

Making Small Claims Work for Copyright Law: Why the Decisions of an Unprecedented Judicial Authority Should Hold Precedential Weight

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Making Small Claims Work for Copyright Law: Why the Decisions of an Unprecedented Judicial Authority Should Hold Precedential Weight

Emma C. Johnson¹

Individual creators increasingly struggle to protect their copyrights, especially in the digital age. It is already often difficult for many creators to make a living, and more often than not, they cannot afford to pay thousands in court and legal fees to bring a copyright infringement claim. With the passing of the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the “CASE Act”) in December of 2020, Congress and the United States Copyright Office formed a federal small claims court for creators in such positions to be able to enforce their copyrights.

The CASE Act seeks to give small copyright owners a procedurally streamlined and economically feasible forum in which to bring their small copyright claims and avoid full-fledged federal litigation. But substantive complexities that the new legislation failed to address may very well continue to keep small copyright claimants out of court.

This note will first give background of the legislative history leading to the enactment of the CASE Act, as well as an overview of how the Copyright Claims Board (“CCB”) operates. Second, it will discuss the difficulties and deterrents for creators of modest means in enforcing their copyrights and the largely procedural

¹ J.D., University of Miami School of Law, 2023; M.A., University of Miami, 2023; B.A., Gustavus Adolphus College, 2018. Many thanks to my advisor, Christie Anne Daniels, Professor of Legal Writing at University of Miami School of Law, and to Allyn Ginns Ayers, LegalARTLink Director at Locust Projects, for all of their guidance.

ways in which the CASE Act aims to address those barriers. Third, it will point out substantive elements which the CASE Act overlooks—namely, that the decisions of the CCB will be binding to the parties to any particular claim and will have no precedential value for other proceedings in the copyright small claims court, nor within any other court of the United States. Finally, this note will contend that the features of this new copyright small claims court set the stage well for determinations of the CCB to hold precedential weight—or, in the alternative, for the future development of a specialized copyright court akin to the Federal Circuit. Such a narrowly focused court whose determinations are precedential would not only assist small claimants assert their rights against copyright infringement but would also go a long way toward reducing the daunting complexity of the United States’ body of copyright law.

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I. INTRODUCTION

Many creators fight an infamous battle to enforce their copyrights in their creative works. Creators struggle to protect their copyrights from unauthorized uses, especially with the rapid growth of technology and the internet and the plague of peer-to-peer filesharing.² As of June 2022, the United States Copyright Office has launched a federal small-claims court to deal with precisely these small copyright claims. In practice, such claims have been unenforceable because of procedural and financial barriers that deter creators from bringing such claims to federal court.³ Due to the Copyright Alternative in Small-Claims Enforcement Act (the “CASE Act”),⁴ small creators, or copyright owners with small claims, are finally in a position to enforce their rights.

Rick Carnes, current President of the Songwriters Guild of America who is a musician and songwriter himself,⁵ provides an illustrative example of the difficulty that creators encounter in protecting their copyrighted works. When Carnes “first saw [his] songs being streamed on YouTube without [his] consent,” he tried to get them taken down from the

² See U.S. COPYRIGHT OFF., *COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS*, 1 (2013) [hereinafter *SMALL CLAIMS REPORT*] (“While infringement is nothing new when it comes to the world of creative works, there is no question that it has proliferated with the ascendance of digital culture and the unprecedented desire for content. Today it is not only easy to make unauthorized copies, but to do so at virtually no cost, much to the detriment of authors and the market for their works.”).

³ See *Learn About the Copyright Claims Board (CCB)*, COPYRIGHT ALL., <https://copyrightalliance.org/trending-topics/copyright-small-claims/> (last visited July 19, 2022), [<https://web.archive.org/web/20220619204635/https://copyrightalliance.org/trending-topics/copyright-small-claims/>].

⁴ Copyright Alternative in Small-Claims Act of 2020 (CASE Act of 2020), 17 U.S.C. §§ 1501–1511.

⁵ See *President*, SONGWRITERS GUILD AM., <https://www.songwritersguild.com/site/rick-carnes> (last visited Apr. 12, 2023).

site.⁶ However, after sending the first takedown notice,⁷ “another unlicensed copy appeared within minutes of the first one being taken down,” and he found himself “playing an unwinnable game of ‘Whack-A-Mole.’”⁸ With his only other option being to file a copyright infringement lawsuit in federal court, the average cost of which is estimated to be six figures,⁹ Carnes justifiably concluded that “copyright law is useless to [creators] when the cost of enforcement of [their] rights far exceeds the compensatory damages able to be recovered against infringers.”¹⁰ Considering that the median musician in the United States makes only around \$25,000 a year,¹¹ the costs of federal litigation, and the attorneys’ fees that go with it, mean that to enforce and protect copyrights is simply not economical.¹²

The CASE Act is intended to give hope to creators like Carnes by making legal remedies for small copyright claims accessible. Further, the federal legislature’s inclination towards copyright reform over the last few decades leaves the door open to continue to build a system that will not only support creators but shape a more cohesive body of copyright law overall.

Part I of this note will examine the legislative history that led to the enactment of the CASE Act, as well as an overview of how the Copyright Claims Board (“CCB”) functions. Part II.A will discuss the specific procedural ways in which the CASE Act strives to make small copyright enforcement more accessible and how the procedures of the CCB amend regular procedures of copyright litigation. Part II.B will focus on some

⁶ Rick Carnes, *Finally, a Small Claims Solution that Would Provide Songwriters and Composers a Real Remedy for Our Rights!*, THE TRICHORDIST (July 17, 2016), <https://the-trichordist.com/2016/07/17/finally-a-small-claims-solution-that-would-provide-songwriters-and-composers-a-real-remedy-for-our-rights/>.

⁷ See generally 17 U.S.C. § 512(c)(3).

⁸ Carnes, *supra* note 5.

⁹ Jeffrey Bills, Comment, *David’s Sling: How to Give Copyright Owners a Practical Way to Pursue Small Claims*, 62 UCLA L. REV. 464, 467 (2015) (“The average copyright lawsuit in federal court . . . usually costs a minimum of five figures and can reach into six figures if it must be pursued through discovery and trial.”); see also SMALL CLAIMS REPORT, *supra* note 2, at 24–26 (citing AM. INTELL. PROP. ASS’N, REPORT OF THE ECONOMIC SURVEY 2011, at 35, App. I-163 (2011) (“[T]he median cost in 2010 for a party to litigate a copyright infringement lawsuit with less than \$1 million at risk through to appeal was \$350,000. To reach even the close of discovery, the median cost was \$200,000.”)).

¹⁰ Carnes, *supra* note 5.

¹¹ Amy X. Wang, *The Median U.S. Musician Is Still Making Under \$24,000 a Year*, ROLLING STONE (June 27, 2018, 1:47 PM), <https://www.rollingstone.com/pro/news/the-median-u-s-musician-is-still-making-under-25000-a-year-666833/>.

¹² The more complex nature of music copyrights in particular, with regard to the intricacies of music itself, as well as the relationships among musicians, music publishers, record companies, and performing rights organizations, often means that copyright enforcement for small copyright owners in musical works is entirely out of reach.

notable substantive copyright issues that the Act failed to address. Part III will highlight features of the CCB and the small copyright claims court that would support future development of a centralized copyright authority with the expertise and competence to harmonize national inconsistencies in the copyright body of law by permitting the determinations of such a court to be persuasive, if not binding, precedential authority.

II. CASE ACT OVERVIEW

A small copyright claims court has been in the making for well over a decade. The desire to establish a system that allows small copyright interests to be more easily enforceable is not only based on a fundamental sense of fairness but is also derived from Constitutional concerns.¹³ Congress has the power to “promote the progress of science and useful arts”¹⁴ by incentivizing creativity and originality. Currently small copyright claimants do not “have a realistic ability to enforce [their] rights.”¹⁵ Recognizing this, the CASE Act “reflects the Congressional determination that a modern copyright system requires a small claims process to effectively promote the creation and distribution of new works.”¹⁶ The Copyright Office is working to instill faith in this copyright small claims system,¹⁷ but the CCB still has a long road ahead.

A. Legislative History

The idea to establish a small claims court to hear copyright infringement claims has circulated through Congress since at least 2006,¹⁸ although “[t]here is nothing new about the notion that a small-claims court can address the problems litigants face in terms of access, expense, and

¹³ See generally U.S. CONST. art. I, § 8, cl. 8.

¹⁴ *Id.*

¹⁵ Letter from Lamar Smith, Chairman, U.S. H. Judiciary Comm., to Hon. Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Oct. 11, 2011), in SMALL CLAIMS REPORT, *supra* note 2 (“On an individual level, the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works. On a collective level, the inability to enforce rights corrodes respect for the rule of law and deprives society of the benefit of new and expressive works of authorship.”).

¹⁶ H.R. REP. NO. 116–252, at 20 (2019).

¹⁷ See Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 26 GEO. MASON L. REV. 65, 68 (2018).

¹⁸ *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. On the Judiciary*, 109th Cong. app. at 45–46 (2006) [hereinafter *Small Claims Hearing*] (prepared statement of the United States Copyright Office) (quoting U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 114 (2006)).

complexity.”¹⁹ The issue was first brought to the attention of the Copyright Office when seeking comments for a report on orphan works.²⁰ Although that report was unrelated to the practical ability of small copyright owners to bring small claims, the Copyright Office noted its importance, which catalyzed a nearly fifteen-year endeavor to reform procedures to pursue small claims.²¹

In the same year, Congress held a hearing on a potential small copyright claims court, in which the Copyright Office offered to study how the current system deters copyright owners from pursuing small claims and provide suggestions for alternatives.²² It took another several years, though, for the Copyright Office to act on this issue. In 2011, the U.S. House Judiciary Committee formally requested that the Register of Copyrights investigate issues with the current system and present possible alternatives:

[Congress has a] responsibility to ensure that authors, photographers and other copyright owners—many of

¹⁹ Jeffrey Bills, *supra* note 8, at 479.

²⁰ See U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS, 1 (2006) (“This Report addresses the issue of ‘orphan works,’ a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.”).

²¹ See *id.* at 114 (“We are sympathetic to the concerns of individual authors about the high cost of litigation and how, in many cases, the individual creator may have little practical recourse in obtaining relief through the court system, particularly against infringements involving small amounts of actual damages. This problem, however, has existed for some time and goes beyond the orphan works situation, extending to all types of infringement of the works of individual authors. While there are some mechanisms in place to help address the problem, such as enforcement by collective organizations or timely registration to secure the availability of statutory damages and attorneys['] fees, we believe that consideration of new procedures, such as establishment of a “small claims” or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress. It is not, however, within the province of this study on orphan works.”).

²² See *Small Claims Hearing*, *supra* note 17, app. at 46 (statement of the United States Copyright Office) (suggesting to study “(1) whether, how, and to what extent authors and copyright owners are hindered or even prevented from seeking relief for infringements of their copyrights due to the cost of litigation under the current system, and (2) if the current system does not provide adequate procedures and remedies for the adjudication of small copyright claims, what changes in the law would be advisable to ensure that authors and copyright owners are able, as a practical matter, to seek remedies for infringements of their works”).

whom rely upon the promise of exclusive rights associated with the grant of copyright to earn a living and provide for their families—have a realistic ability to enforce those rights when they have a comparatively modest claim for damages.²³

In order to advocate for these small copyright owners, whose input might not have otherwise been heard, many creative industries that are largely comprised of small creators showed fervent support.²⁴ In response, the Copyright Office decided to explore, first, how small copyright owners are discouraged from enforcing their rights in court, and second, what changes might allow these copyright owners, “as a practical matter,” to protect their works against infringement.²⁵ The agency then formally opened the issue for comments to consider what changes could realistically be made,²⁶ holding public hearings in conjunction.²⁷

The Copyright Office also ultimately released an extensive “Copyright Small Claims” report in 2013,²⁸ which included a proposed draft of language for new legislation²⁹ to be added to the Copyright Act of 1976,³⁰ much of which was later incorporated into the CASE Act itself when codified.³¹ Following this 2013 Small Claims Report, reform for small copyright claims still struggled to gain traction with the first proposed bills.³² The copyright small claims court was introduced once again in 2019,³³ but it was not until the proposed bill was made part of the Consolidated Appropriations Act of 2021,³⁴ to increase the chances it

²³ Lamar Smith, *supra* note 14.

