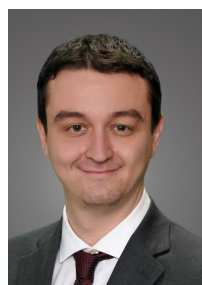


## First Impressions of the Copyright Claims Board

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In December, 2020 the Copyright Alternative in Small-Claims Enforcement Act (the CASE Act) was signed into law at the height of the



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COVID 19 pandemic. The CASE Act provided for the creation of a Copyright Claims Board (CCB) by amending Title 17 of the USC to insert Chapter 15, titled “Copyright

Small Claims.” The CCB was contemplated as a voluntary, affordable, and less time-consuming alternative to federal court, which can cost over \$100,000 to litigate through discovery and significantly more through trial, accordingly to recent surveys.

It has been just over three months since the CCB began accepting claims in early June 2022, and in that time over 140 claims have been brought. Of those cases, slightly over half of the current claimants filed *pro se*. This is in line with the goal to provide a more accessible route for copyright claims other than federal court where claimants can file inexpensively without the need to be represented by an attorney. A review of the remaining cases filed to date reveals that at least a handful of law firms are using the new pro-

ceedings as well – with about 60% of the remaining cases filed by three law firms. It will be interesting to see whether represented claimants are able to obtain better outcomes than those who filed *pro se*.

As for speed and efficiency, only a handful of cases have been dismissed so far (all without prejudice), and no case has advanced into the discovery phase. Thus, it is difficult to draw any definitive conclusions as to whether the process will truly be much faster than a conventional trial. Despite this, over the course of the next year, one would expect the CCB’s limited discovery proceedings and absence of formal motion practice to provide speedier resolutions. For example, while discovery in a federal case can take several months to years and result in significant legal fees, the CCB limits discovery to targeted production of relevant information and documents, written interrogatories, and written requests for admission only – all supervised by a Copyright Board Officer. Depositions typically are not allowed. And, for claims limited to \$5000, there is an even more streamlined, narrowly tailored discovery track available.

Further promoting speed and cost efficiency, the CCB is a remote tribunal which utilizes videoconfer-

encing to conduct proceedings and an electronic filing system, eCCB, to manage and publish case documents, making case documents easily accessible and obviating the need for parties to make travel arrangements. Claimants must create an account to initiate a claim, but most documents are available for public viewing on the eCCB without the need to create an account. Respondents who do not wish to participate in CCB proceedings may opt out without making an account.

Filing a claim with the CCB requires only that the claimant complete and submit a simple form along with a filing fee. The filing fee was initially proposed to be \$100, but that has since been split into two payments – a \$40 filing fee from when the form is submitted and another \$60 if the respondent does not opt out during the opt-out period. The form requests the parties’ names and addresses, information about the copyright at issue (a description of the work, what kind of work, and whether it is registered with the Copyright Office), a description of the rights violated and harm suffered, and the relief sought. Claimants may attach any documents they would like at this stage, though none are required.

Claimants may request up to \$15,000 of relief per claim, up to a maximum of \$30,000 in total (versus up to \$150,000 in federal court for willful statutory damages, per work, with no cap). Not surprisingly, most claimants who have fled to date requested the maximum amount available to them. Notably, the CCB can award limited attorney's fees against a party bringing a claim in bad faith. This is important to mitigate abuse of the system by copyright trolls and other bad faith claimants. Other procedures available to the CCB to prevent bad faith, frivolous claims include the power to prohibit a claimant from filing a case for one year; to dismiss all pending cases filed by a claimant; and/or to proactively limit the number of cases filed by a single claimant – remedies typically not seen and/or available in federal court proceedings.

If a claim is noncompliant, the CCB provides two opportunities for a party to revise and refile. If a claim is compliant, the CCB will notify the party and authorize them to proceed formally with delivering the claim, initial notice, and opt-out form on each respondent. If at least one respondent does not opt out during the 60 day opt-out window, the claim enters the “active” phase, and the \$60 filing fee becomes due. If all respondents opt out, the claim will be dismissed without prejudice, giving the claimant the opportunity to refile in federal court.

As of the date this article was written, there have been only two instances of respondents opting out. In the first instance of a respondent opting out, the CCB was clear that the claim-

ant may only refile with the CCB if they can make a showing that the respondent has changed their stance. If the claimant cannot show the respondent has consented to the CCB proceedings, the claim will be dismissed again – it is not clear whether a second dismissal would be with or without prejudice. The infrequency with which the opt-out option is being exercised suggests that respondents are amenable to the CCB format.

Because no case has progressed beyond the service of process stage, it is unclear how the remaining steps of the CCB process will flesh out in practice. What we do know, is that the CCB has the option to hold conferences to discuss settlements, set discovery schedules, and generally discuss party positions. Parties who decide to settle may ask the CCB to incorporate the terms of settlement into their dismissal to ensure compliance. The CCB is also permitted to decide cases based entirely on the written papers and evidence submitted at the close of discovery without holding hearings.

CCB procedures also make clear that appellate options are limited. Unsatisfied parties can seek reconsideration or modification of the determination within 30 days of the decision but must prove there was an abuse of discretion. Decisions will only be modified or reversed for clear error of law or fact material to the outcome, or a technical mistake. Parties may also make a request for the Register of Copyright to review the decision for abuse of discretion and pay a \$300 fee. Federal court review is only available in the case of fraud,

corruption, misrepresentation, or similar misconduct, or in the case of default, where failure to participate was due to excusable neglect.

All CCB decisions will be posted online and available for public review, but CCB decisions are not precedential. Decisions are not binding on the CCB in later cases and have no impact on decisions in other federal court proceedings.

Importantly, the CCB also allows a copyright owner to file without a copyright registration in hand. This is a significant benefit to copyright holder's given the Supreme Court's 2019 ruling in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019), which clarified a circuit split by confirming that an actual issued copyright registration (not a pending copyright application) is required before an infringement case can be filed in federal court. In contrast, under the CCB, if the copyrightable work at issue is not registered with the Copyright Office, claimants may still file and pay a \$50 expedited registration fee as part of the application (versus the \$800 expedited fee via the Copyright Office standard procedures).

Considering that the CCB has only been in operation for three months, it will be both interesting and exciting to see how the remaining questions concerning CCB proceedings play out over the next few years.

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