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The Higher-Cost Problem: How the CASE Act Addresses the History of Inequity in the American Copyright Regime

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NOTES

The Higher-Cost Problem: How the CASE Act Addresses the History of Inequity in the American Copyright Regime

MICHAEL NEWELL *

The legislative history of copyright law in the United States and its judicial interpretation resulted in a complex web of statutes and doctrine theoretically meant to further the constitutional goal of “promot[ing] the Progress of Science and the useful Arts.” But because of its complexity, enforcing rights against infringers in federal court became prohibitively expensive for most. The American copyright regime simultaneously allowed the music industry to unfairly profit from the creativity of the under-resourced—particularly, musicians of color.

This Note discusses the disparate impact of the American copyright regime. Then, the Note discusses the Copyright Alternatives in the Small-Claims Enforcement Act, which Congress passed to address the high costs of pursuing copyright infringement claims in federal court. Specifically, this Note addresses constitutional and practical concerns raised by scholars about the Act and how the Act might finally signal

* Executive Editor, *University of Miami Law Review*, Volume 77; J.D. Candidate 2023, University of Miami School of Law; B.M. 2016, University of Miami, Frost School of Music. Thank you to my fellow editors for preparing this Note for publication. Thank you to Professor Lili Levy for her guidance. Thank you to my family—especially my wonderful wife, Rebecca—for such unwavering support.

a shift in Congressional focus toward the needs of minority artists in copyright legislation.

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INTRODUCTION

Black musicians invented the genres that later defined popular music in America, from blues, jazz, and soul to rock and roll, rap, and hip-hop.¹ Yet, since the 1920s, American musicians of color have faced an uphill battle to reap the benefits of their own creativity. The music industry used ethically dubious or outright objection-

¹ K.J. Greene, *Copyright, Culture & (and) Black Music; A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L. J. 339, 364 (1998).

able methods to exploit their works and appropriate their copyrights.² Even when Black composers retained intellectual property rights, the relatively high cost of protecting their interests in court inhibited enforcement efforts.³ Recently, Congress legislatively recognized that the high cost of copyright litigation adversely affects independent artists who cannot afford to bring infringement claims in federal court. In response, Congress enacted the Copyright Alternative in Small-Claims Enforcement Act (“CASE Act”), signed into law on December 27, 2020.⁴ One of the most significant, albeit undernoted, consequences of the CASE Act regime is that it offers a belated opportunity to address some of the historic wrongs suffered by African American musicians in the exploitation of their musical works.⁵

The CASE Act aims to offer a remedy for creators of artistic works who otherwise cannot afford to have their copyright claims heard in court due to the high litigation costs inherent in the federal court system.⁶ A welcome concept, the CASE Act establishes a Copyright Claims Board (“CCB”) at the Copyright Office in Washington, D.C. and grants it limited authority to render nonprecedential determinations on copyright claims, award monetary damages, and request that the infringing party cease its infringing activity.⁷ The Act provides a low-cost alternative to filing in federal court by, among other things, controlling a tightly circumscribed discovery

² See discussion *infra* Section I.B; Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, 1, 8–9 (May 2, 2020) GWU Legal Studies Research Paper No. 2020-56, <http://dx.doi.org/10.2139/ssrn.3591113> (describing process where recording studios and radio stations used the compulsory license scheme to take advantage of their relatively small distribution channels and rerecord their songs with white artists to distribute nationwide); K.J. Greene, *supra* note 1, at 372–73 (describing process where artist would sell his composition to a record company or the artist’s manager for absurdly small sums).

³ See discussion *infra* Section I.A.

⁴ H.R. REP. NO. 116-252, at 16 (2019).

⁵ See discussion *infra* Section II.A. Injustices toward people of color or other minority groups seemed to play no role in designing a solution to the high-cost problem.

⁶ H.R. REP. NO. 116-252, *supra* note 4, at 16.

⁷ Copyright Alternative in Small-Claims Enforcement Act, 17 U.S.C. §§ 1502–1504.

process,⁸ encouraging settlement,⁹ and capping damages at \$30,000.¹⁰

Scholars have raised questions about the constitutionality of the CASE Act with respect to its encroachment on Article III adjudication and the opt-out procedure.¹¹ Especially with some minimal amendments, however, the CASE Act regime will likely pass legal muster. Indeed, despite its limitations, the CASE Act represents a positive step toward empowering individual creators to enforce existing rights for which they did not previously have realistic remedies. By facilitating lower-cost access to a copyright tribunal and promoting copyright literacy among artists, the CASE Act offers tools effectively reserved until now for established corporate copyright owners with the resources to litigate and the ability to intimidate infringers. And importantly, despite Congress's failure to consider how a small-claims tribunal might affect creators of color, one of the most significant benefits of the CASE Act approach is that it may help ameliorate the inequitable treatment of African American artists in the copyright regime thus far.

The argument in this Note proceeds as follows. Part I provides an overview of the potential relief associated with the CASE Act. Part I of this Note offers an explanation for the expanding gap between copyright holders' rights and their remedies and discusses how copyright law particularly disadvantaged musicians of color. Part II discusses the details of the CASE Act, its background, and its legislative history. Part III sketches and assesses the principal scholarly criticisms of the Act. Part IV argues that the CASE Act, in combination with the Music Modernization Act, will bolster independent music artists' incentive to create and will increase copyright literacy among under-resourced groups. Regardless of its limitations, Part IV argues, the CASE Act represents a desirable legislative step in equalizing the access to copyright remedies of individual artists and, particularly, of African American creators.

⁸ § 1506(n).

⁹ § 1503(a)(1)(F); § 1506(r).

¹⁰ § 1504(e)(1)(D).

¹¹ See discussion *infra* Sections III.A, III.B.

I. A HISTORY OF COMPROMISE AND APPROPRIATION

A. “Right Without a Remedy”

The Constitution vests Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (“IP Clause”).¹² Acutely aware of the dangers of monopolies generally, the Founders intuited that these monopolies to authors and inventors were justified by the public good they could produce.¹³ Even Thomas Jefferson, who wished to remove this grant of exclusive monopolies, later acknowledged the right of the country to have such a system “as an encouragement to men to pursue ideas which may produce utility”¹⁴ Indeed, with the industrial revolution beginning in Great Britain, the Founders undoubtedly sought to create a form of government that would similarly incentivize American economic growth.¹⁵ The “limited Times” language aimed to quell the fear and aversion of perpetual monopolies, which were, in James Madison’s view, “justly classed among the greatest nuisances [sic] in Government.”¹⁶ Modern courts and scholars routinely acknowledge the utilitarian basis of the IP Clause.¹⁷

¹² U.S. CONST. Art. 1, § 8, cl. 8.

¹³ EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 6–7 (2002).

¹⁴ *Id.* at 6, 9 (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in *XIII THE WRITINGS OF THOMAS JEFFERSON* at 334 (Andrew A. Lipscomb et al. eds., 1904)).

¹⁵ *Id.* at 93–94.

¹⁶ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in, *I THE REPUBLIC OF LETTERS*, at 566 (James Morton Smith ed., 1995).

¹⁷ *See, e.g.,* *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); W. Michael Schuster, *Public Choice Theory, the Constitution, and*

However, the history of legislation in copyright and the judicial interpretation of that legislation led to a complex regime that has become increasingly expensive to enforce. Some scholars argue that the American copyright regime strayed from the Founders' original intent as lobbying interest groups pushed Congress toward compromises.¹⁸ Technological advances led to confusion in court decisions,¹⁹ and social and cultural development led copyright industries to effectively shut out an entire class of Americans from the benefits of copyright.²⁰

The Librarian of Congress in 1903 reported that the copyright system at that time “[was] a highly technical one, largely due to its uneven development by means of many separate enactments dealing with particular matters, or framed to meet special exigencies.”²¹ He also observed that whether a work enjoyed the protections of copyright depended not on equitable grounds but on “exact compliance with statutory formalities.”²² To reconfigure the contradictions, discrepancies, and rigidity of the complex copyright laws of the day, the Librarian of Congress held a conference with representatives of copyright stakeholders and constructed a bill for Congress to consider; joint hearings in Congress commenced soon thereafter.²³ Ul-

Public Understanding of the Copyright System, 51 U.C. DAVIS L. REV. 2247, 2253 (2018) (“The United States’ copyright system is a utilitarian regime intended to benefit the public by expanding the scope of knowledge and culture. To this end, encouraging creation of new works of authorship is the historically recognized goal of copyright law. This narrow target is mandated by a unique constitutional grant of congressional power, which identifies a policy goal to be attained . . . and the manner to achieve this end . . .”).

¹⁸ See, e.g., Jessica D. Litman, *Copyright Compromise and Legislative History*, 72 CORNELL L. REV. 857, 902–03 (1987) (arguing that courts dismantled the delicate industry compromises reflected in the 1976 Copyright Act); Schuster, *supra* note 17, at 2265 (arguing that the over-representation of special interest groups has caused copyright law to expand into the realm of unconstitutionality).

¹⁹ See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 315–16 (1989).

²⁰ See discussion *infra* Section I.B.

²¹ Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1903, S. Doc. No. 10, 58th Cong., 2d Sess. 68–69 (1903).

²² *Id.*

²³ Litman, *supra* note 19, at 284–85.

timately, industry complaints and splintering congressional minorities at the hearings produced four competing versions of the bill, which led the Chairman of the House Committee to urge the competing industries to convene and agree on a compromise solution.²⁴ Thus, the legislative process that ultimately resulted in the Copyright Act of 1909 (“1909 Act”) was essentially a series of negotiations among representatives of industries with interests in copyright whose avowed purpose was to draft legislation that provided for the future.²⁵ But some newly emerging industries had little negotiating power and played no part in the drafting, so the industry-specific drafting quickly became less than useful.²⁶

As the 1909 Act aged, its provisions became increasingly remote with respect to innovation and new technology.²⁷ Common-law interpretation began to fill the gaps where the statute was silent.²⁸ Judicial decisions became inconsistent, distinctions between cases became indefensible.²⁹ Despite an amendment in 1912,³⁰ the increasingly influential radio and motion picture industries quickly grew uncomfortable with the 1909 Act, which was written without attention to their needs.³¹ The American Society of Composers, Authors and Publishers (“ASCAP”) began demanding royalty payments from those industries because they used popular music in their programs, hatching a decades-long embittered battle between the industries to revise the law once again, which lasted until the United States’ intervention in World War II.³² In the meantime, lawyers

²⁴ *Id.* at 285–87.

²⁵ *Id.* at 277.

²⁶ *See id.* at 291–99 (discussing the push for amendments to the 1909 Act by ASCAP and the motion picture industry and hearings before the House Patent Committee, where witnesses testified in 1925 that the existing copyright law was inadequate and needed revision).

²⁷ *See id.* at 302–03.

²⁸ Litman, *supra* note 18, at 858.