²⁴ See, e.g., *Statements of Support*, COPYRIGHT ALL., <https://copyrightalliance.org/news-events/statements-of-support/> (last visited Apr. 12, 2023).

²⁵ *Small Claims Hearing*, *supra* note 17, app. at 46.

²⁶ See Remedies for Small Copyright Claims, 76 Fed. Reg. 66758 (Oct. 27, 2011); Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51068 (Aug. 23, 2012); Remedies for Small Copyright Claims: Third Request for Comments, 78 Fed. Reg. 13094 (Feb. 26, 2013).

²⁷ See U.S. COPYRIGHT OFF., PUBLIC HEARING ON SMALL COPYRIGHT CLAIMS (N.Y.C., N.Y., Nov. 15–16, 2012); U.S. COPYRIGHT OFF., PUBLIC HEARING ON SMALL COPYRIGHT CLAIMS (L.A., Cal., Nov. 26–27, 2012).

²⁸ SMALL CLAIMS REPORT, *supra* note 2.

²⁹ *Id.* at 133–61.

³⁰ 17 U.S.C. §§ 101–122.

³¹ §§ 1501–1511.

³² See H.R. 6496, 114th Cong. (2016); H.R. 5757, 114th Cong. (2016); H.R. 3945, 115th Cong. (2017).

³³ See S. 1273, 116th Cong. (2019); H.R. 2426 (2019).

³⁴ Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, 134 Stat. 1182.

would pass,³⁵ that the CASE Act was finally signed into law in December 2020.³⁶

B. *Effectuating the CASE Act*

The new copyright small claims court opened its doors for claims on June 16, 2022.³⁷ Prior to this, the Copyright Office published a series of rulemaking notices to establish procedures for the CCB, finalizing the rules shortly before beginning operations.³⁸ The Copyright Office largely recognizes the launch of the CCB as a success, and as of the time of this writing, more than 300 small claims have been filed.³⁹

III. HAZARDS OF COPYRIGHT LAW

While small copyright infringements may seem unimportant in the context of the creative industry as a whole, “taken in the aggregate, they have an effect on the livelihoods of individual creators akin to the infamous torture ‘death by a thousand cuts.’”⁴⁰ Copyright protections might mean very little, in practice, for creators of modest means⁴¹ because battling infringement too often leads to the proverbial “right without a remedy,” since, effectively, “the courthouse doors are locked shut.”⁴²

The CASE Act seeks to make such small copyright enforcement more accessible in a number of ways. For the CCB, the Act simplifies certain procedural complexities of copyright law, although it does remarkably

³⁵ June M. Besek, *Getting CASE in Place*, 13 LANDSLIDE 1, 1 (2021).

³⁶ U.S. Copyright Off., *Copyright Small Claims and the Copyright Claims Board*, COPYRIGHT.GOV, <https://www.copyright.gov/about/small-claims/> (last visited Apr. 12, 2023).

³⁷ COPYRIGHT ALL., *supra* note 2.

³⁸ *See generally* 37 C.F.R. §§ 220–235 (2023).

³⁹ *See* Riddhi Setty, *New Copyright Venue Fields Hundreds of Claims, Evoking Optimism*, BLOOMBERG L. (Jan. 13, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/new-copyright-venue-fields-hundreds-of-claims-evoking-optimism>.

⁴⁰ Songwriters Guild of Am. and Nashville Songwriters Association Int’l, Comment Letter on First Notice of Inquiry on Remedies for Small Copyright Claims (Jan. 17, 2011), https://www.copyright.gov/docs/smallclaims/comments/51_songwriters_guild.pdf.

⁴¹ *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 17–18 (2010) (“If the public perceives copyright law to give it a poor return on its investment, it may well respond by divesting—either pressing its elected representatives to enact additional limitations and privileges, or simply failing to comply with rules it no longer perceives as legitimate.”).

⁴² Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?*, 25 COMM. L. & POL’Y 1, 6 (2020) (“[T]he protections afforded by copyright are more theoretical than practical.”) (quoting Terrica Carrington, *A Small Claims Court is on the Horizon for Creators*, COPYRIGHT ALL. (Oct. 4, 2017), <https://copyrightalliance.org/small-claims-court-on-the-horizon/>).

little in terms of substantive complexity, not to mention the fact that certain types of copyrightable works, such as musical works, present their own issues.⁴³

A. Procedural Accommodations for Small Copyright Claims

Policy discussions preceding the CASE Act found that most of the barriers that prohibit copyright owners from bringing their small infringement claims to court are procedural in nature.⁴⁴ Procedural copyright law “can be just as unwelcoming to the uninitiated and underresourced” as the substantive law.⁴⁵ Interested persons weighing in during the 2013 study most often cited the immense financial burden of full-fledged federal litigation as the primary deterrent, including court costs and attorneys’ fees,⁴⁶ as well as the sheer length of time it can take to resolve a claim.⁴⁷ Other significant reasons for the difficulty in bringing

⁴³ The Copyright Office noted that several commenters contended that musical works and sound recordings should not be included as eligible works over which small claims could be brought at the CCB “because music matters can be complex and involve ownership and contract disputes, and potentially frivolous claims of authorship.” SMALL CLAIMS REPORT, *supra* note 2, at 118. “Even the most sophisticated and experienced federal judges and copyright attorneys have difficulties with music copyright issues, such as fair use, authorship and co-authorship, work-for-hire, license compliance, the first sale doctrine, termination rights, secondary liability, sampling, the digital creation of works, access and substantial similarity, willfulness, interpretation of the DMCA safe harbors, divisibility of copyright, and so on.” Nat’l Music Publishers’ Ass’n et al., Comment Letter on Remedies for Small Copyright Claims: 3d Request for Comments at 11 (Apr. 12, 2013), https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/NMPA.pdf. Music copyright ownership is often split several ways, but also because the National Music Publishers’ Association and its members as well as other organizations that act on behalf of musical artists might already “represent songwriters’ interests in infringement matters.” *Id.* at 117–18. Additionally, performing rights organizations such as the ASCAP were concerned about the CCB establishing a “competing or alternative body of case law . . . disrupt[ing] nearly a century of case law regarding the performance right of musical works.” Am. Soc’y of Composers, Authors and Publishers & SESAC, Inc., Comment Letter on Notice of Inquiry regarding Remedies for Small Copyright Claims at 4 (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/03_ascap.pdf.

⁴⁴ See SMALL CLAIMS REPORT, *supra* note 2, at 16–26 (“[F]ederal court procedural rules are not tuned to the specific needs of copyright litigants. At the same time, the Copyright Act and decisional law impose additional requirements on those seeking to pursue copyright infringement claims, which can add to the legal complexity of a case.”).

⁴⁵ Sean Pager, *Making Copyright Work for Creative Upstarts*, 22 GEO. MASON L. REV. 1021, 1026 (2015).

⁴⁶ See SMALL CLAIMS REPORT, *supra* note 2, at 24–26.

⁴⁷ See *id.* at 26 (“In districts that see the most copyright cases, it is likely to be a year and a half before the parties can get to trial.”). This calculation does not even include the length of time it could take to finally resolve a claim. Conversely, because proceedings in the copyright small claims court will be, purportedly, streamlined, the idea is that these

small claims include formalities such as the registration requirement⁴⁸ and its implications for damages and other available remedies,⁴⁹ the frequent issue of identifying online infringers,⁵⁰ and the statute of limitations,⁵¹ among others.⁵² Working within additional boundaries of Constitutional⁵³ and jurisdictional issues, the CASE Act sought to address each of these concerns by bending the rules for CCB proceedings.

i. Jurisdiction and the Copyright Claims Board

Copyright law in the United States exists exclusively under federal jurisdiction.⁵⁴ Ordinarily, a party who files a copyright infringement suit can do so in any appropriate federal district court throughout the United

small claims will be able to be resolved more efficiently and within a much shorter timeframe.

⁴⁸ See *id.* at 16–18.

⁴⁹ See *id.* at 20–24.

⁵⁰ See *id.* at 18–19 (“In the internet age—where wrongdoers can act anonymously—[identifying online infringers] can be difficult.”). The Copyright Office sidestepped this issue for the time being, stating that “the question of whether a small claims court should provide a mechanism to permit identification of unknown online infringers is one that should await another day,” although the Copyright Office “recommend[ed] further consideration of this issue if an alternative small claims system [were to be] adopted.” *Id.* at 123. The codified CASE Act neglected to mention the problem entirely. See generally 17 U.S.C. §§ 1501–1511.

⁵¹ See SMALL CLAIMS REPORT, *supra* note 2, at 19 (“A primary consideration is whether the three-year statute of limitations has expired.”). Despite the Copyright Office having flagged this, the statute of limitations under the CASE Act is the same as for civil claims under the rest of the Copyright Act of 1976: three years. § 507(b); § 1504(b)(1). This will undoubtedly be raised as problematic when the CCB has to decide which jurisdiction’s law to apply in order to determine when a claim of infringement has accrued, since the statute of limitations for copyright claims is the subject of its own circuit split, with some courts ruling that the statute of limitations expires three years after the last incident of infringement (the injury rule), while others start the clock at the point when the claimant “discovers, or with due diligence should have discovered, the infringement” (the discovery rule). Andrea Calvaruso, *Second Circuit Limits Copyright Damages to Three Years Preceding Suit*, KELLEY DRYE (May 21, 2020), https://www.kelleydrye.com/News-Events/Publications/Client-Advisories/Second-Circuit-Limits-Copyright-Damages-To-Three-Y#_ftn1, reprinted in JD SUPRA (May 22, 2020), <https://www.jdsupra.com/legal/news/second-circuit-limits-copyright-damages-87680/> (quoting *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014)). This calculation is only further complicated when continuing acts of infringement toll the statute of limitations. SMALL CLAIMS REPORT, *supra* note 2, at 19 n.105.

⁵² See, e.g., SMALL CLAIMS REPORT, *supra* note 2, at 22–23 (including the standards of burden of proof to obtain injunctive relief).

⁵³ Constitutional issues surrounding the CASE Act include the Seventh Amendment right to a jury trial, Article III judicial power, and due process concerns, to name a few, but these issues are beyond the scope of this note.

⁵⁴ 28 U.S.C. § 1338(a).

States.⁵⁵ After dismissing a number of alternatives, including delegating the issue to state general small claims courts,⁵⁶ the legislature opted to have the CCB small claims court be administered by the Register of Copyrights in the United States Copyright Office.⁵⁷

The CCB, under the supervision of the Copyright Office, consists of three highly qualified⁵⁸ officers,⁵⁹ whom are advised by two full-time expert⁶⁰ staff attorneys.⁶¹ The Officers additionally “may consult with the Register of Copyrights on general issues of law,”⁶² with the exception that the Register may not advise on “the facts of any particular matter,”⁶³ nor “the application of law to the facts.”⁶⁴

The CCB is centralized in one location: at the Copyright Office within the Library of Congress.⁶⁵ Nevertheless, proceedings are conducted predominantly through written submissions.⁶⁶ In the event that a hearing is deemed necessary, it is done virtually,⁶⁷ so that the CCB court proceedings are accessible from anywhere in the country.⁶⁸

⁵⁵ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01[A][1][a] (2022).

