

IP Frontiers: The Copyright Alternative in Small-Claims Enforcement (CASE) Act



By **CHRISTINA E. BRULE**

The Consolidated Appropriations Act 2021 (the “Act”), a.k.a. the Coronavirus Relief Bill, was signed into law on Dec. 27, 2020. In addition to COVID-19 relief, the Act includes several provisions that will significantly influence intellectual property law. This article will

focus on provisions of the Act that affect copyright law, namely the Protecting Lawful Streaming Act (the “PLSA”) and the Copyright Alternative in Small-Claims Enforcement Act (the “CASE Act”). For a discussion of the provisions affecting trademark law, namely the Trademark Modernization Act, please see the IP Frontiers article published March 12.

Felony penalties for high-volume streaming

The PLSA amends title 18 chapter 113 of the United States Code by inserting an additional section — illicit digital transmission services. The PLSA targets websites that provide customers with unauthorized access to copyrighted material, for example, NFLBite and Jetflix. Generally, these websites generate revenue by running ads along with the content and/or are subscription-based; this ultimately deprives copyright owners of the benefits of their hard work. In addition, the PLSA increases the penalty for such conduct from a misdemeanor to a felony; a violation of the act may result in a fine and/or up to five years in prison for a first offense, and a fine and/or up to 10 years in prison for a subsequent offense.

Importantly, the PLSA does not change

what is or is not permitted by law, rather it changes the penalty for performing the prohibited act. Nevertheless, the PLSA provides greater protection to both copyright owners and anyone with authorization to stream copyright protected content — for example, television networks and streaming services such as Netflix and Amazon — because felony charges and prison time are much better deterrents than a misdemeanor charge.

Copyright Claims Board

The CASE Act amends title 17 of the United States Code by inserting chapter 15 — Copyright Small Claims. The amendment creates the Copyright Claims Board (the “CCB”), which is an alternative forum to federal courts, where parties may voluntarily seek to resolve certain copyright infringement claims. Further, the CASE Act provides for an opt-out alternative dispute resolution process that is less costly than litigation in federal courts, which can be expensive and often prevents individual copyright owners from fully protecting their work. The law sets forth the timing for when the CCB will begin operating (within one year of the date the law was enacted) and includes extensions (up to six months) for delays associated with the COVID-19 pandemic.

The CASE Act is the result of a bipartisan effort — led by Rep. Hakeem Jeffries and former Rep. Tom Marino — to help protect creative works. When the CASE Act was first introduced into the House in 2017, Rep. Jeffries stated: “The establishment of the Copyright Claims Board is critical for the creative middle class who deserve to benefit from the fruits of their labor. Copyright enforcement is essential to ensure that these artists, writers, musicians and other creators are able to com-

mercialize their creative work in order to earn a livelihood.” And former Rep. Marino stated: “The CASE Act provides a boost to copyright holders and allows a forum for timely resolutions. This is a positive step in the right direction.” The CASE Act is meant to strengthen copyright protection and thereby strengthen the economy, to which creators contribute greatly and yet often find themselves struggling to enforce their rights and sustain their livelihoods.

Composition, authority, and duties of the CCB

The CCB will be comprised of three full-time Copyright Claims Officers and its administration will be aided by at least two full-time Copyright Claims Attorneys. Officers of the CCB will be recommended by the Copyright Registrar and appointed by the Librarian of Congress to serve a renewable term of six years. They shall have the power to conduct hearings and conferences, manage discovery, and award relief including monetary damages. Further, Officers will have a duty to maintain records of the proceedings before the CCB and to make such records available to the public. Attorneys of the CCB will be hired by the Copyright Register, and, in addition to assisting in the administration of Officer duties, will provide general assistance and information to the public regarding the CCB and its procedures.

Proceedings before the CCB

A proceeding before the CCB must commence within three years after the claim accrued and cannot commence unless at least a copyright application has been filed. Although a copyright registration certificate is not required to commence a proceeding before the CCB, it is required

for the CCB to render a determination. If a registration certificate is pending, the proceeding may be held in abeyance for up to one year before being dismissed without prejudice. Likewise, if a registration certificate is refused, the proceeding may be dismissed without prejudice.

Participation in a proceeding before the CCB is voluntary and the respondent may opt-out within 60 days of receiving notice; failure to opt out legally binds the parties to the CCB's determination. Parties before the CCB may choose to be represented by an attorney, but it is not required. Moreover, student attorneys participating in a law school clinic may provide representation.

A major difference between proceedings before the CCB and litigation in federal court is the maximum amount in statutory damages that may be awarded. In federal court, the upper limit in statutory damages is \$150,000 per claim depending on the facts of the case. By contrast, the CCB is limited to awarding statutory damages of

up to \$15,000 per claim and \$30,000 per case. Similarly, for attorney's fees, a federal court may award a reasonable attorney's fee in exceptional cases whereas the CCB is limited to awarding a maximum of \$5,000 when a party acts in bad faith or there is evidence of extraordinary circumstances. In addition, the CCB lacks authority to consider claims alleging willful infringement.

Effect of proceedings before the CCB

Parties participating in a proceeding before the CCB waive their right to a jury trial and are subject to a limited appellate process. Decisions by the CCB may be reviewed by a federal court under an abuse of discretion standard of review only in a few specific circumstances, such as when the determination was due to fraud or the CCB exceeded its authority. Further, if a claim in a District Court is the subject matter of a proceeding before the CCB, the District Court shall issue a stay of proceedings pending a decision by the CCB.

Conclusion

By creating the Copyright Claims Board, the CASE Act is intended to provide an affordable means for copyright owners to protect their intellectual property rights against infringers, copyright trolls, and frivolous claims. However, given the voluntary nature of the CCB, it may be difficult for copyright owners to actually use the CCB in lieu of a federal court forum. With the implementation of the CCB and its procedures, copyright owners and practitioners will need to navigate this new forum and process to successfully protect copyrights at an affordable cost to the copyright owner.

Christina E. Brule, Esq. is an associate attorney in the Albany Office of Heslin Rothenberg Farley & Mesiti P.C. If you have any questions, please feel free to reach out to her at 518-452-5600 or christina.brule@hrfmlaw.com.