²⁹ *Id.*

³⁰ The Townsend Amendment, passed in May of 1912, was the first time the copyright laws provided protection for “motion pictures.” Wendy A. Maloney, *1912 Amendment Adds Movies to Copyright Law*, U.S. COPYRIGHT OFFICE (Mar. 2012), https://www.copyright.gov/history/lore/pdfs/201203%20CLore_March2012.pdf.

³¹ *See* Litman, *supra* note 19, at 291.

³² *See id.* at 291–99.

surveyed by the Copyright Office observed that the attorney's fees provisions in the 1909 Act rarely sufficed for the time and energy—read, costs of litigation—expended in prosecuting or defending copyright infringement.³³

Scholars like W. Michael Schuster and others suggest that any congressional legislation granting monopoly-like protections pursuant to the IP Clause must “attempt to secure a countervailing benefit to the public.”³⁴ Yet, despite Congress's attempt, these scholars argue that the 1909 Act “falls short of the constitutional requirement of ‘promoting the progress’” because the creative output of authors hardly increased at all in the years following the 1909 Act.³⁵ The 1909 Act also failed to promote fairness or American equality.³⁶

The 1976 Act—today's operative copyright law—has similarly been described as “a series of interrelated and dependent compromises among industries with differing interests in copyright.”³⁷ Competing interests' relentless insistence on conditional exemptions and privileges ultimately resulted in a complex web of rights inundated with fact-specific carve-outs for particular, industry-specific uses.³⁸ Much like the 1909 Act, quickly changing technology exacerbated the high-cost problem as courts encountered difficulties squaring the bargained-for provisions of the 1976 Act in new contexts.³⁹ For example, in the 1976 Act's first decade, cases involving newly invented videocassette recorders, communications satellites, and online databases often required courts to stretch the application

³³ STAFF OF S. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES 85 (Comm. Print 1960).

³⁴ Schuster, *supra* note 17, at 2264 (quoting Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1120 (2000)).

³⁵ *Id.* at 2266.

³⁶ See discussion *infra* Section I.B.

³⁷ Litman, *supra* note 18, at 862.

³⁸ See Litman, *supra* note 19, at 320.

³⁹ See *id.* at 315.

of the fair use doctrine⁴⁰ and draw analogies that broadened technology-specific language.⁴¹ Since then, technology has continued to require courts to stretch the meaning of fair use, and future development of technology will implicate copyright in ways we cannot foresee today. For litigants, dealing with a new or developing technology means hiring expensive expert witnesses to convince the court to apply old-technology-specific copyright law in their favor.⁴² So, while the copyright laws technically apply equally to all, the cost required to navigate the complexity and uncertainty of the copyright regime effectively precludes most individual creators from enforcement in court.⁴³ The CASE Act now provides a limited pathway for

⁴⁰ See *id.* at 349 (discussing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984)).

⁴¹ See *id.* at 343 n.378 (citing circuit decisions that concluded that communications satellites operating as common carriers were entitled to passive carrier exemption in 17 U.S.C. § 111(a)(3)).

⁴² For example, the 1976 Act's negotiated definition of "fair use," Litman, *supra* note 18, at 869, led courts to consider normative arguments about what kinds of uses a "reasonable copyright owner" would allow, see, e.g., *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 550 (1985), which incentivized parties to hire experts that inform the court on reasonableness and customariness to increase the likelihood that a court would rule in their favor. Experts are routinely used in copyright infringement cases for other purposes as well, such as demonstrating copyrightability, copying in fact, and calculating damages.

While section 505 of the Copyright Act allows recovery of "full costs" by or against the other party, subject to the court's discretion, 17 U.S.C. § 505, a recent decision by the Supreme Court interpreted the phrase "full costs" to include only those costs which fall under six categories of expenses that qualify as "costs" according to sections 1821 and 1920 of title 28 of the United States Code. *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 875 (2019). Expenses for party-hired experts do not qualify. See 28 U.S.C. §§ 1821, 1920; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) ("'[C]osts' is a term of art that generally does not include expert fees."). Therefore, the party that hires the expert can expect to bear the expense—even if a judge decides to award costs pursuant to section 505.

⁴³ Take the 2018 testimony of commercial photographer Jenna Close, for example. Speaking before the House Committee on the Judiciary in support of the CASE Act, Ms. Close testified that she regularly finds her works infringed both online and in print and illegally used by her paying clients' competitors. *Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing Before the Comm. on the Judiciary*, 115th Cong. 9–10 (2018) (statement of Jenna Close, Dir. of Photography, Buck the Cubicle) (testifying that an internet search revealed eighteen

small copyright claims⁴⁴ but, if Congress decides to take another look at the 1976 Act, Congress should consider the extent to which technology-specific, rigid copyright legislation increases the cost of litigating a copyright claim.

B. *The Disparate Impact of Copyright Laws on Musicians of Color*

Historically, the appropriation of creative works by a white-dominated copyright industry, endemic American racism, copyright law itself, and the unequal bargaining power between musicians and music labels has particularly disadvantaged musicians of color.⁴⁵ For example, America's most profitable form of entertainment in the 1800s, minstrelsy, would not have existed but for the appropriation of African American culture for racist ends.⁴⁶ And, while the

large companies using her photos without permission) [hereinafter 2018 Hearing]. Her business brings in between \$60,000 and \$100,000 a year, which she uses to pay salaries and other expenses to maintain her business. *Id.* at 10. She testified that she cannot pursue legal action against those infringers because it would bankrupt her. *Id.* at 19.

David Trust, chief executive officer of the Professional Photographers of America, also present at the 2018 hearing, testified that ninety percent of artists said they had been infringed multiple times over the last five years, yet do not seek redress in federal court because they would have to stop operating their businesses to do so. *Id.* at 20 (statement of David Trust, Chief Exec. Officer, Pro. Photographers of Am.).

The American Intellectual Property Law Association calculated that the median cost of a copyright infringement suit with less than \$1 million at risk in 2010 was approximately \$200,000 through discovery and \$350,000 through to appeal. AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION ("AIPLA"), REPORT OF THE ECONOMIC SURVEY 2011, 35 (2011).

⁴⁴ See discussion *infra* Section II.

⁴⁵ See, e.g., Greene, *supra* note 1, at 372–73 (discussing four patterns that resulted in inadequate intellectual property protection for Black music artists).

⁴⁶ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL'Y & LAW 365, 372 (2008). Minstrelsy was a form of entertainment where white actors in black face would perform song, dance, and comic routines based on stereotyped depictions of Black Americans. "The minstrel show was central to American culture from the 1830s to the 1870s, so much so that it is 'difficult for us now to realize how all-pervasive and influential the minstrel show was.'" *Id.* at 372 n.40 (quoting TERRY WALDO, THIS IS RAGTIME 12 (1976)). For a brief history of minstrelsy in the United States, see Tamara Lissette Brown, *So You Think You Can Dance: Black Dance and*

1909 Act consolidated the patchwork of copyright laws enacted throughout the 1900s, many of the formalities to registration and renewal of copyright remained in place.⁴⁷ Just like before the 1909 Act was passed, Black artists unfamiliar with the legal requirements often found their works injected into the public domain to be used freely by anyone.⁴⁸ Further, a work enjoyed federal copyright protection under the 1909 Act only when published with proper notice and promptly registered.⁴⁹ While these formalities disadvantaged unknowing artists of all backgrounds,⁵⁰ professor K.J. Greene recognized a pattern by which managers took advantage of musicians of color by registering a work with the Copyright Office as their own, which deprived those artists of the fruits of their labor.⁵¹

Relatedly, musicians of color also received less protection for their musical works due to inequalities of bargaining power.⁵² They were “routinely swindled out of their publishing rights and underpaid for record sales” due to diminished access to resources and

American Popular Culture, in SOUL THIEVES: THE APPROPRIATION AND MISREPRESENTATION OF AFRICAN AMERICAN POPULAR CULTURE, 201, 208–16 (Tamara Lissette Brown & Baruti N. Kopano, eds., 2014).

⁴⁷ See K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1175, 1202 (2008).

⁴⁸ See Greene, *supra* note 1, at 354. Professor Greene notes that this phenomenon also frequently occurred to indigenous peoples worldwide. *Id.* at 354 n.68.

⁴⁹ See discussion *supra* Section I.A. Until the 1976 Act passed, federal law protected published works and state common law governed unpublished works. While it seems at first glance that all grounds are covered, a non-federally protected work could have been copied virtually without consequence in any state that has no personal jurisdiction over the copier.

⁵⁰ See Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 330 (2010).

⁵¹ See, e.g., Greene, *supra* note 1, at 353–54, 372 (describing *Merchant v. Levy*, No. 87 Civ. 7199, 1995 WL 217508, at *1 (S.D.N.Y. 1993), in which a manager registered copyright only in his and lead singer’s name when two other Black artists co-wrote the song, but were not entitled to full recovery due to statute of limitations).

⁵² See *id.* at 356. For a discussion of unconscionable contracts in the music industry, see Tamera H. Bennett, *Risky Business: Rejecting Adherence to Industry Standards in Exclusive Songwriter Agreements*, 4 TEX. WESLEYAN L. REV. 71, 81–83 (1997).

knowledge.⁵³ For example, take the case of Bessie Smith, the “Empress of the Blues.”⁵⁴ Bessie Smith’s heirs brought a lawsuit in 1979 alleging, among other things, that Columbia Records took advantage of her illiteracy and lack of sophistication in business affairs.⁵⁵ While her contracts with Columbia paid a flat fee of \$200 for each recording and paid no royalties, the label simultaneously signed white performers to contracts with much greater sums and included royalty provisions.⁵⁶ The heirs alleged that any contracts in writing were null and void because (1) Smith’s reported agents did not protect her interests because they worked as officers or employees for Columbia Records; (2) any contracts executed with Smith’s authorization were executed upon the advice of persons working for Columbia Records and had a direct conflict of interest; or (3) the contracts were unconscionable.⁵⁷ The court specifically rejected the argument that the statute of limitations could be tolled by a fraud exception; it would not consider that Smith’s lack of business sophistication could conceal the fraudulent activity for more than forty years.⁵⁸ According to the *Gee v. CBS, Inc.* court, “if Bessie Smith were indeed the copyright holder, she knew, or Should [sic] have known, that certain legal rights, including the rights of licensing, were hers by virtue of those copyrights.”⁵⁹

The Smiths’ case is a window to the past practice of record companies regularly appropriating the creativity of Black artists and profiting from it. The *Gee* court in 1979 refused to consider that the creators of blues music, like Bessie Smith, did not have the literacy, savvy, legal representation, or the wherewithal to navigate the complexities of the 1909 Act.⁶⁰ Copyright owners were assumed to know and follow the complexities of the 1909 Act,⁶¹ but most Black

⁵³ Brauneis, *supra* note 2, at 24.

⁵⁴ *Gee v. CBS, Inc.*, 471 F. Supp. 600, 600 (E.D. Pa. 1979), *aff’d* 612 F.2d 572 (3d Cir. 1979).

⁵⁵ *Id.* at 611.

⁵⁶ *Id.* at 611, 613.