⁵⁶ See SMALL CLAIMS REPORT, *supra* note 2, at 51–61; see Virginia Knapp Dorell, Note, *Recent Development: Picturing a Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 463 (2013) (“Keeping the small claims court within the federal court system could be a small step closer to providing a more efficient forum for small copyright owners.”).

⁵⁷ See 17 U.S.C. § 1502(a).

⁵⁸ See § 1502(b)(3)(A).

⁵⁹ § 1502(b)(1).

⁶⁰ See § 1502(b)(3)(B).

⁶¹ § 1502(b)(2).

⁶² § 1503(b)(2)(A).

⁶³ § 1503(b)(2)(B)(i).

⁶⁴ § 1503(b)(2)(B)(ii).

⁶⁵ § 1506(c); § 1502(b)(9).

⁶⁶ § 1506(c)(2).

⁶⁷ No doubt the COVID-19 pandemic, which globally caused the legal industry to be “forced kicking and screaming” into the twenty-first century and eased the transition of accessing justice to an online platform, influenced this provision. Carolyn M. Proctor, *Law Firms Forced into 21st Century Technology by the Pandemic*, WASH. BUS. J. (Apr. 2, 2021, 5:00 AM), <https://www.bizjournals.com/washington/news/2021/04/02/law-firms-forced-into-new-technology-pandemic.html>. And, virtual justice systems are likely not going anywhere anytime soon, despite the loud critiques of skeptics. See generally Richard Susskind, *The Future of Courts*, 6 THE PRACTICE (July/Aug. 2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/>, [<https://web.archive.org/web/20200804044055/https://thepractice.law.harvard.edu/article/the-future-of-courts/>]; PEW CHARITABLE TRS., HOW COURTS EMBRACED TECHNOLOGY, MET THE PANDEMIC CHALLENGE, AND REVOLUTIONIZED THEIR OPERATIONS (2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf>.

⁶⁸ See § 1506(c)(2).

ii. Formalities

By loosening the requirement of the copyright registration formality to bring a claim of copyright infringement, the Copyright Office seeks to streamline the small claims court. Under the Copyright Act of 1976, a copyright owner may bring a claim of copyright infringement for violation of any of the exclusive rights of copyright owners under 17 U.S.C. §§ 106–122.⁶⁹ Ordinarily, in order to bring a claim for copyright infringement of one of these exclusive rights, the copyright owner must also have registered the work with the Copyright Office.⁷⁰

In contrast, in order for a copyright owner to bring a small claim of copyright infringement to the CCB, the copyright owner need only submit an application to have the work registered;⁷¹ the work does not actually need to have been registered before the owner can bring a claim.⁷² Failing to acquire a timely registration, though, can still impact the award of damages. The CASE Act permits that a claimant may be eligible for statutory damages⁷³ even in absence of a timely registration,⁷⁴ although the total amount potentially available is less than if registration had been timely.⁷⁵

⁶⁹ § 501(a).

⁷⁰ § 411(a). Although, registration is not a prerequisite for copyright protection generally. § 408(a). The Berne Convention, to which treaty the United States became a party in 1989, forbids the requirement of formalities, such as registration, as a condition of copyright protection. Berne Convention for the Protection of Literary and Artistic Works, art. 5(2), signed by U.S. Mar. 1, 1989 (as amended Sep. 28, 1979).

⁷¹ See § 1505(a); 37 C.F.R. § 221.1(a).

⁷² 17 U.S.C. § 1505(a)(2) (stating that the registration certificate need “either be[] issued or . . . not be[] refused”).

⁷³ Curiously, though, while a defendant’s willfulness of infringement can influence the amount of the award of statutory damages in federal court ordinarily, in the small copyright claims court, willfulness will not be a factor. Compare SMALL CLAIMS REPORT, *supra* note 2, at 21 (“Under the Copyright Act, standard statutory damages for copyright infringement range from \$750 to \$30,000 per infringed work. Willful infringement can increase damages to as much as \$150,000 per work, while a finding that the infringement was innocent can reduce damages to as low as \$200.”) (comparing § 504(c)(1)–(2)), with § 1504(e)(1)(A)(ii)(III) (“The Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages.”) This legislative result is almost certainly due to the fact that allowing adjustments to awards of statutory damages for willfulness would likely blow the top off of the total cap on remedies for this small-claims court. *But see* § 1504(e)(1)(A)(ii)(IV) (“The Copyright Claims Board *may* consider, as an additional factor in awarding statutory damages, whether the infringer has agreed to cease or mitigate the infringing activity . . . “ (emphasis added)).

⁷⁴ § 1504(e)(1)(A)(ii)(II).

⁷⁵ § 1504(e)(1)(A)(ii)(I).

In the context of a small claim at the CCB, the copyright owner may even be eligible for expedited registration.⁷⁶ This provision is meant to accelerate the process of bringing a claim, as well as to incentivize creators, who otherwise “may not be aware of the repercussions of not registering in a timely manner,”⁷⁷ to register their works.⁷⁸

As it is, “[t]he inability to enforce infringement claims—especially in the digital marketplace—drives many of these small [copyright owners] toward a skeptical view of the value of the copyright system,” which means they are more likely to “avoid the costs—including in time, opportunity, mental energy, and financial expense—of registering their works.”⁷⁹ However, the CCB cannot make a final determination in any case until a certificate of registration has been issued by the Copyright Office and submitted to the CCB.⁸⁰

iii. Cost Concerns

In order to make small copyright infringement claims a more sensible financial investment, the CASE Act put considerable emphasis on lowering the proverbial “paywall” to justice. Under the CASE Act, a copyright owner may bring a claim for certain statutory damages under a somewhat more flexible standard.⁸¹

As well as statutory damages, a claimant under the CASE Act may bring a claim for actual damages and profits,⁸² which is the issue truly at the heart of a copyright small claims court. Previously, many small copyright owners protested that, “[g]iven the costs of litigation, ‘[u]nless actual damages are truly substantial, the copyright holder will be without

⁷⁶ 37 C.F.R. § 221.2.

⁷⁷ SMALL CLAIMS REPORT, *supra* note 2, at 17.

⁷⁸ *See id.* at 108.

⁷⁹ Aistars, *supra* note 16, at 68.

⁸⁰ 17 U.S.C. § 1505(b)(1)(A). The CCB may hold the proceeding in abeyance until the certificate issued, but only up to one year. § 1505(b)(2). Past that point, the CCB may dismiss the case without prejudice, meaning that, despite this procedural hiccup, a copyright owner is not entirely precluded from seeking judgment on her small claim, should she secure registration at a later date. *Id.*

⁸¹ § 1504(e)(1)(A)(ii). Actual damages are often difficult to determine in a copyright infringement claim. Vivian Cheng, *Seven Benefits of Copyright Registration*, FISH & RICHARDSON (May 8, 2020), <https://www.fr.com/seven-benefits-of-copyright-registration/>, reprinted in JD SUPRA (May 12, 2020), <https://www.jdsupra.com/legalnews/seven-benefits-of-copyright-registration-83951/> (“Statutory damages are sometimes preferable because actual damages and additional profits can be difficult to prove.”). Therefore, statutory damages may be the most reliable remedy; “[y]et the inability to recover statutory damages can effectively preclude legal action against an infringer.” SMALL CLAIMS REPORT, *supra* note 2, at 17.

⁸² § 1504(e)(1)(A)(i).

an effective remedy in federal court”⁸³—or at all, since litigation in a federal district court was essentially the only option. A basic cost-benefit analysis would show that, in the majority of instances of small copyright claims, because the amount recoverable for a “small” claim is often severely outweighed by the costs of federal litigation, bringing an infringement action to federal court for such a claim is simply not worth it.⁸⁴ Essentially, “transaction costs, rather than substantive rights, often dictate outcomes” for those who simply cannot afford to enforce their copyrights.⁸⁵

The CASE Act now provides a more convenient and streamlined forum for copyright owners to bring such financially small claims. While the statute limits damages to \$30,000 that a copyright owner can claim in a single proceeding,⁸⁶ the CASE Act also provides for an even smaller “small” claim,⁸⁷ though, which permits a claim for total damages of \$5,000 or less to be adjudicated by only one Officer of the CCB.⁸⁸

Additionally, the Act seeks to reduce court costs, including the filing fee.⁸⁹ Attorneys’ fees also are expected to be reduced for litigating

⁸³ SMALL CLAIMS REPORT, *supra* note 2, at 18 (quoting Alma Robinson, *Small Copyright Claimants Need Access to Justice*, CAL. LAWS. FOR ARTS: CAL. ARTS BLOG (Feb. 20, 2013, 1:06 PM), https://calawyersforthearts.org/california_arts_blog/1213811).

⁸⁴ Adding to the transaction costs of federal litigation is the price of actually proving those actual damages. *See* SMALL CLAIMS REPORT, *supra* note 2, at 20 n.112, (citing U.S. COPYRIGHT OFF., N.Y.C. PUBLIC HEARING, *supra* note 26, at 37:11-12 (Charles Sanders, SGA) (“[P]roving actual damages is really, really expensive.”)).

⁸⁵ Pager, *supra* note 44, at 1022.

⁸⁶ § 1504(e)(1)(D). Consideration was given to “what in fact constitutes a ‘small’ claim.” SMALL CLAIMS REPORT, *supra* note 2, at 109. This included surveying “what value of likely recovery” would be “economically justifiable.” *Id.* at 25–26. Ultimately, the CASE Act capped actual damages in a single proceeding at \$30,000. § 1504(e)(1)(D). This amount excludes attorneys’ fees and costs, which may be awarded, but only for bad faith conduct by a party. *See* § 1506(y)(2).

⁸⁷ Also referred to as a “micro-claim.” S. REP. NO. 116–105, at 8 (2019).

⁸⁸ § 1506(z). This provision and other contemplations by the Copyright Office indicate that this issue of a “small” amount is an open-ended one and suggests that it may be “subject to future adjustment by Congress if necessary.” SMALL CLAIMS REPORT, *supra* note 2, at 110.

⁸⁹ The filing fee is at most \$100: “\$40 at the time of filing and another \$60 if the other side does not opt out and the claim moves forward.” Shira Perlmutter, Register of Copyrights, U.S. Copyright Off., *A Conversation Between Copyright Alliance CEO Keith Kupferschmid and Register of Copyrights Shira Perlmutter About the Copyright Claims Board*, COPYRIGHT ALL. (June 28, 2022), <https://copyrightalliance.org/keith-kupferschmid-register-of-copyrights-shira-perlmutter-conversation/>; Copyright Claims Bd., *About the Copyright Claims Board*, CCB.gov, <https://ccb.gov/about/> (last visited Apr. 12, 2023). At any rate, the amount “may not exceed the cost of filing an action in [federal] district court.” § 1510(c).

parties⁹⁰ because, while attorneys naturally still may represent parties in front of the CCB,⁹¹ parties may more easily represent themselves.⁹² Alternatively, (supervised) law students may serve as representation on a *pro bono* basis.⁹³ Because of this structure, such *pro se* litigation is more feasible for creators.

iv. Efficiency

Without a doubt, discovery, and the gathering of evidence, is one of the largest contributors to the financial and time burdens of copyright infringement litigation.⁹⁴ In order to “ensure that the proceedings [of the CCB] are streamlined and efficient, discovery is circumscribed.”⁹⁵ Evidence is limited to certain documentary and testimonial evidence.⁹⁶ Notwithstanding the hefty evidence that can be required to prove copyright infringement, “actual damages can be just as difficult to prove and measure in copyright cases.”⁹⁷

v. Eligible Claims

Like in federal court ordinarily, copyright owners may submit a claim to the CCB for infringement of any of the exclusive rights under 17 U.S.C. § 106,⁹⁸ including the rights of reproduction,⁹⁹ derivative works,¹⁰⁰ reproduction,¹⁰¹ public performance,¹⁰² public display,¹⁰³ and, specifically

⁹⁰ The Copyright Office, in its 2013 Small Claims Report, indicated that, “if a copyright owner hires an attorney to enforce his or her copyrights,” those fees alone, aside from court costs, “can easily exceed the value of the work that is being infringed.” SMALL CLAIMS REPORT, *supra* note 2, at 25 (remarking that “the median cost in 2010 for a party to litigate a copyright infringement lawsuit with less than \$1 million at risk through to appeal was \$350,000”).

