U.S.C. § 106, claims for misrepresentation in regard to the Digital Millennium Copyright Act (DMCA) takedown or counter notifications seeking to remove or replace online material, and defenses in regard to a permitted claim or counterclaim, or agreements pertaining to claims of infringement. The CCB will not adjudicate other claims and counterclaims. In addition, certain other claims and counterclaims are excluded, including those adjudicated or pending before a district court (absent a stay), by or against a federal or state governmental entity, or against a foreign individual or entity, although foreign parties may both bring claims before the CCB and be subject to counterclaims after bringing claims. A claim before the CCB must be properly commenced within three years of the claim accruing.

**Damages and Relief:** The CCB may award up to a total of \$30,000 in a single proceeding for either actual damages and profits or statutory damages. Claimants and counterclaimants may elect either actual or statutory damages or not to recover damages. Unlike available attorneys' fees to prevailing parties in district court under existing Copyright Act provisions, CCB parties bear their own fees and costs absent a finding of harassment, improper purpose, or lack of reasonable basis, in which case a fees award is limited to \$5,000. Statutory damages are capped at \$15,000 per claim for works that were timely registered and \$7,500 per claim or a total of \$15,000 in one proceeding for works that were registered after the deadlines set out in 17 U.S.C. § 412. The CCB will not make findings of willfulness, but the CCB may consider agreement to cease or mitigate infringement in determining statutory damages. An award of CCB relief may also require a party to cease either infringing activity or sending DMCA notices or counter notices. If a party fails to pay damages or comply with other provisions in a CCB determination, an aggrieved party may request that a district court confirm the relief awarded and enter a judgment against the delinquent party. The request for district court confirmation must be made within one year of the last CCB action. CCB decisions will not have precedential effect.

**Opt Out or (Mostly) Accept the Ruling:** The CCB process is voluntary. A properly served respondent has 60 days to opt out of the proceedings, in which case the proceeding is dismissed without prejudice. If the respondent does not timely opt out, they are bound by the CCB's final determination, which waives their right to a jury trial and generally precludes relitigation in another court or tribunal. Written requests for reconsideration based on clear error or technical mistake may be filed with the CCB within 30 days of a determination, with additional review available from the Register of Copyrights based upon an abuse of discretion standard. District courts cannot vacate or modify CCB determinations unless the determination was issued as a result of fraud or misconduct, or if the CCB lacked authority.

## **How Is the CCB Likely to Affect Copyright Litigation?**

Although it remains to be seen how the CCB will operate in practice, it may affect the copyright litigation landscape in several ways.

- The CCB offers a more limited and less costly alternative to district court actions. Documentary and other nontestimonial evidence may be submitted, but testimonial evidence is limited, with certain exceptions, to statements by the parties and non-expert witnesses. To file a claim with the CCB, the work must either be registered or be the subject of a completed pending application, deposit, and fees. Registration prior to CCB suits is therefore not required and a claimant can simultaneously file an application and a CCB proceeding, unlike the requirement for pre-suit registration in district court actions following the U.S. Supreme Court's 2019 decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*. However, the CCB may only make determinations after a registration certificate has been issued, and may stay proceedings pending registration.
- Content owners may be more likely to bring infringement actions with low economic value. Indeed, the central purpose behind the CASE Act was to provide a forum for small claims that would be economically infeasible to bring in federal court. Even content owners who do not actually file in the CCB may exert greater leverage in pre-suit negotiations because they can more credibly threaten legal action through the CCB.
- A cottage industry to bring low-dollar copyright claims may further develop. These attorneys and plaintiffs, some of whom may not be the original copyright owners or who may not be actively using their copyrighted works, may hope to monetize their copyrights in a volume industry because the barrier to entry for seeking copyright enforcement has been reduced.
- The corollary to these first two changes is that using another's copyrighted work without permission, even unintentionally, becomes riskier. This is especially true for companies that may be using works with uncertain origin or copyright protection.
- It also remains to be seen how much cheaper and more efficient the CCB is in resolving copyright disputes. Arbitration clauses, for example, are often praised as money savers, but not all arbitrations are meaningfully less expensive than traditional litigation. The CCB's streamlined procedures should help keep costs down, but more complicated cases may still involve significant costs or at least costs that outpace the potential recovery.

One thing that won't change is substantive copyright law. The CCB provides a new forum and procedure, but does not change what is copyrightable, what exclusive rights are given the copyright owner, who owns the copyright, or what constitutes infringement.

## **What Are the Benefits and Drawbacks of the CCB?**

Either party can decide to litigate a copyright case elsewhere. Plaintiffs can choose to file in federal district court instead, and defendants have 60 days after service in the CCB to opt out of the proceedings, which causes dismissal of the CCB case and forces the plaintiff to file in district court. Companies will therefore have the ability to decide whether and when they want to litigate in the CCB.

The CCB has been heralded as the perfect forum for content owners—especially small companies and individuals—to affordably protect their intellectual property; it can be, but the CCB won't be a perfect fit every time. And while defendants may often want to opt out, some defendants in some types of cases may decide that the streamlined CCB procedures and damages caps may help control their downside risk.

The right approach will differ based on each scenario, but sample considerations for potential CCB participants are as follows:

- The maximum amount in controversy as compared to the recovery caps and likely recoveries based upon actual or statutory damages elections before the CCB;
- The cost to litigate in the streamlined CCB versus federal court;
- The nature of the work and the nature and extent of the alleged infringement;
- Whether the infringement is ongoing or historical;
- The type, size, and resources of both parties;
- The number and complexity of the defendant's likely defenses;
- The type and extent of discovery that may be necessary to establish a claim or defense, given the CCB's streamlined and narrower discovery procedures;
- Whether a party may want to seek attorneys' fees if it prevails;
- Whether a party wants other claims or counterclaims to be considered as part of the same case, as the CCB is not an all-purpose forum for any legal claim;
- Whether a plaintiff or defendant may want the option of an appeal;
- Each party's familiarity with the forum; and
- Whether the CCB proves to be more plaintiff-friendly, defense-friendly, or neutral.

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## Authors



### **[Britt L. Anderson](#)**

Partner

[BAnderson@perkinscoie.com](mailto:BAnderson@perkinscoie.com) [650.838.4835](tel:650.838.4835)



## **John Gray**

Partner

[JHGray@perkinscoie.com](mailto:JHGray@perkinscoie.com) [602.351.8092](tel:602.351.8092)



## **Caitlin Hoerberlein**

Associate

[CHoerberlein@perkinscoie.com](mailto:CHoerberlein@perkinscoie.com) [206.359.8160](tel:206.359.8160)

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