⁵⁷ *Id.* at 640–41.

⁵⁸ *Id.* at 626.

⁵⁹ *Id.*

⁶⁰ Greene, *supra* note 47, at 1202.

⁶¹ *Gee*, 471 F. Supp. at 626.

artists in the racially segregated American society of the early-twentieth century simply did not and could not.⁶²

The 1909 Act also vested copyright owners of musical works with the exclusive right to the “mechanical” rendering of their works and facilitated a compulsory license scheme.⁶³ These provisions gave the owner of a copyright in a musical work the exclusive right to make the first sound recording of the work, the right to refuse to license the work to others, to demand any royalty rate, or to place conditions on the ability of others to record the song.⁶⁴ But once the artist licensed the first recording, anyone could make another recording of that musical work so long as they paid the statutory fee, which from 1909 through 1978, was two cents for every record sold.⁶⁵

Although drafted to address concerns of the player-piano market, the 1909 Act’s compulsory license scheme permitted another exploitation of African American creativity.⁶⁶ In racially divided markets, a widespread practice developed of employing a white artist to rerecord songs written by musicians of color, referred to as “mirror cover recordings.”⁶⁷ This practice allowed big record companies to flood the relatively localized distribution channel of the company that originally recorded the song and distribute the rerecorded song nationwide.⁶⁸ This scheme was exceptionally profitable for music labels throughout most of the twentieth century be-

⁶² See Greene, *supra* note 47, at 1202 (“The court in the Bessie Smith case assumed that artists would know the law, but imputing knowledge of complex law is just another form of white domination given the state of Black education and legal representation in the 1920’s.”).

⁶³ An Act to Amend and Consolidate the Acts Respecting Copyright, § 1(e) (1909) (amended 1912).

⁶⁴ Brauneis, *supra* note 2, at 3.

⁶⁵ *Id.* at 3–4. While two cents in 1909 is the equivalent of about sixty-five cents today, two cents in 1978 is worth only nine cents today. See U.S. BUREAU OF LAB. STAT., *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 28, 2022).

⁶⁶ Brauneis, *supra* note 2, at 7.

⁶⁷ *Id.*

⁶⁸ *Id.* at 7–8.

cause it allowed the record companies to sell songs originally written by musicians of color to members of the public and radio stations that refused to buy or play records by African American artists.⁶⁹

Pervasive social discrimination in the 1920s and beyond only exacerbated the challenges to Black music artists.⁷⁰ Record companies began to segment their markets along racial and social lines.⁷¹ “Race” records were those made by and for people of color, “hill-billy” or “old-time” records were made by and for white, rural Americans from the South, and “popular” records were those made for the general, white public.⁷² Companies often barred Black recording artists from recording other genres of music when they deemed it did not fit within the corporate conceptions of Black music.⁷³ From a socioeconomic perspective, the industry argues that the endemic racism during this period resulted in these practices because it maximized the record labels’ profits.⁷⁴ They were selling exactly what the American audience wanted. Into the 1950s, the segregation of “Black” music became as much of a perpetuation of the internalized, deeply-rooted racist assumptions of America as the segregated schools and separate drinking fountains of the South, or the restrictive housing covenants and discriminatory hiring practices of the North.⁷⁵

Why would a label pay fairly for the rights to use music recordings that the radio stations would not air?⁷⁶ As inflation made the two-cent statutory royalty rate less and less significant over time, the overhead costs of mirror cover records decreased.⁷⁷ And not only did the profitability and feasibility of white “mirror covers” make it an attractive practice for record labels, Robert Brauneis, Professor

⁶⁹ *Id.* at 8.

⁷⁰ *See* Greene, *supra* note 1, at 356–57.

⁷¹ Brauneis, *supra* note 2, at 5.

⁷² *Id.*

⁷³ *Id.* (quoting KARL HAGSTROM MILLER, *SEGREGATING SOUND: INVENTING FOLK AND POP MUSIC IN THE AGE OF JIM CROW 188–89* (2010)).

⁷⁴ *See* Brauneis, *supra* note 2, at 7; *see also* Greene, *supra* note 47, at 1184.

⁷⁵ Brauneis, *supra* note 2, at 6 (quoting BRIAN WARD, *JUST MY SOUL RESPONDING: RHYTHM AND BLUES, BLACK CONSCIOUSNESS, AND RACE RELATIONS 27* (1998)).

⁷⁶ *Id.*

⁷⁷ *See id.* at 20.

and Co-Director of the Intellectual Property Law Program at George Washington University Law School, suggests that the practice actively discouraged songwriting in the first place.⁷⁸

Scholars also argue that the structural elements of copyright law clash with the oral traditions of African American culture.⁷⁹ Because blues and jazz are primarily communicated through the oral tradition, blues and jazz musicians face another hurdle to protect their creativity: the distinction between the composition and the sound recording.⁸⁰ While the 1976 Act affords protection to both the written composition and sound recordings of musical improvisations,⁸¹ the Ninth Circuit explains in *Newton v. Diamond* that if the owner of the musical composition does not own the sound recording, he is not protected when elements of the sound recording are sampled by others if the sample is not reflected in the composition.⁸² In *Newton*, flautist James W. Newton's composition, "Choir," was written in the jazz tradition, so his score "does not contain indications for all of the musical subtleties that it is assumed the performer-composer of the work will make in the work's performance."⁸³ Consequently, Newton's use of special techniques in his *performance* of "Choir"

⁷⁸ See, e.g., *id.* at 30.

⁷⁹ See Greene, *supra* note 1 at 356; Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 601–02 (2019).

⁸⁰ Under the 1976 Act, musical works are given two separate copyrights—one for the composition and one for the sound recording. 17 U.S.C. § 102(a)(2), (7). The two copyrights can be, and often are, owned by different individuals or entities.

⁸¹ See 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

⁸² See *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004) ("filtering out" the licensed elements of the sound recording because plaintiff no longer owned it). The Second Circuit also uses this approach. See, e.g., *Poindexter v. EMI Record Grp. Inc.*, No. 11 Civ. 559, 2012 WL 1027639, at *4 (S.D.N.Y. Mar. 27, 2012) (citing *Newton* and filtering out elements unique to the sound recording in an infringement claim because plaintiff owned rights only in composition); *Kelley v. Universal Music Grp.*, 14 Civ. 2968, 2016 WL 5720766, at *7 (S.D.N.Y. Sept. 29, 2016) (dismissing plaintiffs' sound recording infringement claim because they failed to plead beneficial ownership in sound recording).

⁸³ *Newton*, 388 F.3d at 1194.

went beyond the *musical composition* of “Choir.”⁸⁴ Because copyright protection only extends to sounds when they are “fixed in a tangible form,” only the owner of the sound recording—not Newton—could seek recovery for the use of any recorded sounds produced by Newton but not indicated in the score.⁸⁵ Once the *Newton* court determined that the defendant’s liability was limited to its use of the composition separate and apart from the sound recording, the writing was on the wall; the defendant won because its use of Newton’s composition was *de minimis*.⁸⁶ *Newton* suggests that the language of section 114 of the 1976 Act preserves a domain of “style of performance and the manner of interpretation” that can be freely imitated through independent fixation.⁸⁷ Therefore, the unwritten elements of recorded songs—instrumentation, the artistic decision to rush or lag the beat, or instrumental or vocal timbre—are not protected elements of the composition.⁸⁸

Sound recordings began displacing sheet music as the dominant source of revenue as early as the 1920s⁸⁹ and record labels have been the principal means to “fix” the performance in a sound recording because recording artists usually could not produce quality recordings themselves.⁹⁰ Inevitably, as a condition of recording and promoting the record, record labels wielded their weighty bargaining power to require ownership of the master recording of the artist’s

⁸⁴ *Id.*

⁸⁵ *Id.* Newton licensed all rights to the sound recording at issue in this case to ECM Records, which in turn licensed its use to the defendant, the Beastie Boys, for use in their song, “Pass the Mic.” *Id.* at 1191.

⁸⁶ *Id.* at 1196.

⁸⁷ Brauneis, *supra* note 2, at 22.

⁸⁸ Rebecca Tushnet, professor of law at Harvard Law School, argues that the mechanical license scheme, which was carried into the 1976 Act, encoded into the law the notion that interpretive elements of musical performances are not worth protecting against the kind of copying that would be actionable as applied to books, scores, and the like. Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y 209, 217 (2013).

⁸⁹ Tuneen E. Chisholm, *Whose Song Is That? Searching For Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274, 305 (2017).

⁹⁰ *See id.*

songs.⁹¹ Today, with few exceptions,⁹² sound recordings of Black artists' songs are owned by the record company that recorded the song.⁹³ And record companies that control the rights to the sound recording can control the use of the artist's recorded performance and retain the profit.

In sum, the copyright laws afford inadequate copyright protection to musicians of color and increase their inequality among the rest of American society.⁹⁴ Blues, jazz, and rock and roll developed distinctly from African American roots⁹⁵ but, because of the systemic exclusion of Black personnel from positions of power and the segregation of Black audiences, this iconic American music was popularized only when the white-dominated industry permitted it.⁹⁶ Even in periods of relative popularity, Black musicians routinely found their creativity exploited by publishers and recording studios. And they are still subject to the effects of American racism.⁹⁷ Moreover, Congress has not yet specifically addressed the fraud, greed,

⁹¹ *See id.*

⁹² Sam Cooke, Curtis Mayfield, Michael Jackson, and Prince are some major Black artists who were wealthy or influential enough to buy back their music catalogues from the record labels or create their own. *See* Umazi Mvura, *Black Music Month Series: Ownership of Black Culture and Lives*, AURN (June 25, 2019), <https://aurn.com/black-music-month-series-ownership-of-black-culture-and-lives/>.

⁹³ While technological advancements have allowed more artists to self-produce their own albums with their own home-studio equipment, the need for promotional capital perpetuates the practice of heavily one-sided contracts between a record label and an artist. *See* discussion *infra* Section IV.

⁹⁴ Greene, *supra* note 1, at 374.

⁹⁵ *See id.* at 353.

⁹⁶ Reebee Garofalo, Professor Emeritus at University of Massachusetts Boston, refers to the pattern of Black innovation and white popularization as “black roots, white fruits.” Reebee Garofalo, *Crossing Over: From Black Rhythm & Blues to White Rock ‘n’ Roll*, in *RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC*, 112 (Norman Kelley, ed., 2002). Professor Garofalo also notes that the Black “specialty fields” of music—blues, jazz, and gospel—bore the brunt of cutbacks in record production during the World War II shellac shortage. Once out of touch with the general public, the major record companies never reabsorbed the Black music market. *Id.* at 117.