⁹¹ § 1506(d)(1).

⁹² *See* § 1506(d).

⁹³ § 1506(d)(2).

⁹⁴ *See* SMALL CLAIMS REPORT, *supra* note 2, at 13, 124.

⁹⁵ H.R. REP. NO. 116-252, at 17 (2019) (citing § 1506(n)).

⁹⁶ § 1506(o). Although, the CCB does have (equally limited) discretion to “approve additional relevant discovery.” § 1506(n)(1).

⁹⁷ SMALL CLAIMS REPORT, *supra* note 2, at 20 (“First, information about the extent of infringement and resulting profits is unlikely to be known, or fully known, to a plaintiff and may be difficult to obtain from a defendant who did not keep records of infringing activities or is reluctant to produce them in discovery. Second, it may be difficult to assess the full value of the harm caused by an infringer’s unauthorized use of a work.”).

⁹⁸ § 1504(c)(1).

⁹⁹ § 106(1).

¹⁰⁰ § 106(2).

¹⁰¹ § 106(3).

¹⁰² § 106(4).

¹⁰³ § 106(5).

for sound recordings, public performance by means of digital audio transmission.¹⁰⁴ To date, the majority of claims that have been filed are infringement claims.¹⁰⁵ In addition, copyright owners may submit a claim for declaratory relief regarding noninfringement¹⁰⁶ as well as certain claims regarding misrepresentation in Section 512¹⁰⁷ notice-and-takedown procedures under the Digital Millennium Copyright Act (the “DMCA”).¹⁰⁸

The CCB also may hear any “legal or equitable defense” under the Copyright Act of 1976 “or otherwise available under law.”¹⁰⁹ A number of defenses are available under the Copyright Act and under various common law doctrines, including the statute of limitations of three years,¹¹⁰ copyright invalidity (including abandonment), independent creation,¹¹¹ implied permission, *de minimis* copying,¹¹² and fair use.¹¹³ Significantly, the Copyright Office noted that, with Constitutional considerations, although it proposed “a streamlined approach to small copyright claims, alleged infringers must be allowed to defend themselves vigorously” and “must therefore have access to all available defenses arising under the Copyright Act or other relevant law.”¹¹⁴

vi. Review of Decisions

Once a determination has been made by the CCB, the parties have a process by which decisions can be reviewed. First, a party may “submit a written request for reconsideration of, or an amendment to,” the decision.¹¹⁵ If the CCB denies reconsideration, the party may then “request review of the final determination by the Register of Copyrights.”¹¹⁶ Once the Register has completed the review process, a party would “have the option to appeal to an Article III court”¹¹⁷ and may still “seek an order from a district court of the United States vacating, modifying, or correcting

¹⁰⁴ § 106(6).

¹⁰⁵ See Setty, *supra* note 38.

¹⁰⁶ § 1504(c)(2).

¹⁰⁷ See generally § 512.

¹⁰⁸ § 1504(c)(3).

¹⁰⁹ § 1504(c)(5).

¹¹⁰ § 507(b).

¹¹¹ See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

¹¹² See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

¹¹³ § 107.

¹¹⁴ SMALL CLAIMS REPORT, *supra* note 2, at 105.

¹¹⁵ § 1506(w).

¹¹⁶ § 1506(x).

¹¹⁷ Bills, *supra* note 8, at 469 (“This appears to be necessary for the proposal to be constitutional.”).

the determination,”¹¹⁸ but only in certain limited circumstances.¹¹⁹ After that point, decisions are left to the standard federal appeals process. Additionally, if a party has “failed . . . to comply with the relief[] awarded in a final determination,” “the aggrieved party may” seek an order in federal district court to enforce the determination.¹²⁰

B. *Substantive Copyright Difficulties*

The CASE Act endeavors to make copyright enforcement more accessible for small claimants primarily through procedural modifications. Nevertheless, the procedural changes necessarily have an effect on substantive elements of copyright law. While legislators contemplated certain substantive copyright law issues broadly, they largely failed to address these complexities in the context of a small claims court, much less the implications that ensue for small copyright claimants.

i. Copyright Claims

a. Generally

Copyright law is notoriously complex, primarily due to the many sources from which it is derived and the process in which it is established.¹²¹ While the Copyright Act of 1976 is the dominant authority, “reading the statute is only the beginning.”¹²² Much nuanced case law controls copyright doctrines, the principles of which “go well beyond the literal terms of the statute.”¹²³

Since copyright as a subject matter is exclusively under federal jurisdiction,¹²⁴ “all interpretation of copyright law and fair use has been left up to the federal court system.” The root of the problem is that federal district courts are often inconsistent in their rulings,¹²⁵ especially when it comes to more complicated doctrines. Copyright experts often blame inconsistencies and ambiguities within the body of law on “the lack of

¹¹⁸ § 1508(c)(1).

¹¹⁹ § 1508(c)(1)(A)–(C) (“(A) If the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct. (B) If the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue. (C) In the case of a default determination based on a failure to prosecute if it is established that the default or failure was due to excusable neglect.”).

¹²⁰ § 1508(a).

¹²¹ John Zuercher, *Clarifying Uncertainty: Why We Need a Small Claims Copyright Court*, 21 MARQ. INTELL. PROP. L. REV. 105, 120 (2017).

¹²² Pager, *supra* note 44, at 1025.

¹²³ *Id.*

¹²⁴ See discussion *supra* Section III.A.i.

¹²⁵ Bills, *supra* note 8, at 507 (“Copyright law is not uniform from circuit to circuit.”).

experience and familiarity with copyright issues on the part of federal district court judges coupled with the unpredictability and biases of juries.”¹²⁶ However, federal courts of appeal are just as inconsistent in their interpretations of the relevant statutes.¹²⁷ As Congress gradually adapts statutory law to the common law doctrines,¹²⁸ this conflicting case law then gets baked directly into statutory law, reflecting “a series of incremental accretions . . . written in a secret code”¹²⁹ which even advanced copyright attorneys can only hope to comprehend.

In this way, “copyright law has become progressively unreadable during the very time it has become increasingly pervasive.”¹³⁰ If at one point copyright law was ever succinct and easily applicable, it most certainly is no longer.¹³¹ As a result, some copyright scholars have affectionately deemed the body of U.S. copyright law “‘an obese Frankensteinian monster’ and ‘a swollen, barnacle-encrusted collection of incomprehensible prose.’”¹³²

Thus, copyright law,¹³³ and even the Copyright Office itself,¹³⁴ is often the subject of calls for reform. Although “not every body of law

¹²⁶ Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 718 HASTINGS COMM. & ENT. L.J. 717, 737 (1998) (citing *Parke-Davis & Co. v. H.K. Mulford C.*, 189 F. 95 at 115 (S.D.N.Y. 1911) (Learned Hand, J.) (“I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of [the technical subject matter] to pass upon such questions as these.”)).

¹²⁷ *Id.* at 738 (explaining that circuit courts have “disagree[d] regarding almost every possible doctrine covered under federal copyright law from threshold issues of originality and ownership to infringement and damages,” which “inevitably lead[s] to forum shopping.”).

¹²⁸ Sandra M. Aistars, *The Next Great Copyright Act, or a New Great Copyright Agency?*, 38 COLUM. J.L. & ARTS 339, 341 (2015) (“The lack of any administrative agency with comprehensive regulatory authority and expertise to address the many nuanced, technical matters currently at the intersection of copyright and technology law often results in detailed, industry-specific legislative compromises expressed in complicated language hardwired directly into the Act.”).

¹²⁹ Pager, *supra* note 44, at 1024.

¹³⁰ Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 338–39 (2013) (“When the Copyright Act was enacted, it contained seventy-three sections, and the entire statute was fifty-seven pages long. Today, it contains 137 sections and is 280 pages long, nearly five times the size of the original.”).

¹³¹ *Id.* at 339 (citing Leyland Pitt et al., *Changing Channels: The Impact of the Internet on Distribution Strategy*, 42 BUS. HORIZONS 19 (1999)) (“The copyright world, which once had predictable and even pristine demarcations, has morphed dramatically.”).

¹³² Aistars, *supra* note 127, at 340 (first quoting Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557 (2007); and then quoting Litman, *supra* note 40, at 3)).

¹³³ See Pallante, *supra* note 129, at 315.

¹³⁴ See Aistars, *supra* note 127, at 340.

suffers from such lack of guidance,”¹³⁵ such a complaint is common in the intellectual property sphere that the applicable doctrines are utterly incomprehensible.¹³⁶ And, after all, “if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.”¹³⁷

b. Complex Claims in the Small Copyright Claims Court

Critics have expressed numerous and repeated concerns in the last decade or so to legislature and to the Copyright Office regarding the impassable complexity of substantive issues that copyright owners could face in the small claims court. The most common worry has been in regard to expertise¹³⁸— whether small copyright claimants might be able to practically navigate this new system on their own,¹³⁹ and whether the Officers of the CCB would be sufficiently knowledgeable.¹⁴⁰ These concerns are well founded, given that the major benefits of a small claims system, namely, efficiency, “break[] down when the parties must debate technical legal precedents.”¹⁴¹ There exists plenty of complexity in the context of claims of and defenses against infringement alone, without regard to additional issues under the DMCA and takedown misrepresentations, for those eligible claims.¹⁴²

When faced with these problems, the CASE Act kicked the can down the road. With the substantive complexity of copyright law as an elephant in the room, financially disadvantaged claimants are still left to fend for themselves.¹⁴³ Without legal representation, many creators must play a guessing game in order to try and determine, at a minimum, “which legal

¹³⁵ Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 67 (1989) (discussing patent law).

¹³⁶ *Id.*

¹³⁷ Pallante, *supra* note 129, at 323.

¹³⁸ See SMALL CLAIMS REPORT, *supra* note 2, at 99–101.

¹³⁹ See *id.* at 100 (“the participants in such a proceeding—particularly if acting *pro se*—might need guidance in focusing their claims and defenses, making the adjudicators’ knowledge of applicable law that much more important.”).

¹⁴⁰ See *id.* (“The need for knowledgeable decisionmakers presumably would be accentuated in a streamlined proceeding.”).

¹⁴¹ Google, Inc., Comment Letter on Notice of Inquiry regarding Remedies for Small Copyright Claims at 4 (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/22_google_inc.pdf.

¹⁴² See SMALL CLAIMS REPORT, *supra* note 2, at 19 (citing 17 U.S.C. § 512) (giving the CCB authority to hear claims over “the safe harbors for qualifying online service providers available under the DMCA” as a limitation on copyright protection which is “legally complex”).

¹⁴³ *But see* discussion *infra* note 255.

interpretation of these [substantive] issues should be applied in any small claims court.”¹⁴⁴

As for the competency of the CCB, only briefly, and seemingly reluctantly, has the Copyright Office addressed this red flag, stating that, “in the unusual case where, due to the streamlined process, the [CCB] could not appropriately evaluate a [complex claim,] the case could be dismissed without prejudice to be litigated in federal court.”¹⁴⁵ However, just because the Copyright Office may have characterized such a scenario as “unusual” does not mean that it is so in reality. Indeed, this Achilles’ heel slipped easily into the final codification of the CASE Act:

The Copyright Claims Board shall dismiss a claim or counterclaim without prejudice if, upon reviewing the claim or counterclaim, or at any other time in the proceeding, the Copyright Claims Board concludes that the claim or counterclaim is unsuitable for determination by the Copyright Claims Board, including on account of . . . The determination of a relevant issue of law or fact that could exceed . . . the subject matter competence of the Copyright Claims Board.¹⁴⁶

Instead of finding practical and workable solutions, the CCB “would retain the discretion to dismiss without prejudice any claim that it did not believe could be fairly adjudicated through the small claims process.”¹⁴⁷

ii. Eligible Claims, Revisited

The issue of available claims and defenses has been a prominent point of contention throughout the legislative history of the CASE Act, which is well exemplified by the doctrine of fair use. Fair use requires an analysis of four factors: (i) the purpose and character of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the potential market effect on the copyrighted work.¹⁴⁸ A defense of fair use is necessarily a complex, fact-intensive analysis¹⁴⁹ which some commenters

¹⁴⁴ Nat’l Music Publishers’ Ass’n et al., *supra* note 42, at 11.

¹⁴⁵ SMALL CLAIMS REPORT, *supra* note 2, at 107.

¹⁴⁶ 17 U.S.C. § 1506(f)(3)(C).

¹⁴⁷ SMALL CLAIMS REPORT, *supra* note 2, at 4.

¹⁴⁸ § 107. Another layer of complexity has been added now that fair use has been framed as a user’s right (rather than as a limitation on a copyright owner’s exclusive rights). *See generally* *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

¹⁴⁹ SMALL CLAIMS REPORT, *supra* note 2, at 106.

fear may fall beyond the capabilities of a small claims court.¹⁵⁰ This fear is understandable, given also that “direct evidence of copying is rarely, if ever, available,” so courts must typically rely on circumstantial evidence.¹⁵¹

In preparing for its 2013 Small Claims Report, the Copyright Office received numerous comments expressing unease about allowing a fair use defense in a small claims court, among other thorny claims or defenses. Fair use made its way into more than one inquiry,¹⁵² the Copyright Office having noted that a fair use defense “typically requires courts to examine decades of judicial precedent.¹⁵³ Commenters were reluctant to give the CCB the authority to hear complex claims or defenses,¹⁵⁴ stating, for example, that “there may be some types of complex copyright claims that may not be appropriate for an alternative dispute tribunal with more limited discovery.”¹⁵⁵

¹⁵⁰ *E.g.*, Fed. Legal Assistance Self Help Ctr., Comment Letter on Third Notice of Inquiry regarding Remedies for Small Copyright Claims (Apr. 12, 2013), https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/FLASH.pdf (“Even with the legal profession, few non-IP attorneys have an understanding of the complexities of copyright law.”); Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 698 (2018) (“[I]f respondents raised defenses or counterclaims that would require discovery and more elaborate fact-finding than was suitable for adjudication through a small claims process, the Tribunal should be able to inform the parties that the matter was unsuitable for resolution by the Tribunal. The Office’s Small Claims Report acknowledges the need to confine a small claims system to less complex cases and recommends that the Tribunal could dismiss without prejudice any claim that it concludes could not be adequately adjudicated within the constraints of a small claims process. However, the Office also seems more confident than perhaps is warranted that adjudicators with the necessary copyright expertise could successfully navigate a streamlined proceeding including defenses and related counterclaims.”).

¹⁵¹ *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977).

¹⁵² *See* Remedies for Small Copyright Claims, 76 Fed. Reg. 66758; Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51068.

¹⁵³ Remedies for Small Copyright Claims, 76 Fed. Reg. at 66760.

¹⁵⁴ *E.g.*, Pub. Knowledge et al., Comment Letter on Notice of Inquiry regarding Remedies for Small Copyright Claims (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/46_pk_eff_fm.pdf (“Fair use is but one issue that may contribute to the complexity of copyright cases; there are many others. These include: the idea/expression dichotomy; copyright misuse; the first sale defense; proving the identity of the alleged infringer through discovery and forensic evidence; and proving elements of a claim of infringement e.g., that the alleged infringer had access to the work and that the original and the allegedly infringing work are substantially similar.”).

¹⁵⁵ Copyright All., Comment Letter on Notice of Inquiry regarding Remedies for Small Copyright Claims (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/16_copyright_alliance.pdf.

Yet, the CASE Act ultimately allows for a defendant in the small claims court to raise a defense of fair use.¹⁵⁶ The Copyright Office remarked that fair use is likely the most common defense used against copyright infringement claims,¹⁵⁷ adding that it “does not see how claims of infringement can fairly be adjudicated without consideration of legitimate claims of fair use.”¹⁵⁸ Therefore, “to eliminate it from possible consideration likely would rule out the adjudication of many meritorious claims, as many responding parties would presumably decline to proceed with a voluntary process without the ability to have it considered.”¹⁵⁹ Additionally, the expertise of the CCB¹⁶⁰ aims to quell worries regarding the competence of the small claims court to adjudicate defenses of fair use.¹⁶¹

iii. Governing Law

The CASE Act raised the issue of precedent in two different contexts: first, what precedent would control the determinations of the CCB, and second, whether the CCB’s determinations themselves would carry precedential weight.

a. Taking from Precedent

*“The [CASE] Act takes copyright law as it finds it: the Act does not alter the substantive provisions of the Copyright Act or the case law construing it, and the [CCB]’s determinations must follow existing precedent.”*¹⁶²

In making its determinations, the CCB must first look to the Copyright Act of 1976 and any related regulations.¹⁶³ The CCB must render its decisions “independently on the basis of the records in the proceedings before it,” as well as the 1976 Act, judicial precedent, and Copyright Office regulations.¹⁶⁴ Although the CASE Act does not offer guidance on which jurisdiction’s precedent would apply at the outset of any one case, it does provide that if there is a conflict in precedential substantive law “that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought

¹⁵⁶ See 17 U.S.C. § 1504(c)(5).

¹⁵⁷ SMALL CLAIMS REPORT, *supra* note 2, at 106.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See discussion *supra* Section III.B.i.b.

¹⁶¹ SMALL CLAIMS REPORT, *supra* note 2, at 106–07.

¹⁶² H.R. REP. NO. 116-252, at 25 (2019).

¹⁶³ See 17 U.S.C. § 1506(a)(1).

¹⁶⁴ § 1503(b)(1).

if filed in a district court.”¹⁶⁵ This is primarily to get ahead of the possibility that “the case would potentially be reviewable in district courts in more than one circuit” which might each “apply the law differently.”¹⁶⁶

b. Creating Precedent

*“The [CASE] Act also leaves copyright law as it finds it: the determinations of the [CCB] may not be cited or relied upon, and the [CCB] must dismiss claims that, among other things, would require it to make truly novel case law.”*¹⁶⁷

A related but more controversial topic within discussions regarding the authority of the CCB is “the critical question” of “what effect its decisions should have.”¹⁶⁸ Comments received by the Copyright Office preceding the drafting of the CASE Act were overwhelmingly against the idea that CCB determination should hold any precedential weight,¹⁶⁹ though few actually provided a detailed explanation of the rationale behind the arguments.

Generally, “[b]ecause the small claims tribunal would rely on abbreviated procedures, including limited discovery and argument,” many commenters agreed that “the determinations of a streamlined small claims tribunal should not carry precedential weight.”¹⁷⁰ One commenter reasoned that “[t]he goals of a small claims court . . . should not include influencing the direction of copyright law.”¹⁷¹ It is conceivable that, if the determinations of the CCB were precedential, they could have negative influence on copyright law,¹⁷² especially because while there is a

¹⁶⁵ § 1506(a)(2) (“[O]r, if the action could have been brought in more than 1 such jurisdiction, the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue.”).

¹⁶⁶ Bils, *supra* note 8, at 507.

¹⁶⁷ H.R. REP. NO. 116-252, at 25.

¹⁶⁸ SMALL CLAIMS REPORT, *supra* note 2, at 130.

¹⁶⁹ *See, e.g., id.* at 130 n.883.

¹⁷⁰ *Id.* at 130.

¹⁷¹ Google, Inc., *supra* note 140, at 4 (“[D]ecisions of the court will often be made quickly, based on a superficial record, without the benefit of briefing by counsel.”).

¹⁷² Motion Picture Ass’n of Am., Comment Letter on Remedies for Small Copyright Claims: Third Request for Comments at 5 (Apr. 12, 2013), https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/MPAA.pdf (“Small claims decisions should also have no precedential effect. In a system where quick, cheap resolution of claims is the primary goal, judges’ main goal should be to do justice—perhaps even rough justice—for the parties before them. Litigants will likely not have engaged in the extensive discovery necessary to build a full factual record, and small claims judges will rarely have the time, nor the assistance from law clerks, to do the careful and thorough legal research and opinion-drafting engaged in by federal district and appellate court judges. In a legal system where much of ‘the law’ is judge-made, and that relies heavily on judicial opinions to interpret vague concepts such as ‘fair use’ or ‘substantial similarity,’ only thorough,

substantial amount of precedent to draw from, the issues can be “complex and perhaps not well-suited to cursory review by a judge.”¹⁷³ Additionally, it might invite abuse by corporate parties of the very claimants whom the CASE Act endeavors to empower.¹⁷⁴ However, to make the decisions of the CCB nonprecedential could serve to incentivize parties to resolve their smaller disputes.¹⁷⁵

Notably, determinations of the CCB are not only nonprecedential with regard to other federal courts, but even within its own future determinations.¹⁷⁶ The determinations may not be relied upon “before any court or tribunal, *including the Copyright Claims Board*.”¹⁷⁷ Shockingly, the determinations may not even be *cited*—in proceedings at the CCB, or before any other court.¹⁷⁸ Such a rule is, in some situations, extreme: for

carefully-considered opinions should influence – or, worse yet, bind – other courts and litigants. Such opinions are less likely to be produced by a small claims system.”).

¹⁷³ SMALL CLAIMS REPORT, *supra* note 2, at 95.

¹⁷⁴ U.S. COPYRIGHT OFF., L.A. PUBLIC HEARING, *supra* note 26, at at 66:4–11 (Kendall Reed, arbitrator, attorney) (“I could see the opportunity for some gamesmanship for a battle in a small claims environment over an issue that could really have applicability much more broadly, and the opportunity for somebody to go in, test the waters, try to get a quick and cheap ruling in their favor, and then go riding around the countryside and using that very broadly.”).

¹⁷⁵ Volunteer Laws. for the Arts, Comment Letter on Remedies for Small Copyright Claims: Third Request for Comments at 3 (Apr. 12, 2013), https://www.copyright.gov/docs/smallclaims/comments/loi_02263013/VLA.pdf; U.S. COPYRIGHT OFF., N.Y.C. PUBLIC HEARING, *supra* note 26, at 42:21–43:3 (David Leightman, VLA). *But see* U.S. COPYRIGHT OFF., L.A. PUBLIC HEARING, *supra* note 26, at 67:17–68:3 (Edward Hasbrouck, Nat’l Writers Union) (arguing that the nonprecedential nature of CCB decisions “is not going to be a problem for small creators, because . . . their outcome is going to be determined by the judgment in this case anyway. So they are not giving up anything that they actually have now by forgoing that. But the defendant may see it as a more narrow, closed-end thing that makes them more willing to participate.”); Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1026 (2008) (“[A] federal small claims court could still play an important role in dispute resolution between two wealthy parties engaged in multi-million dollar litigation. Small claims court greatly resembles a form of alternative dispute resolution known as a “minitrial” . . . litigants in more “traditional” copyright infringement actions may voluntarily agree to an initial round of litigation in the small claims court . . . in order to evaluate and potentially settle their cases without expensive litigation in district court.”).