⁹⁷ *See* Matt Stahl & Olufunmilayo Arewa, *Denying Black Musicians Their Royalties Has a History Emerging Out of Slavery*, THE CONVERSATION (May 12,

discrimination, and complacency that pervades this historical account in its copyright legislative process.⁹⁸

II. ORIGIN OF THE CASE ACT

A. *Legislative History*

The legislative history of the CASE Act began when then-Chairman of the former Subcommittee on Courts, the Internet, and Intellectual Property, former Representative Lamar Smith, conducted a hearing in 2006 to consider the need for new remedies to address small copyright claims.⁹⁹ At the hearing, Representative Smith heard from several witnesses who testified that the cost of retaining counsel and maintaining an action in federal court precluded many artists whose works were clearly being infringed from vindicating their rights.¹⁰⁰ After the hearing, Representative Smith requested that the Copyright Office conduct a study to assess “the extent to which authors and other copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system” and to furnish “specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution.”¹⁰¹

2021, 1:18 PM), <https://theconversation.com/denying-black-musicians-their-royalties-has-a-history-emerging-out-of-slavery-144397> (“BMG found ‘significant’ racial disparities in royalty payouts to Black and racialized artists in four of its labels.”).

⁹⁸ See discussions *supra* Sections I.A, I.B.

⁹⁹ *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop.*, 109th Cong. (2006) [hereinafter 2006 Hearing].

¹⁰⁰ See *id.* at 4, 34 (statements of Paul Aiken, Exec. Dir., Authors Guild and Victor A. Perlman, Gen. Couns. and Managing Dir., Am. Soc’y of Media Photographers, Inc.).

¹⁰¹ Letter from Rep. Lamar Smith, Chairman, House Judiciary Comm., to Hon. Maria A. Pallante, Register of Copyrights (Oct. 11, 2011).

Then-Register of Copyrights and Director Maria Pallante assembled a team of experts to conduct the study.¹⁰² In 2013, the Copyright Office published a report of their findings and recommendations.¹⁰³ The Copyright Office Report examined several practical and procedural issues with the current system of copyright enforcement, proposing solutions that both address the high-cost problem and arguably stay within constitutional constraints.¹⁰⁴

Regarding the failings of the current system, the Copyright Office acknowledged that the costs of litigating in the federal system are completely disproportionate to the amount a claimant can expect to recover in modest infringement cases and conveyed the frustration felt by copyright owners tasked with navigating the federal system's complex procedural rules.¹⁰⁵ Copyright cases present their own specific challenges in federal litigation. For one, a plaintiff cannot bring a claim until the allegedly infringed domestic work is registered with the Copyright Office.¹⁰⁶ Even if registered, a claimant can only recover actual damages and profits for infringement—and not statutory damages or attorney's fees—if the infringement commenced before registration of an unpublished work or if the infringement commenced after the first publication of a work and the work was not registered within three months after its first publication.¹⁰⁷ Actual damages for infringement typically constitute the licensing

¹⁰² United States Copyright Off., Copyright Small Claims: A Report of the Register of Copyrights (2013) [hereinafter *Copyright Office Report*].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at i–iii.

¹⁰⁵ *Id.* at 8–9. Litigants who proceed *pro se* in federal court, for example, generally face risks of inadvertently waiving or jeopardizing claims or defenses because they are less familiar with the law and the Federal Rules of Civil Procedure. *Id.* at 12. The Copyright Office Report proceeds to describe the complexities at every stage of litigation, from initiating a lawsuit in the correct forum and properly serving defendants to the expense of discovery and motion practice. *Id.* at 12–14.

¹⁰⁶ *Id.* at 16 (quoting 17 U.S.C. § 411(a)). In March 2019, the Supreme Court resolved the circuit disagreement as to what constitutes “registration” under the statute, holding that “‘registration . . . has been made’ within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.” *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

¹⁰⁷ Copyright Office Report, *supra* note 102, at 17; 17 U.S.C. § 412.

fee that artists would charge a client to use the work: between \$300 to a few thousand dollars for illustrators and photographers, for example.¹⁰⁸ Claimants who realize the importance of timely registration too late would have to pay a \$760 fee to expedite the process if they still can¹⁰⁹ but, because individual authors and small firms do not typically timely register their copyrights, commentators agree that the registration requirement for statutory damages places smaller entities at a disadvantage.¹¹⁰

The Copyright Office observed that claimants often face difficulties identifying the infringer in the internet age, especially when the wrong-doer's internet profile remains anonymous.¹¹¹ To reveal an anonymous online infringer's identity, the claimant must subpoena the internet service provider to reveal the operator, a practice that courts resist by construing the relevant Digital Millennium Copyright Act ("DMCA") provision narrowly.¹¹² Once initiated, the statute of limitations may bar an otherwise meritorious claim¹¹³ or legally complex defenses, including fair use, DMCA safe harbor provisions, applicability of statutory licenses, and exceptions for libraries and archives may make litigation prohibitively expensive.¹¹⁴

The Copyright Office Report suggested that, although most graphic artists that suffer from infringement would likely win if they brought a lawsuit, prohibitive costs and inherent difficulties of the current system dissuade them.¹¹⁵ Using numbers from 2010, the Copyright Office Report found that the median cost for a party to litigate a copyright infringement lawsuit through to appeal with less than \$1 million at risk was \$350,000 and, to reach the close of discovery, the median cost was \$200,000.¹¹⁶ Therefore, in an arena where pro se representation is virtually impossible and where most

¹⁰⁸ Copyright Office Report, *supra* note 102, at 17 n.97.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 22.

¹¹¹ *Id.* at 18.

¹¹² *Id.* at 18–19 (citing multiple cases denying issuance of subpoena).

¹¹³ *Id.* at 19.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 26.

¹¹⁶ *Id.* at 25 (citing AIPLA, *supra* note 43, at 35).

copyright attorneys will not take low-value infringement cases, meritorious cases are often shut out of court.¹¹⁷

With respect to constitutional issues, the Report concluded that, despite the Seventh Amendment entitlement to a jury trial on issues pertinent to an award of statutory damages,¹¹⁸ the right to a jury trial “is considered an individual right that can be relinquished.”¹¹⁹ The Report also addressed the constitutionality of a legislatively-created court adjudicating copyright claims by exploring Supreme Court decisions that employed a pragmatic approach to condone the creation of administrative courts for matters involving “public rights,” especially when both parties consent to non-Article III processes.¹²⁰ It concluded that the public nature of the closely-tied rights and remedies of copyright owners to the national system of registration and recordation—when combined with the empirical evidence that many copyright cases could never be practically litigated in Article III courts—rendered the threat of a voluntary small-claims proceeding to Article III courts minimal.¹²¹ Per the Report, a voluntary small-claims court also makes jurisdictional Due Process concerns moot because “if a nonresident defendant voluntarily submits to a court’s jurisdiction, he or she waives any objection and personal jurisdiction is proper.”¹²²

In its quest to find the best solution to the high-cost problem, the Copyright Office held a roundtable discussion in May of 2012 where industry representatives of the news media, authors, photographers, songwriters, and publishers met with copyright scholars to discuss

¹¹⁷ *Id.* at 9.

¹¹⁸ *See Feltner v. Columbia Pictures, Inc.*, 523 U.S. 340, 355 (1998).

¹¹⁹ Copyright Office Report, *supra* note 102, at 28 (citing several Supreme Court and circuit decisions).

¹²⁰ *Id.* at 29–39. The Copyright Office Report suggested that *Executive Benefits Insurance Agency v. Arkinson*, not yet decided when the Copyright Office published its Report, could have an impact on Congress’s approach to an alternative process for small copyright claims. *Id.* at 38. But the Court’s decision quickly dispensed petitioner’s claim, not deciding whether non-consent to a bankruptcy proceeding entitled it to have an Article III court review the bankruptcy court’s decision because, “[i]n effect, [petitioner] received exactly that” when the district court conducted a de novo review and entered its own valid final judgment. *Exec. Benefits Ins. Agency v. Arkinson*, 573 U.S. 25, 39–40 (2014).

¹²¹ Copyright Office Report, *supra* note 102, at 41.

¹²² *Id.* at 46.

the possible forms and functions of a copyright small-claims tribunal.¹²³ Because copyright industries often have competing interests in copyright, industry representatives, unsurprisingly, expressed stark disagreements regarding the appropriate limit on damages, the complexity of claims that would be suitable for the tribunal to hear, how many small-claims courts should exist, whether the tribunal should permit parties to hire attorneys, and whether a copyright small-claims tribunal is constitutional.¹²⁴ For example, while some participants supported allowing only the most straightforward, non-complex claims and disallowing claims where a respondent could argue fair use as a defense, media representatives correctly pointed out that such a restriction would bar almost every claim in their industry.¹²⁵

The Copyright Office also held two-day public hearing events in November 2012 at Columbia Law School in New York City and UCLA School of Law in Los Angeles to address many broad topics of concern that would arise from establishing a copyright small-claims tribunal.¹²⁶ Then in February 2013, the Copyright Office requested and received additional comments to focus on, among other pertinent issues, whether the small-claims system should be voluntary or mandatory, what types of copyrighted works should be covered, and the types of claims that would be appropriate.¹²⁷ The Copyright Office Report's recommendations to Congress were distilled from the views of the speakers at the May 2012 roundtable discussion, the November 2012 hearings, and the responses to the 2013 request for comments.¹²⁸

¹²³ See The George Washington Univ. L. Sch., *Intellectual Property Event Videos*, <http://www.law.gwu.edu/Academics/FocusAreas/IP/Pages/Videos.aspx>. Hyperlinks for videos of the proceedings are under the heading "The IP Small Claims Roundtable, May 20, 2012."

¹²⁴ See GW Law, *IP Small Claims Roundtable: Copyright Roundtable, Session 1*, VIMEO (Aug. 27, 2012, 4:44 PM), <https://vimeo.com/48324943>.

¹²⁵ *Id.*

¹²⁶ Copyright Office Report, *supra* note 102, at 6.

¹²⁷ *Id.* at 7.

¹²⁸ See *id.* at 92–133 (citing to public hearing transcripts and roundtable videos while discussing key findings and recommendations). The Copyright Office's recommended policies and procedures generally reflected a consensus among multiple stakeholders. See *id.*

The Copyright Office ultimately recommended that Congress create a centralized tribunal within the Copyright Office to administer voluntary proceedings without requiring in-person appearances.¹²⁹ The tribunal would have three adjudicators: two would have significant experience in copyright law and one would have a background in alternative dispute resolution.¹³⁰ Per the recommendation, copyright owners must either have registered their works with the Copyright Office or filed an application before bringing an action and would be eligible to receive \$15,000 in statutory damages per registered work or \$7,500 per work not registered by the normal applicable deadline for statutory damages.¹³¹ Actual and statutory damages would be capped at \$30,000.¹³²

The Copyright Office further recommended that claimants who initiate a proceeding in the tribunal must provide notice to the responding parties who must agree to the process through an opt-out system or through affirmative, written consent.¹³³ Respondents would assert all relevant defenses and limited counterclaims, including claims of misrepresentation; those threatened with an infringement action could seek a declaration of noninfringement.¹³⁴ The Office recommended that once proceedings begin, no formal motion practice would be allowed and discovery would be limited.¹³⁵ The tribunal's determinations would bind only the parties and claims at issue and have no precedential effect.¹³⁶ The Copyright Office recommended limited administrative review for error and giving federal district courts power to ensure the enforceability of the tribunal's determination and to remand a case for fraud, misconduct or other improprieties.¹³⁷

Notably, neither the May 2012 roundtable, the November 2012 public hearings, nor any submissions responsive to the February 2013 inquiry included any discussion of the historically adverse

¹²⁹ *Id.* at 4.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

consequences of copyright law toward people of color or how a small-claims tribunal might affect this group.¹³⁸ The Copyright Office and legislative hearings on the CASE Act before Congress similarly failed to consider how a small-claims tribunal might affect people of color.