¹⁷⁶ 5 NIMMER ON COPYRIGHT §§ 16.05[E][3], 16.10[B] (“[P]ast CCB decisions are not to be cited in current proceedings, even implicating the same issues and/or the same parties.”); SMALL CLAIMS REPORT, *supra* note 2, at 130 (“[T]he determinations of a streamlined small claims tribunal should not carry precedential weight, either in federal court *or in future matters before it*.” (emphasis added)).

¹⁷⁷ 17 U.S.C. § 1507(a)(3) (emphasis added).

¹⁷⁸ *Id.*

example, it would make future claims with the same work at issue less efficient to resolve.¹⁷⁹

A specialized court with precedential authority “poses the risk of bias,” and the “benefits of specialization will be compromised” if the public loses its faith in the CCB’s ability to remain impartial.¹⁸⁰ However, it might just as easily go the other way—a specialized court *with* precedential authority could instill faith in the myriad small copyright owners who previously had lost all hope in enforcing their rights.

Despite the vigor behind the decision to make CCB determinations hold no precedential weight, “in the interest of the transparency and maintenance of a public record,” the Copyright Office found it fundamentally important that the determinations nevertheless “should be publicly available.”¹⁸¹ In a seeming contradiction, “[a]lthough many people suggested that the decisions be nonprecedential, at the same time many thought that the decisions should be public.”¹⁸² Thus, the Copyright Office has established a publicly accessible website¹⁸³ through which final determinations of the CCB are made available.¹⁸⁴

c. Review of Decisions, Revisited

As discussed above,¹⁸⁵ final determinations of the CCB are subject to review—“[e]ven though the amount in dispute might be small, and the precedent non-binding, justice requires that defendants have the opportunity to correct erroneous decisions.”¹⁸⁶ Substantively, though, this review is limited to challenges only for such errors as “fraud, misconduct, or other improprieties.”¹⁸⁷ This would mean that, in the occasional case that is appealed through the CCB and the Register, truly substantive copyright law issues may only seldom reach a full federal court. If it did, though, “if the appeals were heard by district courts . . . each district court

¹⁷⁹ Samuelson & Hashimoto, *supra* note 149, at 702 n.49 (“[I]t seems reasonable that such determination ought at least to be precedential within the [CCB], so that in future claims brought involving the same work, the work’s copyright status would not have to be resolved de novo each time.”).

¹⁸⁰ Dreyfuss, *supra* note 134, at 68.

¹⁸¹ SMALL CLAIMS REPORT, *supra* note 2, at 130.

¹⁸² U.S. COPYRIGHT OFF., N.Y.C. PUBLIC HEARING, *supra* note 26, at 221:9–18 (Jacqueline Charlesworth, U.S. Copyright Office).

¹⁸³ *About eCCB*, COPYRIGHT CLAIMS BD., <https://dockets.ccb.gov/#about> (last visited Apr. 12, 2023).

¹⁸⁴ 17 U.S.C. § 1506(t)(3); § 1503(a)(1)(I).

¹⁸⁵ See discussion *supra* Section III.A.vi

¹⁸⁶ Google, Inc., *supra* note 140, at 8.

¹⁸⁷ SMALL CLAIMS REPORT, *supra* note 2, at 4.

would apply its circuit’s law,”¹⁸⁸ which would likely not abate any confusion in substantive doctrines.

IV. A MISSED OPPORTUNITY, OR AN OPPORTUNITY FOR GROWTH?

The procedural compromises embodied in the CASE Act in an effort to lower the threshold for small copyright infringement claimants surely will raise a host of new issues to address. However, “[a]ttempts to reduce complexity . . . can seem deceptively simple,”¹⁸⁹ and the failure of the CASE Act to tweak or even acknowledge substantive concerns demonstrates a lack of willingness to address some thornier issues that are just as problematic for copyright owners who would otherwise benefit from a specialized small claims court. The fact that the decisions of the CCB have no precedential value may actually inject more confusion into a body of law already riddled with complications.¹⁹⁰ If many copyright owners take their small claims to be resolved by the CCB, “copyright law will become less transparent” because “fewer precedents will be set,” which means less case law “from which to assess the plausible legality of” the plans of a prospective user of a copyrighted work.¹⁹¹ More importantly, though, making CCB determinations binding only to the parties to the case at hand is a missed opportunity to harmonize and simplify substantive copyright law.

Luckily for proponents of further development, after three years of the CCB fully in operation, the Copyright Office is to review the “use and efficacy” of the proceedings¹⁹² and determine if any adjustments should be made.¹⁹³

¹⁸⁸ Google, Inc., *supra* note 140, at 4.

¹⁸⁹ Pager, *supra* note 44, at 1043.

¹⁹⁰ See Samuelson & Hashimoto, *supra* note 149, at 708.

¹⁹¹ *Id.* (“While proposed legislation provides for written decisions by the Tribunal and their publication, their lack of precedential value or persuasive weight would surely diminish the overall body of copyright law, particularly with regard to specific works and areas of the law.”).

¹⁹² CASE Act of 2020, Pub. L. No. 116–120, § 212(e)(1), 134 Stat. 1182, 2199 (2021), reprinted in 17 U.S.C. App’x M at 421.

¹⁹³ *Id.* § 212(e)(2)(A), 134 Stat. 1182, 2199 (2021), reprinted in 17 U.S.C. App’x M at 421–22. Even though CCB determinations may not be relied on or even cited in any proceedings other than the one at hand, *see* discussion *supra* Section III.B.iii.b., it would be immensely helpful to look at how the CCB is being discussed and whether legal practitioners are according any deference to the determinations of the CCB or looking to the CCB for leadership in any capacity. Regardless, the adjustments that the legislature has been willing to make are a prominent and promising step towards making copyright justice more accessible, with more amendments in the future.

A. *A Precedential Solution*

While all of the thorough procedural accommodations for small copyright claimants are genuinely beneficial, they came at the steep price of sacrificing the precedential value of judgments made by the CCB. However, “small copyright claims [are] not necessarily . . . small private interests,”¹⁹⁴ and a centralized, specialized copyright court with precedential authority would provide a great deal of potential for copyright reform.

i. The Setup for Success

Certain elements of the CASE Act set the stage well for a court that could, in the future, help to standardize complex and confusing doctrines within the body of U.S. copyright law. First, the procedures outlined in the CASE Act are “drawn from preexisting, related state and federal statutory language, the Federal Rules of Civil Procedure, and established case law.”¹⁹⁵ Because of this, the operations of the CCB should run relatively smoothly, and, in turn, the Copyright Office can expend its energy on more crucial functions of the small copyright claims court, that is, to resolve small copyright disputes by addressing substantive issues.

Second, the small claims court is centralized. The CCB Officers are based out of the Copyright Office in the Library of Congress, and the board is under the supervision of the Register of Copyrights. “There is great wisdom” in organizing a small claims system this way.¹⁹⁶ There is a “real advantage” to having a centralized, and specialized, court: “A centralized court with one centralized [set of] rules means that we would at least know what one uniform procedure is.”¹⁹⁷

Beyond procedure, the centralization of this small claims court could lead to more consistent substantive copyright jurisprudence. The CCB contains an impressive concentration of knowledge and expertise.¹⁹⁸ This

¹⁹⁴ Bills, *supra* note 8, at 491.

¹⁹⁵ H.R. REP. NO. 116-252, at 23 (2019).

¹⁹⁶ U.S. COPYRIGHT OFF., L.A. PUBLIC HEARING, *supra* note 26, at 226:4 (Lorin Brennan, Linde Law Firm).

¹⁹⁷ *Id.* at 226:21–227:2.

¹⁹⁸ There is a loophole to be wary of, however—that the CCB can simply refuse to render a decision on a claim if the CCB determines it to be too complex or beyond the subject matter expertise of its Officers, dismissing the claim “for unsuitability.” 17 U.S.C. § 1506(f)(3); *see* discussion *supra* Section III.B.i.b. This could be dangerous for two reasons: first, because what constitutes an issue that could “exceed . . . the subject matter competence of the Copyright Claims Board,” § 1506(f)(3)(C), is exceptionally vague; second, because, if the Officers of the CCB are at all timid about their fitness to decide any given issue, small copyright claimants, who may have already been through the ringer, will find themselves right back at square one: federal district court. This provision was unquestionably and deliberately left open-ended. *See* SMALL CLAIMS REPORT, *supra* note

expertise extends not only to the Officers, but to the Copyright Claims Attorneys as well, not to mention the Register next door. The proficiency of the CCB Officers soothes “the problem that many federal court judges, as generalist judges, are not always equipped to handle the realities and the complexity of copyright cases.”¹⁹⁹ This was one significant reason why copyright claims were not delegated to the jurisdiction of existing state general small claims courts.²⁰⁰ The expertise would also “expedite the process of litigation,”²⁰¹ since such proceedings “would not typically involve extensive legal research or briefing by the parties”²⁰²—which saves time and effort on the parts of both parties as well as the CCB Officers.

Third, a chief purpose of a small claims court is to streamline proceedings, which results in an efficient way to resolve such claims. This efficiency comes in terms of costs, naturally, not to mention time, both of which have been especially relevant concerns, which a small copyright claims court could address. Ordinarily, federal court judicial rulings come incredibly slowly.²⁰³ However, the CCB’s expedited proceedings ameliorate “this slow rate of judicial decision making” that otherwise “ha[s] a negative impact on developing industries where judicial clarity is

2, at 119 (“[I]t is possible that experience may show that certain types of infringement claims are too complex for a small claims system.”). Unfortunately, because of this, ultimately, submitting a claim to the copyright small claims court could work out to be just another costly, time-consuming, procedural hoop to jump through on the way to a futile attempt at a remedy in federal district court. Copyright owners who venture into small claims court with optimism freshly renewed by the CASE Act might very well wind up even more discouraged than before. Unless the CCB and the Copyright Office are careful, operations at the small copyright claims court could quickly backfire. However, one would hope that the CCB has been careful in its selection of its Officers, among other staff; and one would hope that the first small copyright claimants are willing to make the leap of faith to entrust valuable pieces of their livelihoods to the CCB. At any rate, most assertions of complex claims or defenses “should not be beyond the reach of qualified decisionmakers—especially decisionmakers whose primary job it is to evaluate claims of infringement and defenses thereto.” *Id.* at 106–07. Moreover, although 134 claims have been dismissed to date, the Copyright Office believes that the majority of dismissals are due to settlement. Setty, *supra* note 38. None have been dismissed for unsuitability. *Id.*

¹⁹⁹ Zuercher, *supra* note 119, at 133; Bils, *supra* note 8, at 498 (citing William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 3 (2006) (“[S]ome have argued that federal judges also often lack copyright expertise.”)).

²⁰⁰ The other reason being that copyright is a subject matter exclusively under federal jurisdiction. See discussion *supra* Section III.A.i.

²⁰¹ Zuercher, *supra* note 120, at 133 (citing SMALL CLAIMS REPORT, *supra* note 2, at 99–101).

²⁰² SMALL CLAIMS REPORT, *supra* note 2, at 100.

²⁰³ Ciolli, *supra* note 174, at 1029.

needed.”²⁰⁴ If judicial clarity is needed anywhere, it is in U.S. copyright law.

Fourth, the CASE Act has already granted the CCB the main authority necessary to render determinations that could hold precedential weight. The CCB can hear essentially all claims that would otherwise be available under the Copyright Act of 1976,²⁰⁵ including certain related counterclaims and defenses arising out of the same transaction or occurrence.²⁰⁶

Fifth, the CCB has the opportunity to draw from an immense body of copyright law, across all federal courts of appeals. “[J]udicial precedent”²⁰⁷ is a tremendously broad term; while “[f]ederal courts have generated a wealth of copyright precedent,”²⁰⁸ one question necessarily follows—“whose precedent?”²⁰⁹ It is not immediately apparent where to take precedent from—the CCB must start with the Copyright Act, and the U.S. Supreme Court would naturally be binding, but it is somewhat open after that. The only explicit limitation is that if there is “conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled,” the CCB must “follow the law of the Federal jurisdiction in which the action could have been brought if filed in [federal] district court.”²¹⁰ If more than one jurisdiction could apply, the CCB is to use law from the jurisdiction that it “determines has the most significant ties to the parties and conduct at issue.”²¹¹ This structure provides the CCB with the opportunity, in its expertise, to be discerning about what precedent to use, and, theoretically, begin to subtly influence the interpretation of any given doctrine.

ii. Harmonizing U.S. Copyright Law

Although a federal court for small copyright claims is novel, the idea of one centralized court to harmonize an uncontrollable body of law is not. Rather, because of “the national nature of the copyright industries and the highly technical legal doctrines which are so central to copyright law,” a

²⁰⁴ *Id.*

²⁰⁵ See discussion *supra* Section III.A.v.

²⁰⁶ See 17 U.S.C. §§ 1504(c)(4)–(6).

²⁰⁷ § 1506(a)(2).

²⁰⁸ SMALL CLAIMS REPORT, *supra* note 2, at 95.

²⁰⁹ 5 NIMMER ON COPYRIGHT § 16.05[D][1] (“[Q]uestions of venue and personal jurisdiction that did not delay processing of the case at the outset re-emerge at the end, potentially to cloud its resolution with complex inquiries In this way, small claims may require large inquiries into the array of districts in which civil litigation could have potentially arisen.”).

²¹⁰ § 1506(a)(2).

²¹¹ *Id.*

single, centralized court which handles only this subject matter would provide guidance for doctrines which are “sufficiently elusive” such that “the underlying legal concepts are applied inconsistently.”²¹² Such a court could very well be “necessary in order that uniformity in the handling of copyright cases can be achieved.”²¹³ In the long run, simplifying substantive copyright law, along with procedural reform, will serve to make copyright more accessible—not just to small claimants, but to all parties with a copyright interest. “Copyright should, insofar as possible, be uniform throughout the country . . . [F]airness and efficiency warrant the creation of a special copyright court.”²¹⁴ However, this is only achievable if the decisions of such a court hold precedential weight.

Permitting the determinations of the CCB to be precedential would help with consistency of outcomes and simplifying complex doctrines by resolving conflicting precedent and circuit splits.²¹⁵ For example, “a remounted art work is an infringing unauthorized derivative work in the Ninth Circuit but not in the Seventh.”²¹⁶ Meanwhile, with respect to works made for hire, in the Seventh Circuit, a “written agreement must be signed prior to the time of creation of the work” in order to qualify as a work for hire, but in Ninth Circuit, “a subsequent writing” could suffice.²¹⁷ These are only two illustrations of the many rifts in copyright jurisprudence. Allowing CCB decisions to be persuasive, if not binding, could mend such circuit splits.

First, authoritative CCB determinations could “give guidance to those who are choosing whether to utilize this new process or not as either a

²¹² Landau & Biederman, *supra* note 125, at 719.

²¹³ *Id.* at 719, 784 (largely making the case for a specialized copyright appellate court, but also acknowledging that, “[i]deally, this should be established at the trial level as well as the appellate level, to achieve the truly national treatment which copyright deserves.”).

²¹⁴ *Id.*

²¹⁵ *Id.* at 738 (“There is, or has been, disagreement regarding almost every possible doctrine covered under federal copyright law from threshold issues of originality and ownership to infringement and damages. Some of these intercircuit disagreements have been resolved by the Supreme Court. Others have been resolved by Congress.⁹⁶ Many of the differences—often polar disagreements—still remain unresolved and will inevitably lead to forum shopping. The outcome of a case should not depend upon the jurisdiction in which the suit is initiated; it should be a function of the law.”).

²¹⁶ *Id.* at 746. Currently, whether a derivative work is transformative under the first factor (the purpose and character of the use) of the fair use defense to copyright infringement is at issue in the U.S. Supreme Court. *See generally* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022) (No. 21-869).

²¹⁷ Landau & Biederman, *supra* note 125, at 760 (first citing *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992); and then citing *Magmuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996)).

claimant or respondent.”²¹⁸ Since the Officers would need to be consistent in their decisions, though “not necessarily formulaic,” the CCB could provide a standard for similar claims that it hears on a repetitive basis.²¹⁹

Additionally, determinations of issues that are “commonly heard in the copyright small claims court” could prove useful in simplifying copyright doctrines.²²⁰ Making copyright remedies more accessible, as is the goal of the CASE Act, “would have the effect of subjecting more copyright disputes to adjudication,” which would, in turn, “help to address recurring questions” in copyright infringement cases.²²¹ Further, the limited fact-finding in discovery simplifies decisions that the CCB has to make. If these determinations were to be precedential, it would provide, after some time, a large body of examples that are boiled down and based on more simplified fact patterns that would be easier for all involved to understand and apply.

Lastly, authoritative decisions from the CCB could tackle complex claims and defenses such as fair use, since it could “not only address the shortcomings of the federal courts, but [it could] also create opportunities to clarify” blurry doctrines.²²² It is troubling that, in the CASE Act, such heavily fact-laden claims or defenses, which involve critical copyright issues of a *substantive* nature, are dealt with under the CASE Act in a fundamentally *procedural* manner. Such questions which normally might require lengthy fact-finding missions in order to be resolved are limited by the CCB in order to streamline proceedings.²²³ The mismatch of problem and solution here raises some alarm. However, the idea that the CCB’s determinations could provide a reservoir of simplified examples to look to on various issues might, conversely, make such fact-intensive issues easier to address.

Taking on these complex claims could, in this way, resolve the notorious circuit splits that wreak havoc on U.S. copyright law.²²⁴ “The existence of a single specialized copyright appellate forum would . . . br[ing] about . . . closure to many of these issues, and would . . . expedite[] the formation of a uniform body of copyright law upon which all parties could rely.”²²⁵ While it is “questionable” that the streamlined small

²¹⁸ S. REP. NO. 116-105, at 9 (2019).

²¹⁹ *Id.*

²²⁰ Nat’l Press Photographers Ass’n, Comment Letter on Remedies for Small Copyright Claims: Additional Comments at 12 (Oct. 19, 2012), https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/NPPA.pdf.

²²¹ *Bils*, *supra* note 8, at 480.

²²² *Zuercher*, *supra* note 120, at 128–29.

²²³ *Pager*, *supra* note 44, at 1053.

²²⁴ *See* Landau & Biederman, *supra* note 125, at 739.

²²⁵ *Id.*

copyright claims court “can resolve in satisfactory matter the various complex questions that plague many copyright disputes,”²²⁶ the above factors that are already built into the CCB address such concerns, but only if the CCB has precedential authority.

a. CCB Determinations as Binding Authority

“Copyright Law would benefit immensely from having cases decided by a tribunal comprised of judges experienced in the subject matter, and the consequent formation of a coherent body of law.”²²⁷ A centralized “expert system” should have some weight, “just like other administrative agencies have weight with their decisions.”²²⁸ Because of the organization of the small copyright claims court as a trial-level court,²²⁹ its decisions would only be truly binding on future CCB decisions. However, even this would be beneficial, since without it, the CCB would carry the risk of “fragmented and inconsistent” rulings.²³⁰

b. CCB Determinations as Persuasive Authority

The fact that CCB decisions would not be binding precedent “immediately seems counter to the goal of this solution, which is to give both the courts and the public a better idea” of how some of the more complex copyright issues are determined,²³¹ especially since “it is universally accepted that persuasive precedents play an important role in the development of legal doctrine.”²³² However, even though the CCB does not have precedential authority, “[i]t may be wondered how hermetic that blockade can actually be.”²³³

²²⁶ Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711, 730 (2018).

²²⁷ Landau & Biederman, *supra* note 125, at 782.

²²⁸ U.S. COPYRIGHT OFF., L.A. PUBLIC HEARING, *supra* note 26, at 89:17–90:7 (Alicia Calzada, Nat’l Press Photographers Ass’n); *see also id.* at 225:17–22 (Alma Robinson, Cal. Laws. for the Arts) (noting that the CCB “would tend to start to formalize ideas and procedures in a way that becomes helpful for future litigants”).

²²⁹ *See* Landau & Biederman, *supra* note 125, at 719.

²³⁰ U.S. COPYRIGHT OFF., L.A. PUBLIC HEARING, *supra* note 26, at 88:17–89:5 (Timothy A. Cohan, Peermusic); Bils, *supra* note 8, at 508 (citing Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989)) (“Particularly in cases in which it is not clear which circuit’s law might apply on appeal, the CCB would be well justified in arriving at its own conclusions of law, based on its good-faith effort to apply the law correctly.”).

²³¹ Zuercher, *supra* note 120, at 135.

²³² *Id.*

²³³ 5 NIMMER ON COPYRIGHT § 16.10[B].

Even if it does not officially hold any precedential weight, it could potentially “still operate as an outlet for persuasive authority.”²³⁴ CCB determinations may not be relied on or cited in any other courts, but they could still hold a significant amount of influence. Even if the decisions could not be cited directly, since they are required to be published, parties could see the trends in the CCB’s reasoning and use similar arguments themselves²³⁵:

To the extent that those three individuals have considered a given issue at length and reached a resolution, one imagines that they will adhere to it in future cases. All the more so, if a series of cases arises that the CCB resolves in one direction, it is only natural for that same vector to extend to future cases posing the same inquiries. In this way, although the law erects a formal barrier to the application of *stare decisis*, the reality may well be otherwise.²³⁶

This potential applies not only to involved parties, but other courts, including the Supreme Court,²³⁷ as the CCB could signal how to judicially handle various issues.²³⁸

B. *Moving Forward: Continuing Copyright Reform*

The CASE Act’s notable failure to address substantive challenges to copyright’s accessibility may prove to have been a significant oversight, despite the meticulous drafting behind it.²³⁹ Procedurally, however, the CCB’s roots in other successful, well established small claims or specialized courts are a promising foundation for the CCB to develop into

²³⁴ Zuercher, *supra* note 120, at 135 (citing SMALL CLAIMS REPORT, *supra* note 2, at 129–30).

²³⁵ *Id.* (“The facts, judgments, and opinions of the cases would be recorded, organized, and gradually made available to the public. Thus, this would cause a larger number of specific factual scenarios that have been legally analyzed, decreasing uncertainty . . . Over time, opinions should hopefully begin to hold authoritative value similar to other specialty courts.”).

²³⁶ *Id.*

²³⁷ See Landau & Biederman, *supra* note 125, at 779–80.

²³⁸ Ciolli, *supra* note 174, at 1029 (“One would expect the small claims court to serve as a bellwether, providing early signals as to how courts may view various technologies, and how they may draw the line between infringement and non-infringement, or what constitutes or does not constitute fair use of a copyrighted work.”).