B. *The CASE Act's Structure and Provisions*

The CASE Act, as passed, largely follows the legislative proposal set out in the Copyright Office Report.¹³⁹ The passage of CASE Act added chapter 15 to the Copyright Laws of United States and provides definitions, establishes a Copyright Claims Board ("CCB"); and outlines the CCB's authority and duties, the nature of small-claim proceedings, the requirements for registration of a copyrighted work, how proceedings shall be conducted, their effect on the parties and nonparties, review and appeal procedures, stay procedures, Copyright Office implementation, and funding.¹⁴⁰

The CCB now serves as the alternative forum in which parties may seek resolution of certain copyright claims for any category of copyrighted work.¹⁴¹ As recommended by the Copyright Office in the Copyright Office Report, three copyright claims Officers, recommended by the Register of Copyrights and appointed by the Librarian of Congress, serve on the CCB for renewable and staggered six-year terms; two of the Officers have "substantial" experience in evaluation, litigation, or adjudication of copyright infringement claims; and one has "substantial familiarity with copyright law and experience in the field of alternative dispute resolution"¹⁴² The CCB is staffed with at least two Copyright Claims Attorneys to assist in its administration.¹⁴³ Copyright Claims Officers are tasked with rendering determinations on claims brought before the CCB; ensuring that the claims are properly asserted and appropriate for resolution under the CCB; managing CCB proceedings and render-

¹³⁸ *See generally id.*

¹³⁹ *Compare id.* at 133–61, with 17 U.S.C. §§ 1501–1511.

¹⁴⁰ §§ 1501–1511.

¹⁴¹ § 1502(a).

¹⁴² § 1502(b).

¹⁴³ *Id.*

ing rulings pertaining to claims, counterclaims, defenses, scheduling, discovery, evidentiary, and other matters; requesting relevant documents from parties and nonparties; conducting hearings; facilitating settlement; awarding monetary and injunctive relief; providing information to the public; and maintaining records of the proceedings to provide as needed to the public.¹⁴⁴ The Officers' determinations must be based on the proceedings before it and in accordance with the United States' Copyright Laws, judicial precedent, and applicable regulations of the Register of Copyrights.¹⁴⁵

Participation in a CCB proceeding is entirely voluntary¹⁴⁶ and is available for claims of infringement in a copyrighted work, claims for a declaration of noninfringement, claims for misrepresentation under the DMCA, and counterclaims arising under the same transactions, occurrences or in connection with an agreement that could affect the relief awarded to the claimant.¹⁴⁷

Claimants may elect at any time before a final determination is rendered to recover actual damages and profits up to \$30,000, or statutory damages up to \$15,000 for each work infringed, and capped at \$30,000.¹⁴⁸ The Copyright Claims Officers cannot unilaterally require a respondent cease its infringing activity¹⁴⁹ but may consider the respondent's agreement to cease the activity when awarding actual or statutory damages.¹⁵⁰ Parties to a CCB proceeding will bear their own fees and costs unless the case was brought or defended in bad faith, in which case that party may be ordered to pay up to \$5,000 to the other party, or \$2,500 if the other party appeared pro se.¹⁵¹ Unlike bringing a copyright action in federal court, the CCB only requires that the owner of the allegedly infringed work deliver a completed application for registration and the registration fee before filing an action.¹⁵² But, for works not timely registered

¹⁴⁴ § 1503(a).

¹⁴⁵ § 1503(b)(1).

¹⁴⁶ § 1504(a).

¹⁴⁷ § 1504(c)(1)–(4).

¹⁴⁸ § 1504(e)(1)(A)–(B).

¹⁴⁹ § 1504(e)(2)(A).

¹⁵⁰ § 1504(e)(1)(A)(i), (ii)(IV).

¹⁵¹ §§ 1504(e)(3), 1506(y)(2).

¹⁵² § 1505(a).

under section 412, the CCB limits the maximum statutory award to \$7,500 per work infringed, for up to \$15,000.¹⁵³

CCB Officers follow the Register of Copyright's regulations and judicial precedent; when precedent conflicts, the CCB follows the precedent of the federal jurisdiction that has the most significant ties to the parties and conduct at issue.¹⁵⁴ Claimants may proceed either pro se, represented by an attorney, or represented by a qualified law student on a pro bono basis.¹⁵⁵ All claims and counterclaims are screened by a Copyright Claims Attorney for compliance and either instructed to proceed with service on the respondent or notified of noncompliance and permitted up to two opportunities to amend the claim.¹⁵⁶ The CCB has discretion to dismiss any claim if it determines that a relevant issue of law or fact is too complex or outside the subject matter competence of the CCB.¹⁵⁷

Upon service of process, a respondent who fails to opt out within sixty days loses the opportunity to have the dispute decided by an Article III court, waives the right to a jury trial, and is bound by the determination of the CCB proceeding.¹⁵⁸ If a respondent fails to participate in the proceeding, the CCB may enter a default determination after requiring the claimant to submit evidence sufficient to support a finding in claimants favor.¹⁵⁹

No motion practice is allowed in CCB proceedings, but the CCB may allow parties to address relevant questions of fact or law.¹⁶⁰ Discovery is limited to "relevant information and documents, written interrogatories, and written requests for admission," but the CCB

¹⁵³ § 1504(e)(1)(A)(ii)(II).

¹⁵⁴ § 1506(a)(2).

¹⁵⁵ § 1506(d). The Copyright Office recently concluded its rulemaking phase for the implementation of the CASE Act. The Copyright Office previously accepted comments to establish rules regarding active proceedings and evidence, Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. 69890 (Dec. 8, 2021), as well as eligibility requirements for representation by law students and of business entities, Copyright Claims Board: Representation by Law Students and Business Entities, 86 Fed. Reg. 74394 (Dec. 30, 2021).

¹⁵⁶ § 1506(f)(1), (2).

¹⁵⁷ See § 1506(f)(3).

¹⁵⁸ § 1506(g)(1), (i).

¹⁵⁹ § 1506(u).

¹⁶⁰ § 1506(m).

may request the voluntary submission of documents from nonparties.¹⁶¹ Admissible evidence in CCB proceedings need not conform with formal rules of evidence.¹⁶²

After the CCB makes its final determination, a party may make a request for reconsideration.¹⁶³ If denied, the party may request review of the final determination by the Register of Copyrights, who will only consider whether the CCB abused its discretion in denying reconsideration.¹⁶⁴ Final CCB determinations may be enforced by applying to the appropriate federal district court for an order confirming the relief awarded by the CCB and reducing the award to a judgment.¹⁶⁵

III. CRITICISM FROM SCHOLARS AND RESPONSES

A. *Constitutionality of the Structure and Operation of the Small-Claims Tribunal*

Some are concerned that the structure and details of a small-claims tribunal described by the CASE Act run afoul of Article III courts' exclusive jurisdiction.¹⁶⁶ The Supreme Court has long held that Article I does not give Congress the power to create tribunals that adjudicate claims that can only be adjudicated by Article III courts.¹⁶⁷ But exceptions do exist. Recently, the Supreme Court narrowly held in *Oil States Energy, LLC v. Greene's Energy Group, LLC* that the grant of a patent is a matter of public rights and, therefore, *inter partes* review, or "a second look at an earlier administrative grant of a patent" by the legislatively created Patent Trial and Appeal Board ("PTAB") also falls on the public rights side of the public-private divide.¹⁶⁸ Professors Pamela Samuelson and Kathryn

¹⁶¹ § 1506(n).

¹⁶² § 1506(o).

¹⁶³ § 1506(w).

¹⁶⁴ § 1506(x).

¹⁶⁵ § 1508(a).

¹⁶⁶ Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY L.J. 689, 692 (2018).

¹⁶⁷ *Id.*

¹⁶⁸ *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018).

Hashimoto suggest that the CCB's power to adjudicate copyright disputes presents a different and more challenging issue than the administrative review of patents because adjudicating infringement claims is "exactly what Article III courts are supposed to do."¹⁶⁹

But several cases examining the constitutionality of non-Article III courts give reason to believe voluntary participation in CCB proceedings are constitutional, even when adjudicating private disputes. In addition to ruling such administrative courts constitutional in cases involving "public rights,"¹⁷⁰ the Supreme Court later held that disputes involving "private rights," or the liability of one individual to another, may be assigned to non-Article III courts in contexts where Congress has broad authority over the subject matter, such as in admiralty and maritime law.¹⁷¹ When the Court decided that bankruptcy courts were unconstitutional in *Northern Pipeline Co.* in 1982, most Justices did not join Justice Brennan's opinion that held that only territorial courts, military tribunals, and administrative courts examining matters of public rights were exempted from Article III's constraints, which left the door open for other exemptions.¹⁷² For example, in 1986, a majority of the Court held that whether the parties *consented* to jurisdiction of the non-Article III court was a significant factor in determining whether Article III permitted its use.¹⁷³ And in 2015, the Court in *Wellness International*

¹⁶⁹ Samuelson & Hashimoto, *supra* note 166, at 693.

¹⁷⁰ *See, e.g., Murray's Lessee v. The Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855) (recognizing that Congress could withhold from Article III courts certain matters involving "public rights"). The Supreme Court later confirmed in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* that a public right "at a minimum arise[s] 'between the government and others.'" 458 U.S. 50, 69 (1982) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

¹⁷¹ *See Crowell v. Benson*, 285 U.S. 22, 53–54 (1932).

¹⁷² *Northern Pipeline Co.*, 458 U.S. at 64, 66–69.

¹⁷³ *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) ("[T]he relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication."); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) ("The Court's holding in [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without*

Network Ltd. v. Sharif held that, at least in bankruptcy cases, consent need not be expressed by a respondent so long as it is “knowing and voluntary.”¹⁷⁴

The Constitution vests in Congress the express power to secure authors’ and inventors’ exclusive rights to their writings and discoveries.¹⁷⁵ To date, Congress has made exhaustive use of that power. However, recognizing that its enacted laws do not effectively secure those rights on their own, Congress enacted new legislation—the CASE Act—to bolster their effectiveness.¹⁷⁶ The plain language of the IP Clause does not limit Congress to any particular means of achieving that security so long as it promotes the progress of science and the useful arts.¹⁷⁷ Having shown that the IP Clause gives Congress broad discretion, Congress’s main obstacle is the extent to which the determinations by the CCB conflict with Article III courts’ ability to adjudicate.