²³⁹ See Keith Kupferschmid, *Why is No One Talking About This Provision of the CASE Act? It’s Because It Benefits Users of Copyrighted Works*, COPYRIGHT ALL. (Aug. 27, 2019), <https://copyrightalliance.org/why-is-no-one-talking-about-this-provision-of-the-case-act-its-because-it-benefits-users-of-copyrighted-works/>.

a centralized authority with enough influence to harmonize the complex and conflicted body of copyright law.

i. Future Development of a Specialized Copyright Court

In all likelihood, the determinations of the CCB will not begin to hold any true precedential authority anytime soon, if ever. The CCB proceedings are, in fact, an abbreviated, small claims system, meant to bind only the parties at hand, and the purpose of the CCB is to get claimants over the expense threshold and to get their claims resolved quickly and efficiently. Moreover, small claims court precedent could actually backfire and make copyright law doctrines all the more confusing. It may mean the CCB could establish its own body of law that only further conflicts with the federal circuit courts, which “would cause significant discord and confusion to attempt to determine how issues on which the circuits have split should be resolved.”²⁴⁰ Because the CCB can, potentially, pull precedent from an array of circuit court precedents, the board could have unchecked free reign— “[o]ne might object that the CCB then would be in the position of not following binding precedent in the cases of parties from certain circuits.”²⁴¹ So, because of this, or for a handful of other reasons discussed, the CCB’s decisions might never be precedential.

Nevertheless, the CASE Act and the establishment of this novel small copyright claims court is a momentous milestone. The CCB proceedings open the door to further development, with potential in the future for a specialized copyright court that *will* have precedential authority. Such a court could, for instance, be modeled “upon the Court of Appeals for the Federal Circuit,”²⁴² through which “the conceptual strands of patent law have been integrated into a coherent whole.”²⁴³ Since the Federal Circuit was “the single appellate forum with judges knowledgeable in one specific substantive area of the law,” it greatly ameliorated the “consistency and predictability” of patent law cases.²⁴⁴ Now, since the Federal Circuit decisions have “enabled district courts to apply the law more evenly and ‘correctly,’”²⁴⁵ a “uniform body of patent precedent” has developed.²⁴⁶

²⁴⁰ Nat’l Music Publishers’ Ass’n et al., *supra* note 42, at 6 (“Any small claims court system would necessarily have to adopt a new uniform set of laws – or ignore certain aspects of copyright law - and clarify which specific tests and standards from different circuits would be applied in such a system.”).

²⁴¹ Bills, *supra* note 8, at 508.

²⁴² Landau & Biederman, *supra* note 125, at 774.

²⁴³ Dreyfuss, *supra* note 134, at 21.

²⁴⁴ Landau & Biederman, *supra* note 125, at 775.

²⁴⁵ *Id.* at 776.

²⁴⁶ *Id.* at 777.

The consistency has made patent law not only more cohesive, but has also provided ancillary benefits in the ways of “precision, accuracy, sensitivity to policy, synthesis, and efficiency.”²⁴⁷

Some commenters argued that “the Federal Circuit does not provide a useful model” for a specialized copyright court.²⁴⁸ These arguments were based on the idea that “[o]ne of the goals of that court is to homogenize patent jurisprudence, so the court follows its own precedents on patent matters.”²⁴⁹ Such reasoning rests on the assumption that a specialized copyright court would not have the same goal. While “homogenizing jurisprudence” was not a goal of the CASE Act, it is certainly a goal of the Copyright Office,²⁵⁰ and there is no reason that a future specialized copyright court could not be developed, founded on this objective.

The Federal Circuit was organized in order to “‘increase doctrinal stability in the field of patent law,’ which was important because the ‘uncertainty created by the lack of national law precedent was a significant problem.’”²⁵¹ If an equivalent specialized copyright court were to have been established at the same time, it might have resolved or prevented circuit splits with which copyright attorneys are plagued today.²⁵² Such a court now would make U.S. copyright law more consistent and reliable, and it could all but eliminate forum shopping.²⁵³ In addition, this would allow juries to render more consistent verdicts,²⁵⁴ which, in turn, could start to create a positive feedback loop of harmonized copyright law. This naturally would also help federal court seem less daunting to small claimants, and it might even incentivize such claimants to bring their disputes to court.²⁵⁵

ii. Substantively Assisting Small Copyright Claimants

The fact that copyright law is complex is certainly no secret, particularly to legal scholars in the United States. When even seasoned intellectual property lawyers struggle to make sense of certain doctrines, what hope is there for individual creators, who most often do not have the

²⁴⁷ *Id.* at 776–77 n.300.

²⁴⁸ Google, Inc., *supra* note 140, at 3.

²⁴⁹ *Id.* at 3–4.

²⁵⁰ See Pallante, *supra* note 129, at 319.

²⁵¹ SMALL CLAIMS REPORT, *supra* note 2, at 67 (quoting S. REP. NO. 275, at 5, 97th Cong., 1st Sess. 1981, 1982 U.S.C.C.A.N. 11).

²⁵² See Landau & Biederman, *supra* note 125, at 779.

²⁵³ See *id.* at 739.

²⁵⁴ *Id.* at 780.

²⁵⁵ See *id.* at 781.

resources to hire an attorney to assist with a small infringement claim?²⁵⁶ When copyright law is “counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors,”²⁵⁷ small copyright claimants are, understandably, desperately lost.

Although the CCB presides over a forum which enables copyright owners to seek remedies without the need for legal representation, understanding and interpreting the complexities of copyright law remains a daunting task. Copyright owners who endeavor to represent themselves “must analyze whether their infringement claims will withstand the defenses to infringement available under the Copyright Act” as well as “a number of important limitations and exceptions to copyright protection—some of which are legally complex.”²⁵⁸ Even though the Copyright Office acknowledged such difficulties as “potential bars to recovery,”²⁵⁹ the CASE Act neglects to account for them in its provisions. These complexities might prove to be just as strong a deterrent to copyright owners looking to resolve their small infringement claims as any procedural hurdles that the CASE Act did contend with.

Although the CASE Act purports to make litigation of small copyright infringement claims more accessible, it really only does so procedurally. The intricacies of substantive copyright law issues are almost entirely omitted. While there was considerable objection in the legislative history on issues such as eligible categories of works or certain heavily fact-laden claims or defenses, the CASE Act, as enacted, did little, if anything, to address these concerns. Congress chose instead to focus on the procedural ways in which to make small copyright claim enforcement more readily available to authors or copyright owners, making improvements to the transaction costs of copyright litigation.²⁶⁰ However, this downright silence on substantive copyright issues could, and undoubtedly will, just as easily have the effect of deterring copyright owners from bringing their small infringement claims to court. In order to truly make courts more accessible for small copyright claimants, “the copyright system needs to . . . undertak[e] both substantive and procedural reforms to minimize

²⁵⁶ Notably, the Copyright Office has provided a (lengthy) handbook to provide small claim litigants support for navigating their claims and guidance as to the procedures of the CCB. U.S. COPYRIGHT OFF., COPYRIGHT CLAIMS BOARD HANDBOOK (2022), <https://ccb.gov/handbook/>. The Copyright Office also has helpful resources such as the Fair Use Index. U.S. Copyright Off., *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV (Dec. 2022), <https://www.copyright.gov/fair-use/>. This is still a considerable amount of material to wade through for a *pro se* litigant with a small claim.

²⁵⁷ Litman, *supra* note 40, at 33.

²⁵⁸ SMALL CLAIMS REPORT, *supra* note 2, at 19.

²⁵⁹ *Id.*

²⁶⁰ See discussion *supra* Section III.A.

transaction costs and ensure greater equity in the system.”²⁶¹ If legislature only addresses procedural issues in copyright law, such claimants will once again be left out in the cold. “Such uncertainty leaves upstart artists exposed to potentially crushing liability.”²⁶²

Pessimists have asserted that “[w]ealthy litigants, regardless of whatever rules a court may implement, will always have an advantage over poor litigants and will try to exploit that advantage to the detriment of the poorer party.”²⁶³ Additionally, opponents of a small copyright claims system have cautioned that “hiring an attorney or seeking the assistance of a *pro bono* law clinic should be considered if a party has any concern about their ability to represent themselves before the [CCB].”²⁶⁴ Further, while the Copyright Claims Attorneys at the CCB are charged with “provid[ing] assistance to members of the public with respect to the procedures and requirements of the [CCB],”²⁶⁵ others have retorted that “just as it is not the responsibility of the Board to provide legal advice or assistance with particular claims, it is not the responsibility of the Board to babysit parties who have the means to properly engage with the Board with some effort of their own.”²⁶⁶ None of these contentions sounds particularly inviting to small copyright claimants.

Instead, seeing the CASE Act as a “copyright reform opportunity to remake the copyright system into a more creator-friendly scheme could enhance both its legitimacy and its effectiveness in encouraging the creation and dissemination of works of authorship.”²⁶⁷ Harmonizing copyright law, substantively *and* procedurally, could make it easier for parties to represent themselves²⁶⁸ and the more consistent and predictable outcomes would make it less intimidating for copyright owners to bring their small claims to court.

V. CONCLUSION

It is entirely possible that the procedures required for a centralized, expert court whose holdings would be binding authority would run counter

²⁶¹ Pager, *supra* note 44, at 1053 (emphasis added).

²⁶² *Id.* at 1026.

²⁶³ Ciolli, *supra* note 174, at 1030.

²⁶⁴ S. REP. NO. 116-105, at 9 (2019).

²⁶⁵ 17 U.S.C. § 1503(a)(2)(B).

²⁶⁶ S. REP. NO. 116-105, at 10.

²⁶⁷ Litman, *supra* note 40, at 34–35.

²⁶⁸ See Landau & Biederman, *supra* note 125, at 778–79 (“[R]esearching and writing a brief in a patent infringement litigation is now straightforward; one cites to Federal Circuit precedent, for it is binding on all district courts with respect to patent law substantive issues.”).

to the abbreviated procedures in front of the CCB that are precisely what make the small claims court so accessible. The Constitutional mandates that could allow the determinations of such a court to hold precedential weight may well be beyond the scope of the CCB and the small claims court that the CASE Act established.²⁶⁹

However, if the Copyright Office is serious about “Copyright for All” as one of its primary objectives for the near future,²⁷⁰ factoring in substantive copyright law issues to the Copyright Office’s continued development will help profoundly. The simplification of copyright law doctrines, coupled with streamlined procedures, will serve to “mak[e] the law and its services as easy to understand as possible for both individuals and entities of all sizes” and will certainly result in “a copyright system that truly works ‘for all.’”²⁷¹ A number of features of this new small copyright claims court set up a ripe opportunity for further development either within the small claims court itself or to establish a more advanced, specialized appellate review court for copyright claims.²⁷² Either way, U.S. copyright lawyers have reason to be optimistic about being one step closer to a harmonized body of copyright law.

²⁶⁹ See, e.g., *id.* at 719 n.1 (“[T]he authors would prefer that decisions on all copyright issues be made by judges. This, however, would probably cause a major Seventh Amendment problem.”).

²⁷⁰ U.S. COPYRIGHT OFF., STRATEGIC PLAN 2022–2026: FOSTERING CREATIVITY & ENRICHING CULTURE 5 (2022).

²⁷¹ *Id.* at 6 (“The recently established Copyright Claims Board, or CCB, will also make justice more accessible by providing a forum for resolving small claims. . . . ultimately enriching the volume and diversity of the creative content available to the public.”).

²⁷² See Landau & Biederman, *supra* note 125, at 782 (“Although a specialized court is not perfect . . . it is infinitely preferable to the current system of major disagreement—often polar disagreement—among the circuits on almost every copyright related issue.”); see also Ciolli, *supra* note 174, at 1030 (“When evaluating whether Congress should create a federal copyright small claims court, policymakers should not compare the small claims court to an idealized copyright litigation system, but benchmark it against the system currently in place [I]t is difficult to argue that adopting this system would make poor litigants as a group worse off than under the current system.”).