As recognized by *Schor, Thomas*, and *Wellness International Network*, the question of whether consent to allow non-Article III tribunals to decide claims that would otherwise “impermissibly threate[n] the institutional integrity of the Judicial Branch”¹⁷⁸ must be decided “not by ‘formalistic and unbending rules,’ but ‘with an eye to the practical effect that the’ practice ‘will have on the constitutionally assigned role of the federal judiciary.’”¹⁷⁹ In this regard, Congress and others have extensively documented how the federal court system has failed a specific class of copyright owners who, because of the high costs of enforcing their rights, never bothered to

consent of the litigants, and subject only to ordinary appellate review.”) (emphasis added).

¹⁷⁴ *Wellness Int’l Network Ltd.*, 575 U.S. 665, 683–85 (2015).

¹⁷⁵ U.S. CONST. Art. 1, § 8, cl. 8.

¹⁷⁶ See *supra* Section II.A.

¹⁷⁷ Some argue that the “by” portion of the IP Clause designates that “securing . . . to Authors and inventors . . . the exclusive Right to their respective Writings and Discoveries” directs to Congress an exclusive means to accomplish the purpose of “promot[ing] the Progress of Science and useful Arts.” See WALTERSCHEID, *supra* note 13, at 156–65. But, even reading the IP Clause this way, creating a tribunal to enforce, or “secure” the rights of authors and inventors seems to squarely fit within this limitation.

¹⁷⁸ *Schor*, 478 U.S. at 851.

¹⁷⁹ *Wellness Int’l Network Ltd.*, 575 U.S. at 678 (quoting *Schor*, 478 U.S. at 851).

register their works with the Copyright Office and never filed lawsuits in Article III courts.¹⁸⁰ As argued by the Copyright Office and Sandra Aistars, Senior Fellow for Copyright Research and Policy at George Mason University School of Law, the voluntariness of the court and the *de minimus* impact on Article III courts allows the small-claim court to overcome a jurisdictional challenge.¹⁸¹

B. *Constitutionality of the Opt-Out Provision*

Under the CASE Act, a respondent may simply “opt out” within sixty days of receiving notice of a claim.¹⁸² When a respondent opts out, the CCB will dismiss the proceeding,¹⁸³ leaving claimants the choice to face the risks of re-filing in a district court or forgoing their claims.

The opt-out system serves an obvious jurisdictional purpose: courts cannot exercise personal jurisdiction over parties who do not meet the minimum Due Process standard required by the Fifth Amendment.¹⁸⁴ Eighteen scholars—specializing in economics, civil procedure, and intellectual property—participated in a workshop convened by the Berkeley Center for Law & Technology and the UC Hastings College of Law in February 2017 to examine the effects of the small-claims tribunal.¹⁸⁵ The workshop participants expressed that CCB’s assertion of nationwide personal jurisdiction, service of process, and the opt-out system raises Due Process issues because respondents who fail to opt out face a risk of default.¹⁸⁶

Defenders of the opt-out system point to provisions of the Act that make clear that participation in the tribunal is purely voluntary and that the proceedings will be conducted “without the requirement of in-person appearances by parties or others”¹⁸⁷ Regarding the

¹⁸⁰ See discussion *supra* Section I.A.

¹⁸¹ Copyright Office Report, *supra* note 102, at 41; 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, 75 (2018).

¹⁸² 17 U.S.C. § 1506(i).

¹⁸³ *Id.*

¹⁸⁴ See U.S. CONST. amend. V.

¹⁸⁵ Samuelson & Hashimoto, *supra* note 166, at 691.

¹⁸⁶ *Id.* at 694–96.

¹⁸⁷ See Aistars, *supra* note 181, at 77–78.

degree of voluntariness of participation, “the true disagreement is over whether defendants should be required to opt in or opt out of the forum when properly served.”¹⁸⁸ As an additional safeguard that only meritorious judgments are issued, the CASE Act burdens the plaintiff with showing sufficient evidence of infringement before the CCB can issue a default judgment and then taking that judgment to a federal district court to confirm relief.¹⁸⁹

While service requirements satisfy Due Process concerns because they mirror the service requirements of Rule 4 of the Federal Rules of Civil Procedure,¹⁹⁰ the CASE Act might impermissibly limit the ability of an Article III court to review CCB determinations of default judgments. Before entering a default judgment, the CCB

shall require the claimant to submit relevant evidence and other information in support of the claimant’s claim and any asserted damages and, upon review of such evidence and any other requested submissions from the claimant, shall determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law¹⁹¹

Then, if the evidence is sufficient,¹⁹² the CCB gives notice to the respondent and thirty days to respond with opposing evidence or information.¹⁹³ A respondent who still fails to respond after thirty days

¹⁸⁸ *Id.* at 78.

¹⁸⁹ *Id.* at 79; 17 U.S.C. §§ 1506(u)(1), 1508.

¹⁹⁰ *See Aistars, supra* note 181, at 77–79. *Compare* 17 U.S.C. § 1506(g)(3) (requiring service of process within ninety days by a person who is at least eighteen years old and not a party), *with* FED. R. CIV. P. 4(c) (requiring service of process within ninety days by a person who is at least eighteen years old and not a party).

¹⁹¹ § 1506(u)(1).

¹⁹² What the CCB regards as “sufficient” evidence and whether the threshold amount of evidence required depends on the type of infringement remains to be seen. Section 1506(s) instructs the CCB to use a preponderance of the evidence standard to make factual findings, § 1506(s), but the sufficiency standard in § 1506(u)(1) probably only requires that the evidence supports a finding in favor of the claimant, akin to an appellate-type review.

¹⁹³ § 1506(u)(2).

and suffers a default judgment has another ninety days to ask a district court to vacate, modify, or correct the judgment upon a showing that the default was entered due to excusable neglect.¹⁹⁴

But, unlike the service of process rules, the CASE Act's limited bases by which a district court can vacate a default judgment are narrower than those of the Federal Rules of Civil Procedure, which allow up to one year to challenge a final judgment for excusable neglect¹⁹⁵ and also allow relief from a default judgment for "good cause"¹⁹⁶ or any other justifiable reason.¹⁹⁷ In proposing the limiting "excusable neglect" language, the Copyright Office did not explain the disparity between its rule and the broad latitude for relief allowed by the Federal Rules of Civil Procedure in its Report—other than arguing that its proposed mechanism for challenging default judgments "would provide a means to have the default determination reviewed and potentially set aside by an Article III judge, thus providing an additional safeguard for defaulting respondents."¹⁹⁸ But defaulting respondents may have reason to challenge the constitutionality of this provision because the "additional safeguard," in reality, offers less Due Process protection than the Federal Rules. In the case of a CCB default determination, not every ground for relief enumerated in Rule 60(b) would apply; section 1508(c)(1)(C) harshly limits the time a respondent may argue excusable neglect and does not protect defaulting respondents from mistakes by the CCB in assessing

¹⁹⁴ § 1508(c)(1)(C). Excusable neglect is

[a] failure — which the law will excuse — to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

Neglect, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁹⁵ FED. R. CIV. P. 60(c)(1).

¹⁹⁶ *Id.* 55(c).

¹⁹⁷ *Id.* 60(b)(6) ("[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief.").

¹⁹⁸ See Copyright Office Report, *supra* note 102, at 99.

the sufficiency of the evidence submitted by the claimant or fraud that the CCB fails to detect.¹⁹⁹

Despite the limited ability to vacate default judgments, federal courts presumably will refuse to confirm relief to a claimant if another exception applies under section 1508(c).²⁰⁰ The way federal courts interpret section 1508(a) with respect to claimants' petitions to enforce default judgments therefore impacts whether the critics' Due Process concerns are justified. Therefore, as the CASE Act takes effect, we should monitor how often default judgments are entered—and enforced—against types of uses that do not infringe on copyright holders' rights.

C. *Whether Steep Statutory Damages Squander the Act's Incentive-Based Approach*

Some criticize the use of the relatively small statutory damage cap in the context of a voluntary small-claims tribunal.²⁰¹ Damages for claims brought to the CCB are capped at \$30,000.²⁰² In most cases, this figure is only a fraction of what a plaintiff could expect to receive in federal court,²⁰³ but some fear that they are not low

¹⁹⁹ See § 1508(c)(1)(C).

²⁰⁰ See § 1508(a). Federal courts will not enforce CCB judgments if “the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct,” or “[i]f the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue.” § 1508(c)(1), (2).

²⁰¹ See Samuelson & Hashimoto, *supra* note 166, at 703–04; Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY L.J. 711, 713–14 (2019). Professor Samuelson has long supported reforming the federal copyright system to reduce the statutory damages cap. See generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480–91 (2009) (arguing that some statutory damage awards are inconsistent with congressional intent and Due Process).

²⁰² 17 U.S.C. § 1504(e).

²⁰³ “In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” 17 U.S.C. § 504(c)(2).

enough to convince a respondent to litigate before the CCB.²⁰⁴ They suggest that statutory damages in the tribunal should either be much lower²⁰⁵ or that the CCB be restricted to award only compensatory damages.²⁰⁶ The compensatory-damages-only attitude has been described by others as “so extreme that it draws into question the credibility of the remainder of the critique.”²⁰⁷ The compensatory-damages-only model would incentivize infringers to avoid paying license fees and wait to see whether they ever get caught.²⁰⁸

A statutory damages cap should reflect the limited discovery and streamlined proceedings of a small claims process. A higher limit would make it more likely that the responding party would refuse the small claims process, preferring the full range of discovery and motion practice allowed in federal court, and too low of a cap would shortchange copyright owners and offer little deterrent effect to potential infringers.²⁰⁹ Whether the statutory damages cap is too high, however, may depend on industry-specific factors. For example, photographers, who are less likely to be represented by rights-enforcing organizations than musicians, generally advocated for a higher statutory cap or no cap.²¹⁰ Music industry representatives, by contrast, suggested that the cap should be lower, endorsing the idea that a higher amount would encourage more respondent opt outs.²¹¹ The Copyright Office noted that “[i]t is important to consider carefully the proper claim amount because any voluntary process must

²⁰⁴ Samuelson & Hashimoto, *supra* note 166, at 704; Depoorter, *supra* note 201, at 713–14.

²⁰⁵ Depoorter, *supra* note 201, at 728.

²⁰⁶ Samuelson & Hashimoto, *supra* note 166, at 697.

²⁰⁷ Aistars, *supra* note 181, at 80.

²⁰⁸ *Id.*

²⁰⁹ Copyright Office Report, *supra* note 102, at 109.

²¹⁰ *See, e.g.*, Transcript of proceedings at 140:24–145:15, In re: Small Copyright Claims Public Hearing (Nov. 15, 2012) [hereinafter *Nov. 15, 2012 Public Hearing*] (suggesting that, in photography, limiting statutory damages would dramatically reduce the effectiveness of an alternative claims tribunal). Ironically, photographers routinely forgo registration of the thousands of images they produce, which if then untimely registered, would cut the statutory damages available to them in the small claims court in half. 17 U.S.C. § 1504(e)(1)(A)(ii)(II).

²¹¹ *Nov. 15, 2012 Public Hearing, supra* note 210.

provide sufficient ability for claimants to redress typical infringements while also incentivizing respondents to participate.”²¹² Yet, the Copyright Office summarily recommended, and Congress later adopted, one cap for all types of works and industries.²¹³

Finding the appropriate damage cap does not have a one-size-fits-all solution. To ensure that potential respondents have the optimal incentive to use the CCB, Congress should quickly amend this provision of the CASE Act to better reflect industry-specific needs with respect to statutory damages. This would most likely require different statutory caps depending on the type of work infringed. The Copyright Office Report itself contains enough opinions from copyright stakeholders to gauge the appropriate cap for a variety of types of works.²¹⁴ A claim for the infringing use of a photograph, for example, would be better suited for a higher cap than the infringing use of a sound recording.

D. *The Implicit Precedence of Non-Precedential Copyright Claims Board Decisions*

The CASE Act provides that decisions by the CCB hold no precedential weight in any other action before any other court, including the CCB itself.²¹⁵ With almost universal agreement from copyright stakeholders, the Copyright Office Report reasoned that “[b]ecause the small claims tribunal would rely on abbreviated procedures, including limited discovery and argument, it would be inappropriate for its decisions to be binding beyond the particular parties and disputes it adjudicates.”²¹⁶ However, because Board decisions will be available to the public,²¹⁷ one concern is that CCB holdings may nonetheless influence longstanding copyright doctrine, as these “abbreviated procedures” could shift the focus from what federal courts traditionally emphasize to what the Copyright Claims Officers may

²¹² Copyright Office Report, *supra* note 102, at 109.

²¹³ *Id.* at 110.

²¹⁴ *See id.* at 110–12.

²¹⁵ 17 U.S.C. § 1507(a)(3).

²¹⁶ Copyright Office Report, *supra* note 102, at 130.

²¹⁷ § 1506(t)(3) (“Each final determination of the Copyright Claims Board shall be made available on a publicly accessible website.”).

feel is important.²¹⁸ After all, two of the Board's three adjudicating Officers will be appointed because they have substantial experience working with infringement claims.²¹⁹ In response to this concern, critics suggested in 2018 that periodic audits of CCB decisions would minimize the possibility of systemic bias in the small-claims system.²²⁰ Scholars also suggest that the CCB should at least be able to refer to its prior rulings when it determines that a work alleged to be infringed had entered the public domain.²²¹

With respect to auditing a CCB Officer's decisions for conformity with copyright jurisprudence, the "Performance Appraisal" provision of the CASE Act does allow a review of the CCB Officer performance, so long as the Register of Copyrights or the Librarian of Congress does not assess performance of the Officers based on the substantive result of any *individual* determination reached by the Board.²²² So, by implication, an appraisal may consider whether an Officer *generally tends* to issue decisions that are biased or unfaithful to federal precedent.

But the CASE Act does not require that performance appraisals be conducted on a regular basis, or at all.²²³ Curiously, the same individual who recommends the Officers for appointment, the Register of Copyrights, would likely be the individual conducting performance appraisals if they occur.²²⁴ To the extent that Congress intends this provision as oversight, the Register of Copyrights should not appraise the performance of the Officers he or she recommends to avoid even a hint of impropriety. Regardless, this appraisal is not the audit suggested by Samuelson and Hashimoto because it "may not consider the substantive result of any individual determination reached by the Copyright Claims Board . . . except to the extent that the result may relate to any actual or alleged violation of an ethical

²¹⁸ See generally Samuelson & Hashimoto, *supra* note 166, at 708.

²¹⁹ § 1502(b)(3).

²²⁰ See Samuelson & Hashimoto, *supra* note 166, at 702–03.

²²¹ *Id.* at 702 n.49.

²²² § 1503(b)(3) (emphasis added).

²²³ *Id.*

²²⁴ See § 1503(c) ("Subject to subsection (b), the Copyright Claims Officers and Copyright Claims Attorneys shall, in the administration of their duties, be under the general direction of the Register of Copyrights.").

standard of conduct.”²²⁵ The CASE Act’s only mechanism to keep the CCB honest to federal precedent, therefore, is the losing parties’ burden to challenge its rulings through the limited appeals process.²²⁶

There is some merit to the argument that the CCB should be permitted to use its prior rulings about whether a work is in the public domain: this reliance will save time and effort. But, the Board will often base its decisions on limited evidence and argument.²²⁷ So, if the Board could decide to rely on its own prior rulings, then any non-related party could challenge preclusion on Due Process grounds and, if a party to a current action opposing preclusion was also a party to the prior proceeding, that party could nearly always assert that the informal nature of the prior proceeding meant that it did not have a full and fair opportunity to be heard. Allowing prior precedent in this way, therefore, will add operative costs because the CCB would have to set hearings and otherwise take time to determine whether issue preclusion applies to each proceeding in which it is asserted.

E. *Inequitable Use of the Copyright Claims Board*

Though Congress intends that the CASE Act will allow the sympathetic, independent creators in all industries to remedy infringement,²²⁸ some predict that the small-claims process will be more useful to some industries than others. In fact, when the Subcommittee on Courts, the Internet, and Intellectual Property convened for the first time in 2006 to discuss the low-value copyright suit problem, Jenny Toomey, the Executive Director of the Future of Music Coalition, suggested that it was unclear whether changing the current copyright laws to address the infringement issue would benefit musicians at all.²²⁹ A handful of America’s largest music publishing, licensing, and performing rights organizations submitted a comment

²²⁵ § 1503(b)(3); Samuelson & Hashimoto, *supra* note 166, at 702–03.

²²⁶ *See* § 1503(g).

²²⁷ *See* discussion *supra* Section II.B.

²²⁸ 2018 Hearing, *supra* note 43, at 1 (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary).

²²⁹ 2006 Hearing, *supra* note 99, at 21–22 (statement of Jenny Toomey, Exec. Dir., Future of Music Coal.).

to the Copyright Office in 2013 explaining that the music industry does not need a small claims tribunal because “even the most basic copyright cases frequently require nuanced consideration of key elements of authorship, ownership, copying, and damages assessments” that are “not typically part of the small claims court dynamic.”²³⁰ And by 2017, the focus seemed to have shifted away from musicians’ use of the small claims system and more toward the benefits that the CASE Act will bring to visual artists.²³¹

Another concern is that corporate owners and assignees, rather than the sympathetic creator, will overuse the small-claims process by “buying up small claims and seeking excessive damages before Tribunal panels.”²³² But, according to Sandra Aistars, corporate entities and assignees also include

photography studios, bands (which are often incorporated and may take assignments of copyrights such as of the sound recordings of their members), independent filmmakers (who likewise frequently operate through individually owned production companies and must be work-for-hire owners of various elements of the film to effectively distribute it), indie musician-owned labels, and “mom and pop” book and music publishers (who may be self-publishing through a family business).²³³

Aistars suggests that a sliding scale for filing fees based on the size of the claim would better discourage major corporate plaintiffs from abusing the system.²³⁴

A question to be answered is whether and to what extent it matters that some industries would make more use of the CCB than others. So long as the target claimants use the small claims process to some degree, more use by one industry over the other only shows its

²³⁰ See Nat’l Music Publishers’ Ass’n et al., Comments in Response to February 23, 2013 Notice of Inquiry (Apr. 12, 2013), https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/NMPA.pdf.

²³¹ 2018 Hearing, *supra* note 43, at 2 (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary).

²³² Samuelson & Hashimoto, *supra* note 166, at 703.

²³³ Aistars, *supra* note 181, at 81.

²³⁴ *Id.*

relative usefulness between different types of creators at a moment in time. Industries' priorities shift as new legislation and technology impacts their current practices and business models. Whether the issue of copyright remedies is a higher priority for musicians now than it was in 2006, or if it will ever in the future does not matter. What matters is that a remedy for infringement exists should it be needed.

F. *Upsetting the Balance of Works in the Public Domain*

The 1909 Act's continued formalities and the limited term of protection resulted in a vast public domain.²³⁵ The 1976 Act, by extending the copyright term and abolishing the ability to renew, protected more works but still largely left the balance of protected works versus works in the public domain relatively free from public criticism.²³⁶ Some may feel that the CASE Act will place too much emphasis on the rights of the copyright holder, thereby upsetting the balance of protected works versus works that end up in the public domain. But a model that relies on ignorance should raise red flags. As discussed above, the inability to follow the complexities of the copyright formalities in the twentieth century often resulted in the appropriation of Black creativity.²³⁷ Luckily, the work of scholars like Professors ReeBee Garofalo,²³⁸ K.J. Greene,²³⁹ and Robert Brauneis²⁴⁰ makes turning a blind eye toward the injustices to Black artists increasingly difficult. A rich public domain is valuable to American culture because it fuels creativity in new works, but it cannot exist at the expense of any one group.

Perhaps such critics of the shrinking public domain can focus their frustration on the bigger, albeit more difficult, targets. Since America's founding, it is no coincidence that every copyright law

²³⁵ See discussion *supra* Sections I.A, I.B.

²³⁶ See *id.*

²³⁷ See discussion *supra* Section I.B.

²³⁸ Garofalo, *supra* note 96, at 112–37.

²³⁹ See Greene, *supra* note 1, at 372–73 (discussing four patterns that have resulted in inadequate intellectual property protection for Black music artists).

²⁴⁰ See Brauneis, *supra* note 2, at 24 (describing how the lack of knowledge and bargaining power allowed African Americans to be uncompensated or under-compensated for publishing rights).

has lengthened the term of copyright protection.²⁴¹ In 1998, for example, Congress passed the “Sonny Bono Copyright Term Extension Act,” extending the copyright term for twenty years to protect Disney’s “limited” monopoly on its most well-known icon.²⁴² One could argue that an increased term of copyright protection should result in increased incentive to create. But, using the recording industry as a test case, Professor Glynn Lunney used empirical research to conclude that more incentives did not lead to more and better music.²⁴³ Professor Elizabeth Rosenblatt challenges Lunney’s broad conclusion, suggesting that copyright’s incentives can still provide opportunities for less-resourced creators to “stand on equal footing, or at least more equal footing, with their better-resourced counterparts.”²⁴⁴

Though American society benefits from a rich public domain, a public domain fashioned from unequal bargaining power, differences in class, and level of education does more harm than good from a social justice perspective. Reducing the term of copyright protection to an optimal length, therefore, would still incentivize the creation of new works and create room for Congress to help the less-resourced “stand on equal footing” by, for example, considering the

²⁴¹ See Glynn S. Lunney, Jr., *Copyright’s Excess Revisited*, TEX. A&M UNIV. J. PROP. LAW (forthcoming) (manuscript at 1) (available at <http://dx.doi.org/10.2139/ssrn.3468213>).

²⁴² See Greene, *supra* note 47, at 1223 n.282; see generally Timothy B. Lee, *15 Years Ago, Congress Kept Mickey Mouse Out of the Public Domain. Will They Do It Again?*, WASH. POST (Oct. 25, 2013, 9:00 AM), <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/>.

²⁴³ Lunney, *supra* note 239, at 3, 11 (finding that copyright’s incentive based approach “fail[s] at encouraging additional works at the margins[] and . . . force[s] consumers to overpay for the most popular works”). To define “better” music, Professor Lunney applied an exponential decay function to model the age-based decline in popularity of a song after its initial release, then subtracted a predicted total stream count from the actual Spotify stream count each year. The resulting data shows whether the popularity of music released in a particular year declined more quickly or slowly than other years. *Id.* at 7–8. Professor Lunney posits that music released in years that showed a slower decline over time was “better” music. *Id.*

²⁴⁴ See Elizabeth L. Rosenblatt, *Social Justice and Copyright’s Excess*, 6 TEX. A&M J. PROP. L. 5, 15 (2020).

impact of copyright legislation on historically disadvantaged groups.

IV. EFFECTS OF THE CASE ACT ON THE MUSIC INDUSTRY AND MUSICIANS OF COLOR

As previously discussed, the CASE Act initially was not seen as legislation that would even be helpful to musicians.²⁴⁵ In the 2006 hearing, music representatives indicated a handful of other issues that musicians face, such as public performance rights, copyright reversion, media ownership, and net neutrality²⁴⁶—some of which have since been addressed by legislation like the Music Modernization Act (“MMA”).²⁴⁷

In part, the MMA replaced the existing song licensing system with a blanket license system, simplifying the licensing process.²⁴⁸ Digital music providers report streaming and download data to a “mechanical licensing collective” that maintains a musical works database, collects royalties from the digital music providers and distributes them to identified rights holders.²⁴⁹ The MMA repealed section 114(i), instead providing that in royalty rate disputes, the parties can present evidence of the rates of other voluntary license agreements.²⁵⁰ Title III of the MMA also allows music producers, mixers, and sound engineers to receive royalties for uses of sounds recordings on satellite and online radio.²⁵¹ Supporters of the MMA believe it will incentivize the creation of new works because it modernizes the royalty payment system to pay each musician and rights holder the amount they deserve, rather than only rewarding music artists and professionals who have “made it.”²⁵²

²⁴⁵ See discussion *supra* Section II.A.

²⁴⁶ 2006 Hearing, *supra* note 99, at 22 (2006) (statement of Jenny Toomey, Exec. Dir., Future of Music Coal.).

²⁴⁷ Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

²⁴⁸ *Id.* at 3677.

²⁴⁹ *Id.* at 3687.

²⁵⁰ *Id.* at 3723–24.

²⁵¹ *Id.* at 3739.

²⁵² Charles Wallace, *The Music Modernization Act: Supporting Music Artists* 3 *Steps at a Time*, CREEDON (Dec. 4, 2019),

The CASE Act will allow copyright holders of musical works to enforce rights under the MMA at a fraction of the cost of a federal lawsuit.²⁵³ Artists of all socio-economic backgrounds can take advantage of the MMA's music streaming reporting requirements because they make calculating actual damages a simple task once the CCB finds infringement.

As a natural consequence, however, artists who produce music that involves using samples, like hip-hop and rap, may receive more summons by the owners of the unauthorized samples that artist incorporated into his or her track.²⁵⁴ Those artists can either respond by opting out, participating in a CCB proceeding, or risk default by ignoring the notice. In most cases, most artists would opt out. In some cases, the likelihood of a federal suit might induce the alleged infringing artist to offer licensing fees or otherwise settle. But in all cases, whatever results from more copyright litigation before the CCB pales in comparison to the larger, looming copyright concerns.

Looking at the bigger picture, copyright law historically enabled the disparate treatment of musicians of color, from record labels that underpaid and sold "mirror cover" recordings to the modern trend of label-owned sound recordings.²⁵⁵ Scholars acknowledge that America's copyright system aggravates social and distributive injustice²⁵⁶ but disagree on whether copyright can be used as an effective tool to promote social justice.²⁵⁷ While K.J. Greene believes that

<https://creedon.com/blog/2019/12/4/the-music-modernization-act-supporting-music-artists-3-steps-at-a-time>.

²⁵³ Because the small-claims tribunal's purpose is to facilitate expedited, lower-cost suits, the CCB may decide that some cases involving areas of complex copyright law, such as ownership of a work, be limited to only address the infringement claim at hand. *See* Copyright Office Report, *supra* note 102, at 104 (recommending that the CCB be confined to non-complex copyright cases); 17 U.S.C. § 1503(f)(3).

²⁵⁴ Rosenblatt, *supra* note 244, at 20–21 ("Sampling, a predominantly African-American musical technique, faces greater legal challenge and encumbrance than equivalent remix techniques carried out by the predominantly white creators of mashups and electronic dance music.").

²⁵⁵ *See* discussion *supra* Section I.B.

²⁵⁶ *See, e.g.,* Rosenblatt, *supra* note 244, at 6–9 (describing how copyright law tends to favor corporate interests at the expense of individuals).

²⁵⁷ *Compare id.* at 19 ("[C]opyright may not act as the tool for social justice that some might hope it could."), *with* Greene, *supra* note 46, at 385 ("IP itself is

“IP can be re-engineered to bring about results of distributive justice and to foster norms of racial and gender equality,”²⁵⁸ Elizabeth Rosenblatt argues that increased copyright effectiveness would not necessarily make exploitive record deals any less exploitive²⁵⁹ and that “copyright law will naturally develop to benefit music corporations over artists, and especially over minority artists, because music corporations represent a more consolidated interest group.”²⁶⁰ If the CASE Act can lead to a more equitable society, therefore, its passage must suggest a lasting shift in congressional focus to the needs of those most adversely affected by the current copyright system.

As to the practice of exploitative record deals, the solution lies in encouraging affirmative efforts to increase copyright literacy among artists on the one hand and public condemnation of one-sided contracts between artists and labels on the other. Marginalized groups that know the ins and outs of the copyright laws will be harder to swindle;²⁶¹ the prospect of bringing low-cost copyright claims will help bring awareness of copyright law to under-resourced groups. Already, forum-based websites are full of discussions about copyright infringement, and many organizations, such as the Copyright Society of the USA, provide and disseminate accurate information about every aspect of copyright law.²⁶²

Very few studies exist that survey Americans’ copyright literacy, but the available research shows Americans still have widely held misconceptions about copyright law.²⁶³ Perhaps allowing claimants to represent themselves will cause more harm than good when the floodgates first open. However, the new opportunities to

in a period of analytical and practical turbulence, and a focus on critical perspectives can be invaluable to re-imagining an IP system that actually provides real incentives to artists at the bottom of society, rather than multi-national conglomerates concentrated across IP industries.”).

²⁵⁸ Greene, *supra* note 46, at 385.

²⁵⁹ Rosenblatt, *supra* note 244, at 18.

²⁶⁰ *Id.* at 19.

²⁶¹ See discussion *supra* Section I.B.

²⁶² See, e.g., FAQs, THE COPYRIGHT SOC’Y OF THE USA, <https://www.csusa.org/page/FAQs> (last visited May 17, 2022).

²⁶³ For a survey suggesting that voting-aged Americans have little knowledge of the goals of the copyright system or the 1976 Act, see Schuster, *supra* note 17, at 2284–87.

enforce copyright small claims combined with the efforts of rights groups sharing educational materials about copyright law will substantially increase public knowledge.

But even the knowledge that the record labels' contracts are unfair does not mean that artists will not sign them. As improving technology enables professional-quality home recordings and distribution at lower cost, the need to be seen and discovered amid the noise of thousands of other home artists still makes signing with a label an attractive option.²⁶⁴ The relief the CASE Act provides, by itself, does not even marginally help level the playing field with respect to the relative bargaining power of the music label and the individual—mostly because that was not the main problem the CASE Act meant to address. Copyright reform alone cannot resolve the inequitable nature of pro-corporate power dynamics writ large. Instead, public figures and rights organizations have the onus to educate the public and assert pressure on labels to change their business practices. Celebrity music giants like Kanye West, for example, recently took to Twitter to bring awareness to the disadvantages faced by artists who do not own their own master recordings.²⁶⁵ Taylor Swift also very publicly announced via several news outlets that she rerecorded her songs because she could not buy back her master recordings and thinks that artists deserve to own their work.²⁶⁶

Copyright law may not be well suited to fully address larger societal failures, but the CASE Act is still a positive legislative development because historically disadvantaged groups have a more practical path toward protecting their intellectual property. Though beyond the scope of this Note, more and better copyright legislation is overdue. Congress should granularly assess the 1976 Act's rework provisions that led to the most confusion in the courts. Even more, disadvantaged groups deserve a more certain path to enforcement

²⁶⁴ See Rosenblatt, *supra* note 244, at 20.

²⁶⁵ See Rhian Jones, *Why Kanye West's Fight for His Masters Marks a Changing Music Industry*, THE GUARDIAN (Oct. 9, 2020, 7:25 AM EDT), <https://www.theguardian.com/music/2020/oct/09/kanye-west-fight-for-rights-to-masters-music-industry>.

²⁶⁶ Carolyn Twersky, *Here's Why Taylor Sift Remade "Red,"* SEVENTEEN (Nov. 15, 2021), <https://www.seventeen.com/celebrity/music/a35480094/why-is-taylor-swift-re-recording-her-albums/>.

than hoping that infringers voluntarily participate in CCB proceedings.

CONCLUSION

Congress' observed need to construct a small-claims system reveals that the industry-negotiated compromises in past legislative processes created the high-cost problem and keeps most small copyright claims out of court. An unintended consequence: the industry-specific provisions reflected in the 1909 Act—such as the compulsory license regime—adversely affected Black musicians as the music industry appropriated their creative output.²⁶⁷ The 1976 Act granted additional protections in sound recordings, but the music composition and sound recording dichotomy still permitted exploitation of musicians who could not afford to produce high quality recordings themselves.²⁶⁸

That said, the legislative history of the CASE Act possibly signals a much-needed shift in congressional focus in future legislation toward addressing the high costs of copyright litigation. While the complex provisions of the CASE Act itself might seem excessive, such complexity is needed to address the rest of Title 17 and prevent a loophole that could lead to abuse. While the CASE Act will allow more musicians to enforce their copyrights, it will not solve the incidence of racism in the music business or the prevalence of unfair contracts between labels and artists. However, the new availability of a small-claims court should increase copyright literacy and, when combined with public pressure, may lead to a change in record labels' business practices.

Finally, the CASE Act does ultimately serve to the purpose of the IP Clause with respect to musical works because, in combination with the MMA, the availability of bringing a claim under the CASE Act for damages in the event of infringement should incentivize musicians' creative output.²⁶⁹

²⁶⁷ See discussion *supra* Sections I.A, I.B.

²⁶⁸ See *id.*

²⁶⁹ See discussion *supra* Section IV.